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MEMORANDUM

TO: House Finance Committee

FROM: Mark D. Tucker

DATE: April 16, 2015

SUBJECT: Substitute House Bill 64, Proposed Revisions to R.C. Chapter 4116

I represent the Ohio State Building and Construction Trades Council. The Council opposes the proposed amendments to R.C. Chapter 4116 which were included in the substitute bill both because they represent unwise public policy and because they run afoul of the Supremacy Clause of the United States Constitution.

A project labor agreement is a form of "prehire" collective bargaining agreement between contractors and labor unions in the construction industry. U.S. General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* (May, 1998), Report No. GGD-98-82 at 1. A project labor agreement is a construction project-wide prehire collective bargaining agreement limited to a single construction project and covering all contractors and all construction workers on the project. Kopp, *The Case for Project Labor Agreements* (Jan. 1999), 19 Constr.Law 5, 6-7.

> Because they are negotiated pre-bid and specifically tailored to the needs of particular projects, PLAs give project owners, building contractors and trade unions a unique opportunity to anticipate and avoid potential problems that might otherwise arise and possibly impede project progress. They maximize project stability, efficiency and productivity and minimize the risks and inconvenience to the public that often accompany public works projects.

Kotler, *Project Labor Agreements in New York State: In the Public Interest,* Cornell University School of Industrial and Labor Relations at 2 (March 2009).

Project labor agreements are management tools that establish the ground rules binding on all contractors and workers engaged on a project for the project's entire duration. By overriding each contractor's practices and setting the common rules for the project, a PLA provides the owner and construction manager with a mechanism for coordinating how the different trades and contractors will work together to complete not only their individual tasks, but also the larger project. PLAs reduce many of the uncertainties that are inherent in large-scale construction projects by ensuring a steady flow of highly qualified labor, harmonizing work hours and work rules for all the contractors on the site, and establishing effective mechanisms for fostering communication and cooperation and avoiding and resolving disputes. By providing comprehensive coverage of all contractor/labor issues, PLAs present the ideal bargain between the interests of the contractors, employees, and owner of the project. Given their nature, project labor agreements are commonly negotiated for, and apply to, complex projects that take years to complete and that require a high degree of coordination among a large number of contractors and subcontractors on the site. GAO Report No. GGD-98-82 at 4.[1]

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[1]The Court of Appeals for Jefferson County, Seventh Appellate District, has accurately described the terms of a typical public sector PLA:

> The agreement was drafted for the express purpose of facilitating the orderly performance of work on the [particular] project by eliminating work stoppages, slowdowns and other interferences. Accordingly, the agreement imposed uniform procedures for dealing with labor disputes, contained a comprehensive no-strike clause, established a standardized work week and contained other provisions which made uniform the working conditions for all contractors, subcontractors and workers on the project.
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> The PLA provided that, as a condition to being engaged to perform work on the project, successful bidders were required to execute applicable local collective bargaining agreements for work on the project. These would expire immediately following the last day of work on the project. For contractors that were not signatory to collective bargaining agreements prior to commencing work on the . . . project, the bargaining agreements entered into thereunder were not to be applied to other works in progress or to jobs which were bid prior to execution of the bargaining agreements.
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> The PLA also required contractors performing construction work on the project to utilize the registration facilities and referral systems operated by the local unions in filling job vacancies. However, the PLA specifically provided that the selection of applicants for work on the project would be on a non-discriminatory basis and would not "* * * be based on, or in any way affected by, unions or trade group membership, bylaws, rules, regulations, constitutional provisions or any other aspect or obligation of union or trade group membership. * * *" In addition, the PLA provided that contractors would retain the right to reject any applicant for employment.

State, ex rel. Associated Builders & Contractors, Central Ohio Chapter v. Jefferson County Bd. of Comm'rs, 106 Ohio App.3d 176, 178-79 (Jefferson App. 1995), *appeal denied*, 74 Ohio St.3d 1499 (1996).

In Ohio, such private purchasers of construction services as Honda of America Manufacturing, Timken Company, General Motors, American Electric Power, Key Bank, Proctor & Gamble, Dayton Power & Light, AK Steel, Sun Coke, Pfizer Specialty Minerals, Cargill, Panasonic, the Cleveland Clinic, Eaton, and LTV Steel have used project labor agreements for their major construction projects. Indeed, Toyota Motor Corporation President Tetsuo Agata recently wrote: "I can say without any equivocation that project labor agreements, combined with the pride, performance, and professionalism of America's Building Trades Unions have proven to be a valuable tool to meet Toyota's economical and efficient construction process."

The Council believes that government officials should be free, on a project-by-project basis, to enter into project labor agreements when those agreements would further the government's interest in purchasing high-quality and cost-effective construction services. Such decisions are best made by the government officials purchasing the construction services, and these recently added provisions' removal of that discretion unnecessarily hampers public officials.

The amendments to R.C. Chapter 4116 would rob state and local public officials of a tool used frequently and successfully by non-public purchasers of construction services on their most complex construction projects. The Governor and many members of this General Assembly have argued that government should emulate the productive and cost-effective practices of the private sector. Provisions of this bill deprive state and local government of the ability to do just that. This Committee should not act to tie the hands of these officials attempting to achieve the most efficient expenditure of taxpayer dollars.

In considering these provisions, this Committee should be mindful that because of the peculiar nature of the construction industry—the short-term nature of employment, the need for predictable costs and a ready supply of skilled labor, and the long history of prehire bargaining in the industry—Congress has expressly authorized, as part of the National Labor Relations Act ("NLRA"), prehire agreements governing the wages, hours, and other terms and conditions of employment in the construction industry. See 29 U.S.C. §158(e) & (f). The NLRA preempts state regulation of areas regulated by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). States are thus prohibited from regulating "conduct [that] is either protected by Section 7 or prohibited by Section 8 . . . ." *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St.3d 346, 352, 1998-Ohio-621, *cert. denied,* 525 U.S. 871 (1998). The NLRA also preempts "state and municipal regulation of areas that have been left [by the NLRA] 'to be controlled by the free play of economic forces.'" *Building & Constr.*

Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 225 (1993) ("*Boston Harbor*") (quoting *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) ("*Machinists*")). See also *J.A. Croson Co., supra.*

These two NLRA preemption rules—*Garmon* and *Machinists*—apply with full force to state laws that govern only employers doing business with the state and unions representing such employers' employees. *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 289-90 (1986). By prohibiting that which the NLRA permits, these proposed amendments to R.C. Chapter 4116, if enacted, would violate the *Garmon* preemption principle. And by regulating what the NLRA leaves to project owners, construction contractors, and unions, and the free play of economic forces between them, these provisions, if enacted, would violate the *Machinists* preemption principle as well. State regulation banning project labor agreements is just as invalid as a state regulation requiring them.

Indeed, the Ohio Supreme Court ruled that this legislature's last attempt to ban public-sector project labor agreements was unconstitutional. In 1999, the General Assembly enacted, without the Governor's signature, Amended House Bill 101. That bill adopted R.C. Chapter 4116, which effectively prohibited public-sector project labor agreements. In 2002, the Ohio Supreme Court *unanimously* ruled that Am.H.B. 101 was preempted by federal law and was, therefore, unconstitutional in its entirety:

> Congress believed that PLAs were both lawful and part of the bargaining process in the construction industry prior to 1959, and enacted the construction-industry exemptions specifically to preserve this pattern and practice. *Any state regulatory action* that interferes with this pattern of collective bargaining in the construction industry would, therefore, be incompatible with the goals of the NLRA.

Ohio State Bldg. & Constr. Trades Council v. Cuyahoga County Bd. of Comm'rs, 98 Ohio St.3d 214, 228, 2002-Ohio-7213 at ¶ 65 (2002) (emphasis added).

The Council believes that the proposed revisions to R.C. Chapter 4116 make only cosmetic changes to the chapter and do not save the law from preemption. In this regard, the revisions primarily make two changes to the unconstitutional R.C. Chapter 4116: (1) they include language indicating that the state can neither "require" successful bidders to enter, nor "prohibit" successful bidders from entering, into prehire labor agreements; and (2) they purport to limit the chapter's

application to state construction projects and local government projects undertaken with some state funding.

In its decision, the Ohio Supreme Court recognized that such legislation would still amount to prohibited *regulation,* and would be, therefore, unconstitutional:

> Critically, however, [the U.S. Supreme Court's decision in] *Boston Harbor* suggests that a state would be acting as a regulator or policymaker, rather than as a purchaser, proprietor, or market participant, were it to impose an across-the-board rule that *either requires or prohibits* the use of PLAs on all public construction projects. Thus, the court carefully noted, on the one hand, that "the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project," and indicated, on the other hand, 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 identified in *Machinists.*"

Ohio State Bldg. & Constr. Trades Council, 98 Ohio St.3d at 230, 2002-Ohio-7213 at ¶ 78 (emphasis added). See also *Id.,* 98 Ohio St.3d at 229, 2002-Ohio-7213 at ¶ 69 ("[W]e must conclude that Section 8(f) and the construction-industry proviso to Section 8(e) are clear manifestations of Congress's intent to preclude the states from *regulating* PLAs in the construction industry.") (emphasis added). Simply amending the language of the unconstitutional statute to say that the state can neither "require" nor "prohibit" a PLA does not change its effect. Let there be no doubt, the provisions included in the substitute bill *prohibit* public sector PLAs at the state level and at the local level for any projects that include state money, and they are, therefore, unconstitutional. Indeed, that is the stated purpose as set forth in this Committee's description of the proposed amendments: "[p]rohibits a state agency from requiring a contractor to enter into a project labor agreement . . . ."

Nor does limiting the statute's application to the state and projects funded in whole or in part by the state save it from preemption. The United States Supreme Court made clear in *Boston Harbor* that it is insufficient to find that the state is a "market participant." Rather, to avoid preemption, the state must be "acting as a market participant *with no interest in setting policy." Boston Harbor,* 507 U.S. at 230 (emphasis added). As the court in *Reich* noted:

> The premise on which the Court's further analysis rested, then, was that the Massachusetts governmental entity . . . was not seeking to set general policy in the Commonwealth; it was just trying to operate as if it were an ordinary general contractor whose actions were "specifically tailored to one particular job, the Boston Harbor clean-up project." Surely, *the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements with the BCTC or its Massachusetts-wide counterpart containing Sec. 8(e) pre-hire agreements.* Accordingly, we very much doubt the legality of President Bush's Executive Order 12,818--since revoked, but upon which the government relies--that banned government contractors from entering into pre-hire agreements under Sec. 8(f).

Reich, 74 F.3d at 1336-37 (emphasis added) (footnotes and citation omitted). The stated purpose of these provisions is to set state policy, *i.e.,* regulate. The bill, therefore, crosses the market participation line and imposes a unconstitutional regulatory ban of PLAs.

Moreover, the limitation of the bill's proscriptions to state construction purchasing decisions is of no consequence when the state is, in fact, setting policy. State regulation is not saved from NLRA preemption "simply because it operates through state purchasing decisions . . . ." *Gould Inc.*, 475 U.S. at 289. See also *Reich,* 74 F.3d at 1334. See also *Chamber of Commerce of the USA v. Brown* (2008), 554 U.S. 60, 69 ("It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.").

> [T]he regulations diverge from the Supreme Court's most recent pronouncement that funding conditions in procurement agreements should be "specifically tailored to one particular job" to qualify as market participation.

Tri-M Group, LLC v. Sharp, 638 F.3d 406, 425 (3d Cir. 2011) (quoting *Brown*, 554 U.S. at 70). "[I]t is not 'permissible' for a State to use its spending power to advance an interest that—even if legitimate 'in the absence of the NLRA'—frustrates the comprehensive federal scheme established by that Act." *Brown,* 554 U.S. at 73-74 (quoting *Gould Inc.*, 475 U.S. at 290).

Proponents of similar legislation in the past have suggested that there has been an intervening change in the law since Am.H.B. 101 was declared unconstitutional. The Council disagrees with these assertions. Although some lower federal courts have upheld state laws purporting to ban public sector project labor agreements as an exercise of the state's authority as a "market participant," see, e.g., *Michigan Bldg. & Constr. Trades Council v. Snyder,* 729 F.3d 572 (6th Cir. 2013), the United States Supreme Court's most recent pronouncement on the issue continues to make distinctions "between a government's exercise of regulatory authority and its own *contract-based* participation in a market." *American Trucking Ass'ns v. City of Los Angeles,* 133 S.Ct. 2096, 2102 (2013). And that distinction is the very basis of the Ohio Supreme Court's decision striking down Am.H.B. 101, which it described as "a blanket, across-the-board prohibition that precludes any sort of ad hoc determination as to the benefits or advantages of utilizing a PLA on a particular project. It is therefore "'tantamount to regulation' or policymaking.'" *Ohio State Bldg. & Constr. Trades Council,* 98 Ohio St.3d at 235, 2002-Ohio-7213 at ¶ 95 (*quoting Boston Harbor,* 507 U.S. at 229).[2] The

[2]One of the decisions frequently relied upon by other court's upholding public-sector PLA bans is the D.C. Circuit's decision sustaining President Bush's since-repealed Executive Order dealing with federal construction project labor agreements. In its decision, the Ohio Supreme Court discussed, *and rejected,* the D.C. Circuit's decision upholding the Executive Order:

> Similarly, in *Bldg. & Constr. Trades Dept., AFL-CIO v. Allbaugh* (C.A.D.C. 2002), 295 F.3d 28, petition for certiorari filed Oct. 2, 2002, 71 U.S.L.W. 3283, No. 02-527, the court held that the NLRA does not preempt Executive Order 13,202, 66 F.R. 11225, issued by President George W. Bush on February 17, 2001, which prohibits federal agencies or recipients of federal funding from requiring or prohibiting PLA's in the bid specifications or other authorizing documents for construction projects. In so holding, the court never explained the obvious inconsistency between this decision and its previous discussion in [*Chamber of Commerce of the U.S. v. Reich* (D.C.Cir. 2008), 74 F.3d 1322, 1336-1337], regarding the legality of former President Bush's Executive Order 12,818. Instead, the court essentially reasoned, as did the New Jersey high court in *George Harms Constr. Co., Inc.* [*v. New Jersey Turnpike Auth.* (1994), 137 N.J. 8], that the government acts as a proprietor, rather than a regulator, when it makes "just 'the type of decision regarding the use of labor agreements that a private project owner would be free to make.' " *Allbaugh,* 295 F.3d at 35, quoting the government's brief. According to the court, the government has acted in a propriety capacity despite the "blanket, across-the-board" prohibition of Executive Order 13,202 because " 'the only decisions governed by the executive order are those that the federal government makes as [a] market participant.' " *Id.,* quoting the government's brief.
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> This reasoning, we believe, places the proverbial cart before the horse. These courts assume that a state acts as a market participant by doing what a private actor may do under the NLRA. But the gist of *Boston Harbor* is that a state may act as a private contractor would act when it acts as a market participant. Otherwise, the state would be permitted to regulate within a protected zone because a private actor may do so. As the New Jersey Supreme Court points out, for example, a private corporation may in its bylaws or elsewhere decide as a matter of policy never to utilize a PLA when purchasing construction services without running afoul of the NLRA. But this is not because such a decision is inherently indicative of proprietary activity. Indeed, the private contractor-developer in this situation would be acting not as a typical contractor would act in the furtherance of its proprietary interests, but as a "regulator" of the construction market.

Ohio Supreme Court's decision in *Ohio State Bldg. & Constr. Trades Council* remains directly on-point and must guide this Committee's consideration of the proposed revisions to R.C. Chapter 4116.

Proponents of similar legislation contend that it is needed because PLAs discriminate against non-union contractors. Contrary to proponents' claims, PLAs do not discriminate against non-union contractors. Project labor agreements do not prohibit any contractor, union or non-union, from bidding upon or being awarded a contract. Rather, all contractors submitting bids simply agree to execute and comply with the project agreement for that project only. Indeed, history has shown that non-union contractors are frequently awarded contracts on projects covered by project labor agreements, even in a right-to-work state such as Nevada. See *Associated Builders and Contractors, Inc. v. Southern Nevada Water Auth.*, 979 P.2d 224, 229 n.1 (Nev. 1999) ("Statistics compiled after the PLA had been adopted indicate that the PLA saved funds and that competition increased. Between the institution of the PLA and March 21, 1997, ninety-three bids had been submitted for sixteen contracts with an average of 5.8 bids per contract. Six of the sixteen contracts were awarded to non-union contractors. Prior to the institution of the PLA, sixty-six bids were received on fifteen contracts for an average of 4.4 bids per contract. Three of the fifteen pre-PLA contracts were awarded to non-union contractors. In addition, the awarded costs of the post-PLA projects was twenty-three percent less than anticipated originally and the awarded costs of the pre-PLA projects was fourteen percent less than originally anticipated."); *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 376 (Minn.App. 1999), *review denied* (Minn. 2000).

Nor do project labor agreements require any contractor to "become a union contractor." Project labor agreements merely provide that all contractors on the project shall become parties to the agreement. Public sector PLAs expire upon completion of the project and do not apply to other work performed by the contractor.

Moreover, project labor agreements do not discriminate against non-union employees by requiring them to become union members. Such agreements merely require all contractors on the project to use the local unions' hiring halls. All construction labor unions are required by federal law to operate nondiscriminatory

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Instead, a private corporation or other legal entity may make such a policy decision without violating the NLRA because the NLRA does not preclude a private actor from attempting to regulate in an area reserved for market freedom or NLRB jurisdiction.

Ohio State Bldg. & Constr. Trades Council, 98 Ohio St.3d at 233-34, 2002-Ohio-7213 at ¶¶ 90-91.

hiring halls. 29 U.S.C. §158(a)(3) & (b)(2). Accordingly, qualified non-union employees, if they so choose, could ask to be placed upon the hiring hall referral list for possible referral to a project covered by a project labor agreement. Any non-union employee who believes that the union hiring hall is not, in fact, operating in a non-discriminatory manner may pursue remedies available under the NLRA. Non-union workers may be required to pay an "agency fee" to the union to support its collective bargaining, contract administration, and grievance adjustment functions, but are not required to "join" the union.

Finally, and perhaps most importantly, project labor agreements do not increase costs on public construction projects. A March, 2009 study by Cornell University concluded that "there is no evidence to support claims that project labor agreements either limit the pool of bidders or drive up actual construction costs." Kotler, *Project Labor Agreements in New York State: In the Public Interest,* Cornell University School of Industrial and Labor Relations at 31 (March 2009). Indeed, the Cornell study concluded that PLAs have "proven very successful at saving costs while respecting fair labor standards," and that "PLAs' cost savings are both direct and indirect and can be substantial." *Id.*

In summary, the Ohio State Building and Construction Trades Council opposes the proposed revisions to R.C. Chapter 4116 both because they represent unwise public policy and because they are preempted by the National Labor Relations Act. The Council, therefore, respectfully urges the Committee to remove these provisions from the bill.