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SUPREME COURT OF THE STATE OF WASHINGTON

ALEXANDRIA REAL ESTATE EQUITIES, INC., a Washington
State Taxpayer, JOHN JOSEPH COX, a Washington State Taxpayer,
and DEAN A. TAKKO, a Washington State Taxpayer,

Petitioners,

v.

UNIVERSITY OF WASHINGTON, a Public Institution of Higher
Education and Agency of the State of Washington,

Respondent.

BRIEF OF *AMICUS CURIAE*

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INTRODUCTION

The Supreme Court of Washington should grant review to clarify whether RCW 28B.10.350 applies to projects utilizing novel lease-construction-leaseback agreements.

This matter is of substantial public interest given that the piloted arrangement is geared toward circumventing the Prevailing Wage Act (“PWA”). RCW 39.12.010, *et seq.* The Court of Appeal’s decision creates a glaring exception to important statutory requirements. Specifically, its holding allows Washington higher education institutions to evade paying trade and craft workers prevailing wages by structuring its construction and demolition projects as lease-construction-leaseback agreements. Such a result subverts the long-held and laudable public policies behind the PWA: protecting workers and preserving local wages.

Furthermore, the Court of Appeal’s decision necessitates review because the Court disregarded relevant precedent when determining whether UW’s construction project is a public works project subject to RCW 28B.10.350. By doing so, it undermined any reliance interest on prior precedent and the standard described therein. As such, the legal

standard for ascertaining when a building project is a public work requires clarification.

Since this matter constitutes an issue of substantial public interest, and requires resolution regarding the applicable legal standard, Washington Supreme Court review is warranted.

IDENTITY OF AMICI CURIAE

The Washington State Building and Construction Trades Council, AFL-CIO is an organization composed of forty-eight local unions and sixteen regional building trades councils. The regional building trades councils are comprised of fourteen international unions in the construction trades, which are the 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 Seattle Building & Construction Trades Council is a central labor organization composed of nineteen affiliate building trade unions, representing over 15,000 building and construction workers in the greater Puget Sound area. It coordinates the activities, functions, and interests of its affiliated local unions in the building and construction trades industry.

STATEMENT OF FACTS

Generally, Washington higher education institutions must adhere to specific bidding procedures, and the PWA, when they undertake projects to build, construct, remodel, or demolish buildings that exceed a specific dollar threshold. *See* RCW 28B.10.350.

The Respondent, the University of Washington (“UW”), intends to redevelop its entire West Campus, including nineteen locations, at an estimated cost of \$3 billion. For the inaugural site, UW selected four developers to participate in its request for proposals and, eventually, awarded the contract to Wexford Science + Technology, LLC (“Wexford”). CP 94, 162-63, 228.

The UW-Wexford contract provides for a lease-construction-leaseback arrangement where UW will lease its land to Wexford on the express condition that they demolish the existing buildings, construct a

new building, and lease back between 10 and 30 percent of the new space. CP 136, 146. Eventually, building ownership will revert to UW at the ground lease's conclusion. CP 135, 161, 247.

Petitioners, Alexandria Real Estate Equities (“ARE”), filed suit in Thurston County Superior Court asserting that the transaction between UW and Wexford was illegal because the contract was awarded without the competitive bidding process required by RCW 28B.10.350. The Superior Court disagreed. Ultimately, the Court of Appeals, Division Two, affirmed, holding UW was not obliged to adhere to RCW 28B.10.350 when its construction projects used lease-construction-leaseback arrangements. Alexandria Real Estate Equities, Inc. v. University of Washington, 539 P.3d 54, 63-64 (2023).

ARGUMENT

I. THE WASHINGTON SUPREME COURT SHOULD GRANT REVIEW BECAUSE EXEMPTING LEASE-CONSTRUCTION-LEASEBACK AGREEMENTS FROM RCW 28B.10.350 IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Whether RCW 28B.10.350 applies when Washington higher education institutions enter lease-construction-leaseback agreements is an issue of immense public importance and, naturally, of substantial public interest given its effects on workers throughout the State. The

Court of Appeal’s decision undermines valuable, long-held public policies by allowing public institutions to circumvent paying trade and craft workers prevailing wages when working on building projects.

Notably, RCW 28B.10.350 requires UW to comply with the PWA when the cost of its construction projects exceeds a set statutory threshold. The PWA mandates that the State establish a floor for employees’ wages upon “public works and...public building service maintenance contracts.” RCW 39.12.020. It was implemented to “protect employees on public work projects and preserve local wages.” Silverstreak, Inc. v. Wash. State Dep’t of Labor and Indus., 159 Wn.2d 868, 880 (2007); *see* Heller v. McClure & Sons, Inc., 92 Wn.App. 333, 338 (1998) (“[The] parallel purpose of the act is to prevent the depression of prevailing wages in the area of public works projects.”); D.W. Close Co., Inc. v. Wash. State Dep’t of Labor and Indus., 143 Wn.App. 118, 135 (2008); *see also* Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300 (2000) (Washington has a “long and proud history of being a pioneer in the protection of employee rights”).

The Court of Appeal’s decision is antithetical to the PWA’s policy goals. Its holding allows UW to evade paying prevailing wages because its arrangement with Wexford is structured as a lease-

construction-leaseback agreement, rather than a traditional construction agreement. While a lease-construction-leaseback agreement may save UW considerable funds – and enjoy a newer building over time – without statutory conditions, the result has an immense effect upon the workers who will undertake the project.

Likewise, the Court’s decision has a greater impact beyond the preliminary site. UW acknowledged that the Wexford contractual arrangement was intended as a “test case.” CP 247, 603. Should UW’s lease-construction-leaseback transactions pass legal muster, it will become the dominant mode for completing the remaining eighteen projects. *Id.* Consequently, numerous trade and craft workers in the Seattle area will be ineligible to receive prevailing wages for any work performed on UW’s West Campus buildings. Such a result is contrary to the public policies behind the PWA.

Looking beyond UW, RCW 28B.10.350 applies to all Washington higher education institutions. The Court of Appeal’s decision naturally greenlights other State institutions to enter similar stratagems (lease-construction-leaseback) to evade PWA application. This outcome seems inevitable as public institutions endeavor to save money, navigate less government funding, and manage the inevitable

costs associated with public works projects. Entering into such agreements will predictably allow institutions to reduce costs at the expense of workers' wages, undermining the PWA's goal of ensuring living wages throughout Washington.

Beyond higher education institutions, the Court of Appeal's holding has ramifications for other State agencies. RCW 39.04.260 similarly requires State agencies and municipalities to adhere to the PWA when engaging in private construction projects. Under the Court's reasoning, any public agency or municipality, like Washington higher education institutions, will be permitted to enter lease-construction-leaseback agreements and sidestep any PWA requirements. In all likelihood, many public entities will choose such an arrangement as an easy cost-saving measure. However, by employing such a scheme, they will circumvent important policy goals of ensuring strong wages for workers on such projects. Consequently, workers on public works projects will be worse off and local wages will be negatively affected – contrary to the PWA's policy goals.

By holding RCW 28B.10.350 does not apply to construction projects, when they are structured under a lease-construction-leaseback agreement, the Court of Appeals effectively decreased wages for all

trade and craft workers who might have otherwise received prevailing wages. Such a judicially imposed wage cut is contrary to the PWA's policy goals and has serious and lasting implications for trade and craft workers throughout Washington.

II. REVIEW IS WARRANTED WHERE THE COURT OF APPEALS HAS UPENDED RELIANCE ON PRIOR PRECEDENT ADDRESSING THE PWA'S APPLICATION TO QUASI-PUBLIC/PRIVATE PROJECTS.

Beyond the effect on workers throughout Washington, the Court of Appeal's decision is also significant because it largely disregarded binding precedent that should have guided whether UW's construction project was subject to RCW 28B.10.350 and the PWA.

"In Washington, stare decisis protects reliance interests...by providing clear standards for determining [litigant's] rights and merits of their claims." Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 278 (2009). It further "prevent[s] the law from becoming subject to incautious action or the whims of current holders of judicial office." Id. (internal quotations omitted). As such, ignoring or overturning prior precedent "should not be taken lightly." Id.

In ascertaining whether a construction project is a public work, Supporters of Center, Inc. v. Moore, 119 Wn.App. 352 (2003), is

instructive. It held: “[i]n determining whether a project is a public work required to pay prevailing wages, we look first to whether the project was executed at the cost of the state” and further explained that there is “no bright-line definition of when a project is executed at the cost of the State... [instead] we look to both the *source of the funding and the character of the project.*” Id. at 359 (emphasis added).

When applying this standard to a building project between a city and a non-profit (formed to perform the construction), Moore held that the project, which operated through a lease (and advance rent payment), was a public work. Moore, 119 Wn.App. at 360. In arriving at this conclusion, the court evaluated several factors: the construction project occurred on land owned and leased from the city; ownership of the constructed building eventually reverted to the city; there was “a close, ongoing relationship” between the city and the non-profit; and the constructed building “serve[d] a valuable public interest.” Id. at 360-61. Accordingly, Moore is a significant case that has been relied upon when ascertaining if a building project (ostensibly privately run) is a public work.

Here, however, the Court of Appeals blithely dismissed precedent – “[Moore] does not have application here” – when it

evaluated the UW-Wexford lease-construction-leaseback agreement. Alexandria, 539 P.3d at 63. Similarly, the Court did not apply “a bright line definition” – it applied *no* test or definition. The Court simply held RCW 28B.10.350 was not applicable because UW undertook no construction costs (“[a]lthough UW has committed to spending public funds...the funds will be paid as rent only after all construction is completed.” Id. at 64). Unlike Moore, there was no discussion about the project’s overall character and its source of funding.

The Court of Appeal’s refusal to evaluate the project’s character, or the Moore factors, undermines the precedential reliance value of Moore. The Court’s disinclination to engage the Moore factors is all the more significant given many would be persuasive here. Notably, the UW’s West Campus buildings will arise on land owned and leased from UW; building ownership will eventually revert to UW; the UW-Wexford contract describes an ongoing and close relationship between the parties; and the buildings are designed to support UW students with their academic and professional endeavors – a valuable public interest. *See* Moore, 119 Wn.App. at 360-61.

Consequently, the Court of Appeal’s decision to disregard Moore – or de facto overrule through a factual turn on post-versus-

preconstruction rent payment – disorders the standard upon which parties have relied to ascertain the applicability of the PWA to quasi-public/private projects.

CONCLUSION

The Court of Appeal’s decision has broad implications that supplant strong policies underpinning the PWA and the legal standard for determining when a project is truly a public work. Therefore, review by the Washington Supreme Court is warranted.

I certify this amici brief contains 1,880 words, in compliance with RAP 18.17.



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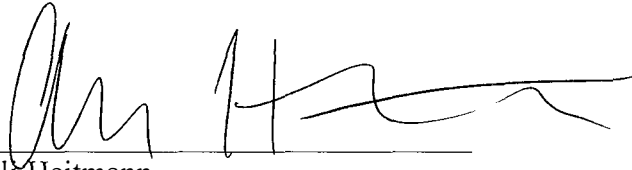
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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2024, I electronically filed the forgoing 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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