No. 12-2548

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL and GENESEE, LAPEER, SHIAWASSEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Plaintiffs-Appellees

v.

RICHARD SNYDER, Governor of the State of Michigan,

Defendant-Appellant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Judge Roberts

BRIEF OF *AMICI CURIAE* ASSOCIATED BUILDERS AND CONTRACTORS, INC., ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN, NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

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IDENTITY AND INTERESTS OF THE *AMICI*

The *Amici* submitting this brief are Associated Builders and Contractors, Inc. (ABC), ABC of Michigan, the National Federation of Independent Business (NFIB), both nationally and in Michigan and the National Right to Work Legal Defense Foundation. The same *Amici* filed separate briefs and motions for leave to file with this Court in the related case of *Michigan Building and Construction Trades Council v. Snyder (Snyder I)*, No. 12-1246. Those motions and briefs remain pending and are hereby incorporated by reference, but the *Amici* will restate their identities and interests below for ease of reference in condensed form.

Amicus ABC is a trade association representing more than 22,000 construction-related firms throughout the country. ABC's Michigan chapter represents more than 900 construction-related firms throughout the State of Michigan. ABC's members include both unionized and non-union construction contractors, many of whom have bid on and successfully performed work for the State and its political subdivisions without any need for Project Labor Agreements (PLAs). ABC opposes government-mandated PLAs as inefficient and discriminatory, and ABC strongly supported passage of both Michigan Public Act 98 of 2011 and Michigan Public Act 238 of 2012.

ABC has participated as an *amicus* or a party in a significant number of cases relating to different aspects of government-mandated PLAs around the

country, beginning with the seminal *Boston Harbor* case, *Building and Const. Trades Council of the Metro. Dist. v. Associated Builders and Contractors*, 507 U.S. 218 (1993), and including *Building Trades Dept., AFL-CIO v. Allbaugh*, 295 F. 3d 28 (D.C. Cir. 2002); and *Johnson v. Rancho Santiago Cmty. College Dist*., 623 F. 3d 1011, 1023 (9th Cir. 2010). ABC has also participated as an *amicus* in *Idaho Building and Constr. Trades Council, AFL-CIO v. Wasden,* 2011 U.S. Dist. LEXIS 147652 (D. Id. Dec. 22, 2011), *appeal pending,* No. 12-35051 (9th Cir

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide, including over 9,000 in Michigan, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

Like ABC, NFIB has participated in many federal appellate actions relating to labor and other regulatory matters throughout the country as either an *amicus* or as a party, including most recently *NFIB v. Sebelius*, 132 S. Ct. 2566 (U.S; *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *National Assoc. of Manufacturers, et al v. NRLB*,

No. 12-5068 (D.C. Cir.); and *Mulhall v. UNITE HERE*, 618 F. 3d 1279 (11th Cir. 2010).

National Right to Work Legal Defense Foundation is a nonprofit, charitable organization that provides free legal aid to individual employees whose rights are infringed upon through compulsory union representation or membership arrangements. The Foundation opposes PLAs because they sacrifice employees' rights of free choice and impose unwanted union representation on employees. Foundation attorneys have represented employees' interests before federal courts in numerous cases involving employees' rights to refrain from joining or supporting unions as a condition of employment, to include cases involving whether government measures imposing PLAs and other union agreements on employees are preempted by the NLRA.

The *Amici* jointly seek to file this *amicus* brief in order to assist the Court in evaluating the legality and enforceability of P.A. 238. Whatever doubt there may have been regarding the purpose and effect of the original Michigan PLA statute, P.A. 98 (and the *Amici* reiterate that there should have been no such doubts as to the Act's labor-neutral, proprietary purpose and effect), the amendments enacted by the State legislature in P.A. 238 have made absolutely clear that nothing in the Act is intended to interfere with the federal regulatory scheme, nor does the new

Act conceivably have that effect.[1] The district court's holding in *Snyder II* ignores or unfairly minimizes the plain language of P.A. 238 and, if allowed to stand, would extend the reach of federal labor law preemption to labor-neutral state legislation in a manner that has never before been countenanced by any court.[2]

Additional Statements Pursuant to FRAP 29

Pursuant to FRAP 29(c)(1) and 26.1, the *Amici* state that they have no parent corporations and that no publicly held corporations own 10% of their stock. (None of the *Amici* have any stockholders).

Pursuant to FRAP 29(c)(5), the *Amici* further state that no party's counsel has authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting of this brief; and no persons other than the *Amici* contributed money that was intended to fund preparing or submitting this brief.

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[1] The Governor's brief, which the *Amici* fully support, focuses most of its attention on showing how the amendments in P.A. 238 establish beyond any doubt that the Act constitutes market participation. (State Br. at 21 - 39). While the Governor also contends that the district court erred in finding that the Michigan law interferes with any rights of private parties protected by the NLRA (State Br. at 40 - 43), the *Amici* believe that additional explanation of that issue will assist the Court, in order to highlight the fundamentally flawed analysis by which the district court reached its conclusion in favor of preemption. It may thus be unnecessary to reach the market participation issue.

[2] ABC hereby incorporates by reference and expresses its general agreement with the positions taken by the Governor in this case.

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ARGUMENT

I. The District Court's Ruling Enjoining P.A. 238, Which In Effect Compels The State To Require Private Employers To Enter Into PLAs, Fundamentally Misstates The Rights Protected By The NLRA And The Purposes Of NLRA Preemption

As explained in the *Amici*'s brief in *Snyder I*, the original "Fair and Open Competition In Governmental Construction Act," P.A. 98, was one of a large number of state laws around the country by which state governments have chosen to opt out of mandating Project Labor Agreements (PLAs) on state-funded construction projects, in the interests of achieving greater economy and efficiency in the procurement process.[3] Responding to the district court's apparent misinterpretation of P.A. 98's original legislative intent in *Snyder I*, the Michigan legislature enacted P.A. 238 in order to remove all doubt as to its intent to avoid any regulation of or interference with rights protected by the NLRA.

By unreasonably rejecting every effort by the State to narrow and tailor the statute to satisfy any concerns regarding the law's supposed regulation of the labor relations of private parties, the district court's ruling in *Snyder II* has reached a radical and insupportable conclusion: that the NLRA somehow *compels* State

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[3] *See* Arizona SB 1403 (2011); Arkansas EO 05-09 (2005); Idaho Code § 44-2013 (2012), as amended in response to judicial action; Iowa EO 69 (2010); Kansas HB 2157 (2012); Louisiana SB 76 (2011; Maine LD 1257 (2011); Missouri RS § 34.209 (2007); Minnesota EO 05-17 (2005) (subsequently repealed) ; Montana Code Ann., § 18-2-425 (1999); Tennessee HB 1498 (2011); Utah Code Ann. § 34-30-14(2) (1995); Virginia HB 33 (2012).

governments to require employer contractors to enter into PLAs. This result cannot be squared with settled principles of federal labor law preemption and must be reversed.

P.A. 238 contains the following provisions that are similar to or are even more narrowly tailored than the PLA procurement laws currently in force in many other states, which have not been found to be preempted by federal labor law:

> P.A. 238 added a new Section 2 to the new Michigan law, § 408.872, which clarifies that the law's purpose is "to provide for more economical, nondiscriminatory, neutral and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants" and that "providing for fair and open competition best effectuates this intent."
>
> P.A. 238 also substantially modified Section 5 of the new law, § 408.875, which was the primary focus of criticism by the district court in *Snyder I*. Section 5 now makes clearer that the purpose and effect of the statute is to be entirely neutral with regard to PLAs in awarding state contracts. Thus, the new Section 5 declares that when a governmental unit is "awarding a contract" for a public construction project (as opposed to merely "entering into" such contracts), it "shall not . . . [r]equire or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations" on that project or a related project.
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> P.A. 238 also amended Section 8 of the law, § 408.878, by adding that "[t]his Act does not prohibit a contractor or subcontractor from voluntarily entering into or complying with an agreement entered into with 1 or more labor organizations in regard to a contract with a governmental unit or funded in whole or in part from a grant, tax abatement, or tax credit from the governmental unit.
>
> P.A. 238 further added a new exemption in Section 9 of the law, § 408.879, which allows the head of a governmental unit to make exemption decisions on a project specific basis for "any particular

> project, contract, subcontract, grant, tax abatement, or tax credit from the requirements in Sections 5 and 7 if the governmental unit finds … that special circumstances require an exemption to avert an imminent threat to public health or safety….” The amendment thus requires an exercise of governmental discretion as to PLAs on specific projects.
>
> Finally, P.A. 238 amended Section 13 of the law, § 408.883, to make clear that the law should be construed so as not to interfere with labor relations of parties that are left unregulated under the NLRA, in addition to the previous language of the P.A. 98 that had already stated that the law does not prohibit employers or other parties from entering into agreements or engaging in any other activity protected by the NLRA.

The district court clearly erred in holding that *none* of the foregoing amendments was sufficient to allow the State to exercise its proprietary choice to remain labor-neutral when procuring construction services, a matter deeply rooted in local procurement concerns. It is now apparent that the district court believes that State governments are compelled by the NLRA to assist private sector unions in imposing PLAs on private employer contractors, thereby taking sides on a matter of private sector labor relations in a manner exactly opposite to what the Supreme Court has declared to be the law in *Garmon* and *Machinists*.[4]

To reach this untenable result, the district court has engaged in the following deeply flawed reasoning:

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[4] *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959) (“*Garmon*”); *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Empl. Relations Comm'n*, 427 U.S. 132, 140 (1976) (“*Machinists*”).

First, the district court has posited that the NLRA somehow protects the right of private sector construction unions to "convince State or governmental units to enter into PLAs," even though no controlling authority has ever so held. *Snyder II* at 9.

Second, the court asserts that Section 5 of the 2012 Act, by prohibiting state governmental units from requiring private employers to agree to adhere to PLAs as a condition of contract award, "effectively constricts the right of employees to negotiate and enter into PLAs," even though the amended Section 5 plainly states that it does not prohibit any private employer from negotiating a PLA with any union, in the manner authorized by the NLRA. *Id*.[5]

Third, the district court claims without any support in the record that the Act renders "futile" the newly asserted right of private sector unions to convince State governments to enter into PLAs, if such governmental units "cannot condition construction awards on a promise to adhere to a PLA, or if contractors or subcontractors are not required to adhere to a PLA." *Id*.

As is further explained below, each of the foregoing holdings by the district is clearly erroneous, and as a result the district court has wrongly transformed the NLRA's protection of a voluntary choice by private (and public) employers into a compulsory mandate *requiring* state governments to impose such PLAs upon

[5] This district court finding stands in stark contrast to the court's reading of Section 5 in *Snyder I.* There the court held : "Section 5 of the Act operates as a flat prohibition on the State from entering into construction contracts which contain the subcontracting language expressly protected by Section 8(e) of the NLRA. Section 5 says nothing of bid specifications, or neutrality in bidding…." *Snyder I*, 846 F. Supp. 2d at 781. P.A. 238 has now made it clear that privately negotiated PLAs *are* permitted on government construction projects and that Section 5 does *not* prohibit the State from "entering into" construction contracts which contain the above referenced subcontracting language. The Plaintiff Unions conceded as much below, admitting that P.A. 238 "cured" P.A. 98's alleged "restrictions on private contractors." *Snyder II* District Court Docket #15, Plaintiff's Reply Brief at 2.

union requests.[6] The *Amici* will show below why each of the district court's holdings is mistaken and is contradicted by settled law under the NLRA.[7]

A. Contrary To The District Court, The NLRA Exclusively Protects The Right Of Private Employers And Unions To Negotiate With Each Other, Not With State Or Local Governments.

As noted above, the district court's starting premise is that the NLRA somehow protects the right of private sector construction unions to "convince State or governmental units to enter into PLAs." *Snyder II* at 9. The district court cites no Supreme Court or Circuit Court of Appeals decision that has ever so held, and there is none. To the contrary, the Supreme Court has long held that the NLRA gives unions *no* federally protected right to negotiate with political subdivisions

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6 The district court's ruling has thereby ignored "the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana,* 451 U. S. 725, 746 (1981). Certainly, the district court failed to require the Plaintiff Unions to bear their burden of showing that no set of circumstances exist under which a state law would be valid, in order for the Court to find preemption under federal labor law. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

7 It must also be noted that the district court erroneously addressed the merits of the case without deciding that the Plaintiff Unions had standing to assert the rights claimed to be injured. Presumably the district court relied on its previous finding of standing in *Snyder I*, but in that case the court committed the same error, postponing consideration of standing until after ruling on the merits of the unions' claims. In any event, the district court impermissibly failed to require the Unions to carry their burden of proving injury to legally protectable interests prior to reaching the merits, as required by the Supreme Court and by this Court. *See Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.")

over any terms or conditions of employment, due to the express exclusion of government entities from the definition of "employer" under the NLRA, 29 U.S.C. 152(2). Thus, in *NLRB v. Natural Gas Util. Dist. Of Hawkins Cty.*, 402 U.S. 600 (1971), a union filed a petition with the NLRB seeking certification as a bargaining agent for the purpose of negotiating with a utility district. The utility district refused to bargain with the union on the ground that as a political subdivision it could not be required to do so under the NLRA. The Supreme Court agreed and the election petition was dismissed.

Subsequently, this Court has applied the same principle on numerous occasions, finding that there is no jurisdiction under federal labor law to force political subdivisions to enter into or maintain contracts with labor organizations. *See, e.g., Moir v. Greater Cleveland Reg. Transit Auth.*, 895 F. 2d 266 (6th Cir. 1990). Likewise, the NLRB itself has repeatedly refused to certify or otherwise protect any supposed right of unions to negotiate with political subdivisions over any aspect of labor conditions under the NLRA. *See, e.g., Fayette Elec. Coop*., 308 NLRB 1071 (1992) (dismissing petition of one of the member unions of the Building and Construction Trades Council seeking the right to negotiate terms and conditions of employment with a political subdivision).[8]

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[8] The NLRB has also refused to take jurisdiction over issues relating to PLAs and/or pre-hire agreements entered into by political subdivisions. *See Local 3, IBEW*, 244 NLRB 357, 359 (1979); *Tri-County BCTC*, 8-CE-110 (Advice Memo.,

In defiance of this long settled principle deriving from the plain language of the NLRA, the district court has now created a right on the part of unions to force a State government to negotiate with them over the imposition of PLAs on state construction projects. No such right exists, and the district court decision should be reversed on this ground alone.

As in *Snyder I*, the district court erroneously claims support for its expansive view of labor's protected rights under the NLRA from a single sentence taken entirely out of context in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989). According to the district court, quoting from *Golden State*: "[t]he NLRA creates rights in labor and management both against one another and against the State." *Snyder II* at 9; *see also Snyder I*, 846 F. Supp. 2d at 782. But nowhere did the *Golden State* Court hold or even consider that the NLRA creates a right in labor to force state governments to negotiate agreements with them, over PLAs or any other subject.

The sole issue before the Court in *Golden State* was whether the State could coerce a private employer to enter into an agreement with a union, which the Court ultimately found that the State could *not* do, because such interference was preempted by the NLRA. Solely in that context, the Court held that the NLRA created rights in labor and management to be protected against State coercion of

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26 Mar. 2009); *Int'l Bhd. Of Boilermakers, Local Lodge 744*, 8-CE- 92-109 (Advice Memo., 30 Oct. 2008).

labor agreements, not the right to *compel* the State to act in such a manner as to impose agreements on private parties. For each of these reasons, the district court has fundamentally erred in finding support in the *Golden State* opinion for the creation of a right protected by the NLRA for either employers or unions to compel state governments to require PLAs.[9]

B. Contrary To The District Court, Nothing In Section 5 Of The 2012 Act "Constricts" The Right Of Employees To Negotiate And Enter Into PLAs With Private Employers In Accordance With The NLRA.

As noted above, the second false premise underlying the district court's ruling is that Section 5 of the 2012 Act, by prohibiting state governmental units from *requiring* private employers to agree to adhere to PLAs as a condition of contract award, "effectively constricts the right of employees to negotiate and enter into PLAs." *Snyder II* at 9. Yet nothing in the amended Section 5 constricts negotiations between unions and employer contractors in any way. Section 5, as amended, plainly states that it neither "requires nor prohibits" any private employer contractor from negotiating a PLA with any union, exactly in the manner authorized by the NLRA. For the district court to find that State government compulsion of private employers is necessary to the negotiation of such

[9] As has been noted by the Governor in this appeal and in the *Amici's* brief in *Snyder I*, the district court's expansive view of the NLRA is also contradicted by the Supreme Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), which declared that "by its plain terms, … the NLRA confers rights only on *employees*, not on unions….") (emphasis in original).

agreements reflects a fundamental misunderstanding of the way PLAs are commonly negotiated under the statutory framework of the NLRA.

As recognized by the Supreme Court in *Boston Harbor*, Sections 8(e) and 8(f) of the NLRA were intended to reflect the prevailing practices of "employers in the construction industry," *i.e.*, private employers. 502 U.S. at 230.[10] The case which first upheld the enforceability of union-signatory subcontractor clauses which are the underpinning of all PLAs, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657 (1982), dealt exclusively with agreements in the private sector, which were entered into without any State government involvement.

Indeed, the practice of negotiating PLAs prior to *Boston Harbor* was primarily engaged in between unions and private parties, *i.e*., general contractors and construction managers, who were authorized by the NLRA to require their subcontractors to sign such project agreements as a condition of performing work on that particular project. *See, e.g., Morrison-Knudson Co., Inc*., 13 NLRB Advice Mem. Rep. ¶ 23,061 (Mar. 27, 1986) (permitting a PLA between a construction manager and construction unions at a Saturn Motors plant). Even in *Boston Harbor* itself, the actual PLA was signed by Kaiser Engineering, a private entity who the Supreme Court found to be an "employer in the construction industry."

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[10] "In 1959, Congress amended the NLRA to add 8(f) and modify 8(e). Section 89f) explicitly permits employers in the construction industry - but no other employers – to enter into prehire agreements." *Id.*

502 U.S. at 230.[11] Finally, the Building and Construction Trades Department's own public web site, www.bctd.org, lists numerous private PLAs that its member unions have negotiated before and after *Boston Harbor*, with no state government involvement.[12]

Even the district court's own opinion in *Snyder I* acknowledged the numerous ways in which PLAs can come into effect between unions and private employers in the manner contemplated by the NLRA, without any state government action requiring such agreements. Thus, in *Snyder I* the district court found, based upon the Plaintiff unions' own sworn affidavits, that "a PLA can come into effect on a given construction project through several different scenarios." 846 F. Supp. 2d at 772. In describing those scenarios (without distinguishing between private and public projects), the court acknowledged that

[11] "It is undisputed that the Agreement between Kaiser and BCTC is a valid laor contract under sections 8(e) and (f). As noted above, those sections explicitly authorize this type of contract between a union and an employer like Kaiser, which is engaged primarily in the construction industry, covering employees engaged in that industry." *Id*.

[12] Among the private sector PLAs touted by the BCTD on its website are agreements with private employers on the Keystone XL Oil Pipeline, at Walt Disney World, and in the National Constructors Agreement. All are publicly available at www.bctd.org/Field-Services/Project-Labor-Agreement.aspx. Also posted on the BCTD website are the Union's "Guidelines for Negotiating Project Labor Agreements" which clearly contemplate negotiation of PLAs with private contractors, with or without State assistance: "Whether in the public or private sector, the safest course for a Council to follow whenever possible is to negotiate the actual PLA with a construction manager or general contractor, and not with the public entity or private owner/developer." *Id*.

"if an owner decides to use a general contractor, the general contractor may independently negotiate a PLA with trades councils either before or after being awarded the work." *Id*.

In light of the long history of privately negotiated PLAs as set forth above, the district court was plainly wrong to declare in this case that State government action is a *prerequisite* to negotiation of PLAs. *Snyder II* at 9, quoted above. Again, this new holding by the district court constitutes a radical expansion of the (erroneous) ruling in *Snyder I*, and is flatly contradicted by the facts and law discussed above.

C. Contrary To The District Court, Nothing In P.A. 238 Renders "Futile" The Ability Of Unions To Negotiate And Enter Into PLAs On Public Projects.

In light of the foregoing discussion of the history of PLAs that have been negotiated by construction unions without any need for governmental coercion of employer contractors, little more need be said regarding the district court's finding that union efforts to obtain PLAs will be rendered "futile" in the absence of State government PLA mandates. As discussed above, unions have negotiated PLAs in the private sector without any government assistance, and the plain language of P.A. 238 leaves them free to do so on public projects.

The district court's finding of union "futility" in the absence of governmental PLA mandates is also contradicted by the facts of the *Allbaugh* case,

or more specifically its aftermath. *Building & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F. 3d 28 (D.C. Cir. 2002). As has been much discussed elsewhere, the D.C. Circuit in *Allbaugh* upheld President Bush's Executive Order prohibiting the government from mandating a PLA on publicly funded projects. What should also be noted, however, is that the Bush Executive Order did not render "futile" the unions' efforts to negotiate a PLA on the public project that was the focus of the *Allbaugh* decision, *i.e.*, the Wilson Bridge project between Maryland and Virginia. To the contrary, the public record of the Wilson Bridge project after the Executive Order indicates that the unions did enter into PLAs for a significant portion of the project, even after the Bush Executive Order went into effect.

As posted on the public website of one of the international unions affiliated with the union parties to this appeal, www.liuna.org/AboutUs/Successes, after the Bush Executive Order was issued prohibiting government-mandated PLAs, the building trades unions *privately negotiated* two PLAs on the Wilson Bridge project, without any governmental PLA mandate. The PLAs were simply negotiated between the building trades unions and the non-governmental project manager and contractors, as the Bush Executive Order (like P.A. 238) expressly permitted. Thus, the existence of the Executive Order upheld in *Allbaugh*, which neither required nor prohibited government action mandating PLAs on public projects (using language identical to P.A. 238), did not obstruct the unions from

negotiating and implementing PLAs on the public construction project which was at issue in that case. For the same reason, the district court clearly erred in declaring that union efforts to negotiate PLAs on public projects in Michigan would be rendered "futile" by P.A. 238.

To be sure, State government PLA mandates give a sizeable boost to unions who are seeking to preserve their otherwise declining market share. But that does not mean that unions have a "right" to compel such preferential treatment that is protected or even intended by the NLRA, under either *Garmon* or *Machinists* preemption. A determination by the State not to assist employers or unions in their labor relations, *i.e*., a decision of labor neutrality, does not violate the principles of non-interference articulated by the Supreme Court's preemption cases, regardless of whether such a determination is made *ad hoc* or by statute. Rather, a State law that neither requires nor prohibits PLAs *exemplifies* the principles of non-interference with labor law and cannot therefore be preempted by the NLRA.

As in *Snyder I*, the district court in *Snyder II* misread *Boston Harbor* as somehow creating protected union rights to negotiate PLAs with political subdivisions under Sections 8(e) and 8(f) of the NLRA. But all that the Supreme Court held in *Boston Harbor* was that the Act did not preempt state agencies from choosing for themselves whether to enter into PLAs. As the Court stated: "In the absence of any express or implied indication by Congress that a State may not

manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Id*. at 231-32. The *Boston Harbor* Court did not hold that either Section 8(e) or 8(f) of the NLRA imposed an *obligation* on the part of political subdivisions to negotiate PLAs with labor unions, and the Court certainly did not hold that the NLRA created a "legally protectable right" on the part of unions to force government units to impose PLAs on public projects.

II. P.A. 238 Removes All Doubt That The State Law, Like Many Other State Statutes Around The Country, Constitutes Lawful Market Participation Which Is Not Preempted By Federal Labor Law.

As explained in the briefs of the *Amici* and the State in *Snyder I*, the district court erred in failing to find that the original law, P.A. 98, was a perfectly valid act of market participation by the State. The amendments contained in P.A. 238 plainly redouble the force of the market participant exemption from preemption in this case, and the district court's failure to so hold provides an additional ground for reversal. The *Amici* agree with and fully support the State's brief in this regard and do not wish to repeat it.

The *Amici* reiterate, however, that with the amendments set forth in P.A. 238, the new law falls well within the market participation exemption recognized in *Allbaugh* and compares favorably with the PLA neutrality laws and executive

orders currently in force in the numerous other states referenced above: Arizona, Arkansas, Idaho, Iowa, Kansas, Louisiana, Maine, Minnesota, Missouri, Montana, Tennessee, Utah, and Virginia. In each of these states, government officials have found that government-mandated PLAs interfere with state efforts to achieve maximum competition in government procurements, and have concluded that such interference is harmful to the states' interests as market participants in controlling costs and guarding against corruption and favoritism.

Such findings regarding the adverse impacts of government-mandated PLAs are well supported by numerous published studies, including not only those cited in the State's brief,[13] but also many more reports reaching the same conclusions which can be found at www.thetruthaboutplas.com, and which were publicly available to the Michigan legislators prior to their vote on P.A. 238. *See Amici* Brief in *Snyder I*, at 3-5.

In addition, for all of the reasons previously argued by the *Amici* and the State in *Snyder I* and in the present appeal, the *Allbaugh* decision was correctly decided and is still good law. The district court's criticisms of P.A. 98 have all been addressed by P.A. 238, including any ambiguity over the law's proprietary

[13] *See* State Brief at 10-11, citing Vasquez, Glaser & Bruvold, *Measuring the Cost of Project Labor Agreements on School Construction in California*, available at www.nusinstitute.org; Tuerck, *Why Project Labor Agreements Are Not in the Public Interest*, 30 Cato J. 45, 46, 61 (Winter 2010); and Tuerck, Glassman & Bachman, *Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem*, available at www.beaconhill.org.

intent (now addressed by Section 2), any claim that the "enter into" language of Section 5 was insufficiently "tailored" to the State's proprietary needs (now addressed by deleting that language in the new Section 5), any perceived lack of "discretion" to impose a PLA under certain circumstances (now addressed by inclusion of such discretion in Section 9), and any perception that the savings clauses of Section 13 left open the possibility of interference with the NLRA (now foreclosed by the new Section 13). The district court's persistence in finding P.A. 238 to be regulatory in the face of all of the above concessions to the court's erroneous holding in *Snyder I* again has resulted in a radical new preemption doctrine that must be reversed.

In light of the amendments to P.A. 238, the straightforward holding of the district court in Iowa has even more force than before. *See Central Iowa Building & Const. Trades Council*, *AFL-CIO v. Branstad*, 2011 U.S. Dist. LEXIS 104871 (D. Ia. Sept. 7, 2011). As the court there stated: "The *Garmon* and *Machinists* preemptions are not applicable to the matter at hand because the State … is not regulating businesses through the issuance of [the executive order]." The court further held: "The State, as the proprietor of its construction projects, can make the decision not to pay union wages or operate under union conditions. This is a business decision that does not come into conflict with the NLRA…." *Id*. at *29-

*30. The district court has failed to distinguish the *Central Iowa* holding and there is no principled basis on which to do so.

CONCLUSION

For each of the reasons set forth above and in the State's brief, the judgment of the district court should be reversed and P.A. 238 should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify that the foregoing brief complies with the type limitations provided in FRAP 32(a)(7). It was prepared using Microsoft Word 2010 and contains 5084 words in 14-point proportionately-spaced Times New Roman font.

CERTIFICATE OF SERVICE (e-file)

I hereby certify that on January 22, 2013, I electronically submitted the foregoing document(s) to the Clerk of the Court for filing in the ECF System, which will provide electronic copies to counsel of record.

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