NO. 102713-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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ALEXANDRIA REAL ESTATE EQUITIES, INC., a Washington State Taxpayer, JOHN JOSEPH COX, a Washington State Taxpayer, and DEAN A. TAKKO, a Washington State Taxpayer,

Petitioners,

v.

UNIVERSITY OF WASHINGTON, a Public Institution of Higher Education and Agency of the State of Washington,

Respondent.

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# ANSWER TO *AMICI* MEMORANDUMS

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Philip A. Talmadge
phil@tal-fitzlaw.com
Aaron Orheim
aaron@tal-fitzlaw.com
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Andrew R. Escobar
aescobar@seyfarth.com
Adam K. Lasky
alasky@seyfarth.com
SEYFARTH SHAW LLP
999 Third Avenue, Suite 4700
Seattle, WA 98104-4041
(206) 946-4910

*Attorneys for Petitioners Alexandria Real Estate Equities, Inc., John Joseph Cox, and Dean A. Takko*

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## I. INTRODUCTION

Builders and Unions joining together with lifelong Democrats and Republicans, to ask the Supreme Court to examine this issue makes clear not only the wide-ranging implications, but also that this matter is truly a Supreme Court case, begging of its own accord for guidance.

The Amici include several labor organizations, the Washington State Labor Council ("WSLC") and the Washington State Building and Construction Trades Council and Seattle Building & Construction Trades Council (collectively "BCTC"). And they include members of the construction industry, the Associated Builders and Contractors of Western Washington ("ABC"), representing subcontractor interests, and the Association of General Contractors, Washington Chapter ("AGC"), representing builders' interests. Finally, former legislators, Brian Blake and Vincent Buys ("Blake/Buys"), submitted a memorandum expressing their views as former representatives of taxpayers on both sides of the political aisle.

The very existence of these five, diverse memoranda in support of Alexandria Real Estate Equities', John Cox, and Dean Takko's (collectively "ARE's") petition for review show that this case meets the RAP 13.4(b)(4) criterium, because it shows that this case has broad substantial public impact beyond just the parties in the case caption. But more than that, the *amici* briefs provide key substance to the case, showing that Division II's holding is untenable. These briefs show that by holding that the University of Washington's ("UW's") "test case" Public-Private Partnership ("P3") funded model for constructing public projects on public land is not a "public work," Division II stripped away more than just the public bidding protections already briefed. *Amici* show that this published opinion has potentially disastrous implications for prevailing wage laws, performance bond, retainage, and lien rights, along with anti-corruption laws like public bidding laws that apply to public works.

This Court should grant review because the RAP 13.4(b)(4) criterium is met. Division II's incorrect decision threatens harm to builders, workers, taxpayers, and citizens of this state.

## II. ARGUMENT IN RESPONSE TO *AMICI*

### A. Public Bidding Is an Issue of Substantial Public Importance.

ARE has already thoroughly briefed Division II's error in holding that UW's redevelopment project is not a public work, therefore stripping public bidding protections from this major project that is a "test case" for future development. *Amici* agree and emphasize the statewide impact Division II's decision will have if left in place.

For example, AGC points out that "public bidding applies to essentially every public entity in Washington." AGC mem. at 6. It includes "cities, counties, school districts, port districts, public utility districts, water-sewer districts, fire district, library districts, and more." *Id.* Essentially every major public facility in the state could be redeveloped using a P3 model, while skirting

public bidding laws. The effect of Division II's opinion will be felt throughout the Washington construction industry.

*Amici* Blake/Buys note that this undoes centuries of "hard-fought lessons" our governments have learned since the Revolutionary War, that procurement and public bidding laws are key protections against corruption, mismanagement, and waste. Blake/Buys mem. at 2-3. Washingtonians of all political persuasions favor public bidding on public construction projects like this one to avoid those pitfalls. *Id.*

To avoid being repetitive, ARE will not echo these sentiments any further, but the participation of such a broad range of *amici* parties highlights the substantial public importance of this case. RAP 13.4(b)(4). Regardless of the outcome of the appeal, the validity of UW's new and untested model for public projects should be decided by this Court.

These *amici* also negate UW's arguments that this case has no "far reaching effects." Ans. to pet. at 25-27. UW knows that this is a "test case" for future construction and development on

its campus; it used that exact language in documents related to the W27 project, which it also described as the first of many buildings involved in its $3 billion redevelopment of the West Campus. And it knows, as AGC and Blake/Buys point out, that it will be used as a template by other public entities, not just UW. This is a Supreme Court case because it affects far more than the parties in the case caption, as shown by the diverse group of *amici* participants.

AGC also adds an interesting note to the merits of the case, citing chapter 47.29 RCW, where the Legislature condoned and regulated a P3 model for transportation projects. That statute defines public works projects, which include facilities that are "owned, ***leased***, used, or operated by the state, as a public facility." RCW 47.29.020(5), .060(3) (emphasis added). Clearly, demolishing and rebuilding a building UW will lease for the next 80 years as part of its public campus is a public works project. Division II's ruling is wrong in law and wrong in policy. The Legislature, not the intermediate appellate courts, should

regulate public construction in our State, as further shown by the Legislature's refusal to pass H.B. 2726, which would have authorized and regulated the P3 project here.

This Court should grant review of this case with statewide impact.

### B. Division II's Opinion Harms Worker Security, an Issue of Statewide Importance.

So wide-reaching is this case that it has not only drawn interest from legislators across the aisle, but also interest across ledger in public construction projects – with contractor and laborers groups support review because Division II's published opinion is so expansive. Not only does it undermine builder and taxpayer interest in open and public bidding, but it potentially impacts subcontractor and laborer security by removing prevailing wage and payment security protections from public construction projects. *Amici* show that review is necessary under RAP 13.4(b)(4).

### 1. Division II's Opinion Undermines Prevailing Wage Protections.

WSLC and BCTC smartly point out that by condoning redevelopment on UW's campus and holding that such construction on public land is not a "public work" Division II's opinion undermines prevailing wage protections of chapter 39.12 RCW.

UW has already objected to these arguments, claiming that they are not issues in the appeal and that they are not relevant to this instant case because the UW ground leases require the developer to pay prevailing wages. UW obj. to motions for *amici curiae*. This objection only exposes several key flaws in UW's arguments to date.

First, UW is correct that prevailing wages are not an issue in *this* case, but Division II's published opinion sets precedent for all future P3 development projects that they are not public works. Op. at 14 ("the construction is not for a public work"). Thus, even though UW volunteered in this instance to follow

prevailing wage laws, it need not do in the future. Nor do the many "cities, counties, school districts, port districts, public utility districts, water-sewer districts, fire district, library districts, and more" that will no doubt follow UW's "test case" model if Division II's opinion stands. AGC mem. at 6. This matter has statewide public importance and this Court should consider all the consequences of determining that major construction projects like this one on public land and for public purposes are not "public works." One such consequence is the insecurity of prevailing wage protections for Washington's workers.

Second, UW is wrong to imply that *amici* cannot discuss these broader consequences of a court's holding. This Court liberally considers all aspects of the cases it considers because this Court sets statewide precedent and therefore must make an informed and just decision. *See, e.g., Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994) (Court can consider any aspect of a case to "serve the ends of justice"); *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 792, 357

P.3d 1040 (2015) (considering issue raised for the first time by *amicus* because "this court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision.") (quoting *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988)); *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972) (this Court must "inform itself, as best it can, of the probable impact its decision may have upon the affairs of the people of this state.") (cleaned up).

Third, UW's argument exposes the absurdity of the merits. It claims that prevailing wage is not an issue because its ground lease requires its developer to adhere to prevailing wage laws. This shows that it has substantial control over the development project, directing the wages its private developer pays its workers to construct a building on public land to be used for a public purpose. Clearly, UW is not just a lessee. It is the mastermind of this development project for which it has already committed an estimated $71.8 million of public funds to construct.

This is a public works construction project that should be treated similarly, as any other. The *amici* support show that the Court should grant review and reverse.

### 2. Division II's Opinion Undermines Payment Security for Subcontractors.

For all the same reasons, ABC's helpful memorandum shows that Division II's opinion undermines payment security for subcontractors in this State. Bond and retainage rights ensure that workers on public projects have a quick and easy method to secure payment. This is key because "public property cannot be subject to a mechanic's lien." ABC mem. at 7 (quoting *Est. of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 500, 210 P.3d 308 (2009)). Thus, our Legislature has regulated bond and retainage rights to protect workers on public projects, like this one.

Again, UW's responses are meritless. Just because it required bonds for the development in its ground lease on this occasion, does not mean that it needs to guarantee payment

security for subcontractors like ABC's members on *future* projects. Division II's holding broadly strips all mandated public works regulations from this P3 model in the future. Op. at 14. Division II's holding cannot be left in place, as all the *amici* groups that have submitted memoranda to this Court argue.

This case warrants review.

## III. CONCLUSION

The broad *amici* support in this case shows that it deserves this Court's attention because it has substantial public impact. RAP 13.4(b)(4). *Amici* cogently argue that Division II's holding is untenable and dangerous. This major construction project funded by a guarantee of public dollars on public land is a "public work" and it should be afforded all public works protections, including public bidding requirements, prevailing wage laws, and bond/retainage rights that have been mandated by our Legislature after decades of "hard-fought lessons" in the public construction arena.

At the very least, this Court should be the ultimate arbiter of this issue of first impression with statewide impact, as shown by the broad *amici* participation. The Court should grant review and reverse.

This document contains 1,178 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of March, 2024.

SEYFARTH SHAW LLP

By *s/ Andrew R. Escobar*

Andrew R. Escobar, WSBA #42793
aescobar@seyfarth.com
Adam K. Lasky, WSBA #40517
alasky@seyfarth.com
Giovanna A. Ferrari, *pro hac vice*
gferrari@seyfarth.com
999 Third Avenue, Suite 4700
Seattle, Washington 98104-4041
Phone: (206) 946-4910

Philip A. Talmadge, WSBA #6973
phil@tal-fitzlaw.com
Aaron Orheim, WSBA #47670
aaron@tal-fitzlaw.com
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

*Attorneys for Petitioners Alexandria Real Estate Equities, Inc., John Joseph Cox, and Dean A. Takko*

## CERTIFICATE OF SERVICE

I certify that on the date below, I caused the foregoing to be served via email pursuant to the parties' e-service agreement, and to be filed via the Washington State Appellate Courts' E-Filing Portal, which provides email notification with link(s) to:

Zachary Tomlinson, WSBA 35940
Pacifica Law Group
1191 Second Avenue, Suite 2000
Seattle, WA 98101
zak.tomlinson@pacificalawgroup.com;
cathy.hendrickson@pacificalawgroup.com;
katie.rodenburg@pacificalawgroup.com

DATED this 27th day of March, 2024, at Seattle, Washington

*s/ George Barrington*
George Barrington, Legal Assistant
Seyfarth Shaw LLP
999 Third Avenue, Suite 4700
Seattle, Washington 98104
Phone: (206) 946-4910
Email: gbarrington@seyfarth.com

**SEYFARTH SHAW LLP**

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- seadocket@seyfarth.com
- trkrider@smithcurrie.com
- woodward@workerlaw.com
- zak.tomlinson@pacificalawgroup.com

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Sender Name: Andrew Escobar - Email: aescobar@seyfarth.com
Address:
999 3RD AVE STE 4700
SEATTLE, WA, 98104-4041

Phone: 206-946-4910

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