No. 100258-1

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

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I. INTRODUCTION

The Court of Appeals correctly held that Substitute Senate Bill 5493 ("SSB 5493") violates the nondelegation doctrine and is unconstitutional because: (1) it mandates the adoption of future wage rates from privately negotiated collective bargaining agreements ("CBAs") to establish prevailing wage rates on public works projects; and (2) no procedural safeguards exist to prevent against arbitrary self-motivated actions and abuse in establishing prevailing wage rates. The attempt by 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"), to transmute the issue as one of public policy—rather than one of constitutional compliance—misrepresents the Court of Appeals' Opinion and the precedent of this Court upon which it relies, as well as the record below.

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 ISSUES RAISED BY PETITIONERS

1. The Court of Appeals found that the legislature failed to provide appropriate standards for setting prevailing wage rates because SSB 5493 mandates the adoption of the highest wage rates in future CBAs negotiated by private parties. Is the Court of Appeals' Opinion consistent with Supreme Court precedent?

2. The Court of Appeals found that no procedural safeguards exist to prevent against arbitrary self-motivated actions and abuse in establishing prevailing wage rates under SSB 5493. 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 ("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 and Analyzed Wage Data and Exercised Discretion in Setting 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.*

In sum, before SSB 5493, 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)

C. Under SSB 5493, the Private Negotiations of Interested Parties Establish Prevailing Wage Rates on Public Works Projects.

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.[1] RCW 39.12.015(3)(a), (b). Because the Industrial Statistician is mandated under SSB 5493 to adopt such privately negotiated future CBA wage rates and has no discretion to review, modify, or reject them, it is the private negotiations of interested parties that establish prevailing wage rates on public contracts—not the Industrial Statistician. The only "delegated authority" the Industrial Statistician has is to merely *adopt* the wage rates reached through private negotiations, as the Industrial Statistician concedes. (CP 2567-2569) Thus, under SSB 5493, the Industrial Statistician is merely an intermediary through whom privately negotiated CBA wage rates pass before being adopted as prevailing wage rates by rubber stamp.

[1] 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.

D. Under SSB 5493, Unsigned CBAs are Used to Set Prevailing Wage Rates.

Under SSB 5493, the Industrial Statistician has used unsigned CBAs to set prevailing wage rates. (CP 391-476) The State asserts, without supporting record evidence, that "[a]lthough L&I may not have a signed copy, it only uses agreements where the original is signed." (Petition, at 7) The record is clear, however, that the Industrial Statistician establishes prevailing wage rates from unsigned CBAs he merely *assumes* are signed. (CP 1868)

Nor is the Industrial Statistician "confident" about the validity of the CBAs and the accuracy of obtained information, as the State summarily asserts.[2] (Petition,

[2] The State identifies a "Wage Update System" it purportedly uses to collect "wage information" from parties to CBAs. (Petition, at 7) No record evidence exists that the State has used any such system. At deposition, Christensen testified that only CBAs are used to set prevailing wages. (CP 2567-2569) Later, in a single declaration paragraph, Christensen generally attested that he relies on updated wage and benefit information union representatives "typically" input into the system. (CP 2515-16)

at 8) Instead, Christensen repeatedly testified that he merely *believes*—but possesses no definitive knowledge—that the CBAs used to establish prevailing wage rates are signed. (CP 1866-67) Often, L&I simply downloads CBAs from public websites without additional verification. (CP 556, 574) Such unsigned CBAs cannot be "operative" or "bona fide," yet wages contained within the CBAs have established the prevailing wage rate under SSB 5493.[3]

E. Under SSB 5493, Expired CBAs are Used to Set Prevailing Wage Rates.

Under SSB 5493, the Industrial Statistician has used expired CBAs to set prevailing wage rates, as Christensen concedes. (CP 571-73, 5556, 578-1669, 2591, 2702-2745) The State attempts to dismiss its use of expired CBAs by citing the possibility that the CBAs were continued through "evergreen clauses," which provide that, after the stated

[3] Christensen concedes that a CBA "not signed by both labor and management … would not be a collective bargaining agreement." (CP 549, 551-52)

expiration of the CBA, the CBA will roll over from year to year absent party objection. (Petition, at 8 n.5) Christensen's testimony that the State relies upon, however, reflects that Christensen does not know what an evergreen clause is, nor does he have any awareness of L&I verifying any such provision. (CP 2587-88) In fact, no record evidence exists that the State has taken any steps to verify whether an evergreen clause has been triggered to extend any expired CBA used to establish prevailing wage rates.

F. Under SSB 5493, Pre-Hire CBAs are Used to Set Prevailing Wage Rates.

Under SSB 5493, the Industrial Statistician has used pre-hire CBAs to set prevailing wage rates. (CP 2597, 497-518) Pre-hire CBAs are signed before any employees have been hired or a union is certified through an election or recognized by demonstrating majority support. *Id.* No hours have been worked under pre-hire CBAs, yet it is a form of a CBA that can exist for years even if no employee

is ever hired or any work is performed. *Id*. Under SSB 5493, the Industrial Statistician must establish prevailing wage rates from pre-hire CBAs. RCW 39.12.015(3)(a), (b). The result is that prevailing wage rates have been—and will be—adopted from pre-hire CBAs under which no employee has performed any work. (CP 2597)

G. Under SSB 5493, the Industrial Statistician Cannot Detect or Prevent Collusion.

Under SSB 5493, the Industrial Statistician cannot ensure that a CBA used to establish a prevailing wage rate is truly negotiated at arm's length. (CP 2550, 2601) SSB 5493 does not prohibit small businesses owned by card-carrying members of a trade union from entering into a CBA with that same union. That is what happened shortly after SSB 5493 was signed into law in 2018 with International Union of Operating Engineers Local 302 ("Local 302") and small

businesses owned by card-carrying Local 302 members.[4] The result, under SSB 5493, was that wage rates from side CBAs entered into between Local 302 and its card-carrying small business owners were prevailed in 16 counties. (CP 2550, 2572, 2576-2580) The Industrial Statistician did not confirm if there was a signatory employer doing work in each of the counties or if these small employers actually employed any operator in every occupation listed in the CBAs. *Id.*

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[4] There, AGC began negotiations with Local 302 for a new multi-employer master labor agreement, covering virtually all operators working in 16 counties. (CP 527-29) After two unsuccessful ratification votes on proposed CBAs, Local 302 called a strike against the employers. *Id.* After the first week of the strike, Local 302 approached small employers—some that were owned by card-carrying Local 302 members—and attempted to carve out a "side" agreement (rather than a comprehensive multi-employer agreement). (CP 527-29, 2655-2701) Some signed agreements to end the strike in exchange for paying a higher wage rate than what AGC had offered. (CP 374-75, 556, 559-561) A few weeks later, AGC, representing employers that constitute roughly 75 percent of the hours worked by operators in Western Washington, ratified a new agreement with Local 302. (CP 374-75, 387, 1670-1742)

The State cannot refute that neither the Industrial Statistician, nor anyone at L&I, was even aware of the prima facie evidence of collusion for the Local 302 CBAs with business owners. (Petition, at 26-27). Instead, the State asserts that the Legislature "can decide that a negotiated contract between competing interests protects against collusive behavior." (Petition, at 27) But it did not in the case of Local 302.[5] As demonstrated with the Local 302 agreements, under SSB 5493 a subgroup can advance its own pecuniary interests over competitors representing the majority without any review or reversal by a neutral

[5] The State claims that "no collusion existed" with Local 302 because Local 302 eventually "signed 50 employers to the CBA." (Petition, at 27, n. 12) But the State ignores the outcome, which is that—despite the fact that the super-majority of operator hours worked in Local 302's geographic jurisdiction are worked under the AGC-negotiated CBA—the side agreements now prevail because they have a higher wage rate. (CP 556, 561) Notably, before SSB 5493, Christensen stated that such a result was inconsistent with the Act's purpose. (CP 388, 1743-51)

government official.[6] The minority now sets the prevailing wage for the majority, violating the statutory definition of "prevailing wage." *See* RCW 39.12.010(1) & (2).

H. Under SSB 5493, Prevailing Wage Rates Do Not Reflect Local Wages or Protect Workers from Substandard Wages.

Under SSB 5493, the reach of a CBA to set prevailing wages is based on its 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.[7] *Id.*

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

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[6] Notably, a Local 302 Director was instrumental in drafting SSB 5493. (CP 1743-51)

[7] 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))

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) 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)

Additionally, 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)

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, under SSB 5493, prevailing wages do not reflect local wages or protect against substandard wages, contrary to the Act's purpose.[8]

I. The Court of Appeals Reverses the Trial Court's Granting of Summary Judgment for the State.

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

[8] *See Superior Asphalt & Concrete Co. v. Dept. of Labor & Industries*, 84 Wn. App. 401, 406, 929 P.2d 1120, 1123 (1996) ("The prevailing wage statute has two purposes: to protect employees working on public projects from substandard wages and to preserve local wages.").

State's favor. (CP 2536-39) The Court of Appeals reversed in an August 31, 2021, published opinion ("Opinion"), holding that SSB 5493 is unconstitutional in violation of the non-delegation doctrine.

V. ARGUMENT SUPPORTING DENIAL OF REVIEW

A. The Legislature May Not Choose to Enact an Unconstitutional Statute under the Guise of "Policy-Making Authority."

The State erroneously characterizes SSB 5493's mandate that the Industrial Statistician adopt future privately negotiated CBA wage rates as prevailing wage rates as properly within the Legislature's "policy-making authority" and asserts that review is warranted based on the "disruptive effect" of a final ruling that SSB 5493 is unconstitutional. (Petition, at 2, 10, 28-29) To accept the State's assertion would be to accept the proposition that the legislature has infinite authority to pass any prevailing wage law free of constitutional constraints under the guise of a "policy-making authority," with no subsequent method

to correct the constitutional error should "disruption" result. Neither is a basis for this Court to accept review.

B. The Court of Appeals' Opinion Holding that SSB 5493 is Unconstitutional in Violation of the Non-Delegation Doctrine is Consistent with Precedent of this Court.

"The Washington Constitution vests legislative authority in the state legislature." *State v. Batson*, 196 Wn.2d 670, 674, 478 P.3d 75 (2020); WASH. CONST. art. II, § 1. "'[I]t is unconstitutional for the [l]egislature to abdicate or transfer its legislative function to others.'" *Batson*, 196 Wn.2d at 674 (quoting *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998)). "The Legislature may ... delegate to administrative officers or boards the power to determine some fact or state of things upon which the application of the law is made to depend provided the law enunciates standards by which those officers or boards will be guided." *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 25, 775 P.2d 947 (1989). This Court has held that delegation of power by the legislature is

constitutional when: (1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power. *Barry & Barry, Inc. v. Dept. of Motor Ve*hicles, 81 Wn.2d 155, 159, 500 P.2d 540, 543 (1972).

Applying these standards established in *Barry*, the Court of Appeals properly held that SSB 5493 violates the non-delegation doctrine because it lacks appropriate "standards or guidelines" and "adequate procedural safeguards." (Opinion, at 10-13) The State seeks review under RAP 13.4(b)(1) by identifying multiple opinions of this Court with which it claims the Opinion is inconsistent.[9] As addressed below, the State is wrong.

[9] *See* Petition, at 11-20.

1. The Court of Appeals' Opinion that SSB 5493 Lacks Appropriate Standards by Mandating the Adoption of Future CBA Wage Rates to Set Prevailing Wage Rates is Consistent with Precedent of this Court.

a. The Opinion is Consistent with *Barry*.

The State asserts that SSB 5493 provides sufficient standards under *Barry* because it defines "in general terms what is to be done," as opposed to "exact and precise standards."[10] (Petition, at 12) Specifically, according to the State, by requiring the Industrial Statistician to adopt the highest negotiated wage rate in CBAs to set prevailing wage rates, the legislature has merely given the Industrial Statistician "little leeway" by providing "tight standards" under SSB 5493. (Petition, at 13)

Under SSB 5493, however, there is nothing "to be done" by the Industrial Statistician—"in general terms" or otherwise—other than to merely *adopt* the highest wage rate from future private CBA negotiations as the prevailing

[10] *See Barry*, 81 Wn.2d at 158-159.

wage rate. This Court in *Barry* 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 no discretion may be exercised. *See Barry*, 81 Wn.2d, at 162 (emphasis added). Absent any discretion by the Industrial Statistician, prevailing wage rates could be established by arbitrary measures, such as a coin toss. Under SSB 5493, the Industrial Statistician is a mere "middleman" through whom the highest wage rates negotiated by private interested parties merely pass to be officially sanctioned—or effectively rubber stamped—as the prevailing wage rate. To this end, SSB 5493 contains no standards by which the Industrial Statistician sets prevailing wage rates, as the Appellate Court correctly found consistent with *Barry*.

b. The Opinion is Consistent with *Diversified, Batson, United Chiropractors, and Motor Vehicles.*

The State asserts that the legislature may "set a standard" for an agency to follow in "applying the law to 'future facts,'" and contends that the Court of Appeals' Opinion "conflates future facts with future standards." (Petition, at 15) The Court's precedent upon which the State relies, however, supports AGC's position—not the State's.

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 Homes Auditing and Cost Reimbursement Act of 1980 ("NHACRA") found to conflict with federal Medicaid law such that federal funding was jeopardized would be inoperative. *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 conflicting

method for valuing the depreciation rates used to calculate state Medicaid reimbursement rates. *See id.*, at 22-23. This Court explained that, although RCW 74.46.840 becoming inoperative was conditioned on a future event, the legislation was complete when it left the legislature because the legislature had decided with certainty what would happen—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), this Court 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).

In contrast, SSB 5493 was not complete when it left the legislature—and 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 incorporates 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, is akin to the statute struck down in *Dougall*.

In *Batson*, this Court rejected a challenge to Washington State's sex registry statute as an unconstitutional delegation to Arizona State to define criminal conduct, or the elements of a crime, in Washington State. *See Batson*, 196 Wn.2d at 674-95. There, under the sex registry statute, Benjamin Batson—who was convicted on two counts of sexual conduct with a minor in Arizona—was required to register as a sex offender in Washington and was convicted for failing to do so. *See id.* In finding no unconstitutional delegation, this Court reasoned that the statute permissibly addressed a "future specified event" (out-of-state sex offense

conviction) that did not change the statute's application or criminal elements. *See id.*, at 677. In other words, this Court concluded, "the legislature permissibly identified circumstances under which Washington sex offender registration requirements become operative as to individuals with out-of-state convictions." *See id.* In contrast, the delegation under SSB 5493 is not a mere "future specified event" with no substantive impact on the Act's application but, instead, dictates the substantive manner in which the prevailing wage rate is set under the Act.

In *United Chiropractors of Wash., Inc.* v. State, 90 Wn.2d 1, 4-8, 578 P.2d 38 (1978), this Court addressed delegation to private parties, which the State erroneously claims "does not apply here because there was no private-party delegation." (Petition, at 21-22) In fact, as record evidence makes clear, the Industrial Statistician has no choice or discretion but to adopt future CBA wage rates

created by private parties to set prevailing wages, reflecting a *de facto* legislative delegation to private parties. *See supra*, § IV.C. The Opinion is consistent with *Salstrom's Vehicles, Inc. v. Dept. of Motor Vehicles*, 87 Wn.2d 686, 555 P.2d 1361 (1976), which also addressed private party delegation but is distinguishable. In *Motor Vehicles,* this Court rejected a constitutional challenge to the motor vehicles license statute (RCW 46.70) as an impermissible delegation to private vehicle manufacturers the authority to determine who may obtain a state vehicle dealer's license. *See Motor Vehicles*, 87 Wn.2d at 695. In rejecting the argument, this Court reasoned that there was no delegation of legislative power to private manufacturers; instead, the Department of Motor Vehicles retained the power to issue dealer's licenses, whereas manufacturers were "vested only with the authority to render sound business judgements" in determining which dealers were able to properly serve consumers. *See id.*, at 695-96

(citation omitted). In contrast, under SSB 5493, the Industrial Statistician retains no "power" but to adopt wage rates negotiated by interested private parties.

c. The Court of Appeals' Reliance on *Kirschner* is Not in Error.

The State asserts that the Court of Appeals' reliance on this Court's opinion in *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135-37, 310 P.2d 261 (1957) is in error, claiming that *Kirschner* was abrogated by this Court in *United Chiropractor*. (Petition, at 19-21) The State is wrong. In fact, this Court relied upon and upheld *Kirschner* two years after *United Chiropractors,* in its opinion in *Woodson v. State*, 95 Wn.2d 257, 261, 623 P.2d 683, 685, (1980):

> We made this abundantly clear in *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135-37, 310 P.2d 261 (1957), wherein we discussed accreditation of medical schools. There we 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.*[11] 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.

Woodson, 95 Wn.2d at 261 (emphasis added). Here, SSB 5493 suffers the same "vice" as the statute struck down in *Kirschner* by declaring wage rates in CBAs that may thereafter be established by some private authority as the prevailing wage rate. The Court of Appeals' reliance on *Kirschner* is proper, and the Opinion is consistent with *Kirschner* and *Woodson*.

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[11] In asserting that "*Woodson* clarified *Kirschner* and explained that it was the Legislature's adoption of a future standard (not future facts) that led to the constitutional difficulty," the State notably omits this cited language (*see* Petition, at 20-21), presumably because the factual scenario addressed is identical to the "constitutional difficulty" with SSB 5493.

d. The Opinion is Consistent with Caselaw in Other Jurisdictions.

The Opinion is consistent with the majority of other jurisdictions with prevailing wage laws.[12] In *Woodson,* this Court relied on the Supreme Court of Wisconsin's opinion in *Wagner v. Milwaukee,* 177 Wis. 410, 188 N.W. 487 (Wis. 1922). *See Woodson*, 95 Wn.2d at 261. In *Wagner*, the court struck down a Milwaukee prevailing wage ordinance as an unconstitutional delegation of legislative authority because it mandated prevailing wages be set based on wage rates from CBAs. *Wagner*, 188 N.W. at 489-90. There, as with SSB 5493, the ordinance required the "prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled

[12] The State completed a survey of current prevailing wage statutes in all 50 states, reflecting that 26 states have prevailing wage laws. (CP 388, 1756-1772) Of those, only Massachusetts, Ohio and Hawaii have laws akin to SSB 5493. *Id.* Every other state that considers CBA wage rates either has procedural protections limiting consideration of CBAs or does so in a permissive—not mandatory—manner. *See id.*

laborers for such skilled labor." *Id.* The ordinance was an unconstitutional delegation by the city council of their independent judgment and an impermissible agreement to be bound by a wage scale to be determined in the future by employers and unions. *Id.* The same is true with SSB 5493.

2. The Court of Appeals' Opinion Finding No Safeguards to Protect against Self-Motivated Actions and Abuse under SSB 5493 is Consistent with *Auto*.

The State's assertion that the Court of Appeals' Opinion "holds that there needs to be procedural protections within a challenged statute to satisfy delegation concerns"—in purported conflict with this Court's decision in *Auto United Trades Org. v. State*, 183 Wn.2d 842, 357 P.3d 615 (2015)—is meritless. (Petition, at 25) In the Opinion, the Court of Appeals relies on *Barry's* requirement that legislative delegation is constitutional when adequate procedural safeguards are provided "*in regard to the procedure for promulgation of the rules* and for testing the constitutionality of the rules after

promulgation." (Opinion, at 10) (emphasis added) In *Barry*, the legislature delegated authority to the Director of the Washington State Department of Vehicles to promulgate rules and regulations regarding the Employment Agency Act. *See Barry*, 81 Wn.2d at 156. In determining that the delegation contained adequate constitutional procedural safeguards, the Court reasoned:

> [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.

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

Even assuming arguendo that a sufficient appellate procedure exists through which prevailing wage rates may be challenged *after* they are established—as the State asserts—no safeguards exist 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, as the Opinion addresses. (Opinion, at 12-13) Specifically, as the record reflects and the Court of Appeals found, there is no safeguard to ensure that CBAs from which prevailing wages are adopted are valid (*i.e.*, that they have been executed or are not expired); to ensure no collusion in CBA negotiations; or to establish whether work is being performed, or has been performed, under the CBAs, let alone within counties covered by the "geographic

jurisdiction" provision of the CBAs used to establish prevailing wage rates.[13] (Opinion, at 11-12)

The Opinion does not narrowly hold that SSB 5493 lacks procedural safeguards, consistent with *Auto*.

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

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 5,000 words, in compliance with the Rules of Appellate Procedure. RAP 18.17 (b).

[13] The National Labor Relations Board is the forum to evaluate the validity of a CBA, not the Industrial Statistician.

CERTIFICATE OF SERVICE

I, Jennifer Parda-Aldrich, certify under penalty of perjury under the laws of the State of Washington that on October 29, 2021, 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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E-Mail via Washington State Appellate Courts Portal:

Anastasia R. Sandstrom, WSBA #24163
Paul Weideman, WSBA #42254
Office of the Attorney General
Labor & Industries Division
anastasia.sandstrom@atg.wa.gov
paul.weideman@atg.wa.gov

s/ Jennifer Parda-Aldrich
Jennifer Parda-Aldrich

SEBRIS BUSTO JAMES

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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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- dfeider@sebrisbusto.com
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