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No. 54465-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants

v.

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

Defendants/Appellees

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

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The State’s brief is remarkable for its mischaracterization of the issues and misrepresentations of the record evidence. By the State’s assertions, the legislature has infinite authority to pass *any* prevailing wage law under the guise of a “policy choice,” constitutional requirements be damned. That the legislature must conform to the requirements of the federal and state constitutions when exercising its legislative authority is axiomatic. The State’s attempt to mischaracterize the issues before this Court as one of public policy—rather than one of constitutional compliance—is both disingenuous and erroneous.

Additionally, in an effort to undercut the merit of AGC’s constitutional arguments, the State flagrantly misrepresents or casually disregards facts clearly supported by the record evidence. Repeating over and over again that the legislature has done nothing more than delegate authority to the Industrial Statistician to set prevailing wage rates does not make it so when both the plain language of SSB 5493 and the record evidence make clear that the Industrial Statistician has zero discretion to do so. In fact, under SSB 5493 the Industrial Statistician is a mere “middle man” through whom the highest wage rates negotiated by private interested parties to CBAs merely pass to be officially sanctioned—or effectively rubber stamped—as the prevailing wage rate for public contracts.

The State further attempts to downplay as inconsequential the clear record evidence reflecting that, in adopting the prevailing wage rate, the Industrial Statistician uses unsigned and expired CBAs under which no

work may be performed; establishes prevailing wages in counties with CBAs that cover only a minority of workers and apply to only a fraction of the county geographically; and has no procedural mechanism at his disposal through which he may detect any collusion between the private interested parties to the CBA negotiations that solely establish the prevailing wage rate. By the State’s assertion, such facts are, in essence, immaterial.

It is understandable that the State would wish for this Court to view these facts as irrelevant or somehow something other than what they are given that they reflect an unconstitutional delegation by the legislature to private interested parties to establish the prevailing wage rate with an absolute lack of safeguards to protect against arbitrary decisions and abuse—in addition to due process and equal protection violations. But the record evidence is clear, and the constitutional violations exist beyond a reasonable doubt.

## II. STATEMENT OF THE CASE

### A. The Private Negotiations of Interested Parties are Establishing Prevailing Wage Rates on Public Contracts.

The plain language of SSB 5493 unequivocally reflects that the Industrial Statistician “*shall establish*” the prevailing wage rate “*by adopting*” the wage rate reflected in CBAs negotiated by private parties.<sup>1</sup> Because the Industrial Statistician is mandated to adopt such privately negotiated wage rates and has no discretion to review, modify, or reject them, it cannot reasonably be disputed that it is the private negotiations of

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<sup>1</sup> See RCW 39.12.015(3)(a) (emphasis added).

interested parties that are, in fact, establishing the prevailing wage rates on public contracts—not the Industrial Statistician. In an effort to discredit such a clear fact, the State repeats its conclusory assertion that, through SSB 5493, the legislature has done no more than properly delegate authority to the Industrial Statistician to establish prevailing wage rates.<sup>2</sup> But the only “delegated authority” the Industrial Statistician has is to merely *adopt* the wage rates reached as a result of private negotiations, as the Industrial Statistician, James Christensen, concedes:

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.

Q: And if there’s a collective bargaining agreement, you’re not going to consider any other information?

A: Yes.

Q: You would have no right to determine whether the rate is reasonable?

A: [After objection noted] I agree with that.

\* \* \*

Q: A collective bargaining agreement is an agreement between two parties, right?

A: Yes.

Q: It’s the union and the employer or the employer representative, right?

A: Correct.

Q: It is your understanding that these two parties get together, they negotiate a deal, and then they memorialize that deal in some

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<sup>2</sup> See Respondents’ Brief, at 13-15, 17-19, 21, 24-28, 30-32.

paper?

A: Yes.

Q: So it's a product of private negotiations?

A: Yes.

Q: And there's no oversight for L&I in those negotiations, is there?

A: L&I does not oversee those negotiations. We don't regulate bargaining as a process.

(CP 2567-2569) Thus, the Industrial Statistician is no more than an intermediary through whom privately negotiated CBA wage rates pass before being adopted as the prevailing wage in a proverbial rubber stamp.

**B. Before SSB 5493, the Industrial Statistician Collected and Analyzed Wage Data and Exercised Discretion in Setting the Prevailing Wage Rate.**

The State disingenuously claims that there is “no distinction” between the method by which the Industrial Statistician set the prevailing wage before SSB 5493—namely, by the collection and analysis of wage data through a wage survey—and his adoption of the highest privately negotiated CBA wage rate, as mandated under SSB 5493. *See id.*, at 14, 19. The record evidence reflects otherwise, as the Industrial Statistician concedes. (CP 2554-2560) Specifically, prior to SSB 5493, the Industrial Statistician “almost exclusively” collected and analyzed data through wage surveys on a statewide basis to arrive at the majority or average wage rate in each locality, which was established as the prevailing wage rate. (CP 2554-2560) Through this process, the Industrial Statistician “systemized” the wage data received to confirm that it was valid, accurate and complete and to identify and eliminate any “outlier” data before arriving at the average rate upon which the prevailing wage rate was established. (CP 2555-2557) As a result, the prevailing wage before SSB 5493 was

based on wages actually paid to the majority of workers in a locality. In contrast, under SSB 5493, the Industrial Statistician conducts no wage survey or data analysis and, instead, is mandated to simply adopt the highest negotiated wage rate in privately negotiated CBAs.<sup>3</sup>

**C. Unsigned CBAs are Used to Set Prevailing Wage Rates.**

The State offers no admissible evidence to counter evidence submitted by AGC of 86 unsigned CBAs that the Industrial Statistician used to establish prevailing wage rates following the enactment of SSB 5493. (CP 391-476 (including 86 unsigned signature pages from CBAs used by the State to establish prevailing wages)) Instead the State disingenuously asserts that “the record is clear that the [CBA] copy L&I has may be unsigned but the agreement itself is signed.” *See* Respondents’ Brief, at 6. To the contrary, there is nothing at all “clear” in the record establishing that the CBAs are signed.<sup>4</sup> The record evidence upon which the State relies in support of its assertion instead reflects that Mr. Christensen establishes the prevailing wage rate based on unsigned CBAs that he merely *assumes* are signed, as follows:

Q: What you’re doing at L&I is, you’re prevailing these collective bargaining agreements on the assumption that they’re signed,

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<sup>3</sup> (CP 2557-2558) (“Q: So before the law that was passed that we’re here about, you considered all the data. A: Yes. Q: Today you don’t right, if there’s a [CBA]? A: Correct . . . .”) (CP 2567-2569)

<sup>4</sup> The State identifies a “Wage Update System” it purportedly uses to collect “wage information” from parties to CBAs. *See* Respondents’ Brief, at 6. The record is void of any evidence of the State’s use of any such “Wage Update System” other than a single paragraph in a declaration of Mr. Christensen submitted in support of the State’s cross summary judgment motion, in which Mr. Christensen generally attests to the fact that he relies on updated wage and benefit schedule information “typically” input into the system by union representatives to establish the prevailing wage rate. (CP 2515)

but you don't have a signed agreement; is that right?

A: That's correct.

Q: So the industrial statistician is prevailing rates with collective bargaining agreements in its possession that are unsigned.

A: We're prevailing rates from agreements that L&I has in its possession, where the agreement that's in our possession doesn't have signatures affixed.

(CP 1868) Nor is Mr. Christensen "highly confident" about the validity of the CBAs and accuracy of the information obtained, as the State summarily asserts. *See* Respondents' Brief, at 6. Instead, Mr. Christensen repeatedly testified that he merely *believes*, but possesses no definitive knowledge, that the CBAs used to establish the prevailing wage rate are signed.<sup>5</sup>

There was a simple way to establish that the CBAs in question are signed: produce signed copies. The State, however, never produced such copies. As such, the record before this Court for purposes of AGC's underlying appeal unequivocally reflects that the State is using unsigned CBAs to establish prevailing wages, and no efforts are taken to obtain signed copies or otherwise ensure that they are signed. Such unsigned CBAs cannot be "bona fide," as the State concedes, yet the wages contained within the CBAs establish the prevailing wage rate.<sup>6</sup>

**D. Expired CBAs are Used to Set Prevailing Wage Rates.**

The State does not—and cannot—negate record evidence reflecting that it uses expired CBAs to set prevailing wage rates. Remarkably, the best

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<sup>5</sup> (CP 1866) ("I *believe* these agreements are signed.") CP 1867 ("I *believe* these agreements are all signed. But L&I does not, in each instance, have the signed signature page . . . . [I]f all I had was a copy of this agreement with the blank signature page, I would *believe* that it's a signed agreement.") (emphasis added)

<sup>6</sup> (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.")

the State can muster in an effort to negate the damning impact of this fact is an assertion that the CBAs used to set prevailing wage rates “may” continue after their expiration date. *See* Respondents’ Brief, at 6, n. 6. The obvious converse to the State’s assertion is that the CBAs may *not* continue after their expiration date, and absent the existence of an “evergreen clause” or other evidence reflecting their continuation, the CBAs would, in fact, *not* continue after their expiration date. In addition to Mr. Christensen’s admission that he does not know what an “evergreen clause” is, there is no record evidence to support the State’s contention that the CBAs it suggests “may” have continued after their expiration, in fact, did continue after their expiration.<sup>7</sup> The record evidence is clear: the Industrial Statistician has set prevailing wage rates using expired CBAs.<sup>8</sup>

**E. The Industrial Statistician Cannot Detect or Prevent Collusion.**

The State has failed to identify any mechanism or procedure to detect or prevent collusion. L&I is not a party to CBA negotiations, and it provides no guidelines to parties. (CP 2568-2569) The State does not, and cannot, refute the fact that neither the Industrial Statistician, nor anyone else at L&I, was even aware of the prima facie evidence of collusion for the Local 302 CBA with independent contractors. *See* Respondents’ Brief, at 35, n.21. Instead, the State resorts to the overly simplistic—and naïve—assertion that there is simply no need for any safeguard to protect against

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<sup>7</sup> *See* Respondents’ Brief, at 6, n. 6 (citing CP 394, 396, 398, 402, 404, 407-10, 414, 419, 430-31, 433, 441-44, 467-70, 473-74, 476).

<sup>8</sup> Even the State concedes as much, “accepting that an expired agreement may have fallen through the cracks.” *See* Respondents’ Brief, at 33, n. 17.

collusion because SSB 5493 requires the Industrial Statistician to adopt the prevailing wage rate from CBAs that result from collective bargaining, and “collusion is not collective bargaining.” *See id.*, at 34. The State’s assertion would be laughable if not absurd.

**F. Under SSB 5493, Prevailing Wage Rates Do Not Reflect Local Wages.**

As the State concedes, a primary purpose of prevailing wage laws is to preserve local wages.<sup>9</sup> *See* Respondents’ Brief, at 1, 10, 39. The State, however, has failed to refute the record evidence cited by AGC reflecting that SSB 5493 interferes with the preservation of local wages in counties with CBAs by requiring the Industrial Statistician to prevail the highest CBA wage regardless of whether:

- the actual prevailing wage in the county is higher or lower than that rate;
- the CBA covers only a fraction of a county geographically;
- the CBA covers only a minority of workers in the county; or
- any work under the CBA is actually performed, whether in the county it purports to cover or at all.<sup>10</sup>

*See* AGC’s Opening Brief, at 39-42. Rather than refute these facts, the State blithely disregards SSB 5493’s failure to preserve—let alone even generally reflect—local wages by asserting that “[l]egislative line drawing need not

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<sup>9</sup> Oddly, throughout its Brief the State additionally asserts that prevailing wage laws are intended to preserve “meaningful” wages, including “meaningful local wages.” *See, e.g.*, Respondents’ Brief, at 39. Nowhere in the prevailing wage laws is there any reference to “meaningful” wages—local or otherwise. This is a new construct on the State’s part.

<sup>10</sup> The State does not dispute that pre-hire CBAs—under which *no* work may ever be performed—are used to establish the prevailing wage. *See* Respondents’ Brief, at 36. Instead, it disregards AGC’s contention that the use of such CBAs, among other things, results in a prevailing wage that does not preserve local wages as nothing more than a “policy argument.” *See id.*

be perfect.” *See* Respondents’ Brief, at 41.

It additionally claims that, by asserting that SSB 5493 fails to preserve local wages because the prevailing wage rate may not reflect a majority of workers, AGC “offers *its own* definition of what local wages mean.” *See* Respondents’ Brief, at 42. But the definition that AGC relies on in support of its assertion is, in fact, the one set forth in RCW 39.12.010—the “definitions” provisions of Washington’s Prevailing Wages on Public Works Act (the “Act”)—which defines:<sup>11</sup>

- the prevailing wage rate as “the 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”; and
- “locality” as “the largest city in the county wherein the physical work is being performed.”

*See* RCW 39.12.010(2) (emphasis added); *see also* AGC’s Opening Brief, at 8, 10, 13, 32, 39-42. Even accepting the State’s assertion that the conflicting definition set forth in SSB 5493 applies, which provides for the prevailing wage to be established based upon the “geographic jurisdiction established in [CBAs]”<sup>12</sup>—SSB 5493 fails to preserve local wages because the “geographic jurisdiction” set forth in CBAs may have no relationship

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<sup>11</sup> As described in AGC’s opening brief and below herein, SSB 5493 provides a modified—and conflicting—definition of “prevailing wage” as the highest wage rate in a CBA in some counties, while the original definition continues to apply in other counties. *See* AGC’s Opening Brief, at 44-45.

<sup>12</sup> *See* Respondents’ Brief, at 42 (“AGC offers its own definition of what local wages mean, but the Legislature used CBAs from a specific ‘geographic area.’”). As described in AGC’s opening brief and herein below, SSB 5493 provides a modified—and conflicting—definition of “prevailing wage” as that provided for in RCW 39.12.010, while the original definition continues to apply in other counties, in violation of Article II, § 39 of the Washington State Constitution. *See* AGC’s Opening Brief, at 44-45.

whatsoever to the locality where work is actually being performed under the CBA. As a result, under SSB 5493, even CBAs with geographic jurisdictions covering other states or countries must be used to set the prevailing wage rates for every Washington county also included in the CBA's geographic scope.<sup>13</sup> That SSB 5493 does not preserve local wages cannot reasonably be denied.

### III. ARGUMENT

#### A. The Legislature May Not “Choose” to Enact Unconstitutional Statutes under the Guise of a “Policy Choice.”

The State erroneously asserts that AGC's constitutional challenges to SSB 5493 “are no more than disputes over the Legislature's policy choices.”<sup>14</sup> To the contrary, AGC does not contest the legislature's authority to pass prevailing wage laws, nor does it disagree with its “policy choice” to enact legislation for this purpose. Distinguishably, AGC challenges the *constitutionality* of SSB 5493 on numerous specific grounds. The Washington State Supreme Court recognized such a distinction in *El Centro de la Raza v. State*, 192 Wn.2d 103, 108, 428 P.3d 1143 (2018), an opinion addressing the constitutionality of legislation establishing charter schools in Washington State (the “Charter Schools Act”). There, in considering the appellants' challenge to the Charter Schools Act, the Court stated:

It is not the province of [the] court to express favor or disfavor of the legislature's policy decision *to create charter schools*. Rather, [a court's] limited role is to determine whether the enacted

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<sup>13</sup> (CP 2585, 2593, 477-496 (CBA covering Idaho and Montana), 497-518 (pre-hire CBA covering Japan))

<sup>14</sup> See Respondents' Brief, at 11 (asserting that “the Legislature chose to use CBAs to set prevailing wages, and this choice cannot be second-guessed”).

legislation complies with the requirements of our state constitution.... While the appellants may disagree with the legislature’s policy decision in this instance, our review is limited to whether the Act violates the state constitution.

*El Centro de la Raza v. State*, 192 Wn.2d at 108, 110, 428 P.3d 1143 (2018) (emphasis added).

Here, AGC does not ask this Court to “express favor or disfavor” of the legislature’s policy decision *to establish a prevailing wage law*. Instead, it properly asks this Court to determine whether such a law—namely, SSB 5493—complies with the requirements of the federal and state constitutions. For the reasons set forth in AGC’s opening appellate brief and below, it does not. That the legislature must conform to the requirements of the federal and state constitutions when exercising its legislative authority is unequivocal.<sup>15</sup> To accept the State’s assertion would be to accept the proposition the legislature has infinite authority to pass any prevailing wage law free of constitutional constraints under the guise of a “policy choice.”<sup>16</sup> It plainly does not.

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<sup>15</sup> See, e.g., *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013) (recognizing that “the legislature’s power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions”).

<sup>16</sup> Because the State’s “policy choice” assertion has no merit, the State’s lengthy recitation of the public policy behind the establishment of prevailing wage laws is largely irrelevant for purposes of this appeal. See Respondents’ Brief, at 9-10. Both relevant to and supportive of AGC’s assertions, however, is the State’s concession that a primary purpose of prevailing wage laws is to “preserve *local* wages.” See *id.*, at 10 (emphasis added). As described in greater detail herein, as well as in AGC’s opening appellate brief, SSB 5493 fails to further this primary purpose. See AGC’s Opening Brief, at 39-42.

**B. SSB 5493 Violates the Non-Delegation Doctrine.**

**1. SSB 5493 Impermissibly Mandates that the Industrial Statistician Adopt Future Wage Rates Negotiated by Private Interested Parties.**

**a. SSB 5493 Affords Private Parties—not the Industrial Statistician—Discretion in Establishing the Prevailing Wage Rate.**

The State erroneously asserts that there is no “requirement” that the Industrial Statistician exercise any discretion whatsoever in setting the prevailing wage rate but claims that he nonetheless retains such discretion because SSB 5493 “sets a legal standard of using an operative CBA that results from collective bargaining.” *See* Respondents’ Brief, at 32. Each assertion has no merit.

First, in claiming that the Industrial Statistician need not exercise any discretion in setting prevailing wage rates, the State refutes its own assertion by its reliance on *Barry & Barry v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972), in which the Washington State Supreme Court recognized that the legislature has “the power to determine *the amount of discretion* an administrative agency should exercise in carrying out the duties granted to it,” not that it need not retain discretion. *See id.*, at 162 (emphasis added). Indeed, implicit in the legislature’s delegation is a necessary degree of discretion that must be exercised in establishing the prevailing wage rate to ensure compliance with the purpose of the law—namely, to protect employees working on public projects from substandard wages *and* to preserve local wages. Absent any degree of discretion, prevailing wage rates could be established by some arbitrary measure, such

as a coin toss or a round of darts.

Second, in claiming that the Industrial Statistician nonetheless retains discretion, the State nonsensically asserts that “the statistician has discretion because [SSB 5493] sets a legal standard of using an operative CBA that results from collective bargaining.” *See* Respondents’ Brief, at 32. Setting aside that the record in no way reflects that the CBAs from which the prevailing wage rates are adopted are, in fact, “operative” as the State claims,<sup>17</sup> it defies logic to conclude that the Industrial Statistician somehow retains any degree of discretion as a direct result of SSB 5493’s mandate that he merely *adopt* the highest privately negotiated CBA wage rate as the prevailing wage. Indeed, the only discretion granted under SSB 5493 is to the interested parties to the privately negotiated wages in the CBAs—operative or otherwise—that the Industrial Statistician essentially cuts and pastes and then adopts as the prevailing wage rate.

**b. The Washington State Supreme Court’s Decisions in *Diversified*, *Kirschner* and *Woodson* Support AGC’s Position.**

The State contends that “case law provides that a statute may establish a legal standard that applies to future facts,” but the case law upon which it relies, in fact, supports AGC’s position, not that of the State. *See* Respondents’ Brief, at 13. Specifically, in *Diversified Inv. P’ship v. Dep’t of Soc. & Health Servs.*, 113 Wn.2d 19, 775 P.2d 947 (1989), the statute at issue—RCW 74.46.840—provided that any provision of the Nursing

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<sup>17</sup> As described in great detail both in AGC’s opening brief and above, the record evidence unequivocally reflects that the Industrial Statistician is using unsigned and potentially expired CBAs in setting the prevailing wage rate.

Homes Auditing and Cost Reimbursement Act of 1980 (“NHACRA”) found to be in conflict with federal Medicaid law such that federal funding was jeopardized would be inoperative to the extent of the conflict. *See id.*, at 24. When the federal government passed the Deficit Reduction Act of 1984 (“DRA”), such a conflict occurred because the DRA provided a different and conflicting method for valuing the depreciation rates used to calculate state Medicaid reimbursement rates. *See id.*, at 22-23. The Washington State Supreme Court explained that, although RCW 74.46.840 becoming operative was conditioned on a future event that may or may not occur, the legislation was complete when it left the legislature because the legislature had decided with certainty what would happen—that is, that the conflicting provision of the NHACRA would become inoperative. *See id.*, at 25. Relying on *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977), the Court specifically recognized that it would indeed be an unconstitutional delegation of legislative authority to incorporate an ever-changing set of facts established by a third party—even if the third party were a neutral entity such as the federal government. *See id.*, at 28 (citing *Dougall*, 829 Wn.2d at 123 (incorporating the ever-changing list of federal control substances to define the illegal drugs in Washington is an unconstitutional delegation of legislative authority)).

In contrast here, the legislation at issue—SSB 5493—was not complete when it left the legislature and still is not complete today because it incorporates an ever-changing set of facts set by private parties. The operative effect of SSB 5493 was not conditioned on a future event like in

*Diversified*. Instead, SSB 5493 attempts to incorporate an ever-changing list of wage rates set by third parties. Thus, SSB 5493 is not similar to the statute upheld in *Diversified* and, instead, it is akin to the statute struck down in *Dougall*.

Similarly, *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 310 P.2d 261 (1957) and *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980)—each relied upon by AGC in its opening brief—support AGC’s position. As summarized by the Washington State Supreme Court in *Woodson*, the Court in *Kirschner*

held that when a legislature declares that schools on an existing list are deemed accredited and those not on such a list are not accredited, it is legislating. *On the other hand, when it declares accredited schools shall be those that may thereafter be established by some private authority, it is clearly an unconstitutional delegation of legislative power.* As *Kirschner* explained, at page 136, the vice is not that the legislature adopts a standard of accreditation fixed by recognized medical societies, but that it defers to the adoption of standards such bodies may make in the future. The same principles apply here. In a similar vein, see *State v. Crawford*, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880 (1919); *State v. Emery*, 55 Ohio St. 364, 370, 45 N.E. 319 (1896); *Wagner v. Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922). Of recent date we have held the same view as to legislative attempts to adopt or acquiesce in future federal rules, regulations or statutes. *State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977). *See also State v. Jordan*, 91 Wn.2d 386, 588 P.2d 1155 (1979).

*Woodson*, 95 Wn.2d at 261 (emphasis added). Here, SSB 5493 suffers the same “vice” as the statute struck down in *Kirschner*, namely, it declares the wage rate in the CBAs that may thereafter be established by some private authority as the prevailing wage under the law. The State repeatedly attempts to represent the Industrial Statistician as having an active role in “determining”

the prevailing wage, but this is disingenuous at best and an outright misrepresentation at worst. Instead, the Industrial Statistician merely *adopts* the wage rates in the privately negotiated CBAs. (CP 2566)

Through its assertion that the Supreme Court of Wisconsin’s opinion in *Wagner v. Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922)—upon which the Court in *Woodson* unequivocally relies—“is distinguishable because it delegated authority directly to unions and not to an administrative agency to determine the prevailing wage,”<sup>18</sup> the State effectively concedes that SSB 5493 represents an impermissible delegation to unions. In *Wagner*, the implementing ordinance called for the City of Milwaukee’s common council to approve the prevailing wages rates, which would be determined based on the rates contained in CBAs. *See Wagner*, 188 N.W. 487, 490 (Wis. 1922). The court rejected the argument that the ordinance constituted a constitutional delegation to the common council because the language of the ordinance provided for the “prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers.” *Id.*, at 488. The court explained:

The controlling, dominant feature of this entire ordinance is the fixing, in concrete, definite form and in express terms of dollars and cents, the prevailing wage scale for the various crafts and industries. *This essential and dominant feature is, by the ordinance, fixed by the labor unions rather than by the common council.* Such rule of action is one we are constrained to hold beyond the power of the common council to make . . . We are not able to agree with the view suggested, that the provision in the ordinance that a majority vote of the members of the common council shall first determine and approve such prevailing wage before it becomes operative makes such action by the common

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<sup>18</sup> *See* Respondents’ Brief, at 17.

council the ultimate determination whether it be in accord with that fixed and established by the labor unions or not, nor with the further suggestion that the wage scale fixed by the recognized labor organizations is but a standard to which the common council may refer if it so elect [sic].

*Id.*, at 490 (emphasis added). In other words, the ordinance in *Wagner* mandated that the CBA wage rate be adopted. Similarly, here, SSB 5493 mandates that the Industrial Statistician *shall adopt* the CBA wage rates. The Industrial Statistician, like the Milwaukee common council, has not been delegated the authority to set prevailing wage rates; instead, private parties to CBA negotiations, including unions, have been delegated such authority.

**2. SSB 5493 Contains No Constitutionally Required Safeguards.**

As the State concedes in its reliance on *Barry & Barry v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972), safeguards are a constitutional requirement in any legislative delegation. The legislature has the freedom to choose between safeguards: New Jersey requires a majority of workers in the locality be covered by the CBA; New York requires 30 percent of workers in the locality be covered by the CBA; and California requires the CBA cover projects of a similar nature.<sup>19</sup> Without these safeguards, the statutes themselves would be unconstitutional. Here with SSB 5493, however, the issue is not *whether* the safeguards included are sufficient because there are none.

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<sup>19</sup> See AGC's Opening Brief, at 25, n. 41.

**a. The Appeals Process in RCW 39.12.060 Does Not Provide an Adequate Safeguard for Challenging Prevailing Wage Rates.**

The State cites RCW 39.12.060 as providing a means of challenging prevailing wage rates, but the State’s assertion has no merit. On its face, RCW 39.12.060 provides a means for L&I to arbitrate a jurisdictional dispute related to an existing contract for the performance of public works.<sup>20</sup> For example, there may be a dispute as to whether certain work should be paid at the rate of an ironworker or a carpenter. (CP 2179) To this end, RCW 39.12.060 provides a statutory mechanism for deciding such a dispute and also establishes the requirement that parties to a public works contract include a provision granting the Director the authority to resolve such a dispute. It does nothing to help if there is no contract won or in place.

AGC nonetheless concedes that disputes regarding the Industrial Statistician’s prevailing wage rate determinations may additionally be submitted to the L&I Director for arbitration under RCW 39.12.060. *See Southeastern Wash. Bldg. & Constr. Trades Council v. Dep’t of Labor & Indus.*, 91 Wn.2d 41, 46-47, 586 P.2d 486 (1978). Before the enactment of SSB 5493, however, the appeal process under RCW 39.12.060 made sense. As expressly recognized by the Washington State Supreme Court in *Southeastern Wash Bldg.*, under the appellate process in RCW

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<sup>20</sup> See RCW 39.12.060 (“Such contract shall contain a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature and such dispute cannot be adjusted by the parties in interest, including labor and management representatives, the matter shall be referred for arbitration to the director of the department of labor and industries of the state and his or her decision therein shall be final and conclusive and binding on all parties involved in the dispute.”); *see also Ak-Wa, Inc. v. Dear*, 66 Wn. App. 484, 489, 832 P.2d 877 (1992).

39.12.060—the “only form of appeal” provided for in the statute—“[s]ince the [industrial] statistician is required to determine the prevailing wage, it will always be his decision which is disputed.” *See id.*, at 47. After SSB 5493, however, the Industrial Statistician no longer has any discretion with setting prevailing wage rates. Any dispute, therefore, will instead center on the validity of the CBA containing the highest wage rate that is merely *adopted* by the Industrial Statistician. The State does not have the authority to invalidate a labor contract, proper on its face.<sup>21</sup> *See, e.g., Trust Fund Servs. v. Heyman*, 88 Wn.2d 698, 706-710 (1977). This legal limitation calls into serious question whether the State can perform any of the checks and balances it alleges are implicit in the language of SSB 5493. Any appeal under RCW 39.12.060 would be useless.

The State’s argument is also unpersuasive because contractors impacted by prevailing wage laws would not have enough information to determine whether to pursue an appeal of a rate. First, the State neither identifies nor publishes the CBA used to establish a prevailing wage rate as a matter of practice. (CP 2591) Second, even if a contractor could learn the name of the CBA used to establish the prevailing wage rate in question, it would have limited or no ability to obtain a copy of the CBA at issue or to engage in discovery with the signatories to confirm the validity of the agreement. In other words, the inability to compel the relevant evidence from the interested third parties to the CBA negotiations who possess

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<sup>21</sup> As AGC asserts in greater detail in its opening brief, it is for the NLRB to evaluate the validity of a CBA. *See* AGC’s Opening Brief, at 30, n. 56.

relevant factual information prohibits any contractor from being able to make any informed decision regarding whether a rate is legitimate. Any attempt to obtain the information from the State—by public records request or otherwise—would be meaningless since the State need only produce a copy of the CBA, which may or may not be signed, expired, or otherwise lacking proper form.

**b. SSB 5493 Contains No Safeguard to Prevent Against Arbitrary Self-Motivated Actions and Abuse in Establishing the Prevailing Wage Rate.**

As recognized by the Washington State Supreme Court in *Barry*, to satisfy the constitutional requirement that adequate safeguards exist in any legislative delegation, the safeguards must be provided both before and after implementation of the delegated act. *See Barry*, 81 Wn.2d at 164. In *Barry*, the legislature delegated authority to the Director of the Washington State Department of Vehicles to promulgate rules and regulations pertaining to the Employment Agency Act. *See id.*, at 156. In determining that the delegation contained adequate constitutionally required procedural safeguards, the Court reasoned as follows:

[A]dequate procedural safeguards must be provided, in regard to the procedure *for promulgation* of the rules and for testing the constitutionality of the rules *after promulgation* . . . Such safeguards can ensure that administratively promulgated rules and standards are as subject to public scrutiny and judicial review as are standards established and statutes passed by the legislature.

In the instant case, the applicable provisions of the Administrative Procedure Act, chapter 34.04 of RCW, ensure that interested parties will be heard *before* a rule is adopted. The act similarly provides for judicial review of administrative rules and standards to protect against arbitrary and capricious administrative action *after* it has occurred. The

framework of procedural safeguards within which the challenged fee standards were established is adequate and therefore does not render unconstitutional the administrative requirements or standards issued within that framework.

*See id.*, at 164 (emphasis added). In other words, **Barry** provides that an established appellate process to challenge the legislatively delegated act *after* it has been rendered does not pass constitutional muster if there are no safeguards in place to protect against arbitrary actions and abuse in the *implementation* of the delegated act. *See id.*

Even assuming *arguendo* that there is a sufficient appellate procedure through which the prevailing wage rate may be challenged *after* it is established (which, as detailed above, RCW 39.12.060 does not provide), SSB 5493 contains no safeguard to prevent against arbitrary self-motivated actions and abuse by the interested private parties to the CBA negotiations that the Industrial Statistician relies on to *establish* the prevailing wage. Specifically, as the record reflects, there is no safeguard to ensure that the CBAs from which the prevailing wage is adopted are valid (*i.e.*, that they have ever even been executed or are not expired); to ensure there is no collusion in the CBA negotiation process and that the CBAs establishing the prevailing wage rate were truly negotiated at arm's length; or to establish whether work is being performed, or has at any time been performed, under the CBAs, let alone within the counties covered by the "geographic jurisdiction" provision of the CBAs used to establish the prevailing wage rate. *See supra*, §§ II.C-F.

As such, SSB 5493's lack of safeguards in the Industrial Statistician's implementation of the prevailing wage rate by adopting the

highest privately negotiated CBA wage rate renders it unconstitutional. *See Barry*, 81 Wn.2d, at 164.

C. **SSB 5493 Provides No Due Process Protections for Contractors.**

The State claims only that SSB 5493 does not violate due process protections for the same reasons that it claims SSB 5493 does not violate the delegation doctrine. *See Respondents' Brief*, at 38-39. As set forth in AGC's opening brief and herein above, that SSB 5493 violates the delegation doctrine is unequivocal. Additionally, in support of its assertion, the State fails to address the Washington State Supreme Court's decision in *United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978), finding that 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. *See id.*, at 6-7. Similarly, here, SSB 5493's lack of safeguards constitutes a violation of the constitutional due process rights of those not belonging to the "favored organizations," namely, employees and employers not a party to the CBAs used to set prevailing wages.

D. **SSB 5493 Does Not Provide Equal Protection under the Law.**

Relying entirely on the legislature's purported "policy choices," the State asserts that SSB 5493 rationally furthers the dual purposes of the Act—namely, to protect employees working on public projects from substandard wages and to preserve local wages—by providing "meaningful wages" on public works projects; by promoting collective bargaining to give workers a "voice" in their wages; and by stopping the practice of

bringing in “cheap” labor from “distant locations.” SSB 5493, however, furthers none of these purported legislative purposes. As an initial matter, the State provides no definition or context as to what “meaningful wages” are while simultaneously dismissing as irrelevant that SSB 5493 mandates the Industrial Statistician to adopt the highest negotiated CBA wage rate even if it is *lower* than the actual prevailing wage in the locality. *See* Respondents’ Brief, at 41. By the State’s nonsensical and conclusory assertion, such an outcome somehow furthers the Act’s purpose because “workers [had] a seat at the table” in negotiating the lower wage rate. *See id.* The State similarly discounts that the prevailing wage rate under SSB 5493 does not necessarily reflect the local wage rate but, instead, may reflect the rate in whatever “geographical jurisdiction” parties to the privately negotiated CBAs decide to identify. And the State ignores entirely that, under SSB 5493, “extra territorial” CBAs may establish prevailing wage rates, thereby encouraging larger contractors to bid on public works projects in smaller counties.<sup>22</sup> (CP 209, 388, 1746)

The State additionally discounts as irrelevant SSB 5493’s exclusion of data from wages paid to the majority of the workforce in establishing the prevailing wage by instead relying solely on CBA rates in counties where they exist. The result is unequal treatment of employers and employees in counties with CBAs versus those in counties without them. In this regard, the State fails to comprehend the holding of *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960), claiming that *Peterson* “involved regulating

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<sup>22</sup> *See also* AGC’s Opening Brief, at 40-41.

identical businesses differently.” In fact, however, the businesses at issue in *Peterson* did vary in that some were covered under the federal Fair Labor Standards Act and others were not—the difference being whether the business engages in interstate commerce (or merely intrastate commerce). The court, however, found the distinction between interstate businesses and intrastate businesses to be an “accident” insufficient to justify different regulations.

Here, the accident is whether a current (or expired) CBA purports to cover the job classification for a relevant project. That, however, is an insufficient justification for an entirely different set of regulations regarding the establishment of a prevailing wage rate.

**E. SSB 5493 Irreconcilably Conflicts with Existing Laws.**

The State would have this Court believe that it would be unreasonable for someone to read the definitions of “prevailing wage” and “locality” set forth in RCW 39.12.010—which provides for “Definitions” under the Act—and interpret such definitions in the manner that the plain statutory language reflects. *See* Respondents’ Brief, at 44; *see also* RCW 39.12.010(1)-(2). Instead, according to the State, such definitions should be ignored entirely because RCW 39.12.010 “grants no regulatory authority” and the Industrial Statistician is given “direction on how to set prevailing wages” elsewhere in the Act. *See id.* By the State’s assertion, any and all statutory definitions contained in the Revised Code of Washington should be routinely disregarded where there is no regulatory authority granted

within them.

The State’s reliance on the Washington State Supreme Court’s decision in *Black v. Central Puget Sound Reg’l Transit Auth.*, 195 Wn.2d 198, 457 P.2d 453 (2020) is also misplaced. Contrary to the issue confronted in *Black*, here there are multiple conflicts created by SSB 5493, but the legislature only identified one—namely, that in RCW 39.12.010(1)—with a “notwithstanding” caveat. The specific reference to subsection (1) of RCW 39.12.010 omits, and thus explicitly implies, that there is *no* conflict with subsection (2). Yet, the definition of “locality” contained within RCW 39.12.010(2) similarly conflicts with language in SSB 5493, in which “locality” is no longer defined to mean “the largest city in a county.” *See* RCW 39.12.015(3)(a). Similarly, there is no cross-reference at all to RCW 39.12.026(1).

#### IV. CONCLUSION

For each of these reasons, and those set forth in AGC’s opening brief, SSB 5493 violates Article II, § 37.

RESPECTFULLY SUBMITTED this 4th day of September, 2020.

SEBRIS BUSTO JAMES

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I, Darren A. Feider, certify under penalty of perjury under the laws of the State of Washington that September 4, 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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# SEBRIS BUSTO JAMES

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