

1 Brunn (Beau) W. Roysden III (028698)

2 **FUSION LAW, PLLC**

3 7600 N. 15th St., Suite 150

4 Phoenix, Arizona 85020

5 Telephone: (602) 315-7545

6 Email: beau@fusion.law

7 *Counsel for Amici Curiae Warren Petersen,*

8 *President of the Arizona State Senate and*

9 *Ben Toma, Speaker of the Arizona House of Representatives*

10 **ARIZONA SUPERIOR COURT**

11 **MARICOPA COUNTY**

12 ASSOCIATED MINORITY
13 CONTRACTORS OF ARIZONA, an
14 Arizona corporation *et al.*,

15 Plaintiffs,

16 vs.

17 CITY OF PHOENIX, a municipal
18 corporation *et al.*,

19 Defendants.

Case No: CV2024-001435

**BRIEF OF AMICI CURIAE
PRESIDENT PETERSEN AND
SPEAKER TOMA IN SUPPORT OF
PLAINTIFFS**

(Assigned to the Hon. Brad Astrowsky)

20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 Senate President Warren Petersen and House Speaker Ben Toma (“Amici”) submit this
3 amicus brief in support of Plaintiffs’ 1) Cross-Motion for Summary Judgment and 2) Response to
4 Motion to Dismiss filed on April 8, 2024. This Court should grant summary judgment for
5 Plaintiffs on the state law-preemption claim under A.R.S. § 34-321(B).

6 This case involves whether the Court can give effect to two voter enactments. It can.
7 In 1984, the voters established a statewide policy for public-works projects to fight inflation,
8 promote competition in government bidding, and obtain the greatest return possible on their tax
9 dollars. They enacted A.R.S. § 34-321, which prohibits prevailing wage provisions in public-
10 works contracts and instead opens that aspect of government contracting to competition. The
11 Legislature has continued that policy for forty years, and the State and its subdivisions have
12 successfully completed many public-works projects for a population that has more than doubled.

13 This Court should reject Defendants’ central and dispositive legal contention—that the
14 voters repealed that fiscal-policy choice *sub silentio* when making changes to a completely
15 different title of the A.R.S. addressing minimum wages. As an initial matter, this is not an express
16 repeal case. When the voters enacted the “Raise the Minimum Wage for Working Arizonans Act”
17 in 2006, they did not strike any portion of § 34-321 or otherwise state that it was repealed in whole
18 or in part. *See In re Riggins*, – Ariz. –, 544 P.3d 64, 68 ¶20 (2024).

19 The voters also did not impliedly repeal § 34-321(B) or repeal it by operation of law. *See*
20 *id.* at 69-70 ¶¶ 29, 32. First, there is no apparent conflict between A.R.S. § 23-364(I), which
21 authorizes counties, cities, and towns to regulate minimum wages in their geographic boundaries,
22 and A.R.S. § 34-321(B), which prohibits prevailing wage provisions in public-works contracts.
23 Simply put, *minimum wages* and *prevailing wages* are well-understood terms that address
24 different economic concepts, and courts do not engage in “legal legerdemain ... to change the
25 meaning of simple English words.” *Kilpatrick v. Superior Court*, 105 Ariz. 413, 421-22 (1970)
26 (rejecting that word “employer” means both “employer” and “employee”); *S.F. Labor Council v.*
27 *Regents of Univ. of Cal.*, 608 P.2d 277, 279 (Cal. 1980) (“Prevailing wage regulations are
28 substantially different from minimum wage statutes. A prevailing wage is in the nature of an

1 average wage....”). The Arizona Supreme Court addressed a similar fact pattern to the instant case
2 and held “[t]here is no conflict between the budget law and the minimum wage law, nor do we
3 think there is the slightest indication that the legislature ever intended that the later law should
4 affect the provisions of the former.” *City of Phoenix v. Kidd*, 54 Ariz. 75, 82, 85-87 (1939)
5 (*Kidd I*), *on rehearing* 54 Ariz. 123, 125-26 (*Kidd II*) (“reaffirm[ing] the rules thus laid down” in
6 prior opinion).

7 But even if these two statutes “appear to conflict”—which they do not—Arizona law
8 “disfavor[s]” finding an implied repeal, and courts instead must “whenever possible ... adopt a
9 construction that reconciles one with the other, giving force and meaning to all statutes involved.”
10 *In re Riggins*, 544 P.3d at 69 ¶29 (quoting *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327,
11 333 ¶28 (2001)). That can be easily done here. Under § 23-364(I), counties, cities, and towns are
12 authorized to regulate minimum wages to establish a higher baseline wage that the local
13 population believes all workers performing any sort of labor with limited exceptions (such as
14 tipped workers) should earn. Under § 34-321(B), when counties, cities, and towns are putting
15 public-works projects out for bid (or enacting ordinances related to such projects), they cannot
16 require that contractors forgo price competition and pay only prevailing wages. Contractors (like
17 all other employers) are still required to pay all employees at least the generally applicable
18 minimum wages. This harmonizes the two provisions and gives each a “reasonable meaning in
19 light of the context of the word[s]” used. *Meyer v. State*, 246 Ariz. 188, 193 ¶14 (App. 2019).¹

20 Finally, if any doubt remains, the Court should apply the principle of interpretation that the
21 legislature (here, the voters) do not use vague statutory language to incorporate extensive federal
22 regulatory schemes or alter the fundamental details of existing regulatory schemes. *See Roberts*
23 *v. State*, 253 Ariz. 259, 266 ¶19 (2002); *see also Whitman v. Am. Trucking Ass’n*, 531 U.S. 457,
24 468 (2001). It would be very unlikely that the voters intended to change longstanding, statewide
25 policy requiring competition in bidding for government contracts in Title 34 and reintroduce the

26
27 ¹ This straightforward harmonization also resolves the question of repeal by operation of law
28 under A.R.S. § 1-245. Because the Court can “construe statutes to avoid conflict and give effect
to each provision,” *see UNUM*, 200 Ariz. at 333 ¶28 (citation omitted), then it also has resolved
the “trigger condition” for § 1-245. *In re Riggins*, 544 P.3d at 70 ¶33. This ends the inquiry.

1 federal Davis-Bacon Act into Arizona law, by adding a sentence in Title 23 that is expressly about
2 minimum wages.

3 To avoid duplication with the Parties' briefs, this amicus brief expands on four discrete
4 points: 1) *Kidd* is directly applicable here regarding the lack of conflict between laws protecting
5 the public fisc and minimum wage laws; 2) the Attorney General's Opinion employs a faulty
6 harmonization analysis because it gives § 34-321(B) no effect as to counties, cities, and towns;
7 3) legislative history and context show that voters had no intent to change state contracting policy;
8 and 4) the major questions doctrine and similar interpretive tools show voters did not intend to
9 give counties, cities, and towns authority to override state contracting law.

10 **INTEREST OF AMICI CURIAE**

11 Amici are Speaker of the Arizona House of Representatives Ben Toma and President of
12 the Arizona Senate Warren Petersen. They file this brief in their official capacities as the presiding
13 officers of their respective chambers. *See* Ariz. Const. art. IV, pt. 2, § 8; Ariz. State Senate Rule
14 2(N); Ariz. House of Reps. Rule 4(K).

15 Even though this case involves two statutes enacted by the voters at the ballot box, it
16 directly implicates powers of the Legislature because the more recent statute, § 23-364(I), is
17 subject to the Voter Protection Act ("VPA"), which severely constrains the Legislature's
18 lawmaking power. Ariz. Const. art. IV, pt. 1, § 6(B)-(C). The Legislature is prohibited from
19 repealing it, can only amend it with a three-fourths vote, and such an amendment must further the
20 measure's purpose. *Id.*; *see also Meyer*, 246 Ariz. at 192 ¶9 ("The VPA's constitutional limitations
21 apply to the Minimum Wage Act."). It would be undemocratic to interpret § 23-364(I) as
22 preventing the Legislature from legislating on topics related to government contracting when the
23 voters have never expressed an intent to change longstanding state policy on that issue or take the
24 issue away from the Legislature's normal lawmaking process. The Legislature therefore has a
25 critical interest in the construction the Court gives to the phrase "minimum wages and benefits"
26 in § 23-364(I).

1 ARGUMENT

2 **I. The Arizona Supreme Court’s Decision in *City of Phoenix v. Kidd* Is Directly**
3 **Applicable Here in Concluding There Is No Conflict Between a Law Designed to**
4 **Protect Taxpayers and a Minimum Wage Law.**

5 The Arizona Supreme Court has held that there was no conflict between an earlier-enacted
6 budget law, which prohibited expenditures in excess of a city’s adopted budget to protect
7 taxpayers, and a minimum wage law, which provided for a minimum wage that increased over
8 time. In *Kidd*, the City of Phoenix had adopted an annual budget for fiscal year 1937-1938. 54
9 Ariz. at 80. After the City adopted its budget, the state highway commission adopted a new
10 minimum wage scale applicable to Kidd and other city employees. *Id.* Kidd sued the city to
11 recover the difference between the wages paid under the adopted budget and the wages due under
12 the minimum wage schedule. *Id.* The question was whether the City was permitted to exceed its
13 budget and pay Kidd in contravention of the state’s budget law but in ostensible compliance with
14 the later-enacted minimum wage law. *Id.* at 82. The court posted the question: “Unless, therefore,
15 it appears that the minimum wage law has changed the policy of the state as set forth in the budget
16 law, plaintiff and his assignors indubitably cannot recover.” *Id.* at 86. The court held, “[t]here is
17 no conflict between the budget law and the minimum wage law, nor do we think there is the
18 slightest indication that the legislature ever intended that the later law should affect the provisions
19 of the former.” *Id.* at 87. The court applied the same analysis as courts apply today: determining
20 if it can establish a “rule laid down by the two [statutes] construed together, as it is our duty to
21 construe them if it can be done.” *Id.* at 87. Because it could, it found no implied repeal. *Id.* at 88.
22 On rehearing, the court “reaffirm[ed] the rules thus laid down” in its prior opinion. *Kidd II*, 54
23 Ariz. at 126.

24 Here, § 34-321(B) functions similarly to the budget law at issue in *Kidd*. It sets forth a
25 fiscal policy to protect taxpayers. And § 23-364 is a minimum wage law. There is thus an earlier
26 statute that is about protecting taxpayers and the public fisc that applies only to government
27 operations, and a later statute that raises the minimum wage. The Arizona Supreme Court found
28 no conflict in *Kidd*. So too here.

1 **II. The Attorney General’s Opinion Uses a Faulty Harmonization Analysis That Gives**
2 **No Effect To § 34-321(B) for Multiple Types of “Political Subdivisions.”**

3 The Attorney General’s proposed harmonization is faulty because it gives no effect to § 34-
4 321(B) for multiple types of “political subdivisions,” and therefore does not harmonize the two
5 provisions at all. *See* Motion to Dismiss Exhibit A at 8. Rather, it conflates repealing with
6 harmonizing. In *Unum*, the Court emphasized that to harmonize statutes, it must “construe [them]
7 to avoid conflict and give effect to each provision.” 200 Ariz. at 333 ¶28 (citation omitted).
8 Relatedly, in *Meyer*, the court said that a harmonization must give each provision a “reasonable
9 meaning in light of the context of the word[s]” used. 246 Ariz. at 193 ¶14.

10 The Attorney General’s harmonization violates the teachings of *Unum* and *Meyer*. It does
11 not avoid conflict and it does not give a reasonable meaning to the term “political subdivisions”
12 in § 34-321(B). Instead, the Attorney General’s proposed harmonization excludes entirely the
13 three most well-known and common categories of political subdivisions—counties, cities, and
14 towns—from § 34-321(B). *See* Motion to Dismiss Exhibit A at 8. In other words, it functions
15 identically as if the voters had expressly repealed § 34-321(B) as to those three categories.
16 *Cf. Cain v. Horne*, 220 Ariz. 77, 80, ¶ 10 (2009) (“Each word, phrase, clause, and sentence must
17 be given meaning so that no part will be void, inert, redundant, or trivial.” (citation omitted)).

18 There is a much more obvious harmonization that gives effect to both § 34-321(B) and
19 § 23-364(I) as to counties, cities, and towns. That harmonization is that counties, cities, and towns
20 can enact generally applicable minimum wages, but they cannot require in government contracting
21 that bidders forego competition and instead pay only prevailing wages. This harmonization
22 actually gives effect to § 34-321(B). It also gives the phrase “political subdivisions” in that
23 subsection a “reasonable” meaning in context. *See Meyer*, 246 Ariz. at 193 ¶14. And it also gives
24 reasonable meaning and effect to § 23-364(I) by conferring on counties, cities, and towns the
25 power to set generally applicable minimum wages.

1 **III. The Legislative History of § 34-321 and § 23-364 Shows That Voters Had No Intent**
2 **to Change State Policy on Prevailing Wages In Government Contracts When Acting**
3 **to Raise the Minimum Wage.**

4 If the Court concludes that two statutes appear to conflict, then it may consider voter intent.
5 *In re Riggins*, 544 P.3d at 70 ¶31. It may also consider historical background and context. *See*
6 *UNUM*, 200 Ariz. at 330–32 ¶¶ 12–24. The Court should give great weight to the fact that the
7 voters understood what the term “prevailing wage” meant when they voted in 1984 on a fiscal-
8 responsibility measure involving government contracting, and they understood what the term
9 “minimum wages” meant when they voted in 2006 on an increased minimum wage as a means of
10 combatting poverty.

11 Neither Defendants in their exhaustive Motion to Dismiss nor the Attorney General in her
12 Opinion can point to a single piece of historical evidence in 2006 suggesting the voters had any
13 indication they were being asked to change state policy regarding government contracting. This
14 section reviews the publicity pamphlet for the 1984 and 2006 ballot measures to show that voter
15 intent supports finding no implied repeal of § 34-321(B) as to counties, cities, and towns.²

16 **A. The Proposition 300 Publicity Pamphlet Shows The Intent of § 34-321 Was**
17 **Taxpayer-Protection and Competition In Government Contracting.**

18 In 1984, the Legislature referred, and the voters approved, Proposition 300, which repealed
19 the State’s depression-era “Little Davis-Bacon Act” and added new § 34-321. The publicity
20 pamphlet arguments uniformly show that the voters’ purpose was safeguarding tax dollars and
21 promoting competition in government bidding.³ The term “minimum wage” does not appear *even*
22 *once* in any discussion. Legislative council explained in arguments favoring Proposition 300:

23 The public welfare requires that the prices the taxpayers pay for their public
24 buildings and improvements be as low as possible. The competitive bidding process
is established to provide the government with a selection of contract proposals from

25 ² The 2016 Ballot Measure did not make any changes whatsoever to § 23-364(I), so it is not
26 discussed further. In any event, there is similarly no indication the voters had any intent to
27 change government contracting policies in that initiative. *See* Secretary of State, *Publicity*
28 *Pamphlet* at 58 (2016), https://apps.azsos.gov/election/2016/general/pamphlet_english.pdf.

³ Courts can review the publicity pamphlet as part of ascertaining voters’ intent. *See State v.*
Patel, 251 Ariz. 131, 135 ¶16 (2021); *Morreno v. Brickner*, 243 Ariz. 543, 549 ¶25 (2018).

1 which it can choose the lowest and best bid. The Little Davis-Bacon Act hurts the
2 competitive bidding process by removing wage rates from competition. A better
3 approach, proposed by Proposition 300, is to allow the contractors to negotiate the
4 wages paid to their employees to obtain the lowest rate they can, thereby saving the
5 taxpayers' money.

6 Arizona Secretary of State, *Publicity Pamphlet* at 70 (1984).⁴ The Phoenix Metropolitan Chamber
7 of Commerce stated in support of Proposition 300:

8 During the depression, Arizona—like many states—adopted the requirement that
9 “prevailing wages” be paid on public works projects. The intent was to prevent
10 outside contractors employing itinerant laborers from undercutting local firms.
11 These days have long since passed. Now, the only remaining effect of ‘prevailing
12 wage’ requirements is to force taxpayers to pay more for the construction of public
13 projects than is necessary. Requiring all contractors to pay the same wage rates
14 prevents taxpayers from benefiting from competition on this factor.

15 *Id.* at 71. And the Tucson Metropolitan Chamber of Commerce wrote:

16 A yes vote will force companies to bid competitively for government contracts,
17 allowing the public to get more for its tax dollars. Currently the law requires any
18 union or non-union company to pay union-like wages on government contracts. If a
19 company offers to do the job for less than those government mandated wage rates,
20 the bid is thrown out and not considered. Some businesses that win the contracts
21 even admit they would have done the job for less money if allowed. Same company,
22 same plans, same labor, same supervision—only for less tax dollars!

23 *Id.* The voters agreed with these competition and taxpayer protection rationales, and they enacted
24 Prop. 300.

25 **B. The Proposition 202 Publicity Pamphlet Shows No Connection Between § 23-364
26 and Government Contracting, But Rather a Primary Focus on Poverty Reduction
27 For Workers Earning Federal Minimum Wage.**

28 The 2006 Publicity Pamphlet for Proposition 202, the “Raise the Minimum Wage for
Working Arizonans Act,” exclusively focused on the generally applicable minimum wage, not
anything relating to government contracting. The arguments for the measure were primarily
focused on poverty reduction for working people. There was no discussion about changing state
policies on government contracts and government contracting.

⁴ Available at <https://azmemory.azlibrary.gov/nodes/view/102831?keywords=&type=all>.

1 Section 2 of the act, titled “Purpose and Intent,” states: “All working Arizonans deserve to
2 be paid *a minimum wage* that is sufficient to give them a fighting chance to provide for their
3 families.” Arizona Secretary of State, *Publicity Pamphlet* (2006) (emphasis added).⁵ The
4 Legislative Council analysis states: “Based on the federal law, *the current minimum wage* in
5 Arizona is \$5.15 per hour.” *Id.* (emphasis added). Both statements focused on a single baseline
6 wage that applied to any type of labor.

7 The arguments by the proposition’s supporters were focused on poverty reduction based
8 on the then-federal minimum wage. They had nothing to do with government contracting or
9 average wages. The arguments by the initiative’s sponsors state: “It’s simple... If you work 40
10 hours a week, 52 weeks a year you should not live in poverty.” *Id.* (Argument by “Arizona
11 Minimum Wage Coalition.”) Another group supporting the measure wrote: “It’s time for a raise.
12 Arizona’s minimum wage workers haven’t had one in almost 9 years. Anyone who works full
13 time, and who works as hard as most minimum wage earners are required to do, should take home
14 enough money to actually be able to live without being homeless, hungry, and without health
15 care.” *Id.* (Argument by “Arizona NOW”). The Arizona Minimum Wage Coalition urged: “Vote
16 “YES” on Proposition 202 to raise the minimum wage and reduce poverty.” *Id.* (Argument by
17 Arizona Minimum Wage Coalition).

18 Even union arguments supporting the minimum wage made no mention or reference of
19 prevailing wages in government contracts, and instead were similarly focused on poverty
20 reduction. “In Arizona, we can agree on two things; People who work hard and play by the rules
21 should not be forced to live in poverty, and We should not be have to shoulder unreasonable
22 burden of paying for public services that should be the responsibility of the corporations that fight
23 this initiative.” *Id.* (Argument by Arizona AFL-CIO). The UFCW stated: “At Arizona’s current
24 minimum wage, most minimum wage workers struggle to make ends meet, often having to work
25 80 hours or more a week, leaving little time for family. Arizona’s minimum wage workers are
26 single-parents struggling to put food on the table, senior citizens scraping by to cover the cost of
27

28 _____
⁵ Available at <https://apps.azsos.gov/election/2006/Info/PubPamphlet/english/Prop202.htm>.

1 their medicine, and first-generation university scholars working to pay for their tuition.” *Id.*
2 argument by UFCW).

3 Given the uniform focus on the single federal minimum wage and changing Arizona law
4 for the purpose of raising that generally applicable minimum wage, there is no basis in the
5 legislative history to find a voter intent to make *any* changes to state law on government
6 contracting. Stated differently there is no evidence of an intent to repeal § 34-321(B).

7 **IV. The Major Questions Doctrine And Similar Interpretive Tools Show That the Voters**
8 **Did Not Intend to Delegate Authority Over Government Contracting in § 23-364.**

9 The Arizona Supreme Court’s recent decision in *Roberts v. State*, which also arose in the
10 labor context, further supports the conclusion that the voters did not intend to change state policy
11 regarding government contracting, when giving counties, cities, and towns authority to regulate
12 minimum wages. 253 Ariz. 259. In *Roberts*, the court had to determine whether the phrase “if by
13 the person’s job classification overtime compensation is mandated by federal law” in A.R.S. § 23-
14 392(A)(1), “implicitly incorporat[ed] into Arizona law (or, alternatively, authoriz[ed] AZDOA to
15 incorporate into Arizona law through regulation)” an extensive federal regulatory scheme. *Id.* at
16 266 ¶19. The Court flatly rejected the argument, stating “that is a great deal of freight to load upon
17 such a tiny statutory vessel.” *Id.*

18 Here, the Defendants are similarly arguing authorization to incorporate an extensive federal
19 regulatory scheme, the Davis-Bacon Act, which would require calculating prevailing wages for
20 many different types of workers in their geographic areas. And they are seeking to do so based on
21 a similarly “tiny statutory vessel”—the provision that “[a] county, city, or town may by ordinance
22 regulate minimum wages and benefits within its geographic boundaries.” A.R.S. § 23-364(I).
23 This provision was never mentioned in the legislative council analysis or arguments for and
24 against Proposition 202 in 2006 or Proposition 206 in 2016. It was certainly never presented as a
25 vehicle to change state contracting policy.

26 For the same reason, this provision also fits squarely in the Supreme Court’s statement that
27 a lawmaking body “does not alter the fundamental details of a regulatory scheme in vague terms
28 or ancillary provisions,” *Whitman*, 531 U.S. at 468. It would be very unlikely that the voters

1 intended to change longstanding, statewide policy requiring competition in bidding for
2 government contracts in Title 34, by adding a sentence in Title 23 that is focused on minimum
3 wages.

4 **CONCLUSION**

5 For the foregoing reasons, the Court should conclude that § 23-364(I) did not repeal § 34-
6 321(B). This is of critical importance to the Legislature because it prevents improperly imposing
7 the Voter Protection Act on state regulation of competition in the process for awarding
8 government contracts.

9 RESPECTFULLY SUBMITTED this 15th day of April, 2024.

10 **FUSION LAW, PLLC**

11 By: /s/ Brunn W. Roysden III
12 Brunn (Beau) W. Roysden III (028698)
13 7600 N. 15th St., Suite 150
14 Phoenix, Arizona 85020

15 *Attorneys for Amici Curiae Warren Petersen,*
16 *President of the Arizona State Senate and*
17 *Ben Toma, Speaker of the Arizona House of*
18 *Representatives*

16 ORIGINAL of the foregoing E-FILED
17 this 15th day of April, 2024.

18 COPY of the foregoing E-DELIVERED
19 this same date to

20 Jonathan Riches
21 John Thorpe
22 Goldwater Institute
23 500 E. Coronado Rd.
24 Phoenix, AZ 85004
litigation@goldwaterinstitute.org

25 Robert G. Schaffer
26 Holden Willits, PLC
27 2 N. Central Ave., Suite 200
28 Phoenix AZ 8504
rschaffer@holdenwillits.com
Attorneys for Plaintiffs

1 Jean-Jacques Cabou
Alexis E. Danneman
2 Karl J. Worsham
3 Jordan M. Buckwald
Perkins Coie LLP
4 2901 N. Central Ave., Suite 200
5 Phoenix, AZ 85012
JCabou@perkinscoie.com
6 ADanneman@perkinscoie.com
7 KWorsham@perkinscoie.com
8 JBuckwald@perkinscoie.com

9 *Attorneys for Defendants*

10 Brett W. Johnson
11 John F. Lomax
Colin P. Ahler
12 Tracy A. Olson Ian R. Joyce
SNELL & WILMER L.L.P.
13 One East Washington Street Suite 2700
14 Phoenix, Arizona 85004-2556
15 bwjohnson@swlaw.com
tolson@swlaw.com
16 jlomax@swlaw.com
17 cahler@swlaw.com
18 ijoyce@swlaw.com

19 *Attorneys for Amici Curiae Arizona Lodging & Tourism Association; Home Builder's*
20 *Association of Central Arizona; the Arizona Chapter of NAIOP; the Greater Phoenix Chamber;*
Southern Arizona Home Builders Association; Tucson Metro Chamber

21
22
23 /s/ Brunn (Beau) W. Roysden III
24
25
26
27
28