IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS,
Plaintiff-Appellant,

v

CITY OF LANSING,
Defendant-Appellee.

Supreme Court No. 149622
COA No. 313684
Ingham Circuit Court
LC No. 12-000406-CZ

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BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF BASIS OF JURISDICTION

Amicus curiae concur in Appellee's statement of jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

1. Should the Court uphold the City of Lansing's prevailing-wage ordinance as a proper and lawful exercise of municipal authority?

Plaintiff-Appellant answers:	No.
Defendant-Appellee answers:	Yes.
This Court should answer:	Yes.
Amicus Curiae answers:	Yes.

2. Should the Court overrule *Attorney General ex rel. Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923)?

Plaintiffs-Appellant answers:	No.
Defendant-Appellee answers:	Yes.
This Court should answer:	Yes.
Amicus Curiae answers:	Yes.

DESCRIPTION OF AMICUS CURIAE

Amicus curiae the Michigan Municipal League (the "MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Defense Fund (the "Defense Fund"). The MML operates the Defense Fund through a board of directors. The purpose of the Defense Fund is to represent the member local governments in litigation of statewide significance. This amicus curiae brief is authorized by the Defense Fund's Board of Directors, whose membership includes the president and executive director of the League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, city attorney, Troy; Clyde J. Robinson, city attorney, Kalamazoo; Randall L. Brown, city attorney, Portage; Catherine M. Mish, city attorney, Grand Rapids; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

Because the MML is an association representing various political subdivisions of the State and this brief is filed on their behalf, the MML requests that this Court accept this amicus curiae brief without a motion for leave, pursuant to MCR 7.306(D)(2).

INTRODUCTION

This case is not about the merits of a "prevailing wage" ordinance. Instead, it is about *who decides* the merits of such an ordinance. Were the residents of the City of Lansing, through their elected representatives, permitted to decide how their city government spends city funds on city projects? Or do courts, from on high, get to decide for them, striking down their duly enacted ordinances whenever the ordinance brushes upon a matter than might also be of "state" concern?

The Michigan Constitution of 1963, the Home Rule City Act, and this Court's precedents interpreting both documents all point to a central, fundamental principle that governs the resolution of this case: What's good for Saugatuck isn't always what's good for Saginaw, or Battle Creek for Bad Axe; and it's a good thing for Michigan democracy that the people of each place get to decide what's best for themselves. It is in these "laboratories of democracy" that the people are permitted to experiment freely, to develop, over time, a government that works for them. Perhaps they discover that a prevailing-wage ordinance isn't such a great idea, that it has all of the negative effects that the plaintiff here suggests it has, and they scuttle the idea altogether. Or perhaps they discover that it has salutary effects, or that the good outweighs the bad, or that they aren't quite sure how the balance tips, and they're going to let it play out before deciding one way or the other whether the experiment was a success. But the experiment is theirs to conduct, without the heavy hand of the courts sweeping it off the laboratory table.

The City of Lansing lawfully enacted the ordinance at issue in this case pursuant to its broad Constitutional authority to adopt any ordinance "relating to its municipal concerns, property and government." Const 1963, art 7, §§ 22. This authority, according to the express language of the Constitution, is a "general grant of authority," and must be "liberally construed" in Lansing's favor. *Id.* §§ 22, 34. So construed, the Lansing ordinance must be upheld, not

struck down by this Court, and the MML urges the Court to affirm the judgment of the Court of Appeals. This Court's decision in *Attorney General ex rel Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923), which struck down a similar ordinance, was decided under a prior version of Michigan's Constitution that was much less respecting of the authority of municipal governments, and does not control here. To the extent *Lennane* is not already dead letter, the MML respectfully requests that the Court overrule the case and bring its jurisprudence in line with the current Michigan Constitution. Finally, if the Court does strike down the ordinance, the Court should do so on the narrowest possible grounds so that it does not disturb the fundamental Constitutional authority of municipalities to govern their own affairs.

ARGUMENT

THE CITY OF LANSING HAS THE AUTHORITY TO ENACT A PREVAILING-WAGE ORDINANCE PURSUANT TO THE MICHIGAN CONSTITUTION, THE HOME RULE CITY ACT, AND THIS COURT'S PRECEDENTS.

A. The Scope of Municipal Authority in Michigan

The scope of municipal authority under the Michigan Constitution of 1963 is broad. Although the State in principle has plenary authority and the power to treat municipalities as mere agents of the State, subject to the whims and control of the State legislature, the People of the State of Michigan have, over time, come to reject such a balance of authority. The People instead have adopted a governing structure in which municipal governments—the ones closest to the people and most attentive to their local concerns—are granted broad authority to govern their affairs. This grant is predicated on the uniquely American notion of the wisdom of decentralized power. As Alexis de Toqueville observed with respect to decentralized American democracy:

> [I]t is difficult to say precisely how a slumbering people can be awakened and endowed with the passions and enlightenment it lacks. I am not unaware that it is an arduous enterprise to persuade

> people that they ought to be concerned with their own affairs . . . But I also think that when the central administration claims that it can dispense entirely with the free participation of those whose interests are primarily at stake, then it is either deceiving itself or trying to deceive you. No central power, no matter how enlightened or intelligent one imagines it to be, can by itself embrace all the details of the life of a great people . . . What I admire most in America is not the *administrative* effects of decentralization but the *political* effects. In the United States, patriotic sentiment is pervasive. Whether at the village level or at the level of the Union as a whole, the public interest is a matter of concern. People care about their country's interests as though they were their own.

Alexis de Tocqueville, *Democracy in America* 102, 106 (Arthur Goldhammer trans., 2004).

And as Thomas Jefferson likewise observed:

> The way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the function he is competent to . . . [i]t is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best.

Letter from Thomas Jefferson, former President, to Joseph C. Cabell, Virginia Senator (1816), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch4s34.html.

It was with this fundamental principle in mind that the People of the State of Michigan dispersed power from the central State government to the local cities, townships, and municipalities. It took time—and several iterations of the Michigan Constitution—to get there. In the early days of statehood, Michigan cities existed at the complete whim of the state—"state lawmakers had the power to select local officers" and "modified city charters and made organizational changes to city departments." *City of Detroit v Walker*, 445 Mich 682, 687; 520 NW2d 135, 137 (1994). These actions "perpetually fueled public resentment," and erupted an extensive debate in the late nineteenth and early twentieth centuries about the proper balance of State and local authority.

This debate led to a new provision in the 1908 Constitution significantly altering the balance of power between the State and local governments. No longer were municipalities subject to absolute State control and the whims of State legislators. The new Constitution granted each city and village "power and authority . . . to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state." Const 1908, art 8, § 21. This pried local government from under the thumb of State control, and recognized the authority of municipalities to govern their own affairs.

Vestiges of the old regime remained, however. In *City of Kalamazoo v Titus*, 208 Mich 252; 175 NW 480 (1919), this Court expressed "grave doubt whether, in the view of the law, there has been any enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution itself and in the home rule act." *Id*. at 261. Likewise, in *Attorney General ex rel. Lennane v City of Detroit*, 225 Mich 631; 196 NW 391 (1923), this Court dismissed what it called "a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and the purpose to exercise them." This viewpoint echoed "Dillon's Rule," the nineteenth century philosophy espoused by Iowa Supreme Court Justice John Dillon that "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control." *City of Clinton v Cedar Rapids & MRR Co*, 24 Iowa 455, 475 (1868) (*disapproved of by Berent v City of Iowa City*, 738 NW2d 193 (2007)). Under the 1908 Constitution, therefore, as interpreted by this Court in cases like *Titus* and *Lennane*, the heavy hand of the State remained.

Finally, in 1963, the People of the State of Michigan cemented municipal authority of self-government. In the 1963 Constitution, the People broadened the municipal-authority language of the 1908 Constitution to leave no doubt that the grant of authority to municipal governments was a broad, "general grant of authority" to govern their own affairs, subject only to enumerated limitations:

> Each such city and village *shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law.* No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the *general grant of authority* conferred by this section.

Const 1963, art 7, § 22 (emphasis added). The convention comment to this section confirms what is evident from the text: the broadened language "reflects Michigan's successful experience with home rule. The new language is a *more positive statement* of municipal powers, giving home rule cities and villages *full power over their own property and government*, subject to this constitution and law" (emphasis added).

Notably, while the 1908 Constitution granted municipalities the authority "to pass all laws and ordinances *relating to its municipal concerns*," the 1963 Constitution expanded the scope of this authority to "resolutions and ordinances relating to its municipal concerns, *property and government*." *Compare* Const 1908, art 8, § 21 (emphasis added), *with* Const 1963, art 7, § 22 (emphasis added). Thus in 1963, for the first time, the Michigan Constitution expressly codified that municipal authority did *not* extend merely to matters of "municipal concern" but also to matters "relating to" the municipality's "property" or "government." Moreover, the 1963 Constitution added a positive affirmation that the authority granted to municipalities was a "*general* grant"—not a limited, enumerated one—meaning that municipalities now have (to the extent they didn't already) full authority to govern their affairs, subject only to specific, enumerated restrictions. *See* Const 1963, art 7, § 22 ("No enumeration of powers granted to

cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section").

On top of this express, broader grant of authority, the 1963 Constitution added a section instructing courts to construe this general grant of authority as *broadly as possible* in favor of municipalities:

> The provisions of this constitution and law concerning counties, townships, cities and villages *shall be liberally construed in their favor*.

Const 1963, art 7, § 34 (emphasis added). The convention comment to *this* section makes clear that "[t]his is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments."

The Home Rule City Act, MCL 117.1, *et seq.*, likewise recognizes the broad power of municipalities to govern their affairs. The Act provides

> [f]or the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

MCL 117.4j(3).

"Michigan is a strong Home Rule state." *Alco Universal Inc v City of Flint*, 386 Mich 359, 363; 192 NW2d 247, 249 (1971). The Act "is intended to give cities a large measure of home rule. It grants general rights and powers subject to enumerated restrictions." *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 254; 566 NW2d 514, 518 (1997). Its purpose "was to secure to cities and villages a greater degree of home rule than they formerly possessed and to confer upon them exclusive rights in the conduct of their

affairs not in conflict with the Constitution or general laws applicable thereto." *Conroy v City of Battle Creek*, 314 Mich 210, 220-21; 22 NW2d 275, 278 (1946).

Thus, as this Court has put it, home rule cities "enjoy not only those powers specifically granted, but they may also exercise *all powers not expressly denied*. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance." *City of Detroit v Walker*, 445 Mich 682, 690; 520 NW2d 135, 139 (1994) (emphasis added). Thus "[t]he dignity and power of a City Commission cannot be lightly construed away." *Alco*, 386 Mich at 363.

Of these powers is a general "police power" which is "of the same general scope and nature as that of the State." *People v Sell*, 310 Mich 305, 315; 17 NW2d 193, 196 (1945). "[O]rdinances exercising police powers are presumed to be constitutional." *Rental Property*, 455 Mich at 253. This Court has interpreted this to include "the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about the greatest good of the greatest number. Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power." *Sell*, 310 Mich at 316 (quoting *People v Brazee*, 183 Mich 259, 262; 149 NW 1053, 1054 (1914)). Moreover, ordinances

> having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, *the safeguarding of the economic structure upon which the public good depends*, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency, *are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or the legislative branch.*

Cady v City of Detroit, 289 Mich 499, 514; 286 NW 805, 810-11 (1939) (emphasis added).

Indeed, this Court has vindicated this general police power. *See People v Krezen*, 427 Mich 681, 696; 397 NW2d 803, 810 (1986) ("So long as the local municipalities and their agents . . . do not circumvent the constitution or a preeminent state statute, the constitutional authority of the municipality is not abridged. Absent such a violation, this Court cannot hinder the local government's exercise of the police power."); *Patchak v Lansing Twp*, 361 Mich 489, 495; 105 NW2d 406, 410 (1960) ("It is the duty of plaintiffs [challenging an ordinance] . . . to show by competent evidence that the regulation has *no substantial relation* to public health, morals, safety, *or general welfare*") (emphasis added).[1]

B. The City of Lansing's Ordinance is Constitutional

To summarize these principles, the City of Lansing under the express terms of the 1963 Constitution has broad constitutional power to adopt any ordinance "relating to its municipal concerns, property and government." Const 1963, art 7, § 22. This is a broad, "general grant of authority," subject only to enumerated restrictions, *id.*, and the express terms of the Constitution direct courts to "liberally construe[]" this broad authority in favor of the municipality. Const 1963, art 7, § 34.

Under the plain language of the 1963 Constitution, the City of Lansing's prevailing-wage ordinance is constitutional. The ordinance "relat[es] to" Lansing's "municipal concerns, property and government." Const 1963, art 7, § 22. Indeed, the ordinance is carefully limited to apply *only* to City contracts, and only to contractors "employed directly on the site of work" in

[1] In its Brief, Associated Builders and Contractors relies on *City of Taylor v Detroit Edison Co*, 475 Mich 109; 715 NW2d 28 (2006). *Taylor* dealt with a city ordinance that required Detroit Edison to relocate overhead lines and wires underground at its own expense. *Id*. at 113. *Taylor* is inapposite to this case because the issue was whether the city ordinance conflicted with a regulation promulgated by the Michigan Public Service Commission pursuant to a broad legislative grant of authority over public utilities. *Id*. at 118-19. The doctrine of "primary jurisdiction" warranted the dismissal of the case because, while the City of Taylor's actions fell within the "reasonable control" over its streets and highways afforded by the Constitution, it may have conflicted with the Michigan Public Service Commission's regulations, and this was for the MPSC to decide. *Id*. at 123-24.

Lansing. (Ordinance § 206.18(a)). The ordinance thus relates directly to how the City of Lansing chooses to spend its own funds and conducts its government. It makes no pronouncements about wages or benefits for any other work done inside or outside of the City of Lansing—it is not a generally applicable "minimum wage" ordinance. The City regulates the use of its *own funds* with respect to its *own City projects* and ensures that the laborers working only "directly upon the site of work" on these City projects are paid what the City considers a fair wage. The ordinance "relat[es] to" Lansing's "municipal concerns," Lansing's "property" (how it spends its money), and Lansing's "government." Adopting the ordinance therefore was well within Lansing's Constitutional authority.

The 1963 Constitution's interpretive-direction clause, providing that the general grant of authority to municipalities "shall be liberally construed in their favor," makes this conclusion inescapable. Const 1963, art 7, § 34. Although a text may not direct a court to read its terms in an unreasonable manner, interpretive-direction clauses at a minimum compel "a fair interpretation as opposed to a strict or crabbed one." *See* Scalia and Garner, *Reading Law*, Canon 36, p. 233. Here, the terms "municipal concerns," "property," and "government" are all exceptionally broad, encompassing wide-reaching swaths of government action. *See, e.g.*, *Funk & Wagnalls New College Standard Dictionary* (1947) (*municipal*: "Pertaining to a town or city or its local government; also, having local self-government"; *property*: "Ownership or dominion; the legal right to the possession, use, enjoyment, and disposal of a thing"); *American Heritage Dictionary*, 2d College ed (*government*: "The exercise of authority in a political unit; rule"; "The agency or apparatus through which an individual or body that governs exercises its

authority and performs its functions").[2] And the term "relating to" makes permissible municipal action even broader—the action need not even be *strictly* a matter of municipal concern, property, or government, it need only be in some way "relat[ed] to" one of those categories. *See, e.g., Black's Law Dictionary*, 4th ed 1951 (*relate*: "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"; *related*: "Standing in relation; connected; allied; akin"). Only under a "crabbed" reading of the these broad terms, rather than a "fair" one, could the City of Lansing's decision on how to spend its own funds on City of Lansing projects *not* be considered "relating to its municipal concerns, property and government." Const 1963, art 7, § 22; Scalia and Garner at p. 233.

That municipal authority is "subject to the constitution and law" does not change this conclusion. Const 1963, art 7, § 22. The grant of authority to municipalities is a broad, "general" one, subject only to specific limitations in the "constitution and law." There is no specific limitation in the 1963 Constitution prohibiting a city from enacting a prevailing-wage ordinance. Thus only a State law could limit the municipality's authority. This limitation could come in one of two forms. Municipal ordinances "are subject to the laws of this state, *i.e.*, statutes," and thus a municipality "is precluded from enacting an ordinance if . . . [1] the ordinance is in direct conflict with" a state law, or "[2] if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance." *Ter Beek v City of Wyoming*, 495 Mich 1, 19-20; 846 NW2d 531 (2014) (quoting *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902, 904 (1977)).

[2] *See also Webster's New Twentieth Century Dictionary of the English Language Unabridged*, 2d ed (1961) (*municipal*: "(a) of or characteristic of a city, town, etc. or its local government; (b) having self-government locally"); *Ballentine's Law Dictionary*, 3d ed (1969) (*municipal*: "Belonging to a city, town or place; having the right of local government"; "The word is usually applied to what belongs to a city, but has a more extensive meaning, and is in legal effect the same as public or governmental, as distinguished from private").

Nobody argues that Lansing's prevailing-wage law is in "direct conflict" with a state law, and for good reason. A "direct conflict" exists only when "the ordinance permits what the [state] statute prohibits or the ordinance prohibits what the statute permits." *Id.* And here, Lansing's prevailing-wage ordinance works in tandem with the State's prevailing-wage statute, MCL 408.551 *et seq.*, which governs wages paid on state contracts. The State statute by its terms does not apply to municipal contracts, *see id.* § 408.551, and Lansing's ordinance by its terms does not apply to State contracts. Thus the two work alongside one another and do not conflict. As this Court has put it, "[t]he state prescribes by its statutes the general provisions with respect to problems, and this court has upheld the right of municipalities to *further regulate* as long as there is no conflict between the state statute and the municipal ordinance." *Miller v Fabius Township Board*, 366 Mich 250; 114 NW2d 205 (1962) (emphasis added).

Lansing's ordinance therefore could be unconstitutional only by resort to the murky underworld of "field" preemption. Field preemption can be "express" or "implied." For "express" preemption, "where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted." *Llewellyn*, 401 Mich at 323. Here, however, the State prevailing-wage statute does *not* expressly state that the State's authority to regulate prevailing-wage issues is exclusive. It is silent on a municipality's authority to enact prevailing-wage ordinances governing their own municipal contracts.

For "implied" field preemption, courts consider nebulous "guidelines" including the "pervasiveness of the state regulatory regime," the "nature of the regulated subject matter," and "legislative history," in an effort to divine inferentially whether the Legislature really meant to preempt the field even though it decided not to say so in the statute. Here, none of those guidelines point to preemption. The State prevailing-wage statute does not enact a "pervasive"

state regulatory regime—it regulates only wages paid on State contracts (it is titled, "Prevailing Wages on *State* Contracts"), and *excludes* cities from its definition of "contracting agents" subject to the statute. *See* MCL 408.551(c). It would be a bizarre inference indeed to assume the Legislature meant to preempt municipal regulation in this area when it apparently made a conscious decision to exclude municipalities from its regulation. If the Legislature wanted prevailing-wage laws to be its exclusive regulatory domain, why exempt municipalities from its regulations rather than simply include them?

The "nature of the regulated subject matter" and "legislative history" likewise suggest no State intent to occupy the field. This Court has made clear that "where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld." *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977). That's precisely the case here. Lansing's ordinance regulates local conditions—wages paid on Lansing contracts in Lansing—and in no way interferes with the State's prevailing-wage act, which regulates wages paid on *State* contracts. This is "supplementary local regulation"—the State and the City of Lansing are both rowing in the same direction, just rowing different boats.

At bottom, resort to field preemption here is inappropriate. Both the 1963 Constitution and the Legislature in the Home Rule City Act *strongly* endorse a constitutional scheme in which municipalities are vested with broad, general powers to govern their affairs, subject only to limited restrictions when their ordinances come into actual conflict with state law. In view of these positive affirmations of municipal authority in both the governing constitutional document *and* from the Legislature itself, it would turn statutory interpretation on its head if a court were nonetheless to decide that the Legislature really, truly intended the opposite. "Field preemption" analysis—nebulous as it is even in its best form—does not compel a court to close one eye to

the Constitution, squint the other to look past a statute, and to peer searchingly through the haze for some faint glimmer of legislative intent to preempt. Instead, courts can, and must, follow the words of the documents themselves. Here, the words of the 1963 Constitution and the Home Rule City Act point to one conclusion: The City of Lansing's ordinance is constitutional.

C. This Court's 1923 Decision in *Lennane* Does Not Control Because It Was Decided Under a Different Constitutional Regime. If *Lennane* is Not Already Dead Letter, the Court Should Overrule It.

This Court's 1923 decision in *Lennane* does not compel a different conclusion. In *Lennane*, the Court, interpreting the 1908 Constitution, struck down a City of Detroit prevailing-wage statute. *Lennane* does not control here.

As set forth in detail above, *Lennane* rests on an outmoded view of municipal power under the 1908 Constitution that the 1963 Constitution flatly rejected. The *Lennane* decision, for example, referred to the City of Detroit as an "agent of the state," explaining that "[w]hile the municipality in the performance of certain of its functions acts *as agent of the state* it may not as such agent *fix for the state its public policy*." *Id*. at 638 (emphasis added). This obsolete view of municipalities as mere "agents of the state" dates to the time under previous constitutions when "state lawmakers had the power to select local officers" and could modify "city charters and made organizational changes to city departments." *Walker*, 445 Mich at 687. Moreover, the *Lennane* decision states unequivocally that "[t]he police power rests in the state," and that nothing "delegates to municipalities the general exercise of all of such police power." *Id*. But this Court has since repeatedly made clear that the Home Rule City Act "grants general rights and powers subject to enumerated restrictions" which includes a "police power" that is "of the same general scope and nature as that of the state." *Rental Property*, 455 Mich at 254; *Sell*, 310 Mich at 315. Indeed, "ordinances exercising police powers are presumed to be constitutional." *Rental Property*, 455 Mich at 253. These holdings are clearly in tension, and

the reason is that *Lennane*'s perspective on municipal authority had not yet caught up to a city's constitutional and statutory ability to propagate ordinances to improve "social and economic conditions affecting the community at large and collectively with a view to bring about the greatest good of the greatest number." *Sell*, 310 Mich at 316.

Significant differences between the 1908 and 1963 Constitutions compel a different result in this case from the one the Court reached in *Lennane*. As also set forth in detail above, the plain language of the 1963 Constitution significantly augmented municipal authority compared with the 1908 Constitution. The 1908 Constitution gave municipalities the power "to pass all laws and ordinances relating to its municipal concerns." Const 1908, art 8, § 21. The 1963 Constitution granted municipalities *additional* powers to pass all laws and ordinances relating not only to its "municipal concerns" but also to its "property or government." Const 1963, art 7, § 22. If these additional words are to be given effect, which they must be, *see People v Alger*, 323 Mich 523, 529; 35 NW2d 669, 671 (1949), this necessarily means that the grant of authority in the 1963 Constitution is broader than the grant of authority in the 1908 Constitution. On top of these additional powers, the 1963 Constitution also expressly added the following statement: "No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." Const 1963, art 7, § 22. And to leave no doubt that outdated views of municipal power—like those embraced in *Titus* and *Lennane*, under which municipalities existed at the whim of state legislators—were no longer the law in Michigan, the 1963 Constitution expressly added that "The provisions of this constitution and law concerning counties, townships, cities and villages *shall be liberally construed in their favor*." Const 1963, art 7, § 34 (emphasis added).

These significant expansions of municipal authority in the 1963 Constitution render *Lennane* dead letter. The additional clauses in the 1963 Constitution work in tandem to bestow

significant additional power on municipalities. *See* Convention Comment (stating that the new constitution was "a more positive statement of municipal powers, giving home rule cities and villages *full power over their own property and government*" made in direct response to "Michigan's successful experience with home rule"). Simply put, municipalities have more power under the 1963 Constitution than they did under the 1908 Constitution, and more authority than municipalities had when the Court decided *Lennane* in 1923.

To the extent *Lennane* is not already dead letter, the MML urges the Court to overrule it once and for all. Even under the 1908 Constitution, *Lennane*'s holding that a prevailing-wage ordinance was not a matter of "municipal concern" was dubious. The *Lennane* Court completely failed to articulate *why*. *Lennane*, 225 Mich at 640-41. The Court summarily concluded that by enacting the ordinance the city "has undertaken to exercise the police power not only over matters of municipal concern, but also over matters of state concern," because the ordinance supposedly applied "alike to local activities and state activities." *Id*. at 640-41. The *Lennane* Court failed to convey, however, the precise nature of the "state concern" that Detroit had infringed upon—whether it was wages, labor relations, contractual relationships, economic regulations, or something else—instead engaging in a cursory analysis that failed to elucidate in what way Detroit had stepped outside the bounds of its City limits.

This Court has since articulated the precise reasons why prevailing-wage ordinances are a predominantly *local* concern, having recognized such ordinances as "'protect[ing] *local* wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area' . . . [and] 'giv[ing] *local* labor and the *local* contractor a fair opportunity to participate in this building program.'" *See Western Michigan University Bd of Control v State of Michigan*, 455 Mich 531, 535; 565 NW2d 828 (1997) (quoting *Universities Research Ass'n, Inc v Coutu*, 450 US 754, 773-74; 101 S Ct 1451 (1981)) (emphasis added). Moreover, it

"'protect[s] the employees of Government contractors from substandard wages and [] promote[s] the hiring of local labor rather than cheap labor from distant sources.'" *Id*. (quoting *North Georgia Building & Construction Trades Council v Goldschmidt*, 621 F 2d 697, 702 (CA 5, 1980)). Indeed, this Court has held that the municipal "police power relates not merely to the public health and public physical safety but, also, to public financial safety." *People v Murphy*, 364 Mich 363, 368; 110 NW2d 805, 807 (1961) (holding that an ordinance was a proper exercise of the City's constitutional authority because "[l]aws may be passed within the police power to protect the public from financial loss").

Thus *Lennane* not only relies on an outdated view of municipal authority; on the questions whether prevailing wages were a matter of "municipal concern," it simply got it wrong. This Court should overrule *Lennane* and uphold Lansing's ordinance.

D. If the Court Strikes Down Lansing's Ordinance, the Court Should Carefully Limit Its Holding to Preserve Municipal Authority in Other Areas

The MML vigorously supports the constitutionality of Lansing's prevailing-wage ordinance, the City of Lansing's right to make legislative judgments about what is best for the City of Lansing, and the overruling of *Lennane*. If the Court strikes down Lansing's ordinance, however, the MML urges the Court to carefully limit its holding to avoid unforeseen consequences to municipal authority in other areas.

Municipalities need a wide berth of authority to effectively govern. If the Court holds that a prevailing wage ordinance is a matter of "state" concern because it is an *economic* regulation and only the state has an interest in economic matters, this would undercut municipalities' authority "to protect the public from financial loss." *Murphy*, 364 Mich at 368. It is one thing to hold that a prevailing wage ordinance is not a "municipal concern"; it is an entirely different matter to diminish municipalities' authority to promulgate economic

regulations or determine with whom it enters into contractual relationships and under what terms. Affirming *Lennane* might very well signal that a City's ability to manage its own contractual relationships is endangered. The Court must take special care to carve off as narrow an exception to municipal authority as possible, lest its holding defeat other ordinances across the State.

For instance, in *Michigan Coalition For Responsible Gun Owners v City of Ferndale*, 256 Mich App 401; 662 NW2d 864 (2003), the City of Ferndale enacted an ordinance that prohibited the possession of firearms in "in all buildings located in Ferndale that are owned or controlled by the city." *Id*. at 402-03. In reviewing Ferndale's ability to enact such an ordinance, the Court recited the applicable constitutional and Home Rule City Act principles and ultimately struck down the ordinance as preempted by a State statute that expressly prevented municipalities from burdening the rights of gun owners. *Id*. at 406-07, 415. The Court, however, held that "*[i]ndisputably*, if not preempted by state law, this ordinance *would be a lawful exercise of the city of Ferndale's power* to enact an ordinance that regulated the use of property it owns or controls." *Id*. at 413. An expansive holding that diminishes municipal authority might call this analysis into question.

Likewise, in *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246; 566 NW2d 514 (1997), the City of Grand Rapids enacted an ordinance allowing the city commission to declare rental property a public nuisance if found to house illegal drug use or prostitution, and ordering the property vacated and padlocked for up to one year. *Id*. at 249. The Court held this to be a "valid exercise of municipal police power." *Id*. at 272. Similarly, the Court has upheld a Grand Rapids ordinance allowing police to impound automobiles, a City of Detroit ordinance regulating and licensing television services and repairs, and numerous zoning

ordinances. *Krezen*, 427 Mich at 695-97; *Murphy*, 364 Mich at 368; *Patchak*, 361 Mich at 495. An expansive holding in this case could endanger these and all similar holdings.

The Court's ruling in this matter should not implicate the continued viability of other case law. If *Lennane* is still good law, it is merely so for the proposition that prevailing-wage laws are not a matter of "municipal concern"—not for anything broader than that—and the decision should not disrupt the framework under which municipal ordinances are analyzed. Even if municipal prevailing-wage ordinances attempt to set state policy, local economic regulations generally do not.

Finally, aside from specific ordinances or case law, there are broader democratic concerns over a holding that limits municipalities' authority going forward. As Justice Brandeis warned, the decline of authority is the decline of experimentation:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel and social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co v Liebmann, 285 US 262, 311; 52 S Ct 371, 387 (1932) (Brandeis, J, dissenting).

If municipalities are only conduits for State edicts, numerous avenues of experimentation are lost. It is beneficial to society at large when such experimentation is done by "those whose interests will prompt them to act with prudence, and who, because of their interest, and because

they relate to matters that must come under their own view and observation, they are presumptively best qualified to decide upon." *People ex rel Bd of Detroit Park Comm'rs v Detroit Common Council*, 28 Mich 228, 242 (1873). With every ounce of extra authority, the principles of decentralization espoused by Jefferson and de Tocqueville are more greatly fulfilled, as it is only when the people closest to the problems at hand have the authority to deal with them that proper and expedient resolutions are discovered.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, the Michigan Municipal League respectfully requests that the Court affirm the judgment of the Court of Appeals, uphold Lansing's prevailing-wage ordinance, and, if necessary, overrule *Attorney General ex rel. Lennane v City of Detroit.*

Respectfully submitted,

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