IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ASSOCIATED MINORITY CONTRACTORS OF ARIZONA, et al., Plaintiffs/Appellees v. CITY OF PHOENIX, et al., Defendants/Appellants.	Arizona Court of Appeals Case No. 1 CA-CV 24-0658 Maricopa County Superior Court Case No. CV2024-001435

PLAINTIFF/APPELLEES' RESPONSE TO AMICUS BRIEF OF CITY OF TEMPE

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INTRODUCTION

Tempe's amicus brief complains that Plaintiff is "hyper-focused on [its] argument." Tempe Br. at 2. But that is as it should be. The problem with Tempe's brief is that it is *not* focused on the dispositive legal issue, but rather blurs the crucial distinction on which this case turns: the difference between a Minimum Wage and Prevailing Wages. These are two different things—as both common sense and case law shows—and that difference is important because state law lets cities impose a *Minimum Wage*, but bars them from adopting *Prevailing Wages* ordinances. Tempe ignores this distinction entirely, and simply assumes they are the same thing—without offering any actual argument to that effect. That is not only unhelpful, but would lead to a legally incorrect result. This Court should refuse Tempe's invitation to blur its focus, and instead affirm the decision below.

ARGUMENT

I. Minimum Wages and Prevailing Wages are different things—and cannot be made the same through mere semantics.

Tempe's brief brings to mind the famous anecdote about Abraham Lincoln, who was said to have asked a young lawyer, "If you call a dog's tail a leg, how many legs does a dog have?" When the lawyer answered "five," Lincoln said no—the correct answer was four, because "calling a tail a leg doesn't make it a leg." *Arteaga v. Mukasey*, 511 F.3d 940, 942 (9th Cir. 2007). Likewise, Tucson,

Phoenix, and Amicus Tempe may call their Prevailing Wage ordinances "Minimum Wage" ordinances, but that does not make it so.

The term "Minimum Wage" is well known in the law. It refers to the basic rate which "every person" must be paid for an employment contract to be legal. *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289, 299 ¶ 34 (Wash. 2012) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)); *accord*, *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 954 (Nev. 2014). Arizona statutes define it as "the nondiscretionary minimum compensation due an employee by reason of employment, including the employee's commissions, but excluding tips or gratuities." A.R.S. § 23-350(5). *Black's Law Dictionary* defines it as "[t]he minimum hourly rate of compensation for labor, as established by … statute." *Black's Law Dictionary* 995 (6th ed. 1990); *Black's Law Dictionary* 1610 (8th ed.,1999).

Ordinary users of American English use the term this way. *Merriam-Webster* defines it as "the lowest wage paid or permitted to be paid"; "*specifically*: a wage fixed by legal authority or by contract as the least that may be paid either to employed persons generally or to a particular category of employed persons." Minimum Wage, Merriam-Webster.com (emphasis in original). The *Oxford English Dictionary* defines it as "[a] wage rate established by statute … which specifies the minimum pay for an employee."

And the term is used that way in virtually all the literature of professional economists, *see, e.g.*, Finis Welch, *Minimum Wages: Issues and Evidence* (1978), Dale Belman & Paul J. Wolfson, *What Does the Minimum Wage Do?* (2014), as well as basic economics textbooks for colleges. *See, e.g.*, Richard G. Lipsey, et al., *Economics* 101 (13th ed. 2008); Thomas Sowell, *Basic Economics* 210 (3d ed. 2007); Paul A. Samuelson, *Basic Economics: An Introductory Analysis* 425 (5th ed. 1961). The International Labour Organization defines "Minimum Wage" as "the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract." *What is a Minimum Wage? Definition and Purpose*, Int'l Labour Org. (Dec. 3, 2015).

But *Prevailing Wages* are different. They do *not* impose an across-the-board minimum, but instead focus on a particular trade (usually construction), and are calculated using a complex formula that averages or multiplies the general rates within some legally defined locality. Prevailing Wages are therefore not only variable (unlike the Minimum Wage), but are typically much more than the Minimum Wage. *See* Armand K. Thieblot, Jr., *Prevailing Wage Legislation*, Wharton Sch. Indus. Res. Unit, Labor Relations and Pol'y Series No. 27 (1986) ("[P]revailing wage determinations, in many if not most cases, will [result in] the imposition of arbitrary super-minimum wage levels.").

Originally established by the federal Davis-Bacon Act, and then copied by state and local laws, the Prevailing Wage is determined by averaging the wages paid in a certain field. For example, 29 C.F.R. § 1.2 defines "prevailing wage" as "[t]he wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question"); similarly, 20 C.F.R. § 655.731(a)(2)(ii) defines it as the "arithmetic mean of the wages of workers similarly employed."

Also, while the Minimum Wage applies through the general police power to all employees, Prevailing Wages apply to a specific class of workers—employees on public works projects—and are implemented *not* through the police power, but through clauses in public works contracts. That explains why the Minimum Wage appears in Title 23 of the Arizona Statutes, which governs "Labor" generally, whereas Prevailing Wages appear in Title 34, entitled "Public Buildings and Improvements."

The Tempe Ordinance is a prime example of a Prevailing Wage ordinance: it does not set the Minimum Wage applicable to all employees, but instead requires that "covered employees"—that is, laborers and mechanics working on the construction, repair, maintenance, etc., of city buildings, be paid "the wages and fringe benefits prevailing for the same class and kind of work in the local area as determined … under … the Davis-Bacon Act." Tempe Amicus Br., Exhibit A at 3.

Moreover, it does so by requiring the *city* to include "mandatory contract provisions" to that effect in all applicable public works contracts. *See id.* at 5-6.

Many courts have acknowledged the difference between Prevailing Wages and the Minimum Wage. *See, e.g.*, *Associated 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."); *San Francisco Labor Council v. Regents of Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980) ("Prevailing wage regulations are substantially different from minimum wage statutes.").

In *Harris v. Atlas Single Ply Sys., Inc.*, 593 N.E.2d 1376, 1377 (Ohio 1992), the Ohio Supreme Court was especially clear: the Minimum Wage, it said, means "a specified hourly wage guaranteed to all qualified workers under federal and [state] law. It is a dollar and cents amount readily cited by most American adults—$4.25 at the time of [this] 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." (Citation omitted).

This distinction was central to the Superior Court's decision in this case. The court rightly said that "[a] prevailing wage ordinance is not a minimum wage law ... [U]nlike 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." Op., Appx53.

Tempe's brief makes *no* attempt to explain why this was wrong. Instead, it simply engages in the semantic game of using the phrase "Minimum Wage" to refer to what are, in actuality, Prevailing Wages. But this approach must fail for the same reason Lincoln offered: calling something by a different name does not change its actual nature. Courts "look to substance and not labels." *Nitrini v. Feinbaum*, 18 Ariz. App. 307, 311 (1972). "What controls [a court's] judgment … is the underlying reality rather than the form or label." *W.B. Worthen Co. ex rel. Bd. of Comm'rs of St. Improvement Dist. No. 513 v. Kavanaugh*, 295 U.S. 56, 62 (1935). To simply call a Prevailing Wage by the name "Minimum Wage" is to "ignore the ancient wisdom that calling a thing by a name does not make it so." *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm'n*, 429 U.S. 167, 174 (1976).

This words-over-substance error permeates Tempe's entire argument. It says, for example, that in adopting Section 23-364, "Arizona voters … intended the statute to allow cities to regulate the *minimum wages* paid to workers performing services through public contracts." Tempe Br. at 3 (emphasis added). That's true: the initiative *does* allow cities to impose a Minimum Wage. But this case doesn't concern a Minimum Wage. It concerns *Prevailing* Wages ordinances. So the point is irrelevant. Plaintiff/Appellee will not belabor the point: the same observation applies to all the rest of Tempe's brief.

II. Tempe is wrong that Section 23-264(I) implicitly repealed Section 34-321(B).

Tempe claims that "[t]hrough the express reference to 'public contracts' in § 23-364(I), Arizona voters plainly intended the statute to allow cities to regulate the minimum wages paid to workers performing services through public contracts." *Id.* The sentence in question, however, says: "State agencies, counties, cities [etc.] … may consider violations of this article in determining whether employers may receive or renew public contracts, financial assistance or licenses." A.R.S. § 23-364(I). This says nothing at all about voters' intent regarding Prevailing Wages. It simply means that a city may base a public contracting decision on whether a contractor has "violat[ed]" the Minimum Wage law. That in no way indicates an intent by voters to repeal Section 34-321(B)'s express prohibition on Prevailing Wages ordinances. *See Est. of Hernandez v. Arizona Bd.*

of Regents, 177 Ariz. 244, 249 (1994) (repeals by implication are disfavored, and courts seek to harmonize statutes whenever possible rather than to hold that one repealed the other *sub silentio*). Tempe's effort to interpret the phrase "public contracts" as somehow meaning that it can impose Prevailing Wages notwithstanding the express prohibition in Section 34-321(B) cannot overcome the strong presumption against implicit repeal.

Tempe also tries to find implicit repeal of Section 34-321(B) in the last sentence of Section 23-364(I). That sentence reads: "This article shall be liberally construed in favor of its purposes and shall not limit the authority of the legislature or any other body to adopt any law or policy that requires payment of higher or supplemental wages or benefits, or that extends such protections to employers or employees not covered by this article." Tempe suggests (Br. at 3-4) that the challenged Prevailing Wages ordinances provide "higher" wages, and that this sentence therefore nullifies the prohibition on Prevailing Wages.

Not only does this argument again conflict with the rule that implicit repeals are disfavored, and that "[u]nless a statute's language or effect *clearly requires* the conclusion that the legislature *must* have intended it to supersede or impliedly repeal an earlier statute, [courts] will not presume such an intent," *Achen-Gardner, Inc. v. Superior Ct.*, 173 Ariz. 48, 54 (1992) (emphasis added), but it also misreads the statute. The statute merely says that "*this* article" does not bar the adoption of

higher wage requirements. It says nothing about whether a *different* article—namely, Section 34-321(B)—*does* prohibit *one specific kind* of higher wage requirement, namely, Prevailing Wage requirements. Thus, Section 23-364(I) poses no difficulty; the Court can harmonize that section with Section 34-321(B) by holding that Section 23-364(I) allows cities to adopt policies that require payment of higher or supplemental wages—*except for* any policy that would violate Section 34-321(B), which the challenged ordinances do.

CONCLUSION

Calling a Prevailing Wage Ordinance a "Minimum Wage" no more makes it one than calling a tail a leg makes it a leg. Prevailing Wages are forbidden by statute, regardless of what label cities use. The judgment should be affirmed.

Respectfully submitted this 14th day of March 2025 by:

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Pursuant to Rule 14(a)(4) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plaintiffs-Appellees' Response to Amicus Brief of City of Tempe appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 2,014 words, excluding table of contents and table of authorities.

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Maricopa County Superior Court
Case No. CV2024-001435

CERTIFICATE OF SERVICE

The undersigned certifies that on March 14, 2025, she caused the attached Plaintiff/Appellees' Response to Amicus Brief of City of Tempe to be filed via the Court's Electronic Filing System and electronically served a copy to:

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