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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ASSOCIATED MINORITY CONTRACTORS OF ARIZONA, an Arizona corporation; ARIZONA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, an Arizona nonprofit corporation; ARIZONA BUILDERS ALLIANCE, an Arizona nonprofit corporation,

Plaintiffs,

vs.

CITY OF PHOENIX, a municipal corporation; KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; ERIC FORBERG, in his official capacity as the City Engineer of the City of Phoenix; CITY OF TUCSON, a municipal corporation; REGINA ROMERO, in her official capacity as Mayor of the City of Tucson; MICHAEL ORTEGA, in his official capacity as City Manager of the City of Tucson; and NATHAN DAOU, in his official capacity as Director of the Department of Procurement of the City of Tucson,

Defendants.

Case No. CV2024-001435

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Brad Astrowsky)

Defendants City of Phoenix and City of Tucson recently enacted nearly identical "Prevailing Wage" ordinances in violation of a clear state-law prohibition on such measures. *See* A.R.S. § 34-321(B). In addition to being preempted by statute, both ordinances violate the Arizona Constitution's due process protections, *see* Ariz. Const. art. II § 4, because they each authorize a single city official to serve as investigator and judge over any alleged violations; this single official can make findings and impose penalties with near-total discretion, and the ordinances provide no opportunity for appeal, apart from a hearing officer hand-picked by the same official.

Plaintiffs move for summary judgment pursuant to Arizona Rule of Civil Procedure 56 on both counts in Plaintiffs' First Amended Complaint. Plaintiffs' claims raise issues of statutory interpretation and constitutional law that do not require discovery and can be resolved now; indeed, the same legal questions already must be decided to resolve Defendants' Motion to Dismiss.

In addition to denying Defendants' Motion to Dismiss for the reasons Plaintiffs state in their Response, this Court should also grant summary judgment in favor of Plaintiffs, because the legal issues are identical, there are no disputed questions of material fact, and Plaintiffs are entitled to judgment as a matter of law.

Although Plaintiffs set out their arguments here sufficiently to establish that they are entitled to summary judgment, they have addressed these issues in much greater detail in their Response to Defendants' Motion to Dismiss, filed concurrently with this Motion. Because the issues are the same, if the Court denies Defendants' Motion, it should also grant this Motion.

BACKGROUND

In 1984, the Legislature prohibited cities and other political subdivisions from imposing so-called "prevailing wage" mandates on public works contractors. Plaintiffs' Statement of Undisputed Facts ("SOF") ¶ 1. Notwithstanding this prohibition, Phoenix and Tucson both enacted substantially similar "Prevailing Wage" ordinances (the "Ordinances") on January 9, 2024. *Id.* ¶¶ 2, 3.

Both Ordinances provide that any contractor or subcontractor under a city construction contract with a minimum aggregate value[1] must pay its workers "not less than the Prevailing Wage Rate for the same class and kind of work in the … metropolitan area" *Id.* ¶ 6. Both Ordinances also mandate that every covered municipal construction contract include provisions requiring contractors to pay their employees "at least once a week the full amount of wages accrued at the time of payment at the applicable Prevailing Wage Rate," and follow detailed "recordkeeping and notice posting requirements." *Id.* ¶ 7.

Both Ordinances also allow "[a]ny affected individual or organization representing such individual(s)" to "file a complaint" with the relevant city official "for any violation," and they establish administrative processes for investigating and adjudicating such complaints. *Id.* ¶ 9. Each Ordinance charges a single city employee[2] with investigating and adjudicating such complaints, and with imposing penalties for violations, including "wage restitution," "liquidated damages in the amount of three (3) times the wages owed," "a directive to the applicable City department to withhold any payments due" to the contractor, "rescission of the contract under which the violation occurred," and, if the official determines a contractor has violated the law "willfully or more than twice in a three-year period," to "order debarment of the contractor." *Id.* ¶ 10. Both Ordinances allow contractors to request review of such findings by a hearing officer, who is appointed by the same official who investigated and adjudicated the complaint in the first instance. *Id.* ¶ 11. And both Ordinances allow the officials and hearing officers to impose additional penalties on contractors if they deem the contractor's "dispute of a finding … frivolous or … brought for the purpose of delaying compliance." *Id.* ¶ 12.

LEGAL STANDARD

A motion for summary judgment "shall" be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgement as a matter of law." Ariz. R. Civ. P. 56(a). A plaintiff is permitted to move for summary judgment after a 12(b)(6) motion to dismiss is filed by the defendant. Ariz. R. Civ. P. 56(b)(1).

[1] $4,000,000 or more for Phoenix; $2,000,000 or more for Tucson.
[2] The City Engineer for Phoenix; the Director of Procurement for Tucson. FAC ¶¶ 32, 45.

DISCUSSION

I. The Ordinances are preempted by state law.

Arizona law provides that:

> Agencies and political subdivisions of this state *shall not* by regulation, ordinance or in any other manner require public works contracts to contain a provision requiring the wages paid by the contractor or any subcontractor to be not less than the prevailing rate of wages for work of a similar nature in the state or political subdivision where the project is located.

A.R.S. § 34-321(B) (the "Prevailing Wage Prohibition"). This statute plainly deprives Defendants of the authority to enact the Ordinances.

Defendants' sole argument to the contrary depends on their claim that one provision in Arizona's minimum wage law, A.R.S. § 23-364(I) (the "Minimum Wage Law"), which was adopted in 2006 and amended in 2016, impliedly repealed the prohibition on prevailing wage ordinances. But a prevailing wage ordinance is not a minimum wage law, and the Minimum Wage Law did not impliedly repeal the Prevailing Wage Prohibition because the two laws can be harmonized by "reasonable construction." *State ex. rel. Larson v. Farley*, 106 Ariz. 119, 122–23 (1970); *see Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7 ¶ 24 (2013) (explaining "the finding of an implied repeal or amendment is generally disfavored" and applies only when "conflicting statutes cannot be harmonized to give each effect and meaning").

"Prevailing wage regulations are substantially different from minimum wage statutes." *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980). They have fundamentally different underlying policy goals. Moreover, unlike minimum wage laws, which set a single, across-the-board floor on wages, prevailing wage measures impose a complex, fluctuating *schedule* of wage standards (determined by federal law and regulation) meant to approximate *average* wages for specific occupations and localities. *See, e.g., Mullally v. Waste Mgmt. of Mass., Inc.*, 895 N.E.2d 1277, 1282 (Mass. 2008) (explaining that a "prevailing wage law endeavors to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry"); *Cipparulo v. David Friedland Painting Co.*, 353 A.2d 105, 109 (N.J. Super. Ct. 1976) (describing the

variable nature of prevailing wage schedules). In sum, the Ordinances here do not "address the same substantive issue," *In re Riggins*, 544 P.3d 64, 71 ¶ 34 (Ariz. 2024), and it is inappropriate to apply the doctrine of implied repeal, because there is a straightforward way to construe both laws harmoniously.

Further, even assuming the laws addressed the same substantive issue, the more specific, longstanding statutory prohibition on prevailing wage requirements in public works contracts must be treated as an exception to the general authorization to cities to regulate minimum wages, given the complete absence of any indication that the voters intended to repeal the specific statutory prohibition on prevailing wage laws. *Midtown Med. Grp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 220 Ariz. 341, 347 ¶ 22 n.9 (App. 2008) ("Where there are two provisions applicable to the same subject, one general in its scope and the other covering a limited portion only of the subject included in the general one, the special statute is to be considered as governing the exception, while the general statute applies only to matters not included in the special one." (alterations adopted, citation omitted)).

II. The Ordinances violate Arizona's constitutional due process protections.

Both Ordinances authorize a single city official to investigate, make determinations of liability, and impose penalties on contractors, without any meaningful checks on that authority and subject to appeal only to another official hand-picked by the first official.

This dynamic creates "an appearance of potential bias," if not "actual bias," and violates "right to a neutral adjudicator" which "has long been recognized as a component of a fair process." *Horne v. Polk*, 242 Ariz. 226, 230–31 ¶¶ 16–17 (2017). "One cannot both participate in a case (for instance, as a prosecutor) and then decide the case." *Id.* at 231 ¶ 17. By the same token, a city official cannot participate in the case as investigator (effectively a prosecutor), make an initial decision, then hand-pick a fellow bureaucrat as the "appellate" tribunal who will review that decision.

Both Ordinances also give officials virtually unchecked power to punish contractors seeking to exercise their appeal rights if the officer in the case deems the appeal frivolous or brought for purposes of delay. The prospect of incurring additional penalties for simply

disputing a city official's findings compounds the due process defects in the Ordinances, because it harnesses the coercive power of the government to discourage citizens from using even what procedural protections they do have. *Cf. Webb v. State ex rel. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558 ¶¶ 10–11 (App. 2002) (finding waiver of formal hearing in favor of "informal interview" was not "voluntary, knowing, and intelligent" because "[a] physician facing potentially severe disciplinary sanctions from the tribunal extending such an invitation would understandably be hesitant to refuse"); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort … and for an agent of the State … to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" (citations omitted)).

Finally, the Ordinances provide inadequately for judicial review of city officials' findings. The Tucson Ordinance does not provide for judicial review at all, and the Phoenix Ordinance only provides for judicial review of "non-final decision[s] of the hearing officer." SOF ¶ 13. While not all agency determinations require judicial review to comport with due process, those that impose fines and other serious penalties do. Moreover, the other due process violations are "magnified where the agency's final determination is subject only to deferential review [or no review at all]." *Horne*, 242 Ariz. at 230 ¶ 14.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant Plaintiffs' Cross-Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 8th day of April, 2024.

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 8th day of April 2024, with a copy delivered via the ECF system to:

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