

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/29/2021 3:17 PM  
BY ERIN L. LENNON  
CLERK

No. 100258-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON, JAY INSLEE, JOEL  
SACKS, AND JIM CHRISTENSEN

*Petitioners,*

vs.

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

*Respondents.*

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**BRIEF OF *AMICUS CURIAE***

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Kristina Detwiler, WSBA #26448  
ROBBLEE DETWILER PLLP  
2101 Fourth Avenue, Suite 1000  
Seattle, Washington 98121  
(206) 467-6700

Attorneys for Amicus Curiae  
Washington State Building and  
Construction Trades Council,  
AFL-CIO

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## **INTRODUCTION AND IDENTITY OF AMICUS CURIAE**

The Council is an organization composed of forty-eight local unions and sixteen regional building trades councils made up from fourteen International Unions in the construction trades, including: International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; International Union of Bricklayers; International Union of Elevator Constructors; International Union of Painters; Laborers' International Union of North America; Operative Plasterers' and Cement Masons' International Association; International Association of Sheet Metal; United Associated of Plumbers and Pipefitters; United Union of Roofers; International Union of Operating Engineers; International Brotherhood of Boilermakers; International Association of Heat and Frost Insulators; and International Association of Iron Workers.

The Council is dedicated to the stability of employment and economic security of construction workers. To accomplish this mission, the Council advocates before the executive, legislative, and judicial branches of State government on behalf of its affiliates to promote the interests and well-being of

construction workers in the State of Washington. Through this work, the Council was instrumental in the drafting and passage of the legislation that resulted in this litigation, Substitute Senate Bill 5493 (“SSB 5493”). The Council therefore has an interest in being heard regarding the constitutionality of the legislation it helped to craft.

The prevailing wage rate was established to preserve local wages in this State. As an advocate for construction workers, the Council has a further interest in protecting the individuals who are the intended beneficiaries of SSB 5493. A significant part of the construction industry in Washington is made up of public works projects. State law requires that the hourly wages paid to workers on all public works projects not be “less than the prevailing wage rate for an hour’s work in the same trade or occupation in the locality within the state where such labor is performed.” RCW 39.12.020. The purpose of the Prevailing Wage Act (“PWA”) is “to discourage contractors on public works projects from paying substandard wages to the classes of their workers...to underbid competition.” *Heller v. McClure & Sons, Inc.*, 92 Wn. App. 333, 338, 963 P.2d 923, 926 (1998).

“Thus, it is the worker...who is the intended beneficiary of the act.” *Silverstreak, Inc. v. Washington State Dep't of Lab. & Indus.*, 159 Wn.2d 868, 880, 154 P.3d 891, 898 (2007). The principal issue in this case is the constitutionality of the method selected by the Legislature for the Industrial Statistician to determine the prevailing wage rate. The Council, through its affiliates, represents the intended beneficiaries of the PWA and therefore has a vital interest in proper review of this matter.

### **STATEMENT OF FACTS**

In Washington, the prevailing wage rate is determined by the Industrial Statistician of the Department of Labor and Industries. RCW 39.12.015. Historically, this determination was made using the results of wage and hour surveys which were sent to employers, contractors, and labor unions across the state. WAC 296-127-019(1). In 2018, the Legislature adopted SSB 5493. Rather than using survey results, this legislation required the Industrial Statistician to instead “establish the prevailing 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 a collective bargaining agreement.” RCW 39.12.015(3)(a).

On January 22, 2019, the Respondents filed a lawsuit in Thurston County Superior Court arguing that SSB 5493 was unconstitutional. (CP 1-20) Specifically, Respondents alleged that SSB 5493 violated the Washington Constitution’s Nondelegation Doctrine, Due Process Clause of the Fourteenth Amendment, Equal Protection Clause of the Fourteenth Amendment, and Article II, Section Thirty-Seven. (CP 11-17; 197-213) The superior court rejected the Respondent’s argument and granted the Petitioner’s Cross Motion for Summary Judgment. (CP 2536-2539) The Respondents appealed to the Court of Appeals, Division II. The Court of Appeals overturned the superior court ruling, found that SSB 5493 was unconstitutional, and remanded to the superior court for further proceedings.

On September 29, 2021 the Petitioners filed a Petition for Discretionary Review with the Washington Supreme Court. This is the Council’s Amicus Curiae in Support of the Petition for Discretionary Review.



## **ARGUMENT**

This matter involves issues of substantial public interest and a question of law under the Washington Constitution. Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), review is warranted.<sup>1</sup>

### **I. THE WASHINGTON STATE PREVAILING WAGE RATE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.**

“A petition for review will be accepted by the Supreme Court...[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). In deciding which petitions meet this criterion, “[t]he RAPs are intended to be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). When determining whether an issue meets this standard, courts have examined its level of impact. *See e.g. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005) (determining an issue to be of substantial public interest where it affects every DOSA sentencing proceeding in Pierce County). Here, using CBAs to

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<sup>1</sup> Review is further warranted pursuant to RAP 13.4(b)(1). The Council relies on the Petitioner’s Brief for this analysis.

set the prevailing wage rate fulfills the purpose of the PWA by ensuring that workers on public works projects are paid living wages. Additionally, it supports the development of a skilled and trained workforce statewide. Because the prevailing wage rate affects all workers on all public projects in this State, it has an immense impact and constitutes a matter of substantial public interest.

A. Using CBAs To Set The Prevailing Wage Rate Fulfills The Purpose Of The PWA By Ensuring Workers On Public Projects Receive Living Wages.

Washington implemented the PWA to “protect employees on public works projects and preserve local wages.” *Silverstreak*, 159 Wn.2d at 880; *See also Heller*, 92 Wn. App. at 338 (“[The] parallel purpose of the act...[is] to prevent the depression of prevailing wages in the area of public works projects.”) These functions are best served by using CBAs to determine the prevailing wage rate.

Unlike wages unilaterally set by employers, wage rates negotiated in CBAs expire. This requires labor and management to periodically renegotiate their agreements. Renegotiation allows the parties to account for market changes such as

inflation. The result is living wages which reflect the actual cost of living in each of Washington's thirty-nine counties.

These living wages are vital to workers on public projects. They allow workers to live near their jobsites, save money, and build intergenerational wealth. As a result, using CBAs to set the prevailing wage rate supports the express purpose of the PWA and impacts every individual employed on a public project statewide. The prevailing wage rate, and how it is calculated, is therefore a matter of substantial public interest.

B. A Living Prevailing Wage Rate Supports The Safe And Efficient Completion Of Public Works Projects.

The establishment of prevailing wage laws discourages companies from “recruiting labor from distant cheap labor areas.” *Southeastern Washington Bldg. & Const. Trades Council v. Dep't of Lab. & Indus.*, 91 Wn.2d 41, 45, 586 P.2d 486, 488 (1978). This helps Washington maintain a robust workforce because when workers are paid living wages, they are more likely to stay employed in their occupations. As a result, contractors on public works projects are able to retain skilled and trained local workers. In turn, public works projects are safer,

suffer less delay, and operate more efficiently. Given this impact, the issues present in the Petition for Review represent matters of substantial public interest. The Supreme Court should therefore grant review of this matter.

**II. THE DETERMINATION OF THE WASHINGTON STATE PREVAILING WAGE RATE INVOLVES A QUESTION OF LAW UNDER THE WASHINGTON CONSTITUTION.**

RAP 13.4(b)(3) allows for Supreme Court review where the petition involves “a significant question of law under the Constitution of the State of Washington.” The superior court and Division II of the Court of Appeals disagree about whether SSB 5493 is an improper delegation of legislative authority in violation of the Washington Constitution.

The Washington Constitution vests legislative authority solely in the State Legislature. Wash. Const. art. II, § 1. This authority cannot be delegated or transferred. *See e.g. Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42, 49 (1998). Although the Legislature must retain its legislative function, it may “delegate to administrative officers or boards the power to determine some fact or state of things upon which the application of law is made to depend provided the law enunciates standards by which those

officers or boards must be guided.” *Water Dist. No. 105, King Cty. v. State*, 79 Wn.2d 337, 342, 485 P.2d 66, 70 (1971). Under this standard, a delegation is appropriate where: (1) the Legislature defines in general terms what is to be done and (2) safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power. *Barry & Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

Here, when reviewing the constitutionality of SSB 5493, the superior court granted summary judgment in favor of the Petitioners. In so doing, it agreed that requiring the Industrial Statistician to use CBAs, where available, to set the prevailing wage rate was not an improper delegation of legislative authority. (CP 2536-2539) Rather, it satisfied both prongs of the *Barry & Barry* test. *Id.* The Court of Appeals reached the opposite conclusion.

The Legislature requires a clear framework under which lawmaking can be achieved. To this end, the Court must clarify what actions are lawful delegations of legislative authority and which are not. This will assist the Legislature in drafting future

legislation by providing clear instruction on the Nondelegation Doctrine. It will also reduce the occurrence of litigation unnecessarily challenging constitutionally sound laws. With the lower courts in disagreement about whether SSB 5493 violates the Constitution's Nondelegation Doctrine, this matter requires clarification from the State's highest judicial authority. For these reasons, the Court should grant review.

### **CONCLUSION**

Being a matter of substantial public interest and significant question of law under the Washington Constitution, the State Supreme Court should accept review of this matter.

DATED this 29<sup>th</sup> day of November, 2021.

/s/ Kristina Detwiler

Kristina Detwiler, WSBA #26448

Alea Carr, WSBA #52540

ROBBLEE DETWILER PLLP

2101 Fourth Avenue, Suite 1000

Seattle, Washington 98121

Phone: (206) 467-6700

[kdetwiler@unionattorneysnw.com](mailto:kdetwiler@unionattorneysnw.com)

[acarr@unionattorneysnw.com](mailto:acarr@unionattorneysnw.com)

Attorneys for Amicus Curiae  
Washington State Building and  
Construction Trades Council, AFL-  
CIO

**CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2021, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** and **BRIEF OF *AMICUS CURIAE*** with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will electronically send a copy to the following:

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Paul Michael Weideman	<a href="mailto:Paul.Weideman@atg.wa.gov">Paul.Weideman@atg.wa.gov</a>
Jennifer Ann Parda-Aldric	<a href="mailto:jparda@sebrisbusto.com">jparda@sebrisbusto.com</a>
Anastasia R. Sandstrom	<a href="mailto:anastasia.sandstrom@atg.wa.gov">anastasia.sandstrom@atg.wa.gov</a>
Seattle Labor & Industries A.g.	<a href="mailto:lniseaeservice@atg.wa.gov">lniseaeservice@atg.wa.gov</a>

SIGNED this 29<sup>th</sup> day of November, 2021.

/s/Kristina Detwiler  
Kristina Detwiler, WSBA #26448  
Alea Carr, WSBA #52540  
ROBBLEE DETWILER PLLP  
2101 Fourth Avenue, Suite 1000  
Seattle, Washington 98121  
Phone: (206) 467-6700  
[kdetwiler@unionattorneysnw.com](mailto:kdetwiler@unionattorneysnw.com)  
[acarr@unionattorneysnw.com](mailto:acarr@unionattorneysnw.com)

Attorneys for Amicus Curiae  
Washington State Building and  
Construction Trades Council, AFL-  
CIO

**ROBBLEE DETWILER PLLP**

**November 29, 2021 - 3:17 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 100,258-1  
**Appellate Court Case Title:** Associated General Contractors of Washington, et al. v. Jay Inslee, et al.  
**Superior Court Case Number:** 19-2-00377-1

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Seattle, WA, 98121  
Phone: (206) 467-6700

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