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.

Supplemental Brief of Respondents

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I. INTRODUCTION

Enacted in 1945, Washington's Prevailing Wages on Public Works Act (the "Act") requires employers to pay "prevailing wages"—defined as the hourly wage, usual benefits and overtime paid to the majority of workers in the applicable trade in each locality—to all employees on public works projects. 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*."[1]

Until 2018, the Industrial Statistician carried out this non-delegable statutory obligation by conducting wage surveys to determine the prevailing wage rate for each trade/occupation on a county-by-county basis, under which either the majority or average wage rate would prevail in the locality. Such a practice is consistent with the underlying dual purpose of the Act: to protect employees working on

[1] RCW 39.12.015(1) (emphasis added).

public projects from substandard wages and to preserve local wages.

Effective June 7, 2018, however, the legislature amended the Act by passing Substitute Senate Bill 5493 ("SSB 5493"), mandating that, in establishing the prevailing wage rate, the Industrial Statistician "*shall*" adopt the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements ("CBAs"), and if there is more than one CBA, the higher rate "*will prevail*."[2] Through this amendment, the legislature tied prevailing wage rates in Washington solely to wage rates in CBAs—that is, to privately negotiated deals between interested parties—without government oversight. This is in violation of the constitutional non-delegation doctrine, which prohibits the abdication of legislative regulatory authority and allows for delegation only with government oversight.

[2] *See* RCW 39.12.015(3)(a) (emphasis added).

The Court of Appeals correctly held that SSB 5493 violates the nondelegation doctrine and is, therefore, unconstitutional. The public has an expectation that the government will safeguard the public purse and legislate in the public good. SSB 5493 instead delegates safeguarding public tax dollars solely to interested parties with no appropriate standards or procedural safeguards, in direct violation of the non-delegation doctrine.

This Court should affirm.

II. STATEMENT OF THE ISSUES

1. By mandating that future wage rates from CBAs negotiated by private parties establish prevailing wage rates, did the legislature fail to provide appropriate standards under SSB 5493?

2. Do no procedural safeguards exist to prevent against arbitrary and self-motivated actions and abuse in establishing prevailing wage rates from private bargaining agreements under SSB 5493?

III. RESTATEMENT OF THE CASE

A. Under The Act, the Prevailing Wage "Shall be Made" by the Industrial Statistician.

The Act requires that employers pay "prevailing wages" to employees performing work on public works projects. *See* RCW 39.12.010. "All 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).

B. The Prevailing Wage Rate, as Defined by the Act.

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).

C. Before SSB 5493, the Industrial Statistician Exercised Discretion in Setting the Prevailing Wage Rate that Reflected Majority Wages in Each "Locality."

Before SSB 5493, the Industrial Statistician "almost exclusively" collected and analyzed data through wage surveys on a statewide basis to arrive at the majority or average wage rate in each locality, which was established as the prevailing wage rate. (CP 2554-2560) Through this process, the Industrial Statistician "systemized" the wage data received to confirm that it was valid, accurate and complete. He then identified and eliminated any "outlier" data before arriving at the average rate upon which the prevailing wage rate was established. (CP 2555-2557) As a result, 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) This was consistent with the Act's statutory requirements and the non-delegation doctrine.

D. Under SSB 5493, Private Negotiations of Interested Parties Establish Prevailing Wage Rates That Do Not Reflect Majority Wages in Each "Locality."

Effective June 7, 2018, the legislature amended the Act by enacting SSB 5493, mandating that, in setting prevailing wage rates, 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) (emphasis added). As a result, after SSB 5493, the only "delegated authority" the Industrial Statistician has is to merely adopt wage rates reached as a result of future privately negotiated CBAs. He no longer has discretion to review, modify, or reject them. (CP 2567-2569) The result is that private negotiations of interested parties—not the Industrial Statistician—establish prevailing wage rates on public works projects.

Moreover, under SSB 5493, the Industrial Statistician has no means to ensure that prevailing wage rates reflect the wage rate paid to the majority of workers in a locality, as required by the Act—including that it is not *lower* than the majority wage rate paid. *See* RCW 39.12.010 (1), (2). The Industrial Statistician, James Christensen, conceded these facts in sworn deposition testimony as follows:

> Q: I want to talk about some of the implications of 5493. It's not the prevailing rate. It's the highest rate, right?
>
> A: The statute seems clear on its face. ... [I]f there are two [CBAs] in a county, then the highest one is used to set the prevailing wage.
>
> Q: Well, if the entire county worked in an open-shop contractor at a lower rate, and there was one contractor who signed a [CBA] and did one hour in that county for that occupation, that would be the prevailing wage rate for that location, correct?
>
> A: Yes.
>
> Q: So 1 percent can set the rate for 99 percent?
>
> A: Yes.
>
> Q: And there's no threshold for a sufficient number of employers [sic]. In other words, you don't have

to have 20 employees to set the rate, right?

A: Correct.

* * *

Q: … I was talking about contractors before. Now I'm talking about employees. Would you agree with me, that 1 percent of the employees could set the rate for 99 percent of them?

A: Yes, I would.

* * *

Q: Since the passage of 5493, there's no requirement for your department to know what is the majority or the average rate for a particular occupation or trade in any county that has a CBA?

A: Correct.

Q: And the reverse could happen, right? The CBA could have a lower rate than the majority of employees or workers in the occupation and have the effect of lowering the prevailing wage rate?

A: Yes.

* * *

Q: Your role is to adopt the highest rate within the geographic restriction, right?

A: Yes.

Q: You don't have the discretion to say, I'm not going

to take that rate because it's too high?

A: Correct.

Q: You don't have the discretion to say, I'm not going to take that rate because it's too low?

A: Correct.

(CP 2560-2571, 2588-2589)

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

In its Petition for Discretionary Review (the "Petition"), the State asserts that the Industrial Statistician is "confident" that it uses only "operative" CBAs—that is, those ratified and signed by the employer and the union and are not expired—in setting prevailing wage rates under SSB 5493. *See* Petition, at 7-8. The State's assertion is unsupported by the record.

1. The Industrial Statistician Has Set Prevailing Wage Rates from CBAs He Merely Assumes are Signed and Operative.

The record evidence is clear that, under SSB 5493, the Industrial Statistician has used unsigned CBAs he merely assumes have been ratified to set prevailing wage rates. As

the Industrial Statistician conceded in sworn deposition testimony:

> Q: Looking at Exhibit Number 17, which is – I don't know how many – over 100 agreements.
>
> A: Okay.
>
> Q: You can count them after the deposition to make sure you have the right number.
>
> What you're doing at L&I is, you're prevailing these [CBAs] on the assumption that they're signed. But you don't have a signed agreement; is that right?
>
> A: That's correct.
>
> Q: So the Industrial Statistician is prevailing rates with [CBAs] in its [sic] possession that are unsigned?
>
> A: We're prevailing rates from agreements that L&I has in its possession, where the agreement in our possession doesn't have signatures affixed.

(CP 1868-69) Indeed, L&I obtains copies of CBAs from public websites without any further verification and relies on mere *belief* that the CBA is signed and valid. (CP 1866-67) ("[I]f all I had was a copy of this agreement with the blank signature page, I would believe that it's a signed agreement.")

2. The Industrial Statistician Has Set Prevailing Wage Rates from Expired CBAs.

Under SSB 5493, the Industrial Statistician has used expired CBAs to set prevailing wage rates. (CP 571-73, 578-1669, 2591, 2702-2745) As admitted by the Industrial Statistician:

> Q: Exhibit 19 is a dredge agreement for Washington, Idaho, and Montana; do you see that?
>
> A: Yes.
>
> Q: Okay. And it's expired, right?
>
> A: That's what - - that's how it appears.
>
> Q: So L&I is prevailing an expired agreement in three different states?
>
> [Objection by State's counsel]
>
> A: This agreement does appear to be expired, yes.
>
> Q: And it's part of the Bates range that you identify in your interrogatory answers as what you prevailed wages at, right?
>
> A: Yes.

(CP 2593)

In its Petition, the State dismisses this fact by citing the possibility that the CBAs were continued through "evergreen clauses," which provide the CBA will roll over from year to year unless a party objects. (Petition, at 8 n.5) Christensen, however, does not know what an evergreen clause is:

> Q: Are you verifying whether or not the [CBA] actually was continued and not under an evergreen provision?
>
> A: Explain that to me.
>
> Q: Do you know what an evergreen provision is?
>
> A: No.

(CP 2587) As such, the record shows that the State has not taken meaningful steps to verify whether CBAs used to establish the prevailing wage rate were valid or expired.

F. Under SSB 5493, Prevailing Wage Rates Have Been Set from CBAs Regardless of Whether, or Where, Any Work Has Been Performed.

SSB 5493 mandates that the Industrial Statistician adopt as the prevailing wage rate the highest wage rate established in a CBA in any occupation, regardless of whether

any work is performed under the CBA, or where it is performed.

1. Under SSB 5493, Prevailing Wage Rates Have Been Set from CBAs under which No Work Has Been Performed.

Under SSB 5493, the Industrial Statistician does not determine or consider what work, if any, is being performed under a CBA setting the prevailing wage rate. (CP 2587-88) ("We're not independently going out there and studying the work performed under the agreement.") Instead, the Industrial Statistician "generally take[s] the agreements at face value … that there are employers and workers under the agreement." (CP 2606) As a result, if a CBA lists 20 occupations, the wages for all 20 occupations are used to set prevailing wage rates, regardless of whether the employer has only a single employee—or any—performing work. *Id.*

Additionally, under SSB 5493, to set prevailing wage rates the Industrial Statistician has used pre-hire CBAs,

which can exist for years even if no employee is ever hired or works under the agreement. (CP 2597, 497-518)

In sum, under SSB 5493, the Industrial Statistician engages in no analysis to determine the actual prevailing wage. Instead, as required, he adopts the highest rate in CBAs without consideration of whether work has actually been, or will ever be, performed.

2. Under SSB 5493, Prevailing Wage Rates Have Been Set in Counties from CBAs under which No Work in the County Has Been Performed.

Under the Act, prevailing wage rates are to be determined based solely on wages paid within each county.[3] Under SSB 5493, however, there is no requirement for the relevant, signatory employer to have an employee working under every occupation listed in the CBA or in every county listed. (CP 2568-70) Thus, the wages from every occupation listed in a CBA can be used to set prevailing wages for every

[3] *See* RCW 39.12.010, .026.

county listed in the geographic scope of a CBA, regardless of whether work is performed in only one county. As the Industrial Statistician conceded:

> Q: What if the employer is a signator to a [CBA] 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.
>
> Q: So the employers in Yakima County will be subject to the prevailing wage rate of an employer who never worked in their County?
>
> A: Potentially, yes.

(CP 2585)

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

The State has failed to identify any mechanism or procedure to detect or prevent collusion, as was the case with Local 302.[4] L&I is not a party to CBA negotiations, and it provides no guidelines to, or oversight of, parties to those

[4] *See* AGC's Answer to Petition for Discretionary Review, at 10-13.

negotiations. (CP 2568-2569) Moreover, the Industrial Statistician:

- Cannot consider the history or creation of a union involved in the CBA;
- Has no discretion to consider whether any unusual or exigent circumstances exist surrounding the creation of the CBA; and
- Has no discretion to consider any preexisting norms.

The plain language of SSB 5493 robs the Industrial Statistician of the ability to disregard a wage negotiated in a CBA, even if the wage is a statistical outlier clearly deviating from any rationally based or commonly accepted prevailing wage rates. SSB 5493 transforms the Industrial Statistician into an intermediary or straw man who rubber stamps the wages created by interested private parties with no mechanism or authority to detect collusion or any other irregularities in the process. By mandating that the higher wage "will prevail" under SSB 5493, the Industrial Statistician has no ability to stop private parties from

manipulating the system or from an artificially high or low prevailing wage rate being set.[5]

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

In 2019, AGC filed this action and both parties filed for summary judgment. (CP 1-97) The trial court ruled in the State's favor. (CP 2536-39) On August 31, 2021, the Court of Appeals reversed (the "Opinion"), holding that SSB 5493 is unconstitutional and in violation of the non-delegation

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[5] After submitting its Answer to the State's Petition, undersigned counsel for AGC learned that an AGC signatory to the ACG-negotiated master labor agreement (the "AGC signatory") was recently confronted with an unsigned "Independent Labor Master Agreement" between "Independent Contractors Association of Washington" and Local 302 that has set the prevailing wage rate for operators in King County. Using this "agreement," the ACG signatory—which had been paying its operators pursuant to the AGC-negotiated master labor agreement—was required to increase the prevailing wage and benefits for its operators retroactively. Research has not confirmed that any "Independent Contractors Association of Washington" exists, and there were no contractors identified as signing onto the "agreement." While AGC recognizes that any such evidence is not properly before this Court, it asks the Court to consider such a fact pattern as a hypothetical.

doctrine because it fails to satisfy the requirements established by this Court under *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 160, 500 P.2d 540, 543 (1972).

IV. ARGUMENT[6]

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

The State claims that, in enacting SSB 5493, the legislature merely "exercised its policy-making authority to improve workers' lives on public works projects."[7] *See* Petition at 10. It further asserts that "turmoil" will ensue if the Opinion holding that SSB 5493 violates the non-delegation doctrine is not overturned. *See id.* at 1.

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[6] On October 29, 2021, AGC submitted its Answer to the State's Petition. AGC hereby incorporates the facts and arguments set forth therein and asserts that the State's legal arguments fundamentally reside on an incomplete application of the two-pronged analysis constitutionally required by this Court's decision in *Barry*. 81 Wn.2d at 163.

[7] Contrary to the State's assertion, the purpose of the Act is "to protect employees working on public works projects from substandard wages and to preserve local wages." *See Superior Asphalt & Concrete Co. v. Dept. of Labor & Indus.*, 84 Wn. App. 401, 406, 929 P.2d 1120(1996).

Separating the establishment of the prevailing wage from any local averages or preexisting norms allows statistical outlying wages to become the norm. This introduces a tremendous amount of risk and uncertainty with business ventures. Contractors will be more cautious to offset this new risk, resulting in harm to workers from the resulting stifled growth.

Moreover, not only is it bad policy to delegate legislative control to private parties, but the legislature cannot enact any "chosen method for setting wage rates" free from constitutional constraints. *See id.* at 1.

Furthermore, the State's contention that SSB 5493 "improve[s] workers' lives on public works projects" (Petition, at 10) has no support in the record where SSB 5493 may have the effect of *lowering* the prevailing wage rate. (CP 2560-2571, 2588-2589)

B. SSB 5493 Violates the Non-Delegation Doctrine.

"The Washington Constitution vests legislative authority in the state legislature." *State v. Batson*, 196 Wn.2d 670, 674, 478 P.3d 75, 77 (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, 49 (1998)). Delegations to administrative agencies can be proper when the legislature has articulated a policy and vested in the agency the "full authority and responsibility for appropriate action to consummate legislative policy." *Barry & Barry*, 81 Wn.2d at 160.

In *Barry*, this Court held that delegations by the legislature to administrative bodies are constitutional only if two elements are met. "First, the legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it." *Barry & Barry*, 81 Wn.2d at 163. "Second, adequate

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." *Id.* at 164.

Applying these standards, the Court of Appeals properly held that SSB 5493 violates the non-delegation doctrine because it lacks appropriate "standards or guidelines" and no "adequate procedural safeguards" exist.

1. SSB 5493 Lacks Appropriate Standards or Guidelines.

The first element in *Barry* requires the legislature to provide the agency with standards and guidelines that indicate in general terms what is to be done and confer to the agency the discretionary power to carry out its wishes. *Barry & Barry*, 81 Wn.2d at 159-160. Satisfaction of this element necessarily requires analyzing the amount of discretion delegated.

In cases where an agency has no discretion to carry out the legislature's wishes, there is a *de facto* delegation to private organizations. For example, in *State ex rel. Kirschner*

v. Urquhart, 50 Wn.2d 131, 310 P.2d 261 (1957), a statute that allowed the Association of American Medical Colleges to set standards for school accreditation was deemed unconstitutional. *See Kirschner*, 50 Wn.2d at 132, 135-36. There, this Court reasoned that:

> It would have been proper for the legislature to have enacted that accredited schools were only those on a list then in being, whether prescribed by the American Medical Association, or some other learned society; but it was not within permissible constitutional limits to define accredited institutions as those on a list not then in existence, irrespective of the standing of the society which might compile such future list.

Id. at 135. It was irrelevant that the director of licenses was responsible for issuing the licenses. *Id.* at 131, 135-36.

Similarly, in *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980), a statute that would have allowed a nongovernmental group to "ultimately define osteopathy and determine what healing procedures an osteopath could employ, both then and in the future" was unconstitutional. 95 Wn.2d at 261 (citing *Kirschner*, 50 Wn.2d at 135-37. Like

with *Kirschner*, it was irrelevant that agencies acted as the intermediaries. *Id.*

The United States Supreme Court has recognized that delegation of regulatory authority to interested private parties represents a "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 873, 80 L. Ed. 1160, 1189 (1936), *abrogated on other grounds by U.S. v. Darby*, 312 U.S. 100, 115-16, 61 S.Ct. 451, 85 L.Ed. 609 (1941). This Court has similarly expressed repugnance for the delegation of legislature authority to private entities as they "raise[] concerns not present in the ordinary delegation of authority to a governmental administrative agency." *See United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 5, 578 P.2d 38 (1978).

Here, in accordance with the goals of protecting workers from substandard wages and preserving local wages, before SSB 5493 the Industrial Statistician had the discretion to determine a county's prevailing wage by: (1) looking at usual wages, (2) paid in the largest city in the county where work was physically being performed, (3) by the majority of workers in the same trade or occupation. *See* RCW 39.12.010 (1), (2); RCW 39.12.015(1); WAC 296-127-011(1).

Under SSB 5493, however, the Industrial Statistician "shall establish" the prevailing wage rate "by adopting" the wage rate reflected in CBAs for those trades and occupations that have CBAs. RCW 39.12.015(3)(a). For trades and occupations with more than one CBA in the county, the higher rate "will prevail." *Id.* This mandatory language robs the Industrial Statistician of the ability to preserve local wages and allows private parties to set prevailing wages through a *de facto* delegation of legislative authority to unions and union-contractors.

The scope and breadth of this delegation is stunning since the Industrial Statistician has no ability to set wages in accordance with any pre-established norms and preserve local wages. Instead, he must adopt wage rates from privately negotiated CBAs that were not in existence at the time SSB 5493 was enacted. There is no requirement for the CBA to cover a minimum number of employers, employees, or hours worked or that the CBA has employees actually working under every occupation listed in the CBA or in every county listed in the geographic scope of the CBA. The Industrial Statistician, therefore, cannot consider the wage norms in the largest city in the county when setting wages.

Unusual or exigent circumstances surrounding the creation of a CBA may exist that cause wages to be set well outside of any norm; however, under SSB 5493, the Industrial Statistician is prohibited from considering any such circumstances. The Industrial Statistician has no ability to stop wages negotiated in an unusual or emergency-type

situation from being set as the prevailing wage. Instead, the Industrial Statistician is mandated under SSB 5493 to adopt any clear statistical outliers.

Unions are sophisticated entities whose mission is to promote the interest of their members—which represent only a minority of workers in the workforce—not that of the public. CBAs can be complex agreements representing many types of workers spanning multiple counties. It can also be assumed that parties at a bargaining table are incentivized to strategically act in their best interest. As such, CBAs can be negotiated to artificially raise wages for a small number of workers in exchange for other concessions.

Despite this, the Industrial Statistician cannot consider the size, history or reputation of a union involved in the CBAs, or the complexity of the agreements and any side agreements. Divorcing the establishment of the prevailing wage from any local averages or norms allows statistical outlying wages to become the norm. This introduces tremendous risk and

uncertainty in the process, resulting in the potential that businesses may be forced to take fewer risks to offset uncertainty, which in turn stifles growth and harms the very workers and communities that the Act was enacted to protect.

SSB 5493 fails to satisfy the first element of *Barry*.

2. Inadequate Procedural Safeguards Exist to Protect against Self-Motivated Actions and Abuse under SSB 5493.

As required by this Court in *Barry*:

> Adequate 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.

Barry & Barry, 81 Wn.2d at 164 (internal citation omitted).

The requirement for safeguards is based on fundamental due process requirements. *See* WASH. CONST. Art. I, § 3; *see also* U.S. CONST. amend. XIV, § 1. Due to the unique concerns implicated in the delegation of legislative authority to private parties, our Constitution requires proper

standards, guidelines and procedural safeguards. *Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005) (citing *United Chiropractors*, 90 Wn.2d. at 4-8). This rule protects the due process rights of those "who do not belong to the legislatively favored organizations" against arbitrary administrative action. *See United Chiropractors*, 90 Wn.2d at 6.

a. No Adequate Pre-Implementation Procedural Safeguards Exist.

By mandating that the Industrial Statistician adopt the prevailing wage from the highest CBA rate, SSB 5493 removes any pre-implementation safeguards. The State's argument that the Industrial Statistician should only use valid and legal CBAs does not satisfy this constitutional requirement as there is no meaningful way to detect collusion or any other irregularities in the process.[8] As described *supra*, there are no procedural safeguards against the

[8] These concerns are not merely theoretical, as in the case of Local 302. *See supra*, notes 4-5.

Industrial Statistician using data from downloaded CBAs, unsigned or expired CBAs, and pre-hire CBAs to set prevailing wages. Under SSB 5493, the Industrial Statistician must adopt the highest rate without regard to whether it reflects the majority rate in the locality; whether the contractor has employees who have or will have worked in the trade in the locality; whether the union that negotiated the rate represents any employees in the locality; or whether the rate reflects hours worked in a different county contained within the geographic scope of the CBA.

There is also no obligation for the Industrial Statistician to perform any statistical analysis to determine the actual prevailing wage in a locality or to detect any statistical anomalies. And, even if he notices clear irregularities, he has no choice but to adopt a wage that is well outside the norm.

The Industrial Statistician has no authority or expertise to investigate collusion or irregularities in the bargaining process, and there is no prohibition against self-dealing. Nor

does the State have authority to invalidate labor contracts proper on their face. *See, e.g., Trust Fund Servs. v. Heyman*, 88 Wn.2d 698, 705, 565 P.2d 805, 809 (1977).

There is also no pre-implementation public scrutiny. The State neither identifies nor publishes CBAs used to establish prevailing wage rates. (CP 2591) Even if a contractor could determine the CBA used to establish the prevailing wage rate in question, private entities are not subjected to public scrutiny. The Freedom of Information Act and other acts designed to provide governmental accountability do not apply to private parties. There is no private right of action. Thus, there is no opportunity for any meaningful investigation concerning the circumstances surrounding the creation of the CBAs from which the Industrial Statistician is mandated to set prevailing wage rates.

b. No Adequate Post-Implementation Procedural Safeguards Exist.

There are no meaningful post-implementation safeguards. Any appeal of prevailing wage rates under RCW 39.12.060 and WAC 296-127-060(3) are useless since there are no grounds upon which the challenged rate could be overturned. Mandating that the highest wage must be used erases any meaningful check against arbitrary action.

Essentially, necessary safeguards must include limiting consideration of CBAs or doing so in a permissive, rather than mandatory, manner; allowing consideration of CBAs only if they cover a certain percentage of workers in each locality; or allowing consideration of CBAs only if they are actually "prevailing." The State cannot point to any state using CBAs that does not have at least one of these protections present. S*ee, e.g., Hunter v. City of Bozeman*, 700 P.2d 184, 187, 216 Mont. 251, 255 (1985) (recognizing that prevailing wage laws with a union-scale provision are constitutional where the union rate of wages "merely assists" in ascertaining

prevailing wages and public authorities are vested with the ultimate determination); (CP 388, 1756-1772) (50 state prevailing wage statutes survey).

SSB 5493 mandates implementation of prevailing wage rates from CBAs negotiated by private interested parties, and no safeguards exist to check such private power and protect against arbitrary action.

SSB 5493 fails to satisfy the second element of *Barry*.

V. CONCLUSION

For these reasons and those in AGC's Answer to the State's Petition, AGC requests that this Court affirm the Court of Appeals Opinion.

I certify that this answer is in 14-point Georgia font and contains 4,975 words, in compliance with the Rules of Appellate Procedure. RAP 18.17 (b).

RESPECTFULLY SUBMITTED this 4th day of February, 2022.

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CERTIFICATE OF SERVICE

I, Jennifer Parda-Aldrich, certify under penalty of perjury under the laws of the State of Washington that on February 4, 2022, 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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