No. 101997-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 54465-2-II

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

Petitioners,

v.

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

Respondents.

Answer to Petition for Discretionary Review

Submitted by:

Darren A. Feider, WSBA No. 22430
Jennifer A. Parda-Aldrich, WSBA No. 35308
SEBRIS BUSTO JAMES
15375 S.E. 30th Place, Suite 310
Bellevue, WA 98007
Tel: (425) 454-4233 • Fax: (425) 453-9005

Attorneys for Respondents

TABLE OF CONTENTS

I. INTRODUCTION 1
II. INDENTITY OF RESPONDENTS 3
III. RESTATEMENT OF ISSUE RAISED BY PETITIONERS 3
IV. RESTATEMENT OF THE CASE 4
A. Washington's Prevailing Wage Law 4
B. Before SSB 5493, the Industrial Statistician Collected Wage Data to Set Prevailing Wage Rates 5
C. SSB 5493 Mandates the Industrial Statistician to Adopt the Highest Wage Rate in CBAs but Did Not Otherwise Amend the Act 6
D. SSB 5493 Permits the Use of Cross-County Wage Data to Set the Prevailing Wage Rate ... 8
E. Procedural History 11
V. ARGUMENT SUPPORTING DENIAL OF REVIEW 13
A. THE Court of Appeals Correctly Found That a Straightforward Reading of RCW 39.12.026(1) is in Direct Conflict with RCW 39.12.015(3)(a), which Cannot be Harmonized 13
1. A Straightforward Reading of RCW 39.12.026(1) is in Direct Conflict with RCW 39.12.015(3)(a) 14
2. THE Direct Conflict between RCW 39.12.015(3)(a) and RCW 39.12.026(1) Cannot be Harmonized 21
B. The Court of Appeals' Opinion Holding that SSB 5493 Violates Article II, Section 37 is Consistent with Supreme Court Precedent ... 23

TABLE OF CONTENTS (cont'd)

C. Invalidating SSB 5493 as Unconstitutional Will Not Harm Workers, Contractors and Public Agencies 28
VI. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

AllianceOne Receivables Mgmt., Inc. v. Lewis, 180 Wn2d 389, 325 P.3d 904 (2014) 15
Amalgamated Transit v. State, 142 Wn.2d 183, 11 P.3d 762 (2000) 19
Associated General Contractors of Wash. v. State, 19 Wn. App.2d 99, 494, P.3d 443 (2201). 12
Associated General Contractors of Wash. v. State, 200 Wn.2d 396, 518 P.3d 639 (2002) 12
Associated General Contractors of Wash. v. State, No. 54465-2-II, (Wash. Ct. App. April 18, 2023) ..... passim
Birgen v. Dep't of Labor & Indus., 186 Wn. App. 851, 857, 347, P.3d 503, *review denied*, 184 Wn.2d 1012 (2015) 15
Black v. Cent. Puget Sound Reg'l Transit Auth., 195 Wn.2d 198, 457 P.3d 453 (2020) 23, 24, 26
Gray v. Suttell & Assocs., 181 Wn.2d 329, 334 P.3d 14 (2014) 15
Han Nguyen v. R.S., 124 Wn.2d 766, 881 P.2d 972 (1994) 21
Spokane Grain & Fuel Co., v. Lyttaker, 59 Wn. 76, 82, 109 P. 316 (1910) 26
Wash State Ass'n of Cntys v. State, 199 Wn.2d 1, 502 P.3d 825 (2022).....25, 26
Wash. State Legislature v. Inslee, 198 Wn.2d 561, 498 P.3d 496 (2021).....24

TABLE OF AUTHORITIES (cont'd)

Statutes

RCW 39.12.010 ..... 4, 6
RCW 39.12.010(1) 4, 20
RCW 39.12.010(2) 4
RCW 39.12.015 ..... 13, 20
RCW 39.12.015(1) 4
RCW 39.12.015(3)(a) ..... passim
RCW 39.12.015(3)(a)-(b) 14
RCW 39.12.015(3)(a), (b) 6
RCW 39.12.015(a)(3) 17, 20, 22, 24
RCW 39.12.017 20
RCW 39.12.026 ..... 6, 7, 15, 20
RCW 39.12.026(1) ..... passim

Regulations

WAC 296-197-019(1)(b) 18

I. INTRODUCTION

The Court of Appeals correctly held that Substitute Senate Bill 5493 ("SSB 5493")—which amended Washington's Prevailing Wages on Public Works Act (the "Act") in 2018—violates article II, section 37 of the Washington State Constitution because a straightforward reading of RCW 39.12.015(3)(a) is in direct conflict with RCW 39.12.026(1) and renders RCW 39.12.026(1) erroneous.

The plain language of RCW 39.12.026(1) prohibits the use of wage data in one county to set prevailing wages in other counties. But RCW 39.12.015(a)(3) allows for such a practice by requiring the Industrial Statistician to set the prevailing wage rate by adopting the hourly wage, usual benefits, and overtime paid in collective bargaining agreements ("CBA") based on the CBA's geographic jurisdiction. As the Court of Appeals correctly found, the Industrial Statistician cannot comply with both RCW 39.12.015(a)(3) and RCW 39.12.026(1) if a multicounty CBA wage is used to set the

prevailing wage rate. As such, a clear conflict exists rendering RCW 39.12.026(1)'s prohibition against using cross-county wage data in establishing the prevailing wage rate erroneous, and the Court of Appeals' opinion holding that SSB 5493 violates article II, section 37 is consistent with Supreme Court precedent.

In an effort to reconcile the conflicting statutory language, Petitioners, the State of Washington, Governor Jay Inslee, Director Joel Sacks of the Department of Labor and Industries ("L&I"), and Industrial Statistician Jim Christensen (referred to collectively herein as the "State"), claim RCW 39.12.015(3)(a) only prohibits the use of cross-county data from wage *surveys* conducted by L&I in setting the prevailing wage—not wage data contained in CBAs from which the prevailing wage is adopted. By the State's assertion, there is no prohibition under the Act against the Industrial Statistician using wages from one county to establish the prevailing wage rate in another county when the

rate is prevailed by adopting wage rates contained in CBAs. The State takes this position *despite* testimony by L&I to the Legislature when it was considering SSB 5493 that, if SSB 5493 were to pass, the existing prohibition under RCW 39.12.026(1) would remain in effect under the Washington's Prevailing Wages on Public Works Act.

This Court should deny review.

II. IDENTITY OF RESPONDENTS

Respondents Associated General Contractors of Washington, Associated Builders and Contractors of Western Washington, Inland Pacific Chapter of Associated Builders and Contractors, and Inland Northwest AGC (referred to collectively herein as "AGC") represent union and non-union contractors and subcontractors performing public works projects in Washington State.

III. RESTATEMENT OF ISSUE RAISED BY PETITIONERS

The Court of Appeals found that SSB 5493 violates article II, section 37 of the Washington State Constitution because a straightforward reading of RCW 39.12.026(1) is in direct

conflict with RCW 39.12.015(3)(a) and renders the former erroneous. Is the Court of Appeals' Opinion consistent with Supreme Court precedent?

IV. RESTATEMENT OF THE CASE

A. Washington's Prevailing Wage Law.

Washington's Prevailing Wages on Public Works Act requires that employers pay "prevailing wages" to all employees performing work on public works projects. *See* RCW 39.12.010. Under the Act, "[a]ll determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries." RCW 39.12.015(1). According to the Industrial Statistician, Jim Christensen, determining the prevailing wage rate is his non-delegable statutory obligation. (CP 2559)

The "prevailing wage" is defined as the hourly wage, usual benefits, and overtime paid to the majority of workers in the applicable trade in each "locality." RCW 39.12.010(1). "Locality" is defined as the largest city in each county. RCW 39.12.010(2). The "prevailing wage" for each

trade is to be established on a county-by-county basis, based on the wages paid to workers in the largest city in the county. *See id.* The Act prohibits using wage data gathered from one county to establish prevailing wage rates in a different county. RCW 39.12.026(1).

B. Before SSB 5493, the Industrial Statistician Collected Wage Data to Set Prevailing Wage Rates.

Before SSB 5493, the Industrial Statistician conducted wage surveys to determine prevailing wage rates for each trade/occupation on a county-by-county basis. (CP 2559) Surveys were sent to every non-union and union contractor requesting a breakdown of wages paid, benefits, and hours worked by occupation. (CP 2553-4, 555-56, 566-67) L&I subsequently reviewed and analyzed the data to determine prevailing wage rates for each occupation on a county-by-county basis. (CP 2555-2557) If the majority of workers in a "locality" (largest city in each county) were paid the same wage rate, that rate became the prevailing

wage for that occupation in that county. If no single rate was paid to a majority of workers in a locality, the Industrial Statistician determined an average wage rate that became the prevailing wage for that occupation in that county. *Id.*

C. SSB 5493 Mandates the Industrial Statistician to Adopt the Highest Wage Rate in CBAs but Did Not Otherwise Amend the Act.

Effective June 7, 2018, the Legislature amended the Act by enacting SSB 5493 to change how the Industrial Statistician establishes prevailing wage rates. Under SSB 5493, to establish the prevailing wage rate, the Industrial Statistician "shall" adopt the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in CBAs, and if there is more than one CBA, the higher rate will prevail. RCW 39.12.015(3)(a), (b).

SSB 5493 made no other amendment to the Act. (CP 22-23) RCW 39.12.010, which defines the "prevailing wage," remained the same, as did RCW 39.12.026, which

restricts the use of wage data to the county in which the data originated.

Notably, when the Washington State Legislature was considering passage of SSB 5493, it heard testimony from L&I that RCW 39.12.026(1) prohibits the use of cross-county data to set the prevailing wage rate. Specifically, Tammy Fellin, L&I Legislative Director, testified before the Washington State Senate Labor and Commerce Committee as follows: "The law at RCW 39.12.026 … prohibits the use of cross-county data to set the prevailing wage. So, we are prohibited in law, this bill would not change that, from using wages in [sic] for King County, for work that is performed in King County, to establish the prevailing wage rate in another county." Testimony of T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37 (available at https://tvw.org/video/senate-labor-commerce-committee-018011113/?eventID=2018011113).

D. SSB 5493 Permits the Use of Cross-County Wage Data to Set the Prevailing Wage Rate.

As described above, before SSB 5493, the Industrial Statistician conducted wage surveys to determine prevailing wage rates for each trade/occupation on a county-by-county basis. (CP 2553-2559, 555-56, 566-67) Thus, before SSB 5493, through this process, either the average or majority wage paid to workers within each occupation in the largest city in each county was the prevailing wage rate in that county, as assessed and determined by the Industrial Statistician. (CP 2557)

Under SSB 5493, however, the reach of a CBA to set prevailing wages is based on the CBA's stated geographical jurisdiction—not where work is actually performed. (CP 2585) If a CBA's geographic jurisdiction covers multiple counties, the wages for each occupation listed in the CBA will be used to set prevailing wages for all the listed counties, even if work is performed in only one county, as

to which the Industrial Statistician testified during his deposition as follows:

> Q: So if I work in King County, but my collective bargaining agreement covers King County and Pierce County, you'll prevail that rate in Pierce County, correct, if it's the highest?
>
> A: Yes.
>
> * * *
>
> Q: What if the employer is a signator to a collective bargaining agreement that includes King County and Yakima County but performs no work in Yakima County? Will you still prevail that rate in Yakima County?
>
> A: Yes.

(CP 2582-83, 2585) Even if a CBA covers another state or country, SSB 5493 requires that it be used to set the prevailing wage rates for every Washington county listed in the geographic scope of the agreement. (CP 2593, 477-496 (CBA covering Idaho and Montana), 497-518 (pre-hire CBA covering Japan)).

Before SSB 5493, the Industrial Statistician considered CBAs when setting prevailing wage rates but

verified actual work being performed, and the CBA was used to set the rate only if the wage survey confirmed the majority of workers in a "locality" were actually performing work under the CBA. (CP 2550, 2563-64) In contrast, under SSB 5493, the Industrial Statistician makes no effort to determine whether work is actually performed under the CBA and instead only "takes the agreements at face value" that work is being performed. (CP 2606)

When establishing the prevailing wage rate from a CBA under SSB 5493, if the CBA lists 20 occupations, the wages for all 20 occupations are used to set prevailing rates, even if the employer has only a single employee performing work. As the Industrial Statistician concedes, even if a CBA covers only 100 yards of a county, it will still prevail to set the rate for the county. (CP 2550, 2561) Similarly, if one CBA covers 99 percent of the hours worked in a county and another covers one percent, the CBA with the higher wage rates will prevail, not the CBA that covers

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

Further, under SSB 5493, in any county with an applicable CBA, the prevailing wage is based on CBA wages only—even if non-union employees earn a higher hourly wage. (CP 388, 1754, 2574) Thus, SSB 5493 may have the effect of *lowering* the prevailing wage rate.

For each of these reasons, the record evidence is clear that SSB 5493 allows for the use of cross-county wage data to set the prevailing wage rate.

E. Procedural History.

In January 2019, AGC filed the instant action asserting that SSB 5493 is unconstitutional. (CP 1-97) In November 2020, the parties filed cross-motions for summary judgment, which the trial court resolved in the State's favor. (CP 2536-39) The Court of Appeals reversed in an August 31, 2021, published opinion, holding that SSB

5493 is unconstitutional in violation of the non-delegation doctrine. *See Associated General Contractors of Wash. v. State ("AGC I")*, 19 Wn. App.2d 99, 107, 494, P.3d 443 (2201). This Court reversed *AGC I* and remanded to the Court of Appeals to address whether SSB 5493 violates article II, section 37 of the Washington State Constitution. *See Associated General Contractors of Wash. v. State ("AGC II")*, 200 Wn.2d 396, 415-16, 518 P.3d 639 (2002). After remand, the Court of Appeals reversed the trial court in an April 18, 2023, unpublished opinion and held that SSB 5493 violates article II, section 37. *See Associated General Contractors of Wash. v. State ("AGC III"),* No. 54465-2-II, slip op. at 8 (Wash. Ct. App. April 18, 2023) The State seeks discretionary review of the Court of Appeals' April 18, 2023, unpublished opinion in *AGC III*.

V. ARGUMENT SUPPORTING DENIAL OF REVIEW

A. The Court of Appeals Correctly Found That a Straightforward Reading of RCW 39.12.026(1) is in Direct Conflict with RCW 39.12.015(3)(a), which Cannot be Harmonized.

Effective June 7, 2018, the Legislature amended the Act by enacting SSB 5493, through which subsections (3)(a) and (3)(b) were added to RCW 39.12.015 as follows:

> (3)(a) Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.
>
> (3)(b) For trades and occupations in which there are no collective bargaining agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW 39.12.010 by conducting wage and hour surveys. In instances when there are no applicable collective bargaining agreements and conducting wage and hour surveys is not feasible, the industrial statistician may employ other

> appropriate methods to establish the prevailing rate of wage.

See RCW 39.12.015(3)(a)-(b). RCW 39.12.026(1)—which was not amended by SSB 5493—provides as follows:

> (1) In 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.

See RCW 39.12.026(1).

As described below, the Court of Appeals correctly found that the plain language in RCW 39.12.015(3)(a) conflicts with RCW 39.12.026(1) and renders RCW 39.12.026(1) erroneous. Contrary to the State's assertion, that conflict cannot be harmonized.

1. A Straightforward Reading of RCW 39.12.026(1) is in Direct Conflict with RCW 39.12.015(3)(a).

"The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent." *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 857, 347,

P.3d 503, *review denied*, 184 Wn.2d 1012 (2015). Courts derive legislative intent from the plain language of the statute "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). Courts may use dictionary definitions to discern the plain meaning of terms undefined by statute. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn2d 389, 395, 325 P.3d 904 (2014).

Here, when the Washington State Legislature was considering passage of SSB 5493, it heard testimony from L&I that RCW 39.12.026(1) prohibits the use of cross-county wages to set the prevailing wage rate, both *before* SSB 5493's passage and *afterwards*. *See* Testimony of T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37 ("The law at RCW 39.12.026 … prohibits the use of cross-county data to set

the prevailing wage. So, we are prohibited in law, this bill would not change that, from using wages in [sic] for King County, for work that is performed in King County, to establish the prevailing wage rate in another county."). Yet the record evidence is clear that, since the passage of SSB 5493, the Industrial Statistician has established the prevailing wage rate in counties by using wages worked in other counties through wage rates in CBAs. (CP 2582-83, 2585) Indeed, under SSB 5493, in circumstances when a CBA covers another state or country, the Industrial Statistician is *required* to use that rate to set the prevailing wage rates for every Washington county listed in the geographic scope of the agreement. (CP 2593, 477-496 (CBA covering Idaho and Montana), 497-518 (pre-hire CBA covering Japan)).

This is true because, under RCW 39.12.015(3)(a)'s mandate, the Industrial Statistician is required to establish the prevailing wage rate "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." *See* RCW 39.12.015(a)(3). The Industrial Statistician has no discretion to disregard this mandate in circumstances when the outcome under RCW 39.12.015(a)(3) is that wages from one county in a CBA are used to set prevailing wage rates in another county. For this reason, as the Court of Appeals correctly found:

> [I]f the industrial statistician used a multicounty CBA—a form of data—to establish the prevailing wage in several counties, a straightforward reading of RCW 39.12.026(1) is then in direct conflict with RCW 39.12.015(3)(a). It becomes impossible for the industrial statistician to comply with both statutes if a multicounty CBA is involved.

See AGC III, slip op., at 16.

In so finding, the Court of Appeals correctly determined that wages, as contained in the CBAs the Industrial Statistician is mandated to adopt in setting the

prevailing wage rate, are a form of multicounty "data" excluded under RCW 39.12.026(1) as follows:

> While it is true that RCW 39.12.026(1) neither requires the industrial statistician to calculate the prevailing wage where he or she finds data nor prohibits the establishment of a prevailing wage without data, the State misses the thrust of the provision. CBAs are a form of data that an industrial statistician may use to establish a prevailing wage. *See* WAC 296-197-019(1)(b); RCW 39.12.015(3)(a). Just because a CBA wage is adopted as the prevailing wages does not disqualify the CBA as "data."
>
> Furthermore, RCW 39.12.026(1) does not confine the definition of "data" to only "wage survey data." The provision states "*all data* collected by the department of labor and industries." RCW 39.12.026(1) (emphasis added)....

See AGC III, slip op., at 15-16 (emphasis in original). Indeed, a contrary finding would mean that, in considering SSB 5493, legislators were misled on SSB 5493's impact and how it would be applied in terms of using multicounty CBA wage rates to set the prevailing wage rates from county to county. At a minimum, a contrary finding would beg the question of whether those who voted in favor of

SSB 5493 realized the significant modification to the Act. Did they know that they were creating a law that would require the Industrial Statistician to use hours worked in one county to establish the prevailing wage rate in another, in direct contrast to L&I's testimony that it would not? *See Amalgamated Transit v. State*, 142 Wn.2d 183, 246, 11 P.3d 762 (2000) (recognizing that the purpose of article II, section 37's requirement is to "avoid confusion, ambiguity, and uncertainty in the statutory law" and ensure the Legislature is aware of the impact a bill has on already existing laws).

The Court of Appeals also correctly rejected the State's assertion that RCW 39.12.026(1) contains "qualifying" language to exclude the one-county limitation found in RCW 39.12.026(1) from applying to RCW 39.12.015(3)(a), or vice versa. *See AGC III*, slip op., at 15. Specifically, as the Court of Appeals correctly determined:

> There is no qualifying language within RCW 39.12.026(1), such as "when conducting wage

> surveys," which would clarify an intention to exclude the one-county limitation found in RCW 39.12.026(1) from applying to RCW 39.12.015(3)(a).
>
> Furthermore, RCW 39.12.015 says nothing of RCW 39.12.026. *See* RCW 39.12.015. RCW 39.12.015's lack of reference to RCW 39.12.026 is all the more apparent because it does reference other provisions: "Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1)." RCW 39.12.015(3)(a).

See AGC III, slip op., at 15.

The Court of Appeals' finding is not only supported by the plain language in RCW 39.12.026(1) and RCW 39.12.015(a)(3) but comports with L&I's testimony to the Washington State Senate Labor and Commerce Committee that SSB 5493 "would not change" RCW 39.12.026(1)'s prohibition against using wages in one county to establish the prevailing wage rate in another county. *See* Testimony of T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37.

For each of these reasons, the Court of Appeals correctly found that a direct conflict exists between RCW 39.12.015(3)(a) and RCW 39.12.026(1) that renders RCW 39.12.026(1) erroneous.

2. The Direct Conflict between RCW 39.12.015(3)(a) and RCW 39.12.026(1) Cannot be Harmonized.

The State's assertion that the Court of Appeals failed to "harmonize" RCW 39.12.015(3)(a) and RCW 39.12.026(1) has no merit. When the various provisions of a chapter can be harmonized there is no repeal or amendment by implication. *Han Nguyen v. R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994). A statute may be harmonized where the conflicting language is not "prohibitive" and where it may "supplement, rather than supplant, the existing provisions." *See id.* Neither is true here.

First, as the Court of Appeals correctly found, in circumstances when the industrial statistician uses a

multicounty CBA to establish the prevailing wage in several counties, a straightforward reading of RCW 39.12.026(1) is then in direct conflict with RCW 39.12.015(3)(a). *See AGC III*, slip op., at 16. Under such circumstances, "[i]t becomes impossible for the industrial statistician to comply with both statutes if a multicounty CBA is involved." *See id.* In other words, the language in RCW 39.12.015(3)(a) is "prohibitive" of that in RCW 39.12.026(1).

Second, RCW 39.12.015(a)(3)'s mandate that the Industrial Statistician adopt the highest wage rate in CBAs to set the prevailing wage rate based on its geographic scope supplants, rather than supplements, the existing provisions in RCW 39.12.026(1). Such an outcome is in direct contrast with L&I's testimony that RCW 39.12.026(1)'s prohibition against the use of cross-county wages to set the prevailing wage rate would remain in effect under SSB 5493's amendment to the Act. *See* Testimony of

T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37.

For each of these reasons, the conflicting language in RCW 39.12.015(3)(a) and RCW 39.12.026(1) cannot be harmonized.

B. The Court of Appeals' Opinion Holding that SSB 5493 Violates Article II, Section 37 is Consistent with Supreme Court Precedent.

Article II, section 37 of the Washington State Constitution provides: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." Courts employ a two-part test to determine if a statute violates article II, section 37. *See Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 205, 457 P.3d 453 (2020). First, courts must assess whether a statute is a "complete act," meaning "the rights or duties under the statute can be understood without referring to another statute. *See id.* (internal citation and quotation omitted).

Second, courts must evaluate whether the amendment renders a straightforward determination of the rights or duties under existing statutes erroneous. *See id.* A straightforward understanding of the rights or duties imposed under an existing statute becomes erroneous when the amendment creates a conflict or alters criteria. *Wash. State Legislature v. Inslee*, 198 Wn.2d 561, 594-95, 498 P.3d 496 (2021). A complete act may still violate article II, section 37 if it fails to inform readers how an amendment impacts or modifies rights or duties created by other statutes. *Black*, 195 Wn.2d at 210.

Here, the Court of Appeals' Opinion holding that SSB 5493 fails to satisfy the second element of the two-part test, and thus violates article II, section 37, is consistent with Supreme Court precedent. As described above, RCW 39.12.015(a)(3) directly conflicts with RCW 39.12.026(1) and renders RCW 39.12.026(1) erroneous. *See supra*, § IV.A. The State's assertion that such a conflict is not a "per

se violation of article II, section 37" is without merit. (Petition, at 25)

In support of its claim, the State asserts that "many cases identify potential conflicts between statutes, and they are routinely resolved with no suggestion that the legislature violated [article II,] section 37." (Petition, at 27) The State relies on one case—*Wash State Ass'n of Cntys v. State*, 199 Wn.2d 1, 502 P.3d 825 (2022)—in support of its position in this regard. Unlike with the Court of Appeals' ruling in *AGC III* with regard to SSB 5493, however, this Court in *Wash State Ass'n of Cntys* was able to resolve the conflicting statutory language at issue. *See id.*, at 10-14. As described above, in contrast, the conflicting language in RCW 39.12.015(a)(3) and RCW 39.12.026(1) cannot be harmonized. *See supra*, § IV.A.2. Further, unlike here, the Court in *Wash State Ass'n of Cntys* made no finding that the amended statutory language conflicted with existing

statutory language and rendered it erroneous. *See id.*, at 17. Thus, the decision is inapposite.

The State further argues that the Court of Appeals' decision is inconsistent with Supreme Court precedent "that the purpose of [article II,] section 37 is to 'protect members of the Legislature and the public against fraud and deception, not to trammel or hamper the Legislature in the enactment of laws.'" (Petition, at 27) (quoting *Spokane Grain & Fuel Co., v. Lyttaker*, 59 Wn. 76, 82, 109 P. 316 (1910)) In support of its assertion, the State relies on *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 205, 457 P.3d 453 (2020), for the proposition that "a significant purpose of article II, section 37 is to ensure that those enacting an amendatory law are fully aware of the proposed law's impact on existing law." *See Black*, 457 P.3d, at 458.

This Court's precedent in *Black* supports AGC's position, not that of the State's. Indeed, in testimony to the

Washington State Senate Labor and Commerce Committee, L&I testified that SSB 5493 "would not change" RCW 39.12.026(1)'s prohibition against using wages in one county to establish the prevailing wage rate in another county. *See* Testimony of T. Fellin, Senate Labor & Commerce Committee Hearing Dated January 11, 2018, at 57:10-37. To accept the State's position that, after SSB 5493, wages from one county may be used to set prevailing wage rates in other counties would confirm that the legislature was, in fact, *not* fully aware of SSB 5493's impact on existing language in the Act, in direct conflict with the purpose of article II, section 37.

For each of these reasons, the Court of Appeals' opinion holding that SSB 5493 violates article II, section 37 is consistent with Supreme Court precedent. This Court should deny review.

C. Invalidating SSB 5493 as Unconstitutional Will Not Harm Workers, Contractors and Public Agencies.

The State asserts that SSB 5493 should not be invalidated—despite its violation of article II, section 37—because "[t]he prospect of 22,000 wage rates revoked" would "create[] uncertainty and disruption for contractors and public agencies." (Petition, at 30) To accept the State's assertion would be to accept the proposition that a statute that violates the Washington State Constitution should be permitted to stand without correction to avoid "uncertainty and disruption." "Uncertainty" and "disruption" is not a basis for this Court to accept review.

Nonetheless, the record evidence is clear that under SSB 5493, in any county with an applicable CBA, the prevailing wage is based on CBA wages only—even if non-union employees earn a higher hourly wage. (CP 388, 1754, 2574) Thus, SSB 5493 may, in fact, have the effect of *lowering* the prevailing wage rate. For this reason, under

SSB 5493, prevailing wages do not reflect local wages or protect against substandard wages, contrary to the Act's purpose. In other words—contrary to the State's position—invalidating SSB 5493 for its violation of article II, section 37, would foster *certainty* that prevailing wages will reflect local wages, consistent with the Act's purpose.

VI. CONCLUSION

For each of these reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 20th day of June, 2023

SEBRIS BUSTO JAMES

s/ Jennifer Parda-Aldrich
Darren A Feider,
WSBA No. 22430
Jennifer A. Parda-Aldrich,
WSBA No. 35308
Attorneys for Respondents

I certify that this answer is in 14-point Georgia font and 4,396 words, in compliance with the Rules of Appellate Procedure. RAP 18.17 (b).

CERTIFICATE OF SERVICE

I, Jennifer Parda-Aldrich, certify under penalty of perjury under the laws of the State of Washington that on June 20, 2023, I caused to be served the document to which this is attached to the parties listed below in the manner shown:

E-Filing via Washington State Appellate Courts Portal:

Erin L. Lennon, Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

Anastasia R. Sandstrom, WSBA #24163
James Mills, WSBA #36978
Office of the Attorney General
Labor & Industries Division
anastasia.sandstrom@atg.wa.gov
james.mills@atg.wa.gov

s/ Jennifer Parda-Aldrich
Jennifer Parda-Aldrich

SEBRIS BUSTO JAMES

June 20, 2023 - 8:28 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,997-1
Appellate Court Case Title:	Associated General Contractors of Washington, et al. v. Jay Inslee, et al.
Superior Court Case Number:	19-2-00377-1

The following documents have been uploaded:

- 1019971_Answer_Reply_20230620082518SC839817_6315.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 20230620 AGC Answer to Petition for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- LITacCal@atg.wa.gov
- Paul.Weideman@atg.wa.gov
- ajendresen@sbj.law
- anastasia.sandstrom@atg.wa.gov
- dfeider@sbj.law
- james.mills@atg.wa.gov
- lniseaeservice@atg.wa.gov

Comments:

Sender Name: April Jendresen - Email: ajendresen@sbj.law
Filing on Behalf of: Jennifer Ann Parda-Aldrich - Email: jparda@sbj.law (Alternate Email:)

Address:
15375 SE 30th Pl., Suite 310
Bellevue, WA, 98007
Phone: (425) 454-4233

Note: The Filing Id is 20230620082518SC839817