

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX. REL., NORTHERN OHIO  
CHAPTER OF ASSOCIATED  
BUILDERS & CONTRACTORS, INC.,  
*et. al.*

Plaintiffs/Appellants,

v.

THE BARBERTON CITY SCHOOLS  
BOARD OF EDUCATION, *et al.*

Defendants/Appellees.

Supreme Court Case No:

10-0948

On Appeal from the Summit County Court of  
Appeals, Ninth Appellate District Case No.  
CA-24898

Summit County Court of Common Pleas,  
Case No. 2009-04-2636

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE ABC OF OHIO, INC.

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## **I. INTEREST OF AMICUS CURIAE ABC OF OHIO, INC.**

ABC of Ohio, Inc.<sup>1</sup> (“ABC”), is a statewide trade association consisting of over one thousand (1000) construction industry employers, suppliers and associates which all adhere to the merit shop, free enterprise philosophy that all construction projects should be awarded based upon merit to the lowest responsible bidder. ABC members employ thousands of construction industry workers in the State of Ohio. The fundamental goal of ABC is “to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation.”

In turn, ABC is part of Associated Builders & Contractors Inc., the largest national association of construction contractors and subcontractors in America. Its membership includes over twenty-six thousand (26,000) construction and construction related firms in eighty-four (84) chapters across the United States that collectively employ millions of construction industry employees. ABC members regularly perform construction work, manufacture/fabricate, supply and transport products and materials under public works construction contracts for governmental agencies, municipalities and other public entities.

Any case involving Ohio’s Prevailing Wage Law (“PWL”) is by definition of interest to ABC, as its members regularly perform work on public improvement projects throughout the State of Ohio. ABC has participated either as a litigant or as Amicus in dozens of cases filed in this State pertaining to the application or interpretation of PWL. ABC members are directly impacted by any decision regarding contractor/trade association standing to challenge unlawful bid specifications or with regard to the unlawful application of PWL to school construction

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<sup>1</sup> ABC of Ohio represents three Ohio Chapters – the Northern Ohio, Central Ohio and Ohio Valley Chapters, which together cover the entire State of Ohio.

projects in this State. The unlawful application of PWL requirements adversely impacts the competitiveness of ABC members, imposes onerous requirements on members to pay union wages and/or comply with outdated union work rules, which substantially increases the cost of their bids, resulting in lost contracts and business opportunities for ABC members and their employees. ABC urges this Court to accept jurisdiction over the propositions of law set forth in this case and reverse the decision of the Ninth District Court of Appeals.<sup>2</sup>

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

In accordance with Article IV Section 2 of the Ohio Constitution, this Court may review judgments rendered by a lower court – “in cases of public or great general interest.” This case involves a question of first impression for Ohio as to whether the Barberton City Schools Board of Education (“Board”) or the Ohio School Facilities Commission (“OSFC”) have statutory authority to require compliance with PWL requirements on school construction projects. The issue presented to this Court is of great general interest and public importance as it involves the manner in which billions of taxpayer dollars have been and will be expended on school projects in the State of Ohio.

In 1997, the Legislature enacted Senate Bill 102 which removed school construction projects from the requirements of PWL, including the requirement to pay employees who work on such projects so called “prevailing wages.”<sup>3</sup> At the time of the passage of Senate Bill 102, the

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<sup>2</sup> ABC incorporates the arguments made in Appellants Memorandum in Support of Jurisdiction. In addition, this Amicus Brief also contains additional arguments for the Court to consider in deciding to accept review regarding Propositions of Law No. 3 and 4.

<sup>3</sup> Union wages and fringe benefits that establish the so called “prevailing wage” and are based upon wages earned by less than fifteen (15) percent of Ohio’s construction workforce, yet all contractors are required to pay these wages on public works projects in the State of Ohio. Source: 2009 United States Department of Labor Bureau of Labor Statistics, <http://www.bls.gov/news.release/union2.t03.htm>.

Legislature also created the OSFC to, among other things, administer, fund and oversee school construction projects. In addition, the Legislature also commissioned the Legislative Service Commission (“LSC”) to conduct a study to examine the effects of the removal of PWL requirements from school projects. Shortly after the enactment of Senate Bill 102, the OSFC’s executive director communicated to various local school districts stating that the express purpose of Senate Bill No. 102 was to “reduce school construction costs in order to maximize the number of school districts served” with OSFC funding. The OSFC director concluded that it would be against the intent of the Legislature to allow any school district receiving OSFC funding to attempt to apply a PWL requirement to an OSFC funded project given the Legislature’s express purpose for removing school projects from the application of PWL requirements.

As such, and for over a decade since the 1997 passage of Senate Bill 102, the OSFC refused to fund or approve any school district construction project which attempted to impose a PWL requirement. During this time, no school district challenged the position of the OSFC in any court of law, and the Attorney General never issued any opinion that contradicted the position of the OSFC that the Legislature intended through the enactment of R.C. 4115.04(B)(3) to prohibit school boards from applying PWL requirements to school projects.

In accordance with the directive of the Legislature, the LSC did conduct a study through its Legislative Budget Office (“LBO”). On May 20, 2002, it published Report No. 149 (the “LSC Report”), which concluded that an aggregate 10.7% savings on school construction projects was due to not applying PWL requirements to school projects, amounting to an aggregate savings in school construction costs of 487.9 million dollars in just the five-year period of the study. Following the results of the LSC Report in 2002, the only official study commissioned by the Legislature, the Legislature did not act to change or modify the PWL

prohibition created by the enactment of R.C. 4115.04(B)(3) for school projects.

Against this background, on July 26, 2007, the OSFC, under a new administration, enacted Resolution 07-98<sup>4</sup> and passed so called “Model Responsible Bidder Workforce Standards” for OSFC funded school projects. Specifically, those Standards state – “These responsible bidder criteria are reasonably related to performance of the contract work within the statutory framework set forth in Section 9.312 of the Ohio Revised Code.” One of the “responsible bidder” factors established by the OSFC Resolution allows school boards the “authority” to apply PWL requirements to a school project. However, paying prevailing wages to employees is not, and has never been recognized as a “responsible bidder criteria,” nor is it “reasonably related” as stated by the OSFC in its Resolution. See 9.312. PWL is nothing more than a “minimum wage law” for public projects. Hence, the OSFC Resolution is nothing more than an attempt by the Executive branch to subvert a law enacted by the Legislature.

Obviously, whether or not a bidder chooses to pay so called “prevailing wages” to its employees is not at all probative or “reasonably related” to determining a bidder’s experience, financial condition, conduct on previous contracts, its facilities, management skills or the ability to perform the work properly. R.C. 9.312. Indeed, the Board officials deposed in this litigation admitted that the PWL requirement was not a “responsible” bidder criteria pursuant to R.C. 9.312 that was used in awarding a school construction contract.<sup>5</sup> Suddenly paying employees the

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<sup>4</sup> OSFC Resolution 07-98 specifically provides at Paragraph No. 17 as follows: “The Bidder shall certify that it, and its subcontractors or any contractor performing work on the project covered under the contract of the Bidder, shall pay the prevailing wage rate and comply with the other provisions set forth in Ohio’s Prevailing Wage Law, R.C. 4115.03 through 4115.16, and O.A.C. 4101:9-4-01 through 4101:9-4-28. This includes, but is not limited to, the filing of certified payroll reports.”

<sup>5</sup> The Barberton School Board President and Vice President testified that the prevailing wage requirement applied to the Project was NOT a factor used to determine if a bidder was “responsible” bidder pursuant to R.C. 9.312 for the Project. (Liddle Depo. at 20, and 28-29;

so called “prevailing wage” does not miraculously transform the workforce of an otherwise unqualified bidder into a responsible bidder. The OSFC and the Board cannot mask its lack of authority to apply PWL requirement to a school project by claiming it is somehow a “responsible bidder criteria.” Regardless of these clear statutory violations, the Board passed a Resolution on October 21, 2008 imposing a PWL requirement for the construction contracts let for bid for the construction of the New Barberton Middle School Project (“Project”) based upon the “authority” provided by the OSFC Resolution.

However, in order to avoid addressing Appellants numerous legal arguments as to why the Board and the OSFC lack statutory authority to impose PWL requirements on a school projects, arguments which the Board and the OSFC presented no defense to, the Ninth District erroneously concluded that no one has standing to challenge the actions of a school board and the OSFC with regards to this, and other contracts, which will be bid for this overall 72 Million Dollar Project. By attempting to skirt deciding this issue, the Ninth District eliminated the doctrine of common law taxpayer standing as well as limiting challenges by bidders and trade associations to only those situations where the contractor was lowest bidder and was rejected, or when a bidder can establish a compensatory injury.

Following the Ninth District decision regarding standing, the OSFC and school boards are now free to place whatever bid requirements they wish in school construction contracts, and so long as those contracts are “awarded to the lowest bidder,” they cannot be challenged, even if those specifications required contractors to pay their employees \$100 per hour for work on a

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McQuaide Dep. at p. 16-18). As further evidence that paying prevailing wages is not a “responsibility” factor used to award a construction contract, the Board President and Vice President further testified that the prevailing wage requirement was not applied five other (5) construction projects recently undertaken by the Board. (McQuaide Depo. at 42-46; Exhibit “O” Liddle Dep. at 11-13).

school project. Today, the OSFC and the Board through a bid specification unlawfully require contractors to pay so called “prevailing wages” for work performed on school construction projects. Tomorrow, they can include a bid specification which effectively excludes all non-union contractors from bidding school projects, eliminate competitive bidding altogether, or possibly direct public contracts to those whom they favor, promoting corruption, favoritism and collusion in government contracting.

Furthermore, the unlawful and wasteful spending of taxpayer dollars to construct schools with PWL requirements will detrimentally affect the ability of other school districts to receive funding to improve, build or renovate their classroom facilities as the money allocated to the OSFC by the Legislature to aid school district construction projects is finite. If one school district adopts a PWL requirement, increasing the cost their construction project, such actions will adversely affect another school district’s ability to receive funding from the OSFC for their project. As such, the issue presented is a matter of great public and general concern. In other words, school boards that exceed their statutory authority and unlawfully elect to apply PWL requirements to their construction projects in order to prevent “Mexicans” from working on the project or to simply “please their union constituents” will injure other school districts who have complied with the law by depriving these districts of much needed construction funds.<sup>6</sup>

Finally, the situation presented to this Court for review is not an isolated incident. This Project is but one of a dozen school construction projects about to commence under the direction of the OSFC where hundreds of millions of Ohio taxpayer dollars will be unlawfully spent on

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<sup>6</sup> The Barberton School Board President and Vice President testified in depositions that the Board “exercised its discretion” and adopted the prevailing wage requirement on the Project at issue to solely please their union constituents, and according to the Vice President of the Board, to ensure that “Mexicans” she believed to be employed by non-union contractors did not perform work on the Project. (Appellants Motion to Stay and Request for Injunction, McQuaide Depo. at 14, 18-19, and Liddle Depo. at 18-19, and 41).

projects where school districts are unlawfully applying PWL requirements under the guise of authority granted by OSFC Resolution 07-98. The OSFC is charged with doling out billions of Ohio taxpayer dollars for school projects. An aggregate savings of 10.7% on school construction costs would amount to hundreds of millions of taxpayer dollars either being spent against the mandate of the Legislature, or that would be preserved with a ruling from this Court.

For the reasons set forth below, ABC respectfully requests this Court accept jurisdiction over the Propositions of Law set forth in this Appeal.

## II. STATEMENT OF THE CASE AND FACTS

ABC of Ohio adopts the statements of facts as presented by Appellants.

## III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

ABC adopts the arguments in support of the reasoning for accepting Appellants Propositions of Law Nos. 1 and 2 regarding common law taxpayer and bidder/associational standing. Clearly, if the Ninth District's decision is permitted to stand, no one but the lowest bidder has standing to challenge its own contract award or unlawful bid specifications. This is not and cannot be allowed to be the law in Ohio.

**Proposition of Law No. 3:** A board of education exceeds its statutory authority and abuses its discretion by imposing or mandating the payment of so called prevailing wages on a school construction project because the Legislature expressly stated that Chapter 4115 of the Ohio Revised Code, Ohio's Prevailing Wage Law, "do[es] not apply to" such projects through operation of R.C. 4115.04(B)(3).

The Board and the OSFC lack any statutory authority to apply a PWL requirement to a school construction project pursuant to R.C. 4115.04(B)(3). The plain language of R.C. 4115.04(B)(3) and (B)(4) when read *in pari materia* clearly demonstrates for the Court that the Legislature intended to prohibit the Board and the OSFC from exercising any authority to "elect" to apply a PWL requirement to a construction project undertaken by the Board. See *Sheet Metal*

provides in part the following:

(B) Sections 4115.03 to 4115.16 of the Revised Code **do not apply to:**

\* \* \*

(3) **Public improvements undertaken by, or under contract for, the board of education of any school district** or the governing board of any educational service center;

(4) Public improvements undertaken by, or under contract for, a county hospital operated pursuant to Chapter 339 of the Revised Code or a municipal hospital operated pursuant to Chapter 749...**provided that a county hospital or municipal hospital may elect to apply sections 4115.03 to 4115.16 of the Revised Code to a public improvement undertaken by, or under contract for, the hospital;**

\* \* \*

(Emphasis added). The statutory language deliberately used by the Legislature in Section (B)(3) bars a school board or the OSFC from applying a PWL to school projects by removing such projects from PWL altogether. When Section (B)(3) is compared with the explicit statutory language used in Section (B)(4), which excludes county and municipal hospital construction projects from PWL, it is clear that the Legislature specifically included language to allow county hospitals the option to “elect” to apply PWL to a construction project, thereby vesting the Department of Commerce with jurisdiction to administer and enforce the law. This act allows the municipal and county hospitals the necessary statutory authority and discretion to decide whether or not to “elect” to apply PWL to such projects. Thus, it is apparent from the specific language used on Section (B)(3) that the Legislature acted intentionally to deny the same statutory authority to a board of education or the OSFC to “elect” to apply PWL to a school construction project.

Here, the words of R.C. 4115.04(B)(3) are not ambiguous and clearly set forth the Legislature’s intent to prohibit boards of education from applying PWL requirements to any school construction project and to permit **ONLY** county and municipal hospitals the authority to

“elect” to do so. When enforcing the statute as written, it is clear that the Board and the OSFC have exceeded their statutory authority in applying a PW requirement to a school construction project because such laws by mandate of the Legislature “do not apply” to such projects.

**A. The Board has no Authority to Subvert the Intent of the Legislature.**

The PWL prohibition created by the Legislature in R.C. 4115.04(B)(3) for school boards is bolstered by case law detailing the authority of school boards. In *Hall v. Lakeview Local Sch. Dist. Bd. of Ed.* (1992), 63 Ohio St. 3d 380, 588 N.E.2d 785, this Court found that a school board exceeds its authority when it acts outside the powers granted to it by statute. In so ruling, this Court analyzed the two statutory provisions to determine that a school board did not have the authority to enter into a supplemental contract with a custodial employee. Specifically, this Court stated the following:

Boards of education, as creatures of statute, have no more authority than that conferred upon them by statute, or what it clearly implied there from. R.C. 3319.081 applies to contracts with respect to non-teaching employees. The statute does not contain a provision authorizing a board of education to enter into supplemental contracts with non-teaching employees. In comparison R.C. 3319.08 specifically authorizes a board of education to enter into supplemental contracts with teachers whereby a teacher receives additional compensation for additional duties performed. Clearly, if the General Assembly had intended to employ a board of education to enter into supplemental contracts with non-teaching employees, the General Assembly could have specifically so stated as it did with regard to teachers in R.C. 3319.08. Therefore we find that a board of education does not have the authority to enter into supplemental contracts with non-teaching employees.

*Id.* (internal citations omitted, emphasis added).

Likewise, in *Educational Services Institute, Inc., et al., v. Gallia-Vinton Education Service Center, et al.*, 4<sup>th</sup> Dist No. 03CA6, 2004 Ohio 874, the Court held a school board had no authority to contract with a consulting company to provide superintendent services when the statute failed to provide the school board with explicit authority to do so, causing the contract the school board entered into to be void. The Court stated:

In framing this issue, appellants argue that contracting with a consulting company to provide for superintendent services is permissible because nothing in the Revised Code prohibits it. This argument ignores the nature of a school board's authority. Under appellants' argument, a school board has the power to act unless a specific statutory restriction prohibits it. However, as indicated, a school board's authority is limited to those powers expressly granted to it by statute, or clearly implied from it. Hall, supra. Thus, a school board has no authority to act unless a specific statute gives it such authority.

(Id. at ¶15, emphasis added).

*Educational Services*, like *Hall, supra*, directly contradict the Ninth District's conclusion that the Board or the OSFC has any authority to elect to apply PWL, or that the R.C. 4115.04(B)(3) prohibition is merely an "exemption," which like R.C. 4115.04(B)(4), would allow them to "elect" by contract, a PWL requirement on a school project. Section (B)(3) is clearly a prohibition because it lacks the same "election" language used by the Legislature in Section (B)(4). The Legislature knew exactly how provide authority for a county hospital to apply a PWL requirement to their projects while denying the same to school boards. More so, and contrary to the Ninth District decision, which ignores the fundamental nature of "a creature of statute," silence or the absence of a direct prohibition in the statute does not amount to an express grant of authority. See *Educational Services, supra*.

It is clear that school boards have no license to increase their powers or confer upon themselves additional jurisdiction under any general authority conferred upon them to adopt rules and regulations for their governance where, as here, the Legislature has explicitly prohibited school districts from applying PWL requirements. If such conduct were permitted, the enactments of the Legislature would be rendered meaningless. *State, ex rel. Bd. of End. of Cincinnati, v. Griffith*, 74 Ohio St., 80, 77 N. E., 686.

Furthermore, the Board and the OSFC concede that the Ohio Department of Commerce ("DOC") is without jurisdiction over school projects, and will not administer or enforce PWL on

a school projects because of the prohibition created by the Legislature in R.C. 4115.04(B)(3). If the DOC will not enforce or administer PWL on a school project, then who will set wage rates, determine fringe benefits credits, where will employees or interested parties file complaints, how will contractors be audited for prevailing wage compliance, who will conduct such audits, etc...? Will each school board now enact their own Wage & Hour Bureau and provide their own overtime, minimum wage and PWL laws? The notion is preposterous, only the Legislature can wield such police powers to set minimum wage rates under the law.

This Court has held Chapter 4115 evidences a legislative intent to provide a comprehensive, uniform framework for worker rights and remedies vis-à-vis private contractors, sub-contractors and materialmen engaged in the construction of public improvements in this state. See *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 91. This comprehensive and uniform framework is only possible when the DOC has jurisdiction to enforce PWL, which jurisdiction was removed when the Legislature enacted R.C. 4115.04(B)(3). The lack of authority call upon the investigative and administrative powers of the DOC should be determinative of the Legislature's unambiguous intent prevent the Board and the OSFC from applying a PWL requirement to a school project.

**B. PWL cannot be Applied by Contract to a School Project.**

The Board and the OSFC have no authority to apply a PWL requirement by contract to a school project pursuant to R.C. 4115.04(B)(3) or R.C. 3313.46(A)(6). A school board is not free to do by contract that which it cannot do by authority under statute. See *Hamilton Local Bd. of Educ. v. Arthur*, 1973 Ohio App. LEXIS 1777 (Ohio Ct. App., Franklin County July 24, 1973), citing, 48 Ohio Jurisprudence 2d, at Section 80, page 778. Since, the Board and the OSFC cannot contract for an act that exceeds their statutory authority the Board and the OSFC cannot adopt their own PWL by resolution or contract. Unlike a natural person, or a municipality for

that matter, the acts of the Board and the OSFC are at all times restricted by the statutes governing their administration. *Hall, supra.* Because the Legislature prohibited the Board and the OSFC from applying PWL requirements by statute, by failing to provide them any authority to do so, they also lack the authority to do the same by resolution or contract.

**C. A PWL Requirement Violates R.C. 3313.46(A)(6).**

Appellants also assert that based upon the language of R.C. 4115.04(B)(3), when read in conjunction with R.C. 3313.46(A)(6), the Board and the OSFC exceeded their authority and abused their discretion in not properly advertising and awarding school contracts to the “lowest responsible bidder” for the Project. R.C. 3313.46(A)(6) mandates the Board and the OSFC to accept only the “lowest” responsible bid for work on the Project. Due to the Board and OSFC’s unlawful actions in imposing the PW requirement on the Project, acceptance of the lowest responsible bid for the Project has been made impossible and any contract entered into is unlawful and void in violation of State law.

As mentioned above, PWL requirements “do not apply to” school boards in order to “reduce costs,” a fact borne out by the LSC Report, which evidenced an aggregate 10.7% savings on school projects due their removal from PWL requirements, amounting to 487.9 Million Dollars in savings over just the five year period of the study. Following the results of the LSC Report, the Legislature did not act to change R.C. 4115.04(B)(3) in any way, nor did the Legislature amend the statute to allow a board of education to “elect” to apply prevailing wages to a construction project undertaken by a board of education.

In this case, the underlying facts clearly establish that Fechko’s bid for the ESP phase of the Project would have been \$10,000 lower if the PWL requirement not been included on the Project. For the next phase of the Project, involving the actual construction of the school facility, the total of the PWL based bids amounts to 22 million dollars. Utilizing the LSC Report finding

that non PWL based bids are 10.7% less than PWL based bids, removing the PWL requirement would generate a savings of 2.35 million dollars to Barberton taxpayers. Stated otherwise, if the 2 billion dollars of funding that is necessary for school construction is spent using PWL based bids it will cost 10.7% more or 214 Million Dollars—enough to build several entire school systems in several communities. Thus, when the Board or the OSFC imposes a PWL requirement it cannot, by enactment of R.C. 4115.04(B)(3) meet its statutory obligation to award contracts to the “lowest” responsible bidder pursuant to R.C. 3313.46(A)(6) since PWL based bids have been determined by the LSC Report to be 10.7% higher. With these undisputed facts, how could the trial court or the Ninth District conclude that the Board accepted the “lowest responsible bid” for the Project?

Thus, even if R.C. 4115.04(B)(3) was determined to be an exemption rather than a prohibition to the application of prevailing wage law, a school board and the OSFC would still violation R.C. 3313.46(A)(6) by not advertising for and accepting the lowest bid for a school construction project. The imposition of PWL requirements on this Project alone would result in the misapplication of millions of dollars taxpayer funds.

**Proposition of Law No. 4:** The Ohio School Facilities Commission exceeded its statutory authority and abused its discretion by enacting Resolution 07-98 that promotes the imposition of so called prevailing wages on a school construction projects because the Legislature expressly stated that Chapter 4115 of the Ohio Revised Code, Ohio’s Prevailing Wage Law, does not apply to such projects through operation of R.C. 4115.04(B)(3).

Likewise, the OSFC’s Resolution 07-98, passed July 26, 2007, is also unlawful given the Legislature’s mandate that school construction projects are excluded from PWL. The OSFC is an administrative agency of the State created by Senate Bill No. 102 to fund school construction Projects in order to “reduce costs” and “maximize” school construction dollars.

The OSFC itself has no statutory authority to legislate or pass resolutions in contravention

of State law, particularly in contravention of R.C. 4115.04(B)(3) or R.C. 3313.46(A)(6). It is well established by this Court that administrative regulations and resolutions cannot dictate public policy, but rather can only develop and administer policy already established by the General Assembly. *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 259-260 (Ohio 2002), citing, *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 567, 697 N.E.2d 198. *In D.A.B.E.*, this Court explained that an administrative agency has only such regulatory power as is delegated to it by the General Assembly and authority that is conferred by the General Asscmbly cannot be extended by the administrative agency citing *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, 71 Ohio Op. 2d 366, 329 N.E.2d 693. This Court stated further “such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective.

In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.” (Emphasis added). In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it. *Id.* at P38-40, quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6.<sup>7</sup>

Quite pointedly, the *Burger Brewing Court* decision alone, should have demonstrated to

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<sup>7</sup> See also, *State ex rel. Godfray v. McGivney* (1981), 66 Ohio St. 2d 113 (a county welfare department is limited to the exercise of only those powers that are clearly and distinctly granted by the Legislature); *Browning-Ferris Industries of Ohio, Inc. v. Mahoning Cty. Bd. of Health* (1990), 69 Ohio App.3d 96, 100 (“Generally, an administrative agency or board. . . has no greater power than that expressly conferred upon it and has no inherent power.”).

the courts below that the language of R.C. 4115.04(B)(3) does support the proposition that the OSFC or a school board can apply a prevailing wage requirement to a school construction project because prevailing wage law “do[es] not apply” to such projects, and without an “express grant” to permit application of prevailing wage requirements, “there is no implied grant to do so.” Therefore, any prevailing wage requirement imposed by the OSFC and a school board violates State law.

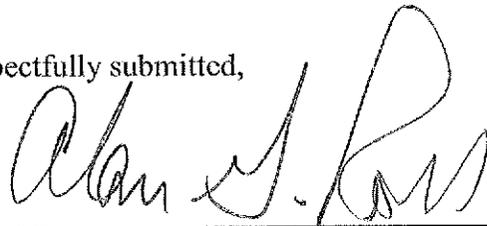
Furthermore, even if an argument could be made that the OSFC and the Board had discretion to apply PWL requirements to a school project, because it is not “expressly” prohibited by the language of R.C. 4115.04(B)(3), the court must still resolve any doubt against the OSFC and the Board and hold that the Board and the OSFC do not have the statutory authority to apply a PWL requirement to a school project for the multitude of reasons provided herein. See *D.A.B.E., Inc. and Burger Brewing Co., supra*.

#### IV. CONCLUSION

For the foregoing reasons, this case involves a matter of great public and general interest. ABC respectfully requests this Court grant jurisdiction to review the rulings of the Ninth District Court of Appeals.

Dated: May 25, 2010

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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

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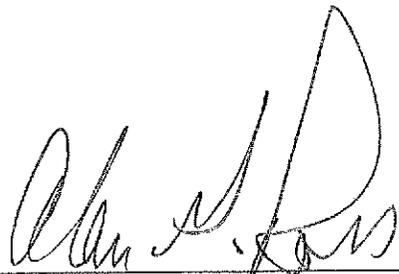
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