No. 100258-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

Countless workers rely on prevailing wages for a living wage. Reflecting that wages are fairer when both workers and employers have a say, the Legislature directed the Industrial Statistician to use facts from collective-bargaining agreements to set prevailing wages. The Legislature properly delegated prevailing-wage determinations to the statistician and gave clear guidance. It provided procedural protections, with the ability to appeal a prevailing-wage rate.

AGC divines a danger of unions and contractors colluding in setting CBA-wage rates to manipulate prevailing-wage rates. But such collusion would violate antitrust laws, the National Labor Relations Act, and the Prevailing Wages on Public Works Act. And the Legislature may reasonably rely on Washingtonians to be law-abiding in supplying information.

Nor is there any delegation to private parties. Although such delegation is permissible, the Legislature made the statistician responsible for "[a]ll determinations" about

prevailing wages. RCW 39.12.015. The Legislature did not ask unions and contractors to set prevailing wages. Instead, their agreements comprehensively govern the employment relationship and cover wages, benefits, discipline, management rights, health and safety policies, and other working conditions—whether performed on public or private projects.

The statistician's consideration of facts established after the legislation's enactment does not create an improper delegation. The Legislature often directs agencies to consider future facts in taking action, and a blanket prohibition of this approach would needlessly disrupt agencies exercising their duties.

Although AGC characterizes its arguments as challenging the statute as an improper delegation, in truth it simply disagrees with the Legislature's policy choices. The Court of Appeals erred when it accepted those arguments, and this Court should reverse.

II. ISSUES

1. Did the Legislature provide clear standards and adequate protections when it directed the statistician to use facts from ratified agreements, when RCW 39.12 contains appeal rights, and when antitrust and prevailing-wage laws and the NLRA guard against abuses?

2. Did the Legislature delegate prevailing-wage rate-setting to private parties when CBAs cover everything from wages to discipline and do not mention prevailing wages?

3. Did the Legislature properly direct the statistician to set prevailing-wage rates using current and relevant CBAs, when the case law establishes that the Legislature may delegate "the power to determine some fact . . . upon which the application of the law" depends?[1]

III. FACTS

A. Background of Prevailing-Wage Laws

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Prevailing-wage laws protect workers from substandard earnings by fixing a floor for wages on government projects.

[1] *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 25, 775 P.2d 947 (1989).

See Everett Concrete Prods., Inc. v. Dep't of Lab. & Indus., 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988); *Drake v. Molvik & Olsen Elec., Inc.*, 107 Wn.2d 26, 28-29, 726 P.2d 1238 (1986).

Parallel to adopting prevailing-wage laws, the Legislature recognized that collective bargaining empowers workers by giving them a voice about their wages and working conditions. *See* RCW 49.32.020.

The Legislature delegated to the statistician the authority to set the prevailing wage used on public-works projects. RCW 39.12.015(1) ("All determinations of the prevailing rate of wage shall be made by the industrial statistician . . . ."). The statistician sets over 22,000 prevailing-wage rates. CP 2518. There are tens of thousands of public-works projects. *Id.*

B. In 2018, the Legislature Sought to Reduce the Use of Cumbersome Surveys, Instructing the Statistician to Set Prevailing-Wage Rates Using CBAs Reflecting the Negotiated Wage

Before 2018, prevailing-wage rates were generally set using wage surveys, through which contractors and unions

voluntarily reported hours and wages in different trades and occupations. WAC 296-127-019. The wage surveys identified wage facts from private contracts (primarily CBAs). CP 1844, 2119-20, 2124-25.

In 2018, the Legislature changed to using rates established in certain CBAs to set most prevailing-wage rates. Laws of 2018, ch. 248, § 1. In adopting the law, the Legislature recognized the cumbersome nature of surveys, and wanted to simplify the system and provide "a more reasonable way to" determine prevailing wages. S. Lab. & Com. Comm., 2018 Leg., 65th Sess., TVW.org at 22:00-22:26 (Jan. 22, 2018) (statement of Sen. Steve Conway, Member, S. Lab. & Com. Comm.). "The collectively bargained wage is a negotiated wage and best represents area standard wages." H. B. Report, SSB 5493, 2018 Leg., 65th Sess, at 2 (2018).

RCW 39.12.015(3)(a) now provides that "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." Where more than one CBA exists for the relevant trade in the relevant county, the Legislature directs the use of the higher rate. *Id*.

C. The Superior Court Upheld the Constitutionality of SSB 5493, but the Court of Appeals Reversed

After AGC sued to invalidate the amendment, all parties moved for summary judgment. CP 1, 184, 1794. The trial court ruled for the State, but the Court of Appeals reversed. *Assoc'd Gen. Contractors v. State*, 19 Wn. App. 2d 99, 102, 494 P.3d 443 (2021), *review granted*, 2022 WL 43665 (Wash. 2022).

IV. ARGUMENT

Workers depend on prevailing wages for a living wage. But the Court of Appeals' reasoning threatens to deprive them of such wages with an abrogated approach to delegation that not only hurts workers but would threaten efficient state government.

No violation of the delegation doctrine exists here as SSB 5493 satisfies the three lines of cases about a delegation's constitutionality. First, *Barry & Barry, Inc. v. Department of Motor Vehicles* establishes that delegation is lawful when (1) the Legislature defines "in general terms what is to be done" and (2) when "safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

Second, although the Legislature may delegate to private parties (*Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*, 153 Wn.2d 657, 664, 105 P.3d 985 (2005)), the use of information from private parties is not a delegation. *See Salstrom's Vehicles, Inc. v. Dep't of Motor Vehicles*, 87 Wn.2d 686, 695-96, 555 P.2d 1361 (1976).

And third, *State v. Batson* and other cases hold that, although the Legislature cannot make laws dependent on future standards, it may use future facts. 196 Wn.2d 670, 675-76, 675 n.2, 478 P.3d 75 (2020).

A. The Legislature Obeyed *Barry & Barry* When Adopting SSB 5493

Decided in 1972, *Barry & Barry* departed from the Court's previous delegation doctrine jurisprudence, finding earlier tests "excessively harsh and needlessly difficult to fulfill." 81 Wn.2d at 159. Holding that the constitution does not require "exact and precise standards," the Court explained that it is enough that a law provides "in general terms what is to be done," with protections against arbitrary action. *Id*. at 159-60. The Court recognized that the modern delegation doctrine is flexible to further "efficient government" and "the public interest in administrative efficiency in a complex modern society." *Id.* at 159.

1. SSB 5493 sets in "general terms what is to be done"

RCW 39.12.015(3)(a) provides that "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." RCW 39.12.015 meets the first *Barry & Barry* prong to "define in general terms what is to be done." *See Barry & Barry*, 81 Wn.2d at 159. The Legislature could calibrate the level of discretion to provide and, in doing so, provided for the use of "collective bargaining agreements"—meaning signed agreements resulting from collective bargaining. RCW 39.12.015.

a. The Legislature may limit agency discretion

The Legislature has given little leeway to L&I, setting tight standards for determining prevailing-wage rates. AGC argues this means that there are insufficient standards, arguing the statistician "merely adopt[s]" the CBA. Answer 19-20. But under *Barry & Barry*, the Legislature can determine the level of discretion for a state official: "We believe that one of the legislative powers . . . is the power to determine the amount of discretion an administrative agency should exercise in carrying out the duties granted to it by the legislature." 81 Wn.2d at 162.

Even so, AGC asserts "the amount of discretion" language in *Barry & Barry* means there must be some discretion instead of "no discretion." Answer 19-20 (emphasis omitted). But *Barry & Barry* does not preclude giving a state official little discretion. Many laws direct state officials to take specific actions when certain facts are established, without giving the official any discretion. *E.g.*, RCW 49.46.020(2)(b) (L&I shall calculate future minimum wage increases by using consumer price index); RCW 39.12.065(1) (upon complaint, director shall cause a prevailing-wage investigation to be made); RCW 39.12.065(4) (director may not waive interest on finding prevailing-wage violation).

And AGC's argument does not make sense: that SSB 5493 gives the statistician specific directions to follow means the statute sets clear standards for rate determinations, not that the statute includes no standards. AGC's true argument is it dislikes the Legislature's standard—adopting the highest CBA

in a given county as the prevailing wage—not that there are no standards. *See* Answer 9, 12-14, 12 n.5, 28 n.12, 31-32.

b. The Legislature has given the statistician standards to set rates

AGC is wrong that the statistician makes decisions by "a coin toss" (Answer 20), and it is wrong when it says that "SSB 5493 contains no standards by which the Industrial Statistician sets prevailing wage rates." *Id.* The agency is to use the highest rate negotiated in a CBA for the relevant county, trade, and occupation that "have collective bargaining agreements." RCW 39.12.015(3)(a). Using the highest CBA rate sets a standard. And the words "have" and "agreement" require an operative agreement. "Have" means "to hold or maintain as a possession, privilege, or entitlement." Have, *Merriam-Webster.com*.[2] The word directs a present privilege or entitlement, not a past or future one. "Agreement" in this context means "a contract duly executed . . . and legally binding." Agreement, *Merriam-*

[2] https://www.merriam-webster.com/dictionary/have (last visited Jan. 20, 2022).

Webster.com.[3] The words together show the statute requires an operative CBA.

AGC has waived any right to argue deficiencies in L&I's practices about operative agreements because it didn't exhaust administrative remedies under RCW 39.12.060 and WAC 296-127-060. *See Se. Wash. Bldg. & Constr. Trades Council v. Dep't of Lab. & Indus.*, 91 Wn.2d 41, 47, 586 P.2d 486 (1978) (to contest prevailing-wage issue, must exhaust remedies under RCW 39.12)

The statistician uses only signed and unexpired CBAs, but AGC has not shown a single example where a prevailing-

[3] https://www.merriam-webster.com/dictionary/agreement (last visited Jan. 20, 2022).

wage rate was set using an unsigned or expired agreement.[4] If an example existed, AGC would be required to contest that with L&I. WAC 296-127-060; *see also* RCW 39.12.060; *Se. Wash.*, 91 Wn.2d at 47. The remedy is not to invalidate an entire law on allegations of isolated conduct when there is a remedy to contest the conduct.

In any event, its waived claims lack merit. Although L&I may not have a signed copy, it only uses agreements where the original is signed. CP 1866-69. AGC asserts there is no evidence the unsigned copies the statistician possesses are actually copies of signed agreements. Answer 7. But the statistician testified that the agreements L&I relied on were

[4] The Court of Appeals stated that the statistician acknowledged he had used expired CBAs, referring to AGC's claim. 19 Wn. App. 2d at 105. AGC asked him if L&I was using an expired agreement that listed its effective period as 2013 to 2015 (Ex 19, not 16 as misstated), CP 477, 571, 2703, and based on those dates, the statistician agreed it was expired. But the agreement had an evergreen clause to continue in effect "year to year" after the dates listed in the CBA. CP 477. So AGC obfuscated the issue with the statistician, and he has not relied on an expired CBA.

signed, it's just that the *copies* were unsigned: "Q. As the industrial statistician, you would prevail a [CBA] in your possession that's unsigned?" "A. No." CP 1868; *see also* CP 1866-67. And contrary to AGC's further misrepresentation, a declaration shows L&I uses its Wage Update System, under which CBA parties submit the latest negotiated wage rate. *See* Answer 7; CP 2515-16.

AGC also claims that L&I uses expired CBAs, citing spreadsheets listing CBA dates to imply expired CBA use (Answer 8 (citing CP 578-1669, 2702-45)), ignoring that the CBAs contain a "year-to-year" clause, which means that CBAs continue to be in effect beyond their initially-stated time period. *E.g.*, CP 394, 396, 398, 404, 407-10, 414, 419, 430, 433, 441-44, 467-70, 473-74, 476, 2534, 2615.

c. The statistician must use valid CBAs

Another standard guiding the statistician is that agreements must stem from "collective bargaining," and the statistician can consider whether collective bargaining occurred

in deciding whether to use the CBA's rates. A "collective bargaining agreement" is "an agreement between an employer and a labor union produced through collective bargaining." Collective Bargaining Agreement, *Merriam-Webster.com*.[5] "Collective bargaining" in turn is "a negotiation for the settlement of a collective agreement between an employer or group of employers on one side and a union or number of unions on the other." Collective Bargaining, *Webster's Third New International Dictionary* (2002). A CBA requires unions and employers to negotiate at arm's length. *See Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178, 1190, 1195 (9th Cir. 2017); *see* 29 U.S.C. § 158(d). Thus, CBAs only exist when they stem from arm's length negotiations.

A collusive agreement does not form a CBA and violates the NLRA and state and federal antitrust laws, including

[5] https://www.merriam-webster.com/legal/collective%20bargaining%20agreement (last visited Jan. 20, 2022).

criminal provisions, and would incur prevailing-wage penalties. *See* 29 U.S.C. § 158(d) (NLRA violation to not negotiate at arm's length); 15 U.S.C. §§ 1-2 (federal civil and criminal violation to collude in CBA formation); *Int'l Longshore*, 863 F.3d at 1190, 1195 (federal civil antitrust violation to collude); RCW 19.86.030, .040, .090 (state antitrust violation to collude, enforceable in private lawsuit); RCW 39.12.050 (penalty if contractor submits false statement, including submitting fraudulent CBAs for prevailing-wage purposes), .065 (shall investigate prevailing-wage violation complaints, including about CBA); WAC 296-127-060 (allows complaints about prevailing-wage rates); RCW 39.12.060 (same).

Guarding against using agreements that are not the result of collective bargaining, RCW 39.12.015 authorizes the statistician to make "[a]ll determinations" about prevailing-wage rates. This includes following RCW 39.12.015 to accept only agreements that result from collective bargaining, meaning an agreement produced by arm's length negotiations. CP 2123-

24. AGC notes that the NLRB is the forum to evaluate CBA validity, not the statistician. Answer 32 n.13. The NLRB enforces rights and duties under the NLRA. *See* 29 U.S.C. § 153. In contrast, the statistician makes a "determination" whether to use facts in the CBA (RCW 39.12.015), and this determination doesn't affect contractual relationships between unions and contractors.

Even if the statistician lacks authority to reject the validity of a CBA, it is a reasonable legislative choice to allow presumptively valid CBAs as a source of facts because the Legislature can assume that documents submitted to state agencies are truthful and that Washington residents will follow the law in producing these documents. *E.g.*, *Birrueta v. Dep't of Lab. & Indus.*, 186 Wn.2d 537, 553, 379 P.3d 120 (2016) (appropriate to rely on facts reported to agency within a person's particular knowledge); *State v. Minor*, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008) (appropriate to rely on law-abiding residents to keep and bear arms, despite escalating violence

because of ready availability of firearms).[6] As courts have emphasized, a legislature can decide that a negotiated contract between competing interests protects against collusive behavior: "We regard it as being highly improbable that these competing groups representing opposing economic interests would conspire together or collaborate to subvert the interest of the public in work performed on public construction." *Male v. Ernest Renda Contracting Co.*, 122 N.J. Super. Ct. App. Div. 526, 535, 301 A.2d 153, *aff'd*, 64 N.J. 199, 314 A.2d 361 (1974).

The statistician emphasized CBAs are overwhelmingly "straightforward and reflect market forces that balance competing interests [with] no evidence of not being . . . negotiated at arms' length." CP 2124. This is because "parties have competing interests that are balanced at the bargaining

[6] Agencies routinely rely on federal income tax forms for information, and no one suggests they investigate the underlying data. As it is a crime to collude in CBA formation, it is a crime to falsify a tax form. 26 U.S.C. § 7206.

table . . . [and] if the parties . . . become tempted to collude . . . then they should also fear the regulation of law and the cost to their reputation." *Id.*

AGC fails to explain why mandated compliance with the NLRA, antitrust laws, and prevailing-wage provisions wouldn't provide adequate protections. *See* 29 U.S.C. § 158(d); 15 U.S.C. §§ 1-2; RCW 19.86.030, .040, .090; RCW 39.12.050, .065.

As for the waived issue of collusion, the evidence shows that the statistician follows RCW 39.12.015 to accept only agreements that result from collective bargaining, meaning an agreement produced by arm's length negotiations. CP 2123-24. In determining this, the statistician may notice something off about the CBA or someone trying to manipulate the prevailing wage. CP 2121-22. It is normal to see modest wage rate increases in CBAs to reflect market forces. CP 2121. A departure would trigger questions. *Id.* Thus, the statistician monitors for collusion, questioning CBAs that are suspect. CP

2123.

AGC points to its dispute with the International Union of Operating Engineers Local 302 to argue that some CBAs result from collusion. Answer 10-11. AGC claims "card-carrying [union] members" were allegedly acting as both union members and contractors in negotiations. *Id.* It asserts there are cites in the record to support its claim, but its cites include no mention of the issue. Answer 11 (citing CP 2550, 2572, 2576-80).

And this argument lacks merit. Because managers and owners are not employees under the NLRA, they cannot perform work within a CBA bargaining unit and could not negotiate on behalf of both union workers and management. *See N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974) (excluding management from NLRA protections). That an owner/manager of a construction company may carry a union card (which represents membership in an organization no different from the Fraternal Order of Eagles or the ACLU) presents no evidence of collusion.

AGC points to other facts it alleges show collusion: Local 302 operators did not represent the majority of workers and obtained a higher rate in the Local 302 contracts than the one AGC negotiated with other operators. Answer 10-13. AGC does not explain how this is collusion, given RCW 39.12.015 authorizes CBAs to determine area wages and requires use of the highest CBA rate.

2. Procedural protections guard against arbitrary action

SSB 5493 satisfies *Barry & Barry*'s second prong about procedural protections. When a statute affords little discretion to start with, as here, then fewer procedural protections are necessary because there is less room for arbitrary action. To the extent there is discretion (identifying the applicable CBAs), adequate procedural safeguards exist. The Court of Appeals ruled that procedural protections need to be *within* a statute for it to satisfy *Barry & Barry*. 19 Wn. App. 2d at 111. But in *Automotive United Trades Organization v. State*, this Court emphasized the opposite: "separation of powers does not

require the safeguards be found in the same statute under challenge—just that the Safeguards exist." 183 Wn.2d 842, 861, 357 P.3d 615 (2015). This rule reflects that it wouldn't make sense to enact identical appeal provisions in multiple related statutes.

The law presumes state agencies will properly exercise their delegated authority. *See* RCW 34.05.570(1)(a). But if the statistician stumbles about any rates, which are published for public review (WAC 296-127-011), RCW 39.12.060 allows the director to hear wage rate disputes. *Se. Wash.*, 91 Wn.2d at 46-47. WAC 296-127-060 provides:

> Any party in interest [which includes contractors who might bid on projects] who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition [to the director] for arbitration . . . .

When a rate is not accurate, the statistician emphasized that interested parties call L&I to request that L&I fix the rates, and

then, if unsatisfied, may challenge under WAC 296-127-060. CP 1912, 2516, 2518. AGC's concern about unsigned, expired CBAs and collusion is misplaced because an interested party can challenge the rates.

B. No Private Party Delegation Occurred Here

1. CBAs are not negotiated to set prevailing wages

No private party delegation occurred here. AGC conflates delegation to private parties with use of information from private parties. Answer 1, 6, 19-20, 22-24, 26. The Legislature did not ask private parties to set the prevailing-wage rate; it directed the statistician to use independently significant facts in applying the legislative standard. CBAs are not negotiated to set prevailing-wage rates, but govern the employment relationship about wages, benefits, discipline, management rights, health and safety policies, and other working conditions—whether performed on public or private projects.

The Court affirmed the use of information from non-state actors in *Diversified*, 113 Wn.2d at 28 (*see* discussion *infra* Part IV.C.1), and *Salstrom's*, 87 Wn.2d at 695-96, which upheld requiring potential car dealer licensees to have a service agreement with a manufacturer. The Court rejected the notion that the law delegated authority to private, contractual arrangements with manufacturers to decide eligibility for a dealer license but considered it information the State may use in licensing. *Salstrom's*, 87 Wn.2d at 695-96.

AGC cites *Salstrom's* because the motor-vehicles agency retained the power to issue dealer licenses, and AGC claims the statistician allegedly "retains no 'power' but to adopt wage rates negotiated by interested private parties." Answer 25-26. But RCW 39.12.015 directs the statistician to make "[a]ll determinations" about prevailing wages, applying the level of discretion the Legislature deems fit. *See supra* Part IV.A.1.a.

2. Delegation to private parties is permissible

In any event, standards mirroring *Barry & Barry* apply to uphold delegations to private parties. *Ent. Indus.*, 153 Wn.2d at 664. *Entertainment Industries* authorizes private-party delegation "if proper standards, guidelines, and procedural safeguards exist." *Id.* There, smoking guidelines were given for private businesses' use in setting policy, and the government (local health boards and fire departments) enforced the statute. *Id.* Here, if the Court entertained the argument that there is a delegation to private parties, which it should not, there would be the federally enforceable standards and guidelines about forming a CBA (29 U.S.C. § 158(d); 15 U.S.C. §§ 1-2), and L&I enforces the prevailing-wage laws and provides procedural protections. RCW 39.12.050, .060, .065.

C. The Court Allows the Legislature to Use "Future Facts"

1. *Batson* and *Diversified* approved future-facts use, which is echoed in other jurisdictions

As is routine in legislation overseeing the government, the Legislature routinely directs applying the law to "future facts," and it is not per se forbidden as AGC urges. Answer 16, 19-24. AGC, like the Court of Appeals, conflates future facts with future standards. *Id.*; 19 Wn. App. 2d at 109.

A statute may rely on a "future specified event" or "facts" outside a law. *Batson*, 196 Wn.2d at 675-76, 675 n.2 (quoting *Diversified*, 113 Wn.2d at 28). In *Batson*, the law "set[] the circumstances under which [the state law] becomes operative," and once this circumstance occurred, Washington could apply the now operative law. *Id.* at 675-76. The case involved the use of criminal convictions where "countless Washington laws . . . incorporate the underlying facts of convictions from other jurisdictions." *Id.* at 675 n.2.

Likewise, SSB 5493 is just one of countless examples of a law relying on outside facts. Once the "future specified event" of adoption of a CBA occurs, the statistician may use its "underlying facts."

AGC argues that under *Batson*, "SSB 5493 is not a mere 'future specified event' with no substantive impact on the Act's application." Answer 24. Nonsense. In *Batson*, the future events had a "substantive" impact—they, like the CBAs, determined the future facts (convictions, like wage rates) to use.

Like *Batson*, *Diversified* sanctioned use of future facts. 113 Wn.2d at 25. There, the Court considered a statute that provided if a federal agency found the statute to conflict with federal Medicaid law, the Washington statute would become inoperative. 113 Wn.2d at 24. The Court upheld delegating "the power to determine some fact or state of things upon which the application of the law is made to depend" (*Id.* at 25)—facts like CBA rates.

AGC claims *Diversified* recognized "an unconstitutional delegation of legislative authority to incorporate an ever-changing set of facts established by a third party." Answer 22. Not so. *Diversified* approved using "future actions of a non-state [actor] over which [the agency] has no control." 113 Wn.2d at 26, 28. What the doctrine prohibits is adopting future laws, meaning the "adoption of standards such [non-state] bodies may make in the future." *Woodson v. State*, 95 Wn.2d 257, 261, 623 P.2d 683 (1980); *see Diversified*, 113 Wn.2d at 24.

Legislating future standards differs from incorporating future facts. A standard is "[a] criterion for measuring acceptability." Standard, *Black's Law Dictionary* (11th ed. 2019). In contrast, a fact is "[s]omething that actually exists; an aspect of reality." Fact, *Black's Law Dictionary* (11th ed. 2019). The "criterion" was the 2018 standard using operative agreements from collective bargaining. The "aspect of reality" is the negotiated rates.

Other courts have considered similar issues. An Ohio court held that a wage survey was a constitutional delegation: "[a city] can make a law to delegate a power to determine some fact upon which that law shall depend." *Fuldauer v. City of Cleveland*, 30 Ohio App. 2d 237, 239, 285 N.E.2d 80 (1972), *aff'd*, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972).

Likewise, in New Jersey, use of a CBA satisfied the delegation doctrine with an agency "granted the power, as a matter of legislative convenience, to determine a set of facts, i.e., the wage rates established under [CBAs] in given circumstances." *Male*, 122 N.J. Super. at 533-34; *accord Constr. Indus. of Mass. v. Comm'r of Lab. & Indus.*, 406 Mass. 162, 171-72, 546 N.E.2d 367 (1989); *Assoc. Builders & Contractors, Saginaw Valley Area Chapter v. Dep't of Consumer & Indus. Servs.*, 267 Mich. App. 386, 390-93, 705 N.W.2d 509 (2005); *Donahue v. Cardinal Constr. Co.*, 11 Ohio App. 3d 204, 206-07, 463 N.E.2d 1300 (1983).

AGC cites a 1922 Wisconsin case, *Wagner v. City of*

Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922), which invalidated a law that used CBAs. Answer 28. Conflicting with *Batson*, it is distinguishable because the statute delegated to unions, not to an agency determining prevailing wages. *Wagner*, 188 N.W. at 489.

AGC concedes that other states have laws identical to Washington's but prefers policies of different states' statutes. Answer 28 & n.12. Yet Washington's policy choices may not be second-guessed. *See Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

2. *Kirschner* was abrogated

The Court of Appeals mistakenly relied on *State ex rel. Kirschner v. Urquhart* to say the Legislature cannot use "CBAs not in existence at the time the legislature passed the bill." 19 Wn. App. 2d at 109-10 (citing 50 Wn.2d 131, 310 P.2d 261 (1957)). There, the Legislature adopted a statute requiring a diploma from a medical school accredited by specific societies

to practice medicine, which violated the delegation doctrine. *Id.* at 132-35.

This Court abrogated *Kirschner* in *United Chiropractors of Wash., Inc. v. State*, reasoning *Kirschner* rested on outdated notions about legislative power. 90 Wn.2d 1, 4, 578 P.2d 38 (1978). And *Woodson* recast *Kirschner*, explaining that the adoption of a future standard caused the constitutional difficulty: "the vice is . . . that [the Legislature] defers to the adoption of standards [the compilation of a list of approved schools] such bodies may make in the future." 95 Wn.2d at 261. The Court has held that impermissible delegations adopt future standards, not future facts. *Batson*, 196 Wn.2d at 675-76, 675 n.2; *Diversified*, 113 Wn.2d at 25, 31; *Woodson*, 95 Wn.2d at 261; *Salstrom's*, 87 Wn.2d at 695-96.

3. A prohibition on "future facts" would dismantle many laws and prevailing-wage use

Kirschner, read as the Court of Appeals urges, does not make sense. Using facts not in existence at the time of bill adoption is commonplace. *See Wash. Water Power Co. v.*

Human Rights Comm'n, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978) (future fact of discrimination). There would be many unintended consequences using the Court of Appeals' view.

For example, before SSB 5493, wage surveys were used based on privately negotiated employment agreements. WAC 296-127-019. In a wage survey done before SSB 5493, the CBA laborer rate was used in 38 of Washington's 39 counties. CP 2122. AGC has never suggested that wage survey data based on CBAs was suspect. In fact, it lauded wage surveys and viewed the previous system as constitutional. Appellant's Br. 1, 8-9, 13, 17, 39. Although the statistician processed wage surveys by collating results, a survey depends on private-party facts. The future-facts standard will dismantle the 78-year-old prevailing-wage law.

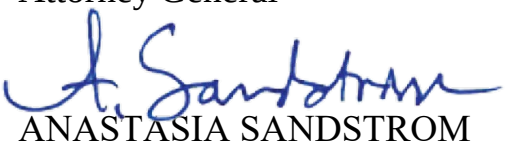
V. CONCLUSION

The Court of Appeals' decision should be reversed.

This document contains 4941 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 4th day of February 2022.

ROBERT W. FERGUSON
Attorney General



ANASTASIA SANDSTROM
Senior Counsel
WSBA No. 24163

Supreme Court No. 100258-1

SUPREME COURT
STATE OF WASHINGTON

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, v. STATE OF WASHINGTON, JAY INSLEE, JOEL SACKS, and JIM CHRISTENSEN, Petitioners.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Supplemental Brief and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Erin Lennon
Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

Darren Feider
Jennifer Parda-Aldrich
Sebris Busto James
dfeider@sebrisbusto.com
jparda@sebrisbusto.com

Kristina Detwiler
Robblee Detwiler
kdetwiler@unionattorneysnw.com
aburner@unionattorneysnw.com

DATED this 4th day of February 2022.

MYKAILA J. OSTROM
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

February 04, 2022 - 3:04 PM

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

The following documents have been uploaded:

- 1002581_Briefs_Plus_20220204143445SC304197_8893.pdf
  This File Contains:
  Briefs - Petitioners Supplemental
  Certificate of Service
  The Original File Name was AGCSuppBr2022.pdf

A copy of the uploaded files will be sent to:

- Paul.Weideman@atg.wa.gov
- aburner@unionattorneysnw.com
- dfeider@sebrisbusto.com
- jparda@sebrisbusto.com
- kdetwiler@unionattorneysnw.com
- lniseaeservice@atg.wa.gov

Comments:

Sender Name: Mykaila Ostrom - Email: mykailao@atg.wa.gov
Filing on Behalf of: Anastasia R. Sandstrom - Email: anastasia.sandstrom@atg.wa.gov (Alternate Email:)

Address:
800 Fifth Avenue, Ste. 2000
Seattle, WA, 98104
Phone: (206) 464-7740

Note: The Filing Id is 20220204143445SC304197