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No. 100258-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

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.

BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

INTRODUCTION AND IDENTITY OF AMICUS CURIAE 1

STATEMENT OF THE ISSUES 2

STATEMENT OF FACTS 2

ARGUMENT 4

I. THE USE OF COLLECTIVE BARGAINING AGREEMENTS TO DETERMINE THE PREVAILING WAGE RATE IS CONSISTENT WITH NONDELEGATION DOCTRINE 5

 A. The Power To Set The Prevailing Wage Is The Type Of Power Which May Be Properly Delegated By The Legislature. 6

 B. SSB 5493 Provides Specific Guidelines Directing What Is To Be Done And How The Industrial Statistician Should Accomplish It. 8

 C. SSB 5493 Contains Sufficient Procedural Safeguards To Control Arbitrary Administrative Action And Prevent Administrative Abuse Of Discretionary Power. 9

II. USING COLLECTIVE BARGAINING AGREEMENTS TO SET THE PREVAILING WAGE RATE FULFILLS THE PURPOSE OF THE PREVAILING WAGE ACT 15

A. Using Collective Bargaining Agreements To Set The Prevailing Wage Rate Fulfills The Purpose Of The PWA By Ensuring Workers On Public Projects Receive Living Wages..... 16

B. A Living Prevailing Wage Rate Supports The Safe And Efficient Completion Of Public Works Projects..... 17

III. WASHINGTON STATE HAS A LONG HISTORY OF USING COLLECTIVE BARGAINING AGREEMENTS TO SET THE PREVAILING WAGE RATES..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Allen Bradley Co. v. IBEW Local Union 3</i> , 325 U.S. 797, 60 S.Ct. 982, 84 L.Ed. 1311(1945)	12
<i>Anderson v. City of Issaquah</i> , 70 Wn. App. 64, 80, 851 P.2d 744 (1993)	8
<i>Apex Hosiery Co. v. Leader</i> , 310 U.S. 469, 65 S.Ct. 1533, 89 L.3d 1939 (1940).....	12
<i>Barry & Barry. Inc. v. State Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	6, 8
<i>Carstens v. De Sellem</i> , 82 Wash. 643, 144 P. 934 (1914)	6
<i>Diversified Inv. v. Dep't of Social & Health Servs.</i> , 113 Wn.2d 19, 24, 775 P.2d 947 (1989).....	7
<i>Drinkwitz v. Alliant Technologies</i> , 140 Wn.2d 291, 996 P.2d 582 (2000)	19
<i>Heller v. McClure & Sons</i> , 92 Wn. App. 333, 338, 963 P.2d 923 (1998)	15
<i>Keeting v. Public Utility District No. 1</i> , 49 Wn.2d 761, 306 P.2d 762 (1957)	5
<i>Sackett v. Santilli</i> , 146 Wn.2d 498, 47 P.3d 948 (2002)	5
<i>Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	15, 16

<i>Southeastern Washington Bldg. & Const. Trades Council v. Dep't of Labor & Indus.</i> , 91 Wn.2d 41, 586 P.2d 486 (1978)	18
<i>State v. Crown Zellerbach Corp.</i> , 92 Wn.2d 894, 602 P.2d 1172 (1979)	10, 11
<i>State v. Simmons</i> , 152 Wn.2d 450, 98 P.3d 789 (2004).....	10
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)	12
<i>United States v. Hutcheson</i> , 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941)	12
<i>Woodson v. State</i> , 95 Wn.2d 257, 623 P.2d 683 (1980)	7

Statutes

15 U.S.C. § 1	12
15 U.S.C. § 15(a).....	12
15 U.S.C. § 17	12
29 U.S.C. § 52	12
29 U.S.C. §§ 104, 105, 113	12
RCW 19.86.070	12
RCW 34.05	14
RCW 39.12	5
RCW 39.12.015	2
RCW 39.12.015(3)	2

RCW 39.12.015(3)(a).....	3, 7, 9
RCW 39.12.015(3)(b)	9
RCW 39.12.020.....	15
RCW 39.12.060.....	14
RCW 39.12.065.....	13
WAC 296-127-019(1)	3
WAC 296-127-060.....	14

Constitutional Provisions

Wash. Const. art. II, § 1.....	5
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INTRODUCTION AND IDENTITY OF AMICUS CURIAE

The Council is an organization composed of forty-eight local unions and sixteen regional building trades councils made up from fourteen international unions in the construction trades, including: International Brotherhood of Electrical Workers; International Brotherhood of Teamsters; International Union of Bricklayers; International Union of Elevator Constructors; International Union of Painters; Laborers' International Union of North America; Operative Plasterers' and Cement Masons' International Association; International Association of Sheet Metal; United Associated of Plumbers and Pipefitters; United Union of Roofers; International Union of Operating Engineers; International Brotherhood of Boilermakers; International Association of Heat and Frost Insulators; and International Association of Iron Workers.

The Council's mission is to promote the economic and employment security of construction workers. The Council advocates before the executive, legislative, and judicial branches

of State government on behalf of its affiliates to promote the interests and well-being of construction workers in the State of Washington. Through this work, the Council was instrumental in the drafting and passage of the legislation that resulted in this litigation, Substitute Senate Bill 5493¹ (“SSB 5493”), codified as RCW 39.12.015(3). The Council has an interest in being heard regarding the constitutionality of the legislation it helped to craft.

STATEMENT OF THE ISSUES

Whether the Court of Appeals erred in finding that SSB 5493 was an unconstitutional delegation of legislative power.

STATEMENT OF FACTS

In Washington, the prevailing wage rate is determined by the Industrial Statistician at the Department of Labor and Industries. RCW 39.12.015. Historically, this determination was made using the results of wage and hour surveys which were sent to employers, contractors, and labor unions across the state.

¹ Substitute Senate Bill 5493, 65th Leg., Reg. Sess. (Wash. 2018).

WAC 296-127-019(1). In 2018, the Legislature adopted SSB 5493. Rather than using survey results, this legislation required the Industrial Statistician to instead “establish the prevailing 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 a collective bargaining agreement.” RCW 39.12.015(3)(a).

On January 22, 2019, the Respondents filed a lawsuit in Thurston County Superior Court arguing that SSB 5493 was unconstitutional. (CP 1-20) Specifically, Respondents alleged that SSB 5493 violates Article II, Section 1 of the Washington Constitution (Nondelegation Doctrine), Article II, Section 37 of the Washington Constitution, the Due Process Clauses of the U.S. and Washington Constitutions, and the Equal Protection Clause of the U.S. and Washington Constitutions. (CP 11-17; 197-213) The Superior Court rejected the Respondent’s arguments and granted the Petitioner’s Cross Motion for Summary Judgment. (CP 2536-2539) The Respondents

appealed to the Court of Appeals, Division II. The court of appeals overturned the superior court ruling, finding that SSB 5493 was an unconstitutional delegation.² The matter was remanded to the superior court for further proceedings.

On September 29, 2021, the Petitioners filed a Petition for Discretionary Review with the Supreme Court. The Court accepted review on January 5, 2022. This is the Council's Amicus Curiae brief on the Merits.

ARGUMENT

In Washington, the Industrial Statistician sets the prevailing wage rate for public works projects. The legislature's decision to direct the Industrial Statistician to set the prevailing wage rate based on collective bargaining agreements, as opposed to the former method of wage and hour surveys, is not an

² The court of appeals declined to decide whether SSB 5493 violates Article II, Section 37 of the Washington State Constitution. The court further declined to address the due process and equal protection claims because the Petitioners had failed to make any argument in support of those claims.

unconstitutional delegation of power. Rather, it is a policy choice, supported by precedent, that best fulfills the purpose of the Prevailing Wage Act (“PWA”), RCW 39.12.

I. THE USE OF COLLECTIVE BARGAINING AGREEMENTS TO DETERMINE THE PREVAILING WAGE RATE IS CONSISTENT WITH THE NONDELEGATION DOCTRINE.

The Washington State Constitution directs that “[t]he legislative authority of the state of Washington shall be vested in the legislature.” Wash. Const. art. II, § 1. The purpose of this section is to maintain the balance of government by prohibiting the delegation of functions which expressly rest with the legislature. *See Sackett v. Santilli*, 146 Wn.2d 498, 504, 47 P.3d 948 (2002). Not all power vested in the legislature is nondelegable, however. “It is not unconstitutional for the legislature to delegate administrative power.” *Keeting v. Public Utility Dist. No. 1*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957). Distinct from lawmaking, administrative power is the “power to determine some fact or state of things upon which the law makes,

or intends to make, its own action depend.” *Barry & Barry, Inc. v. State Dep’t of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

The Court has held that a delegation of power is valid and constitutional where:

(1) that 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) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

Barry, 81 Wn. 2d at 159. As next seen, the power to set the prevailing wage rate is the type of power which may be properly delegated to an administrative agency. SSB 5493 further contains procedural protections for a constitutional delegation.

A. The Power To Set The Prevailing Wage Is The Type Of Power Which May Be Properly Delegated By The Legislature.

The power to determine the prevailing wage rate is the type of authority which may be properly delegated to the Department’s Industrial Statistician. Under the Constitution,

certain powers of the legislature must remain with the legislature. These “nondelegable powers include the power to enact, suspend, and repeal laws, and the power to declare general public policy.” *Diversified Inv. v. Dep’t of Social & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989). In order to preserve these powers, “[a] statute must be complete in itself when it leaves the hands of the Legislature.” *Id.* This prevents the legislature from transferring power to render judgement on an issue or adopting future law by statute. *See Woodson v. State*, 95 Wn.2d 257, 261, 623 P.2d 683 (1980); *Diversified*, 113 Wn.2d at 24-25.

Here, SSB 5493 requires the Industrial Statistician to use collective bargaining agreements to set the prevailing wage rate. RCW 39.12.015(3)(a). While the legislation empowers the Industrial Statistician to “look to patterns to see if there is something about the collective bargaining agreement to suggest it isn’t reflective of market forces,” he/she is not empowered to identify alternative methods for setting the wage rate. (CP 2517) The power to set the prevailing wage rate pursuant to the

provisions of SSB 5493 may be properly delegated to the Department's Industrial Statistician.

B. SSB 5493 Provides Specific Guidelines Directing What Is To Be Done And How The Industrial Statistician Should Accomplish It.

SSB 5493 contains sufficient standards and procedural safeguards to properly delegate the power to determine the prevailing wage rate. The purpose of the Nondelegation Doctrine is not to block all delegation of legislative authority. Rather, the purpose of the doctrine is to ensure administrative safeguards and standards and to prevent an administrative agency from acting in the “absence of clear legislative guidelines” or “arbitrarily impos[ing] vague, unarticulated, and unpublished standards upon the public.” *Barry*, 81 Wn.2d at 161; *Anderson v. Issaquah*, 70 Wn. App. 64, 80, 851 P.2d 744 (1993).

SSB 5493 provides clear direction by which the Industrial Statistician must set the prevailing wage. The Statistician is instructed to:

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 trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

RCW 39.12.015(3)(a). When there is no collective bargaining agreement for an occupation within a jurisdiction, the Industrial Statistician is directed to use the results of wage and hour surveys to set the prevailing wage rate. RCW 39.12.015(3)(b).

The language of SSB 5493 is clear. The statute describes: that the prevailing wage rate is to be set; who should set it; and the specific data that should be used in making the determination.

SSB 5493 satisfies the first prong of the *Barry* test.

C. SSB 5493 Contains Sufficient Procedural Safeguards To Control Arbitrary Administrative Action And Prevent Administrative Abuse Of Discretionary Power.

SSB 5493 contains protections to prevent arbitrary decision-making and curb administrative abuse of power. When

determining whether the second prong of the *Barry* test is satisfied, a court must balance the following three factors:

(1) the private interest to be protected, (2) the risk of erroneous deprivation of that interest by the government's procedures, and (3) the government's interest in maintaining the current procedures.

State v. Simmons, 152 Wn.2d 450, 456, 98 P.3d 789 (2004).

In *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 602 P.2d 1172 (1979), the Court heard a matter challenging the legislature's decision to delegate to the Department of Game and Fisheries the authority to issue and place conditions on permits for certain projects. The Court, in finding for the state, determined this was a constitutionally valid delegation. The Court reasoned that the statute contained sufficient protections because an aggrieved party was entitled to a "second look" at the agency action through administrative channels, including judicial review, and other procedural safeguards normally afforded to a defendant in a criminal prosecution. *Id.*, at 901. Here too, SSB 5493 contains ample protections.

The very nature of the collective bargaining process contains inherent protections against collusion. Collective bargaining is the process of negotiations between employers and labor organizations with the goal of reaching an agreement setting wages, benefits, and terms and conditions of employment. The resulting collective bargaining agreement is the result of hard fought negotiations by independent entities with their own self-interests. With respect to wages and benefits, employers and unions typically have oppositional interests, with employers wanting to keep wages and benefits low and unions wanting to increase wages and benefits. These oppositional interests protect the integrity of the collective bargaining process.

Recognizing the protections afforded by the oppositional interests inherent in collective bargaining, Congress and the courts have exempted labor unions and collective bargaining

from anti-trust laws.³ If labor and management conspire to either depress wages or increase wages to drive other employers out of the market, then the exemption does not apply and significant penalties apply.⁴ *See e.g. United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

The Industrial Statistician, James Christensen, noted that he is “guided by the dictionary definition of collective bargaining agreements...Because collective bargaining requires negotiation between parties with different interests, I look to see if there is

³ The statutory exemptions, contained in provisions of the Clayton Act, [15 U.S.C. § 17](#); [29 U.S.C. § 52](#), and the Norris-LaGuardia Act, [29 U.S.C. §§ 104, 105, 113](#), exempt certain activities engaged in by labor unions. *See also* RCW 19.86.070. The nonstatutory exemption, created by the courts, favors labor law over antitrust law and permits collective bargaining between unions and employers over wages, hours and working conditions. *Apex Hosiery v. Leader*, 310 U.S. 469, 65 S.Ct. 1533, 89 L.3d 1939 (1940); *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941); *Allen Bradley Co. v. IBEW Local Union 3*, 325 U.S. 797, 60 S.Ct. 982, 84 L.Ed. 1311(1945).

⁴ For example, violations of the Sherman Act include both civil and criminal penalties. Civil penalties include treble damages and attorneys’ fees. 15 U.S.C. § 15(a). Criminal penalties include up to 10 years in prison and \$100 million for a corporation and \$1 million for an individual. 15 U.S.C. § 1.

evidence of collusive behavior.” To do this, Christensen, who has reviewed over one-thousand collective bargaining agreements throughout his career, studies the agreements to look for patterns confirming that collective bargaining has taken place. (CP 2517) This allows him to “judge whether the agreement is a typical agreement or whether a provision in the agreement is an outlier.” (CP 2021)

The Industrial Statistician and the Department are empowered to unilaterally investigate and invalidate suspicious wage rates and contract provisions. If the Industrial Statistician identifies something unusual about a collective bargaining agreement, he or she will “investigate such absurdities or simply dismiss the absurd provisions as obviously collusive, and not the result of collective bargaining reflective of market forces. (CP 2123) RCW 39.12.065 permits the Department to investigate and “take further action” to rectify a collective bargaining agreement suspected to be erroneous or fraudulent. (CP 2518-2519)

Likewise, parties harmed by the Industrial Statistician's prevailing wage determination may file an appeal. If an interested party believes that the wage rate has been set using an improper collective bargaining agreement, they are entitled to file an appeal with the Department. *See* RCW 39.12.060 and .065; WAC 296-127-060. The appeal triggers an investigation and ultimately, the Director will issue a written determination. *Id.* Should the interested party disagree with the Director's findings, they are further allowed to file an appeal for judicial review under the Administrative Procedure Act, RCW 34.05. *Id.*

SSB 5493 directs the Industrial Statistician to set a prevailing wage and specifies the specific data that should be used to calculate it. It further prevents the abuse of discretionary power through the careful use of only those contracts which meet the definition of a collective bargaining agreement, empowering the Industrial Statistician and the Department to investigate anomalies, and by providing any aggrieved parties the right to

file an appeal. Thus, SSB 5493 satisfies the *Barry* test and should be upheld as a constitutional delegation of legislative power.

II. USING COLLECTIVE BARGAINING AGREEMENTS TO SET THE PREVAILING WAGE RATE FULFILLS THE PURPOSE OF THE PREVAILING WAGE ACT.

Using collective bargaining agreements to set the prevailing wage rate best fulfills the purpose of the PWA. State law requires that the hourly wages paid to workers on all public works projects not be “less than the prevailing wage rate for an hour’s work in the same trade or occupation in the locality within the state where such labor is performed.” RCW 39.12.020. The purpose of this statute is to “protect employees on public works projects.” *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 880, 154 P.3d 891 (2007). It also serves the parallel purpose of preventing the depression of wages on public projects by discouraging contractors from paying substandard wages to underbid competition. *Heller v. McClure & Sons*, 92 Wn. App. 333, 338, 963 P.2d 923 (1998). The result

is a statutorily protected minimum wage rate of which the worker is the intended beneficiary. *Silverstreak*, 159 Wn.2d at 880.

A. Using Collective Bargaining Agreements To Set The Prevailing Wage Rate Fulfills The Purpose Of The PWA By Ensuring Workers On Public Projects Receive Living Wages.

The regular renegotiation of collective bargaining agreements ensures that wages reflect current market forces. Unlike wages unilaterally set by employers, wage rates negotiated in collective bargaining agreements are the product of arms' length negotiations between unions and employers. Additionally, collective bargaining agreements are for a set duration and include annual wage increases over the term of the contract. (CP 2119) When a contract expires, the parties must renegotiate a new agreement which will reflect current market and economic conditions. The renegotiation process results in agreements "reflective of market forces and a balance of interests." (CP 2021) Generally, this results in "modest wage increases in wage rates between one agreement to the next." (Id.)

The outcome is wage rates which reflect the actual cost of living in each of the state's thirty-nine counties.

The PWA was drafted to protect Washington workers and ensure that they receive proper compensation for their labor. Using collective bargaining agreements to set the prevailing wage creates an economy that works for everyone. It enables workers to live in the communities where they work and buy goods and services, thereby increasing consumer demand and fueling economic growth. This in turn creates a broader tax base so local and state governments can invest in infrastructure and services. Using collective bargaining agreements to set the prevailing wage rate better fulfills the purpose of the PWA.

B. A Living Prevailing Wage Rate Supports The Safe And Efficient Completion Of Public Works Projects.

Using collective bargaining agreements to set the prevailing wage rate also benefits employers by ensuring a robust and trained workforce. Prevailing wage laws discourage companies from "recruiting labor from distant cheap labor

areas.” *Southeastern Washington Bldg. & Const. Trades Council v. Dep’t of Labor & Indus.*, 91 Wn.2d 41, 45, 586 P.2d 486 (1978). This helps the State maintain a robust workforce because when workers are paid living wages, they are more likely to stay employed in their occupations. Likewise, it helps attract people to the construction trades. As a result, contractors on public works projects are able to retain skilled and trained local workers. In turn, public works projects are safer, suffer less delay, and operate more efficiently.

These benefits are not funded by the employers themselves. Labor costs on public works projects are passed from the contractor to the public agency ordering the work. (CP 2119) Thus, it is the government that is paying to ensure a steady supply of trained labor, not individual employers. Using collective bargaining agreements to set the prevailing wage rate on public projects therefore better fulfills the intent of the PWA. It ensures that workers are appropriately compensated, and that Washington State maintains a ready and willing workforce.

III. WASHINGTON STATE HAS A LONG HISTORY OF USING COLLECTIVE BARGAINING AGREEMENTS TO SET THE PREVAILING WAGE RATE.

The use of collectively bargained wages to establish the prevailing wage rate is not unique to SSB 5493. This State has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Technologies*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). Since the passage of the PWA, this history has included the consideration of collective bargaining agreements when setting the prevailing wage rate.

Prior to SSB 5493, the industrial statistician used the results of wage and hour surveys to set the prevailing wage rate. As described by the industrial statistician “[t]he Department would survey employers as to what wages were paid, and employers under collective bargaining agreements would submit the collective bargaining agreement to show what they paid.” (CP 2122) Even under the former method, it was not uncommon for the collective bargaining agreement wage rate to be the rate

ultimately adopted. In fact, “in the most recent (2010) statewide survey for the trade of Laborers, a union Labor wage was reported to be paid for the majority of hours in 38 of Washington’s 39 counties.” (CP 2122)

SSB 5493 does not impose a new radical standard for setting the prevailing wage rate. Instead, it is the legislature’s attempt to codify a long-held practice aimed at protecting the workforce. It is constitutionally sound and should be upheld.

CONCLUSION

The Court of Appeals’ ruling that SSB 5493 is unconstitutional is properly reversed.

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DATED this 15th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2022, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** and **AMICUS CURIAE BRIEF** with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will electronically send a copy to the following:

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