NO. 101997-1

SUPREME COURT
STATE OF WASHINGTON

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

Petitioners,

v.

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.

STATE'S SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom, WSBA No. 24163
James Mills, WSBA No. 36978
Senior Counsel
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740
Office Id. No. 91018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

Workers laboring on public works projects deserve to receive wages that reflect contemporary market rates of pay in the trades rather than stale wage rates based on work performed years ago. To this end, as amended in 2018, RCW 39.12.015(3)(a) requires prevailing wage rates to be set using CBA rates, where available. AGC's article II, section 37 challenge to the 2018 law fails because this law doesn't render RCW 39.12.026(1) erroneous. It is a preexisting statute that addresses an entirely different method of setting prevailing wage rates: use of wage survey data. Each statute has independent meaning and application.

The Court of Appeals' decision turned on its belief that .015(3)(a) conflicted with .026(1), but no conflict exists. And in any event, mere conflict without a showing the statute was rendered erroneous doesn't violate article II, section 37. Examination of the new and old laws reflect no violation as they show that both legislators and the public could know about

the impact of the new law on existing statutes and weren't misled.

The Court should reverse the Court of Appeals and affirm the summary judgment dismissing AGC's challenge.

II. ISSUES PRESENTED FOR REVIEW

RCW 39.12.026(1) provides that "[i]n establishing the prevailing rate of wage…all data collected by [L&I] may be used only in the county for which the work was performed."

1. Does this statute limit "data collected" to data systemized from historical wage surveys, unlike negotiated wages in a CBA that are "adopt[ed]" in a separate statute, given that when the Legislature adopted .026(1) in 2003, "data collected" meant data from wage surveys?

2. Does SSB 5493 comply with article II, section 37 when a straightforward reading of a preexisting law, .026(1), shows it wasn't rendered erroneous when the new law, .015(3)(a), didn't implicitly or explicitly modify it and when

both legislators and the public could know about the impact of the new law and weren't misled?

III. STATEMENT OF THE CASE

The Prevailing Wages on Public Works Act protects workers from substandard earnings by fixing a floor for wages on government projects. *See Everett Concrete Prods., Inc. v. Dep't of Lab. & Indus.*, 109 Wn.2d 819, 823-24, 748 P.2d 1112 (1988). Workers rely on over 22,000 prevailing wage rates for fair wages (CP 2518), and courts construe statutes to protect employees on public works projects and preserve local wages. *See Associated Gen. Contractors of Wash. v. State* (*AGC II*), 200 Wn.2d 396, 404, 415-16, 518 P.3d 639 (2022).

Before 2018, prevailing wage rates were generally set using wage surveys. *See* RCW 39.12.010(1). The wage survey process "systemize[s]" data collected from past work performed:

> [Wage] surveys were used "to gather…market data regarding the wages paid to workers in various classifications and the hours of their labor." Then [the industrial statistician] would systemize the data

> from wage survey responses and CBAs and check the data for accuracy, looking for any outliers or data that raised questions. [They] would then determine the majority or average rate by statistical estimation. *See* WAC 296-127-019 (detailing current survey and statistical estimation process).

AGC II, 200 Wn.2d at 401 (omission in original) (citation omitted). The survey process was cumbersome and delays in updating wage rates to market rates were common because surveys weren't conducted annually. *See* RCW 49.04.141 (findings).

In 2018, the Legislature moved away from wage surveys as the default method to set prevailing wages and instead used a simplified process of adopting CBA rates. Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a). AGC challenged the constitutionality of SSB 5493 in superior court, claiming a violation of the delegation doctrine and article II, section 37. CP 1. The superior court ruled for the State. CP 2536-39.

The Court of Appeals reversed on delegation of power grounds. *Associated Gen. Contractors of Wash. v. State* (*AGC*

I), 19 Wn. App. 2d 99, 107, 494 P.3d 443 (2021). This Court reversed the delegation decision and remanded for consideration of the article II, section 37 issue. *AGC II*, 200 Wn.2d at 415-16.

After remand, the Court of Appeals again reversed the trial court, this time under section 37. *Associated Gen. Contractors of Wash. v. State* (*AGC III*), No. 54465-2-II, 2023 WL 2983114, slip op. at 2, 11, 16 (Wash. Ct. App. Apr. 18, 2023) (unpublished). The State petitioned for review, which this Court granted.

IV. ARGUMENT

There are three statutory provisions at issue in this case.

- RCW 39.12.015(3)(a), enacted in 2018, 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."

- RCW 39.12.015(3)(b), also enacted in 2018, provides "[f]or trades and occupations in which there are no [CBAs] 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."
- RCW 39.12.026(1), enacted in 2003, provides that "[i]n establishing the prevailing rate of wage…all data collected by [L&I] may be used only in the county for which the work was performed."

AGC claims, and the Court of Appeals held, that .015(3)(a) violates article II, section 37, because "[i]t becomes impossible for the industrial statistician to comply with both [.015(3)(a) and .026(1)] if a multicounty CBA is involved." *AGC III*, slip op. at 16. The Court of Appeals then concluded that "[b]ecause of this conflict, RCW 39.12.015(3)(a) renders a straightforward reading of RCW 39.12.026(1) erroneous" and

thus "violates article II, section 37." *Id.* The Court of Appeals got it wrong in several respects.

First, .026(1) doesn't apply to the adoption of CBA rates. Rather, the term "data collected" only applies to wage survey data, which is used in the absence of CBAs. The Court of Appeals added "CBA" to the meaning of data, an amendment by implication that should be rejected.

Second, even if .026(1) would otherwise include CBA rates, .015(3)(a) is the more specific statute, which, according to well-established statutory interpretation principles, acts as the exception to the general statute. Thus, any conflict is reconciled through ordinary statutory interpretation principles, including the principle of constitutional avoidance. *See Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015).

Third, the premise that .026(1), even if it does apply to CBA rates adopted under .015(3)(a), is violated simply by adopting multicounty CBAs is incorrect. A multicounty CBA

still applies the rates applicable in that CBA only to the counties covered by the CBA. So L&I is using such rates "only in the count[ies] for which the work [at issue] was performed," obeying .026(1), if it even applies.

Finally, in any event, the meaning and impact of newer legislation—.015(3)(a)—is clear and doesn't render a straightforward reading of .026(1) erroneous.

A. RCW 39.12.015(3)(a) and .026(1) Operate Independently and in Harmony

RCW 39.12.015(3)(a) creates a new system for adopting CBAs for jurisdictions in which there are CBAs. RCW 39.12.026(1) isn't implicated in this new system. And .015(3)(b) continues to use wage surveys when there is no CBA, so .026(1) has continued application in that context. RCW 39.12.015 and .026 work in harmony.

This approach rests on the plain language of .026(1), which provides that prevailing wage rate "data collected…may be used only in the county for which the work was performed." Under this statute, "data" means wage surveys, not CBAs.

The Court of Appeals disagreed; it believed CBAs were a form of "data." *AGC III*, slip op. at 14-16. The first step to determining what effect, if any, .015(3)(a) has on .026(1) is to determine what "data collected" in .026(1) means—does "data collected" include the adoption of CBA rates, or does it mean data that is collected through wage surveys? If it is just wage surveys, there is no conflict. If there is a conflict, the next step is to judge how to resolve that conflict.

1. The wording of RCW 39.12.026(1) confirms that "data" refers to data collected in wage surveys

For four reasons, .026(1)'s wording shows the Legislature intended "data collected" to mean wage surveys such that .015(3)(a) and .026(1) work independently but .015(3)(b) and .026(1) harmonize.

First, considering the context in which the term—"data collected"—is used is crucial: "[t]his court does not examine a specific word in a vacuum; rather, we must consider the context of the surrounding text to determine the legislature's intent."

Green v. Pierce Cnty, 197 Wn.2d 841, 853, 487 P.3d 499 (2021), *cert. denied*, 142 S. Ct. 1399 (2022). In this regard, .026 expressly uses the term "wage survey." Subsection (1) specifies conditions about use of "data collected" by L&I. Subsection (2) provides the method of collecting that data: L&I "must provide registered contractors with the option of completing a wage survey electronically."

Completing the wage survey provides the "data." So this use of the phrase "wage survey" connects to the term "data." This makes sense, given that, as discussed in more detail below, at the time .026 was adopted, only wage survey data was used to establish prevailing wage rates. Thus, it is logical to think that the Legislature intended to apply the county restriction to the use of wage survey data specifically when it enacted .026.

Second, using different language in two statutory provisions shows a difference in legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 776, 238 P.3d 1168 (2010). RCW 39.12.015(3)(a) uses the term "adopting" CBA rates to set the

prevailing wage. In contrast, .026(1) uses the terms "collected" for "data" to reference a prevailing wage rate that is used to determine the rate paid to a "majority of workers" or the "average rate" paid to such workers under RCW 39.12.010(1). This difference in language is material.

As this Court observed, wage surveys "gather market data," then the industrial statistician "systemizes the data from wage survey responses," and then determines the rate "by statistical estimation." *AGC II*, 200 Wn.2d at 401 (cleaned up). The Legislature directed no such process for adopting CBA rates. The process of "systemizing data" for wage surveys is unlike "adopting" CBA rates under .015.

With respect to its delegation challenge in *AGC I* and *II*, AGC repeatedly complained that CBA rates were adopted without considering data where work was performed.[1] This

[1] *See AGC I*, Appellant's Br. 3-4, 12-13, 19, 29; *AGC I*, Reply Br. 1-2, 8-10, 21; *AGC II*, Answer 10, 13-14, 20; *AGC II*, AGC Suppl. Br. 19, 24-30.

acknowledges that "adopting" CBA rates differs from using "data collected" from work performed in setting prevailing wage rates.

Third, .026(1) provides that, to establish the prevailing wage rate, "all data collected by [L&I] may be used only in the county for which the work was performed." (emphasis added). The term "data collected" cannot be read in isolation; instead, it must be read with the phrase limiting "data collected" to "work [that] was performed." Significantly, "work…performed" is in the past tense as shown by the use of "was" and the verb suffix -ed, *Merriam-Webster Unabridged Dictionary*.[2] Thus, "work was performed" means data collected for work performed in the *past*. In contrast, unions and contractors negotiate CBAs for market wages and benefits to apply to work generally performed in the future.

[2] https://unabridged.merriam-webster.com/unabridged/ed (last visited Oct. 3, 2023)

Finally, to give effect to legislative intent the Court first harmonizes statutes. *Tommy P. v. Bd. of Cnty. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). RCW 39.12.015(3)(a), .015(3)(b), and .026 readily harmonize. RCW 39.12.015(3)(a) and .026 act separately because "data" doesn't mean CBAs, so .026(1) has no effect on .015(3)(a). But .015(3)(b) and .026 harmonize because the data that is used in wage surveys under .026(1) apply when wage surveys are used in .015(3)(b). It all fits together.

2. Previous versions of RCW 39.12.026 show that "data collected" refers to wage surveys

RCW 39.12.026's previous versions confirm "data" refers to wage surveys. The Court considers "the entire sequence of all statutes relating to the same subject matter." *State v. Veliz*, 176 Wn.2d 849, 854, 298 P.3d 75 (2013) (quoting *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012) (examining evolution of parenting plan law); *accord State v. Roth*, 78 Wn.2d 711, 715, 479 P.2d 55 (1971) ("Earlier enactments dealing with the same subject matter are presumed

to have been considered by the legislature…."). Even if other language in a statutory scheme is amended, the unamended language retains its original meaning. *State v. Roggenkamp*, 153 Wn.2d 614, 629-30, 106 P.3d 196 (2005) (holding significant that, despite many statutory changes, the Legislature never took opportunity to redefine applicable term).

The Prevailing Wage on Public Works Act has long provided that "data" means wage surveys. In 2003, when the Legislature adopted former RCW 39.12.026 (2003), former WAC 296-127-019(6)(a) (1992) directed that wage surveys were used to set initial rates, not CBAs. The regulation directed that "[v]alid *data* reported on *wage surveys* shall be calculated" using the "majority of hours reported." Former WAC 296-127-019(6) (1992).

This regulation implemented setting prevailing wages under former RCW 39.12.010(1)-(2) (1989) and former RCW 39.12.015 (1965), which collectively directed the industrial statistician to set prevailing wages using the hourly rate where

the physical work was performed. In 2003 (and beyond), the Legislature affirmatively adopted the approach of using wage surveys to obtain the majority hourly rate when it adopted .026. *Cf. Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 118, 622 P.2d 826 (1980), *modified on reh'g*, 95 Wn.2d 962 (1981) (noting the exceptional persuasiveness of a "construction by the department charged with administering" a statute when "the legislature not only fails to repudiate the construction, but also amends the statute in some other particular without disturbing the administrative interpretation").

Affirmative adoption is shown in the express language in former RCW 39.12.026(2) (2003): "[t]his section applies only to prevailing *wage surveys* initiated on or after August 1, 2003." Laws of 2003, ch. 363, § 206(2) (emphasis added). Legislative findings confirmed "data" meant wage surveys. Laws of 2003, ch. 363, § 201(2) (encouraging "innovative

outreach methods be used to enhance wage surveys in order to better reflect current wages in counties across the state").

In 2015, because the effective date of the prior version (August 1, 2003) had long passed, the Legislature removed the effective date provision, replacing it with the sentence, "[L&I] must provide registered contractors with the option of completing a *wage survey* electronically." Laws of 2015, 3d Spec. Sess., ch. 40, § 2(2) (emphasis added). This change reflected the continued use of wage surveys to obtain the data—now also by an electronic source—used for calculating prevailing wage rates. And at that time, the hourly wage rate needed in RCW 39.12.010(1)-(2) was still set using wage surveys. Former WAC 296-127-019(6)(a).

RCW 39.12.026 was last amended in 2015—three years before the CBA legislation. Laws of 2015, 3d Spec. Sess., ch. 40, § 2. So "data collected" couldn't have meant "CBAs" because they weren't yet used to establish the initial prevailing

wage rate; wage surveys were used. Former WAC 296-127-019(6).

3. The Court of Appeals' decision is underpinned by an improper attempt to amend by implication

In 2018, that "data collected" means wage surveys didn't change when the Legislature amended .015 but not .026(1). In *Roggenkamp*, there were further amendments to the statutory scheme but no change to the meaning of a definition, which meant the original meaning stayed the same. 153 Wn.2d at 629-30. Here, like *Roggenkamp*, there have been no changes to the meaning of "data."

The unstated premise of the Court of Appeals' decision is that the amendments in .015(3)(a) amended .026(1) to append CBA to the meaning of "data." *AGC III*, slip op. at 15. But because amendment by implication is strongly disfavored, *See In re Det. of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994), the meaning of .026(1) wasn't changed from what it was before the SSB 5493 amendments.

4. Even if there were a conflict, it is resolved by ordinary principles of statutory construction'

RCW 39.12.015(3)(a) doesn't implicate .026(1) as they operate independently, and there is no conflict between them. Even if there is a conflict, it may be resolved on statutory interpretation principles: a general statutory provision yields to a more specific one. *Wash. State Ass'n of Cntys. v. State*, 199 Wn.2d 1, 13, 502 P.3d 825 (2022). "This does not mean that the more specific statute invalidates the general statute." *Id.* Rather, the specific statute "will be considered as an exception to, or qualification of, the general statute." *Id.* (quoting *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)).

If the Court accepted the premise that "data" means wage surveys and CBAs, the term "data" in .026(1) is then a more general statute: "all [*wage survey and allegedly CBA*] data collected." Under this rationale, .026(1) is the general statute because it involves a larger set of documents (wage surveys and CBAs) while .015(3)(a) is the more specific statute, with the narrower subset (CBAs only).

Accepting AGC's theory, the general statute, .026(1), would then conflict with the more specific statute, .015(3)(a). But conflict principles resolve the purported conflict: the most recent specific statute controls. *See Muije v. Dep't of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982).

B. AGC's Arguments About the Meaning of RCW 39.12.015 and .026 Fail

Beyond bare assertions of conflict, AGC raises four arguments. Not one of them has merit.

First, AGC repeatedly points to an L&I staff person's brief legislative testimony that cross-county "data" wouldn't be used to establish wage rates. Answer 7, 15, 19-20, 22-23, 26-27. "The law at RCW 39.12.026…prohibits the use of cross-county *data* to set the prevailing wage." Answer 7 (omission in original) (emphasis added) (quoting Test. of Tammy Fellin, SSB 5493 Senate Labor & Commerce Committee Hearing, 57:10-37 (Jan. 11, 2018)). AGC misconstrues the statement. "Data" refers to wage surveys, as already discussed. Nothing in the testimony (even if relevant) changes the meaning of "data."

And even if the Court looked to legislative history, the Court rarely considers the testimony in support of a bill as suggestive of the Legislature's intent. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991) (noting that "testimony before a legislative committee is given little weight").

Second, AGC argues that the language between .015 and .026(1) can't be harmonized because "[.015(3)(a)] supplants, rather than supplements [.026(1)]." Answer 21-22, 25. This argument wholly depends on a flawed reading of "data" to mean CBAs. If the Court rejects that premise, as it should, nothing is "supplant[ed.]" *Contra* Answer 22.

Third, AGC's only explanation to why .026(1)'s reference to "data" includes CBAs was to quote the Court of Appeals' scant analysis. Answer 17-18. The Court of Appeals asserted, "CBAs are a form of data that an industrial statistician may use to establish a prevailing wage." *AGC III*, slip op. at 15. It cited .015(3)(a) and WAC 296-127-019(1)(b). *Id.*

Citing .015(3)(a)'s reference to CBAs makes no sense. RCW 39.12.015(3)(a) says nothing about "data." The mere use of CBAs in the new statute doesn't mean that the use of "data" in preexisting .026(1) now includes CBAs. Altering statutes by implication is disfavored. *R.S.*, 124 Wn.2d at 774.

As to the Court of Appeals' citation to WAC 296-127-019, *AGC III*, slip op. at 15, this regulation supports L&I. Former WAC 296-127-019(6)(a) existed when .026 was adopted in 2003 and directed that "[v]alid *data* reported on *wage surveys* shall be calculated" using the "majority of hours reported." (emphasis added).

The Court of Appeals' citations also suggested that WAC 296-127-019(1)(b)'s language supported that CBAs were data. *AGC III*, slip op. at 15. WAC 296-127-019(1) directs L&I to first perform wage surveys to ascertain the rates, and then if that rate derived from a CBA rate, L&I could update the wages by "[a]dopting the wage and benefit adjustments established in [CBAs]." This only concerns adjustments to an already

established prevailing wage rate set by the wage survey. Thus, the data in the wage survey establishes the rate. If the prevailed rate reflects a CBA rate, then the rate is used to make yearly adjustments provided for in a CBA. But the wage survey itself was the source of data as to what rate prevailed.

Finally, like the Court of Appeals, AGC equated "data" with CBAs and argues that using multicounty CBAs under .015(3)(a) conflicts with .026(1). Answer 18, 22. Even if "data" means both wage surveys and CBAs, there is no violation of section 37. RCW 39.12.026(1) allows use of a multicounty CBA because multicounty rates are negotiated for the specific counties covered by the CBAs. And then this rate is used for the county where the work at issue was performed.

AGC's arguments fail in the initial premise that multicounty CBAs import a "rate" from another county simply because the same rate applies to more than one county under the CBA. The rate was negotiated for that particular county (in addition to, potentially, other counties). Thus, even if .026(1)

applies to the adoption of CBA rates under .015(3)(a), adoption of a multicounty CBA rate to only the counties covered by that CBA doesn't violate .026(1)'s limit that "all data collected…may be used only in the county for which the work was performed."

C. Article II, Section 37 Is Satisfied Because a Straightforward Reading of Preexisting Law Shows No Confusion by the Public and Legislators, Who Were Not Deceived in the Meaning of the New Law

Section 37 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." The Court gives section 37 "a reasonable construction." *In re Dietrick*, 32 Wash. 471, 477, 73 P. 506 (1903).

Under section 37's test, there is no violation if the bill (1) is a complete act and (2) doesn't render a straightforward determination of the scope of duties or rights under the existing statutes erroneous. *Wash. State Ass'n of Cntys.*, 199 Wn.2d at 15-16. AGC cites the second prong. Answer 3-4, 24.

SSB 5493 doesn't render a straightforward determination of the scope of duties or rights under .026 erroneous for at least two reasons. First, as outlined above (*supra* Part IV.A) applying accepted statutory interpretation principles shows that .015(3)(a) and .026(1) are two independent statutes and .015(3)(b) and .026(1) are harmonized, or alternatively accepted principles show that any conflict is resolved through statutory principles. Second, even if .015(3)(a) and .026(1) overlap, it doesn't render a straightforward reading of .026(1) erroneous; examination of old and new laws shows that both legislators and the public could know about the impact of the new law (.015) on existing statutes (.026) and weren't misled.

1. Applying principles of statutory construction shows no "confusion, ambiguity and conflict"

There have been over a hundred years of cases resolving conflicts in statutes, and not all conflicts violate section 37. *See Wash. State Ass'n of Cntys.*, 199 Wn.2d at 10-18 (considering article II, section 37 and conflict didn't violate the constitution); *Richland Irrigation Dist. v. De Bow*, 149 Wash. 242, 244-45,

270 P. 816 (1928) (same); *Swanson v. Sch. Dist. No. 15*, 109 Wash. 652, 654-59, 187 P. 386 (1920) (same). The courts have, however, found constitutional violations when faced with circumstances "in terms so [confusing] that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 246-47, 257, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (Wash. 2001) (quotation omitted).

In *Amalgamated Transit*, an existing statute required a public vote if a port district sought to extend an improvement district assessment beyond a six-year period. 142 Wn.2d at 253. The new law, I-695, contained a more general voter approval provision for such assessments. *Id.* The Court noted that I-695 didn't repeal or mention the existing statute, but clearly impacted it by directing voter approval for all taxes. *Id.* The Court held that I-695 violated article II, section 37 "because

both statutes contain voter approval requirements, the impact is not at all clear. At the least, one would not know the law by referring to the existing statute." *Id.* at 253, 257. I-695's change caused "confusion, ambiguity and conflict" about the existing law, leading to a ruling of unconstitutionality. *Id.* at 257.

No such confusion exists here. A straightforward reading of .015(3)(a) and .026(1) shows that .026(1) isn't rendered erroneous under principles of statutory construction. *See supra* Part IV.A.

The Court of Appeals thought .015 and .026 were ambiguous as to the interaction between the statutes. *AGC III*, slip op. at 14. The Court of Appeals is wrong for the reasons outlined in Part IV.A. But in any event, "[i]f a statute is susceptible of two or more interpretations, some of which may render it unconstitutional, the court will, if possible, give it an interpretation which upholds its constitutionality." *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971).

2. Under section 37, RCW 39.12.015 did not render .026 erroneous because the public and legislators, in reading .026, could readily learn about amendments to .015

Looking to see whether .015(3)(a) and .026(1) operate independently without conflict isn't the end of the section 37 inquiry. Even if the Court found that .026(1) applies to CBAs adopted under .015(3)(a), and even if the Court found that .026(1) is violated by adoption of multicounty CBAs, there are three reasons why there is no constitutional violation.

First, even if .015(3)(a) and .026(1) overlapped, this doesn't matter if the statutes show that both legislators and the public could know about the impact of the new law on existing statutes and weren't misled. Section 37's purpose "is to disclose the effect of the new legislation and its impact on existing laws." *Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wn.2d 198, 211-12, 457 P.3d 453 (2020). This is a nuanced inquiry.

In making this nuanced inquiry, it isn't enough that an enactment "renders the existing law by itself 'erroneous' in a

certain sense." *Wash. Educ. Ass'n v. State,* 97 Wn.2d 899, 906, 652 P.2d 1347 (1982). This Court has upheld enactments when the change "should be apparent," *id.*, or is "obvious," *Black*, 195 Wn.2d at 212 (quoting *State v. Thorne*, 129 Wn.2d 736, 756, 921 P.2d 514 (1996)).

In *Black*, the Court emphasized that "the fact that the [statute became] inapplicable for a period of time has no effect on the statute's constitutionality because the statute still complies with one of the primary purposes of article II, section 37—'ensur[ing] that those enacting an amendatory law are fully aware of the proposed law's impact on existing law.'" 195 Wn.2d at 208 (second alteration in original) (quoting *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 152, 171 P.3d 486 (2007)).

Second, no one need "search out amended statutes to know the law on the subject treated in [SSB 5493]." *See Black*,

195 Wn.2d at 210-11 (quotation omitted). The statutes are in a short chapter and are readily visible.[3]

In *Amalgamated Transit*, the Court looked at the perspective of whether "a person reading an existing statute [would be] unaware there is new law on the subject." 142 Wn.2d at 253. Reading .026(1) wouldn't lead to unawareness because there is a cross-reference to .015 in .026(1). Cross-references show that the public and legislators couldn't be misled. *Black*, 195 Wn.2d at 212-13.

SSB 5493 satisfied section 37's purpose. As long ago as 1910, the Court held that section 37's purpose is "to protect the members of the Legislature and the public against fraud and deception, not to trammel or hamper the Legislature in the enactment of laws." *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 82, 109 P. 316 (1910). Section 37 cases affirm that

[3] In this electronic age, finding related statutes is easy. The Legislature's website provides a "Complete Chapter" option, which allows a search for .015 (Ctrl F).

the principle is to avoid fraud and deception. *E.g.*, *Black*, 195 Wn.2d at 205. Nothing in SSB 5493 shows a hint of language that could cause fraud or deception, or precludes legislators and the public from knowing the legislation's effect.

Finally, the CBA provision and .026(1) may be applied when a CBA rate is limited to one county. So the statute isn't rendered erroneous in all respects—AGC highlights only "certain respects" in which .026(1) is inapplicable. *See Wash. Educ. Ass'n*, 97 Wn.2d at 906 (stressing it isn't enough that an enactment "renders the existing law by itself 'erroneous' in a certain sense").

3. Any drafting error was cured in 2019

As the Legislature has revisited .015 after SSB 5493, it addressed any purported confusion about .015 and .026. In 2019, the Legislature returned to using wage surveys for residential construction to address an issue with public housing. Laws of 2019, ch. 29, §§ 2-3. This return recognizes that wage surveys are separate from the CBA process and cured any

defect. *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007). Because the Legislature revisited the application of wage surveys to address issues with the residential construction occupation, if the Legislature felt it had been misled about the application of multicounty CBAs, it would have done something.[4]

///

///

///

///

///

///

///

[4] Finally, AGC has suggested that using CBA rates risks depressing wages. Answer 11, 28. That in some obscure situation, CBA use may lower rates is of no moment. The key policy is that using wage surveys causes delays and doesn't reflect market rates. While CBAs have provisions to update the wage rates, wage surveys can go years without updates. *See* Laws of 2003, ch. 363, § 201. The Legislature enacted a methodology that cured this problem.

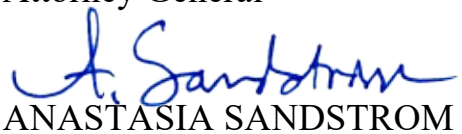
V. CONCLUSION

This Court should affirm the superior court.

This document contains 4,976 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

ROBERT W. FERGUSON
Attorney General



ANASTASIA SANDSTROM
Senior Counsel, WSBA No. 24163
JAMES MILLS
Senior Counsel, WSBA No. 36978
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740
Office Id. No. 91018

No. 101997-1

SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, JAY INSLEE, JOEL SACKS, and JIM CHRISTENSEN, Petitioner, v. ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON; ASSOCIATED BUILDERS AND CONTRACTORS OF WASHINGTON; INLAND PACIFIC CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.; and INLAND NORTHWEST AGC, Respondent.	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 State's Supplemental Brief and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Erin L. Lennon
Court Administrator/Clerk
Supreme Court of Washington

E-Mail via Washington State Appellate Courts Portal:

Karanjot Gill
kgill@unionattorneysnw.com
Bradley Lynn Medlin
bmedlin@unionattorneysnw.com

Darren Anthony Feider
dfeider@sbj.law
Jennifer Ann Parda-Aldrich
jparda@sbj.law

DATED this 6th day of October, 2023.

BRITTNEY VALANDINGHAM
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 389-3895

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

October 06, 2023 - 1:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,997-1
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:

- 1019971_Briefs_Plus_20231006125637SC231753_3205.pdf
  This File Contains:
  Briefs - Petitioners Supplemental
  Certificate of Service
  The Original File Name was 231006_StatesSuppleBrief.pdf

A copy of the uploaded files will be sent to:

- LITacCal@atg.wa.gov
- Paul.Weideman@atg.wa.gov
- bmedlin@unionattorneysnw.com
- dfeider@sbj.law
- james.mills@atg.wa.gov
- jparda@sbj.law
- kgill@unionattorneysnw.com
- lniseaeservice@atg.wa.gov

Comments:

Sender Name: Brittney Valandingham - Email: brittney.valandingham@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 20231006125637SC231753