STATE OF MICHIGAN

SUPREME COURT

Associated Builders and Contractors,
Saginaw Valley Area Chapter,

Plaintiff/Appellant,

-vs-

SC: 124835
COA: 234037
Midland CC: 00-2512-CL-L

Director of the Michigan Department
Of Consumer & Industry Services and
Midland County Prosecuting Attorney,

Defendants/Appellees,

and

Michigan State Building & Construction
Trades Council, et al,

Intervenors/Defendants-Appellees,

and

Saginaw County Prosecuting Attorney,

Intervenor/Appellee.

124835

INTERVENORS/DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO LEAVE TO APPEAL

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By Order dated September 17, 2004, this Court directed that oral argument be scheduled on whether to grant Plaintiff ABC's application for leave to appeal or take other peremptory action pursuant to MCR 7.302(G)(1). The Court stated that the parties "shall include among the issues to be addressed whether the Court of Appeals correctly ruled that there was no actual controversy between the parties and that therefore a declaratory judgment could not be maintained," and permitted the parties to file supplemental briefs by October 15, 2004.

I. INTRODUCTION

This Supplemental Brief is filed jointly by the Intervenors/Defendants/Appellees ("Intervenor Defendants") Michigan Chapter of the National Electrical Contractors Association, Inc. ("Michigan NECA"), the Michigan Mechanical Contractors Association ("Michigan MCA"), the Michigan Chapter of the Sheet Metal and Air Conditioning Contractors National Association ("Michigan SMACNA") and the Michigan State Building and Construction Trades Council ("MSBCTC"). Most of the issues have been fully addressed in the Intervenor Defendants' prior Brief in Opposition to Leave to Appeal ("Intervenor Defendants Brief in Opposition") filed in Response to the Brief in Support of Application for Leave to Appeal ("ABC Brief") submitted by Plaintiff Appellant Associated Builders and Contractors, Saginaw Valley Area Chapter ("Plaintiff" or "ABC").

On July 30, 2004 this Court decided *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW3d 800 (2004). In *National Wildlife*, a majority of the Court reaffirmed the principles of standing set forth in *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), in particular the principle that an "actual controversy" is a precondition for the exercise of "judicial power" pursuant to the separation of powers provisions of the Michigan Constitution. *Lee*, in turn, adopted the standing requirements established by the U.S. Supreme Court in *Lujan v*

Defenders of Wildlife, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992):

> First, the plaintiff must have suffered an "injury in fact" - - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lee, 464 Mich at 739, quoting *Lujan*, 504 US at 560-561.[1]

The issue in *National Wildlife* was whether the Legislature could confer standing on the plaintiffs to sue under the Michigan Environmental Protection Act, MCL 324.1701(1), even if they did not satisfy the test for standing adopted in *Lee*. MCL 324.1701 provides that the attorney general or "any person" may maintain a suit against "any person" for declaratory and equitable relief against violations of the statute that have occurred or are likely to occur.

The majority of this Court reaffirmed *Lee*. Justices Markman, Corrigan, Taylor and Young concluded that the *Lee* factors are a constitutional minimum that cannot be overridden by an act of the Legislature. The majority did not reach the constitutionality of the MEPA standing provision, however, because it concluded that the plaintiffs had standing under *Lee*. Justices Weaver and Cavanaugh, concurring in the result, concluded that the *Lujan* test is not constitutionally mandated in Michigan and that the plaintiffs had standing under MCL 324.1701. Justice Kelly stated in a concurrence that *Lee* should not be applied where, like the Michigan Environmental Protection Act,

[1] Although the justiciability issue in this case has been described as whether an "actual controversy" exists, it may also be described as an issue of standing: i.e. whether ABC has demonstrated an actual controversy as to at least one of its members.

a statute specifically provides for citizen suits to enforce legislation of public concern.

The issues which divided the Court in *National Wildlife* are not present here. This case simply presents the straightforward issue of whether an "actual controversy" exists. *National Wildlife* is entirely consistent with the Court of Appeals' resolution of the standing issue in this case. Unlike the Michigan Environmental Protection Act, the Michigan Prevailing Wage Act ("PWA") MCL 408.551 *et seq* does not contain a specific provision conferring standing on "any person" to sue without regard to particularized injury. Here, Plaintiff seeks a declaratory judgment pursuant to MCR 2.605(A) that the PWA is unconstitutional. Rather than relaxing standing requirements, the declaratory judgment rule expressly provides that ABC must establish an "actual controversy" in order to obtain declaratory relief. MCR 2.605(A)(1).

This case is the antithesis of a justiciable controversy. No event occurred to trigger it. The PWA has been on the books for nearly 40 years, yet no one has *ever* been prosecuted under it. ABC admits its members comply with the law and does not allege any intent, general or specific, to violate the PWA now, or ever. There are no First Amendment rights involved. Plaintiff has never raised any of its many complaints concerning application of the PWA with the agency charged with administering the law. Simply put, this is not a real case involving any specific, concrete dispute under the PWA that would be capable of judicial resolution. Rather, Plaintiff has built its arguments on speculation and hypotheticals and invites the Court to decide the case on that basis. The Court of Appeals wisely declined that invitation. This Court should decline it as well.

This supplemental brief will focus primarily on analogous federal precedent,[2] respond to

[2] Michigan courts have traditionally looked to federal courts for guidance in helping to define and apply the meaning of "actual controversy." See, *e.g., Allstate Ins Co v Hayes*, 442 Mich 56, 70; 499 NW2d 743 (1993). Such guidance is especially appropriate here because the federal courts have had extensive experience in applying the "actual controversy" requirement as set forth in *Lujan* and other

certain points raised in ABC's Consolidated Reply Brief ("ABC Reply Brief"), and bring to the Court's attention certain new developments which render this case moot and/or not ripe for review.

II. ARGUMENT

Pursuant to Michigan Court Rule 7.302(B)(5), an application for leave to appeal from a decision of the Court of Appeals must show that the decision below is "clearly erroneous" *and* "will cause material injustice" or that the decision "conflicts with a Supreme Court decision or another decision of the Court of Appeals." Neither standard is met here.

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD AND RIGHTLY CONCLUDED THAT THERE IS NO ACTUAL CONTROVERSY SUPPORTING A DECLARATORY JUDGMENT IN THIS CASE.

A. MCR 2.605(A) Requires the Existence of An Actual, Not Hypothetical, Controversy Before a Declaratory Judgment May Be Rendered.

MCR 2.605(A) empowers the courts to issue a declaratory judgment only where an actual controversy exists.[3] Where no actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment. *Lee v Macomb County Bd of Comm'rs, supra.*

ABC seeks to establish an actual controversy by two means. First, ABC contends that its members face the threat of prosecution.[4] Second, ABC contends that a declaratory judgment is

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cases.

[3] The pertinent section of Rule 2.605 states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1)

[4] ABC states: "Clearly, declaratory judgment is an appropriate form of relief in this case because ABC members who perform work subject to the PWA face a real threat of criminal prosecution and, thus, have presented an 'actual controversy' to the lower court under M.C.R. 2.605." ABC Brief at 7.

necessary to guide its members' future conduct in order to preserve their legal rights.[5] The Court of Appeals considered and properly rejected both grounds. In concluding that no actual controversy exists, the Court of Appeals stated:

> We conclude that the plaintiff did not establish that there was actual or imminently threatened prosecution of any of its members, nor has plaintiff shown that a declaratory judgment or decree is necessary to guide its future conduct in order to preserve its legal rights with respect to any particular contract or bid. Absent an actual controversy, the circuit court lacked subject matter jurisdiction to enter a declaratory judgment [citation omitted], and this Court lacks jurisdiction and thus may not consider plaintiff's constitutional challenges.

ABC v Wilbur, et al, No. 234037 (Mich Ct App Aug. 5, 2003) ("Opinion"), at 14.

Contrary to ABC's argument, the Court of Appeals applied longstanding and well-settled principles to reach the conclusion that ABC does not have standing. The "actual controversy" requirement prohibits courts from deciding hypothetical issues. *Blue Cross and Blue Shield of Michigan v Governor*, 422 Mich 1, 72-73, 77-78, 84-86, 92-93; 367 NW2d 1 (1985); *Shavers v Atty General*, 402 Mich 554, 589; 267 NW2d 72 (1978). See also, *National Wildlife Federation, supra; Lee, supra.*

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[5] ABC contends that this case meets the case or controversy requirement because: (1) "ABC members ... are required to abide by the PWA" (ABC Brief at 10); (2) "ABC members perform (or desire to perform) work on state funded construction projects and that the business conduct of ABC members is therefore regulated by the PWA" (ABC Brief at 15); (3) "ABC members ... continue to maintain a reasonable and justifiable fear of criminal prosecution *should* they violate any of the provisions of the PWA" (ABC Brief at 15) (emphasis supplied); and (4) "ABC members believe the state law at issue is unconstitutional" (ABC Brief at 10). In other words, ABC contends that it has standing merely because its members fear the specter of criminal prosecution based on some undefined future conduct, not that they have already engaged in, are currently engaging in, or are poised to engage in, any actual conduct that threatens to violate the PWA in a definable way. The flaw in this argument is that alleging the possibility of unlawful future *conduct* is not the same as alleging the possibility of future *prosecution* based on current conduct. The latter has a degree of immediacy – the plaintiff's conduct is on a collision course with the law – while the former is purely hypothetical.

As set forth in greater detail below, the Court of Appeals correctly concluded that in the absence of an actual or imminent threat of prosecution for specific conduct, or evidence that any ABC member is currently engaged in or will imminently engage in a specific behavior that violates the PWA, ABC's allegations raise only a hypothetical controversy that does not confer jurisdiction to issue a declaratory judgment.

B. To The Extent Plaintiff's Claims Are Premised on the Standing of General Electric Contracting, Inc. ("GEC"), Those Claims Are Moot Because GEC Is No Longer in Business and No Longer an ABC Member

As a preliminary matter, counsel for Intervenor Defendants recently learned that General Electric Contracting, Inc. – the company upon which ABC largely rests its standing claims – is no longer in business and no longer an ABC member. (See Affidavit of Gary Tenaglia attached as Exhibit 1). ABC does not have standing as an association unless it can establish standing on behalf of at least one of its members. *Hunt v Washington State Apple Advertising Comm'n*, 432 US 333, 343; 97 S Ct 2434; 53 L Ed 2d 383 (1977). Where the party upon whom standing is premised goes out of business, the case is moot. *Bd of License Comm'rs of Tiverton v Pastore*, 469 US 238; 105 S Ct 685; 83 L Ed 2d 618 (1985). See also, *Arizonans for Official English v Arizona*, 520 US 43; 117 S Ct 1055; 137 L Ed 2d 170 (1997) (where original state employee plaintiff subsequently resigned and took private sector job, case was moot).

Accordingly, to the extent ABC bases its standing on that of GEC, the case is moot. The prior factual assertions regarding GEC can no longer be considered to establish ABC's standing. Assuming, *arguendo*, that GEC's standing is still relevant, as explained *infra*, ABC has nevertheless failed to establish a justiciable actual or imminent "injury-in-fact" to any member, including GEC. ABC has therefore failed to establish an actual controversy, as the Court of Appeals properly held.

C. The Court of Appeals Correctly Concluded That Plaintiff Failed to Establish a Justiciable Controversy Based on an Actual or Imminent, Not Conjectural or Hypothetical, Injury in Fact

ABC would have this Court believe that a justiciable controversy is established merely because the PWA exists and the ABC's members are subject to the law. But that simply is not enough, as the Court of Appeals correctly concluded. As this Court explained in *National Wildlife Federation*:

> It is the role of courts to provide relief to claimants ... who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution... [T]he distinction between the two roles would be obliterated if, to invoke intervention of the courts, **no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.** (emphasis supplied)

471 Mich at 620-621, 684, quoting *Lewis v Casey*, 518 US 343, 349-350; 116 S Ct 2174; 135 L Ed 2d 606 (1996) (emphasis supplied).

Plaintiff's submissions to this Court do not show actual or imminent harm, but only generalized objections to the PWA, divorced from any instance of concrete, focused and personal harm which could be remedied by judicial action. Repeating the approach it has used throughout this litigation, Plaintiff recites a litany, page after page – a virtual catalogue – of the ways it finds fault with the PWA and its administration by CIS.[6] As the court stated in *American Library Ass'n v Barr*, 294 US App DC 57, 66; 956 F2d 1178 (1992), "[the plaintiffs] have combed the statute and found many sections objectionable. They build their arguments on hypothetical factual situations and invite us to decide the case on the same basis." Here too, Plaintiff's concerns are hypothetical.

[6] As noted previously, CIS is now known as the Department of Labor and Economic Growth (DLEG).

Plaintiff never raised any of these concerns with CIS. Had Plaintiff done so, and had Plaintiff done so *in the context of a concrete dispute involving one of its members*, CIS could have addressed the actual facts of such a case and attempted to resolve the controversy. But Plaintiff is not interested in such a "fix." Plaintiff wants this Court – not DLEG or the Legislature – to go through its catalogue of faults, point by point, and strike down the law *in toto*. In short, this "case" represents the antithesis of a justiciable controversy. It is simply not appropriate for judicial resolution.

Here, Plaintiff has not shown even one instance of actual harm amenable to a judicial resolution. But even if Plaintiff were able to show a specific instance of justiciable injury to one of its members with respect to a particular application of the PWA, that would not entitle Plaintiff to the wholesale invalidation of the PWA which it seeks. As explained in *Lewis v Casey*, 518 US at 357:

> The actual injury requirement would hardly serve the purpose we have described above – of preventing courts from undertaking tasks assigned to the political branches – if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established. (citation omitted).

As the Court further explained at n 6, *Id*:

> [S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." (Citation omitted)

Again, Plaintiffs' argument that there exists a justiciable "actual controversy" is ultimately premised on the mere fact that the PWA exists, and that Plaintiff's members are at times subject to the statute. The fallacy of this argument is that Plaintiff has never alleged or shown that any of its members are currently violating the PWA, nor that they have concrete, specific plans to violate the PWA in the future. In fact, Plaintiff has repeatedly ***admitted*** that its members have at all times "complied with the mandates of the law where applicable." (See, Tenaglia Affidavit, ¶10 and Goulet Affidavit, ¶8, Exs. F&G to Plaintiff's Brief).

It is this critical distinction which precludes Plaintiff from establishing a justiciable controversy here. Federal courts have routinely rejected similar claims that a justiciable controversy existed where, as here, the plaintiff was neither currently engaging in, nor alleging an intention to specifically engage in, conduct proscribed by the challenged law or practice. See, *e.g.*, *Blakely v United States*, 276 F3d 853, 872-874 (CA6 2002) (plaintiffs seeking to invalidate civil forfeiture statute as unconstitutional, following forfeiture arising from subsequently overturned conviction for "structuring" of banking transactions, lacked standing to seek declaratory judgment or injunction where they did not allege they continued to structure banking transactions or that they anticipated doing so in the immediate future); *Grendell v Ohio Supreme Court*, 252 F3d 828, 832-835 (CA6 2001) (attorneys previously sanctioned for pursuing frivolous litigation lacked standing to seek pre-enforcement declaratory and injunctive relief against further enforcement of purportedly unconstitutional sanctions rule where there was no evidence they were presently pursuing or "highly likely" to pursue litigation that would be seen as frivolous); *Thomas v Anchorage Equal Rights Comm'n*, 220 F3d 1134, 1138-1141 (CA9 2000) (*en banc*) (action to declare unconstitutional and enjoin enforcement of laws barring discrimination in renting to unmarried couples held not

justiciable, on standing and ripeness grounds, where plaintiff landlords had not alleged "concrete plan" to violate law in question); *Johnson v State of Missouri*, 142 F3d 1087, 1090 (CA8 1998) (inmates lacked standing to challenge sanctions against filing frivolous lawsuits because, among other things, there was no showing that plaintiffs would engage again in prohibited conduct).

Here, ABC seeks to invalidate the PWA on the basis of hypothetical areas of future confrontation. It desires to sweep away the entire statute without alleging a single concrete controversy that will serve to sharpen the issues. ABC's argument is simply that one of it members may engage in some form of conduct in the future that would run afoul of the statute. *The Court has no way of determining whether or not the liability this hypothetical member may face has any nexus to an allegedly unconstitutional feature of the law.* This argument does not permit the Court to focus on any particular statutory provision or process and to determine whether or not an unavoidable constitutional conflict exists.

Thomas v Anchorage Equal Rights Comm'n, supra, is highly instructive here. In *Thomas*, the plaintiffs were landlords who sought to invalidate, on freedom of religion grounds, a city ordinance and state statute which required them not to discriminate in renting to unmarried couples. As here, the subject laws had been on the books for many years. In contrast to the Plaintiff here, who admits that its members have complied with the PWA and does not allege any general or specific intent to engage in future conduct which violates the PWA, the plaintiffs in *Thomas* alleged that they had refused to rent to unmarried couples in the past and would refuse to do so in the future. The Ninth Circuit, sitting *en banc*, held that the *Thomas* plaintiffs had failed to establish a justiciable controversy, on both ripeness and standing grounds.

The Ninth Circuit rejected the plaintiffs' argument that they were injured because they were

forced to choose between violating the statute or violating their religious beliefs. The court stated that "[t]his argument is essentially another way of saying that the mere existence of a statute can create a constitutionally sufficient direct injury, a position that we have rejected before and decline to adopt now." 220 F3d at 1139. The court analyzed the justiciability issues on both constitutional and prudential grounds.

With respect to the constitutional component, the court looked to whether the plaintiffs articulated a "concrete plan" to violate the law in question, whether the prosecuting authorities communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.

On the first point, the court found that the plaintiffs had alleged only a hypothetical, general intent to violate the law in the future, not the articulated, concrete plan which Article III requires:

> [S]uch "some day" intentions – without ... specification of when the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

220 F3d at 1140, quoting *Lujan, supra*, 504 US at 564. On the second point, the court found that the plaintiffs had failed to establish the requisite threat of prosecution. Although noting that actual arrest or prosecution was not always required to challenge the constitutionality of a statute, the court explained that the threat of prosecution must be "credible" and not merely "imaginary or speculative." On the third point, the court found that the plaintiffs' fear of prosecution was not reasonable because there had not been a single criminal prosecution in the laws' 25 year history; past enforcement had been limited, and was civil, not criminal; and civil enforcement had been in each case precipitated by the filing of complaints by individual tenants.

In concluding its analysis of the constitutional component, the court explained:

> Considering the applicable factors, we hold that any threat of enforcement or prosecution against the landlords in this case–though theoretically possible–is not reasonable or imminent. The asserted threat is wholly contingent upon the occurrence of unforeseeable events.... The landlords do not at this time confront "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," and thus this "dispute is not justiciable, because it is not ripe for court review." (citations omitted.)

Id, 1141.

Turning to the prudential component, the court explained that whether a case is justiciable under the prudential component of the ripeness doctrine depends on (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. 220 F3d at 1141. As to the "fitness" factor, the court concluded that the case was "unfit for judicial resolution" because it was "devoid of any specific factual context..." *Id.* The court disagreed that the issues were purely legal, noting that the plaintiffs' claim "rests upon hypothetical situations with hypothetical tenants." *Id*, 1142. Finally, the court concluded that the hardship factor weighed in favor of declining jurisdiction on prudential grounds. The court noted that the absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermined any claim of hardship. And, the court noted, the state and city would suffer greater hardship by being forced to "defend the housing laws in a vacuum" were the court to adjudicate the constitutional claims. *Id,* at 1142.

Thomas is on all fours with the present case. If anything, the plaintiffs in *Thomas* made out a better claim of sustaining an "injury-in-fact" than does ABC here, because, unlike ABC, the *Thomas* plaintiffs alleged that they had rented to unmarried couples in the past and intended to do so in the future. Nonetheless, the Ninth Circuit, sitting *en banc*, after a well-reasoned and careful

review of the issues, had no trouble concluding that the case was not justiciable. This Court should follow the lead of *Thomas.*

The cases upon which ABC relies do not support its claim that an actual controversy is established simply because the PWA exists and its members are subject to the Act. For example, in *Strager v Wayne County Prosecuting Attorney*, 10 Mich App 166; 159 NW2d 175 (1968), the plaintiff builder received a letter from the prosecutor informing him that a complaint had been received that he was in violation of the Home Improvement Finance Act and warning that "A warrant will be asked for your arrest if you fail to answer this notice." 10 Mich App at 168. The plaintiff filed a complaint for a declaratory judgment that the statute was unconstitutional *in which he admitted that he had been in violation of the law's requirements since the statute was passed.* 10 Mich App at 168-69.

In *Kalamazoo Police Supervisors' Assoc v Kalamazoo*, 130 Mich App 513; 343 NW2d 601 (1983), the actual controversy was established by the existence of an "hours of work" schedule in a negotiated and ratified collective bargaining agreement ("CBA") that, on its face, arguably violated the Fire Department Hours of Labor Act. The City of Kalamazoo alleged a specific intent to implement the new work schedule, and city officials were subject to fines and imprisonment if the new work schedule violated the Act. 130 Mich App at 517-18. The Court of Appeals held that the city officials did not first have to be arrested in order to obtain guidance as to whether or not the CBA ran afoul of the statute. *Id.* Unlike here, the plaintiffs in *Kalamazoo* alleged a specific intent to engage in specifically identified conduct that was potentially unlawful, and sought judicial guidance before they actually engaged in the conduct. Significantly, in *Kalamazoo*, the plaintiffs sought a declaratory judgment regarding the legality of their *conduct*, not the legality of the statute.

They were not seeking to strike down the statute. While it is questionable whether the "dispute" in *Kalamazoo*, where both parties *agreed* to seek a declaratory judgment, would pass muster today as an "actual controversy" under the test articulated in *Lee*, the case is nevertheless clearly distinguishable, and inapposite.

ABC's reliance on *United Food and Commercial Workers Int'l Union v IBP, Inc*, 872 F2d 422 (CA8 1988), is also misplaced. In *UFCW*, union members were restrained in their ability to engage in otherwise lawful picketing by a Nebraska "mass picketing" law. Union members had been arrested for violating the law, the union had refrained from picketing because of the law and the union alleged a specific intention to engage in First Amendment conduct that would violate the law. At stake in *UFCW* was not the hypothetical fear of prosecution for some undefined future act, but the clear and continuing restraint created by the mass picketing law on the union's ability to engage in constitutionally protected conduct integral to its functions as a union.

Finally, Plaintiff's reliance in its Reply Brief on *Sterling Secret Service, Inc v Dept of State Police*, 20 Mich App 502; 174 NW2d 298 (1969) is similarly misplaced. In *Sterling*, a security guard agency challenged the implementation of new licensing rules implemented by the Michigan State Police. The plaintiff agency was operating under the prior licensing rules. When the new rules became effective, the plaintiff continued to operate under the old requirements and failed to comply with the new rules. Thus, unlike Plaintiff's members here, the plaintiff in *Sterling* was, at the time it filed suit, in direct and flagrant violation of the law it was challenging. Moreover, as the trial court found and the Court of Appeals agreed, the plaintiff was threatened with losing its license unless it incurred great financial cost to comply with the new rules. 20 Mich App at 508-509. Finally, the plaintiff was specifically warned by the State Police, in writing, that it was subject to arrest and

prosecution if it did not comply with the rules. *Id,* at 512 n 18. Under these circumstances, the court in *Sterling* found an actual controversy. Again, the critical distinction is that the plaintiff in *Sterling* was in a state of active and ongoing violation of the law it was challenging. Here, in contrast, ABC admits that its members are obeying the law and does not allege any intent to violate the PWA in the future, let alone any specific and concrete intent.

The Court of Appeals properly concluded that there was no "actual controversy" because Plaintiff had failed to establish anything but hypothetical or speculative injury.

D. The Court of Appeals Correctly Concluded That Plaintiff Failed to Establish an Actual or Imminent Threat of Prosecution

In addition to its general argument that the mere existence of criminal penalties in the PWA confers standing on all contractors potentially subject to it, ABC also attempts to present examples through Affidavits of what it contends are imminent threats of prosecution to certain of its members. These Affidavits add nothing to ABC's argument.

1. There Has Been No Threat of Prosecution Sufficient to Confer Standing on ABC

ABC's evidence before the Court of Appeals involved: (1) the referral of PWA charges against a Kalamazoo lawn sprinkler company to the Prosecuting Attorney in 1991; (2) the referral of 27 complaints against Gary Tenaglia and General Electric Contracting, Inc., to the Prosecuting Attorney for violating the PWA in 1999; and (3) CIS' advice to claimants to pursue their PWA claims criminally against Lee Goulet and Midland Painting Company in 1999. Opinion at 8-9. The only evidence ABC proffered regarding actual events, as opposed to subjective fears, are contained in the Affidavits of Gary Tenaglia (ABC Brief Exhibit F) and Lee Goulet (ABC Brief Exhibit G). See ABC Brief at 15-16. Both of these Affidavits focus on potential criminal prosecution, but each

falls well short of establishing an actual controversy.

Tenaglia asserts that he had been "subject to criminal investigation and threatened with criminal prosecution by the Macomb Prosecutor's office for alleged violations of Michigan's Prevailing Wage Act." Tenaglia Aff. ¶ 11. Specifically, Tenaglia asserts with respect to the "criminal investigation" that CIS referred twenty-seven PWA complaints against him to the County Prosecutor in 1999, that the County Prosecutor referred the complaints back to CIS at Tenaglia's request, but informed Tenaglia that the prosecutor retained jurisdiction without regard to CIS' determination, and that CIS re-investigated the complaints and concluded that there was no basis for proceeding on any of them. Tenaglia Aff. ¶¶ 12-17. With respect to the "threatened criminal prosecution," Tenaglia asserts that, notwithstanding the result of the re-investigation, "the Macomb County Prosecutor's office continues to fail or refuse to dismiss the criminal investigation of General Electric Contracting, Inc., and myself." Tenaglia Aff. ¶ 20. Nowhere in the Affidavit is any indication that there is, in fact, an ongoing criminal investigation or that the County Prosecutor has threatened any criminal action against Tenaglia or his company.[7] Tenaglia also asserts that he "remains apprehensive" about bidding and working on prevailing wage projects and has altered his work practices due to the "administrative burdens and uncertainty" as to how the CIS establishes prevailing wage rates. Tenaglia Aff. ¶ 9. Tenaglia's Affidavit contains no concrete examples, however, of the manner in which Tenaglia has allegedly altered his work practices, or the specific infirmity in the PWA that has allegedly compelled him to do so.

Like Tenaglia, Goulet complains of a complaint against him for violating the PWA.

[7] Moreover, as noted in Intervenor Defendants Brief in Opposition at 18 & n 9, there is apparently no such thing as "dismissal" of an investigation; and since no such legal process exists, an actual controversy cannot be premised on the failure to utilize the nonexistent procedure.

Specifically Goulet asserts that he was cited in 1998 by the CIS for misclassifying workers who applied a sealant known as "Dryvit" as painters rather than laborers. Goulet Aff. ¶¶ 19-20. Goulet asserts that, even though it was uncertain which classification applied to workers applying Dryvit, the CIS nevertheless concluded its investigation by "advising claimants to pursue their claims criminally through the Mackinac County Prosecutor." Goulet Aff. ¶34. The Affidavit contains no indication that any such prosecution was ever pursued, let alone initiated. Goulet also asserts that he remains apprehensive about bidding and working on prevailing wage projects and that he has altered his business practices due to the "administrative burdens and uncertainty" imposed by the PWA, but also gives no concrete examples of ways in which he has altered his business practices or what he is trying to avoid by doing so. Goulet Aff. ¶ 10.

Neither of these Affidavits contains any evidence that any prosecutor ever expressly notified Tenaglia or Goulet (or their companies) of his/her intention to prosecute them for violating the PWA. Furthermore, neither Affidavit establishes even a tangible possibility of criminal prosecution. Significantly, neither Tenaglia nor Goulet allege, or assert any facts indicating, that they are, or might be, guilty of current unresolved violations of the PWA. Thus, the presumption that the County Prosecutor will "do his duty" in the case of a criminal violation is irrelevant. Nor do these Affidavits indicate that either contractor is foregoing a legal right or lawful course of conduct integral to its business based on a defined proscription in the PWA that would render that conduct unlawful.

While ABC apparently hopes that the Court will *infer* from these Affidavits that Tenaglia and Goulet face a tangible threat of criminal prosecution under the PWA as a result of conduct in 1998 and 1999, that inference is devoid of logical or factual support. At best, these Affidavits establish that Tenaglia and Goulet had an unpleasant experience with the CIS some four or five years ago that

never ripened into a criminal proceeding and that they "fear" that they may be cited again in the future for some *other* conduct that may result in criminal prosecution. This is patently insufficient to establish an actual controversy.

In short, ABC's proofs do not establish that any ABC member was ever prosecuted or otherwise sanctioned for violating the PWA. Proof of an actual past prosecution would not in any event establish an actual controversy here. Even *possible* future injury is not enough. As stated in *Whitmore v Arkansas*, 495 US 156, 158; 110 S Ct 1717; 109 L Ed 2d 135 (1990):

> [As] we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. **A threatened injury must be "certainly impending" to constitute injury in fact.** (citations omitted) (emphasis supplied)

Accord, *Los Angeles v Lyons*, 401 US 95, 102; 103 S Ct 1660; 75 L Ed 2d 675 (1983); *Blakely v US*, 276 F3d at 873; *Grendell v Ohio Supreme Court*, 252 F3d at 832-833; *Johnson v State of Missouri*, 142 F3d at 1089. Plaintiff has obviously not shown any credible threat of "certainly impending" prosecution, and thus cannot establish standing on that basis.

2. ABC's "Chilling Effect" Claims Do Not Establish Standing

Ultimately, Plaintiff's claim that its members have suffered injury because they "fear" prosecution boils down to an argument that the PWA has a chilling effect on their activities and that this chilling effect is sufficient to establish an actual controversy. As the Court of Appeals properly concluded, however, such "chilling effect" claims cannot establish standing where, as here, no First Amendment rights are implicated. As the Court of Appeals noted, quoting *BCBSM v Governor*, 422 Mich at 92-93, "statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." Opinion at 7. See also Opinion at 14, n 7.

For example, in *Grendell v Ohio Supreme Court*, *supra*, the Sixth Circuit rejected the same "chilling effect" standing argument that ABC asserts here. In *Grendell*, the plaintiffs were attorneys seeking a declaratory judgment and injunctive relief against a rule sanctioning frivolous litigation. The *Grendell* plaintiffs had been sanctioned in the past for bringing frivolous litigation, and had withdrawn from two recent cases out of fear that the allegedly unconstitutional sanction would again be imposed. The Sixth Circuit rejected the plaintiffs' "sword of Damocles" argument because, as here, no First Amendment rights were involved:

> Grendell cannot argue, however, that a chilling effect due to the possibility of attorney sanctions in this case is an injury sufficient to confer standing. It is well-settled that facial constitutional challenges relying on the overbreadth doctrine and the resultant chilling effect such overbreadth has on speech, are limited to the First Amendment sphere.

252 F3d at 834. The court continued its analysis by assuming, *arguendo,* that First Amendment concerns were at stake. The court held the alleged chilling effect nevertheless did not confer standing because the plaintiffs' subjective fears were inadequate where (as here) there was no imminent threat. *Id*, at 834-835.

Because Plaintiff here cannot establish that any First Amendment rights are inhibited, and has not shown any other imminent, credible threat that chills constitutionally protected activity, Plaintiff does not have standing based on the alleged "chilling effect" of the PWA.

Relying on *Northeastern Florida Contractors v Jacksonville*, 508 US 656; 113 S Ct 2297; 124 L Ed 2d 586 (1993), ABC alleges in its Reply Brief at 11, n6 that requiring ABC contractors to "surrender their right to be free of unlawful delegation of legislative authority [under the PWA] in order to participate in prevailing wage projects constitutes a legally cognizable injury." To the

contrary, *Jacksonville* does not establish that the philosophical right to be free of an unconstitutional statute, regardless of its actual application to you, creates standing. Rather, *Jacksonville* merely held that contractors who were ready, willing and able to bid on public works projects but were ineligible to do so based on discriminatory minority set-asides, had standing.

Here, unlike in *Jacksonville*, ABC has not alleged and cannot establish any discrimination against its members in the equal opportunity to bid – or any other real, concrete injury – as a result of the alleged unlawful delegation. In short, Plaintiff has not established any injury in fact which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical;" which is "fairly traceable" to the alleged unlawful delegation; and which is likely "redressable" by a decision on the merits. *Lee, supra* at 739. Accordingly, ABC does not have standing.

E. Recent Policy Developments Have Made This Case Not Ripe for Review and/or Moot

As explained above, Plaintiff has failed to establish any credible threat of imminent prosecution. Moreover, recent policy changes by the Wage & Hour Division of DLEG have made the possibility of criminal prosecution not only unlikely, but nonexistent. Thus, Section D4.00, Policy 8, of the Wage & Hour Division's Policy Manual revised effective February 15, 2004, provides that after an investigation is conducted and noncompliance has been determined, "[a] complainant shall not be referred to the prosecuting attorney."[8] Thus, any claim that Plaintiff has asserted in this case based on any actual or imminent threat of future prosecution, has vanished. (See

[8] The only exception is under Section D3.03, Policy 5, which provides for referral to the prosecuting attorney only in cases where a contractor has refused to make available employment records for inspection under Section 5 of the PWA, which provides that certain employment records "shall be available for reasonable inspection by the contracting agent or the commissioner." The Plaintiff has neither alleged nor provided any evidence regarding any threat of prosecution for failure to provide records under Section 5 of the Act.

excerpts of revised Policy Manual attached as Exhibit 2).

In lieu of criminal enforcement, the Wage & Hour Division has now moved to a civil enforcement mechanism which may lead to debarment. Under the Wage & Hour Division's new Debarment Policy, effective May 17, 2004, a contractor or subcontractor found in violation of the Prevailing Wage Act by a determination of the Wage & Hour Division more than two (2) times in a five (5) year period may be subject to potential debarment. Before debarment can occur, however, a number of things must happen, including written notice, an opportunity to provide written information opposing the proposed debarment, and an opportunity for a hearing. If a debarment determination is made pursuant to the hearing, the matter is then referred to the Department of Management and Budget for further action. (See Debarment Policy attached as Exhibit 3, available at www.michigan.gov/document/PW_Debarment_LTR_and_Policy_92918_7.pdf)

There is no evidence that any ABC member qualifies to have this procedure invoked against it, nor is there any evidence that the procedure has been invoked against *anyone* to date. The new procedure should be allowed to run its course. At this point it would be pure speculation that any ABC member suffered harm, let alone harm sufficient to confer standing, under the debarment policy. Most importantly, any concerns that Plaintiff may have regarding allegedly improper administration of the Prevailing Wage Act can and should be raised in this administrative context. See, *e.g., Peter Kiewit Sons & Co v U S Army Corps of Engrs,* 230 US App DC 72, 77; 714 F2d 163 (1983)(dismissing, on exhaustion and ripeness grounds, action by contractor subject to debarment; agency debarment procedure should be allowed to conclude because debarment was matter particularly suited to agency expertise and discretion, and thus matter was not suitable for judicial resolution, and not ripe).

Finally, the Wage & Hour Division has revised its survey methodology for establishing prevailing wage rates. Among other things, the new survey specifically requests not only collective bargaining agreements, but collective bargaining agreements and understandings; specifies that "if there is more than one pay rate in effect, list as the prevailing wage the one that has been the most frequently or commonly paid during the 60 days prior to completing this Survey;" and specifies that "[i]n determining the most common or frequent wage, include the pay rates in effect in the area even if a collective bargaining agreement or understanding excludes those rates from prevailing wage projects." (See Revised Survey form attached as Exhibit 4, available at www.michigan.gov/documents/2004_PW_survey_102846_7.pdf) Thus, although Plaintiff has never established any justiciable injury to any of its members traceable to its unlawful delegation claims, the possibility of any such injury is now nonexistent.

In short, based on the existing record as well as the new developments resulting from the Wage & Hour Division's revised policies, there is no justiciable actual controversy, and the case is not ripe for review. With respect to the constitutional component of ripeness, as previously explained, Plaintiff has not established any "invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not conjectural or hypothetical." *Lee, supra*, at 739. With respect to the prudential component of ripeness, the case is not fit for judicial resolution, and Plaintiff cannot establish any hardship which would require its constitutional claims to be addressed at this time. The case is not fit for review because factual developments have yet to occur under the new procedures, and the administrative process should be allowed to run its course in order to develop a specific factual context based on an actual dispute between real parties with actual or "certainly impending" harm. As to hardship, Plaintiff cannot show any. It is sheer

speculation that Plaintiff's members will suffer any harm under the new policies. Indeed, it is equally or more likely that any concerns they may have about administration of the PWA will be *ameliorated* by the new policies. In contrast, DLEG will suffer great hardship if it is forced to defend the validity of the PWA in a vacuum before it has had a reasonable opportunity even to utilize the policies. Accordingly, based on these new developments, the Court should find that this case is not ripe for judicial review. See, *Thomas v Anchorage Equal Rights Commission, supra*, 220 F3d at 1138-1142.

III. CONCLUSION

For the reasons stated, Intervenor Defendants respectfully request that the Court find there is no actual controversy sufficient to confer jurisdiction, and pursuant to MCR 7.302(G)(1) either deny leave to appeal, or affirm the decision of the Court of Appeals.

Respectfully submitted,

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