No. 101997-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 54465-2-II

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

Petitioners,

v.

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

Respondents.

Answer to *Amicus Curiae* Brief of Washington State Building and Construction Trades Council

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I. INTRODUCTION

In its Amicus Curiae brief, the Washington State Building and Construction Trades Council (the "Council") completely fails to address the issue at hand, namely, whether Substitute Senate Bill 5493 ("SSB 5493") violates article II, section 37 of the Washington State constitution because a straightforward reading of RCW 39.12.015(3)(a) is in direct conflict with RCW 39.12.026(1) and renders RCW 39.12.026(1) erroneous. Instead, it argues only that public policy would be undermined if the Court of Appeals' opinion ruling that SSB 5493 is unconstitutional is not overturned. Public policy considerations, however, are not a legitimate basis for allowing an unconstitutional statute to remain in effect. Moreover, contrary to the Council's assertions, SSB 5493's mandate that the Industrial Statistician set the prevailing wage rate from collective bargaining agreements ("CBA") does not further the dual purpose of Washington's Prevailing Wages on Public Works Act (the "Act") to protect

employees working on public projects from substandard wages and to preserve local wages.

This Court should deny review.

II. ARGUMENT SUPPORTING DENIAL OF REVIEW

A. The Council Fails to Address Whether a Straightforward Reading of RCW 39.12.026(1) is in Direct Conflict with RCW 39.12.015(3)(a).

As set forth in detail in AGC's underlying answer to the State's Petition for Discretionary Review, the Court of Appeals correctly found that SSB 5493 violates article II, section 37 because the plain language in RCW 39.12.015(3)(a) conflicts with RCW 39.12.026(1) and renders RCW 39.12.026(1) erroneous. The Council fails to address this issue in its Amicus Curiae brief. Instead, as described below, the Council focuses entirely on public policy arguments that are not relevant to the issue of whether SSB 5493 is constitutional.

B. The Legislature May Not Choose to Enact an Unconstitutional Statute under the Guise of "Policy-Making Authority."

The Council argues that the Legislature properly engaged in policy-making authority to amend the Act to require that prevailing wages be established from existing CBAs and asserts that review by this Court is warranted based on the disruptive effect of a final ruling that SSB 5493 is unconstitutional. (Amicus Brief, at 6-13) In so arguing, the Council focuses solely on the Legislature's policy-making authority to amend the Act while ignoring that the amended language in RCW 39.12.015(3)(a) conflicts with that in RCW 39.12.026(1), in violation of article II, section 37. To accept the Council's assertion would be to accept the proposition that the legislature has infinite authority to pass any prevailing wage law free of constitutional constraints under the guise of a policy-making authority, with no subsequent method to correct

the constitutional error should disruption result. Neither is a basis for this Court to accept review.

C. SSB 5493 Does Not Support Public Policy underlying the Act.

Contrary to the Council's assertion, SSB 5493 does not support public policy underlying the Act. As the Council concedes, the Act's dual purpose is to protect employees working on public projects from substandard wages and to preserve local wages. (Amicus Brief, at 6) (citing *Silverstreak, Inc., v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 880, 151 P.3d 891 (2007); *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 338, 963 P.2d 923, (1998); *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 135, 177 P.3d 143 (2008); *Alvarez v. IBP*, Inc., 339 F.3d 894 (2003)).

Before SSB 5493, the Washington State Department of Labor and Industries ("L&I") conducted wage analyses to establish the prevailing wage rate. Specifically, it conducted wage surveys by gathering all possible data on

wages and determined the actual average (or majority) wage, which protected employees from substandard wages. By only using data for the county where the hours were worked, the Act protected local wages. After SSB 5493, the law no longer serves either of the Act's purposes.

In Washington, only about 25 percent of employees in the construction industry are union members. (CP 387, 537-43) SSB 5493 excludes the wages paid to a majority of the workforce simply based on the existence of a CBA. This distinction between union and non-union wages is irrational. If non-union carpenters are paid $100 per hour and 75 percent of carpenters are non-union, there is no rational basis to establish $50 per hour as the prevailing wage based purely on the existence of a CBA that applies to 25 percent of the workers. If the goal is to protect workers from substandard wages, all wages must be considered, and they are not under SSB 5493.

SSB 5493 also irrationally interferes with the preservation of local wages in counties with CBAs. SSB 5493 requires the Industrial Statistician to prevail the highest CBA wage in a county, regardless of whether the actual prevailing wage in the county is higher or lower than that rate. The Industrial Statistician conceded that evidence of the majority or average rate paid in a county is now irrelevant under SSB 5493 as follows:

> Q: So under the change in the law with 5493, the prevailing wage, where there's a collective bargaining agreement, is not based on the majority, right?
>
> A: Correct.
>
> Q: It's not based on an average?
>
> A: Correct.

(CP 2567)

Several CBAs in Washington have a geographic boundary along the 120th meridian, meaning counties such as Grant County are split by multiple CBAs. Before SSB 5493, the prevailing wage was determined based on

the union and non-union wages paid in the largest city in the county, which meant the CBAs in the largest city would be considered. Now, instead of considering the wages from the CBAs in the largest city, it only matters if the CBA covers any part of the county—even if it covers only a tiny sliver of the county. (CP 2570) As such, SSB 5493 does nothing to further the purpose of preserving local wages within the county. It does the opposite. In fact, before the passage of SSB 5493, the Industrial Statistician noted "extra territorial" CBAs should not trump the CBA covering the largest city in a county. (CP 388, 1746) Under SSB 5493 and its "highest wage" requirement, the Industrial Statistician does not preserve local wages—s/he takes the highest. (CP 2584)

In Grant County, the Seattle Local 302 CBA reaches the 120th meridian. (CP 388, 547) Before SSB 5493, the Seattle rates never prevailed in Grant County because 90 percent of Grant County is covered under the Inland

Empire operators CBA, which has much lower rates. *Id.* Now, Seattle rates prevail. *Id.* With the higher prevailing wage rates, large Seattle contractors that own their own equipment will be able to underbid smaller Grant County contractors that would have to rent equipment for large public works contracts. In the past, when local wages set the prevailing wage rates, King County contractors that were signatories to the Local 302 CBA with mandatory higher wages (regardless of the prevailing wage) would not bid on public works contracts in Grant County because it was not profitable. Now that is not the case. Large contractors can move into smaller counties, damaging local wages, employers and employees. Before SSB 5493, the Industrial Statistician would not have allowed such adverse impact based on an "extra territorial" CBA. (CP 388, 1746) Under SSB 5493, the Industrial Statistician is powerless to stop it.

SSB 5493's dependence on CBA wage rates to determine the prevailing wage in some counties is irrational and purely arbitrary. Limiting the data used by the Industrial Statistician to determine the prevailing wage in a locality is not rationally related to the goal of protecting workers' wages or preserving local wage standards. It can lead to prevailing wages that are higher or lower than what is actually paid in the locality, which is contrary to the purpose of the Act. The Industrial Statistician concedes that this is a potential outcome. (CP 2584-85) SSB 5493's failure to require that the underlying CBA wage rate apply to a majority of workers in the county, or even that work be performed under the CBA within the relevant county, is also arbitrary and irrational. There is no rational reason to exclude data from the majority of the workforce if the legislature's goal is to protect workers and preserve local wage standards. One employer must pay its employees a prevailing wage based on the wages earned by the majority

of workers in the largest city in the county, while the other is not required to do so.

The effect of SSB 5493 fails to advance the goals of the Act, and the Council's assertion to the contrary as a basis for this Court to accept review of the Court of Appeals' decision ruling that SSB 5493 violates article II, section 37 is both erroneous and disingenuous.

III. CONCLUSION

For each of these reasons and those set forth in AGC's Answer to Petition for Discretionary Review, this Court should deny review.

I certify that this answer is in 14-point Georgia font and 1,467 words, in compliance with the Rules of Appellate Procedure. RAP 18.17 (b).

RESPECTFULLY SUBMITTED this 9th day of August 2023.

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CERTIFICATE OF SERVICE

I, Jennifer Parda-Aldrich, certify under penalty of perjury under the laws of the State of Washington that on August 9, 2023, I caused to be served the document to which this is attached to the parties listed below in the manner shown:

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