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NO. 101997-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, JAY INSLEE, JOEL SACKS, and JIM CHRISTENSEN,

Petitioners.

v.

ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON; ASSOCIATED BUILDERS AND CONTRACTORS OF WASHINGTON; INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.; and INLAND NORTHWEST AGC,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom, WSBA No. 24163
James Mills, WSBA No. 36978
Senior Counsel
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740
Office Id. No. 91018

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Appendix A: Court of Appeals II, 54465-2, Unpublished Opinion, April 18, 2023

I. INTRODUCTION

Prevailing wage laws provide a living wage for the tradespeople who build our highways, schools, and other critical public infrastructure. Before 2018, the Department of Labor and Industries set most prevailing wage rates using cumbersome wage surveys. Seeking to improve this process, the Legislature decided to use a collectively bargained wage to set prevailing wage rates as it would reflect the true long-term costs of public projects, provide a "steady reliable wage rate," and "best represent[] area standard wages." H. B. Rep., SSB 5493, 65th Leg., Reg. Sess., at 2 (2018).

So in 2018, the Legislature directed L&I to adopt rates negotiated in collective bargaining agreements (where available) to set prevailing wage rates. RCW 39.12.015(3)(a). When CBAs are unavailable, the law continues to direct L&I to set rates using historical wage survey data (or other methods). RCW 39.12.015(3)(b). Moreover, the law still specifies that when L&I sets rates based on wage surveys, it must use data

from the county where the work was performed. RCW 39.12.026(1).

In invalidating the resulting bill, SSB 5493, under article II, section 37 of the state constitution, the Court of Appeals failed to apply correctly this Court's precedent addressing potential statutory conflicts and misread section 37. Its decision—if it stands—will cause widespread disruption and uncertainty to workers, employers, and public agencies. Three reasons warrant review.

First, it is not and never has been the law that a mere potential conflict between statutes renders the later-enacted legislation unconstitutional. If this were so, every subsequent bill that potentially conflicts with prior legislation would violate the constitution. Instead, multiple decisions from this Court direct courts to harmonize statutes.

Applying this ordinary statutory interpretation rule shows no actual conflict here and resolves any potential conflict. The purported conflict between RCW 39.12.026(1) and RCW

39.12.015(3)(a) turns on misunderstanding the term "data" in .026(1) to mean both wage surveys and CBAs. But .026—which long predated .015(3)(a)—governs only wage surveys.

Second, the Court of Appeals' ruling conflicts with precedent analyzing section 37 challenges, which determines whether a new legislation's impact is clear from the bill's face and whether it renders a straightforward reading of other statutes erroneous. SSB 5493's impact is clear from the bill's face and doesn't render a straightforward reading of any other law meaningless, so no constitutional violation exists.

Finally, the Court of Appeals' decision could force a return to pre-2018 wage survey generated wages. There are tens of thousands of public works projects, and many workers could face wage reductions during a period of high inflation. This Court should grant review to correct the conflict with this Court's decisions, address the misapplication of constitutional law, and safeguard workers, contractors, and public agencies. RAP 13.4(b)(1), (3), (4).

II. IDENTITY OF PETITIONERS/DECISION

Petitioners State of Washington, Director of the Department of Labor and Industries, and Industrial Statistician seek review for the third decision in this long-running case. The Court of Appeals first reversed the trial court in *Associated General Contractors of Wash. v. State* (*AGC I*), 19 Wn. App. 2d 99, 107, 494 P.3d 443 (2021). This Court reversed and remanded in *Associated General Contractors of Wash. v. State* (*AGC II*), 200 Wn.2d 396, 415-16, 518 P.3d 639 (2022). After remand, the Court of Appeals again reversed the trial court in *Associated General Contractors of Wash. v. State* (*AGC III*), No. 54465-2-II, slip op. at 8 (Wash. Ct. App. Apr. 18, 2023), for which the Petitioners seek review.

III. ISSUES PRESENTED FOR REVIEW

1. RCW 39.12.026(1) provides that "[i]n establishing the prevailing rate of wage…all data collected by the department…may be used only in the county for which the

work was performed." When the Legislature adopted .026 in 2003, "data collected" meant data from wage surveys. Does this statute still limit "data collected" to data systemized from historical wage surveys (measuring "work performed"), as opposed to negotiated wages in a CBA?

2. Does SSB 5493 comply with article II, section 37 when any alleged conflict between RCW 39.12.015 and other laws is readily resolved through normal statutory interpretation principles, when there is no showing that legislators or the public were potentially deceived about the new law's meaning, and when there is no need to exhaustively search statutes to understand the new law's import?

IV. STATEMENT OF THE CASE

A. Background of Prevailing Wage Laws

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). The Prevailing Wages on Public Works Act protects

workers from substandard earnings by fixing a floor for wages on government projects. *See Everett Concrete Prods., Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988); *Drake v. Molvik & Olsen Elec., Inc.*, 107 Wn.2d 26, 28-29, 726 P.2d 1238 (1986).

L&I enforces prevailing wage laws, acting to protect workers. RCW 39.12.050, .065. The Legislature has delegated to L&I's industrial statistician the authority to set the prevailing wage rates used on public works. RCW 39.12.015(1).

The industrial statistician sets over 22,000 prevailing wages for trades and occupations. CP 2518. There are tens of thousands of public works projects in Washington. Contractors must submit "intent" certificates reflecting the prevailing wage rates they intend to pay at project start and affidavits reflecting the number of workers and the wages paid before the project's final acceptance. RCW 39.12.040. Each year L&I processes 130,000 intents to pay prevailing wage and affidavits of wages paid forms, documenting the many who do this work. CP 2518.

B. In 2018, the Legislature Sought to Reduce the Use of Cumbersome Surveys and Adopted CBAs, When Available, to Set Prevailing Wage Rates

Before 2018, prevailing wage rates were generally set using wage surveys in all 39 counties. *See* RCW 39.12.010(1). The surveys asked contractors and unions to voluntarily report the hours and wages in different trades and occupations. WAC 296-127-019. The wage survey process "systemize[s]" data collected from past work performed:

> [Wage] surveys were used "to gather…market data regarding the wages paid to workers in various classifications and the hours of their labor." Then [the industrial statistician] would systemize the data from wage survey responses and CBAs and check the data for accuracy, looking for any outliers or data that raised questions. [They] would then determine the majority or average rate by statistical estimation. *See* WAC 296-127-019 (detailing current survey and statistical estimation process).

AGC II, 200 Wn.2d at 401 (alteration in original).

The Legislature changed the system in 2018 to adopt CBA rates to set most prevailing wage rates. Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a). The law now directs L&I to set prevailing wage rates "by adopting the hourly wage, usual

benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements" and directs it to adopt the "higher rate" when multiple CBAs apply. RCW 39.12.015(3)(a). When there is no CBA applicable to work to be performed in any specific county, a wage survey is still used. RCW 39.12.015(3)(b). And when wage survey data is used, L&I uses only wage "data" from the county in which the corresponding "work was performed." RCW 39.12.026(1).

When adopting SSB 5493 in 2018, the Legislature heard concerns that filling out and using wage surveys imposed costs to the State and contractors. S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 3 (2018). The survey process was cumbersome and delays in updating wage rates to market rates were common because surveys were not conducted annually. *See* RCW 49.04.141 (findings). The Legislature understood from industry representatives that SSB 5493 would provide consistency by moving away from wage surveys, which are only as accurate as

the information the survey provided. Hearings on SSB 5493 before the H. Lab. & Workplace Standards Comm., 65th Leg., Reg. Sess., at 23:56-24:38 (2018) (statement of Scott Middleton, Gen. Couns., Mech. Contractors Ass'n of W. Wash.).[1] Using CBAs simplifies the process and reflects the true cost of the employment. S.B. Rep., SB 5493, at 3.

Using CBAs also has advantages because collective bargaining gives workers a voice about wages and working conditions. RCW 49.32.020. It allows workers "to obtain acceptable terms and conditions of employment" that take effect after the CBA is signed. *Id.*; *see also* 29 U.S.C. § 158(d) (collective bargaining means bargaining to reach an agreement about wages and terms of employment).

If SSB 5493 were invalidated, prevailing wage rates would likely return to pre-2018 wage survey levels until L&I

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[1] https://www.tvw.org/watch/?clientID=9375922947&eventID=2018021229&startStreamAt=1436&stopStreamAt=1478.

could conduct additional surveys because of delays inherent in the process of updating wage survey data for tens of thousands of wage rates across Washington's 39 counties.

C. The Superior Court and this Court Upheld the Constitutionality of SSB 5493, but the Court of Appeals Invalidated It Twice

Associated General Contractors, et al., sued the State to enjoin use of SSB 5493. CP 1. The trial court ruled for the State. CP 2536-39.

The Court of Appeals reversed on delegation of power grounds. *AGC I*, 19 Wn. App. 2d at 108-12. The Supreme Court reversed and remanded to the Court of Appeals to address AGC's article II, section 37 claim. *AGC II*, 200 Wn.2d at 415-16.

The RCW 39.12.026 issue under section 37 was scarcely addressed in the parties' original briefing, and the Court of Appeals requested no supplemental briefing. Appellant's Br. 46-47; Resp't's Br. 45-46. The court then found SSB 5493

unconstitutional, this time under article II, section 37. *AGC III*, slip op. at 2, 11, 16.

V. ARGUMENT

A. The Court of Appeals' Decision Conflicts with Ordinary Interpretation Principles that Harmonize Statutes

Contrary to basic principles of statutory construction, the Court of Appeals ruled there was a conflict between RCW 39.12.026(1) and RCW 39.12.015(3)(a), which it believed invalidated SSB 5493 under article II, section 37. As discussed below, this provision isn't implicated. *See infra* Part V.B.

The Court of Appeals too readily found a conflict by failing to harmonize the statutes and, after finding a conflict, it didn't apply standard conflict principles. This Court should take review because the Court of Appeals' decision conflicts with this Court's precedent about statutory interpretation and alleged conflicts. *See* RAP 13.4(b)(1).

1. There is no conflict between RCW 39.12.015(3)(a) and RCW 39.12.026(1)

RCW 39.12.015(3) sets forth three alternative methods for establishing prevailing wages, depending on whether a CBA is available for the specified geographic jurisdiction:

> (3)(a) Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in [CBAs] for those trades and occupations that have [CBAs]….
>
> (b) For trades and occupations in which there are no [CBAs] in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW 39.12.010 by conducting wage and hour surveys. In instances when there are no applicable [CBAs] and conducting wage and hour surveys is not feasible, the industrial statistician may employ other appropriate methods to establish the prevailing rate of wage.[2]

[2] RCW 39.12.017 provides a fourth method that applies only to residential construction irrespective of whether there is a CBA rate. AGC has not challenged that provision.

RCW 39.12.026 provides more specificity as to the second method of establishing prevailing wage rates—using wage survey data when no CBA is available:

> Surveys—Applicability by county—Electronic option.
>
> (1) In establishing the prevailing rate of wage under RCW 39.12.010, 39.12.015, and 39.12.020, all data collected by the department of labor and industries may be used only in the county for which the work was performed.
>
> (2) The department of labor and industries must provide registered contractors with the option of completing a *wage survey* electronically.

(Emphasis added.) This provision predates the 2018 legislation that requires adoption of applicable CBA rates as the presumptive prevailing wage rate and was last amended in 2015—three years before that legislation. Laws of 2015, 3d Spec. Sess., ch. 40, § 2. Thus, SSB 5493 was drafted when only wage surveys were used to set prevailing wage rates.

RCW 39.12.015(3)(b) and RCW 39.12.026(1) work together in that .026(1) references wage surveys that are then

used in .015(3)(b) if there is no CBA. Nothing in the statutory scheme provides otherwise.

RCW 39.12.015(3)(a) provides "the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in [CBAs]." RCW 39.12.026(1) provides that "[i]n establishing the prevailing rate of wage…, all data collected by the department of labor and industries may be used only in the county for which the work was performed." The Court of Appeals concluded that setting prevailing wages based on CBAs under RCW 39.12.015(3)(a) conflicts with RCW 39.12.026(1) because CBAs in some circumstances span more than one county under .015(3)(a) and .026(1) limits the L&I to considering "data" from only the county in which the work was performed. *AGC III*, slip op. at 14-16. The Court of Appeals characterized CBAs as a form of "data" and applied .026(1)'s one-county data rule to find a conflict with the multi-county provision in .015(3)(a). *Id.* at 15.

Pivotal is what "data collected" means: is it data collected from just wage surveys or does "data" also include the use of CBA rates? If it is just wage surveys, there is no conflict.

Oft-cited statutory interpretation principles confirm, "data collected" refers to just data collected in wage surveys. The fundamental goal in interpreting a statute is to give effect to legislative intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). To discern this intent, a court looks to a statute's text, its context, related provisions, and the statutory scheme. *State v. Garza*, 200 Wn.2d 449, 455, 518 P.3d 1029 (2022). Considering the context in which a word is used is crucial: "[t]his court does not examine a specific word in a vacuum; rather, we must consider the context of the surrounding text to determine the legislature's intent." *Green v. Pierce County*, 197 Wn.2d 841, 853, 487 P.3d 499 (2021), *cert. denied*, 142 S. Ct. 1399 (2022). Further, the courts harmonize statutes read together "to give force and effect to each." *State v. Chapman*, 140 Wn.2d 436, 452, 998 P.2d 282 (2000). And

significantly, courts must interpret the statute in a way that favors constitutionality. *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). Employing these principles demands review.

The text of RCW 39.12.026(1) provides that "all *data collected* by the department of labor and industries may be *used* only in the county for which the *work was performed*." (Emphasis added.) Several important points can be drawn from the emphasized language.

The term "data collected" cannot be read in isolation; instead, it must be read with the phrase limiting "data collected" to that about "work [that] was performed." Significantly, "work…performed" is in the past tense as shown by the verb suffix "ed." -ed, *Merriam-Webster Unabridged Dictionary.*[3] Thus, "work…performed" means data is collected for work performed in the *past*. In contrast, CBAs are negotiated

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[3] https://unabridged.merriam-webster.com/unabridged/ed (last visited May 16, 2023)

between unions and contractors for market wages and benefits. 29 U.S.C. § 158(d).

The industrial statistician uses wage rates in CBAs, once found applicable, by "adopting" them under RCW 39.12.015(3)(a), which does not reflect specific wages paid for work performed in the past. AGC's whole complaint in *AGC I* and *II* was that CBAs were adopted without considering data where work was performed.[4] But this Court held that this approach was an acceptable method to set prevailing wage rates. *AGC II*, 200 Wn.2d at 412.

Unlike adopting a CBA, wage survey "data" is "collected" and "used" to generate a new prevailing wage rate. RCW 39.12.026(1), .015(3)(b). As this Court observed, wage surveys "gather…market data," then the industrial statistician "systemize[s] the data from wage survey responses," and then

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[4] *E.g.*, *AGC I*, Appellant's Br. 3-4, 12-13, 19, 29 (2020); *AGC I*, Reply Br.1-2, 8-10, 21 (2020); *AGC II*, Ans. 10, 13-14, 20 (2021); *AGC II*, AGC Suppl. Br. 19, 24-30 (2022).

determines the rate "by statistical estimation." *AGC II*, 200 Wn.2d at 401 (alteration in original). This process of "systemiz[ing] data" is unlike "adopting" CBAs. Because wage surveys reflect statistical data collected about past "work…performed," and CBAs reflect an agreement about wages, CBAs are not "data collected" under RCW 39.12.026(1).

This understanding about wage surveys is confirmed by successive versions of RCW 39.12.026 and the use of "wage survey" in subsection (2). To interpret a statute, the court considers "the entire sequence of all statutes relating to the same subject matter." *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012). In 2003, when the Legislature adopted RCW 39.12.026, only wage surveys set prevailing wage rates. No provision directed basing prevailing wages initially on CBA rates. And RCW 39.12.026 provided that "[t]his section applies only to prevailing *wage surveys* initiated on or after August 1, 2003." Laws of 2003, ch. 363, § 206 (emphasis added).

Legislative findings confirmed "data" meant wage surveys. Laws of 2003, ch. 363, § 201(2) (encouraging "innovative outreach methods be used to enhance wage surveys in order to better reflect current wages in counties across the state").

The 2003 version of RCW 39.12.026 had an effective date of August 1, 2003. Laws of 2003, ch. 363, § 206. Because the effective date of the prior version has long passed, the Legislature removed that provision in 2015, replacing it with the sentence, "[L&I] must provide registered contractors with the option of completing a *wage survey* electronically." Laws of 2015, 3d Spec. Sess., ch. 40, § 2(2) (emphasis added). And "data collected" in 2015 couldn't have meant "CBAs" because they were not then used to establish the original prevailing wage rate; wage surveys were used. This is likewise true in 2018 before the Legislature adopted SSB 5493.

The Court of Appeals essentially treated RCW 39.12.026(1) as if it had been amended by RCW 39.12.015(3)(a), indeed it cited to .015(3)(a) as support for its

interpretation of the term "data" in .026(1). *AGC III*, slip op. at 15. But the Legislature doesn't amend by implication. *See In re Det. of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994). Instead, the Court harmonizes language to avoid amendment by implication. *Id.* So no change can be read into RCW 39.12.026 with the passage of SSB 5493 to transform the rule that applies to data collected from wage surveys to also apply to CBAs because this would amend by implication. A harmonized view of the statutes is that RCW 39.12.026 references wage surveys that are then used in RCW 39.12.015(3)(b) if there is no CBA.[5]

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[5] This is confirmed by L&I's rule, WAC 296-127-019(6)(a). This regulation existed when RCW 39.12.026 was adopted and directs that "[v]alid *data* reported on wage surveys shall be calculated" using the "majority of hours reported." WAC 296-127-019(6); Wash. St. Reg. 92-01-104 (1992). WAC 296-127-019(6) and WAC 296-127-019(1)(b) also differentiate between "valid data" for wage surveys and adjustments to prevailing wage rates that have been set by a wage survey where the CBA rate prevailed. In the latter case, increases in CBAs would increase prevailing wage rates. This is for updates only and is not the initial data from the wage survey used to set prevailing wages.

2. If the meaning of "data" is ambiguous, then tools of statutory construction show it is meant to apply only to wage surveys

The meanings of RCW 39.12.026(1) and RCW 39.12.015(3) are shown by their plain language. But the Court of Appeals asserted that it "is not clear whether the legislature intended RCW 39.12.026(1) to apply to all of RCW 39.12.015, or only to RCW 39.12.015(3)(b), the non-CBA scenario." *AGC III*, slip op. at 15. As explained above, it is clear that RCW 39.12.026(1) refers to wage surveys used in RCW 39.12.015(3)(b) when there is not a CBA. But if the Court believes the language's meaning cannot be resolved through a plain language analysis, then principles governing ambiguity govern. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

With ambiguous statutes, the court liberally construes remedial wage statutes to effectuate their purpose. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d

801, 808, 863 P.2d 64 (1993). In considering issues under the prevailing wage act, the court construes statutes in favor of workers. *See AGC II*, 200 Wn.2d at 400. The act protects employees on public works projects and preserves local wages. *Id.* The purpose of SSB 5493 was to make a more efficient prevailing wage process that more accurately reflected wages. Such a purpose can only help workers. The labored process to perform wage surveys only results in delay out of step with inflation. Defining "data" to refer only to wage surveys, as shown by its context and historical meaning, affords a liberal construction of the statute to aid workers.

Courts "accord an agency's interpretation of the law great weight where the statute is ambiguous and is within the agency's special expertise." *Snohomish Cnty v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 357, 370, 386 P.3d 1064 (2016). L&I is the agency historically charged with interpreting the term "data collected by [L&I]." It understands that "data" has a specific statistical meaning used for calculations about

past hours performed as contrasted with adopting CBAs to set prevailing wage rates. CP 1842, 1848-49.

Legislative history, also used in ambiguity analysis, *Gorre v. City of Tacoma*, 184 Wn.2d 30, 42-43, 357 P.3d 625 (2015), shows that the Legislature understood "data" to mean data in wage surveys in SSB 5493 as it described the practice before the legislation as using wage surveys. Final B. Rep., SSB 5493, 65th Leg., Reg. Sess. (2018). Likewise, the practice in 2015 was to use wage surveys. H. B. Rep., 2ESB 5993, 64th Leg., 3d Spec. Sess., at 2 (2015).

3. Even if there is a conflict, it may be resolved on statutory interpretation grounds as demanded by constitutional avoidance

Even if there is a conflict, it may be resolved with no need to invoke the constitution. And this should have been the procedure under the principle of constitutional avoidance. *See Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015).

A general statutory provision yields to a more specific one. *Wash. State Ass'n of Cntys. v. State*, 199 Wn.2d 1, 13, 502 P.3d 825 (2022). "This does not mean that the more specific statute invalidates the general statute. Instead, 'the [specific statute] will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.'" *Id.* (alteration in original) (quoting *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)).

Under the Court of Appeals' reasoning, the term "data" in RCW 39.12.026(1) encompasses both wage surveys and CBA information, making it a more general statute: "all [*wage survey and CBA*] data collected." (emphasis added). This would then make RCW 39.12.026(1) the general statute because it encompasses the larger set of coverage (wage surveys and CBAs) while RCW 39.12.015(3)(a), the more specific statute, includes the narrower subset (CBAs only).

The general statute, RCW 39.12.026(1), would then conflict with the more specific statute, RCW 39.12.015(3)(a). Under principles of conflict analysis, the most recent specific statute controls. *See Muije v. Dep't of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982). If a conflict existed, RCW 39.12.015(3)(a)'s treatment of CBAs would be an exception to RCW 39.12.026(1)'s rule, resolving the purported conflict. And it would avoid an unnecessary analysis under article II, section 37.

B. The Court of Appeals' New Article II, Section 37 Test Misapplies Section 37 and Raises a Significant Constitutional Issue

Even if a conflict exists (it doesn't), the Court of Appeals' decision rests on the mistaken supposition that any conflict between a new law and an existing statutory provision is a per se violation of article II, section 37. *AGC III*, slip op. at 16. This Court should take review under RAP 13.4(b)(1) and (3) because this reasoning creates a significant constitutional issue and conflicts with this Court's decisions.

Section 37 provides: “[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.” The Court gives section 37 “a reasonable construction.” *In re Dietrick*, 32 Wash. 471, 477, 73 P. 506 (1903). Courts presume statutes are constitutional, and a statute’s challenger has a heavy burden to overcome that presumption: the challenger must prove the statute unconstitutional beyond a reasonable doubt. *Sch. Dists.’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). This Court imposes this high standard based on respect for the Legislature as a co-equal branch of government. *Id.*. The Court of Appeals failed to implement this mandate, garbling the section 37 test.

Under section 37’s test as authorized by this Court, there is no violation if the bill (1) is a complete act and (2) does not render a straightforward determination of the scope of duties or rights under the existing statutes erroneous. *Wash. State Ass’n of Cntys.*, 199 Wn.2d at 15-16. The Court of Appeals found the

first prong satisfied, but found the second prong violated under its view of section 37. *AGC III*, slip op. at 2, 9-11, 16.

Many cases identify potential conflicts between statutes, and they are routinely resolved with no suggestion that the Legislature violated section 37. *E.g.*, *Wash. State Ass'n of Cntys.*, 199 Wn.2d at 10-14. In *Washington State Association of Counties*, for instance, the Court first found a conflict, resolved it under conflict principles, and then looked on other grounds as to whether there was a section 37 violation. *Id.* Nothing in the decision held that just because there was a conflict, the statute was unconstitutional under section 37. *Id.* at 14-18.

Next, this unwillingness to find a statute unconstitutional based solely on a statutory interpretation basis is reflected by principles enunciated as long ago as 1910, where the Court held that the purpose of section 37 is to "protect the members of the Legislature and the public against fraud and deception, not to trammel or hamper the Legislature in the enactment of laws." *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 82, 109 P.

316 (1910). Countless section 37 cases have affirmed that the principle is to avoid deception. *See, e.g.*, *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 205, 457 P.3d 453 (2020). Nothing in SSB 5493 shows a hint of language that could cause fraud or deception. The opposite is true: the plain language and legislative history of RCW 39.12.015 make it readily apparent to the Legislature and the public what the amendment did.

And, as the Court in *Black* emphasized, section 37 ensures that legislators or the public "must not be required to search out amended statutes to know the law on the subject treated in a new statute." 195 Wn.2d at 210-11. In *Black*, although a statutory provision became ineffective, it did not matter "because the statute still complies with one of the primary purposes of article II, section 37—'ensur[ing] that those enacting an amendatory law are fully aware of the proposed law's impact on existing law.'" *Id.* at 208 (quoting

Wash. Citizens Action of Wash. v. State, 162 Wn.2d 142, 152, 171 P.3d 486 (2007)).

No one need "search out amended statutes to know the law on the subject treated in [SSB 5493]." *See id.* at 210-11. The two statutes are in a single short chapter and readily visible. RCW 39.12.026(1) cross-references RCW 39.12.015. Cross-references satisfy the second prong. *Black*, 195 Wn.2d at 212-13.

Finally, as the Legislature has revisited RCW 39.12.015 after SSB 5493, it addressed any prior confusion about the application of RCW 39.12.015 and .026. In 2019, the Legislature returned to using wage surveys for residential construction, showing wage surveys are separate from the CBA process. Laws of 2019, ch. 29, § 2. This cured any defect. *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007).

C. Invalidating SSB 5493 Will Harm Workers, Contractors, and Public Agencies

The Court should also take review under RAP 13.4(b)(4). The Court of Appeals' decision raises substantial issues of

public interest. Workers rely on prevailing wages to set fair wages, and, as noted above, courts construe statutes to achieve the purpose of protecting employees on public works projects and preserving local wages. *See AGC II*, 200 Wn.2d at 400.

The 130,000 wage forms filed annually, listing multiple workers, show that many workers would be affected by SSB 5493's invalidation. *See* CP 2518. Threatening 22,000 wage rates causes wage insecurity and potential wage reductions. Wages could revert to pre-2018 levels (over five years ago—a hardship after recent inflation) before they can be changed by new wage surveys. Given the labored process of conducting wage surveys, it could be awhile before workers received a fair wage.

Contractors and public agencies rely on certainty in prevailing wages, and there are tens of thousands prevailing wage contracts. The prospect of 22,000 wage rates revoked because of SSB 5493's invalidation creates uncertainty and disruption for contractors and public agencies. They are

required to post prevailing wage rates in their contracts. RCW 39.12.030. To satisfy this requirement, they need certainty in the wage rates.

As for L&I, project oversight will suffer while forced to devote scarce resources to conduct wage surveys for 39 counties instead of enforcement—ultimately harming workers, contractors, public agencies, and the public.

The prospect of this disruption demands review.

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VI. CONCLUSION

This Court should grant review.

This document contains 4,980 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of May, 2023.

ROBERT W. FERGUSON
Attorney General

ANASTASIA SANDSTROM
Senior Counsel, WSBA No. 24163
JAMES MILLS, WSBA No. 36978
Senior Counsel
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740
Office Id. No. 91018

Appendix A

Filed
Washington State
Court of Appeals
Division Two

April 18, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, a Washington Nonprofit Corporation; ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON, INC., a Washington Nonprofit Corporation; INLAND PACIFIC CHAPTER OF ASSOCIATE BUILDERS AND CONTRACTORS, INC., a Washington Nonprofit Corporation; and INLAND NORTHWEST AGC, INC., a Washington Nonprofit Corporation,

Appellants,

v.

STATE OF WASHINGTON; JAY INSLEE, Governor; JOEL SACKS, Director of Washington State Department of Labor & Industries; and JIM CHRISTENSEN, Washington State Department of Labor and Industries Program Manager and Industrial Statistician, Prevailing Wage Program; in their official capacities,

Respondents.

No. 54465-2-II

UNPUBLISHED OPINION

LEE, J. — Appellants Associated General Contractors of Washington, Associated Builders and Contractors of Western Washington, Inc., Inland Pacific Chapter of Associate Builders and Contractors, Inc., and Inland Northwest AGC, Inc. (collectively AGC) appealed the superior court's summary judgment order stating that Substitute Senate Bill (SSB) 5493,[1] codified at RCW

[1] SUBSTITUTE S.B. (S.S.B.) 5493, 65th Leg., Reg. Sess. (Wash. 2018).

39.12.015(3), did not violate the non-delegation doctrine, due process, equal protection, or article II, section 37 of the Washington Constitution. *Associated Gen. Contractors of Wash. v. State*, 19 Wn. App. 2d 99, 108, 494 P.3d 443 (2021) (*AGCW I*). We reversed the superior court, holding that RCW 39.12.015(3) violated the non-delegation doctrine and declined to address article II, section 37 in light of our holding regarding the non-delegation doctrine.[2] *Id.* at 112. The Supreme Court reversed, holding there was no violation of the non-delegation doctrine, and remanded to this court to address "the issue not reached because of its disposition of the case." *Associated Gen. Contractors of Wash. v. State*, 200 Wn.2d 396, 416, 518 P.3d 639 (2022) (*AGCW II*). We now address whether RCW 39.12.015(3) violates article II, section 37.

Because RCW 39.12.015(3) renders a straightforward determination of the scope of rights or duties under RCW 39.12.026(1) erroneous, RCW 39.12.015(3) violates article II, section 37 of the Washington Constitution. Accordingly, we reverse the superior court's summary judgment order on the issue of article II, section 37 and remand for further proceedings.

FACTS

A. PREVAILING WAGES ON PUBLIC WORKS ACT

Under Washington's Prevailing Wages on Public Works Act (Act), chapter 39.12 RCW, employers must pay the "prevailing rate of wage" to employees who perform work on public projects. *See* RCW 39.12.010. The Department of Labor and Industries (L&I) Industrial Statistician determines the prevailing wage rates for all public works contracts twice a year. RCW 39.12.015(1); WAC 296-127-011(1). The "prevailing rate of wage" is defined:

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[2] We also declined to address due process and equal protection arguments based on insufficient briefing. *AGCW I*, 19 Wn. App. 2d at 101 n.3.

> The "prevailing rate of wage" is the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation is the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage is mathematically determined by the number of hours worked in such period of time.

RCW 39.12.010(1). A "locality" is the largest city in a county where work is performed. RCW 39.12.010(2). The industrial statistician may establish the prevailing wage county by county through wage and hour surveys, among other methods. WAC 296-127-019(1). "In establishing the prevailing rate of wage . . . all data collected by the department of labor and industries may be used only in the county for which the work was performed." RCW 39.12.026(1).

B. SUBSTITUTE SENATE BILL 5493

In 2018, the Washington State Legislature amended the Act through SSB 5493. Specifically, the amendment revised RCW 39.12.015 by modifying the way in which the industrial statistician calculates the prevailing wage rates for public works projects. S.S.B. 5493. SSB 5493/amended RCW 39.12.015 states:

> Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements [CBAs]. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

RCW 39.12.015(3)(a).[3] If multiple CBAs exist within a county, the industrial statistician must adopt the highest rate. RCW 39.12.015(3)(a). If no CBA exists for a particular trade or occupation, then the industrial statistician establishes the prevailing wage as defined in RCW 39.12.010(1)—the original method prior to the amendment of RCW 39.12.015 by SSB 5493. RCW 39.12.015(3)(b).

C. PROCEDURAL HISTORY

In January 2019, AGC filed suit against the State of Washington, Governor Jay Inslee, L&I Director Joel Sacks, and L&I Industrial Statistician Jim Christensen, in their official capacities (collectively the State), challenging the constitutionality of SSB 5493. AGC sought declaratory and injunctive relief, and moved for a preliminary injunction. AGC argued that SSB 5493 was (1) an unconstitutional delegation of legislative authority, (2) violated due process, (3) violated equal protection, and (4) violated article II, section 37 of the Washington State Constitution.

The trial court denied AGC's motion for a preliminary injunction. Both parties then moved for summary judgment.

During the summary judgment hearing, AGC argued that the language of SSB 5493 conflicted with RCW 39.12.010 and RCW 39.12.026, making it unconstitutional. The State, on the other hand, argued no conflict existed between SSB 5493 and RCW 39.12.010 or RCW 39.12.026. In regard to RCW 39.12.026, the State asserted, "[T]hat doesn't have anything to do with this case because it has—it's about wage surveys . . . this isn't a wage survey issue here. We

[3] In 2019, the legislature again amended RCW 39.12.015. H.B. 1743, 66th Leg., Reg. Sess. (Wash. 2019). The pertinent language from the 2018 amendment remained the same in the 2019 amendment. The parties refer to the numbering of the current statute. Therefore, this opinion will also refer to the numbering of the current statute.

have collective bargaining agreements which are at issue. So that statute just simply doesn't apply." Verbatim Rep. of Proc. (VRP) (Dec. 27, 2019) at 17-18. The trial court granted the State's motion for summary judgment "for the reasons articulated by the [State]" and denied AGC's motion for summary judgment. VRP (Dec. 27, 2019) at 20. The trial court's order stated, "SSB 5493 does not violate . . . article II, section 37 of the Washington Constitution." Clerk's Papers at 2538. AGC appealed to this court.

We reversed the trial court, holding that SSB 5493, codified at RCW 39.12.015(3), violated the non-delegation doctrine because "it mandate[d] the use of schedule wage rate lists in CBAs after its enactment to establish prevailing wages." *AGCW I*, 19 Wn. App. 2d at 109. We declined to address AGC's claim that the statute violated article II, section 37 of the Washington Constitution in light of our holding that the statute violated the non-delegation doctrine. *Id.* at 101 n.4.

The Supreme Court reversed, holding that RCW 39.12.015(3) did not violate the non-delegation doctrine. *AGCW II*, 200 Wn.2d at 415. The Court then remanded "to the Court of Appeals for consideration of the issue not reached because of its disposition of the case." *Id.* at 416. Because we did not reach the issue of article II, section 37 based on our prior holding, we now consider on remand whether RCW 39.12.015(3) violates article II, section 37 of the Washington Constitution.

ANALYSIS

A. Standard of Review

We review summary judgment orders de novo. *Davies v. MultiCare Health Sys.*, 199 Wn.2d 608, 616, 510 P.3d 346 (2022). Summary judgment is appropriate when "there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

Appellate courts "also review constitutional questions and statutory interpretation de novo." *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 204, 457 P.3d 453 (2020). "Where the constitutionality of a statute is challenged, the statute is presumed constitutional." *State v. Tessema*, 139 Wn. App. 483, 488, 162 P.3d 420 (2007), *review denied*, 163 Wn.2d 1018 (2008). The party challenging the statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. *Id.* "This standard is met if argument and research show that there is no reasonable doubt that the statute violates the constitution." *Amalg. Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000).

The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *Birgen v. Dep't of Lab. & Indus.*, 186 Wn. App. 851, 857, 347 P.3d 503, *review denied*, 184 Wn.2d 1012 (2015). Courts derive legislative intent from the plain language of the statute, "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). Courts may use dictionary definitions to discern the plain meaning of terms undefined by statute. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014).

B. WASHINGTON CONSTITUTION ARTICLE II, SECTION 37

1. Legal Principles

Article II, section 37 of the Washington Constitution provides: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set

forth at full length." Article II, section 37 is intended to "protect the legislature and the public against fraud and deception," and its purpose is to disclose the impact of new legislation on existing laws. *Black*, 195 Wn.2d at 205. Article II, section 37 "applies equally to bills and initiatives." *Tessema*, 139 Wn. App. at 489.

a. Two-prong test

Courts employ a two-part test to determine if a statute violates article II, section 37. *Black*, 195 Wn.2d at 205; *accord Wash. State Legislature v. Inslee*, 198 Wn.2d 561, 592, 498 P.3d 496 (2021) (analyzing the "two-step framework [applied] to article II, section 37 challenges."). Both prongs of the test are necessary in an article II, section 37 analysis. *Black*, 195 Wn.2d at 205.

First, courts must assess whether a statute is a "'complete act,'" meaning "the rights or duties under the statute can be understood without referring to another statute." *Id.* (internal citation omitted) (quoting *El Centro de la Raza v. State*, 192 Wn.2d 103, 128, 428 P.3d 1143 (2018) (plurality opinion)). In other words, the rights or duties conferred by statute must be readily ascertainable from the statute's text alone. *Id.* at 206. The purpose of this first step is to avoid confusion, ambiguity, and uncertainty in the law through disconnected legislative provisions. *Id.* "Complete acts which (1) repeal prior acts or sections thereof on the same subject, (2) adopt by reference provisions of prior acts, (3) supplement prior acts or sections thereof without repealing them, or (4) incidentally or impliedly amend prior acts are excepted from section 37." *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 642, 71 P.3d 644 (2003); *accord Black*, 195 Wn.2d at 205 (holding that complete acts that adopt other statutes by reference satisfy the first prong).

Second, courts must evaluate whether the amendment renders a straightforward determination of the rights or duties under existing statutes erroneous. *Black*, 195 Wn.2d at 210. A straightforward understanding of the rights granted or duties imposed under an existing statute become erroneous when the amendment creates a conflict or alters criteria. *Inslee*, 198 Wn.2d at 594-95. A complete act may still violate article II, section 37 if it fails to inform readers how an amendment impacts or modifies rights or duties created by other statutes. *Black*, 195 Wn.2d at 210.

b. RCW 39.12.010(1)

RCW 39.12.010(1) provides a method of determining the "prevailing rate of wage." The prevailing rate is:

> the rate of hourly wage, usual benefits, and overtime *paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation*. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation is the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage is mathematically determined by the number of hours worked in such period of time.

RCW 39.12.010(1) (emphasis added). Under RCW 39.12.010(2), a "locality" is "the largest city in the county wherein the physical work is being performed."

RCW 39.12.026(1) limits the sources of data used by the industrial statistician to set the prevailing wage by county. RCW 39.12.026(1) states: "In establishing the prevailing rate of wage under RCW 39.12.010, 39.12.015, and 39.12.020, all data collected by the department of labor and industries may be used only in the county for which the work was performed."

c. SSB 5493 / RCW 39.12.015(3)

SSB 5493, codified at RCW 39.12.015(3), provides:

> (a) Except as provided in RCW 39.12.017, and *notwithstanding RCW 39.12.010(1)*, the industrial statistician shall establish the *prevailing rate of wage* by adopting the hourly wage, usual benefits, and overtime *paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements*. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.
>
> (b) For trades and occupations in which there are no collective bargaining agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW 39.12.010 by conducting wage and hour surveys. In instances when there are no applicable collective bargaining agreements and conducting wage and hour surveys is not feasible, the industrial statistician may employ other appropriate methods to establish the prevailing rate of wage.

(Emphasis added.)

The industrial statistician must adopt as the prevailing wage the highest rate found in a CBA, regardless of the number of employees covered by that CBA or hours worked. *AGCW II*, 200 Wn.2d at 402. The industrial statistician uses wage surveys—the method of establishing the prevailing wage prior to the amendment—only when there are no applicable CBAs. *Id.*

2. Complete Act

AGC argues that RCW 39.12.015(3) violates article II, section 37 because “it alters the existing prevailing wage laws without setting forth the amended sections at full length.” Br. of Appellant at 44. We disagree.

Here, RCW 39.12.015(3) explicitly references other provisions within chapter 39.12 RCW. *See* RCW 39.12.015(3). For instance, RCW 39.12.015(3)(a) begins with the phrase, “Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1).” Similarly, RCW 39.12.015(3)(b) provides, “For trades and occupations in which there are no collective bargaining

agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW 39.12.010 by conducting wage and hour surveys." An act or amendment that adopts by reference provisions from prior acts constitutes a "complete act" and satisfies the first prong of an article II, section 37 analysis. *Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 642. Because RCW 39.12.015(3) clearly references other provisions, it need not set forth the amended sections at full length.

The industrial statistician's duties under RCW 39.12.015(3) are readily ascertainable from the text alone. If a CBA exists for a particular trade or occupation, then the industrial statistician must adopt as the prevailing wage the rate found in the CBA, or the highest rate found within multiple CBAs. RCW 39.12.015(3)(a). The plain language of RCW 39.12.015(3)(a) states that the definition of "prevailing rate of wage" found in RCW 39.12.010(1) does not apply in circumstances where a CBA exists. RCW 39.12.015(3)(a); *see AGCW II*, 200 Wn.2d at 402. Conversely, if no CBA exists, the industrial statistician establishes the prevailing wage as defined in RCW 39.12.010(1). RCW 39.12.015(3)(b).

AGC also argues that before RCW 39.12.015(3) was amended by SSB 5493, workers "had the right to be paid a 'prevailing wage' based on the wages paid to the majority of workers in the locality." Br. of Appellant at 44. We disagree.

Here, AGC conflates a definitional statute with the creation of a right. While a worker on a public works project may be entitled to the prevailing wage, that worker is not entitled to a specific wage or specific calculation of the prevailing wage. RCW 39.12.010(1) and RCW 39.12.015(3) provide ways in which the industrial statistician may establish the prevailing wage, at his or her discretion, based on information available when he or she makes that determination.

Because the duties under RCW 39.12.015(3) are readily ascertainable, we hold that RCW 39.12.015 is a complete act. *Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 642.

3. Amendment Creates a Conflict or Alters Criteria in Existing Statutes

AGC argues that RCW 39.12.015(3) conflicts with various provisions within chapter 39.12 RCW, and therefore it violates article II, section 37. AGC contends that RCW 39.12.015(3) alters the definitions of "'prevailing'" and "'locality'" as found in RCW 39.12.010, and the mandate to use a CBA rate as the prevailing wage—specifically if that CBA is a multicounty one—is inconsistent with RCW 39.12.026(1). Br. of Appellant at 44, 45.

The State argues that "no provision of [RCW 39.12.010 or RCW 39.12.026] is rendered erroneous by SSB 5493." Br. of Resp't at 44. Specifically, the State contends that any misunderstanding of the definitions found within RCW 39.12.010 would be unreasonable, and there is no conflict with RCW 39.12.026(1) because it applies only to circumstances where the industrial statistician uses wage surveys.

We agree with the State that RCW 39.12.010 is not rendered erroneous by RCW 39.12.015(3). However, we agree with AGC that RCW 39.12.015(3) conflicts with RCW 39.12.026 and, therefore, violates article II, section 37.

a. RCW 39.12.010

AGC argues that RCW 39.12.015(3), as amended by SSB 5493, changed the definition of "'prevailing'" in the clause "prevailing rate of wage" found in RCW 39.12.010(1). Br. of Appellant at 44. AGC contends that the "modified" definition of prevailing "no longer means prevailing." Br. of Appellant at 44.

RCW 39.12.010 does not define "prevailing" on its own; rather, RCW 39.12.010(1) defines "prevailing rate of wage." Courts may use dictionary definitions to discern the plain meaning of terms undefined by statute. *AllianceOne Receivables Mgmt., Inc.*, 180 Wn.2d at 395. "Prevailing" means "most frequent" or "generally current." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1797 (2002). Therefore, a "prevailing" wage need not be only the "most frequent" so long as it is "generally current." As discussed in the analysis above, the industrial statistician may determine the prevailing wage according to two different definitions depending upon the circumstances.

If a CBA exists for a particular trade or industry, then RCW 39.12.015(3)(a) requires that the CBA wage rate—arguably a "generally current" rate—be adopted. If there is no CBA, then the definition of prevailing wage within RCW 39.12.010(1) applies. RCW 39.12.015(3)(b). Therefore, RCW 39.12.015(3) does not modify the definition of "prevailing" in such a way that renders the definition of "prevailing rate of wage" in RCW 39.12.010(1) erroneous. Moreover, there is no conflict between RCW 39.12.015(3)(a) and RCW 39.12.010(1) because RCW 39.12.015(3)(a) expressly states "notwithstanding RCW 39.12.010(1)."

AGC also argues that RCW 39.12.015(3) changed the definition of "'locality.'" Br. of Appellant at 45. AGC contends that "in some counties, a 'locality' means a tiny sliver of land covered by a CBA but in other counties the original definition of the largest city in the county applies." Br. of Appellant at 45.

Here, locality is defined only in RCW 39.12.010(2). RCW 39.12.015(3) does not once use the word "locality." Instead, RCW 39.12.015(3)(a) uses the phrase, "geographic jurisdiction." RCW 39.12.010(1) is the only provision that uses "locality"; therefore, RCW 39.12.010(2) is

subsumed by the definition of prevailing wage found within RCW 39.12.010(1). There is simply no conflict between RCW 39.12.010(2) and RCW 39.12.015(3) because, contrary to AGC's argument, RCW 39.12.010(2) and RCW 39.12.015(3) do not possess competing definitions of "locality." Again, as discussed in the analysis above, the industrial statistician determines which definition of "prevailing rate of wage" applies depending on the circumstances. If a CBA exists, then the industrial statistician considers the "geographic jurisdiction established in" the CBA. RCW 39.12.015(3)(a). If no CBA exists, then RCW 39.12.010(1) and its attendant definition of "locality" in RCW 39.12.010(2) apply. *See* RCW 39.12.015(3)(b). Therefore, we hold RCW 39.12.015(3) does not render RCW 39.12.010(2) erroneous.

b. RCW 39.12.026

AGC argues that "a reading of RCW 39.12.026(1) would lead one to conclude that L&I does not use hours worked in one county to set the prevailing wage rate in another." Br. of Appellant at 45. AGC contends that because RCW 39.12.015(3)(a) "plainly calls for the Industrial Statistician to use data of work performed in one county to establish the prevailing wages in another county if the work is performed under a CBA," there is a direct conflict with RCW 39.12.026(1), which limits data collection and use to the county where the work is performed. Br. of Appellant at 46.

The State asserts that because RCW 39.12.026(1) specifically references RCW 39.12.015, a reasonable person would then look at RCW 39.12.015 and understand that RCW 39.12.026(1) does not apply to RCW 39.12.015(3)(a). The State further contends "[c]ross-references to other statutes satisfy the second prong." Br. of Resp't at 45. We disagree with the State.

RCW 39.12.026(1) states: "In establishing the prevailing rate of wage under RCW 39.12.010, 39.12.015, and 39.12.020, all data collected by the department of labor and industries may be used only in the county for which the work was performed." RCW 39.12.015(3)(a), however, directs the industrial statistician to "establish the prevailing rate of wage by adopting the hourly wage . . . paid for the *geographic jurisdiction* established in collective bargaining agreements." (Emphasis added.)

We note that AGC's statement that RCW 39.12.015(3)(a) "plainly" calls for the "use [of] data of work performed in one county to establish the prevailing wages in another county if the work is performed under a CBA" is not entirely true. Br. of Appellant at 46. For instance, a CBA's geographic jurisdiction could be within a single county. If that is the case, then the industrial statistician would not be using data from another county to set the prevailing wage, even if a CBA was involved. However, the plain language of RCW 39.12.015(3)(a) permits the use of a multicounty CBA to set the prevailing wage. When parties negotiate a multicounty CBA, they undoubtedly take account of wage rates in different areas, i.e., counties, when landing on a finalized rate. Even if the CBA delineated pay rates between workers in different counties in a multicounty CBA, the industrial statistician is still obligated to adopt the highest rate as the prevailing wage. RCW 39.12.015(3)(a). Accordingly, if a multicounty CBA wage is used to set the prevailing wage in multiple counties, at least one county's prevailing wage could be established by data from another county.

Also, while RCW 39.12.026(1) references RCW 39.12.015, the reference is ambiguous. The first clause of RCW 39.12.026(1) states, "In establishing the prevailing rate of wage under RCW 39.12.010, 39.12.015, and 39.12.020 . . . ." As discussed, there are two ways to establish

the prevailing wage under RCW 39.12.015—one when a CBA exists and one when no CBA exists. The statute is not clear whether the legislature intended RCW 39.12.026(1) to apply to all of RCW 39.12.015, or only to RCW 39.12.015(3)(b), the non-CBA scenario. And, contrary to the State's argument, there is no qualifying language within RCW 39.12.026(1), such as "when conducting wage surveys," which would clarify an intention to exclude the one-county limitation found in RCW 39.12.026(1) from applying to RCW 39.12.015(3)(a).

Furthermore, RCW 39.12.015 says nothing of RCW 39.12.026. *See* RCW 39.12.015. RCW 39.12.015's lack of reference to RCW 39.12.026 is all the more apparent because it does reference other provisions: "Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1)." RCW 39.12.015(3)(a).

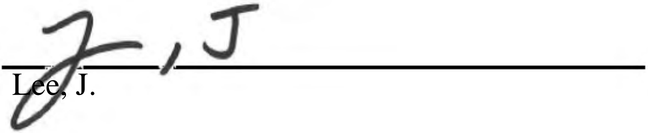
The State also argues that "RCW 39.12.026 does not require that L&I calculate a prevailing wage rate where it finds data, nor does it prohibit L&I from creating a rate with no survey data. Here, the Industrial Statistician is not setting the wages based on survey data about hours. Instead, the statistician is using CBAs." Br. of Resp't at 46. This argument is inapposite.

While true that RCW 39.12.026(1) neither requires the industrial statistician to calculate the prevailing wage where he or she finds data nor prohibits the establishment of a prevailing wage without data, the State misses the thrust of the provision. CBAs are a form of data that an industrial statistician may use to establish a prevailing wage. *See* WAC 296-197-019(1)(b); RCW 39.12.015(3)(a). Just because a CBA wage is adopted as the prevailing wage does not disqualify the CBA as "data."

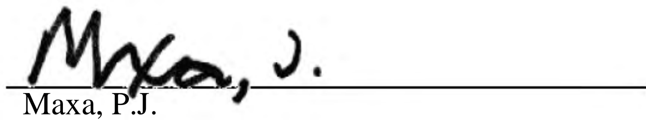
Furthermore, RCW 39.12.026(1) does not confine the definition of "data" to only "wage survey data." The provision states "*all data* collected by the department of labor and industries."

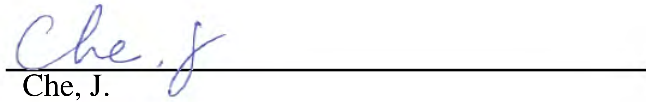
RCW 39.12.026(1) (emphasis added). As discussed above, if the industrial statistician used a multicounty CBA—a form of data—to establish the prevailing wage in several counties, a straightforward reading of RCW 39.12.026(1) is then in direct conflict with RCW 39.12.015(3)(a). It becomes impossible for the industrial statistician to comply with both statutes if a multicounty CBA is involved. Because of this conflict, RCW 39.12.015(3)(a) renders a straightforward reading of RCW 39.12.026(1) erroneous. Therefore, RCW 39.12.015(3)(a) violates article II, section 37. Accordingly, we reverse the trial court's summary judgment order in regard to article II, section 37 and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Lee, J.

We concur:


Maxa, P.J.


Che, J.

No.

SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, JAY INSLEE, JOEL SACKS, and JIM CHRISTENSEN, Petitioners, v. ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON; ASSOCIATED BUILDERS AND CONTRACTORS OF WASHINGTON; INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.; and INLAND NORTHWEST AGC, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Petitioner's Petition for Review with Appendix and this Certificate of Service in the below described manner:

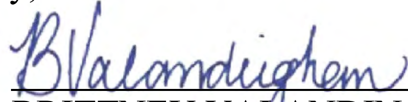
E-Filing via Washington State Appellate Courts Portal:

Erin L. Lennon
Supreme Court Clerk
Supreme Court of the State of Washington

E-Mail via Washington State Appellate Courts Portal:

Darren Anthony Feider
dfeider@sbj.law

DATED this 18th day of May, 2023.



BRITTNEY VALANDINGHAM
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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Petition for Review with Appendix A and Certificate of Service

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