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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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Assigned to the Honorable Brad Astrowsky)

The Ordinances violate Arizona's clear statutory prohibition on municipal "prevailing wage" laws, and Arizona's Minimum Wage Act did not repeal that prohibition. The Ordinances also violate procedural due process by combining investigatory and adjudicatory power in a single official, as well as giving that official broad power to decide penalties, sanction contractors for defending themselves, and hand-pick who decides their appeal.

As an initial matter, the Ordinances do not involve Defendants "hold[ing] *themselves* to a higher wage standard" or "requir[ing] that *their* contract workers be paid more," Resp. to MSJ at 1 (emphases added). Of course, Defendants are free to behave however they wish in their capacities as *employers*; they're also free to adopt generally applicable minimum wage provisions as authorized by state law. What they *cannot* do is violate state law by singling out public contractors and requiring them to follow federal wage schedules as a condition of working on taxpayer-funded projects.

Defendants make no argument that the Minimum Wage Act expressly repeals the Prevailing Wage Law because they cannot—there is no express repeal. They instead argue that voters impliedly repealed a statute that addresses a narrow and specific subject matter through general provisions in another statute dealing with a fundamentally different issue. But a statute is impliedly repealed only through "repugnancy." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001). There is no evidence of such an implied repeal, because the two statutes can be easily harmonized. Defendants' effort to "inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions" does not work here. *Roberts v. State*, 253 Ariz. 259, 266 ¶ 20 (2022) (citation and quotation marks omitted).

The Ordinances mandate what state law prohibits, plain and simple. The Minimum Wage Law did not address prevailing wages, much less repeal the statutory prohibition on them. Defendants' arguments fail and summary judgment should be entered for Plaintiffs.

I. State law preempts the Ordinances.

Defendants' argument hinges on the premise that when the Minimum Wage Act enabled cities to "regulate minimum wages and benefits within [their] geographic boundaries," A.R.S. § 23-364(I), it authorized them to enact *any* measures having to do with "wages" or "benefits"—

including the "prevailing wage" mandates specifically prohibited by A.R.S. § 34-321. As Plaintiffs have already explained, this argument is flawed for three reasons.

A. There is no implied repeal when statutes can be harmonized.

Defendants ask this Court to apply the "disfavored" doctrine of "implied repeal," which is appropriate only "when conflicting statutes *cannot* be harmonized to give each effect and meaning." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 7 ¶ 24 (2013) (emphasis added). As explained in the following sections, the two statutes *can* be harmonized.

Defendants and the State (in its amicus brief) also try to bypass the high bar for implied repeal by arguing that the Minimum Wage Act is "more recent," and that when two statutes conflict, the more recent enactment controls. But "[i]nstead of presuming that the more recent statute controls," courts "first look to whether [they] can reconcile the statutes that are in apparent conflict." *Jurju v. Ile*, 534 P.3d 926, 930 ¶ 21 (Ariz. App. 2023). If recency of enactment were anything but a last resort—relevant only when "two statutes truly conflict," *Berndt v. Ariz. Dep't of Corr.*, 238 Ariz. 524, 528 ¶ 11 (App. 2015), and the other tools of statutory interpretation cannot harmonize them—then it would mean that later enactments trump earlier ones any time they deal with the same subject matter, contrary to Arizona's narrow approach to the doctrine of implied repeal.

The State's Voter Protection Act ("VPA") argument, *see* Br. Amicus Curiae of State of Arizona ("State's Br.") at 11–13, is likewise unavailing.[1] First, Section 34-321 (prohibiting municipal prevailing wage measures) does not "amend" the Minimum Wage Act; it predates it. *See* Ariz. Const. art. IV, pt. 1 § 1(6)(C) (prohibiting Legislature from "amend[ing] an initiative measure"). Second, Section 34-321 was itself a referendum and thus an act of the voters; the VPA does not apply because it merely "eliminated the *legislature's* authority to repeal a voter-approved law." *Ariz. Advocacy Network Found. v. State*, 250 Ariz. 109, 112 ¶ 7 (App. 2020). Third, the VPA simply prohibits the Legislature from "amend[ing] an initiative measure," Ariz. Const. art. IV, pt. 1 § 1(6)(C), and thus, it only applies when one measure "amends" another.

[1] No party or other amicus has raised this issue. *See Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 483 ¶ 27 n.6 (App. 2009) ("Amici are not allowed to raise new issues and their briefs may not create, extend or enlarge issues beyond those argued by the parties." (citation omitted, alterations adopted)).

But that simply begs the question of whether the two statutes conflict such that one impliedly repeals other. *See Meyer v. State*, 246 Ariz. 188, 192 ¶ 11 (App. 2019) ("A statute can be impliedly amended or repealed [for VPA purposes] through 'repugnancy' or 'inconsistency' with a more recent and apparently conflicting statute."). And the VPA says nothing about how to substantively interpret the provisions to answer the question of whether they do conflict.

B. There is no conflict between the two statutes.

The Minimum Wage Act cannot override the prevailing wage prohibition because "minimum wage" and "prevailing wage" are entirely distinct concepts. Instead of recognizing this, Defendants artificially graft together definitions of "minimum" and "wage" to mean *any* "floor on compensation—however that compensation is defined." Resp. at 3. The State's brief takes the same flawed approach, conflating "the term 'minimum' and the phrase 'not less than,'" rather than accounting for the ordinary meaning of the term "minimum wage." State's Br. at 3–4.[2]

But as Plaintiffs explained in their earlier briefing, the statutes' plain language, informed by common understanding of the terms "prevailing wage" and "minimum wage,"[3] show that these are two different kinds of laws: they regulate different entities (public contractors versus employers in general), are implemented differently (through clauses in public works contracts versus through direct regulation), appear in different statutory titles (Title 34, Public Buildings and Improvements versus Title 23, Labor), and involve different policy considerations. *See* Resp. to MTD at 6–8; MSJ at 3–4.

For the most part, Defendants do not dispute that minimum wage laws and prevailing wage laws are fundamentally different. They suggest that minimum wages can "'fluctuate' by industry and occupation," MTD Reply at 4, but this is not true. While minimum wage laws might include "very limited exceptions," Resp. to MTD at 6, they operate by setting a single,

[2] Likewise, the nearly century-old authorities the State cites do not show that "prevailing wage" and "minimum wage" are identical concepts because they do not employ "minimum wage" as it's understood today, as a definite, across-the-board floor on wages. *See, e.g.*, Laws 1933, H.B. No. 37 ("Not less than the minimum per diem wages fixed by the state highway commission for manual or mechanical labor … shall be paid ….").

[3] Plaintiffs have pointed to an extensive body of law construing "minimum wage" and "prevailing wage" as distinct legal concepts. *See* Resp. to MTD at 6–8; MSJ at 3–4.

across-the-board price floor for labor, rather than establishing a complex schedule of *average* wages for different occupations in one specific industry, as prevailing wage laws do. For example, while Arizona's Minimum Wage Act lets employers count tips and gratuities toward the minimum wage, it allows that *only if* the employee's total compensation adds up to the generally applicable minimum:

> For any employee who customarily and regularly receives tips or gratuities from patrons or others, the employer may pay a wage up to $3.00 per hour less than the minimum wage if the employer can establish by its records of charged tips or by the employee's declaration … that for each week, when adding tips received to wages paid, the employee received not less than the minimum wage for all hours worked.

A.R.S. § 23-363(C).

To be sure, *other* aspects of wage-and-hour law can vary based on factors like occupation. *See, e.g.*, 29 U.S.C. § 213(a)(17) (exempting "computer systems analyst, computer programmer, software engineer, or other similarly skilled worker … who … is compensated at a rate of not less than $27.63 an hour," from wage-and-hour provisions such as mandatory overtime and maximum hour requirements). But as Defendants' own citations show, the phrase "minimum wage" specifically refers to a single, definite floor on wages in general—not a complex, variable schedule of average rates for different job types. *See, e.g.*, A.R.S. § 23-350(5) (defining "[m]inimum wage" as "the nondiscretionary minimum compensation due [to] an employee by reason of employment," including commissions but excluding tips); *Wage*, Black's Law Dictionary (11th ed. 2019) (defining "minimum wage" as "the lowest permissible hourly rate of compensation for labor").

Because prevailing wage laws involve variable pay schedules that depend on locality, economic conditions, occupation, and other factors, such laws necessarily raise different questions about compliance and enforcement. Thus, the Ordinances necessarily incorporate not only the federal Department of Labor's ever-changing schedules of what constitutes a "prevailing wage," but also a complex body of authority on how to apply those schedules. For example, they require an employer to determine which of dozens of job classifications (and corresponding pay rates) apply to workers based on what tasks they perform on any given

workday. *See Int'l Bhd. of Elec. Workers v. T & H Servs.*, 8 F.4th 950, 953 (10th Cir. 2021) (describing dispute over whether "workers who repaired [a] roof should have been classified as general maintenance workers or roofers for that labor," and noting the "Department of Labor has a robust system … for determining job classifications … and resolving disputes over classifications"); *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088, 1090–95 (9th Cir. 1999) (analyzing whether "workers who performed certain types of piping work" were properly classified as "Laborers" or "Plumbers & Steamfitters" under federal prevailing wage law).

If Arizona voters had intended to import this complex federal regulatory regime into municipal construction projects, they would have done so in clearer terms than simply authorizing cities to "regulate minimum wages and benefits within [their] geographic boundaries," A.R.S. § 23-364(I). *See* Br. Amici Curiae of Pres. Petersen and Speaker Toma at 9–10. As the Arizona Supreme Court made clear in *Roberts*, courts will not infer an intent to incorporate federal labor law, absent a clear statement to that effect. 253 Ariz. at 266–67 ¶¶ 19–23.

Defendants argue that it is "irrelevant" that prevailing wage laws "take a different form and are enacted for different purposes than laws setting or regulating minimum wages." Resp. at 4. On the contrary: when determining whether two laws are so directly in conflict that one impliedly repeals the other, such considerations are highly pertinent. If the laws differ in application, scope, mechanism, and purpose, this means that a "reasonable construction can [reconcile the] two statutes," and thus there is no implied repeal. *State ex. rel. Larson v. Farley*, 106 Ariz. 119, 122–23 (1970); *see also Ariz. Dep't of Rev. v. Action Marine, Inc.*, 218 Ariz. 141, 143 ¶ 10 (2008) ("We construe the statute as a whole, and consider its context, language, subject matter, historical background, effects and consequences, and its spirit and purpose." (citations omitted, alterations adopted)).

Moreover, recognizing these differences does not require any speculation about legislative intent. *Cf.* State's Br. at 6–8 (characterizing Plaintiffs' points as "extra-textual" or "policy" arguments). When the voters and the Legislature referred to "prevailing wage" and

"minimum wage," they used terms that are not only textually distinct, and that in common layman's parlance are used to refer to different things, *see, e.g.*, *What's the Difference Between Minimum Wage, Prevailing Wage, and Living Wage?*, GovDocs.com,[4] but that courts have long recognized as "substantially different" from one another. *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980); *see* MSJ at 3–4. "It is presumed the legislature is aware of existing case law when it passes a statute, and that it is aware of court decisions interpreting the language of the statute; and when it retains the language upon which those decisions are based, it approves the interpretations." *State v. Pennington*, 149 Ariz. 167, 168 (App. 1985) (citations omitted); *see also State v. Patel*, 247 Ariz. 482, 484 ¶ 8 (App. 2019) (applying the same principle to ballot initiatives).

C. Even if there were a conflict, the specific prohibition on prevailing wages would control over the general authorization to enact minimum wage laws.

Defendants flip the general/specific canon on its head.[5] "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." *Midtown Med. Grp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 220 Ariz. 341, 347 ¶ 22 n.9 (App. 2008). The fact that the Minimum Wage Act might be more "general" in other respects (i.e., that it "applies to all political subdivisions, covers the entire state, and imposes an absolute prohibition," Resp. to MSJ at 4), is irrelevant, because there is no tension between the two statutes as to these factors.

When applying the general/specific canon, much depends on framing the comparison properly. After all, any two statutes might be "narrow and broad in their own ways such that determining which provision is more specific turns entirely on how you define the subject matter at issue." *Milne v. Robinson*, -- N.W.3d --, 2024 WL 1200489, at *6 (Mich. Mar. 20, 2024). When, as here, two statutes both address whether certain actions are allowed or prohibited, the

[4] https://www.govdocs.com/minimum-wage-and-its-counterparts/.
[5] To be sure, the Court need not even "apply the general/specific canon because … there is no conflict in the first place": the statutes can be harmonized based on their plain language. *State v. Santillanes*, 541 P.3d 1150, 1156 ¶ 20 (Ariz. 2024).

proper question is whether *what is prohibited* is more specific than *what is allowed*. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission."); *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (holding specific provision authorizing federal agency to accord an employment preference to Native Americans controlled over general prohibition on employment discrimination); *Hackie v. Bryant*, 654 S.W.3d 814, 819 (Ark. 2022) (holding specific prohibition on issuing licenses for private security or investigative services to an unpardoned felon controlled over general statement that criminal records were not an automatic bar to occupational licensing).[6]

Here, the only relevant comparison between Section 23-364(I) and Section 34-321(B) is *what they allow cities to do.* Section 23-364(I) *allows* cities to set minimum wage laws, while Section 34-321(B) specifically *prohibits* cities from enacting prevailing wage laws. Minimum wage laws apply generally to all employers and employees (apart from specific exceptions not relevant here). Prevailing wage laws, by contrast, only apply to public contractors. Assuming prevailing wage laws are a type of minimum wage law,[7] they are one specific *type*, compared with the general category of minimum wage laws. That means the specific prohibition on prevailing wage laws would control over the general authorization to enact minimum wage laws.

II. The Ordinances' enforcement provisions violate due process.

Defendants argue that Ordinances "provide all the process due" because the "investigatory and adjudicatory powers" they create "do not reside in a single city official." Resp. to MSJ at 4–5. But the Ordinances create a unique problem, unlike any of those addressed by the cases Defendants cite, because they vest a single city official with the power to (1)

[6] Similarly, in *Baker v. Gardner*, which the State cites in its amicus brief, two sets of statutes facially conflicted as to what types of deficiency judgments they prohibited; the Supreme Court held that the more specific provisions were the ones whose prohibition "appl[ied] to a particular, limited group of mortgages and trust deeds." 160 Ariz. 98, 101 (1988).

[7] Plaintiffs dispute this premise, of course, but they address it here insofar as Defendants argue their prevailing wage laws are one specific type of minimum wage law that Section 23-364(I) authorizes cities to enact.

investigate alleged violations, (2) adjudicate those same alleged violations, and (3) hand-pick who will decide any appeal from their decisions.

While there appears to be no precedent for this precise problem, vesting a single official with all these powers violates the prohibition on having "the same individual" "performing accusatory, advocacy, and adjudicatory functions," *Horne v. Polk*, 242 Ariz. 226, 232 ¶ 20 (2017), with no possibility of an impartial appeal other than (possibly) a special action. *See id.* at 231 ¶ 17 ("One cannot both participate in a case (for instance, as a prosecutor) and then decide the case."); *see also Falcone Bros. & Assocs. v. City of Tucson*, 240 Ariz. 482 (App. 2016); *R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368 (1997).[8]

In addition to this core defect, the Ordinances' provisions authorizing city officials to unilaterally punish contractors for exercising appeal rights, and giving those officials broad discretion in determining penalties, as well as the Ordinances' constricted provision for judicial review all compound the procedural due process violations. *Cf. Horne*, 242 Ariz. at 230 ¶ 14 (noting that due process violations are "magnified where the agency's final determination is subject only to deferential review").

CONCLUSION

The Court should grant Plaintiffs' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 20th day of May, 2024.

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[8] Defendants' citation to *Pavlik v. Chinle Unified School District No. 24*, 195 Ariz. 148, 152 (App. 1999) is inapposite. That case articulated the standard for an as-applied challenge based on claims of bias by specific officials. Here, the problem is not with any particular city official, but with the Ordinances' failures to include "sufficient safeguards … to ensure due process." *Horne*, 242 Ariz. at 232 ¶ 21.

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CERTIFICATE OF SERVICE

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