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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Plaintiff/Appellant,

v.

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

Defendants/Appellees

APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY
THE HONORABLE CHRIS LANESE
Case No. 19-2-00377-34

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Enacted in 1945, Washington's Prevailing Wages on Public Works Act (the "Act" or "prevailing wage law") requires employers to pay "prevailing wages"—defined as the hourly wage, usual benefits and overtime paid to the majority of works in the applicable trade in each "locality"—to all employees on public works projects. Under the Act, "[a]ll determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries."[1] In carrying out this non-delegable statutory obligation, the Industrial Statistician conducted wage surveys to determine the prevailing wage rate for each trade/occupation on a county-by-county basis, under which either the majority or average wage rate would prevail in the locality. Such a practice is consistent with the underlying dual purpose of the Act, namely, to protect employees working on public projects from substandard wages and to preserve local wages.

Effective June 7, 2018, however, the legislature amended the Act by passing Substitute Senate Bill 5493 ("SSB 5493"), mandating that, in establishing the prevailing wage, the Industrial Statistician "*shall*" adopt the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements ("CBAs") and if there is more than one CBA, the higher rate will prevail. Through this amendment, the legislature tied the prevailing wage rate in Washington solely to wage rates in CBAs—that is, to privately negotiated deals between

[1] *See* RCW 39.12.015(1).

interested parties without any government oversight—in direct violation of the federal and state constitutional non-delegation doctrine, which prohibits the abdication of legislative regulatory authority and allows for delegation only with government oversight. The public has an expectation that the government will safeguard the public purse and regulate commerce. SSB 5493 instead delegates the "safeguard" of public tax dollars solely to interested parties—namely, to unions and union contractors through their privately negotiated deals.

Although the State concedes that no government actor is involved in negotiating, setting standards, validating or enforcing the privately negotiated CBAs, it erroneously contends that the legislature is free to choose *any* method for setting the prevailing wage and that statutory safeguards are merely precatory policy choices. To the contrary, the legislature's authority is not infinite. As an initial matter, when incorporating facts to be determined by non-government actors in a statutory scheme, the legislature is limited to adopting facts already in existence; it cannot incorporate future facts—in this case CBAs—not yet in existence without violating the non-delegation doctrine, as with SSB 5493.

Additionally, when granting regulatory authority to non-government actors, statutory safeguards to protect against arbitrary self-motivated actions and abuse by interested private parties are mandatory to ensure compliance with the non-delegation doctrine and the constitutional due process rights of those "who do not belong to the legislatively favored

organizations"[2]—or in this case with SSB 5493, the employees and employers who are not parties to the CBAs that solely establish the prevailing wage. On its face, SSB 5493 has *no* established safeguards. The implementation process has also failed to enact any regulation, rule, or other governance that could be relied upon to save SSB 5493's constitutional deficiencies in this regard. The Department of Labor & Industries ("L&I") does not verify whether a given CBA is still valid, nor does it verify the scope or amount of work performed under a given CBA (if any). L&I does not even verify the veracity of CBAs used to establish the prevailing wage rate. In sum, L&I performs no review or analysis under SSB 5493.

Furthermore, SSB 5493 violates the equal protection clauses of the federal and state constitutions because it does not rationally further the Act's dual purpose to protect employees working on public projects from substandard wages and to preserve local wages. SSB 5493's mandate that the Industrial Statistician prevail the wages established in CBAs—even if non-union employees earn a higher hourly wage—results in the exclusion of the (potentially higher) wages paid to a vast majority (or even all) of the workers in a county when determining the "prevailing wage." Such exclusion is not a rational means of protecting workers from substandard wages. Nor is it a rational means of preserving local wages when SSB 5493 requires the Industrial Statistician to prevail the CBA wage in a county regardless of whether the actual prevailing wage in the county is higher or lower than that rate or where the CBA geographically covers only a fraction

[2] ***United Chiropractors of Wash. v. State***, 90 Wn.2d 1, 5, 578 P.2d 38 (1978).

of the county. Indeed, even if the CBA covers another state (or country for that matter), under SSB 5493 it must still be used to set the prevailing wage rates for every county listed in the geographic scope of the agreement, while requiring that no steps be taken to confirm that work is actually being performed in those counties.

Finally, when amending a statute, Article II, § 37 of the Washington State Constitution requires that the amended section must be harmonized with existing law and the full length of impacted sections must be set forth in the bill. When the legislature passed SSB 5493, it failed to meet either of these requirements. The Act has different definitions of prevailing wage, which misleads the public and leaves the incorrect impression that "prevailing wage" means the average or majority wage in a certain locality.

Associated General Contractors of Washington ("AGC"), Associated Builders and Contractors of Western Washington ("ABC"), Inland Pacific Chapter of Associated Builders and Contractors ("IPC") and Inland Northwest AGC ("INW") (referred to collectively herein as "AGC" or "Appellants") filed this action against the State and its officers (referred to collectively herein as "State" or "Appellees") responsible for administering SSB 5493, asserting that SSB 5493 is unconstitutional because it violates the non-delegation doctrine, due process and equal protection clauses and Article II, § 37 of the State Constitution. The parties filed cross-motions for summary judgment, and the trial court granted

summary judgment to the State on all issues.[3] This Court should reverse the trial court's order and grant AGC's motion for summary judgment, ruling that SSB 5493 is unconstitutional.[4]

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

The trial court erred in entering its December 27, 2019 order granting the State's Cross Motion for Summary and denying AGC's Motion for Summary Judgment.

B. Issues Pertaining to Assignments of Error

Whether the trial court erred by granting the State's Cross Motion for Summary Judgment holding that:[5]

1. SSB 5493, which mandates that the Industrial Statistician adopt the wage rates established by CBAs not in existence at the time SSB 5493 was enacted as the prevailing wage rates and contains no procedural safeguards, does not represent an unconstitutional delegation of legislative authority to private parties;

2. the lack of any statutory safeguards and oversight codified by SSB 5493 does not violate the due process rights of employees and employers not a party to the CBAs used to set prevailing wages;

3. prohibiting the Industrial Statistician from considering the

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[3] As described in greater detail below, the trial court issued no written opinion and instead simply adopted all the State's arguments as set forth in its cross-motion for summary judgment without any explanation or justification for the ruling.

[4] Alternatively, this Court should reverse the trial court's ruling on the State's cross-motion for summary judgment and remand this matter to the trial court for trial.

[5] *See supra*, note 3.

actual wages paid in the construction industry in every county is rationally related to ensuring employees on public works projects are not paid substandard wages and protecting local wages; and

4. the failure of SSB 5493 to set forth its conflict with and modification of RCW 39.12.010(1) and 39.12.026(1) does not violate Art. II, § 37 of the Washington State Constitution.

III. STATEMENT OF THE CASE

A. Appellants

AGC represents unionized and open shop contractors and subcontractors performing prevailing wage work in Washington and, before SSB 5493, participated in prevailing wage surveys conducted by the Industrial Statistician. (Clerk's Papers ("CP") 64-77) Before SSB 5493, wages paid by AGC's members—union and non-union contractors—were considered by the Industrial Statistician in setting prevailing wage rates.[6] (CP 387, 2553-4, 2557) AGC supports the construction industry, assists its members with labor and employee relations issues, provides safety and management resources, supports fair and equitable apprenticeship and prevailing wage programs, conducts lobbying on behalf of the industry, and ensures fair treatment for members and their employees. (CP 526-28, 531-32, 522-23, 534-35)

Relevant here, AGC and INW frequently negotiate so-called "master" CBAs with trade unions across broad geographic regions on behalf

[6] Notably, only about 25 percent of construction industry employees in Washington are union members. (CP 387, 537-43)

of their members. (CP 528, 546) Members assign their bargaining rights, which, in turn, allows AGC or INW to negotiate CBAs on behalf of multiple employers simultaneously.[7] *Id*. Once a union reaches a "master" agreement with a representative organization such as AGC or INW, other employers may sign a "me too" agreement, which is a CBA with the exact same terms as the previously negotiated "master" agreement. (CP 527) Some AGC and INW members also negotiate individual CBAs with unions, including project only agreements that cover a specific project only, or pre-hire agreements under Section 8(f) of the National Labor Relations Act.[8] (CP 528, 546) ABC and IPC do not negotiate on behalf of their members; however, some of their members directly negotiate CBAs with unions, including project only and Section 8(f) pre-hire agreements. (CP 532-36)

B. <u>Washington's Prevailing Wage Law</u>

The Act requires that employers pay "prevailing wages" to all employees performing work on public works projects. *See* RCW 39.12.010. Under the Act, "[a]ll determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries."

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[7] Each CBA has several key parts, including a geographic scope of the agreement—which is based on the territory covered by the union as opposed to the territory where the employer actually does business—and a schedule of wages (commonly referred to as "Schedule A") for every potential job position (also known as an "occupation") covered by the agreement, which is based on the occupations covered by the union as opposed to occupations of the actual employees working for each employer. (CP 2550, 2573-4, 2613-2654)

[8] Described in greater detail *infra*, such agreements are signed *before* a union is recognized after demonstrating majority support or being certified through a National Labor Relations Board ("NLRB") election and *before* employees have been hired (referred to herein as "Section 8(f)pre-hire agreements" or "pre-hire CBA"). *See* 29 U.S.C. § 158(f). Notably, under SSB 5493, a Section 8(f) pre-hire agreement that applies to *no* employees and is implemented on *no* projects can be used to set prevailing wages. (CP 2596-97, 497-518)

RCW 39.12.015(1). According to the Industrial Statistician, Jim Christensen, determining the prevailing wage rate is his non-delegable statutory obligation. (CP 2559) The "prevailing wage" is defined statutorily as the hourly wage, usual benefits, and overtime paid to the majority of workers in the applicable trade in each "locality." RCW 39.12.010(1). "Locality" is defined as the largest city in each county. RCW 39.12.010(2). The "prevailing wage" for each trade is to be established on a county-by-county basis, based on the wages paid to workers in the largest city in the county. *See id.* The Act prohibits using wage data gathered from one county to establish a prevailing wage rate in a different county. RCW 39.12.026(1).

1. Before SSB 5493—Wage Survey Method

Before SSB 5493, the Industrial Statistician conducted wage surveys to determine the prevailing wage rate for each trade/occupation on a county-by-county basis.[9] (CP 2559) Surveys were sent to every non-union and union contractor requesting a breakdown of wages paid, benefits, and hours worked by occupation. (CP 2553-4, 555-56, 566-67) L&I staff would subsequently review, "clean up" and analyze the data received to determine the prevailing wage rate for each occupation on a county-by-county basis. (CP 2555-2557) If the majority of workers in a "locality" (largest city within each county) were paid the same wage rate, that rate became the prevailing wage for that occupation in that county.[10] If no single rate was paid to a majority of workers in the largest city in the county, the Industrial

[9] *See also* RCW 39.12.015; WAC 296-127-019.
[10] *See* RCW 39.12.015; WAC 296-127-109.

Statistician determined an average wage rate that became the prevailing wage for that occupation in that county. *Id*. In sum, before SSB 5493, either the average or majority wage paid to workers within each occupation in the largest city in each county was the prevailing wage rate in that county, as assessed and determined by the Industrial Statistician. (CP 2557)

2. After SSB 5493—Mandatory Adoption of CBA Wage Rate Method

Effective June 7, 2018, the legislature amended the Act by enacting SSB 5493, which added two clauses to § 39.12.015 of the Act as follows:

> (3)(a) 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.

RCW 39.12.015(3)(a), (b) (2018).[11] SSB 5493 made no other amendment

[11] In 2019 the Legislature again amended 39.12.015(3)(a) to incorporate by reference newly enacted RCW 39.12.017, but the amendment does not alter the legal basis for AGC's challenge. *See* RCW 39.12.015(3)(a) (2019) ("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.").

of the Act. (CP 22-23) SSB 5493's definition of "prevailing wage" differs materially from the definition set forth in RCW 39.12.010(1). There are conflicting definitions, namely:

- Under RCW 39.12.010, the prevailing wage rate is determined based on the wages actually paid to the majority of employees for each occupation in each "locality," but under SSB 5493 the Industrial Statistician "shall establish the prevailing wage rate by adopting" the wages rates negotiated by trade unions and private employers in collective bargaining agreements.[12]

- Under RCW 39.12.010, the prevailing wage is set based on the majority rate or average rate if there is no majority, but under SSB 5493 there is no requirement for the CBA to cover a minimum number of employers, employees, or hours worked.[13]

- Under RCW 39.12.010, prevailing wage rates are determined based solely on wages paid within each county as required by RCW 39.12.026, but under SSB 5493 there is no requirement for the relevant, signatory employer to have an employee working under every occupation listed in the CBA or in every county listed in the geographic scope of the CBA to use the CBA to establish the prevailing wage rate for every occupation listed in every county listed.[14]

- Under SSB 5493, the wages from every occupation listed in a CBA can be used to set the prevailing wage for every county listed in the geographic scope of the CBA.[15] Thus, a CBA can set the prevailing wage rate in counties where the employer has no employees working (or even where the union has no members working).

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[12] (CP 2567) ("Q. So the union rate will be the prevailing wage rate if there's a collective bargaining agreement? A. Yes.")

[13] (CP 2568) ("If there's a collective bargaining agreement covering a specific occupation with a specific geographic jurisdiction and one hour is worked under that collective bargaining agreement, that could set the prevailing wage rate for that occupation in that geographic jurisdiction? A. I think the short answer is yes.")

[14] (CP 2568-70)

[15] (CP 2568-70, 2585)

For each of these reasons, the prevailing wage definition in RCW 39.12.010 conflicts with the prevailing wage definition under SSB 5493.[16]

3. SSB 5493—As Applied

Under SSB 5493, L&I has used expired CBAs to set prevailing wage rates.[17] Although "an unsigned CBA is not a valid CBA," as the Industrial Statistician concedes, L&I does not verify whether a CBA is signed by a union or employer representative before using it to set prevailing wages under SSB 5493.[18] Often L&I simply downloads the CBA from public websites without additional verification. (CP 556, 574)

Under Section 8(f) of the National Labor Relations Act ("NLRA"), a construction company can enter into a so-called "pre-hire" agreement (or CBA). *See* 29 U.S.C. § 158(f). Under SSB 5493, Section 8(f) pre-hire agreement can be used to set prevailing wages. (CP 2596-97, 497-518) Not only is a pre-hire CBA is signed before any employees have been hired but also before a union is recognized after demonstrating majority support or being certified through a NLRB election. *See id*. It is, however, still a valid CBA and it can exist for years even if no employee is ever hired. As a result of SSB 5493, a pre-hire CBA between a company with no employees and a union that was never certified through an NLRB election or recognized after

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[16] *Compare* RCW 39.12.010(1) *with* 39.12.015(3)(a).

[17] (CP 2591, 2702-2745 (listing 889 occupation/county combinations with prevailing wages based on *expired* agreements as of 6/11/2019); 5556, 0571 ("Q. So you're basing that prevailing wage rate on an expired agreement? A. Yes."); 571-73, 578-1669)

[18] (CP 2550, 2592 ("What you're doing at L&I is, you're prevailing these collective bargaining agreements on the assumption that they're signed. But you don't have a signed agreement; is that right? A. That's correct."); 0391-476 (including 86 unsigned signature pages from CBAs used by the State to establish prevailing wages)

demonstrating majority support can establish a county's prevailing wage.[19]

Under SSB 5493, "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." RCW 39.12.015(3)(a) (emphasis added). Under this language, the Industrial Statistician is required to adopt the wage rate established in a CBA in any occupation, *even if the work is not performed*, as in the case of a pre-hire CBA. Additionally, the reach of a CBA to set prevailing wages is based on its stated geographical jurisdiction—*not where work is actually performed*. (CP 2585) If a CBA's geographic jurisdiction covers multiple counties, the wages for each occupation listed in the CBA will be used to set prevailing wages for all the listed counties, regardless of whether work is performed in only one county. *Id.* In fact, even if the CBA covers another state or country, SSB 5493 requires that it be used to set the prevailing wage rates for every Washington county listed in the geographic scope of the agreement.[20]

When adopting wage rates pursuant to SSB 5493, neither L&I nor the Industrial Statistician makes any effort to determine (or consider) what

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[19] (CP 2550, 2596-97, 497-518)

[20] (CP 2593, 477-496 (CBA covering Idaho and Montana), 497-518 (pre-hire CBA covering Japan))

work is actually performed under the CBA.[21] If the CBA lists 20 occupations, the wages for all 20 occupations are used to set prevailing rates, even if the employer has only a single employee performing work.[22] Before SSB 5493, the Industrial Statistician considered CBAs when setting prevailing wage rates but *verified* actual work being performed, and the CBA was used to set the rate only if the wage survey confirmed the majority of workers in a "locality" were actually performing work under the CBA. (CP 2550, 2563-64) Since SSB 5493, the Industrial Statistician no longer conducts wage surveys for any trade or occupation in a county if there is a CBA covering that trade/occupation in the county, resulting in an approximately 75 percent reduction in the number of wage surveys conducted by L&I. (CP 556, 564-65, 2557-58)

Under SSB 5493, "[f]or trades and occupations with more than one [CBA] in the county, the higher rate will prevail." RCW 39.12.015(3)(a). The Industrial Statistician conceded that even if a CBA covers only 100 yards of a county, *it will still prevail to set the rate for the county*. (CP 2561) Similarly, if one CBA covers 99 percent of the hours worked in a county and another covers one percent, the CBA with the higher wage rates will

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[21] (CP 2586-87) ("Q. My question is: Are you verifying that the wages are being paid? A. No. We're not independently going out there and studying the work performed under the agreement.")

[22] (CP 2606) ("Q. To make sure that someone really has employees working under an agreement, to make sure they're actually doing the work in the county, to make sure they're actually in business, to make sure the union hasn't been decertified, all those things I just went through. You haven't gone back to check on those agreements, have you? A. I -- I generally take the agreements at face value, with some confidence that there are employers and workers under that agreement.")

prevail, *not the CBA that covers the 99 percent of hours worked*.[23] The mandates in SSB 5493 that the Industrial Statistician "shall" establish prevailing wage rates by "adopting" the wage rates from CBAs when applicable leaves no statutory authority for the Industrial Statistician to make a determination or reject a CBA that is unconscionable.[24]

C. <u>Operating Engineers (IUOE) Local 302 Negotiations & Strike</u>

AGC's concerns regarding the adverse impact of SSB 5493 are not esoteric and have come to fruition in a relatively short period of time. After SSB 5493 was signed into law in 2018, AGC began negotiations with IUOE Local 302 for a new multi-employer master labor agreement, which would cover virtually all of the operators working in 16 counties.[25] (CP 527-29) After two unsuccessful ratification votes on proposed agreements, Local 302 called a strike against the employers. *Id*. After the first week of the strike, Local 302 approached small employers and attempted to carve out a "side" agreement (as opposed to a comprehensive multi-employer agreement). (CP 527-29, 2655-2701) Some of these small employers are owned by card-carrying members of Local 302 (*i.e.*, members of Local 302 who have started their own business yet remain union members). *Id*. A few of these small employers signed agreements to end the strike in exchange for paying a higher wage rate than what AGC had offered. (CP 374-75,

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[23] (CP 2550, 2570) ("Would you agree with me, that 1 percent of the employees could set the rate for 99 percent of them? A. Yes, I would.")

[24] (CP 2550, 2569, 2588-29)

[25] The impacted counties were Clallam, Jefferson, Mason, Grays Harbor, Kitsap, Island, San Juan, King, Snohomish, Skagit, Whatcom, Kittitas and the portion of Okanogan, Chelan, Douglas and Yakima counties lying west of the 120th Meridian. (CP 527-29)

556, 559-561) AGC, representing employers that constitute roughly 75 percent of the hours worked by operators in Western Washington, held firm and a few weeks later ratified a new agreement with Local 302 that included lower wage rates than the side agreements.[26] Because of SSB 5493, the wage rates from the side agreements, which represent a minority of hours worked, were prevailed in all 16 counties. (CP 2550, 2572, 2576-2580) L&I did not confirm if there was a signatory employer doing work in each of the counties or if these small employers actually employed an operator in every occupation listed in the CBA. *Id.*

D. <u>Procedural History</u>

On January 22, 2019, AGC filed the instant action asserting that SSB 5493 is unconstitutional and moved the court for a preliminary injunction. (CP 1-97) After holding a hearing on AGC's motion on February 22, 2019, the court denied the motion. (CP 182-183) On November 12, 2019, AGC filed their motion for summary judgment. (CP 184-369) On November 27, 2019, the State filed its cross-motion for summary judgment. (CP 1794-1832) On December 27, 2019, the trial court held a hearing on the parties' cross-motions for summary judgment, denied AGC's motion for summary judgment, and granted the State's cross-motion. (CP 2536-39) In granting the State's cross-motion, the trial court issued no written opinion and instead simply adopted the State's arguments in total as set forth in its

[26] (CP 374-75, 387, 1670-1742 (pension report showing the majority of pension fund contributions, which are based on a per hour basis, come from AGC member employers)

motion.[27] AGC timely appealed the trial court's ruling. (CP 2541-2548)

IV. ARGUMENT

A. Standard of Review

The trial court resolved all of the issues in this case on summary judgment. This Court reviews a summary judgment de novo. ***Wilson v. Steinbach***, 98 Wn.2d 434,437,656 P.2d 1030 (1982). Issues of statutory and constitutional interpretation are also reviewed de novo. ***Sleasman v. City of Lacey***, 159 Wn.2d 639,642,647,151 P.3d 990 (2007). Under CR56(c), all facts and reasonable inferences from the facts are reviewed in a light most favorable to AGC as the nonmoving party.

A party challenging a statute's constitutionality bears the burden of proving its case beyond a reasonable doubt. ***Amalgamated Transit v. State***, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). This is not a burden of proof as in the criminal context; rather, as the Washington State Supreme Court explained in ***Island County v. State***, 135 W n.2d 141, 147, 955 P.2d 377 (1998), the standard is one of deference to a co-equal branch of government:[28]

The "beyond a reasonable doubt" standard used when a statute is

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[27] December 27, 2019 Verbatim Report of Proceedings ("12/27/19 RP") 19-20 ("The court is prepared to rule at this time. Sometimes I talk for a long time when I give my rulings, sometimes I don't, especially when I'm nearly certain the case will be appealed, the review standard is de novo, and I have other cases waiting and I have briefs that have been filed where, one, the prevailing party has explained my reasons in depth. I am finding in favor of the Department for the reasons articulated by the Department. It's a summary judgment motion, so I don't need to go further; for the reasons I already articulated, I'm not going to. But I will sign an order consistent with that.")

[28] Because the trial court did not enter a reasoned written opinion in granting the State's cross-motion for summary judgment, it is not clear whether it properly applied this standard of review. (CP 2536-39; RP 12/27/19 19-20)

> challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.

That standard does not prevent this Court from exercising its prime constitutional role of declaring what our Constitution means and finding a statute wanting, as the Court did in ***Island County*** and in many other instances too numerous to recite. AGC concedes the legislature has the constitutional authority to establish prevailing wage rates. The issue is not the constitutionality of prevailing wage laws but whether the method codified by SSB 5493 to establish a prevailing wage complies with constitutional requirements. It does not beyond a reasonable doubt.[29]

B. <u>SSB 5493 Violates the Non-Delegation Doctrine</u>

1. SSB 5493 Violates the Non-Delegation Doctrine by Adopting Future Facts.

The Washington State Constitution vests legislative authority with the state senate and house of representatives. Wash. Const. Art. II, § 1. It is unconstitutional for the legislature to "abdicate or transfer its legislative function to others." ***Brower v. State***, 137 Wn.2d 44, 54, 969 P.2d 42 (1998).

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[29] Here, in adopting all the State's arguments set forth in its cross-motion for summary judgment in granting summary judgment in favor of the State, the trial court held that SSB 5493 does not violate the non-delegation doctrine, due process and equal protection clauses and Article II, § 37 of the State Constitution. (CP 2536-39; RP 12/27/19 19-20) While AGC contends that the trial court erred in finding no constitutional violation on *each* of these bases, this Court need only find that it erred with regard to *one* to reverse the trial court's ruling on that specified basis and hold SSB 5493 unconstitutional on summary judgment grounds.

"This legislative duty requires that all statutes be complete when they leave the legislature." ***State v. Batson***, 9 Wn. App. 2d 546, 550, 447 P.3d 402 (2019). When the legislature points to a fact already in existence, it is legislating; but when the legislature points to a fact that will be created in the future, it is delegating—not legislating.[30] As such, incorporating a fact not in existence at the time a statute is enacted is an unlawful delegation of legislative authority. ***Kirschner,*** 50 Wn.2d at 135-37; ***Woodson v. State***, 95 Wn.2d 257, 261, 623 P.2d 683 (1980).

SSB 5493 violates this well-settled constitutional standard articulated by the Washington Supreme Court in ***Kirschner***, as affirmed in ***Woodson*** and more recently in ***Batson***, namely: The legislature cannot delegate authority to a private party to establish "a fact" *in the future* that will be incorporated in legislation. Notably here, the Industrial Statistician admitted:

- Under SSB 5493*, he will be adopting future wage rates* from CBAs created by private parties that did not exist at the time SSB 5493 was enacted.[31]

- He has no discretion but to adopt the future CBA rates created by private parties.[32]

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[30] *See* ***State ex rel. Kirschner v. Urquhart***, 50 Wn.2d 131, 135, 310 P.2d 261 (1957) ("When the legislature declares that schools on an existing list are accredited schools and those not on an existing list are not, it is legislating; but when it declares that accredited schools shall be those on a list thereafter to be promulgated, irrespective of the authority promulgating such list, it is attempting to delegate legislative power, and such an act is unconstitutional.")

[31] (CP 2550, 2603) ("Q: In the future, you're going to be prevailing collective bargaining agreements that did not exist at the time 5493 was passed, right? A: Yes.")

[32] (CP 2550, 2567-68) ("Q. So the union rate will be the prevailing wage rate if there's a collective bargaining agreement? A. Yes. Q. And it's mandatory? A. Yes.") Several weeks later, Mr. Christensen attempted to change this straightforward answer to add a "bona fide" CBA preface. (CP 2610) Notably, however, "[s]elf-serving affidavits contradicting prior

These admissions are detrimental to the State's position. The State attempts to undercut his admissions by asserting that, because the Industrial Statistician merely adopts or uses the future CBA wage rates to "make [a] determination," SSB 5493 must be constitutional.[33] This argument ignores the complete lack of discretion the Industrial Statistician has to make any "determination" whatsoever to review or modify the wage rate in a CBA. It similarly ignores Washington Supreme Court precedent holding that statutes that incorporate facts from future "lists" to be created by private parties are an unconstitutional delegation of legislative authority,[34] as well as the Court's repeated reliance on ***Wagner v. Milwaukee***, 188 N.W. 487 (Wis. 1922), which specifically addresses adopting CBA wage rates as the prevailing wage rate as an example of an unconstitutional delegation.[35]

The Washington Supreme Court squarely confronted this issue in ***Kirschner***. There, the court struck down a 1947 amendment to the medical licensing statute that required applicants to have graduated from a medical

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depositions cannot be used to create an issue of material fact." ***McCormick v. Lake Wash. Sch. Dist***., 99 Wn. App. 107, 111, 992 P.2d 107 (1999). "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." ***Klontz v. Puget Sound Power & Light Co.***, 90 Wn. App. 186, 192, 951 P.2d 280 (1998) (quoting ***Marshall v. AC & S, Inc.***, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)).

[33] *See* CP 1808 (State's assertion that "cases such as [***Kirschner***] do not apply when the Legislature has delegated to an agency the ability to use facts to make its determination.").

[34] *See, e.g.*, ***Kirschner,*** 50 Wn.2d at 135-37; ***Woodson***, 95 Wn.2d at 261.

[35] Here, the trial court requested a 50-state survey of prevailing wage laws and similar constitutional challenges, which identified 15 relevant cases. (CP 388, 1756-1772) The Washington Supreme Court has twice approvingly cited ***Wagner***, one of the relevant cases, when addressing the non-delegation doctrine. *See* ***Kirschner***, 50 Wn.2d at 136; ***Woodson***, 95 Wn.2d at 261. The Washington Supreme Court has thus approved the reason found in ***Wagner*** that delegating the setting of prevailing wage to the collective bargaining process was unconstitutional.

school accredited by the Association of American Medical Colleges ("AAMC") or American Medical Association ("AMA") at the time the applicant graduated. ***Kirschner***, 50 Wn.2d at 132-35. The plaintiff graduated in 1937 from the University of Vienna medical school, but neither the AAMC nor AMA created a list of accredited foreign medical schools until 1950—three years *after* the 1947 amendment. *Id*. Striking down the 1947 amendment, the court explained:

> It would have been proper for the legislature to have enacted that accredited schools were only those on a list then in being, whether prescribed by the [AMA,] or some other learned society; but it was not within permissible constitutional limits to define accredited institutions as those on a list not then in existence, irrespective of the standing of the society which might compile such future list.

Id. Notably, the Court relied on the Supreme Court of Wisconsin's decision in ***Wagner***, which addressed an issue nearly identical to the instant matter as an example or an impermissible delegation. *Id.*, at 136.

In ***Wagner***, the court struck down a Milwaukee prevailing wage ordinance as an unconstitutional delegation of legislative authority because it mandated prevailing wages be set based on wage rates from CBAs. ***Wagner***, 188 N.W. at 489-90. There, as with SSB 5493, the ordinance required the "prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor." *Id.* The ordinance was unconstitutional delegation by the members of the city council of their independent judgment and an impermissible agreement to be bound by a wage scale to be determined in the future by employers and labor unions. *Id*. Other cases

citing ***Wagner*** are also instructive here. For example, in ***Fuldauer v. City of Cleveland***, 285 N.E.2d 80 (Ohio App 1972), citing ***Wagner***, the Ohio Court of Appeals recognized that courts have struck down prevailing wage statutes "especially where the wage setting depends upon a future determination of facts as contrasted with a simple reference to a fact already in existence, *e.g.*, an existing prevailing wage." *See* ***Fuldauer***, 285 N.E.2d at 89, n. 11.

Notably, the court in ***Kirschner*** cites approvingly other examples of unconstitutional delegations based on "future facts," such as ***State v. Crawford***, 177 P. 360 (Kan. 1919), a Kansas Supreme Court case addressing the adoption of the national electrical code, which is compiled and revised every two years, as follows:

> [T]he legislature of Kansas enacted a statute requiring all electrical wiring within that state to conform to the national electrical code; and this, the supreme court of Kansas said, was an unlawful attempt to delegate legislative power. Had the act provided that all electrical wiring conform to the national electrical code of 1915, or to any then-existing edition thereof, no question would arise; but the use of future editions was held unconstitutional in *State v. Crawford*, 104 Kan. 141.

Kirschner, 50 Wn.2d at 136. Thus, the Washington Supreme Court has held that incorporating "future facts" in a regulatory scheme is impermissible even when the future fact is established by a government actor. *Id*. at 137 ("Statutes adopting existing Federal rules, regulations, or statutes, are valid, but attempts to adopt future Federal rules, regulations, or statutes, are unconstitutional and void."). Washington courts have consistently upheld the ***Kirschner*** standard distinguishing between legislating based on current

facts and delegating based on future facts. *See* ***Woodson***, 95 Wn.2d at 261 (reaffirming the holding and reasoning of ***Kirschner*** and again citing ***Wagner*** as an example of an impermissible delegation of legislative authority); ***Batson***, 9 Wn. App. 2d at 550 (citing ***Kirschner*** for the proposition that the "legislature cannot pass licensing law that declares that accredited medical schools shall be those thereafter established by private medical societies").

The vice of SSB 5493 is it mandates the use of Schedule A wage rate lists in CBAs created *after* its enactment to establish prevailing wages—*i.e.*, "[CBA wage rate lists] thereafter to be promulgated." SSB 5493 violates ***Kirschner's*** holding that the usage of future facts is an unconstitutional delegation of authority. SSB 5493 attempts to unlawfully delegate the legislature's authority by "adopting" the wages in future CBAs as the prevailing wages. Although a future list of accredited medical schools is not at issue as in ***Kirschner***, a future list of wage rates is at issue. If the legislature had made the decision to adopt the CBA wage rates in existence at the time it passed SSB 5493, it would have been legislating—but that is not what happened.[36] Instead, SSB 5493 mandates the adoption of the wage rates *contained in future CBAs*, which is delegating.[37]

Under established Washington Supreme Court precedent, SSB 5493 would be unconstitutional if it attempted to adopt the future federal

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[36] AGC notes that such a rule would still violate due process and equal protection standards and violate Article II, §37 of the Washington State Constitution.

[37] The Industrial Statistician concedes that CBAs not in existence when SSB 5493 passed will be used to establish prevailing wages under SSB 5493. (CP 2603)

prevailing wage rates promulgated by the U.S. Secretary of Labor. ***Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.***, 113 Wn.2d 19, 24-5 (1989) ("It is well settled in Washington that the legislature may not constitutionally attempt to adopt future federal law by statute.").[38] The Oklahoma Supreme Court confronted this exact issue in ***City of Okla. City v. State ex rel. Okla. DOL***, 918 P.2d 26, 30 (Okla. 1995), holding that an amendment to Oklahoma's prevailing wage law was an unconstitutional delegation of legislative authority where the amendment mandated that Oklahoma's Labor Commissioner use the prevailing wage rates set by the federal Department of Labor to establish the prevailing wages within the state. *Id*. at 30. There, the court seized on the fact the Commissioner had *no discretion* to review or modify the future federal prevailing wage rates enacted under the Davis Bacon Act. *Id*. Even though the legislature delegated its authority to the federal government (not private parties in the same industry as with SSB 5493), the Commissioner's lack of authority to review and modify the federal wage rates, as appropriate, was fatal under the non-delegation doctrine. *Id*. This follows the holdings and reasoning of the Washington Supreme Court in myriad cases including ***Diversified Inv. P'ship***, ***Woodson*** and ***Dougall***, *supra*.

If it is "well-settled," according to the Washington Supreme Court, that an attempt to "adopt" future wage rates established by the U.S.

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[38] *C.f.,* ***State v. Dougall***, 89 Wn.2d 118, 123 (1977) (holding delegation of legislative authority unconstitutional when Washington's Uniform Controlled Substances Act attempted to incorporate all of the substances designated as controlled substances by the federal government on an ongoing basis).

Department of Labor violates the non-delegation doctrine, it cannot seriously be contended that adoption of future rates that will be established by private parties in a for-profit industry does not violate the same doctrine. SSB 5493 is unconstitutional beyond a reasonable doubt.

2. SSB 5493 Violates the Non-Delegation Doctrine Because It Contains No Procedural Safeguards.[39]

"Delegation [of legislative authority] to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency." ***United Chiropractors of Wash., Inc. v. State***, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978). As the United States Supreme Court explained in ***Carter v. Carter Coal Co.***, 298 U.S. 238 (1936), a delegation of regulatory authority to interested private parties represents a "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.*, at 311. Recognizing this danger, the Washington State Supreme Court has held that "the legislature

[39] In its motion for summary judgment, AGC addressed SSB 5493's lack of procedural safeguards within the context of SSB 5493's violation of federal and state due process protections. (CP 197, 200-206) In response to AGC's motion and in support of its cross-motion, the State relied on the Washington Supreme Court's decision in ***Barry & Barry v. Dep't of Motor Vehicles***, 81 Wn.2d 155, 500 P.2d 540 (1972), in asserting that procedural safeguards—or a lack thereof—implicate the non-delegation doctrine. (CP 1816) As described *supra*, the trial court issued no written opinion and instead simply adopted the State's arguments in total—presumably including the State's assertion that SSB 5493 does not run afoul of the non-delegation doctrine because it purportedly contains sufficient procedural safeguards—as set forth in its cross-motion. Given the trial court's presumed acceptance of the State's assertion in this regard as a basis for granting the State's cross-motion for summary judgment, AGC addresses SSB 5493's lack of procedural safeguards as a basis for its violation of the non-delegation doctrine.

may grant regulatory authority to private parties only if proper standards, guidelines, and procedural safeguards exist." ***United Chiropractors of Wash., Inc. v. State***, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978) (citing ***Barry & Barry v. Dep't of Motor Vehicles***, 81 Wn.2d 155, 500 P.2d 540 (1972)).

As the State concedes in its reliance on ***Barry***, safeguards are a *constitutional requirement* to ensure compliance with the non-delegation doctrine—not mere precatory policy choices as the State suggests—to guard against arbitrary self-motivated actions and abuse by interested private parties—such as, in this case, unions and union contractors in their private negotiations.[40] *See* ***United Chiropractors***, 90 Wn.2d at 4, 7; ***Barry***, 81 Wn.2d at 164. While the legislature has the freedom to choose between safeguards, it does not have the freedom to choose to implement *no* safeguards without violating the non-delegation doctrine. Here the issue is not whether any safeguards in SSB 5493 are sufficient because there are none.[41] SSB 5493 is, therefore, unconstitutional beyond a reasonable doubt

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[40] (CP 1807-1812)

[41] In this case, the State completed a survey of current prevailing wage statutes in all 50 states. (CP 388, 1756-1772) In total, 26 states have prevailing wage laws. *Id.* Of those, only Massachusetts, Ohio and Hawaii have laws akin to SSB 5493. *Id.* Every other state that considers CBA wage rates either has procedural protections limiting consideration of CBAs or does so in a permissive—not mandatory—manner. *See id*. For example, New Jersey uses only rates from the CBA covering the majority of workers in each locality. *See* N.J. Stat. § 34:11-56.26(9) (defining "prevailing wage"). New York uses CBA wage rates only if they cover at least 30 percent of the workers. *See* NY CLS Labor § 220(5)(a). California uses CBA wage rates only if they are actually "prevailing." ***Ind. Roofing Contractors v. Dept. of Indus. Rel.***, 23 Cal. App. 4th 345, 355, (Cal. App. 1994) ("The Department is allowed to rely on CBA wage rates as a basis for a prevailing wage only where the CBA constitutes 'the rates actually prevailing in the locality.'") (quoting Cal. Lab. Code § 1773). Even Hawaii, which generally uses CBAs, has a procedural requirement for submitting CBAs to be considered. *See* HRS § 104-34.

in violation of the non-delegation doctrine.[42]

a. The Plain Language of SSB 5493 Contains No Safeguards.

The first constitutional failure of SSB 5493 is the statutory language itself, which provides no safeguards to prevent arbitrary action and abuse of power. SSB 5493 does not require the Industrial Statistician to:

- verify whether a CBA is signed by the employer and union prior to using the CBA to establish a prevailing wage rate;
- verify whether a CBA is expired prior to using the CBA to establish a prevailing wage rate;
- verify whether a CBA downloaded from an unsecure website is accurate prior to using the CBA to establish a prevailing wage rate;
- verify whether a CBA is signed by a union member as the "employer" prior to using the CBA to establish a prevailing wage rate;
- verify whether a pre-hire CBA covers any actual employees prior to using the CBA to establish a prevailing wage rate;[43]
- verify whether there is evidence of collusion in the establishment of a CBA, such as a voluntary reduction in the fringe benefit contribution rate, prior to using the CBA to establish a prevailing wage rate;
- provide private parties with any standards for negotiations resulting in the formation of a CBA used to establish a prevailing wage rate under SSB 5493;[44]
- verify whether a signatory employer is performing work in the counties covered by the "geographic jurisdiction"

[42] As described *infra*, SSB 5493's lack of safeguards similarly results in a violation of constitutional due process protections.

[43] (CP 2550, 2594) ("Q: Are you checking if employees are working under those agreements? A: No.")

[44] (CP 2550, 2602)

provision of a CBA used to establish a prevailing wage rate under SSB 5493;[45] or

- verify if unsigned CBAs are used to set prevailing wages.

SSB 5493 contains no safeguards to guard against using unsigned CBAs to establish prevailing wage rates. The State offered no admissible evidence to counter the evidence submitted by AGC of *86* unsigned CBAs that have been used to establish prevailing wage rates following the enactment of SSB 5493.[46] Instead, the State relied solely on the Industrial Statistician's *assumptions* in claiming that "the record is clear that the copy that L&I has may be unsigned but that the agreement itself is signed."[47]

The Industrial Statistician's "assumptions" are not facts for summary judgment purposes.[48] Instead, the uncontested *facts* reflect that the State is using unsigned CBAs to establish prevailing wage rates.[49] There

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[45] (CP 2550, 2585) ("Q. What if the employer is a signator to a collective bargaining agreement that includes King County and Yakima County but performs no work in Yakima County? Will you still prevail that rate in Yakima County? A. Yes. Q. So the employers in Yakima County will be subject to the prevailing wage rate of an employer who never worked in their county? A. Potentially, yes.")

[46] (CP 2550, 2592 ("What you're doing at L&I is, you're prevailing these collective bargaining agreements on the assumption that they're signed. But you don't have a signed agreement; is that right? A. That's correct."), 391-476 (including 86 unsigned signature pages from CBAs used by the State to establish prevailing wages)

[47] (CP 1799, 2592)

[48] A statement of belief that contradicts objective evidence such as an unambiguous, unsigned document may not create a dispute of fact defeating summary judgment. *See, e.g.*, ***Scott v. Harris***, 550 U.S. 372, 379-81 (2007) (holding plaintiff's testimony that he was not fleeing from police and was not driving recklessly and therefore was not a threat did not create a "genuine" dispute of fact where the plaintiff's testimony was "blatantly contradicted" by videotape of the incident).

[49] L&I's practice is to rely on unsigned CBAs obtained from union websites to set prevailing wages under SSB 5493. (CP 556-574) Notably, the State *objected* to evidence regarding union membership adduced by AGC from the website "unionstats.com" as "unreliable hearsay." (CP 1806) To this end, the State concedes the very argument AGC has advanced throughout this litigation: It is inappropriate to use data from a CBA downloaded from a website to create a regulation when L&I does not verify the contract

was a simple way for the State to establish the CBAs in question are signed: produce signed copies, which the Stated did not do, even after being directly confronted on the issue during the Industrial Statistician's deposition. On the record before the Court for purposes of this appeal, the State is using unsigned CBAs to establish prevailing wages. As the State concedes, such CBAs cannot be "bona fide" and would not constitute CBAs for prevailing wage purposes with no safeguards in place to prevent such a practice.[50]

i. Expired CBAs Used to Set Prevailing Wages

SSB 5493 contains no safeguards to guard against using expired CBAs to establish prevailing wage rates. The State attempted to dismiss its use of expired CBAs to set prevailing wage rates by citing the possibility that the CBAs were continued through "evergreen provisions."[51] (CP 1799, 2587) The Industrial Statistician's testimony relied upon by the State, however, reflects that he *does not know what an evergreen provision is*, nor does he have any awareness of L&I verifying any such provision.[52] By affirmatively stating that "many" CBAs have evergreen provisions as a justification for prevailing expired CBAs, the State concedes that "some" agreements do not. The State has taken no steps to verify whether an

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details such as whether the contract is signed, whether the contract is expired, whether any work is performed under the contract, and where work is performed under the contract. Notably, before SSB 5493, this issue did not exist. Even if L&I downloaded a CBA from a website, the wage survey methodology provided a safeguard to verify whether the wages in the CBA were actually the prevailing wage rate for each county.

[50] (CP 549, 551-52) ("I cannot recall any CBA which was not signed by both labor and management. Such an agreement would not be a collective bargaining agreement.")

[51] An evergreen provision provides that after the stated expiration of the agreement, the agreement will roll over from year to year unless a party objects.

[52] (CP 2587-88) ("Q: Do you know what an evergreen provision is. A: No.")

evergreen provision has been triggered to extend the duration of any CBA in question. For purposes of this appeal, based on the evidence submitted to the trial court,[53] the Court should accept as an undisputed fact that the State is using expired CBAs to establish prevailing wage rates with no safeguards in place to prevent against such a practice.

ii. SSB 5493 Does Not Address Pre-Hire CBAs

SSB 5493 contains no safeguards to address the unique nature of "pre-hire" CBAs negotiated under §8(f) of the NLRA.[54] (CP 2550, 2596) A pre-hire CBA is signed before any employees have been hired and before a union is certified through an election or recognized by demonstrating majority support. *Id*. No hours have been worked under a pre-hire CBA. *Id*. It is, however, still a valid CBA and can exist for years even if no employee is ever hired. Under SSB 5493, as the Industrial Statistician concedes, because a pre-hire CBA can establish the prevailing wage within a county, the Industrial Statistician may be required to adopt as the prevailing wage rate a wage rate from an employer who (a) has *no employees*, (b) has performed *no work* (public or private) and (c) has agreed to a CBA with a union that *has not been certified or recognized*. (CP 2597) Notably, when asked to produce the CBAs used to establish prevailing wages under SSB 5493, the State produced a pre-hire agreement. (CP 2597, 497-518) For purposes of this appeal, based on the evidence submitted to the trial court,[55] the Court should accept as an

[53] (CP 2550, 2591, 2702-2745) (listing 889 occupation/county combinations with prevailing wages based on expired agreements as of 6/11/2019); 5556, 0571 ("Q. So you're basing that prevailing wage rate on an expired agreement? A. Yes."), 571-73, 578-1669)
[54] 29 U.S.C. § 158(f).
[55] (CP 2597, 497-518)

undisputed fact that the State is using pre-hire CBAs to establish prevailing wage rates with no safeguards in place to prevent against such a practice.

iii. The State Cannot Detect or Prevent Collusion.

SSB 5493 contains no safeguards to ensure a CBA used to establish a prevailing wage rate is truly negotiated at arm's length, as the Industrial Statistician admitted.[56] (CP 2550, 2601) SSB 5493 does not prohibit small businesses owned by a card-carrying members of a trade union from entering into a CBA with that same union. In the case of Local 302's strike, that is what happened.[57] There, despite the fact that the super-majority of operator hours worked in Local 302's geographic jurisdiction are worked under the AGC-negotiated CBA, the side agreement now prevails because it has a higher wage rate. (CP 556, 561) Notably, before SSB 5493, the Industrial Statistician stated that such a result would not be consistent with

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[56] The State dismisses AGC's argument that SSB 5493 includes no safeguards to ensure a CBA is bargained in good faith by assuring the Court that "the industrial statistician reviews CBAs to determine whether they involve collective bargaining and so are bona fide." (CP 1811) The NLRB, however, is the forum to evaluate the validity of a CBA, not the Industrial Statistician. And according to the Board, "[t]here are hundreds, perhaps thousands, of NLRB cases dealing with the issue of the duty to bargain in good faith." https://www.nlrb.gov/rights-we-protect/rights/employer-union-rightsand-obligations (accessed Dec. 15, 2019). The NLRB reviews objective criteria to determine if parties are honoring their obligation to bargain in good faith, including the parties' conduct away from the table. Accepting the State's argument, who needs the NLRB or its precedent when the State can rely on the Industrial Statistician's ability to weed out suspect CBAs?

[57] The State does not dispute that card-carrying members of Local 302 are signatories to the CBA being used to set prevailing wage rates for operators in sixteen counties. *See* supra, § III.C. The result of such a practice is that a single union member can negotiate with her or his union to set the prevailing wage for every employee in each occupation category. Despite the Industrial Statistician's background, he apparently had no idea that this commonly happens in the construction industry, and, in fact, occurred in the case of Local 302. (CP 528-29, 2320) SSB 5493 contains no safeguards to guard against this practice by self-interested parties to influence—or manipulate—the prevailing wage rate.

the purpose of the Act. (CP 388, 1743-51) He additionally concedes that interested parties are negotiating CBAs that have the effect to set the prevailing wage rate within the particular occupation or trade without government oversight. (CP 2601) As demonstrated with the Local 302 agreements, under SSB 5493 a subgroup of the industry can advance its own pecuniary interests over competitors representing the majority without any review or reversal by a neutral government official.[58]

The State failed to offer any evidence to show an unbiased and "arm's length" explanation for Local 302 reducing the fringe benefit contribution rate in its contract with "independent contractors," which is used to set the prevailing wage rate for all operators in sixteen counties.[59] Nor did it—or can it—refute the fact that SSB 5493 did not allow the Industrial Statistician to evaluate the *bona fide* nature of this CBA. Instead, he merely adopted the rate in the *redlined, unsigned draft CBA* posted on the Internet without testing its veracity or investigating indicators of collusion. (CP 2576-2580, 2655-2701) For purposes of this appeal, based on the evidence submitted to the trial court, the Court should accept as an undisputed fact that the State has failed to identify any safeguards in place

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[58] It should come as no surprise a Director of Local 302, Josh Swanson, was instrumental in drafting the language of SSB 5493. (CP 1743-51)

[59] The State's declaration from Local 302 does not dispute the fact that the Industrial Statistician did not "ask any questions" to explain why the fringe benefit contribution rate in the Local 302/independent contractor CBA was originally listed as "$TBD." (CP 1926-1932, 2670-2671) Nor did the State's declaration provide any explanation for why the contribution rate was "$TBD" in a CBA used to establish the prevailing wages. *Id.* The State does not provide an explanation but a comparison with the AGC master agreement makes it clear the union waited and set the contribution rates to match the terms agreed to by AGC. (*Compare* CP 2613-2654 *with* 2655-2701)

to detect or prevent collusion, including manipulation by interested parties of the prevailing wage rate.

b. SSB 5493 Prohibits Independent Review.

SSB 5493 also fails to provide constitutionally required procedural safeguards not only because there is no provision providing for independent review by a government agency, but because SSB 5493 actually *prohibits* such review. The Industrial Statistician has *no discretion* to reject a CBA wage rate that is obviously: (1) lower than the actual prevailing wage in the locality (*i.e.*, the wage paid to the majority of workers); or (2) higher than the actual prevailing wage in the locality.[60] If he cannot reject a rate that is too low and he cannot reject a rate that is too high, the only logical conclusion is the Industrial Statistician has no discretion.

SSB 5493's failure to provide for independent review of CBA wage rates by an unbiased public official—namely, the Industrial Statistician—is fatal. As the Industrial Statistician concedes, the statute is now bereft of any delegation of authority for him to do anything other than copy the union CBA rates. (CP 2550, 2566) Regardless of whether a CBA wage rate is higher or lower than the prevailing wage in the locality or whether it applies to 1,000 hours or no hours, under SSB 5493 the Industrial Statistician is prohibited from reviewing, modifying or otherwise rejecting the highest wage rate from a CBA in the county. The Industrial Statistician no longer determines the

[60] (CP 2569, 2588-89) ("Q. Your role is to adopt the highest rate within the geographic restriction, right? A. Yes. Q. You don't have the discretion to say, I'm not going to take that rate because it's too high? A. Correct. Q. You don't have the discretion to say, I'm not going to take that rate because it's too low? A. Correct.")

prevailing wage rate; he merely *collects and copies CBAs negotiated by private parties.* He is required to use, as his *only* source of wage data, collectively bargained wage rates without considering how many employees are covered, whether there is a signatory employer in each county within the stated geographical jurisdiction, whether any hours are actually worked under the agreement and the reasonableness of the wages. (CP 2550, 2566) None of that matters under SSB 5493.

The State made much of the background of the Industrial Statistician, Mr. Christensen, claiming his experience allows him to "see patterns" and recognize suspicious CBAs so that he can ferret out those expired, unsigned, wrongly identified party agreements. (CP 1800) The record is clear, however, that L&I Economic Analyst 2 Sean Anderson, does all of the work collecting CBAs, analyzing them to determine wage rates, and updating prevailing wage rates for publication.[61] AGC assumes Mr. Anderson is a dedicated State employee; however, he has none of Mr. Christensen's experience or education to know if collusive bargaining has occurred,[62] though notably, the Industrial Statistician never actually questions the bargaining parties about anything either. (CP 2414) Perhaps this explains why Mr. Christensen did not "see any patterns" or "ask any questions" when prevailing wage rates doubled for some occupations

[61] (CP 2161, 2403, 2406, 2419)

[62] Mr. Anderson earned a degree in English from Western Washington University in 2005, worked as a fee collector for the National Park Service for two summers, worked for a nonprofit helping disabled adults, and then was hired as a data compiler for L&I in 2007. (CP 2484-85)

following the implementation of SSB 5493.[63]

Although presenting a question of first impression in the State of Washington, other courts have previously considered constitutional challenges to similar statutes and "[s]tatutes which make the union scale absolutely determinative of prevailing wages have been held to be invalid" delegations of legislative authority.[64] *See* ***Hunter v. Bozeman***, 700 P.2d 184, 187 (Mont. 1985). Here, the Industrial Statistician testified that, with the passage of SSB 5493, L&I would now *only adopt the union scale*, ignoring the actual hours worked and open shop wage data. (CP 2568) As such, SSB 5493 suffers from the same fatal flaw as the statutes struck down in other states because it allows interested private parties to enact regulations without any safeguard in the form of government review. As the Industrial Statistician concedes, SSB 5493 allows private parties to set the prevailing wage rate without L&I's involvement.[65] SSB 5493 gives the Industrial Statistician *no discretion* whatsoever to review and accept or reject CBA wage rates.[66]

c. An Appeal Process Without Meaningful Information is Not a Constitutional Safeguard.

The State asserts that because an appeal process exists to challenge a prevailing wage determination,[67] SSB 5493 includes a safeguard. (CP 1817) This ignores: (1) the lack of safeguards in the statute itself; and (2)

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[63] (CP 2411)("Q. Because certain prevailing wage rates doubled as a result of this law, right? A. Yes.")

[64] *See also* CP 388, 1756-1772 (summarizing similar constitutional challenges).

[65] (CP 2600) ("Q. Under 5493, the union and the employer give you the rates in the collective bargaining agreement. And with that information, you prevail the rate if it's the highest; is that correct? A. Yes.")

[66] *See* RCW 39.12.015(3).

[67] *See* RCW 39.12.060 and RCW 34.05.570(4).

the lack of information available to support an appeal. The Industrial Statistician testified that SSB 5493 provides no rulemaking authority or other mechanism to provide interpretative guidelines or policies for the new law. (CP 2176) As it stands today, if a prevailing wage rate based on a CBA is appealed, the production of a signed CBA with an employer listed would be all the State needs to produce—and, as shown, the State *may not even produce a singed CBA*. It instead may produce a redlined agreement with no employer listed, and as long as the Industrial Statistician "assumes" the CBA is signed, that is enough to establish the document as a bona fide CBA. (CP 2550, 2592) The State need not prove any hours are worked under the CBA or even that the signatory employer works in the relevant county. And, as shown, the State *may not even produce a signed CBA*. To call this "appeal process" a rubber stamp would be generous. It is not a procedural safeguard. It is a surrender of oversight on public projects financed by taxpayers, and it is unconstitutional beyond a reasonable doubt.

C. <u>SSB 5493 Provides No Due Process Protections for Contractors</u>

SSB 5493's mandate that privately negotiated CBAs be used to establish prevailing wage rates without any safeguards or government review (as described in detail *supra*) violates the due process rights of all employees and employers who are not a party to the CBAs being used. Constitutional due process protections provide that "[n]o person shall be deprived of life, liberty, or property without due process of law." Wash. Const. Art. I, § 3; *see also* U.S. Const. amend. XIV ("No state shall ... deprive a person of life, liberty, or property, without due process of law"). Due to the unique concerns implicated

in the delegation of legislative authority to private parties, such a delegation does not run afoul of constitutional due process protections *only if* proper standards, guidelines and procedural safeguards exist. ***Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't***, 153 Wn.2d 657, 664, 105 P.3d 985 (2005) (citing ***United Chiropractors of Wash., Inc. v. State***, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978)). This rule protects the constitutional due process rights of those "who do not belong to the legislatively favored organizations." ***United Chiropractors***, 90 Wn.2d at 6.

Applying this standard, the Washington Supreme Court in ***United Chiropractors*** struck down a statute vesting two chiropractic trade organizations with the authority to nominate members of the regulatory board responsible for overseeing them. *Id*. Relying on ***Barry & Barry v. State Dep't of Motor Vehicles***, 81 Wn.2d 155, 500 P.2d 540 (1972), the Court found a lack of safeguards in the delegation of legislative authority to the chiropractor regulatory board violated the constitutional due process rights of chiropractors not belonging to that favored organization as follows:

> The second component of the test set forth in *Barry & Barry, Inc. v. Department of Motor Vehicles*, *supra*, is applicable here and this delegation violates the constitutional due process rights of those chiropractors who do not belong to the legislatively favored organizations. The procedural safeguards which exist in this scheme are inadequate to control arbitrary administrative action and abuse of discretion in licensing and disciplining of chiropractors not belonging to the favored groups. As stated in *Group Health Ins. v. Howell*, 40 N.J. 436, 445, 193 A.2d 103 (1963), wherein the New Jersey Supreme Court invalidated a delegation of power to the State Medical Society to approve the trustees of medical service corporations, "We think such a power to determine who shall have the right to engage in an otherwise lawful enterprise may not validly be delegated by the Legislature to a private body which, unlike a public official, is not

> subject to public accountability, at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action on the part of such private body."… As stated in *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 236, 368 P.2d 101, 18 Cal. Rptr. 501 (1962), wherein the California Supreme Court struck down a law allowing already-licensed dispensing opticians to control licensing of new opticians, "Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse." The statutes under attack here, as they relate to methods of appointment, violate this principle and offend both federal and state constitutional due process standards.

Id., at 6-7. The court was concerned with the lack of any oversight or independent review by governmental officials because members of the sub-group could "advance the pecuniary interests of the members of the favored groups" without being subject to review or reversal by government. *Id.*

Similarly, the United States Supreme Court has held that private entities wielding regulatory power must be "disinterested" so that personal interests do not influence the discharge of a public duty. *See, e.g.,* ***Gibson v. Berryhill***, 411 U.S. 564, 578-79 (1973). In ***Carter v. Carter Coal Co***., 298 U.S. 238 (1936), the Court struck down the Bituminous Coal Conservation Act, which delegated authority to establish the minimum wages and maximum hours within the coal mining industry to a small group of coal producers and miners. *Id*. at 310-11. The Court held that granting a private entity "the power to regulate the business of another, and especially of a competitor" is "clearly a denial of rights safeguarded by the due process clause." *Id*. at 311-12.

Here, SSB 5493 delegates regulatory authority to a sub-group (unions and union contractors) who are interested parties in the construction industry, without providing any safeguards, in the form of government oversight or

review. *See supra*, § IV.B.2. Indeed, SSB 5493 actually *prohibits* such review by affording the Industrial Statistician has *no discretion* to reject a CBA wage rate. *See supra,* § IV.B.2.b. SSB 5493 is unconstitutional beyond a reasonable doubt by violating due process protections.

D. <u>SSB 5493 Does Not Provide Equal Protection Under the Law</u>

SSB 5493 violates the equal protection clauses of the Washington State Constitution and Fourteenth Amendment because SSB 5493 does not rationally further the dual purposes of the Act. "No law shall be passed granting to any citizen, class of citizens, or corporation ... privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. art. I, §12; *see also* U.S. Const. amend XIV. When passing on the constitutionality of an economic regulation, courts apply the rational basis test: they first identify the purpose of the statute and then ask if the classification within the statute rationally furthers that purpose. ***Foley v. Dep't of Fisheries***, 119 Wn.2d 783, 788, 578 P.2d 38 (1992). If the classification fails to rationally further the purpose of the statute, it is unconstitutional. ***Peterson v. Hagan***, 56 Wn.2d 48, 60-2, 351 P.2d 127 (1960).

In ***Peterson***, the Washington Supreme Court struck down an overtime wage statute on equal protection grounds. *Id*., 56 Wn.2d at 56. There the statute required employers not engaged in interstate commerce to pay overtime to employees who worked more than eight hours in a day, while exempting employers engaged in interstate commerce. *Id*. at 55-60. The Court noted the original purpose of the statute was to protect women

and children from excessive work and substandard working conditions and concluded the amendment resulted in different treatment for employers without furthering the purpose of the statute. *Id*. "Except for the accident of interstate commerce, employers engaged in identical businesses [were] not equally dealt with," which was a clear violation of equal protection.[68]

Washington's "prevailing wage statute has two purposes: to protect employees working on public projects from substandard wages and to preserve local wages." ***Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus***., 84 Wn. App. 401, 406, 929 P.2d 1120 (1996). At issue is whether SSB 5493 furthers these dual purposes. Before SSB 5493, the Act clearly did so. By conducting wage surveys, L&I gathered 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.

Instead, SSB 5493 *excludes* the wages paid to a vast majority (or even all) of the workers in a county when determining the "prevailing wage." Such exclusion is not a rational means of protecting workers from substandard wages. Following SSB 5493, in any county with an applicable CBA, the prevailing wage is based on CBA wages only—*even if non-union*

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[68] *Id.* at 58. ("One must pay its employees overtime for more than eight hours work in any one day, while the other is not so required to do. This is not classification or even an attempt at classification. It is discrimination – no more, no less – and prohibited by the equal protection clause.")

employees earn a higher hourly wage.[69]

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.

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.[70] 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

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[69] (CP 2574 ("The CBA could have a lower rate than the majority of employees or workers in the occupation and have the effect of lowering the prevailing wage rate? A. Yes."), 388, 1754)

[70] (CP 2567) ("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.")

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. This is irrational because it 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.[71] Now under SSB 5493 and its "highest wage" requirement, the Industrial Statistician does not preserve local wages—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, and the smaller Grant County contractors are powerless to stop it. Large contractors can move into smaller counties, damaging local wages, employers

[71] (CP 388, 1746) ("Extra-territorial CBA rates should be set aside in favor of local CBA rates.")

and employees. Before SSB 5493, the Industrial Statistician would not have allowed such adverse impact based on an "extra territorial" CBA. (CP 388, 1746) Now he 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.[72] Thus, SSB 5493 suffers the same flaws as the statute struck down in ***Peterson***: "Except for the accident of [doing business in a county with an applicable CBA], employers engaged in identical businesses are not equally dealt with" under SSB 5493, which is a clear violation of equal protection. ***Peterson***, 56 Wn.2d at 58. 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

[72] The Industrial Statistician concedes that under SSB 5493, data from the majority of the workforce is excluded. (CP 2567) ("[W]ith 5493, the prevailing wage, where there's a [CBA], is not based on the majority, right. A. Correct.")

required to do so. The effect of SSB 5493 is irrational, fails to advance the goals of prevailing wage law, and is a clear violation of equal protection.

E. SSB 5493 Irreconcilably Conflicts with Existing Laws

SSB 5493 violates the Washington State Constitution by altering the existing prevailing wage laws without setting forth the amended sections. The Washington State 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." Art. II, §37. The purpose of this requirement is to "avoid confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume." ***Amalgamated Transit v. State***, 142 Wn.2d 183, 245-6, 11 P.3d 762 (2000). This requirement ensures the legislature is aware of the impact a bill has on already existing laws. *Id*.

Washington courts have consistently struck down statutes that, without full explanation, narrowed, conflicted with, or otherwise altered other statutes. For example, in ***El Centro de la Raza v. State***, 192 Wn.2d 103, 428 P.3d 1143 (2018), the Washington Supreme Court declared legislation that modified the collective bargaining rights of charter school employees unconstitutional for failure to comply with the requirements of Art. II, § 37. *Id*., 192 Wn.2d at 127-33. In that case, the default rule under existing laws was that school employees could be part of a bargaining unit that included multiple schools. *Id*. The Charter School Act, however, restricted this right by limiting bargaining units for charter school

employees to individual charter schools. *Id*. Because the statute altered the bargaining rights of charter school employees without "explicitly show[ing]" how the new law impacted the existing statutes, the court found it violated the completeness requirement of Art. II, § 37. *Id*. Similarly, in ***Wash. Educ. Ass'n v. State***, 93 Wn.2d 37, 38, 604 P.2d 950 (1980), the court struck down an appropriations bill that limited the sources school districts could use for salary increases for employees because existing laws provided school districts could "spend funds, from whatever source, as they choose on teacher salaries." *Id*. at 41.

Similar to the legislation struck down in ***Wash. Educ. Ass'n*** and ***El Centro de la Raza***, SSB 5493 fails to satisfy the requirements of Art. II, §37 because it alters the existing prevailing wage laws without setting forth the amended sections at full length. Before SSB 5493: (1) workers had the right to be paid a "prevailing wage" based on the wages paid to the majority of workers in the locality;[73] and (2) L&I was expressly prohibited from using the data collected from one county to set the prevailing wage rate in another.[74] The Industrial Statistician concedes that he is required to follow those statutes and understands they may conflict with SSB 5493—as he must use wage data from another county if it is in the CBA. (CP 2582) The plain meaning of SSB 5493 conflicts with both statutes.

SSB 5493 modified the definition of "prevailing" so it no longer means prevailing. Before SSB 5493, prevailing wage laws defined

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[73] RCW 39.12.010.
[74] RCW 39.12.026.

"prevailing wage" as "the rate of hourly wage … paid in the locality … to the majority of workers, laborers, or mechanics, in the same trade or occupation," and a "locality" was defined as "the largest city in the county wherein the physical work is being performed." RCW 39.12.010(1)-(2). After SSB 5493, prevailing wage is defined as the highest rate of a CBA (that may apply to many or to zero employees) in some counties, while the original definition still applies in other counties. Similarly, 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.

SSB 5493 cannot be saved with "[n]otwithstanding RCW 39.12.010(1)." In ***De la Razo*** and ***Washington Education Ass'n***, the Washington Supreme Court made clear the focus of the analysis rests on whether the text of the other statutes would create confusion. There can be no doubt a thorough reading of RCW 39.12.010 would lead one to reasonably conclude "prevailing wage" means the hourly wage paid to a majority of workers in the same trade or occupation and "locality" means largest city in a county. Similarly, 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. Following SSB 5493, that is no longer correct. The legislature failed to amend all impacted sections when it enacted SSB 5493, which is a direct contravention of the purpose of Art. II, § 37, which is to ensure that "[c]itizens or legislators must not be required to search out amended statutes to know the law on the subject treated in a new statute." ***Wash. Citizens Action of Wash. v. State***, 162 Wn.2d 142, 152,

171 P.3d 486 (2007).

SSB 5493 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. The Industrial Statistician recognizes the direct conflict between the mandates of RCW 39.12.015(3)(a) and RCW 39.12.026(1).[75] To resolve the conflict, he follows SSB 5493 (RCW 39.12.015(3)) and ignores RCW 39.12.026.[76] This is particularly troubling given that during the hearing on the original version of SSB 5493, L&I testified it was prohibited from using hours worked in one county to set the prevailing wage in another.[77] Thus, it is fair to conclude that legislators were misled on how SSB 5493—which relies on the stated geographic scope of a CBA with no consideration to where work is actually performed—would be applied in terms of using cross-county CBA wage rates to set prevailing wages in multiple counties.

The legislature's failure to include the impacted sections in the text of SSB 5493 begs the question of whether those who voted in favor of SSB 5493 even realized the significant and irrational modification it made to

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[75] (CP 2582-83) ("Q. So if I work in King County, but my collective bargaining agreement covers King County and Pierce County, you'll prevail that rate in Pierce County, correct, if it's the highest? A. Yes.")

[76] (CP 2585) ("Q. What if the employer is a signator to a collective bargaining agreement that includes King County and Yakima County but performs no work in Yakima County? Will you still prevail that rate in Yakima County? A. Yes.")

[77] *See* Testimony of T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37 ("The law at RCW 39.12.026 ... prohibits the use of cross county data to set the prevailing wage. So we are prohibited in law, this bill would not change that, from using wages in [sic] for King County, for work that is performed in King County, to establish the prevailing wage rate in another county") (available at https://www.tvw.org/watch/?eventID=2018011113).

existing laws. Did they know the term "geographic scope" in a CBA does not necessarily mean that work is being performed under the agreement in every county? Did they know that wages earned in the largest city are no longer relevant to determining prevailing wage? Did they know a CBA can lower the prevailing wage or the average wage paid to workers in a geographic area? Did they know they were creating a law that could require the Industrial Statistician to use hours worked in one county to establish the prevailing wage rate in another? For these reasons, SSB 5493 presents the other danger Art. II, § 37 attempts to avoid—ensuring the legislature is aware of any impact a bill has on existing laws[78]—and is unconstitutional.

It is clear the rights and obligations created by existing sections within the prevailing wage laws have changed and SSB 5493 did not set forth the full text of the sections it amended. SSB 5493 specifically references RCW 39.12.010(1) but includes no other reference to the other sections of the Act modified by its requirements. Because it does not identify existing laws it amends, the import of SSB 5493 cannot be fully understood without prior knowledge or a search of existing code sections. This reduces anyone attempting to navigate the Act to nothing more than a pig hunting for the truffle buried in RCW 39.12.015(3).

F. <u>The "Plain Meaning" Rule, As Applied</u>

At summary judgment, the State added words, processes, discretion, and other statutory elements not present in the text of SSB 5493 in an effort to turn an unambiguously unconstitutional statute into an enforceable one.

[78] ***Amalg. Transit***, 142 Wn.2d at 246.

In Washington, courts "should not and do not construe an unambiguous statute." ***Vita Food Prods. v. State***, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). "If the language is unambiguous, [courts] give effect to that language and that language alone because [it is] presume[d] the legislature says what it means and means what it says." ***State v. Costich***, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). "It is not within [the court's] power to add words to a statute even if [it] believe[s] the legislature intended something else but failed to express it adequately." ***Vita Food Prods***., 91 Wn.2d at 134.

Here, the plain meaning of RCW 39.12.026 conflicts with SSB 5493's mandate. RCW 39.12.026 prohibits the use of "data" from one county to establish the prevailing wage in a different county.[79] The State asserts that SSB 5493 does not conflict with RCW 39.12.026 even when the CBA signed by a contractor that only works in county A is used to establish the prevailing wage rate in county B. According to the State, if the CBA says it applies to county B, there is no issue. This argument is nonsensical. There is no data from county B if the employer, employees, and work are all in county A.[80] In this way, SSB 5493 conflicts with and ignores the definition in RCW 39.12.010, which specifically defines the "locality" from which the prevailing wage determination shall be made.

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[79] The Industrial Statistician conceded this limitation and how SSB 5493 could violate it. (CP 2582)

[80] In other words, just because the CBA would apply to county B, if the employer ever performed work in county B, does not mean that the data related to work performed in county A can be used to set the prevailing wage in county B in direct violation of RCW 39.12.026.

The other crucial mistake in the State's analysis is that it focuses solely on the plain meaning of "collective bargaining agreement." The use of CBAs is not the vice of SSB 5493; it is the absolute mandate that the Industrial Statistician must adopt CBA wage rates. Thus, the proper focus of analysis is the phrase "*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." *See* RCW 39.12.015(3)(a) (emphasis added). The plain meaning of SSB 5493 is that the Industrial Statistician has no discretion to review, modify, or reject CBA wage rates in violation of constitutional standards.[81]

V. CONCLUSION

For the reasons set forth above, the Superior Court's order dated December 27, 2019 should be reversed and AGC's motion for summary judgment should be granted.[82]

RESPECTFULLY SUBMITTED this 3rd day of June, 2020.

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[81] This lack of discretion is a clear manifestation of a lack of safeguards, which violates the non-delegation doctrine and due process protections for all contractors in the State of Washington. *See supra*, § IV.B-C.

[82] Alternatively, this Court should reverse the trial court's ruling on the State's cross-motion for summary judgment and remand this matter to the trial court for trial.

CERTIFICATE OF SERVICE

I, Darren A. Feider, certify under penalty of perjury under the laws of the United States and of the State of Washington that June 3, 2020, 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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s/ *Darren A. Feider*
Darren A. Feider

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