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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' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

(Assigned to the Honorable Brad Astrowsky)

INTRODUCTION

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. Defendants do not even try to argue that their ordinances are consistent with that state law. Instead, they argue in their Motion to Dismiss that their ordinances are not preempted by state law because the prevailing wage prohibition was impliedly repealed by subsequent, *minimum wage* laws, leaving cities free to adopt these ordinances.

But a prevailing wage is not a minimum wage. The two statutes (the minimum wage law and the state law preempting city prevailing wage ordinances) address distinct concepts, and because the two state laws are consistent with each other, there is no implied repeal. Consequently, the prevailing wage preemption remains in place, and the cities' motion must fail.

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.

In addition to being preempted by statute, both ordinances violate the Arizona Constitution's due process protections 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.

For these reasons, Defendants' motion to dismiss should be denied.

BACKGROUND

In 1984, the Legislature prohibited cities and other political subdivisions from imposing so-called "prevailing wage" mandates on public works contractors. Corrected First Amended Complaint ("FAC") ¶ 1. Notwithstanding this prohibition, Phoenix and Tucson both enacted substantially similar "Prevailing Wage" ordinances (the "Ordinances") on January 9, 2024. *Id.* ¶¶ 25–28, 39–41.

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.* ¶¶ 30, 43. 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.* ¶¶ 31, 44.

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. FAC ¶¶ 32, 45. 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.* ¶¶ 47–48, 34–35. 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. 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.* ¶¶ 36, 49.

DISCUSSION

I. Legal Standards

A complaint may only be dismissed "if 'as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (citation omitted). Motions to dismiss are disfavored and should not be granted unless it is "certain that plaintiff would not be entitled to relief." *State ex*

[1] $4,000,000 or more for Phoenix; $2,000,000 or more for Tucson. FAC ¶¶ 30, 43.
[2] The City Engineer for Phoenix; the Director of Procurement for Tucson. FAC ¶¶ 32, 45.

rel. Corbin v. Pickrell, 136 Ariz. 589, 594 (1983) (citation omitted). "[C]ourts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences," relying on the complaint and any "exhibits" or "public records" referenced in the complaint. *Coleman*, 230 Ariz. at 356 ¶ 9.

II. State law preempts the prevailing wage ordinances.

A. State law prohibits cities from enacting prevailing wage ordinances.

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") (emphasis added). This statute plainly deprives the Defendants of authority to impose 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. That provision states, in relevant part: "A county, city, or town may by ordinance regulate minimum wages and benefits within its geographic boundaries but may not provide for a minimum wage lower than that prescribed in this article." A.R.S. § 23-364(I).

But this argument fails. The doctrine of implied repeal applies only when two laws are irreconcilable, and here, the Minimum Wage Law is easily reconcilable with the Prevailing Wage Prohibition because the laws address completely different concepts.

B. Implied repeal applies only to irreconcilable statutes.

"It is generally disfavored to find an implied repeal of a statute." *Jurju v. Ile*, 534 P.3d 926, 930 ¶ 21 (Ariz. App. 2023). Indeed, courts find implied repeal only in the rare case "where it appears by reason of repugnancy, or inconsistency, that two conflicting statutes cannot operate contemporaneously," *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 333 ¶ 29 (2001), "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), and where "*no reasonable construction* can [reconcile the] two statutes." *State ex. rel. Larson v. Farley*, 106 Ariz. 119, 122–23 (1970) (emphasis added; citation omitted).

This is a high bar for Defendants to clear. "Instead of presuming that the more recent statute controls, [courts] first look to whether [they] can reconcile the statutes that are in apparent conflict," *Jurju*, 534 P.3d at 930 ¶ 21, and only where there is a "plain, unavoidable, and irreconcilable repugnancy" between the two statutes will courts conclude that the later one implicitly repealed the earlier one. *Burnside v. Douglas Sch. Dist. No. 27*, 33 Ariz. 1, 8 (1927). Notably, the implied repeal analysis does not depend on whether a law was enacted by the Legislature or by popular initiative. *See In re Riggins*, 544 P.3d 64, 67–68 ¶¶ 13–20 (Ariz. 2024).

Defendants argue that Section 1-245 creates an exception to these well-established principles. But the Supreme Court rejected that argument in *In re Riggins*, where it analyzed Section 1-245 at length and concluded that that provision "deems as repealed *only* those former statutes that address 'cases provided for by the subsequent statute'"—that is, only in situations where a court must determine "which of two applicable statutes, both of which address the same substantive issue, controls in a given case." *Id.* 70–71 ¶¶ 33–34.[3]

Here, the two statutes do not "address the same substantive issue," *Riggins*, 544 P.3d 71 ¶ 34, and it is inappropriate to apply the doctrine of implied repeal, because there is a straightforward way to construe both laws harmoniously. The minimum wage and the prevailing wage are two different things. The Minimum Wage Law allows cities to "regulate minimum wages," A.R.S. § 23-364(I), i.e., to set across-the-board wage floors for private and public employees and employers generally. The Prevailing Wage Prohibition, on the other hand, bans cities from requiring contractors on public works projects to follow detailed wage requirements based on locality, occupation, and market conditions, as a requirement for contracting with the city.

[3] This approach to implied repeal is not, as Defendants suggest, a "recent" development. Motion to Dismiss ("MTD") at 10 n.4. *See Burnside,* 33 Ariz. at 8 ("Repeals by implication are not favored, nor is it sufficient to raise such implication that the subsequent law covers some of the cases provided for by the former statute.").

C. Prevailing wage ordinances are not minimum wage laws.

Defendants' entire argument against preemption depends on the premise that a prevailing wage law is a type of minimum wage law. But "[p]revailing 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). As the Ohio Supreme Court explained in *Harris v. Atlas Single Ply Sys., Inc.*, 593 N.E.2d 1376, 1376 (Ohio 1992):

> The term "minimum wages" denotes a specified hourly wage guaranteed to all qualified workers under federal and Ohio law. It is a dollar and cents amount readily cited by most American adults—$4.25 at the time of the decision. … The term "prevailing wage," by contrast, is calculated based on union wages paid in a given locale and based on a sum of various compensation factors defined in [state law], including hourly wage rates and fringe benefits. Accordingly, if we were to find that the reference … to "minimum wages" governs actions for prevailing wages, we would be ascribing two entirely different meanings to the use of the term "minimum wages."

This distinction is well known. *See, e.g., Assoc. Builders & Contractors, Golden Gate Chapter Inc. v. Baca*, 769 F. Supp. 1537, 1545 (N.D. Cal. 1991) ("[V]irtually by definition, a 'prevailing' wage is not a 'minimum' wage. One is a definitive standard, applicable to *all* workers. The other is a standard determined by the agreements of a certain segment of workers and employers."); *Druml Co. v. Milwaukee Sewerage Comm'n*, 337 N.W.2d 856, 1983 WL 161480, at *4 (Wis. App. 1983) (unpublished) ("The coexistence of the concepts of minimum wages and prevailing wages for state and municipal contracts are of long standing and have been rigidly adhered to.").

It is commonplace in federal law, too, where statutes such as the Davis-Bacon Act and the Fair Labor Standards Act establish a "prevailing wage" that significantly exceeds the Minimum Wage. *Moodie v. Kiawah Island Inn Co.*, 124 F. Supp. 3d 711, 720–21 (D.S.C. 2015); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1319 (N.D. Ga. 2008).

This distinction is also reflected in the differing structures of Arizona's Prevailing Wage Prohibition and its Minimum Wage Law, the general/specific canon of construction, and legislative history.

1. "Minimum wage" is a term of art distinct from "prevailing wage."

Defendants synthesize their definition of "minimum wage" by grafting a dictionary definition of "minimum"[4] onto a statutory definition of "wage."[5] But they overlook the fact that "minimum wage" is a term of art with a long history of use to mean a single, generally-applicable floor on pay. *See* S. Rep. No. 6, 101st Cong., 1st Sess. 12 (1989) (describing the purpose of the federal minimum wage law, first enacted in 1938, as "establish[ing] a floor below which wages would not fall, a floor which is adequate to support life and a measure of human dignity").

Minimum wage laws set an across-the-board floor on wages, that, with very limited exceptions, *applies to all workers*, regardless of industry, occupation, locality, or public contractor status. *See* A.R.S. § 23-363(A) ("Employers shall pay employees no less than the minimum wage, which shall be not less than … .")[6]; *see also* Flagstaff City Code § 15-01-001-0003(A) ("Employers shall pay employees no less than the minimum wage, which shall be not less than … ."); 29 U.S.C. § 206(a) ("Every employer shall pay to each of his employees … wages at the following rates … ."). They establish a single minimum rate of pay, which may increase over time or to account for inflation, but *does not fluctuate by locality, industry, occupation, or other market conditions*.

Prevailing wage laws, on the other hand, apply only to *specific industries* (i.e., construction and public works contracting), and mandate *variable pay scales* depending on occupation and locality. *See, e.g.,* Phoenix Ordinance at 2–3 (Ex. B to MTD); Tucson Ordinance at 2 attached as Exhibit 1 (defining "Prevailing Wage Rate"). "The prevailing wage rate … due

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[4] "[T]he smallest acceptable or possible quantity in a given case." *Minimum*, Black's Law Dictionary (11th ed. 2019).

[5] "[M]onetary compensation due to an employee by reason of employment, including an employee's commissions, but not tips or gratuities." A.R.S. § 23-362(E).

[6] An "employee" is "any person who is or was employed by an employer," apart from those "employed by a parent or a sibling" and babysitters. A.R.S. § 23-362(A). "Employer" includes "any corporation, proprietorship, partnership, joint venture … individual or other entity acting directly or indirectly in the interest of an employer in relation to an employee," other than the state and federal government, and "small business[es]," which are exempted. *Id.* (B).

to the method of its calculation, might fluctuate at an uncertain and therefore unpredictable rate." *Cipparulo v. David Friedland Painting Co.*, 353 A.2d 105, 109 (N.J. Super. Ct. 1976).

Additionally, prevailing wage laws have much more specific, and distinct, purposes, inseparable from their context as regulations of public works projects, collective bargaining, and labor relations. As the Ohio Supreme Court put it:

> The prevailing wage law evidences a legislative intent 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 … . *Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process* by preventing the undercutting of employee wages in the private construction sector.

State ex rel. Evans v. Moore, 431 N.E.2d 311, 313 (Ohio 1982); *see also, e.g.*, *Mullally v. Waste Mgmt. of Mass., Inc.*, 895 N.E.2d 1277, 1282 (Mass. 2008) ("The 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."); *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 649 (Cal. 1992) (listing "specific goals" of prevailing wage law, including "to permit union contractors to compete with nonunion contractors" and "to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees").

Also unlike minimum wage laws, prevailing wage laws like the Ordinances incorporate federal law by reference, in that they rely prospectively on a set of fluctuating determinations set by a federal agency based on federal statutes and regulations. *See* Phoenix Ordinance, Ex. 1 § 43-51, Tucson Ordinance, Ex. 2 § 28-160 (setting prevailing wages "on the basis of applicable prevailing wage rate determinations made by the U.S. Secretary of Labor under the provisions of the Davis-Bacon Act, 40 U.S.C. § 3142 et seq., as amended"). If the Minimum Wage Law authorized cities to enact prevailing wage measures, it would "implicitly incorporate into Arizona law (or, alternatively, authorize [cities] to incorporate)" a whole complex federal legal regime of statute, regulations, and administrative determinations. *Roberts v. State*, 253 Ariz. 259, 266 ¶ 19 (2022). "That is a great deal of freight to load upon a tiny statutory vessel." *Id.*

Obviously, there is a sense in which prevailing wage laws do set "minimums," i.e., they establish lower limits on permissible pay rates. But unlike minimum wage laws, they set entire *schedules* of pay rates for specific industries. Moreover, these schedules are highly variable, and they represent an *average* wage based on a particular trade and locality, not an across-the-board floor.[7] A superficial overlap in the colloquial meaning of the word "minimum" does not mean that "minimum wage *laws*," as a term of art, encompasses "prevailing wage laws."

Prevailing wage laws express specific policy choices on how to resolve the tension between minimizing government spending by awarding contracts "to the lowest responsible bidder" on one hand, and "discourag[ing] contractors on public works projects from paying substandard wages to [certain] classes of their workers" on the other. *Heller v. McClure & Sons, Inc.*, 963 P.2d 923, 926 (Wash. App. 1998). Because prevailing wage laws involve fundamentally different policy considerations, and have different effects, than minimum wage laws, it makes little sense to simply treat them the same way. *See Harris*, 593 N.E.2d at 1378 ("The minimum wage laws were enacted to protect all workers; the prevailing wage laws were intended to support the integrity of the collective bargaining process in the building and construction trades.").

2. The Prevailing Wage Prohibition does not operate as a minimum wage law.

In addition to the conceptual differences between minimum wage and prevailing wage laws, the Prevailing Wage Prohibition is separate from, and independent of, the Minimum Wage Law. It appears in a different title: Title 34 (Public Buildings and Improvements), not 23 (Labor). That is because, unlike the Minimum Wage Law, the focus of a Prevailing Wage law is not on the wages employers pay their employees, but rather, the terms of public works contracts between political subdivisions and private parties. A.R.S. § 34-321(B). In fact, other subsections

[7] The federal Department of Labor (whose determinations both Ordinances use in establishing their own wage schedules) calculates prevailing wages based on "[t]he wage paid to the majority … of the laborers or mechanics in the classification on similar projects in the area during the period in question," "the wage paid to the greatest number" of such workers, or a weighted average of wages paid to such workers. 29 C.F.R. § 1.2.

of the statute regulate how political subdivisions may deal with labor unions and collective bargaining processes. *Id.* (C).

This focus on contracting, collective bargaining, and labor agreements rather than generalized employee compensation makes sense, given the differences between prevailing wage and minimum wage regulations. Unlike the Minimum Wage Law, the Prevailing Wage Prohibition is part of a package of specific policy choices by the Legislature regarding how Arizona's political subdivisions will handle public works projects. *Cf. Heller*, 963 P.2d at 926. There is no reason to think that Arizonans intended to alter these policy choices when they enacted general requirements about what "[e]mployers shall pay employees," A.R.S. § 23-363(A), and authorized cities to "regulate minimum wages and benefits" consistent with those "prescribed in [Title 23]," § 23-364(I).

The Prevailing Wage Prohibition coexists easily with the Minimum Wage Law. The Minimum Wage specifies the lowest limit of payment for services generally, while the Prevailing Wage Prohibition forbids cities from doing what the Defendants have done: namely, mandate that "public works contracts … contain a provision" which requires contractors or subcontracts to pay "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). Because there is no conflict, Defendants' motion to dismiss must be denied. *Nat'l Union Fire Ins. Co. v. Truck Ins. Exch.*, 107 Ariz. 291, 294 (1971) ("[R]epeals by implication are not favored and will not be indulged in if there is any other reasonable construction.").

3. The general/specific canon supports the Prevailing Wage Prohibition.

Defendants argue that the Prevailing Wage Prohibition "provides the general rule," while the Minimum Wage Law "provides the exception," MTD at 12, and that the latter controls here under the general/specific canon. *See, e.g.*, *State v. Santillanes*, 541 P.3d 1150, 1156 ¶ 20 (Ariz. 2024) ("[I]f there is a conflict between a general provision and a specific provision … the specific provision prevails." (citation omitted)). This argument fails for three reasons.

First, we need "not apply the general/specific canon because, as noted above, there is no conflict in the first place." *Id.* As explained above, the Prevailing Wage Prohibition and the

Minimum Wage Law are easily reconciled, so no repeal exists—and therefore there is no need to consult the general/specific canon.

Second, however, even if the canon did apply, Defendants' logic is inconsistent. They argue on page 12 of their motion that the Minimum Wage Law is the more specific provision—because it (supposedly) permits particular kinds of wage laws—whereas the Prevailing Wage Prohibition is the more general, because it bans prevailing wages "anywhere in the state." But elsewhere they argue that "a prevailing wage is just one kind of minimum wage," that "[a]ny law that addresses minimum wages generally, necessarily covers prevailing wages, which are specific kinds of minimum wages," MTD at 10, and that the Minimum Wage Law applies only to "counties, cities, and towns," while the Prevailing Wage Prohibition covers "every other political subdivision without exception." *Id*. at 13. But if that's true, then the Minimum Wage Law is plainly the more general, because it sets the broader policy and sets wages for more people—while the Prevailing Wage Prohibition, which bans one particular type of ordinance, applying to specific industries and local communities, is the more specific. Thus, the specific (the prohibition) should trump the general (the Minimum Wage Law).

Third, the Arizona Supreme Court has made clear that "[w]hen statutes relate to the same subject matter, and the later enactment does not contain an express repeal or amendment, the later enactment is deemed to have been enacted in accordance with the legislative policy embodied in the earlier statute." *Hibbs ex rel. Ariz. Dep't of Rev. v. Chandler Ginning Co.*, 164 Ariz. 11, 16 (App. 1990). Thus, "[a] later act, general in its terms, will not be construed as repealing a prior act treating in a special way something within the purview of the general act." *Hudson v. Brooks*, 62 Ariz. 505, 513 (1945). Instead, when "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) (citation omitted).

4. Legislative history supports the Prevailing Wage Prohibition.

Defendants recount a lengthy history of Arizona minimum wage laws enacted through both the Legislature and the initiative process, and they try to cast that history as a battle between the people and the Legislature, which they characterize as "hostil[e] to fairly paying working Arizonans … ." MTD at 1. These arguments fail for several reasons.

First, legislative history cannot "supersede the unambiguous words in a statute." *Qasimyar v. Maricopa Cnty.*, 250 Ariz. 580, 590 ¶ 33 (App. 2021). Here, the relevant statutory text is "clear and unambiguous," *id.* (citation omitted), in authorizing cities to regulate minimum wages while prohibiting them from mandating prevailing wages.

Second, to the extent legislative history is relevant, it indicates that the voters who enacted the Minimum Wage Law understood "minimum wage" in its usual sense, as an across-the-board floor on wages. That Law's express purpose and intent was that "[a]ll working Arizonans deserve to be paid a minimum wage that is sufficient to give them a fighting chance to provide for their families." Prop. 202, sec. 2 (2006). In the amendment to the minimum wage law on which Defendants rely, there is not a shred of evidence that the initiative was intended to repeal A.R.S. § 34-321(B). The name of the initiative is the "Fair Wages and *Healthy Families* Act," indicating that the measure was intended to apply to working families, not municipal contractors. What's more, nowhere in the measure's text, ballot description, or in the arguments for or against the act is the phrase "prevailing wage" ever used.[8] Instead, all of those materials describe a broad-based *minimum* wage for all employees in the state, not a variable prevailing wage schedule for municipal contractors. There is simply no indication that the Initiative was meant to repeal and authorize cities to specially regulate public contractors' payrolls based on complex, locality- and occupation-specific tables, via "prevailing wage" ordinances.

Third, even assuming Defendants were correct in their characterization of a struggle between the people (favoring a higher minimum wage) and the Legislature (which allegedly kept trying to undermine minimum wage initiatives), this account would *support* Plaintiffs'

[8] *See* https://apps.azsos.gov/election/2016/general/ballotmeasuretext/I-24-2016.pdf; https://apps.azsos.gov/election/2016/BallotMeasure/document/Arguments/Wages_PRO.pdf; https://apps.azsos.gov/election/2016/BallotMeasure/document/Arguments/Wages_CON.pdf.

preemption argument. Section 34-231's prevailing wage prohibition has been in place since 1984. If Arizonans really intended the series of minimum wage initiatives to repeal "that four decades-old decree," MTD at 6–7, they would have made that clear. They would have included *some* kind of language to that effect *somewhere* in the initiatives, clarifying that in authorizing cities to regulate the *minimum wage*, they were also authorizing cities to implement *prevailing wage* laws. But they never did so, which is why Defendants ask this Court to "indulge" their "repeal[] by implication" argument. *Truck Ins. Exchange*, 107 Ariz. at 294.

III. The prevailing wage ordinances violate due process.

With respect to Plaintiffs' Due Process cause of action—that the Ordinances empower a single unelected official to investigate and adjudicate alleged violations, without any meaningful checks on that authority—Defendants argue that "[a]n administrative scheme" may "empower[] a single official to both investigate and make an initial compliance determination," consistent with due process, "so long as that official does not also make the *final* adjudication." MTD at 16. But under both Ordinances, a single official effectively *does* have final adjudicative power. That is because the only opportunity for appeal is to another bureaucrat appointed by the original decision-maker.

Under well-established case law, this dynamic creates "an appearance of potential bias," if not "actual bias." *Horne v. Polk*, 242 Ariz. 226, 230–31 ¶ 16 (2017). The "right to a neutral adjudicator has long been recognized as a component of a fair process." *Id.* at 230–31 ¶ 16. "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.

What's more, the Ordinances empower investigators to make far more than an "initial compliance determination," MTD at 16. They authorize the city official to actually make findings of liability and impose whatever penalties they see fit. Phoenix Ordinance, MTD Ex. B §§ 43–54, 43–55; Tucson Ordinance, Ex. 1 §§ 43–54, 43–55. This supposedly "initial determination" is therefore "not akin to a judge finding probable cause to proceed to trial and

then reaching a final decision after an adversarial process in which the judge was not an advocate." *Horne*, 242 Ariz. at 232 ¶ 20. Rather, it *is* the final decision (unless a contractor pursues an appeal, whereupon it is reviewed by a person chosen by the initial decision-maker). Thus "we have here not only a single agency performing accusatory, advocacy, and adjudicatory functions, but the same individual performing all three functions," in violation of due process. *Id.*

Both *Falcone Brothers & Assocs. v. City of Tucson*, 240 Ariz. 482 (App. 2016), and *R.L. Augustine Construction Co. v. Peoria Unified School District No. 11*, 188 Ariz. 368 (1997), found similar arrangements invalid because they provided insufficient procedural protections. *Falcone Brothers* involved a city's procurement rules, whereby an initial decision was made by the city's procurement officer, but then an aggrieved party could appeal to the director of procurement, who would then assign a hearing officer to conduct the review. *See* 240 Ariz. at 485–86 ¶ 2. This arrangement was actually more protective of due process than the one challenged here, given that under these Ordinances, the same officer can reach a finding of liability and impose a penalty. Still, the plaintiff in *Falcone Brothers* argued that was an inadequate appellate process, because it did not provide for a genuinely *de novo* review of a wrongful initial determination. *Id.* at 487 ¶ 9. Given that "[t]he second level of administrative review … took place before a hearing officer selected by the City's procurement director," the review procedure was illusory. *Id.* at 488–89 ¶ 18. "Despite its formalities," the court said, this process "provided only *one* level of administrative review in which the City, through its agents and employees, acted as 'both the first-tier reviewer and the second-tier final decision maker.'" *Id*. at 489 ¶ 19 (emphasis added, citation omitted). The same was true in *R.L. Augustine*, where the rules empowered the Board of Education to make an initial contracting decision and allowed aggrieved parties to appeal—but the appeal was before "a hearing officer appointed by the Governing Board." 188 Ariz. at 370. Under such rules, said the court, "the purchasing agency is both the first-tier reviewer and the second-tier final decision maker. … [T]he interested party is the adjudicator of contract obligations." *Id.* Likewise, here, the alleged "appeal" rights enjoyed

by entities subject to the Ordinance are illusory, because the accusing official is the one who chooses the so-called appellate reviewer.

Defendants fail to mention a particularly egregious aspect of the adjudicative processes both Ordinances create: namely, that city officials have 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. *See* FAC at ¶¶ 36, 49. 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)).

The Ordinances also violate due process because they provide inadequately for judicial review of city officials' decisions to impose penalties.[9] Defendants argue that "the actions of a city officer are always subject to review by special action when such actions are required by law." MTD at 17. But the prospect of special action review is a poor substitute for ordinary judicial review. "Acceptance of special action jurisdiction is highly discretionary," *Pompa v. Superior Ct.*, 187 Ariz. 531, 533 (App. 1997), and the law provides for special actions only in a few limited circumstances, such as when an official fails "to perform a duty required by law as to which he has no discretion," acts "without or in excess of jurisdiction or legal authority," or makes a "determination" that is "arbitrary and capricious or an abuse of discretion," Ariz. R. Proc. Spec. Actions 3. Here, where city officials are empowered to investigate allegations and

[9] While the Phoenix Ordinance authorizes contractors to "seek judicial review" of "a non-final decision of the hearing officer," the Tucson ordinance includes no such provision. Moreover, it is unclear what the scope of the Phoenix Ordinance's judicial review provision includes, as the language is limited to "non-final decision[s] of the hearing officer."

impose punishments based on their findings, contractors are unlikely to have recourse to special action review except in the most unusual or egregious circumstances.

Defendants also argue that the Ordinances can constitutionally empower city officials to punish contractors for alleged violations without any judicial review. 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.

The Ordinances give city officials broad discretion to impose penalties including "wage restitution," "liquidated damages" (including up to three times the wages owed," withholding contractual payments the contractor has already earned, and even "debarment" (i.e., permanent disqualification from working on city projects). Arizona's constitutional guarantee of due process simply does not allow a single city official to impose such penalties at his own total discretion, with no opportunity for appeal apart from his own hand-picked hearing officer.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

RESPECTFULLY SUBMITTED this 8th day of April, 2024.

GOLDWATER INSTITUTE

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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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THIS IS A DRAFT COPY ONLY AND IS NOT AN OFFICIAL COPY OF THE FINAL ADOPTED ORDINANCE

ORDINANCE G-7217

AN ORDINANCE AMENDING CHAPTER 43 OF THE PHOENIX CITY CODE ENACTING THE FOLLOWING PREVAILING WAGE ORDINANCE FOR CITY CONSTRUCTION PROJECTS TO BE CODIFIED AS ARTICLE XIV OF CHAPTER 43 OF THE PHOENIX CITY CODE.

WHEREAS, the City Council for the City of Phoenix hereby declares that it is in the best interests of the City to have a uniform determination of the prevailing wages to be paid to the various classes of mechanics, laborer or other workers on City construction projects which will be required in the performance of work covered by this Ordinance.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PHOENIX as follows:

SECTION 1. That Chapter 43 of the Phoenix City Code is amended and a new Article XIV is adopted as follows:

Chapter 43 –Article XIV.
Payment of Prevailing Wage for Work Performed on City Construction Projects.

Sec. 43-51. Definitions.

In this Article, unless the context otherwise requires:

Affordable Housing means residential or mixed-use development, excluding any projects that are subject to the Davis-Bacon Act, that provides low-to-moderate-income housing to at least 50% of the dwelling units at a site committed for a minimum term through covenants or restrictions to households with incomes at 80% or less of the area median income as defined by the United States Department of Housing and Urban Development.

City means the City of Phoenix and any related City agency, department or authority.

Construction in the context of *Construction Contracting* has the meaning as set forth in Section 34-101(3) of Title 34, Chapter 1, Article 1 of the Arizona Revised Statutes. For the purposes of this Article, Construction Contracting is limited to construction conducted on City-owned or leased property and does not include work performed by employees of the City.

City Construction Contract means a contract for construction on City-owned or City-leased property and to which the City is the contracting party financially obligated to pay the contract sum and which is solicited in accordance with the City Procurement Code.

Covered Employer means any employer obligated to pay employees a prevailing wage under this Article.

Prevailing Wage Rate means the rate, amount, or level of wages, salaries, benefits, and other remuneration prevailing for the corresponding class of mechanics, laborers, or workers employed for the same work in the same trade or occupation in the locality in which the construction takes place, as determined by the City Engineer

on the basis of applicable prevailing wage rate determinations made by the U.S. Secretary of Labor under the provisions of the Davis-Bacon Act, 40 U.S.C. § 3142 et seq., as amended.

Willfully means any act which is intentional, deliberate, conscious or voluntary and designed to achieve a particular result.

Sec. 43-52. Payment of Prevailing Wages.

(A) *Required*. Every mechanic, laborer or other worker employed by any contractor or subcontractor under any applicable City Construction Contract to perform Construction Contracting shall be paid not less than the Prevailing Wage Rate for the same class and kind of work in the Phoenix metropolitan area. This section shall not apply to: (i) any participant in a youth employment program where the participant is employed in non-construction work; (ii) situations where there is no contract directly requiring or permitting construction work; or (iii) contracts that are neither a revenue nor expenditure contract contemplating construction work, such as licenses or permits to use city-owned land.

(B) *Apprenticeship Programs.* Every Covered Employer may support employee apprenticeship participation by contributing an amount to an apprenticeship program approved by the U.S. Department of Labor that is equivalent to and consistent with the appropriate Prevailing Wage Rate as determined by the U.S. Department of Labor and registered with the State of Arizona, Western Maricopa Education Center, East Valley Institute of Technology, or an equivalent career training program.

(C) *Contract Specifications.* Every City Construction Contract with an aggregate value of four million dollars ($4,000,000) or greater at the time the City Construction Contract is entered into shall contain a provision: (i) stating that the minimum wages to be paid for every class of mechanic, laborer and worker shall be not less than the Prevailing Wage Rate for each class of worker; (ii) requiring a Covered Employer to pay every mechanic, laborer or other worker at least once a week the full amount of wages accrued at the time of payment at the applicable Prevailing Wage Rate; (iii) mandating that every Covered Employer comply with the recordkeeping and notice posting requirements in Section 43-53 of this Article. No Covered Employer shall misclassify any mechanic, laborer or other worker as an independent contractor, as defined in CFR 541. A mechanic, laborer or other worker shall be classified as an independent contractor only if their work relationship satisfies the legal definition of an independent contractor under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., as amended.

Sec. 43-53. Required Recordkeeping and Notice Posting.

(A) Every Covered Employer shall keep certified payroll records showing the name, address, job classification, wages and benefits paid or provided, and the number of hours worked for each employee. These records shall be preserved for four (4) years from the date of an employee's final payment and shall be considered public records under Arizona Public Records Law. A.R.S. § 39-101 et seq.

(B) Every Covered Employer shall file weekly Federal Form WH-347 or its equivalent which shall specify for each employee the employee's name,

address, employee ID#/last four digits of the Social Security Number, job classification, hourly wage rate paid, the number of hours worked each week, all deductions made from gross pay, and net weekly pay, with the City Engineer. Every Covered Employer shall file a statement weekly with the City Engineer certifying that all workers have been paid no less than the wage required by their contract, if any wages remain unpaid to set forth the amount of wages due and owing to each worker respectively, and that the job classification for each employee conforms with the work performed. Social Security Numbers and other personal identifying information shall be kept confidential by the City, unless otherwise required by law.

(C) The City Engineer must notify in writing all Covered Employers at least once every twelve (12) months of their obligation to file weekly the Federal Form WH-347 or its equivalent. The notification must include a copy of the Federal Form WH-347 with instructions for completing the form, the dates that the completed form is due throughout the proceeding twelve (12) months, contact information for an employee within the City Engineer's office where questions can be referred, a notice of the penalties that can be assessed if the Covered Employer becomes non-compliant. In addition, the notice shall include a letter that provides the name, address and telephone number of the City Engineer, the applicable prevailing wages for the job classifications at the Covered Employer, and a statement advising workers that if they have been paid less than the Prevailing Wage Rate they may notify the City Engineer and request an investigation. The City's failure to provide the previously described written

notification to covered employers does not relieve Covered Employers of their obligations under this Article.

(D) Every Covered Employer shall post the letter with the related information referenced in Subsection C above at the job site in an area easily accessible by all employees.

Sec. 43-54. Enforcement.

(A) *Complaint Procedure*. The City Engineer shall provide a complaint form on the official City website. Any affected individual or organization representing such individual(s) may file a complaint with the City Engineer for any violation of this Article.

(B) *Review and Investigation*. The City Engineer shall review and investigate the complaint and shall make a finding of compliance or noncompliance within sixty (60) days of the complaint being filed, including a determination of whether an employer is covered by this Article. The Covered Employer shall permit authorized agents of the City Engineer to observe the work being performed on the work site, to interview employees, and examine the books and records relating to the payrolls being investigated to determine whether or not the Covered Employer is in compliance with this Article. Failure of the City Engineer to issue a finding of compliance or noncompliance does not relieve the Covered Employer of their obligations under this Article.

(C) *Finding of Noncompliance.* If at any time the City Engineer, upon investigation of a complaint or upon independent investigation, finds that a

violation of this Article has occurred, it shall issue a finding of noncompliance and notice of corrective action to the Covered Employer. The finding of noncompliance shall specify the areas of noncompliance, indicate such corrective action as may be necessary to achieve compliance, and impose deadlines for achieving compliance.

(D) *Dispute of Finding of Noncompliance.* A Covered Employer may dispute a finding of noncompliance and notice of corrective action by requesting a review within thirty (30) days of the date of the finding. The City Engineer shall appoint a hearing officer, who shall affirm or reverse the finding of noncompliance based upon evidence presented by the applicable City department and the Covered Employer. Where the finding of noncompliance and notice of corrective action requires wage restitution, the Covered Employer must, as a precondition to a request for review, provide evidence that such wages have either been paid or placed into an escrow account for the satisfaction of the judgment of the hearing officer. A Covered Employer who does not request review or appeal, or who fails to pay or escrow wages as provided herein, waives the right to dispute a finding of noncompliance. A finding of noncompliance and notice of corrective action shall become final if either the Covered Employer fails to request review within thirty (30) days as provided in this paragraph, or the hearing officer affirms such finding after a review.

(E) A violation by a subcontractor of a Covered Employer shall be deemed a violation by the Covered Employer.

Sec. 43-55. Sanctions.

(A) In the event the City Engineer or hearing officer determines that a Covered Employer has failed to comply for more than sixty (60) days after a notice of corrective action has become final, or in the event the hearing officer determines that any portion of a Covered Employer's dispute of a finding of noncompliance is frivolous or was brought for the purpose of delaying compliance, the City Engineer shall order any or all of the following penalties: (1) wage restitution for the affected employee(s); (2) liquidated damages in the amount of three (3) times the wages owed; (3) a directive to the applicable City department to withhold any payments due the Covered Employer, and to apply such payments to the payment of fines or the restitution of wages; or (4) rescission of the City Construction Contract in violation.

(B) In the event that the City Engineer or hearing officer determines that a Covered Employer has willfully or more than twice in a three-year period failed to comply with this Article, the City Engineer or hearing officer, in addition to the sanctions that may be imposed pursuant to subsection A above, may (1) order debarment of the contractor pursuant to Section 43-28 of the Phoenix City Code; and (2) in the case of a project receiving a city subsidy, order the payment of a fine in the amount of no less than 3% of the total cost of construction.

Sec. 43-56. Regulation.

The City Engineer may issue regulations to implement the provisions of this Article.

Sec. 43-57. Exclusions.

The provisions of this Article do not apply to City Construction Contracts:

1. valued at less than $4,000,000;

2. subject to Federal prevailing wage law;

3. solicited before July 1, 2024, including any renewals; or

4. excluded from the City of Phoenix Procurement Code.

In addition, none of the provisions of this Article apply to any of the following:

5. Procurements for any projects funded in whole or in part by the proposed 2023 General Obligation Bond Program.

6. Any Job Order Contracts (JOCs).

7. Any Affordable Housing construction project.

8. Any solicitation where a City Construction Contract is being re-advertised because the initial solicitation received less than three (3) responsive qualifying bids.

9. Public infrastructure reimbursement agreements between the City and private developers.

10. Construction by private developers of improvements that are, or are intended to be, constructed in City rights-of-way or on other property dedicated, or intended to be dedicated, to the City.

SECTION 2. That the provisions of this Ordinance are severable, and if any provision of this Ordinance or any application thereof is held invalid, that invalidity shall not affect the other provisions or applications of this Ordinance that can be given effect without the invalid provision or application.

SECTION 3. That this Ordinance shall become effective on July 1, 2024.

PASSED by the City Council of the City of Phoenix this 9th day of January, 2024.

_____
M A Y O R

_____
Date

ATTEST:

_____
Denise Archibald, City Clerk

APPROVED AS TO FORM:
Julie M. Kriegh, City Attorney

By:

_____

_____

REVIEWED BY:

_____
Jeffrey Barton, City Manager

ADOPTED BY THE
MAYOR AND COUNCIL

January 9, 2024

ORDINANCE NO. 12066

AMENDING CHAPTER 28 OF THE TUCSON CITY CODE BY ENACTING PREVAILING WAGE REQUIREMENTS FOR CERTAIN CITY PUBLIC WORKS CONSTRUCTION CONTRACTS; BY ADOPTING A NEW ARTICLE XV OF CHAPTER 28, "PREVAILING WAGE," TUCSON CODE SECTIONS 28-160 THROUGH 28-165; AMENDING TUCSON CODE SECTION 28-100; SETTING AN EFFECTIVE DATE AND DECLARING AN EMERGENCY.

WHEREAS, the Mayor and Council of the City of Tucson hereby declares that it is in the best interests of the City to have a uniform determination of the prevailing wages to be paid to the various classes of mechanics, laborers, and other workers on City public works construction projects covered by this Ordinance; and

WHEREAS, the Mayor and Council of the City of Tucson hereby finds that this Prevailing Wage Ordinance will:

• Ensure fair livable wages regardless of current market conditions, provide improved benefits, and provide safer working conditions for labor in connection with the contracts that are subject to its requirements;

• Produce higher quality public works construction projects;

• Facilitate and support apprenticeship programs to develop and sustain a highly skilled workforce;

Exhibit 2

• Help to prevent fraud and labor misclassifications, and increase accountability, by requiring certified payroll; and

WHEREAS, the Mayor and Council of the City of Tucson hereby finds that recent evidence from states and municipalities across the country appears to show that while there is a correlation between prevailing wage requirements and some level of increased costs to the contracting jurisdiction, the prevailing wage requirements have a positive impact on workers and the overall economy. By way of example, a February 2023 study conducted on the impact of Montana's prevailing wage laws by the Illinois Economic Policy Institute found that the law "keeps construction costs stable and supported local contractors; ensures that the next generation of workers is trained for in-demand careers, which combats labor shortages and protects worksite safety; and promotes labor market competitiveness." The study also found that Montana's prevailing wage law "increases construction worker incomes by eight percent and expands employer provided health insurance coverage for construction workers by eight percent." The study contends that increases in labor costs are beneficial to the overall economy and that these increases can be generally offset through savings elsewhere on large construction projects.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA AS FOLLOWS:

SECTION 1. That Chapter 28 of the Tucson City Code is amended by enacting a new Article XV to provide as follows:

Article XV. PREVAILING WAGE

Payment of Prevailing Wage for Work Performed on City Construction Projects.

Sec. 28-160. Definitions.

In this Article, unless the context otherwise requires:

Affordable housing means residential or mixed-use development that provides low-to-moderate- income housing to at least 50% of the dwelling units at a site committed for a minimum term through covenants or restrictions to households with incomes at 80% or less of the area median income as defined by the United States Department of Housing and Urban Development.

City means the City of Tucson and any related City agency, department or authority.

Construction has the meaning as set forth in Section 34-101(3) of Title 34, Chapter 1, Article 1 of the Arizona Revised Statutes. For the purposes of this Article, construction does not include work performed by employees of the City.

Covered contractor means any contractor or subcontractor performing work on a covered project.

Covered project means a City construction project on City-owned or leased property where the City is the "owner" of the project, the solicitation and award of contract(s) for the construction of the project is subject to the Procurement Code as well as Title 34 of the Arizona Revised Statutes, and the engineer's estimate of the total project cost is no less than $2,000,000, with the exception of the following:

1. Projects subject to Federal prevailing wage law;

2. Projects for which contracts are solicited before July 1, 2024, including any renewals;

4. Projects funded in whole or in part by revenues generated from ballot measures approved by voters prior to January 1, 2024;

5. Any projects to be constructed under a job order contract (JOC).

6. Any affordable housing project.

7. Any project where the contract solicitation is being re-advertised because the initial solicitation received less than three (3) responsive qualifying bids.

8. Public infrastructure projects built by private developers regardless of whether the City is providing any form of cost reimbursement.

Prevailing wage rate means the rate, amount, or level of wages, salaries, benefits, and other remuneration prevailing for the corresponding class of mechanics, laborers, or workers employed for the same work in the same trade or occupation in the locality in which the construction takes place, as determined by the director on the basis of applicable prevailing wage rate determinations made by the U.S. Secretary of Labor under the provisions of the Davis-Bacon Act, 40 U.S.C. § 3142 et seq., as amended.

Willfully means any act that is intentional, deliberate, conscious or voluntary and designed to achieve a particular result.

Sec. 28-161. Payment of Prevailing Wages.

(A) *Required.* Every mechanic, laborer or other worker employed by any contractor or subcontractor performing work on a covered project shall be paid not less than the prevailing wage rate for the same class and kind of work in the Tucson metropolitan area. This section shall not apply to any participant in a youth employment program where the participant is employed in non-construction work..

(B) *Apprenticeship Programs.* Any covered contractor may support employee apprenticeship participation by contributing an amount to an apprenticeship program approved by the U.S. Department of Labor that is equivalent to and consistent with the appropriate Prevailing Wage Rate as determined by the U.S. Department of Labor and is registered with the State of Arizona.

(C) *Contract Specifications.* Every Construction contract entered into by the City for a covered project shall contain a provision: (i) stating that the minimum wages to be paid for every class of mechanic, laborer and worker performing construction work on the project shall be not less than the Prevailing Wage Rate for that class of worker; (ii) requiring the contractor to pay every mechanic, laborer or other worker at least once a week the full amount of wages accrued at the time of payment at the applicable Prevailing Wage Rate; (iii) mandating that the contractor comply with the recordkeeping and notice posting requirements in Section 43-53 of this Article; (iv) stating that the contractor may not misclassify any mechanic, laborer or other worker as an independent contractor, as defined in CFR 541; (v) requiring compliance with this Article; and (vi) requiring the contractor impose these same requirements on all subcontractors. A mechanic, laborer or other worker shall

be classified as an independent contractor only if their work relationship satisfies the legal definition of an independent contractor under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., as amended.

Sec. 28-162. Required Recordkeeping and Notice Posting.

(A) Every covered contractor shall keep certified payroll records showing the name, address, job classification, wages and benefits paid or provided, and the number of hours worked for each employee. These records shall be preserved for four (4) years from the date of an employee's final payment for work done on the covered project and shall be considered public records under Arizona Public Records Law. A.R.S. § 39-101 et seq. Every covered contractor shall file weekly Federal Form WH-347 or its equivalent which shall specify for each employee the employee's name, address, employee ID#/last four digits of the Social Security Number, job classification, hourly wage rate paid, the number of hours worked each week, all deductions made from gross pay, and net weekly pay, with the director. Every covered contractor shall file a statement weekly with the director certifying that (i) all its employees performing work on the Covered Project have been paid no less than the wage required by this Article, or if any wages remain unpaid, setting forth the amount of wages due and owing to each worker respectively, and (ii) the job classification for each employee conforms with the work performed. Social Security Numbers and other personal identifying information shall be kept confidential by the City, unless otherwise required by law.

(B) The director must notify in writing all covered contractors at least once every twelve (12) months of their obligation to file weekly the Federal Form WH-347 or its equivalent. The notification must include a copy of the Federal Form WH-347 with instructions for completing the form, the dates that the completed form is due throughout the subsequent twelve (12) months, contact information for an employee within the director's office where questions can be referred, and a notice of the penalties that can be assessed if the covered contractor becomes non-compliant. In addition, the notice shall include a letter that provides the name, address and telephone number of the director, the applicable prevailing wages for the job classifications at the covered contractor, and a statement advising workers that if they have been paid less than the prevailing wage rate they may notify the director and request an investigation. The City's failure to provide the previously described written notification to covered employers does not relieve covered contractors of their obligations under this Article.

(C) Every covered contractor shall post the letter with the related information referenced in Subsection C above at the job site in an area easily accessible by all employees.

Sec. 28-163. Enforcement.

(A) *Complaint Procedure.* The director shall provide a complaint form on the official City website. Any affected individual or organization representing such individual(s) may file a complaint with the director for any violation of this Article.

(B) *Review and Investigation.* The director shall review and investigate the complaint and shall make a finding of compliance or noncompliance within sixty (60) days of the complaint being filed, including a determination of whether an employer is covered by this Article. The covered contractor shall permit authorized agents of the director to observe the work being performed on the work site, to interview employees, and examine the books and records relating to the payrolls being investigated to determine whether or not the covered contractor is in compliance with this Article. Failure of the director to issue a finding of compliance or noncompliance does not relieve the covered contractor of their obligations under this Article.

(C) *Finding of Noncompliance.* If at any time the director, upon investigation of a complaint or upon independent investigation, finds that a violation of this Article has occurred it shall issue a finding of noncompliance and notice of corrective action to the covered contractor. The finding of noncompliance shall specify the areas of noncompliance, indicate such corrective action as may be necessary to achieve compliance, and impose deadlines for achieving compliance.

(D) *Dispute of Finding of Noncompliance.* A covered contractor may dispute a finding of noncompliance and notice of corrective action by requesting a review within thirty (30) days of the date of the finding. The director shall appoint a hearing officer, who shall affirm or reverse the finding of noncompliance based upon evidence presented by the applicable City department and the covered contractor. Where the finding of noncompliance and notice of corrective action requires wage restitution, the covered contractor must, as a precondition to a request for review, provide evidence that such wages have either been paid or placed into an escrow account and will be paid from the escrow account directly to employees if the hearing officer affirms the director's finding. A covered contractor who does not timely request review or appeal, or who fails to pay or escrow wages as provided herein, waives the right to dispute a finding of noncompliance. A finding of noncompliance and notice of corrective action shall become final if either the covered contractor fails to request review within thirty (30) days as provided in this paragraph, or the hearing officer affirms such finding after a review.

(E) A violation by a subcontractor of a covered contractor shall be deemed a violation by the covered contractor.

Sec. 28-164. Sanctions.

(A) If (i) the director or hearing officer determines that a covered contractor has failed to take corrective action for more than sixty (60) days after a notice of corrective action has become final, or (ii) the hearing officer determines that any portion of a covered contractor's dispute of a finding of noncompliance is frivolous or was brought for the purpose of delaying compliance, the director shall impose penalties, which may include any or all of the following: (1) wage restitution for the affected employee(s); (2) liquidated damages in the amount of three (3) times the wages owed; (3) a directive to the applicable City department to withhold any payments due the covered contractor, and to apply such payments to the payment of fines or the restitution of wages; or (4) rescission of the contract under which the violation occurred.

(B) In the event that the director or hearing officer determines that a covered contractor has willfully or more than twice in a three-year period failed to comply with this Article, the director or hearing officer, in addition to the sanctions that may be imposed pursuant to subsection A above, may order debarment of the contractor pursuant to Sections 28-99 through 28-106 of the Tucson City Code.

Sec. 28-165. Regulation.

The director may issue regulations to implement the provisions of this Article.

SECTION 2. Section 28-100 of the Tucson City Code is amended to add *Sec. 28-100(7)* to read as follows:

Sec. 28-100. Debarment or suspension causes.

The causes for debarment or suspension shall be limited to the following:

Sec. 28-100(1). Conviction of any person or any affiliate of any person for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

Sec. 28-100(2). Conviction of any person or any affiliate of any person under any statute of the federal government, this state or any other state for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, or receiving stolen property; or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a city contractor and which conviction arises out of or obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

Sec. 28-100(3). Conviction or civil judgment finding a violation by any person or affiliate of any person under state or federal antitrust statutes arising out of the response to a solicitation.

Sec. 28-100(4). Violations of contract provisions within three (3) years of current debarment action, as set forth below, of a character which are reasonably deemed to be so serious as to justify debarment action:

(a) Abandonment of a contract without good cause; or

(b) Knowingly fails without good cause to perform in accordance with the specifications or within the time limit provided in the contract;

(c) Failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts, except that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; or

(d) Failure to pay a contractor, subcontractor or material provider as required by A.R.S. section 32-1129.

Sec. 28-100(5). A determination by the Arizona Registrar of Contractors that the contractor has violated the provisions of A.R.S. § 32-1129 or a finding of responsibility by the municipal court for a violation of Tucson Code section 11-38.

Sec. 28-100(6). Any other cause that the director reasonably determines to be so serious and compelling as to affect responsibility as a city contractor, including suspension or debarment of such person or any affiliate of such person by another governmental entity for any cause listed in this section.

Sec. 28-100(7). Non-compliance with Article XV of the Procurement Code as set forth in provided in Section 28-164(B).

SECTION 3. The provisions of this Ordinance are severable, and if any provision of this Ordinance or any application thereof is held invalid, that invalidity shall not affect the other provisions or applications of this Ordinance that can be given effect without the invalid provision or application.

SECTION 4. This Ordinance shall become effective on July 1, 2024 and the prevailing wage requirements will apply to contracts covered under Article XV of Chapter 28 as enacted under this Ordinance beginning with solicitations advertised on and after July 1, 2024.

SECTION 5. The various City officers and employees are authorized and directed to perform all acts necessary or desirable to give effect to this Ordinance.

SECTION 6. WHEREAS, it is necessary for the preservation of the peace, health, and safety of the City of Tucson that this Ordinance become immediately effective, an emergency is hereby declared to exist, and this Ordinance shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED, AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, January 9, 2024.

_____
MAYOR

ATTEST:

_____
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

REVIEWED BY:

_____
CITY MANAGER

MR/dg
12/19/23