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.

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] The Act prohibits the use of wage data in one county to establish the prevailing wage rate in another county.

Until 2018, the Industrial Statistician conducted 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. In setting the prevailing wage rate in this manner, the Industrial Statistician did not use wage data from one

[1] RCW 39.12.015(1).

county to establish the prevailing wage rate in another county, consistent with the Act's prohibition against such a practice.

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] The legislature made no changes to language in the Act prohibiting the use of wage data in one county to establish the prevailing wage rate in another county.[3]

As a result, after SSB 5493's passage, the Act requires the Industrial Statistician to establish the prevailing wage rates from the highest rate in CBAs based on the CBA's stated

[2] *See* RCW 39.12.015(3)(a).
[3] See RCW 39.12.021(1).

geographic jurisdiction—not where any work is actually performed. Thus, under SSB 5493, if a CBA's geographic jurisdiction covers multiple counties, the Industrial Statistician is *required* to use the wages for each occupation listed in the CBA to set prevailing wages in each county within the CBA's stated geographic scope, even if work is performed in only one county. Yet the Act simultaneously *prohibits* the use of cross-county wage data to set prevailing wage rates.

In other words, under SSB 5493, when a multicounty CBA exists, the Industrial Statistician must establish the prevailing wage rate in one county based on wages paid for work performed in another county, in spite of—and in direct conflict with—the Act's prohibition against the use of wage data from one county to set prevailing wages in other counties. Under such circumstances, the Industrial Statistician cannot comply both with the Act's requirement that prevailing wage rates be established from the highest wage rate in an existing CBA and the Act's prohibition against

the use of wage data in one county to establish the prevailing wage rate in another county.

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 a straightforward reading of RCW 39.12.026(1) erroneous, in violation of article II, section 37 of the Washington State Constitution. Contrary to the State's assertion, that conflict is unambiguous and cannot be harmonized.

This Court should affirm.

II. STATEMENT OF THE ISSUE

Whether the Court of Appeals correctly held that SSB 5493 violates article II, section 37 of the Washington State Constitution because RCW 39.12.015(3)(a) is in direct conflict with RCW 39.12.026(1) and renders a straightforward reading of the latter erroneous.

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) ("In establishing the prevailing rate of wage ... all data collected by the department of labor and industries may be used only in the county for which the work was performed.").

C. SSB 5493 Amends the Manner in which the Prevailing Wage is Set under RCW 39.12.015 but Does Not Amend RCW 39.12.026's Prohibition against the Use of Cross-County Wage Data.

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). Thus, under SSB 5493, in cases where multiple CBAs exist within a county, the Industrial Statistician must adopt the highest rate. RCW 39.12.015(3)(a). If no CBA exists for a particular trade or occupation, then the Industrial Statistician establishes the prevailing wage as defined in RCW 39.12.010(1), which is the original method used before SSB 5493 (described above).

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).

D. Under SSB 5493, Prevailing Wage Rates in One County May be Established from Wage Data of Work Performed in Other Counties.

Under the Act, prevailing wage rates are to be determined based solely on wages paid within each county.[4] Under RCW 39.12.015(3)(a), as amended by SSB 5493, the Industrial Statistician is required to establish the prevailing wage rates from a CBA's stated geographical jurisdiction—not where work is actually performed. (CP 2585) As such, 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. In other words, under SSB 5493, the prevailing wage rate may be established in one county based on wages paid for work performed in another county. (CP 2585)

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

E. Procedural History.

In January 2019, 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" or "Respondents") 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 sought, and this Court accepted, discretionary review of the Court of Appeals' April 18, 2023, unpublished opinion in *AGC III*.

IV. ARGUMENT[5]

A. SSB 5493 Violates Article II, Section 37 of the Washington State Constitution.

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." Article

[5] On June 20, 2023, AGC submitted its Answer to the State's Petition for Discretionary Review. AGC hereby incorporates the facts and arguments set forth therein. AGC further incorporates herein the facts and arguments set forth in its August 9, 2023, Answer to the Amicus Curiae Brief of Washington State Building and Construction Trades Council.

II, section 37 is intended to "protect the legislature and the public against fraud and deception," and its purpose is to disclose the impact of new legislation on existing laws. *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 205, 457 P.3d 453 (2020).

Courts employ a two-part test to determine if a statute violates article II, section 37. *Black*, 195 Wn.2d at 205. 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.*

Here, the Court of Appeals correctly held that SSB 5493 fails to satisfy the second element of the two-part test, and thus violates article II, section 37.

1. RCW 39.12.015(3)(a) Directly Conflicts with RCW 39.12.026(1) and Renders a Straightforward Reading of the Latter Erroneous.

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, RCW 39.12.015(a)(3) directly conflicts with RCW 39.12.026(1) and renders a straightforward reading of the latter erroneous. RCW 39.12.026(1) states: "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." At the same time, RCW 39.12.015(3)(a) directs the Industrial Statistician to

"establish the prevailing rate of wage by adopting the hourly wage … paid for the *geographic jurisdiction* established in collective bargaining agreements." *See* RCW 39.12.015(3)(a) (emphasis added).

Under the plain language of RCW 39.12.015(a)(3), the prevailing wage rate may be established in one county using data of work performed in another county if the work is performed under a CBA with multi-county geographic jurisdictions, yet RCW 39.12.026(1) plainly prohibits such a practice. There is no qualifying language within RCW 39.12.026(1) to clarify any intention by the legislature to exclude the one-county limitation found in RCW

39.12.026(1) from applying to RCW 39.12.015(3)(a).[6] Similarly, RCW 39.12.015 contains no reference to RCW 39.12.026 while, notably, referencing other sections of the Act. *See* RCW 39.12.015(3)(a)("Except as provided in RCW 39.12.017, and notwithstanding RCW 39.12.010(1)....").

Additionally, RCW 39.12.026(1) does not define "data" to include only "wage survey data." *See* RCW 39.12.026(1). Instead, the provision plainly provides that "*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) (emphasis added). The State's asserted position

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[6] 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 (available at https://tvw.org/video/senate-labor-commerce-committee-018011113/?eventID=2018011113). Based on such a representation, the legislature would not have had any intention to exclude the one-county limitation found in RCW 31.12.026(1) from applying to RCW 39.12.015(3)(a).

that wage rates contained within CBAs do not constitute "data" is not only without merit but is in direct conflict with the contrary position the State has taken throughout this litigation in asserting that CBAs are a reasonable and reliable source of wage data from which the prevailing wage rate may be established. (CP 117 (equating wage rates in CBAs to "external sources such as wage data from private parties"); CP 1811 (asserting that in setting the prevailing wage rate, the Industrial Statistician "analyzes data" by, *inter alia*, "determining whether the CBA reflects collective bargaining"))

For each of these reasons, under SSB 5493, in circumstances when the Industrial Statistician uses a multicounty CBA—which in and of itself is a form of data—to establish the prevailing wage in several counties, a straightforward reading of RCW 39.12.015(3)(a)) is then in direct conflict with RCW 39.12.026(1). Because the Industrial Statistician is required under RCW 39.12.015(3)(a)

to adopt the highest wage rate in CBAs to set the prevailing wage rate, it is not possible for him or her to comply with both RCW 29.12.26(1) and RCW 39.12.015(3)(a) when establishing the prevailing wage rate from a multi-county CBA. As a result of this direct conflict, RCW 39.12.015(3)(a) renders a straightforward reading of RCW 39.12.26(1) erroneous, in violation of article II, section 37.

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

The State's assertion that the Court of Appeals failed to "harmonize" an ambiguous conflict between RCW 39.12.015(3)(a) and RCW 39.12.026(1) has no merit. As described *supra*, a direct conflict exists between RCW 39.12.015(3)(a) and RCW 39.12.026(1), and the State has failed to establish that any ambiguity exists.

In support of its assertion that the conflicting language is ambiguous, the State relies on this Court's opinion in *Nguyen v. R.S.,* 124 Wn.2d 766, 881 P.2d 972 (1994). In that

case, however, this Court found that the grammatical differences between the two challenged laws were actually semantically consistent because neither statute was expressly prohibitive of the other. *See id.,* at 775. Specifically, language in the subject statute was "not prohibitive" and, instead, provided that engaging in the subject action "'*may be*' inappropriate." *See id.* (emphasis in original). Here, in contrast, language in RCW 39.12.015(3)(a)—providing that the Industrial Statistician "shall" establish the prevailing wage rate from the geographic jurisdiction established in collective bargaining agreements—is expressly prohibitive of that in RCW 39.12.026(1)—providing that "all data collected by the department of labor and industries may be used only in the county for which the work was performed." In other words, RCW 39.12.015(3)(a) and RCW 39.12.026(1), constitute two directly contradictory mandates, expressly prohibitive of the other, for which no ambiguity exists.

A statute's plain language is of central importance in its interpretation. *See, e.g., Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 125 Wn. App. 202, 218, 104 P.3d 699 (2005) ("While we acknowledge the remedial purposes of the prevailing wage statute and the liberal construction we must give such a statute, we cannot ignore the plain words of the regulation in effectuating the underlying purposes of the regulation."); *see also Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). In interpreting a statute's plain meaning, courts will consider context disclosing legislative intent about the provisions in question. *See Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 748, 317 P.3d 1037 (2014).

Here, both the plain language of the statutory language, in addition to the context in which SSB 5493 was passed

reflecting legislative intent,[7] reflect an unambiguous and irreconcilable conflict between RCW 39.12.015(3)(a) and RCW 39.12.026(1). As a result of this direct conflict, RCW 39.12.015(3)(a) renders a straightforward reading of RCW 39.12.26(1) erroneous, in violation of article II, section 37.

V. CONCLUSION

For these reasons and those in AGC's Answer to the State's Petition and Response to the Amicus Curiae Brief of Washington State Building and Construction Trades Council, AGC requests that this Court affirm the Court of Appeals Opinion.

I certify that this answer is in 14-point Georgia font and contains 2,834 words, in compliance with the Rules of Appellate Procedure. RAP 18.17.

[7] *See supra*, note 6.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

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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 October 6, 2023, 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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