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NO. 54465-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Legislature wants public dollars to fund meaningful wages on public projects, so it looks to collective bargaining agreements (CBAs) to measure prevailing wages. This reflects the legislative judgment that negotiated local wages best protect workers from substandard wages. RCW 39.12.015(3)(a).

Although AGC¹ ostensibly raises four constitutional issues, each of them hinges on a criticism of the Legislature's decision to use CBAs to set prevailing wages, instead of hours worked in its preferred geographical area. AGC Br. 3, 10-14, 26, 29-30, 32-33, 35, 39-42, 44-45, 47. AGC should direct its criticism to the Legislature.

It does not violate the constitution for the Legislature to decide to base prevailing wages on agreements where both labor and management have a say about workers' wages.

II. ISSUES

1. Did the Legislature properly allow the Industrial Statistician to consider future facts to set the prevailing wage rates when the Legislature may delegate to administrative officers "the power to determine some fact or state of things upon which the application of the law is made to depend provided the law enunciates standards by which those officers or boards will be guided?"²

¹ "AGC" refers collectively to the appellants: Associated General Contractors of Washington; Associated Builders and Contractors of Western Washington, Inc.; Inland Pacific Chapters of Associated Builders and Contractors, Inc.; and Inland Northwest AGC.

² *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 25, 775 P.2d 947 (1989).

2. By requiring the Industrial Statistician to use CBAs, where available, in determining prevailing wage rates, and by allowing an appeal from a prevailing-wage-rate setting, did the Legislature provide general terms of what the agency must do and provide review procedures to satisfy *Barry & Barry*?³
3. Does AGC's due process argument merely reiterate its delegation argument and fail because it did not argue the three-part test in *Mathews*?⁴
4. Does using the collectively bargained wage rate rationally relate to the interest of meaningful local wages for Washington workers on public works projects, such that there is no equal protection concern?
5. Does RCW 39.12.015 comply with Washington constitution article II, section 37's prohibition on rendering other statutes meaningless when these statutes implicitly or explicitly direct a legislator to read RCW 39.12.015?

III. STATEMENT OF THE CASE

A. The Industrial Statistician Uses Employment Contracts to Set Prevailing Wages

The Industrial Statistician of the Department of Labor & Industries (L&I) sets the prevailing wage used to determine the wage to pay on public works projects. RCW 39.12.015. In doing so, the Industrial Statistician advances the Legislature's interest in providing meaningful wages to workers on public projects.

The Industrial Statistician sets the prevailing wage rates twice a year. WAC 296-127-011(1). The prevailing wage in effect at the time of

³ *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

the bid for contract is used for the life of the contract, unless more than six months lapses after bids were due, in which case the rate when the contract was awarded is used. WAC 296-127-011(3)(a)-(b).

In determining the prevailing wage rate, the Industrial Statistician has long looked to information provided by private parties. CP 2124-25. The Legislature directs the use of private employment contracts, either in a CBA or in other employment contracts, oral or written. RCW 39.12.015(3) (using CBAs or wage surveys of non-CBA employment contracts). The statistician measures local wages in two ways.

First, RCW 39.12.015(3)(b) provides that if there is no CBA, rates must be set using RCW 39.12.010:

[T]he rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation shall be the prevailing rate.

RCW 39.12.010(1). To apply this statute, the Industrial Statistician generally uses wage surveys to gather information. RCW 39.12.015(3)(b); WAC 296-127-019. The wage surveys identify wage facts from private contracts—in other words, what employers agreed to pay workers. CP 1844, 2124-25.

Second, if there is a CBA for a given trade or occupation in a given geographical region, then prevailing wages are set under the 2018 amendments to RCW 39.12.015. S. Sub. 5493, 65th Leg., Reg. Sess.; Laws of 2018, ch. 248, § 1. Under these amendments, the Industrial Statistician uses CBAs to set prevailing wages, and, if there is not one available, the Industrial Statistician uses a wage survey or similar method. *Id.* The CBA-requirement does not apply to residential construction. RCW 39.12.015(3), .017.

B. Before SSB 5493 Passed, 113 CBAs in the Construction Industry Reflected the Wage Rate, and Now 114 Do

The Industrial Statistician sets around 22,000 prevailing wages for trades and occupations, and the statistician refers to the terms of about 114 CBAs. CP 2518. Before SSB 5493 passed, CBAs were relevant in setting wages because L&I would ask employers what wages they paid in a survey, and, in response, employers would submit CBAs to show what they paid workers. CP 2122. Generally, even before SSB 5493, the statistician used the rates in CBAs to set the prevailing wage. CP 2122. This is because they were typically the majority of wages. For example, in a statewide wage survey done before SSB 5493 for the laborers' trade, private parties reported that they paid the CBA laborer wage rate for the majority of hours in 38 of Washington's 39 counties. CP 2122.

Before SSB 5493 passed, 113 CBAs reflected the wage rate for the construction industry; after SSB 5493, 114 did. CP 2122.⁵

C. The Industrial Statistician Uses Only Ratified Collectively Bargained for Agreements

RCW 39.12.015's words guide the Industrial Statistician in setting the prevailing wage rate. CP 2120. RCW 39.12.015 provides that "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). The focus is on "hav[ing] collective bargaining agreements." *Id.* This means (1) an operative collective bargaining agreement and (2) an agreement that stems from collective bargaining.

1. The Industrial Statistician may use unsigned copies of signed agreements

The Industrial Statistician uses only CBAs that have been ratified by the employer and the union—a signed agreement. CP 1853-54. AGC claims that L&I uses unsigned CBAs. AGC Br. 11, 27-28, 31. What it is referring to is unsigned *copies* of agreements. But nothing requires that

⁵ AGC claims that only about 25 percent of construction industry employees are union members. AGC Br. 6 n.6. This claim depends on hearsay that the State objected to at superior court, and the trial court agreed in all respects to the State's argument. CP 1806 n.6; 2RP 20. AGC does not assign error to this evidentiary ruling. AGC Br. 5-6.

L&I have a copy of the signed agreement in its possession if it is using the actual rate from the signed agreement itself. CP 2516.

The record is clear that the copy that L&I has may be unsigned, but the agreement itself is signed. CP 1866-69. To set the wages, L&I relies on PDFs of CBAs or its Wage Update system, where parties to the CBA input the wage rates. CP 2515-16. Industrial Statistician Jim Christensen is highly confident about the accuracy of the information obtained. CP 2516. And, if it is not accurate, interested parties let L&I know if it did not get the rate right. CP 1912, 2516, 2518. Rates are published, so unions and contractors may see the rates. CP 2518.

AGC also worries about the use of expired agreements even though it knows that many agreements have evergreen provisions. AGC Br. 11, 28-29; CP 394, 1860.⁶ It also ignores that current rates are entered into the Wage Update system. CP 2515-16. And AGC ignores that if an aggrieved party felt that an expired agreement no longer represented the parties' agreement, it could contact L&I about the rate (CP 2517-18) or formally challenge the rate. WAC 296-127-060; RCW 39.12.060.

⁶ AGC cites a list of CBA titles to argue that the multiple CBAs are expired (AGC Br. 11), but ignores that, although there may be a listed date in the title, the agreement may continue after the expiration date. *E.g.*, CP 394, 396, 398, 402, 404, 407-10, 414, 419, 430-31, 433, 441-44, 467-70, 473-74, 476.

2. The Industrial Statistician uses agreements only when they result from collective bargaining

The Industrial Statistician accepts only agreements that result from collective bargaining, producing a bona fide CBA. CP 1861-63, 2120-21.⁷ In determining whether a CBA is bona fide, an Industrial Statistician may notice something out of line in the CBA, based on familiarity with CBAs. CP 2121-22.⁸ It would be usual to see a modest wage rate increase from one agreement to the next to reflect market forces. CP 2121. A departure would cause the Industrial Statistician to ask questions. CP 2121.

D. The Superior Court Rejected AGC's Arguments

After AGC sued the State, the parties cross-moved for summary judgment. CP 1, 184, 1794. The trial court ruled for the State. CP 2536.

IV. STANDARD OF REVIEW

“[S]tatutes are presumed constitutional and that a statute’s challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt.” *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010).

⁷ In Christensen’s deposition, he repeatedly testified he would only consider bona fide agreements. CP 1854, 1857, 1861-62. This opinion is not a new opinion from weeks later, as AGC claims. AGC Br. 18-19 n.32.

⁸ AGC claims that analyst Sean Anderson sets the prevailing wage. AGC Br. 33. But RCW 39.12.015 provides that the Industrial Statistician sets the prevailing wage, and it is only natural that the statistician has staff to assist.

V. ARGUMENT

At the outset, AGC's arguments suffer from two flaws. First, it seeks to invalidate RCW 39.12.015(3)(a) based on the legislative choice to set the prevailing wage by using the rate from applicable CBAs, rather than the wages for the majority of workers as determined by wage surveys. Accepting this argument would mean usurping the Legislature's province to set policy. Second, AGC bases its arguments on how the Industrial Statistician applies the law (*e.g.*, using unsigned copies of signed CBAs). But this case is not an "as applied" case, which would involve an appeal of individual facts. AGC Br. 11 (pointing to "as applied" facts). It is a facial challenge to the statute's constitutionality. If AGC wants to argue that an error occurred, it may ask the Industrial Statistician to correct the rate, and then it may appeal.

AGC's remaining five arguments also lack merit.

First, AGC argues there is a violation of the delegation doctrine because it claims the Industrial Statistician cannot use "future facts" to determine the prevailing wage. AGC Br. 17-18. But there is no constitutional defect in enacting a statute that creates a legal standard that a public official must apply to facts that arise in the future.

Second, AGC claims that RCW 39.12.015(3)(a) provides no standards to review whether CBAs are operative and valid. AGC Br. 26,

32. But the Legislature has given the Industrial Statistician the authority to set prevailing wages, and the statistician must only use agreements that exist and that result from collective bargaining. By constraining the Industrial Statistician to use only existing, collectively bargained CBAs, the Legislature provides the standards to use and appeal rights.

Third, AGC's due process claims repeat other invalid arguments.

Fourth, AGC argues an equal protection violation. AGC Br. 38.

But the statute rationally relates to the State's interest in paying meaningful wages, which is achieved when both workers and employers have a say about wages.

Finally, AGC argues that SSB 5493 violates article II, section 37 of the Washington constitution. AGC Br. 43. But each of the statutes that AGC cites to support its argument contemplates the use of RCW 39.12.015(3). So SSB 5493 rendered no other statute erroneous.

A. The Legislature Seeks to Provide Meaningful Wages to Workers by Giving Them a Say in the Wages

1. Prevailing wage laws benefit workers, not contractors

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Prevailing wage laws provide a minimum wage on public work projects. RCW 39.12.020. Because the

Prevailing Wages on Public Works Act is a remedial statute, the courts liberally construe its provisions in favor of workers. *See Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988). AGC promotes contractors' interests, but the Legislature did not enact these laws to benefit contractors. *See id.* at 823-24. Instead, the Act protects workers from substandard earnings by fixing a floor for wages on government projects. *Id.*; *Drake v. Molvik & Olsen Elec., Inc.*, 107 Wn.2d 26, 29, 726 P.2d 1238 (1986).

The courts have historically articulated the purposes of prevailing wage laws to (1) protect employees working on public projects from substandard wages and (2) preserve local wages. *Silverstreak v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 880, 154 P.3d 891 (2007). RCW 39.12.015 creates its own public policy: establishing meaningful wages on public works by recognizing the value of a negotiated wage, instead of an employer unilaterally setting the wage rate. And RCW 39.12.015 furthers the purpose of stopping the practice of bringing in cheap labor from distant locations. *Se. Wash. Bldg. & Constr. Trades Council v. Dep't of Labor & Indus.*, 91 Wn.2d 41, 45, 586 P.2d 486 (1978).

The Legislature has a policy to promote collective bargaining to give workers a voice about their wages. RCW 49.32.020. Collective bargaining allows workers "to obtain acceptable terms and conditions of

employment,” given that an “individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his or her freedom of labor.” RCW 49.32.020.

2. The Legislature chose to use CBAs to set prevailing wages, and this choice cannot be second-guessed

AGC’s arguments are no more than disputes over the Legislature’s policy choices. AGC doubts that CBAs are the best measure of prevailing wages. Over and over, it declaims that the Industrial Statistician need not establish that the hours worked under a CBA are the majority of hours worked in the locality, and it criticizes the geographic scope of the statute. AGC Br. 3, 10-14, 26-27, 29-30, 32-33, 35, 39-42, 44-45, 47. It repeatedly argues that these aspects of SSB 5493 make it unconstitutional. *See id.* It appears to believe that the constitution requires the Industrial Statistician to consider “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.” AGC Br. 33. But these are not constitutional requirements, just other ways the statistician could set the prevailing wage. And the Legislature may choose between competing public policy options. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (court will not second-guess legislative choices).

The Legislature decided that CBAs best inform the rate to pay workers funded by public dollars. The Legislature could believe that this will lead to a fair wage for workers. It could wish to promote the use of CBAs to best reflect local wages because they stem from both labor and contractors having a say in the wages, reflecting local needs. It made a policy determination that CBA rates are the best measure of prevailing wages. While an “individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his or her freedom of labor,” collective bargaining allows workers “to obtain acceptable terms and conditions of employment.” RCW 49.32.020.

And in adopting the law, the Legislature heard concerns that the effort in filling out and using wage surveys impose costs to the State and to contractors. Senate Bill Report, SB 5493, at 3 (2018). A transportation study reported that using CBAs would save money. Substitute House Bill Report, SSB 5493, at 2 (2018). Using CBAs simplifies the process and makes it less complicated than dealing with surveys, and it reflects the true cost of the work. Senate Bill Report, SB 5493, at 3 (2018). “Using these wages will reflect the true long-term costs of a project and establish a steady reliable wage rate that will provide consistency. The collectively bargained wage is a negotiated wage and best represents area standard wages.” Substitute House Bill Report, SSB 5493, at 2 (2018).

B. SSB 5493 Has Not Violated the Delegation Doctrine by Allowing the Industrial Statistician to Apply Standards Created in the Future and Has Not Delegated to Private Parties

SSB 5493 does not violate the prohibition against delegating legislative authority to another entity to apply future laws or standards. The Legislature may delegate authority to a state agency to determine a fact in the future to which to apply the standard set when the law was adopted. *See Woodson v. State*, 95 Wn.2d 257, 261, 623 P.2d 683 (1980) (no fault in the use of external standards to determine facts).

1. The courts allow agencies to apply legal standards to facts arising after a statute is enacted

Case law provides that a statute may establish a legal standard that applies to future facts. AGC cites no case to refute this point, and the cases it does cite reinforce this principle.

a. *Diversified Investment* approves of statutes that establish legal standards to apply to future facts

RCW 39.12.015(3)(a) requires the Industrial Statistician to apply law to facts—such an exercise does not violate the delegation doctrine. AGC argues that the Legislature has impermissibly delegated adoption of future facts, relying heavily on *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135-37, 310 P.2d 261 (1957). AGC Br. 18-22. But *Kirschner* does not apply when, as here, the Legislature has set a standard and

delegated to an agency the ability to use facts to make its determination under that standard. *See Diversified Inv. P'ship*, 113 Wn.2d at 25. This delegation is proper when the legislation passes the *Barry & Barry* test. *Id.* As discussed below, the *Barry & Barry* test determines whether a delegation is lawful. 81 Wn.2d at 159; *infra* Part V.C.

Any other rule would not make sense. Otherwise, any delegation of power when the agency has to apply facts that did not exist at the time of the legislation would be invalid. For example, AGC repeatedly lauds wage surveys (AGC Br. 1, 8-9, 13, 39), and it concedes the Legislature “has the constitutional authority to establish prevailing wage rates” (AGC Br. 17), so by its logic, it believes that wage surveys used before SSB 5493, which involve the use of future facts, are constitutional. There is no distinction between a standard using a wage survey and a standard using a CBA.

The Supreme Court has approved of statutes that establish legal standards to apply to future facts. *Diversified Inv. P'ship*, 113 Wn.2d at 25. The *Diversified Investment Partnership* Court emphasized that the Legislature may “delegate to administrative officers or boards the power to determine some fact or state of things upon which the application of the law is made to depend provided the law enunciates standards by which those officers or boards will be guided.” *Id.*; *see also Auto. United Trades Org. v. State*, 183 Wn.2d 842, 860-61, 357 P.3d 615 (2015) (Legislature

may condition standards based on private parties' actions); *Wash. Water Power Co. v. Wash. State Human Rights Comm'n*, 91 Wn.2d 62, 67-68, 586 P.2d 1149 (1978) (could determine whether the future fact of discrimination occurred). That is what SSB 5493 does. It sets the standard of using CBAs, which are operative agreements that result from collective bargaining, and delegates to the Industrial Statistician the power to determine and set wage rates using those CBAs. *See infra* Part V.C.1.

AGC asserts that “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.” AGC Br. 2. But *Diversified Investment Partnership* says the opposite, explicitly allowing the Legislature to refer to future events when it legislates without violating the delegation doctrine: “conditioning the operative effect of a statute upon a future event specified by the Legislature does not transfer the legislative power to render judgment to the persons or entity capable of bringing about that event.” 113 Wn.2d at 28. Applying this rule here, RCW 39.12.015 delegates authority to the Industrial Statistician to periodically set and reset the rate based on information current when the rate is set. But the standard to determine the rate was set when SSB 5493 was adopted. So the Legislature has conditioned prevailing wage rates on future events: ratifications of bona fide CBA. *See infra* Part V.C.1.

b. *Kirschner* and *Woodson* approve of statutes that establish standards to apply to future facts

Despite AGC's reliance on *Kirschner* and *Woodson*, these cases support the State, not AGC. *See* AGC Br. 18. The Court in those cases found no fault in the use of external standards to determine facts, such as is present here; their concern was limited to situations in which the Legislature referenced standards not yet developed when it enacted the legislation. *Woodson*, 95 Wn.2d 257; *Kirschner*, 50 Wn.2d 131.

In *Kirschner*, the Legislature adopted a standard of accreditation fixed by medical societies' criteria. 50 Wn.2d at 133 n.1. The vice was that the medical societies' standards to specify what schools were accredited were to be developed in the future, which was an unconstitutional delegation of legislative power. *Woodson*, 95 Wn.2d at 261 (discussing *Kirschner*). As *Woodson* explained, the vice was not that the Legislature used a list created by recognized medical societies, but that it deferred to such bodies the future adoption of standards to create such a list. *See Woodson*, 95 Wn. 2d at 261 (citing *Kirschner*, 50 Wn.2d at 136).⁹

⁹ This unwillingness to allow the Legislature to use future *standards* is echoed by cases like *State v. Batson*, 9 Wn. App. 2d 546, 550, 447 P.3d 202 (2019) (other state's law), and *Diversified Inv. P'ship*, 113 Wn.2d at 25 (federal law), which recognize that the Legislature cannot adopt a future version of a federal or another state's statute. *See also State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977) (federal rule); *State v. Crawford*, 177 P. 360 (Kan. 1919) (electrical code); *City of Okla. City v. State ex rel. Okla. Dep't of Labor*, 918 P.2d 26, 30 (Okla. 1995) (federal standards), *cited in* AGC Br. 21, 23.

Here, the Legislature already set the standards in the statute, and it is only a matter of applying the set standards to the facts. RCW 39.12.015 provides the standard what the Industrial Statistician is to do—establish wage rates from existing “collective bargaining agreements” and only use agreements that result from collective bargaining. *Infra* Part V.C.1. Because the standards have already been set, it is acceptable to use facts developed from private parties. *Kirschner*, 50 Wn.2d at 136; *Woodson*, 95 Wn.2d at 261.

AGC relies on a 1922 Wisconsin case, *Wagner v. Milwaukee*, 188 N.W. 487 (Wis. 1922), that struck down a prevailing wage law. AGC Br. 19-21. But it cites no authority for its proposition that, because the Court in *Kirschner* and *Woodson* cited this case, the Court has passed on the prevailing wage issue. Citation to a case does not set precedent because it is not consideration of a particular factual and legal scenario. *See Wilber v. Dep’t of Labor & Indus.*, 61 Wn.2d 439, 445-46, 378 P.2d 684 (1963).

In any event, the statute in *Wagner* is distinguishable because it delegated authority directly to unions, and not to an administrative agency, to determine the prevailing wage. 188 N.W. at 489. Here, the Legislature delegated this authority to the Industrial Statistician, not to unions. And, consistent with *Kirschner* and *Woodson*, the Court decided *Diversified*

Investments Partnership, which recognizes an agency may determine a fact in the future to which to apply the law. 113 Wn.2d at 25.

Finally, AGC argues that the Industrial Statistician does not have any discretion regarding the setting of prevailing wages using CBAs, and that this somehow violates the doctrine that prevents the use of future standards. AGC Br. 19. But cite no authority that any particular level of discretion is required and *Barry & Barry* provides the opposite. 81 Wn.2d at 162; *infra* Part V.C.1.c.

2. The Legislature has not asked private parties to set prevailing wages; instead, it delegates authority to the Industrial Statistician to use facts to set wage rates

It is permissible to delegate to private parties, provided there are adequate standards. *Entm't Indus. Coal. v. Tacoma-Pierce Cty. Health Dep't*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005). And it is acceptable to use information from private parties. *Kirschner*, 50 Wn.2d at 136. There is no impermissible delegation just because other persons or entities can bring about a future event on which the operative effect of a statute is conditioned. *Diversified Inv. P'ship*, 113 Wn.2d at 28.

Under *Diversified Investment Partnership*, using CBAs under the standards set in RCW 39.12.015(3)(a) does not “transfer the state legislative power to render judgment” to the unions and employers who can create CBAs. 113 Wn.2d at 28. Rather, the legislative power stays

with the Industrial Statistician, who retains the delegated power to set prevailing wage rates using the standards set in RCW 39.12.015(3)(a).

Here, although it may be permissible (*Entertainment Industry*, 153 Wn.2d at 664), the Legislature has not delegated prevailing-wage-rate setting to private individuals. *Contra* AGC Br. 18, 24-25. The Legislature has instead delegated the power to the Industrial Statistician, who uses information from private parties. RCW 39.12.015(1). The Legislature did not delegate to private parties because it did not ask them to negotiate CBAs to set a prevailing wage rate. The purpose of CBAs is not to set prevailing wages, but to govern the working relationship between workers and employers. Although parties negotiate wages, they also negotiate many other concerns like hours, working conditions, and discipline.

The Industrial Statistician has long used facts from private parties' employment contracts to set prevailing wages. Wage surveys collect data about what employers pay workers under private contracts. WAC 296-127-019. As AGC must agree, these wage rates reflect private bargaining, which is then reported to the Industrial Statistician. Yet AGC could not reasonably argue that the Legislature cannot require the statistician to set the prevailing wage based on wage surveys. There is no difference in using information from private parties found in CBAs. Just like the private employment contract information reflected in wage surveys, CBAs merely

provide information used by the Industrial Statistician. The Legislature has asked no private party to set prevailing wages.

This case contrasts with the cases that AGC relies on. The problem in *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), was that the statute at issue directly placed decision-making power about wages in the private group's hands, unlike here. *Id.* at 283-84, 310-11; AGC Br. 24. Here, the Legislature placed the responsibility in the Industrial Statistician's hands.

AGC's citation to *United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978), is also unhelpful. In that case, the Legislature allowed private parties to say who would be on a licensing board without governmental oversight. *See* AGC Br. 24-25. Here, the Legislature has not asked private parties to set prevailing wages, and there is governmental oversight by scrutiny of CBAs before using them to set prevailing wage rates.

Finally, AGC also cites *Entertainment Industry*, but this case aids the State, not AGC. *See* AGC Br. 36. In that case, the Legislature allowed business owners to designate smoking areas, and the Court approved, noting "proper standards, guidelines, and procedural safeguards." *Entm't Indus. Coal.*, 153 Wn.2d at 664-65. Here there are standards and safeguards under *Barry & Barry* test. *See infra* Part V.C.2.

The Legislature may properly look to voluntary arrangements of the business community when it makes legislative judgments. *See In re Binding Declaratory Ruling of Dep't of Motor Vehicles*, 87 Wn.2d 686, 695-96, 555 P.2d 1361 (1976). In that case, the Court upheld a law that required potential car dealer licensees to have a current service agreement with a manufacturer, holding the law did not delegate power to manufacturers to determine who received dealer licenses, even though the manufacturer could choose with whom to contract. *Id.* So the involvement of private parties in creating a fact that the law referenced did not delegate legislative power.

A holding that the Legislature could not direct an agency to use information provided by private parties would not only conflict with many cases (including *Kirschner* and *Woodson*), it would implicate many existing statutes. For example, many statutes reference consumer price indices to adjust wages for inflation. *E.g.*, RCW 85.08.320; RCW 85.24.080. These indices use facts that private parties—specifically, retailers and businesses that set prices for their products—create in the future. What's more, RCW 48.74.030(3)(e) relies on data “published by Moody's Investors Services, Inc.” in valuation. *See also* RCW 48.23.085. And many statutes require state agencies to determine the “fair market value” of something, which involves information from private parties.

E.g., RCW 8.26.190; RCW 79.13.160. All of these statutes highlight the unremarkable fact that the Legislature doesn't just make things up to set policy, but depends on sources of information from private parties to accomplish its ultimate policy in the statute.

3. Out-of-state cases confirm that using facts from a CBA is not legislating use of a future standard and is not delegating to private parties

Other courts have affirmed similar statutes to the one present here against challenges that they were adopting future facts or improperly using facts from private parties. The Ohio Court of Appeals in *Fuldauer* held that a charter amendment to establish wages for firefighters and police officers based on survey of wages was not an unconstitutional delegation. *Fuldauer v. City of Cleveland*, 285 N.E.2d 80, 82 (Ohio Ct. App. 1972), *aff'd*, 290 N.E.2d 546 (Ohio 1972). The court noted that “[w]hile it is unconstitutional for the city to delegate its power to make a law, it can make a law to delegate a power to determine some fact upon which that law shall depend.” *Id.* Ohio’s Supreme Court agreed, saying

The formula for salary adjustments, which we have before us in these charter amendments, that tie the adjustments into future events which do not lie within the power or control of the council does not constitute an unlawful delegation of power. It is not unlike a formula which links the wage adjustment to the cost of living index, to average earnings or prevailing wages of a comparable occupation, or to average earnings or prevailing wages generally.

Fuldauer v. City of Cleveland, 290 N.E.2d 546, 551 (Ohio 1972); accord *Donahue v. Cardinal Const. Co.*, 463 N.E.2d 1300, 1303 (Ohio Ct. App. 1983) (CBA rate in prevailing wage statute is like “a formula which links the wage adjustment to the cost of living index”).

Ignoring the majorities in the Ohio Court of Appeals and Ohio Supreme Court in *Fuldauer*, AGC cites the dissent in the Ohio Court of Appeals for the proposition that some courts have struck down prevailing wage laws “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.” AGC Br. 21 (citing 285 N.E.2d at 87 n.11 (Day, J., dissenting)). But this rule of law that AGC urges would mean that the Legislature would have to adopt a new statute each time there needed to be a change in the prevailing wage rate even if a wage survey is used. AGC Br. 21. With 22,000 wage rates that simply isn’t feasible, nor is it required. CP 2518.

Contrary to the *Fuldauer* dissent’s rule that AGC urges, a legislative body’s decision to direct an official to use facts from a CBA is not an improper delegation of legislative power. In New Jersey, a state where CBAs were used to determine the prevailing wage, the court recognized that using a CBA is not an issue of delegating legislative power; “rather, [the labor commissioner was] granted the power, as a

matter of legislative convenience, to determine a set of facts, *i.e.*, the wage rates established under collective bargaining agreements in given circumstances.” *Male v. Ernest Renda Contracting Co.*, 301 A.2d 153, 157 (N.J. Super. Ct. App. Div. 1973), *aff’d*, 314 A.2d 361 (N.J. 1974); *accord Constr. Indus. of Mass. v. Comm’r of Labor & Indus.*, 546 N.E.2d 367, 373 (Mass. 1989); *Assoc. Builders & Contractors, Saginaw Valley Area Chapter v. Dep’t of Consumer & Indus. Servs.*, 705 N.W.2d 509, 512-14 (Mich. Ct. App. 2005). AGC tried to distinguish *Male* below by saying the statute involved required a “majority” of employees subject to the agreement. CP 136. It criticized the Legislature’s use of less than a majority of workers in SSB 5493. *Id.* But this is not a delegation issue; instead, AGC is contesting the wisdom of the statute in adopting the CBA requirement.¹⁰

C. The Legislature May Delegate Responsibility to the Industrial Statistician to Set Prevailing Wages Using CBAs

RCW 39.12.015(3)(a) does not violate the delegation doctrine. In RCW 39.12.015, the Legislature has delegated power to the Industrial Statistician to gather facts from private parties’ employment contracts to determine what must be paid on public projects. This reflects the

¹⁰ AGC cites *Hunter v. City of Bozeman*, 700 P.2d 184, 187 (Mont. 1985) (AGC Br. 34), but this case did not reach the question of the constitutionality of a statute that exclusively uses CBAs to set rates because the Montana statute included reliance on other information.

Legislature’s judgment on the best method to set wages.

Barry & Barry sets the standard to determine whether this delegation is permissible. 81 Wn.2d at 159. A delegation is lawful when (1) the Legislature defines “in general terms what is to be done and the . . . administrative body which is to accomplish it” and (2) “safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.” *Id.* RCW 39.12.015 meets the test because it provides general terms of what the Industrial Statistician is to do and because there are review procedures to protect against arbitrary action.

1. RCW 39.12.015 satisfies the first prong of the *Barry & Barry* test: the Legislature gave the Industrial Statistician standards that identify in general terms what is to be done

The Legislature has adopted a standard of using only operative CBAs that result from collective bargaining. RCW 39.12.015(3)(a). The Legislature need not have overly specific standards to accomplish this goal, nor is any particular level of discretion required. Rather than refute the plain language of RCW 39.12.015(3)(a), AGC raises several arguments about how RCW 39.12.015 is applied, but because this is not an “as applied” case, its arguments are not before the Court.

a. RCW 39.12.015(3)(a) sets a standard of requiring the Industrial Statistician to use an operative agreement that results from collective bargaining

RCW 39.12.015 satisfies the first prong of the *Barry & Barry* test to provide general terms on what is to be done and who must do it. In delegating the ability to set prevailing wages to the Industrial Statistician, the Legislature specified that (1) “[a]ll determinations of the prevailing rate of wage shall be made by the Industrial Statistician” and (2) the Industrial Statistician uses “collective bargaining agreements” to set the wages for trades and occupations with CBAs. RCW 39.12.015.

The fundamental purpose in interpreting a statute is to give effect to the Legislature’s intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). If the statute’s meaning is plain, then the court must give effect to that plain meaning as an expression of the Legislature’s intent. *Id.* The court discerns plain meaning from the ordinary meaning of the language, the context of the statute in which that provision is found, related provisions, and the statutory scheme. *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). When possible, the court construes statutes in a manner to find them constitutional. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154, *amended*, 943 P.2d 1358 (1997).

RCW 39.12.015 provides that “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.” The focus is on “hav[ing] collective bargaining agreements” in the trade and occupation. RCW 39.12.015. So it follows that (1) an agreement must be operative for a trade and occupation in the geographic jurisdiction, with a ratified (signed) agreement and (2) the agreement must arise from collective bargaining.

First, an agreement must be operative; otherwise, the trade or occupation would not “have” a collective bargaining “agreement.” The words “have” and “agreement” require an operative agreement. “Have” means “to hold or maintain as a possession, privilege, or entitlement.”¹¹ The word contemplates a present privilege or entitlement, not a past or future one. To be an “agreement,” a CBA must be ratified, which is shown by the signatures on the agreement. *E.g.*, CP 516-17. An expired agreement is no longer operative absent an evergreen provision.

Second, the language requires that an agreement result from “collective bargaining.” With no statutory definition of CBA, the court

¹¹ *Have*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/have> (last visited Aug. 2, 2020).

may use a dictionary to determine plain meaning. *See State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002). A collective bargaining agreement is “[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.” *Collective bargaining agreement*, Black’s Law Dictionary (11th ed. 2019). It is “an agreement between an employer and a labor union produced through collective bargaining.”¹² “Collective bargaining” is “a negotiation for the settlement of a collective agreement between an employer or group of employers on one side and a union or number of unions on the other.” Webster’s Third New International Dictionary 444 (2002).¹³

So under these definitions, the Legislature gives authority to the statistician to determine whether a CBA—a ratified agreement that comes from collective bargaining—exists.

¹² *Collective bargaining agreement*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/legal/collective%20bargaining%20agreement> (last visited Aug. 2, 2020).

¹³ *Accord* RCW 41.80.005 (“‘Collective bargaining’ means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times and to bargain in good faith in an effort to reach agreement with respect to the subjects of bargaining specified under RCW 41.80.020”; 29 U.S.C. § 158(d) (“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.”); RCW 41.56.030.

b. *Barry & Barry* does not require overly specific standards

Despite the standards setting forth in general terms what the Industrial Statistician must do, AGC argues that the Legislature needed detailed instructions directing the Industrial Statistician to verify a host of facts, including whether the agreement was signed, whether it was expired, whether the internet version is accurate, and whether there is evidence of collusion. AGC Br. 26.¹⁴ But courts have rejected this type of overly specific approach.

“We believe that one of the legislative powers granted by [article II, section 1] is the power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it by the legislature.” *Barry & Barry*, 81 Wn.2d at 162. In *Barry & Barry*, the Court overturned past precedent that required that “the legislature must define (a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality’s authority in so doing, by prescribing reasonable administrative standards.” *Id.* at 158. The Court found this “excessively harsh and needlessly difficult to fulfill.” *Id.*

¹⁴ AGC also says there needs to be standards to verify whether there is a pre-hire agreement that covers employees, whether there are standards for negotiations to form a CBA, and whether a signatory employer is performing work in the geographic jurisdiction. AGC Br. 26-27. RCW 39.12.015 does not require these things, nor does any constitutional provision require the Legislature adopt such provisions.

at 159. The Court held that the delegation is constitutional when “the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it.” *Id.* In *Barry & Barry*, the Court approved the statute at issue, which provided “[t]he director shall administer the provisions of this chapter and shall issue from time to time reasonable rules and regulations for enforcing and carrying out the provisions and purposes of this chapter.” *Id.* at 156 (quoting RCW 19.31.070(1)). This broad language shows that courts permit statutes that provide much less direction than RCW 39.12.015.

RCW 39.12.015 gives sufficient direction to the Industrial Statistician. AGC ignores that the delegation doctrine encompasses principles of express and implied authority. Not everything has to be spelled out in the statute. Instead, administrative agencies have both those powers expressly granted and those implied by the statutory delegation of authority. *Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010). Under these principles, the Legislature did not have to pinpoint the method that the Industrial Statistician must use to determine whether a CBA is in effect. The Industrial Statistician has express and implied authority to set prevailing wages and may use this authority to determine whether a CBA is operative. An agency possesses implied authority where the Legislature

charges the agency with a specific duty but has not set the ways to accomplish that duty. *Brown v. Vail*, 169 Wn.2d at 330. Agencies have authority to determine specific actions necessary to achieve a legislative mandate. *Id.* at 330-31. In *Brown*, the Court rejected an argument that a delegation was not specific enough to satisfy the first *Barry & Barry* prong, pointing to the implicit powers of the agency. “The Department, through the superintendent of the state penitentiary, is charged with the duty to supervise executions by lethal injection under RCW 10.95.180(1), necessarily including the authority to establish the protocol by which lethal injection will be administered.” *Id.* at 330. Part of the Industrial Statistician’s express and implied authority is to determine whether a CBA rate is current and reflects a negotiated rate.¹⁵

c. A public agency need not have discretion for a statute to be constitutional, but in any event, the Industrial Statistician has discretion to determine if a ratified bona fide CBA exists

AGC cannot deny that an agency can use facts to make a determination. But it argues that the Industrial Statistician lacks any discretion to make a determination. AGC Br. 19. It cites no authority that the Legislature cannot adopt a standard with nondiscretionary aspects, so its argument should be rejected. *See Cowiche Canyon Conservancy v.*

¹⁵ For example, it uses its Wage Update system. CP 2515-16.

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider argument unsupported by authority); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (a court may generally assume when a party has not cited authority, the party has found none after a diligent search). The *Barry & Barry* test does not require that an administrative body have discretion and leaves “the power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it by the legislature.” *Barry & Barry*, 81 Wn.2d at 162. Instead of a level of discretion, it requires that the Legislature “define in general terms what is to be done and the . . . administrative body which is to accomplish it.” *Id.* at 159.

So the issue isn't whether there is discretion; the issue is whether the Industrial Statistician has the authority to adopt a wage rate. AGC ignores that the Industrial Statistician does have this authority and, although it is unnecessary under *Barry & Barry* to have discretion, in fact, the statistician has discretion because the statute sets a legal standard of using an operative CBA that results from collective bargaining. So the Industrial Statistician must make a factual determination whether the CBAs rates are the applicable and operative rate and whether the agreement reflected collective bargaining. If not, the Industrial Statistician can reject the CBA. But again, the level of discretion is irrelevant.

d. AGC's arguments about unsigned or expired agreements, and collusion are red herrings that attack the way L&I implements RCW 39.12.015(3)(a), not the power the Legislature granted L&I

AGC raises a series of arguments that go to how L&I has implemented RCW 39.12.015(3)(a). This is not an as applied case involving setting a specific rate, and therefore AGC's arguments are not before this Court.

Trying to transform its factual arguments into a legal argument, AGC points out unsigned copies of CBAs and expired CBAs. AGC 27-28.¹⁶ But there is no need for the Legislature to have included express statutory language that the Industrial Statistician use only signed CBAs or unexpired CBAs. An agreement that was never signed would not be operative. *See* CP 1853-54. An agreement that has expired is no longer operative, absent an evergreen provision. *E.g.*, CP 394. Thus, the statute provides enough standards.¹⁷

¹⁶ It ignores that L&I uses rates that derive from agreements that are themselves signed. CP 1866-69. As Industrial Statistician Christensen explained, L&I's copy might be unsigned, but the original agreement is signed. CP 1866-69. L&I relies on a Wage Update system where knowledgeable parties enter the current CBA rates. CP 2515-16.

¹⁷ AGC argues that L&I uses expired agreements, AGC Br. 28. AGC ignores that L&I uses the Wage Update system. CP 2515-16. AGC does not show that current information was not used in that system. It also ignores that agreements have provisions that continue the terms after the expiration date. *E.g.*, CP 394. In any event, even accepting that an expired agreement may have fallen through the cracks, an interested party could inform the Industrial Statistician and then appeal if a noncurrent wage rate was used. WAC 296-127-060(3).

AGC points to facts that it says show collusion. AGC Br. 30-31. But RCW 39.12.015 only allows the Industrial Statistician to use “collective bargaining agreements,” which necessarily implies agreements reached during arm’s length bargaining. Collusion is not collective bargaining. Collective bargaining involves negotiations between parties on different sides with different interests. Webster’s Third New International Dictionary at 444; *see also* 29 U.S.C. § 158(d); RCW 41.56.030; RCW 41.80.005.¹⁸ And, under federal law, to be a valid CBA, unions and employers must negotiate at arm’s length and produce bona fide agreements. *Int’l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 863 F.3d 1178, 1190, 1195 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1262 (2018); *see* 15 U.S.C. § 1; 29 U.S.C. § 158(d). Collusive agreements violate anti-trust provisions. *Id.*¹⁹

The Legislature can decide that a negotiated contract between competing interests establishes an appropriate prevailing wage that protects against collusive behavior. *See Constr. Indus.*, 546 N.E.2d at 373.

¹⁸ This understanding of collective bargaining is confirmed by looking at other statutes, as plain language analysis contemplates. *Larson*, 184 Wn.2d at 848 (court looks to “related provisions” in plain language analysis). In Washington, it is a crime to seek to improperly influence a labor representative or a business agent. RCW 49.44.020, .030, .060.

¹⁹ AGC argues that the Industrial Statistician cannot determine whether there was a bona fide agreement, asserting only the National Labor Relations Board can do so. AGC Br. 30 n. 56. The statistician can verify that there was collective bargaining to use the CBA to set prevailing wages. This decision does not regulate the CBA itself.

As another state court noted,

We regard it as being highly improbable that these competing groups representing opposing economic interests would conspire together or collaborate to subvert the interest of the public in work performed on public construction. As the Attorney General has noted in his brief, collective bargaining agreements reached between groups such as these represent a balancing of interests, not the interests of a group having a single purpose.

Male, 301 A.2d 153, 158.

To show collusion, AGC points to a dispute it had with Local 302 operators. AGC Br. 14-15, 30-31.²⁰ Despite its allegations, when the wage rates were set, AGC did not challenge the wage rates from the Local 302 contracts. And only bona fide agreements can be used, and AGC could have challenged the wage rate with a charge of collusion.²¹

²⁰ AGC says Local 302 signed only a “few” agreements. AGC Br. 14. To the contrary, Local 302 signed 50 employers. CP 2527.

²¹ AGC proves no collusion as it is required. AGC claims that employers signed the CBA who also were union members. AGC Br. 30. None of its record cites prove this fact. AGC Br. 30 n.57; AGC Br. 14 (citing CP 527-29 (declaration that does not discuss issue), 2655-2701 (operators CBA)). Management is excluded from the protections of the National Labor Relations Act. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275, 94 S. Ct. 1757, 40 L. Ed. 2d 124 (1974). Because managers and owners are not employees under the Act, they cannot perform work within a bargaining unit covered by a CBA. Thus, they could not negotiate on behalf of workers in the union. That an owner/manager of a construction company may also carry a union card (which simply represents membership in an organization no different from the Fraternal Order of Eagles or the ACLU) presents no evidence of collusion. AGC also points to Local 302’s CBA where the agreement increased the wage (\$3.61+) and pension amount (\$.75+) but slightly reduced the health benefit (\$.03-). AGC Br. 31 n. 59; CP 2517. But, as Industrial Statistician Christensen explains, the rates in those agreements aligned with existing rates and raised no concern that the negotiations were not at arm’s length. CP 2517.

AGC’s real concern is that CBAs entered into by competitors with less market share were used to set the prevailing wage rate. AGC Br. 30-31. AGC argues to the wrong branch of government. It seeks to impose substantive requirements not found in the legislation: verification of whether there were actual employees and whether a signatory employer is performing work in the jurisdiction. AGC Br. 26. But none of these is necessary when the Legislature looks to CBAs, not wage surveys.

AGC also argues that pre-hire CBAs should not be used. AGC Br. 29. These are agreements negotiated by employers and union representatives. CP 2125.²² And the Legislature allows CBAs of any type. AGC’s problem with them is that they are negotiated before the work begins, and ultimately no work may be performed under them. AGC Br. 29. But this goes to its policy argument about hours worked under a CBA.

2. RCW 39.12.015 satisfies the second prong of the *Barry & Barry* test: there are procedural protections

RCW 39.12.015(3)(a) satisfies the second prong of the *Barry & Barry* test. If there is a defect in the Industrial Statistician’s application of RCW 39.12.015, then a party may appeal. RCW 39.12.060; WAC 296-

²² “‘Pre-hire’ agreements are negotiated under Section 8(f) of the National Labor Relations Act (rather than under Section 9(a)) and are typically negotiated between one or more building trades unions and one or more employers or construction ‘owners.’ 29 U.S.C. § 158(f).” CP 2125. AGC could only point to one in L&I’s possession, and Industrial Statistician Christensen said he was not confident it was used to set prevailing wages. CP 2597.

127-060(3). If an AGC contractor member thinks that a wage rate was set incorrectly because the rates were not the product of a CBA or because the Local 302 CBA was not bona fide, the contractor could appeal under WAC 296-127-060(3). This regulation provides for appeal rights:

Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the Industrial Statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition [to the director] for arbitration of the determination.

WAC 296-127-060(3); *see also Se. Wash. Bldg.*, 91 Wn.2d at 46-47 (RCW 39.12.060 allows appeals to the director for dispute of the wage rate in public contracts). A party in interest includes contractors or associations of contractors who are “likely to seek or to work under a contract containing a particular wage determination.” WAC 296-127-060(3)(a)(i).

AGC does not dispute that it possesses appeal rights. Instead, AGC argues that all the State would have to produce at hearing is a CBA to prove its case. AGC Br. 35. And it argues that SSB 5493 prohibits review because the Industrial Statistician uses the wage rate in the CBA, characterizing the decision-making as lacking discretion. AGC Br. 32. Nothing prohibits the Legislature from including nondiscretionary elements in a statute. As noted above, AGC has cited no Washington State

authority that says otherwise. In any event, there are discretionary decisions, and an appeal is not simply a “rubber stamp.” *Contra* AGC Br.

35. A contractor may:

- Argue there isn’t a ratified agreement;
- Argue that there is only an expired agreement;
- Argue that a redlined version of a CBA wasn’t the real agreement;
- Argue that a rate is not one found in a CBA;
- Argue that the agreement did not result from collective bargaining, but from collusion.

Making yet another run at the policy decisions of the Legislature, AGC criticizes any appeal because the State would not need to prove hours under the agreement. AGC Br. 35. But the Legislature made a policy choice not to rely on that figure as a factor in the prevailing wage calculation.

D. AGC’s Conclusory Due Process Argument Shows No Constitutional Violation

AGC shows no due process violation. It repeats arguments about three cases made in the delegation argument. *See* AGC Br. 35-36 (citing *Entm’t Indus. Coal.*, 153 Wn.2d 657; *United Chiropractors*, 90 Wn.2d 1; *Carter*, 298 U.S. 238). These cases are inapt for the reasons stated above

in Part V.B.2. And AGC cannot claim a procedural due process violation without arguing the three-prong test under *Mathews v. Eldridge*, 424 U.S. at 335, which is necessary to satisfy a procedural due process challenge. See *In re Det. of Stout*, 159 Wn.2d 357, 373, 150 P.3d 86 (2007).

E. No Equal Protection Violation Exists Because RCW 39.12.015(3)(a) Rationally Relates to the Prevailing Wage Laws' Purpose to Pay Workers Meaningful Wages by Giving Workers a Say in the Wages

The statute satisfies equal protection because it rationally furthers the purposes of providing meaningful local wages in public work projects. Under rational basis review, a law is constitutional if it rationally relates to the state law's purpose. *Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 664, 374 P.3d 1123 (2016). "The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). Under this deferential standard, the courts will uphold a statute "unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *Id.*

The courts have described the purpose of prevailing wage laws: (1) to protect employees working on public projects from substandard wages and (2) to preserve local wages. *Silverstreak, Inc.*, 159 Wn.2d at 880. These goals are met here. But more importantly, these oft-stated purposes

are not the objectives to use to assess AGC's equal protection challenge because a statute's constitutionality is judged against the purposes the Legislature sought to achieve in the statute it adopted. *See M.W.*, 185 Wn.2d at 664. With passage of SSB 5493, the Legislature's public policies are to: (1) provide meaningful wages on public works when both employers and workers can negotiate the amount of pay, instead of an employer unilaterally setting the wage rate; (2) promote collective bargaining to give workers a voice about their wages, and (3) continue to stop the practice of bringing in cheap labor from distant locations (*See Wash. Bldg.*, 91 Wn.2d at 45). Using CBAs is rationally related to these objectives.

To achieve meaningful wages in projects funded by public dollars, the Legislature could decide that to benefit workers, they should receive a meaningful wage as reflected in a CBA. The Legislature could decide that to benefit workers in areas with CBAs, contractors should not pay one segment of the workforce in the area different from other segments for a similar trade, so all should get the collectively bargained rate. *See Constr. Indus.*, 546 N.E.2d at 373. AGC argues that the CBA rate could be less than the non-CBA rate, and this would be substandard wages. AGC Br. 40. But the prevailing wage is a floor for wages on government projects. *Drake*, 107 Wn.2d at 29. Nothing stops a contractor from paying a higher

wage. And, significantly, the purpose is to use negotiated wages where workers and employers have bargaining power to achieve a meaningful result. Even if the prevailing wage rate ends up being lower than a non-union rate, the goal of using wages that stem from arm's length negotiation to achieve a fair wage rate is preserved. It is up to the Legislature to define what substandard wages are.

Legislative line drawing need not be perfect. The Legislature need not make a classification “with ‘mathematical nicety,’ and its application may result[] in some inequality.” *Am. Legion Post #149 v. Dep’t of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008) (internal citation omitted). “It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” *Id.* at 609-10 (internal citation omitted). The Legislature could weigh the competing policies and decide that a CBA negotiated between contractors and labor would fairly reflect the community wage in the CBA’s locality because workers have a seat at the table, even though there could be the chance that a non-union wage is higher than a collectively bargained for wage.²³

²³ It is more likely that a CBA would cover the majority of a county’s workers. So AGC’s premise that SSB 5493 “excludes the wages paid to a vast majority (or even all) of the workers in a county when determining the ‘prevailing wage’” is flawed. AGC Br. 39. This happened before SSB 5493, with the laborers’ rate in 38 out of 39 counties. CP 2122. And if the court can conceive of any facts to sustain a law, it upholds the law under rational basis review. *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 901, 83 P.3d 999 (2004).

Again raising its policy argument, AGC argues that CBA rates are not “local wages” because they could reflect less than a majority of hours worked (ignoring that before SSB 5493, the CBA rate was generally used). AGC Br. 40. AGC offers its own definition of what local wages mean, but the Legislature used CBAs from a specific “geographic area.” RCW 39.12.015(3)(a). So it flows from this that the wages are local.

AGC also argues that *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960) applies here. AGC Br. 42. It does not. *Peterson* invalidated a statute that involved regulating identical businesses differently. *Id.* at 58. AGC argues that a business in one county is treated differently than the same business in another county. AGC Br. 42-43. But a business in one county is not identical to a business in another county because each has different local wages, so there is a rational distinction between them. Tracking individual jurisdiction’s wages has been the historical practice, and AGC shows no constitutional violation.

F. SSB 5493 Did Not Violate Article II, Section 37 as a Legislator Could Readily Determine What the Statute Means

The Legislature did not violate article II, section 37 because a legislator could readily discern the meaning of SSB 5493. *See State v. Tessema*, 139 Wn. App. 483, 489-90, 162 P.3d 420 (2007). Article II, section 37 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.” There is a two-part test for article II, section 37:

1. Is the new enactment such a complete act that a reader can determine the rights or duties created or affected by the legislative action without referring to any other statute?
2. Would a straightforward determination “of rights or duties under the existing statutes . . . be rendered erroneous by the new enactment?”

El Centro De La Raza v. State, 192 Wn.2d 103, 128-29, 428 P.3d 1143 (2018). This provision is given a “reasonable construction.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 245, 11 P.3d 762 (2000). It was designed to remedy “the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison.” *Id.* at 246-47.

AGC raises a challenge only under the test’s second prong. AGC Br. 43-47. Under the second prong, the court examines existing statutes to see if the Legislature’s will is intelligible. *See Tessema*, 139 Wn. App. at 489-90. This does not mean that a new act cannot change existing statutes by implication. Under the second prong, a complete enactment “may very well change prior acts and [yet still be] exempt from the requirement of [article II, section 37].” *Amalgamated Transit*, 142 Wn.2d at 251-52.

Nearly every act of a general nature changes another law, but that does not

make the act unconstitutional. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640, 71 P.3d 644 (2003).

AGC points to RCW 39.12.010 and 39.12.026 to say that there is an article II, section 37 violation. AGC Br. 45-46. But no provision of these two statutes is rendered erroneous by SSB 5493. These statutes contemplated the setting of the prevailing wage by L&I elsewhere in the act. RCW 39.12.010 is a definition section, so someone would have to go elsewhere for the regulatory authority. AGC argues that someone reading RCW 39.12.010 would think that “‘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.” AGC Br. 45. But such a belief on someone’s part would not be reasonable, as RCW 39.12.010 grants no regulatory authority—it doesn’t say who sets the prevailing wage, whether it is owed, or whether there is further qualification. Someone would have to seek out other laws, and that person would see that RCW 39.12.015(3)(a) gives the Industrial Statistician direction on how to set prevailing wages and how to do it, as it applies CBAs “notwithstanding RCW 39.12.010(1).”

Although AGC criticizes the use of the “notwithstanding” language (AGC Br. 45), the Supreme Court has recently approved its use under the second prong of the test. *Black v. Cent. Puget Sound Reg’l*

Transit Auth., 195 Wn.2d 198, 212, 457 P.3d 453 (2020). In *Black*, a statute used “notwithstanding” to specify when it would not apply, and the Court found this obviated any concern under the second prong of the article II, section 37 test. *Id.* Here, like in *Black*, the “notwithstanding” language qualifies the definitional section in RCW 39.12.010(1) with RCW 39.12.015(3). Thus, RCW 39.12.010(1) is not viewed standing alone; instead, the cross-reference explained the law’s scope regarding other statutes to any reader of the bill.

Likewise, there is no article II, section 37 violation as RCW 39.12.015 relates to RCW 39.12.026. AGC ignores the plain language of RCW 39.12.026, which provides that “(1) [i]n establishing the prevailing rate of wage under RCW 39.12.010, 39.12.015, and 39.12.020, all data collected by the department of labor and industries may be used only in the county for which the work was performed.” (emphasis added). This statute specifically references RCW 39.12.015, and it would be irrational not to look at that statute. The Court need go no further in its analysis. Cross-references to other statutes satisfy the second prong. *See Black*, 195 Wn.2d at 212.

AGC appears to argue legislators were misled because RCW 39.12.026 uses wage survey data from a given county, and RCW 39.12.015 permits the use of multi-county CBAs. AGC Br. 46-47. In

passing SSB 5493, the Legislature set aside surveys to set wage rates when one or more CBAs exist.

AGC's claim of conflict arises only if survey data about hours and wages in a county is necessary for rate setting there. AGC Br. 48. But this is not the case under RCW 39.12.015(3)(a). RCW 39.12.026 does not require that L&I calculate a prevailing wage rate where it finds data, nor does it prohibit L&I from creating a rate with no survey data. Here, the Industrial Statistician is not setting the wages based on survey data about hours. Instead, the statistician is using CBAs.

VI. CONCLUSION

AGC disagrees with the Legislature's policy choices, but this cannot justify the relief it seeks. This Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of August 2020.

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No. 54465-2-II

**COURT OF APPEALS FOR DIVISION II
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,

Appellants,

v.

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

Respondents.

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SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Brief of Respondents and this Certificate of Service in the below described manner:

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DATED this 5th day of August, 2020.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a large initial 'S'.

SHANA PACARRO-MULLER
Legal Assistant

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

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