No. 102713-3

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

ALEXANDRIA REAL ESTATE EQUITIES, INC., JOHN JOSEPH COX, and DEAN A. TAKKO,

Appellants,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

UNIVERSITY OF WASHINGTON'S RESPONSE TO MEMORANDA OF AMICI CURIAE

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I. INTRODUCTION

Respondent University of Washington (UW) responds as follows to the memoranda submitted by *amici curiae* Washington State Labor Council (WSLC); Association of General Contractors, Washington Chapter (AGC); Associated Builders and Contractors of Western Washington (ABC); Washington State Building and Construction Trades Council, AFL-CIO and Seattle Building & Construction Trades Council (AFL-CIO); and Legislators Brian Blake and Vincent Buys (Former Legislators).

Amici curiae's concerns are misplaced, unsupported by the record, and will not assist this Court in its consideration of the issues raised by the petition of Appellants Alexandria Real Estate Equities, Inc., *et al.* (ARE). *Amici* appear to believe this case is about a multi-billion-dollar development of a neighborhood where workers will not be paid prevailing wages and subcontractors will not have legal protections. It is not. This case is about one building that a private party will construct

under contracts that guarantee prevailing wages and protection of laborers and subcontractors. No claim on appeal raises, or could raise, the issues *amici* want to argue based on the actual process and leases at issue. Accordingly, *amici*'s memoranda offer no reason to grant review under RAP 13.4.

II. ARGUMENT

A. *Amici* Seek Review of Public Contracting Issues Not Raised by This Case.

Amici's arguments in favor of review are rooted in issues that are not presented by ARE's appeal. This Court addresses "only those claims and issues necessary to properly resolving the case as raised on appeal by interested parties." *Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 50, 534 P.3d 339 (2023) (quoting *Clark County v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 145, 298 P.3d 704 (2013)); *see also Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by

the parties."). *Amici* are not parties, and issues raised by them alone are not presented by this appeal. *See Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993) ("We do not consider issues raised first and only by amicus."); *State v. J.W.M.*, 1 Wn.3d 58, 74 n.4, 524 P.3d 596 (2023) ("[W]e decline to adopt a new legal standard in this case because the issue is raised only by amici.").

The only issues raised by ARE's petition are whether the Court of Appeals correctly determined that (1) UW's leases were not subject to public bidding requirements; and (2) UW had authority to lease its property to a developer and then lease-back a portion of a newly constructed building for use as research facilities. No *amici* discusses UW's authority to enter into the transaction. *Amici* instead raise issues related to public contracting that are not raised by this appeal, and in any event are addressed by the terms of UW's leases. Accordingly, *amici* offer no compelling reasons for this Court to grant review.

1. *Amici*'s Concerns Regarding Prevailing Wage and Subcontractor Protections are Not Presented by This Appeal and the Contract in Question Provides the Relevant Protections.

Amici WSLC and AFL-CIO raise concerns over the application of the Prevailing Wage Act ("PWA"), RCW 39.12.010, *et seq*. But the applicability of the PWA to this project is not a matter raised before the trial court or the Court of Appeals, nor by ARE's petition for review. Accordingly, this Court's review would not address *amici*'s concerns. Further, as a factual matter, these concerns ignore the record. AFL-CIO argues that "[t]his matter is of substantial public interest given that the piloted arrangement is geared toward circumventing the Prevailing Wage Act." AFL-CIO Mem. at 5; *see also id.* at 10 (arguing that "numerous trade and craft workers will be ineligible to receive prevailing wages from any work performed on UW's West Campus buildings."). The WSLC contends that "UW's contractors are now free to pay below market wages." WSLC Mem. at 9. There is, of course, no evidence that the UW's arrangement here is geared towards circumventing the Prevailing

Wage Act. And the lease governing the Site W27 transaction *requires* the payment of prevailing wage, stating that "[Developer Wexford] shall ensure compliance with all provisions of Chapter 39.12 of the Revised Code of Washington in connection with the construction of the Project." Trial Ex. 158 (Ground Lease), Section 11.6(g). Thus, the developer is not "free to pay below market wages" and no workers are "ineligible to receive prevailing wages." Rather, the developer is contractually mandated to pay prevailing wages in accordance with chapter 39.12 RCW.

Regardless, assuming that the lease-leaseback transaction falls within the UW's governing authority and is not a construction contract, the Washington legislature has already addressed *amici*'s concern that such transactions will generally enable public entities to avoid payment of prevailing wages. RCW 39.04.260 *requires* the payment of prevailing wages where a public entity arranges for a private entity to construct a building through a contract to lease more than half the building. Nothing

at issue here will upset the Legislature's determination when to require the payment of prevailing wages in a lease-leaseback transaction.

Amicus ABC contends that this project somehow "undermines important lien, payment bond, and retainage rights . . . under Washington law." ABC Mem. at 6. As with *amici's* other concerns, these matters are not a basis of ARE's appeal, and granting review would not result in this Court reaching the issues raised by ABC. *See generally* Petition for Review.

ABC's concerns likewise have no factual basis in the actual development at issue here. *Amici* appear unaware that the contract in question requires that the Developer Wexford obtain and provide surety bonds guaranteeing (among other things) "full payment of all subcontractors, labor and materialmen." Ground Lease, Section 11.6(f). The payment bond will provide full payment protection to the same class of claimants who would receive protection under the statutory payment bond required by RCW 39.08. Simply put, if a subcontractor or laborer on the

project fails to receive payment for work performed, that party can file a claim against the payment bond. There is no lack of protection here.

ABC also contends that the nature of this project (construction by a private developer pursuant to a long-term ground lease) eliminates any potential right to lien the project under chapter 60.04 RCW. That is simply wrong: While no party can lien UW's fee interest, any party performing work or providing materials to the project at the direction of Wexford will have full chapter 60.04 RCW lien rights against Wexford's 80-year leasehold property interest. Those payment rights are fully secured by the property interest of the party that will finance, construct, own and operate the Site W27 Facility.

2. The Remaining Issues Raised by *Amici* Misstate the Record and Are Not Presented By This Case.

Amici's other attempts to conjure an "issue of substantial public interest" are based on misunderstanding (or mischaracterizing) the record. They attempt to overinflate the scope of the Site W27 development and present concerns

divorced from the reality of what occurred in this process. These abstract concerns—unmoored from the record—offer no support for granting review under RAP 13.4.

First, *amici* parrot ARE's baseless contention that this case involves a multi-billion dollar development of the entire West Campus neighborhood. *See* WSLC Mem. at 4, 8; ABC Mem. at 7; Former Legislators Mem. at 7; AFL-CIO Mem. at 10. As explained in UW's answer to the petition for review, the RFP issued in this case, and the leases that were executed, were for one building on a single site—not a $3 billion redevelopment of a neighborhood. *See* CP 96-98 (making clear that RFP is for one facility, Site W27); Trial Exs. 157-159 (Leases referring only to Site W27); *Alexandria Real Estate Equities, Inc. v. University of Washington*, 539 P.3d 54 (2023) (discussing only Site W27 development).

Amici also appear to have been misled about the circumstances surrounding the end of the ground lease. Their memoranda suggest that UW will take ownership of a useful

building at the end of the lease. *See* AGC Mem. at 8 (contending that Site W27 is a building that UW "will eventually own free and clear from the developer"); WSLC Mem. at 8 ("[UW] will take over in fee simple ownership after a number of years"); AFL-CIO Mem. at 14 ("building ownership will eventually revert to UW"). But it is uncontested that the reversion that occurs at the end of the Ground Lease—80 years after construction—is "well beyond the end of [the building's] expected useful life." CP 161. This detail matters. UW will not be gaining control of a functional building at the end of the lease, and so any reversion cannot transform the building into a "public work." Indeed, two opinions issued by the Attorney General have endorsed the idea that lease-leaseback arrangements are not public works if the building lease ends after the expected useful life of the building. *See* AGO 1988 No. 17 ("In the case of long-term leases where the useful life of the improvements will be substantially expended before they revert to the lessor, it seems

unlikely that the construction of the improvements could be deemed a 'public work.'"); AGO 2008 No. 10 at 17 (same).

Finally, *amici*'s concerns regarding taxpayers being harmed by a lack of public bidding in this case are belied by the record. Only one of the five *amici* mentions—briefly and incompletely—the competitive process that UW ran to select the Site W27 developer. AFL-CIO Mem. at 7. Remaining *amici* appear unaware that UW issued a Request for Qualifications, for which it received 11 responses, before issuing Requests for Proposals to four developers. CP 1427. They also appear unaware that Appellant Alexandria Real Estate Equities (Alexandria) competed in, and lost, the entire process to evaluate developers. Indeed, Alexandria sued UW, arguing that UW's selection process was arbitrary and capricious. After a weeklong trial, the court concluded that "UW's process for selecting a developer for Site W27 was not arbitrary. The process was thoughtful, robust, and ultimately fair." CP 1441 ¶15. The trial court dismissed the claim on both the merits and lack of standing.

The Court of Appeals affirmed the dismissal of the arbitrary and capricious claim on Alexandria's lack of standing. And Appellants do not seek review of that dismissal from this Court.[1] Thus, the process here raises no concerns about taxpayer harm from the competitive procurement process utilized by the UW.

Moreover, the trial court denied Alexandria's request for equitable relief because "the equities in this matter favor allowing the Site W27 development to proceed, including the harm that will accrue to Washington State taxpayers should [Alexandria] be awarded its requested relief." CP 1444 ¶29.

Whether *amici* have been misled or simply have not reviewed the record closely, their inaccurate references to the record call into question any help that *amici* can provide this

[1] Concerns about UW's procurement process are thus res judicata at this point. *See Clark Cnty.*, 177 Wn.2d at144 ("The portions . . . not appealed from [become] res judicata, and . . . legal and binding, and the court [is] without power to set [them] aside." (quoting *Cook v. Commellini*, 200 Wn. 268, 270–71, 93 P.2d 441 (1939) (alterations in original).

Court. More immediately, they should not serve as the basis for this Court granting review.

B. *Amici* Blake and Buys Raise an Irrelevant Argument based on Draft Legislation That Was Never Voted On.

Though the memoranda of the other *amici* display a lack of familiarity with the record, the Memorandum of *Amici Curiae* "Legislators" Brian Blake and Vincent Buys (Blake and Buys) is both irrelevant and misleading. It offers no help to this Court.

Blake and Buys purport to aid this Court by discussing proposed legislation that they "monitored," but which they did not debate or vote on. *See* Former Legislator's Mem. at 7-8. Indeed, no legislators voted on the legislation, and it never made it out of committee. *Id.* As this Court has observed, "legislation that has not been enacted (let alone passed out of legislative committee) reveals little about the intent of the legislature and should not generally be relied on." *Lowe's Home Centers, LLC v. Dep't of Revenue*, 195 Wn.2d 27, 41 n.5, 455 P.3d 659 (2020).

Their memorandum offers no insight into this defunct proposed legislation and offers no assistance to this Court.

Moreover, Blake and Buys' memorandum and accompanying motion contain disingenuous statements regarding the identities of the *amici curiae*. The Memorandum repeatedly identifies Mssrs. Blake and Buys as "Legislators". *See* Former Legislators' Mem. at 1, 4, 5, 7, 8; *see also id.* at 8 (referring to "Legislators Blake and Buys' constituents" in the present tense). They are not: they are former legislators. *Id.* at 4.[2] The opinions and observations of two former legislators offer this Court no assistance in its determination as to whether it

[2] Mr. Blake is now a registered lobbyist. *See Brian E. Blake Consulting*, Public Disclosure Commission online records system for information on lobbyists and entities who employ lobbyists, PDC, https://accesshub.pdc.wa.gov/node/81673. Mr. Buys works in Government and Regulatory Affairs for Comcast. Comcast, *Comcast Names New Gov. Affairs Manager for Northwest Washington*, May 29, 2019, https://washington.comcast.com/2019/05/29/comcast-names-new-gov-affairs-manager-for-northwest-washington/; LinkedIn, *Vincent Buys*, https://www.linkedin.com/in/vincent-buys-72378a176/ (showing Mr. Buys remains employed by Comcast).

should grant or deny the petition for review filed by ARE. *See* RAP 10.6(a).

III. CONCLUSION

The issues that *amici* contend are of public importance are not present in this case. Their unfounded concerns and ignorance of the record can offer this Court no assistance in evaluating ARE's petition for review under RAP 13.4. UW respectfully requests that this Court deny ARE's petition for review.

Respectfully submitted this 27th day of March, 2024.

I certify that this memorandum contains 2,285 words, in compliance with RAP 18.17.

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