

*Associated Minority Contractors of Arizona et al. v. City of Phoenix et al.*

**Backgrounder**

Date Filed: January 23, 2024

Last Step: Filed complaint

Next Step: Awaiting response

Executive Summary

The City of Phoenix (“City”) recently enacted a “Prevailing Wage” Ordinance (“Ordinance”) that regulates how contractors and subcontractors on public works projects pay their workers. The Ordinance requires these employers to pay their employees a “prevailing wage”—determined by the City Engineer based on complex tables set by the federal government—and it saddles them with burdensome record-keeping requirements. Moreover, violations of the Ordinance, including minor or inadvertent violations, can result in severe punishment: restitution, triple damages, withholding of contractual payments, and even disqualification from working on future public works contracts.

All of this is illegal. Arizona law clearly and expressly prohibits cities from enacting “prevailing wage” requirements for public works projects. What’s more, the Arizona constitution prohibits the government from depriving individuals or businesses of their rights without adequate legal safeguards, and the Ordinance gives an unelected bureaucrat—the City Engineer—virtually unchecked power to investigate and punish any contractor he believes has run afoul of the Ordinance’s requirements.

The Ordinance is invalid because it conflicts with both state law and the Arizona Constitution. The Goldwater Institute, together with co-counsel Robert G. Schaffer of Holden Willits PLC, has filed a lawsuit challenging it in Maricopa County Superior Court.

Background

Enacting a prevailing wage ordinance has long been a political priority for several members of the Phoenix City Council. At a meeting on March 22, 2023, the City Council introduced a proposed “Prevailing Wage Ordinance for City Projects” with barely 24 hours’ notice—leaving no opportunity for the many organizations and individuals affected by the law to weigh in—and it passed the ordinance by a 5–4 vote, with confusing floor amendments that were never incorporated into a public version of the ordinance. The City Attorney herself admitted during the meeting that her legal team hadn’t had the chance to review the ordinance and that “there might be some legal issues” with it. The City Manager testified that the ordinance would result in budget overruns and would likely cost the City upwards of \$93 million in the coming year.

Less than a month later, after considerable public opposition to the ordinance from the Goldwater Institute and others, and amid concerns about the ordinance’s illegality under state law, the City Council repealed that ordinance. Nevertheless, several council members expressed a desire to revisit the issue of a municipal prevailing wage requirement as soon as possible, and they instructed City staff to research the issue and prepare another draft ordinance for the City Council’s consideration.

On January 9, 2024, the City Council introduced the current Ordinance, Ordinance G-7217. Apart from some minor technical differences, the Ordinance is substantially similar to the March 2023 ordinance in its requirement that public works contractors and subcontractors pay a “prevailing wage,” its record-keeping requirements, and its penalties for violations. The City Council approved the Ordinance by a 6–3 vote, despite “strong concerns” from dissenting members that “state law is clear: [the City] cannot pass a prevailing wage.”<sup>1</sup>

The Ordinance requires that any contractor or subcontractor under a City construction contract with an aggregate value of \$4,000,000 or more must pay its workers “not less than the Prevailing Wage Rate for the same class and kind of work in the Phoenix metropolitan area.”<sup>2</sup> Prevailing wages are set by the City Engineer with reference to the federal Department of Labor’s determinations. Contractors and subcontractors must also follow painstaking record-keeping and notice requirements, including weekly reporting obligations, posting workplace notices, and maintaining detailed “certified payroll records” for at least four years “from the date of an employee’s final payment.”<sup>3</sup>

It authorizes the City Engineer to investigate alleged violations and to impose penalties including restitution, treble damages, contract rescission, and disqualification from future City contracts.<sup>4</sup> The City Engineer has sole discretion to decide whether a violation has occurred and what punishment to impose.<sup>5</sup> If a contractor disagrees with the City Engineer, its only recourse is to appeal the finding to a “hearing officer” *appointed by the City Engineer*.<sup>6</sup> What’s more, a contractor may face additional penalties just for appealing if the City Engineer or his hearing officer, in their sole discretion, deems the contractor’s

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<sup>1</sup> Phoenix City Council Policy Session (Jan. 9, 2024) at 48:45–48:00 (Hon. Ann O’Brien), <https://www.youtube.com/watch?v=akRyKFBIInTY>; *see also id.* at 50:30–51:10 (Hon. Debra Stark).

<sup>2</sup> Phoenix City Ordinance G-7217, <https://www.phoenix.gov/cityclerk/site/City%20Council%20Meeting%20Files/1-9-24%20Policy%20Agenda-FINAL.pdf> (last visited Jan. 19, 2024).

<sup>3</sup> *Id.* at 4–6.

<sup>4</sup> *Id.* at 6–8.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 7.

argument “frivolous or... brought for the purpose of delaying compliance.”<sup>7</sup> The Ordinance does not even mention judicial review.

### Legal Analysis

Since 1984, Arizona law has expressly forbidden cities from enacting prevailing wage laws. Specifically, it states:

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.<sup>8</sup>

The law also provides that “[t]he public interest in the rates of wages paid under public works contracts transcends local or municipal interests and is of statewide concern.”<sup>9</sup>

Courts have consistently held that when the Legislature enacts a law on a matter of statewide concern, that law pre-empts and overrides any conflicting municipal ordinance or regulation.<sup>10</sup> In this case, the conflict is clear and irreconcilable: state law prohibits cities from “requiring the wages paid by [a] contractor or... subcontractor to be not less than the prevailing rate of wages for work of a similar nature.”<sup>11</sup> Thus, the Ordinance is invalid. Notably, the Ordinance conflicts with state law, and is therefore preempted, *in its entirety*, because every part of the ordinance, from its core mandate to the record-keeping and enforcement provisions, is designed to implement and advance the unlawful prevailing wage requirement.

The Ordinance is also invalid because it violates the Arizona Constitution’s guarantee of due process of law. Article II, section 4 of the Arizona Constitution states: “No person shall be deprived of life, liberty, or property without due process of law.”<sup>12</sup> Courts recognize that this guarantee means, at a minimum, that the government may not take people’s rights or property without adequate notice, a reasonable opportunity to be heard, and fair and neutral adjudication.

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<sup>7</sup> *Id.* at 8.

<sup>8</sup> A.R.S. § 34-321(B).

<sup>9</sup> A.R.S. § 34-321(A).

<sup>10</sup> *See, e.g., City of Scottsdale v. Scottsdale Assoc. Merchants, Inc.*, 583 P.2d 891, 893 (1978).

<sup>11</sup> A.R.S. § 34-321(B).

<sup>12</sup> Ariz. Const. art. II § 4.

The Prevailing Wage Ordinance lacks adequate procedural safeguards because it vests a single unelected City official—the City Engineer—with virtually unchecked power to investigate and adjudicate alleged violations. It makes no provision for a contractor to be given timely and adequate notice of the allegations against it, to be heard meaningfully, or to receive a reasoned explanation of the City Engineer’s decision. It also makes no provision for judicial review; the only opportunity for appeal is before a City “hearing officer” *appointed by the City Engineer himself*, and a contractor can be punished for merely trying to exercise its due process rights if the City Engineer or his appointed hearing officer deem an appeal “frivolous or... brought for the purpose of delaying compliance.”

### Case Logistics

The Goldwater Institute, together with Robert G. Schaffer of Holden Willits PLC, is representing the Associated Minority Contractors of Arizona, the Arizona Chapter of the Associated General Contractors of America, and the Arizona Builders Alliance in a lawsuit against the City of Phoenix and several City officials responsible for enforcing the Ordinance. The City officials are being sued in their official capacities only.

The case is *Associated Minority Contractors of Arizona v. City of Phoenix*. The complaint was filed January 23, 2024, in Maricopa County Superior Court, seeking injunctive and declaratory relief invalidating the Ordinance in its entirety.

### Legal Team

The Plaintiffs are represented by lawyers at the Goldwater Institute’s Sharf-Norton Center for Constitutional Litigation as well as Robert G. Schaffer, an attorney with the law firm Holden Willits PLC.

**John Thorpe** is a Staff Attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, where he litigates in the areas of education, free speech, economic liberty, government transparency, regulatory reform, and property rights.

**Jon Riches** is the Vice President for Litigation for the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others. Jon has litigated cases in multiple state and federal trial and appellate courts.

**Robert G. Schaffer** is a Member of the law firm Holden Willits PLC. A former U.S. Supreme Court law clerk, he has over two decades of experience persuading trial and appellate courts in both routine and high-stakes litigation. He specializes in complex business, real estate, and corporate/partnership/LLC disputes and civil appeals of all

kinds. He has extensive experience in construction litigation representing the interests of contractors and subcontractors.