

[Cite as *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, 2001-Ohio-4228.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 77242 and 77262

OHIO STATE BUILDING &	:	
CONSTRUCTION TRADES COUNCIL,	:	
ET AL.	:	JOURNAL ENTRY
PLAINTIFFS-APPELLEES	:	
v.	:	AND
CUYAHOGA COUNTY BOARD OF	:	
COMMISSIONERS	:	OPINION
DEFENDANT-APPELLEE	:	
and	:	
STATE OF OHIO	:	
DEFENDANT-APPELLANT	:	
and	:	
OHIO ASSOCIATED BUILDERS AND	:	
CONTRACTORS, INC.	:	
PROPOSED INTERVENOR-	:	
APPELLANT	:	

DATE OF ANNOUNCEMENT
OF DECISION: SEPTEMBER 27, 2001

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court,
No. 391084.

JUDGMENT: Appeal No. 77242 AFFIRMED.
Appeal No. 77262 REVERSED.

DATE OF JOURNALIZATION:

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TIMOTHY E. McMONAGLE, P.J.:

{¶1} In this consolidated appeal, defendant-appellant, State of Ohio, challenges the decision of the Cuyahoga County Court of Common Pleas entered on the complaint for declaratory relief brought by Ohio State Building and Construction Trades Council, Cleveland Building & Construction Trades Council and International Union of Operating Engineers, Local 18, (collectively referred to as "plaintiffs"). The court declared R.C. Chapter 4116 to be preempted by the National Labor Relations Act and thereafter permanently enjoined its enforcement. Proposed intervenor-appellant, Ohio Associated Builders & Contractors, Inc. ("Ohio

ABC"), claims that the trial court erred in the denial of its motion to intervene. For the reasons that follow, we affirm the trial court's denial of Ohio ABC's motion to intervene but we reverse the decision of the trial court that found R.C. Chapter 4116 preempted by the National Labor Relations Act and thereafter enjoined the statute's enforcement.

Background

{¶2} This appeal involves the use of a project labor agreement ("PLA"), which is a form of "pre-hire" collective bargaining agreement used primarily in complex construction projects where large numbers of contractors and sub-contractors are on site. These agreements provide uniform working hours, shift times, scheduling of holidays, overtime and premium pay and terms and conditions of employment. When in place, all contractors, unions and their employees become subject to the same agreement. This document supersedes any other agreement between or among the respective parties and is limited to the construction project that it covers. Historically, PLAs have been used in Ohio for both private and public construction projects.

{¶3} On January 28, 1999, H.B. 101, the "Open Contracting Act," was introduced in the Ohio General Assembly. After amendment, Am. H.B. 101 was passed by the Ohio House of Representatives on May 12, 1999 and by the Ohio Senate on June 23, 1999. On July 13, 1999, the bill became law without the signature

of the governor. It became effective on October 11, 1999 and is codified at R.C. Chapter 4116. Prior to the enactment of this statute, the Cuyahoga County Commissioners ("County") and the Cleveland Building & Construction Trades Council ("CBCTC") had been negotiating terms for a potential PLA to cover the construction of a new juvenile detention center in the county. Negotiations were terminated by letter dated July 2, 1999, in which the county deputy administrator advised CBCTC that " *** passage of H.B. 101 prohibits the County from pursuing the development and execution of the proposed agreement."

{¶4} Thereafter, on September 9, 1999, plaintiffs filed a complaint for declaratory and injunctive relief seeking to prohibit the enforcement of R.C. Chapter 4116.¹ Named as defendants were the State of Ohio and the County. Plaintiffs allege in their complaint that the statute prevents public authorities from entering into "pre-hire collective bargaining agreements" despite Section 8(f) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(f), which, it alleges, permits employers in the construction industry to enter into such agreements. Plaintiffs sought a declaration that (1) R.C. Chapter 4116 is invalid because it is preempted by the NLRA and therefore violative of the Supremacy Clause of the United States Constitution and (2) the

¹Contemporaneous requests for a temporary restraining order and preliminary injunction were denied when plaintiffs were unable to demonstrate "immediate irreparable loss, injury or damage."

County incorrectly relied upon this invalid statute when it terminated its negotiations with CBCTC.

{¶5} On September 17, 1999, non-party Ohio ABC, moved to intervene in the matter pursuant to Civ.R. 24(A) and (B). This motion was ultimately denied on October 13, 1999.²

{¶6} A hearing on plaintiffs' complaint and request for permanent injunction was held October 12, 1999. Plaintiffs presented the testimony of one witness, Loree K. Soggs, who is both the Executive Secretary of CBCTC and a member of Local 18, International Union of Operating Engineers.³ Soggs testified that he is responsible for negotiating PLAs between local unions and the owners, contractors and developers of construction projects and that such agreements provide the working rules, security clauses and provisions precluding work slow downs or stoppages during the course of construction. He noted that PLAs covered recent private sector projects such as the construction of Tower City, Key Center, Strongsville Mall and Severance Hall. Public sector projects such as Jacobs Field, Gund Arena and the Cleveland Browns Football

²On September 20, 1999, the State removed the matter to the United States District Court, Northern District of Ohio, and the trial court initially denied the motion to intervene as moot. The County and proposed intervenor, Ohio ABC, filed motions to remand, which the district court granted on October 6, 1999.

³Local 18, International Union of Operating Engineers is a member of both CBCTC and Ohio State Building & Construction Trades Council.

Stadium were likewise covered by PLAs.

{¶7} Soggs further testified that, in September 1998, while meeting with representatives from the County, he proposed the idea of a PLA for the construction of the proposed juvenile detention center. Soggs made the same proposal in a letter to Lee Trotter, Cuyahoga County Assistant Administrator. Soggs met with the county commissioners on several occasions and sent examples of prior local public works PLAs to Court Administrator Tom Hayes for his review. In a letter dated July 2, 1999 and before an agreement could be reached, Trotter terminated negotiations on behalf of the County citing the passage of H.B. 101 as his reason. CBCTC, nonetheless, remains interested in negotiating a PLA for the eventual construction of a juvenile detention center.

{¶8} In its order journalized October 18, 1999, the trial court permanently enjoined the enforcement of R.C. Chapter 4116 finding (1) that this statute is violative of, and preempted by, the NLRA and, therefore, invalid under the Supremacy Clause of the United States Constitution; and (2) that the County did rely upon this invalid statute in terminating its negotiations with CBCTC regarding a project labor agreement for the proposed juvenile detention center.

{¶9} The State now appeals this order. This court permitted Ohio ABC and National Right to Work Legal Defense Foundation to file briefs *amici curiae* on this issue (case number 77262). Ohio

ABC also appeals the trial court's denial of its motion to intervene, which this court initially dismissed (case number 77242). Its appeal was later reinstated and consolidated with case number 77262 for briefing on appeal.

**Case Number 77242
Intervention Issue**

{¶10} Ohio ABC was not entitled to intervene either permissively or as a matter of right where its interests were adequately represented by the State of Ohio.

{¶11} Ohio ABC appeals the denial of its motion to intervene and advances two assignments of error for our review. Succinctly, Ohio ABC complains that the trial court erred when it failed to allow it to intervene as a matter of right under Civ.R. 24(A)(2) or, alternatively, permissively under Civ.R. 24(B). These assigned errors having a common basis in law and fact will, therefore, be considered together.

{¶12} Civ.R. 24 governs intervention and provides, in relevant part:

{¶13} Intervention of right.

{¶14} Upon timely application anyone shall be permitted to intervene in an action: *** (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

{¶15} Permissive intervention.

{¶16} Upon timely application anyone may be permitted to intervene in an action: *** (2) when an applicant's claim or defense and the main action have a question of law or fact in common. *** In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

{¶17} The rule is to be liberally construed in favor of intervention. *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107, 108. This court will not reverse the denial of a motion to intervene unless the trial court's action constituted an abuse of discretion. *Young v. Equitec Real Estate Investors Fund* (1995), 100 Ohio App.3d 136, 138; *Widder and Widder v. Kutnick* (1996), 113 Ohio App.3d 616, 624. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; *Castlebrook, Ltd. v. Dayton Properties, Ltd.* (1992), 78 Ohio App.3d 340, 346.

{¶18} In order to be entitled to intervene as a matter of right under Civ.R. 24(A)(2), the intervenor must (1) claim an interest relating to the property or transaction that is the subject of the action; (2) be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) demonstrate that his or her interest is not adequately represented by the existing parties; and (4) demonstrate that the motion to intervene is timely made. *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 831;

Southern Ohio Coal Co. v. Kidney (1995), 100 Ohio App.3d 661, citing *Fouche v. Denihan* (1990), 66 Ohio App.3d 120, 122-123; and, *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350, 352. Each of the four conditions must be established in order for there to be a right to intervene. Civ.R. 24(A). The failure by a prospective intervenor to satisfy any one of the required elements justifies the denial of the right to intervene. *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d at 831; see, also, *Ribovich v. Miele Bros. Ent., Inc.* (Dec. 2, 1999), Cuyahoga App. Nos. 76137 & 76182, unreported at 17, 1999 Ohio App. Lexis 5711.

{¶19} In determining whether Ohio ABC had the right to intervene pursuant to Civ.R. 24(A)(2), this court must consider whether Ohio ABC timely demonstrated a direct and substantial interest in the present litigation that would not have been adequately represented by the existing parties and whether such interest would be impaired upon the trial court's ruling regarding the issue of whether R.C. Chapter 4116 is preempted by federal law.

Ohio ABC claims that (1) it has the requisite interest because it is a statewide non-profit organization representing contractors and subcontractors who provide non-union construction services and, as such, its members would directly benefit from the enforcement of R.C. Chapter 4116; (2) disposition of the matter will impair or impede its ability to protect that interest; and (3) the governmental entities named as defendants have interests distinct

from the interests of Ohio ABC. Therefore, it claims to have satisfied the rule's requirements and it was error for the trial court to deny its motion for intervention. We disagree.

{¶20} While we find that Ohio ABC has timely filed its motion and has adequately demonstrated an interest in the matter, the record supports that Ohio ABC and the State have identical objectives in that both parties want to defend the constitutionality of the statute. "When the party seeking intervention has the same ultimate objective as a party in the suit, the presumption arises that its interests are adequately represented against which the petitioner must demonstrate adversity of interest, collusion or nonfeasance." *Piedmont Paper Products, Inc. v. Am. Fin. Corp.* (S.D. Ohio 1980), 89 F.R.D. 41, 44; see, also, *ICSC Partners, L.P. v. Kenwood Plaza, L.P.* (1996), 116 Ohio App.3d 278, 283.

{¶21} We acknowledge the interests of Ohio ABC in presenting its views and concerns to the trial court.⁴ We, nonetheless, find that Ohio ABC failed to show that those interests would not be fairly and adequately represented by the State. There is nothing in the record to suggest that the State and Ohio ABC have adverse interests or that the State has been derelict in its duty to present its case. As a consequence, it was reasonable for the

⁴On appeal, Ohio ABC has been granted leave by this court to file its brief *amicus curiae*.

trial court to conclude that Ohio ABC's rights were adequately represented precluding its "right" to intervene under Civ.R. 24(A)(2). See *Ottawa Cty. Bd. of Commrs. v. Marblehead* (1995), 102 Ohio App.3d 306, 316-317.

{¶22} Consequently, Ohio ABC's first assignment of error is not well taken and is overruled.

{¶23} Alternatively, Ohio ABC argues that the trial court abused its discretion in denying its motion to permissively intervene in the action where its intervention would not cause undue delay or prejudice to the adjudication of the rights of the original parties. We will not, however, substitute our judgment for that of the trial court. We find no abuse of discretion in denying Ohio ABC permissive intervention where the matter may be fairly and adequately decided without intervention of the petitioning party.

{¶24} Finally, because we find no support in the law for Ohio ABC's assertion that the trial court's failure to elucidate its rationale for denying its motion constitutes reversible error, we simply reject this argument. Consequently, Ohio ABC's second assignment of error is not well taken and is overruled.

{¶25} The decision of the trial court is affirmed as to Ohio ABC's appeal in case number 77242.

Case Number 77262
Constitutional Challenge

Propriety of Declaratory Judgment

{¶26} R.C. Chapter 4116 does not preclude a public authority from entering into a PLA therefore no controversy existed justifying the trial court's decision to grant declaratory relief.

{¶27} R.C. 2721.03 governs the construction or validity of instruments or other legal provisions as they relate to declaratory judgment actions and provides, in part:

{¶28} Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a *** written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.***

{¶29} In determining that a case is ripe for a declaratory judgment, it must be demonstrated that (1) a real controversy exists between the parties; (2) the controversy is justiciable in character; and (3) the situation requires speedy relief to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97; see, also, *Buckeye Quality Care Centers, Inc. v. Fletcher* (1988), 48 Ohio App.3d 150, 154. It is not necessary that there be a violation of the statute at issue in order for a justiciable controversy to exist. *Burger Brewing*, 34

Ohio St.2d at 98. On the contrary, it is necessary only that there be a controversy "between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Peltz v. South Euclid* (1967), 11 Ohio St.2d 128, 131.

{¶30} Plaintiffs contend that R.C. Chapter 4116 has the effect of prohibiting a public authority from ever entering into a PLA, a practice that is expressly permitted under Section 8(f) of the NLRA, 29 U.S.C. 158(f). This section provides, in relevant part:

{¶31} It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members *** because *** (2) such agreement requires as a condition of employment, membership in such labor organization *** .

{¶32} A careful reading of R.C. 4116.02, the statutory provision directed at agreements such as PLAs, however, does not lend itself to the interpretation that plaintiffs assert. R.C. 4116.02 provides, in relevant part:

{¶33} A public authority, when engaged in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements, shall ensure that bid specifications issued by the public authority for the proposed public improvement, and any subsequent contract or other agreement for the public improvement to which the public authority and a contractor or subcontractor are direct parties, do not require a contractor or subcontractor to do any of the following:

{¶34} Enter into agreements with any labor organization on the public improvement;

{¶35} Enter into any agreement that requires the employees of that contractor or subcontractor to do either of the following as a condition of employment or continued employment:

{¶36} Become members of or affiliated with a labor organization;

{¶37} Pay dues or fees to a labor organization.

{¶38} The statute itself does not on its face or by its application prohibit a public authority from entering into a PLA. On the contrary, the statute merely prohibits such an entity from entering into a PLA that requires (1) the contractor to enter into an agreement with a labor organization; (2) the employees of that contractor to become members or otherwise affiliated with a labor organization; or (3) the contractor's employees to pay fees or dues to a labor organization. Thus, it is not that the public authority is prohibited under the statute from entering into a PLA but, rather, that the public authority is prohibited from entering into a PLA with objectionable terms.

{¶39} Merely because Section 8(f) of the NLRA provides that it is not an unfair labor practice to include such terms in a PLA does not mean that these very terms are essential to the agreement and must be included in order to be an effective PLA. On the contrary, a PLA can be drafted without these terms and still be valid and enforceable.

{¶40} Moreover, Section 164(b) of the NLRA specifically

provides that nothing in the Act "shall be construed as authorizing the execution" of an agreement that requires "membership in a labor organization as a condition of employment" where the execution of such an agreement is prohibited by state law. Section 164(b), Title 29, U.S. Code. It is disingenuous, therefore, to suggest that the statute's restrictions have the effect of prohibiting a public authority from entering into a PLA. This simply is not true.

{¶41} The dissent asserts that R.C. 4116.02(A) does effectively prohibit such agreements. We do not disagree with the dissent that there are many benefits to the proper use of a PLA. Nor do we disagree that the NLRA accommodates conditions specific to the construction industry by exempting such agreements from what would otherwise be an unfair labor practice in other industries. See Section 158(e), Title 29, U.S. Code. Nonetheless, the dissent relies on assumptions that are unsupported by the facts contained in the record.

{¶42} In particular, the dissent rests heavily on the assumption that it is the labor organization that directs the substance and content of a PLA and that it is only after its negotiations with the project owner that contractors and subcontractors are brought in. Whether this is an accurate portrayal of the practice in the construction industry is unknown to this court and is not supported by the record. The dissent

concedes that R.C. Chapter 4116 is unaffected if this business practice is not as the dissent assumes because it is the contractual relationship between public authorities and contractors that the statute governs.

{¶43} We make no such assumptions, however, and continue to adhere to our conclusion that the statute's restrictions do not effectively prohibit a public authority from entering into a PLA. While the statute's effect *could* alter a business practice, it does not create a real controversy worthy of declaratory relief. It was error, therefore, for the trial court to grant such relief.

Constitutionality of R.C. Chapter 4116

{¶44} Even if we were to find that R.C. Chapter 4116 precludes a public authority from entering into a PLA and therefore a real controversy existed justifying declaratory relief, the statute is not preempted by the NLRA because the State, in enacting this legislation, is not regulating the market but allowing a public authority to act as a market participant.

{¶45} It is well established that statutes enjoy a strong presumption of constitutionality. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. A legislative enactment is presumed valid and cannot be declared invalid unless it appears that there exists a clear conflict

between the legislation at issue and a particular provision or provisions of the Constitution. *State v. Cook* (1998), 83 Ohio St.3d 404, 409 citing *Xenia v. Schmidt* (1920), 101 Ohio St. 437, paragraph two of the syllabus.

{¶46} Judicial consideration of issues arising under the Supremacy Clause begins with the "assumption that the historic police powers of the States are not to be superseded by *** Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 516 quoting *Rice v. Sante Fe Elevator Corp.* (1947), 331 U.S. 218, 230; see, also, *Dutton v. Acromed* (1997), 117 Ohio App.3d 804, 809. Whether a federal statute preempts state law is a question of congressional intent. *Cipollone*, 505 U.S. at 545; see, also, *English v. General Elect. Co.*, (1990), 496 U.S. 72, 78-79.

{¶47} The NLRA contains no express preemption provision. *Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.* (1993), 507 U.S. 218, 224 ["Boston Harbor"]; *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 350. Where there is no express preemption provision, a state statute will be upheld unless it conflicts with the federal law, frustrates the federal scheme or unless it can be determined from the totality of the circumstances that Congress meant to occupy the field to the exclusion of the states. *Metropolitan Life Ins. Co. v. Massachusetts* (1985), 471 U.S. 724,

747-748, citing *Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 209.

{¶48} The courts have recognized two types of preemption by the NLRA. The first is "Garmon" preemption, which forbids state and local regulation of activities either protected by the NLRA under Section 7 or prohibited as an unfair labor practice under Section 8 of the Act. *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236. Since neither is implicated in this case, analysis under this type of preemption is unwarranted.

{¶49} The second type of preemption recognized by the United States Supreme Court is set forth in *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n* (1976), 427 U.S. 132, 96 S.Ct. 2548. Under *Machinists*, a statute will be preempted by the NLRA if the state attempts to regulate areas which have been left open by the NLRA in order that they "be controlled by the free play of economic forces." *Id.* Thus, the state is prevented from regulating within a zone protected and reserved for market freedom. Nonetheless, when the state acts as a market participant as opposed to a market regulator, the preemption doctrine is inapplicable and a state may enact legislation allowing a public authority to choose whether to enter into a PLA. *Boston Harbor*, 507 U.S. at the syllabus.

{¶50} With these principles of law in mind, we review the statute to determine whether it is a permissible exercise of the

State's legislative authority in light of the terms of the NLRA. Our review is limited to a determination of whether the legislative action by the State in enacting R.C. Chapter 4116 is preempted by the NLRA. This question has not been decided by any court.

{¶51} Were we to find that the statute prevents public authorities from *requiring* contractors to agree to be bound by a PLA, R.C. 4116.02 seems to regulate a public authority's freedom to choose whether to enter into a PLA when that entity acts as a market participant while contracting on public works projects. More directly, however, the issue is whether the statute represents the public authority's exercise of its right to choose, in a summary manner, never to enter into a PLA on any public construction project when it acts as a market participant; or, whether the statute creates an impermissible regulation upon the public authority itself because, as a "market participant," that entity has the right to choose whether to enter into a PLA on each construction project on a "project-by-project" basis.

{¶52} The dissent claims that the enactment of the statute has the effect of regulating all construction contracts for any public improvement as opposed to the state acting as a market participant on a single contract as was the case in *Boston Harbor*. Yet *Boston Harbor* need not be read so narrowly. It is true that the NLRA was intended to supplant state labor regulation. The Act was not intended, however, to supplant all legitimate state activity that

affects labor. 207 U.S. at 227. The dissent appears willing to find that the state may be considered a market participant if the statute's application would be limited to projects involving state funds. It claims that the "any subsequent contract" language contained in R.C. 4116.02(A) is far-reaching and would involve any project by an "institution supported in whole or in part by public funds." This language, it contends, goes beyond projects involving state funds and therefore attempts to regulate an area meant to be left to the free play of economic forces. We disagree.

{¶53} A public authority is permitted to make a choice of whether it will enter into a PLA on its construction projects. See *Boston Harbor*, 507 U.S. at 231. Even if the statute could be interpreted so as to preclude a public authority from entering into a PLA, we do not see this as a violation of any freedoms encompassed in the NLRA as set forth in 158(e) or (f). R.C. Chapter 4116 merely sets forth, in statutory form, the self-imposed limitations when entering into construction contracts when a public authority acts as a market participant. The State has the right to limit itself. The statute does not impinge on the rights of any other entity to enter into a PLA and, as such, it does not frustrate the intent of Congress to permit the use or non-use of PLAs to be "controlled by the free play of economic forces."

{¶54} Consequently, even if we were to find that R.C. Chapter 4116 prohibits a public authority from entering into a PLA, this

statute is not preempted by the NLRA because it does not regulate an area protected for the free play of economic forces but only embraces the position taken by such an entity when it acts as a market participant.

Conclusion

{¶55} We do not find that R.C. Chapter 4116 prohibits a public authority from entering into a PLA and, as such, there is no real controversy that warrants declaratory relief. Even were we to find that R.C. Chapter 4116 precludes a public authority from entering into a PLA, the statute is not constitutionally infirm on the basis that it is preempted by the NLRA because the State is not acting as a market regulator but rather is acting as a market participant. Consequently, the trial court erred when it found R.C. Chapter 4116 unconstitutional and enjoined its enforcement.

{¶56} The State's sole assignment of error is well taken and is sustained.

{¶57} The decision of the trial court is reversed as to Case Number 77262.

{¶58} Case No. 77242 is affirmed. The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. Ohio Associated Builders and Contractors, Inc. to pay costs.

{¶59} Case No. 77262 is reversed for further proceedings consistent with the opinion herein. Ohio State Building & Construction Trades Council and Cuyahoga County Board of Commissioners to pay costs.

{¶60} It is ordered that a special mandate be sent to said court to carry this judgment into execution.

{¶61} A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE
PRESIDING JUDGE

MICHAEL J. CORRIGAN, J., CONCURS;

KENNETH A. ROCCO, J., CONCURS AND
DISSENTS WITH OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(D) and 26(A); Loc.App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J., CONCURRING AND DISSENTING:

{¶62} I agree that the trial court acted within its discretion by denying the Ohio Associated Builders and Contractors' motion to intervene; therefore, I concur with the majority opinion on this issue.

{¶63} However, I would construe R.C. Chapter 4116 differently than the majority. In my view, R.C. 4116.02(A) effectively prohibits "public authorities"—including state and local governmental entities and "any institution supported in whole or in part by public funds"—from entering into project labor agreements ("PLA's"). Consequently, its constitutionality is not a moot point as the majority suggests. I would reach the constitutional issue on the merits and would hold that R.C. 4116.02(A) regulates an area which the National Labor Relations Act ("NLRA") intended to leave to the free play of economic forces and therefore violates the Supremacy Clause of the United States Constitution. Accordingly, I dissent from the majority opinion with respect to the constitutionality of R.C. Chapter 4116.

R.C. Chapter 4116 Prohibits
Project Labor Agreements

{¶64} The testimony at the preliminary injunction hearing showed that PLA's are three-way agreements among the project owner,

contractors and organized labor. In the context of a public sector project such as the juvenile detention center, as a practical matter, the contractor and/or subcontractors cannot be involved in the initial PLA negotiations because no contracts have been awarded yet. Consequently, the agreement is first negotiated between the public authority and labor organizations representing all of the trades which will work on the project.

{¶65} If PLA's were only an arrangement between the public authority and labor representatives, they would not even be affected by R.C. Chapter 4116; that statute only limits the contractual relationships between public authorities and contractors. Nor would the NLRA be implicated. The NLRA is concerned with the relationship among employers and labor organizations, not the relationship among project owners and labor organizations.

{¶66} However, a PLA does not stop with an agreement among the project owner and labor representatives. The purpose of a PLA is to obtain consistent terms for all the labor involved on a project.

The project owner does not directly employ the various tradesmen and laborers involved; the contractors and subcontractors do. Thus, for the PLA to be effective, it must require the public authority to ensure that any contractor it retains will comply with the terms to which the public authority and the labor organizations have agreed.

{¶67} This is—clearly—a requirement that a contractor or subcontractor “enter into agreements with any labor organization on the public improvement,” a prohibited term of a public improvement contract under R.C. 4116.02(A). The contractor or subcontractor must accede to the terms of employment agreed upon by the public authority and the labor organization, so it is a party to an agreement with a labor organization.

{¶68} It is essential to the purpose of a PLA that the contractors and the labor organizations agree to comply with the same terms. A PLA is intended to avoid conflicting work rules and to prevent work stoppages and inefficiencies due to the differing terms of collective bargaining agreements independently negotiated between the various unions and their various employers, and the still-different terms upon which non-union contractors have engaged their own employees. The only way this can work is if all contractors and unions agree to the same terms.

{¶69} Because R.C. 4116.02(A) prohibits a public authority from requiring a contractor or subcontractor to enter into an agreement with a labor organization, and that kind of requirement is an essential part of a PLA, R.C. 4116.02(A) effectively prohibits PLA's.

{¶70} R.C. 4116.02(A) Is Preempted by the NLRA

Generally

{¶71} The NLRA contains no express preemption provision; therefore, it is presumed that Congress did not intend for the NLRA to displace state law, and courts must be reluctant to infer preemption. *Building & Construction Trades Council v. Associated Builders and Contractors* (1993), 507 U.S. 218, 224. Nevertheless, the United States Supreme Court has articulated two distinct NLRA preemption principles: First, to prevent conflict between state regulations and the NLRA, *Garmon* preemption prohibits state regulation of activities that, arguably, the NLRA affirmatively protects under section 7 or prohibits as an unfair labor practice under section 8. *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236. Second, *Machinists* preemption proscribes state regulation of matters which Congress intended to be unregulated and left to the free play of economic forces. *Machinists v. Wisconsin Employment Relations Comm'n.* (1976), 427 U.S. 132.

Pre-Hire Collective
Bargaining Agreements Under The NLRA

{¶72} There is no provision in the NLRA, correlative to sections 8(a)(3) and 14(b),¹ which expressly allows or disallows

¹As the majority correctly notes, section 14(b) of the NLRA, 29 U.S.C. section 164(b), expressly allows states to forbid contracts requiring employees to become members of a labor organization as a condition of employment, despite the provisions of section 8(a)(3), 29 U.S.C. section 158(a)(3), which states that,

contractual obligations on contractors to enter into agreements with labor organizations or expressly allows or disallows state regulations of such provisions. Therefore, the question before us is whether Congress intended to leave this area to the free play of economic forces and prohibit any state regulation.

{¶73} Section 8(e) of the NLRA, 29 U.S.C. section 158(e), provides in pertinent part:

{¶74} (e) **Enforceability of contract or agreement to boycott any other employer; exception.** It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void; Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction ***.

{¶75} The proviso specifically allows construction industry pre-hire collective bargaining agreements which, among other things, require the employer to use only union contractors, subcontractors and suppliers. As the United States Supreme Court

under certain circumstances, such contracts are not forbidden by the NLRA. For this reason, I assume that R.C. 4116.02(B) is not preempted by the NLRA. Cf. *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.* (1976), 426 U.S. 407; *Local Union Nos. 141, 229, 681, and 706 v. NLRB* (1982), 675 F.2d 1257. This opinion is limited to the constitutionality of R.C. 4116.02(A).

recognized in *Building and Construction Trades Council v. Associated Builders and Contractors* (1993), 507 U.S. 218, 231,

{¶76} [i]t is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire collective bargaining in the industry.

{¶77} In *Building and Construction Trades Council*, the Supreme Court held that when the state is acting as the purchaser of contractors' services, it may choose a contractor based upon the contractor's willingness to enter into a prehire collective bargaining agreement. Therefore, the court held, the state could include bid specifications in its solicitation for bids which required "each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, *** will be bound by the provisions of" a project labor agreement which the state agency had negotiated with the Building and Construction Trades Council.

{¶78} Implicit in its holding that the state may enter into such a contract in its capacity as a purchaser of construction services, is the Supreme Court's recognition that the NLRA intended to leave such matters to the free play of economic forces, in which

the state was a participant in that case. The Court specifically noted that

{¶79} [i]ndeed, there is some force to petitioners' argument *** that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces.

{¶80} 507 U.S. at 232.

{¶81} The critical distinction between this case and the *Building and Construction Trades Council* is that, in this case, the state is not acting as a purchaser of construction services but as a regulator. This case does not involve a single contract but a statute generally governing all construction contracts for "public improvements." Furthermore, the statute regulates not only the state itself as a purchaser but almost every governmental entity in the state² and, more tellingly, "any institution supported in whole or in part by public funds." R.C. 4116.01(A) (defining "public authority"). The variety of entities whose purchasing decisions are circumscribed by this law exceeds the bounds of the state making decisions in its own behalf and enters the realm of regulation.

{¶82} It might be possible to defend the state as a "market participant" if the application of the statute were limited to

²The one exception is a charter municipality constructing a public improvement for which state funds have not been appropriated. See R.C. 4116.01(A).

projects involving state funds; however, R.C. Chapter 4116 is not so limited. It applies to "bid specifications *** for the proposed public improvement" and "any subsequent contract or other agreement for the public improvement to which the public authority and a contractor or subcontractor are direct parties." Public improvements are defined broadly to include:

{¶83} *** all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and other structures or works constructed by a public authority or by any person who, pursuant to a contract with a public authority, constructs any structure or work for a public authority.

{¶84} R.C. 4116.01(C). There is no statutory restriction which might limit the statute's application to projects involving state funds.

{¶85} For these reasons, I would hold that Congress intended in the NLRA to relegate prehire collective bargaining agreements to the free play of economic forces and that the state's regulation in this case is therefore preempted to the extent it prohibits any "public authority" from requiring a contractor to enter into an agreement with a labor organization. Consequently, I would hold that R.C. 4116.02(A) is preempted by the NLRA and violates the Supremacy Clause of the United States Constitution.