No. 101997-1

SUPREME COURT OF THE 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.

BRIEF OF *AMICUS CURIAE*

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INTRODUCTION

Trade and craft workers are an essential component of Washington's workforce. The Court of Appeals decision holding Substitute Senate Bill 5493 ("SSB 5493") unconstitutional places these workers in an unsound position. SSB 5493 had amended the Prevailing Wage on Public Works Act ("PWA") by altering the manner in which the prevailing wage rate was determined for numerous crafts on public works projects. *See* RCW 39.12.015. This new method created a fairer procedure that transitioned away from the laborious process – oftentimes ineffective – of utilizing wage surveys. The Court of Appeals used Washington State Constitution article II, section 37 to substitute its judgment for the Legislature's policy decisions. These important policies demonstrate an issue of substantial public interest, which should compel this Court's review.

IDENTITY OF AMICUS CURIAE

The Washington State Building and Construction Trades Council ("Council") is an organization composed of forty-eight local unions and sixteen regional building trades councils. The regional building trades councils are comprised of fourteen International Unions in the

construction trades, which are the 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 is a statutorily defined interested party under the PWA. An "interested party" includes "an organization whose members' wages, benefits and conditions of employment are affected by this chapter..." RCW 39.12.010(4). A significant part of the Washington State's construction industry consists of public work projects and the Council is composed of several Unions that represent construction workers. Consequently, the Council is an "interested party" under the terms of the relevant statute.

For these reasons, the Council has a significant interest in the review of whether SSB 5493 is constitutional.

STATEMENT OF FACTS

The PWA requires the State to establish a floor for employees' wages upon "public works and...public building service maintenance contracts." RCW 39.12.020. The Washington State Department of Labor and Industries ("L&I") enforces the prevailing wage laws and L&I's industrial statistician retains the authority to set prevailing wage rates. RCW 39.12.015(1); *see* RCW 39.12.050.

A prevailing wage rate is established for each trade and occupation employed on public work projects. CP 1847. L&I determines the "scope of work descriptions for each trade and occupation" and, currently, recognizes about sixty-five trades. WAC 296-127-013; *see* WAC 296-127 (listing administrative codes that correspond to the trades recognized by L&I);

L&I calculates over 20,000 prevailing wage rates for these trades. CP 1889, 2124. Additionally, employers must submit "intent" certificates reflecting the prevailing wage rates they intend to pay at the start of a project, along with affidavits reflecting the number of workers and wages actually paid before final acceptance. *See* RCW 39.12.040.

Each year, L&I processes 130,000 intent and affidavit forms, documenting the workers who perform the applicable work. CP 2518.

Prior to SSB 5493, the prevailing wage rates were "[a]lmost exclusively" determined by using data from wage and hour surveys. CP 2559-2560; *see* CP 2554-2555. The surveys solicited wages and hours worked from numerous trades (both union and non-union). *See* WAC 296-127-019 (detailing the wage and hour survey methodology); CP 129, 2563.

In 2018, the State Legislature changed how L&I must determine the prevailing wage rate by requiring it to adopt wage rates listed in CBAs. Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a). Additionally, it provided that, if there are "no [applicable] collective bargaining agreements in the county," then L&I must "establish the prevailing rate of wage…by conducting wage and hour surveys." Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(b).

On January 22, 2019, Respondents filed a lawsuit in Thurston County Superior Court arguing that SSB 5493 was unconstitutional. *See* CP 1-20. Following a series of decisions at the Trial and Appellate Courts, the Washington Supreme Court found that SSB 5493 was not "an unconstitutional delegation of legislative authority" under the State

Constitution and remanded to the Court of Appeals. Associated General Contractors of Wash. v. State ("AGC I"), 200 Wn.2d 396, 415-416 (2022). The Court of Appeals held on remand that SSB 5493 was unconstitutional under Article II, Section Thirty-Seven of the Washington Constitution. *See* Associated General Contractors of Wash. v. State ("AGC II"), 2023 WL 2983114 at *6-8 (2023).

On May 18, 2023, a Petition for Discretionary Review was filed with the Washington Supreme Court. This is the Council's Amicus Curiae in Support of the Petition for Discretionary Review.

ARGUMENT

I. THE WASHINGTON SUPREME COURT SHOULD GRANT REVIEW BECAUSE THE INVALIDATION OF THE PREVAILING WAGE ACT'S USE OF COLLECTIVELY BARGAINED RATES IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

Whether workers on a public works project are paid as the Legislature intended is an issue of immense public importance and, naturally, one of substantial public interest. In invalidating SSB 5493, the Court of Appeals completely disregarded the Legislature's intent behind following collectively bargained wage rates, and grossly misconstrued how wage and hour surveys are actually conducted. Its decision subverts PWA's policy – discouraging substandard wages –

and is akin to a judicially imposed worker pay cut. Consequently, whether SSB 5493 is constitutional is a matter of public interest that warrants review by the Supreme Court under RAP 13.4(b)(4).

II. IN STRIKING RCW 39.12.015(3)(a), THE COURT OF APPEALS UNDERMINES THE PUBLIC POLICY BEHIND THE PWA.

The Court of Appeals' strained reading of RCW 39.12.026 to invalidate RCW 39.12.015(3)(a) undermines valuable public policies.

Critically, the PWA was implemented to "protect employees on public work projects and preserve local wages." Silverstreak, Inc. v. Wash. State Dep't. of Labor and Indus., 159 Wn.2d 868, 880 (2007); *see* Heller v. McClure & Sons, Inc., 92 Wn. App. 333, 338 (1998) ("[The] parallel purpose of the act...[is] to prevent the depression of prevailing wages in the area of public work projects."); D.W. Close Co., Inc. v. Wash. State Dep't of Labor and Indus., 143 Wn.App. 118, 135 (2008); *see also* Alvarez v. IBP, Inc., 339 F.3d 894, 911 (2003) ("Washington's long and proud history of being a pioneer in the protection of employee rights" has manifested "in a strong policy in favor of payment of wages due employees and in a comprehensive statutory scheme to ensure such payment") (internal quotations omitted).

"[T]he intended beneficiaries of the Prevailing Wage Act are the workers, not the government contractors or their assignees." Superior Asphalt and Concrete Co. v. Dep't. of Labor and Indus., 112 Wn.App 291, 297 (2002); Moreover, "RCW 39.12 is remedial and must be construed *liberally* in order to fulfill its purpose." Heller, 92 Wn.App. at 338; *see* D.W. Close Co., 143 Wn.App. at 135; Superior Asphalt, 112 Wn.App. at 297.

Here, the Court did not liberally construe the PWA. Rather, it performed the opposite – rebuffing harmonization of the newly adopted provision – RCW 39.12.015(3)(a) – with the much-older RCW 39.12.026(1). This strained reading – and invalidation of the CBA wage method – directly harms the craft workers across the state who will toil away on public projects, for less pay now.

Importantly, the Legislature considered testimony and ultimately concluded that adopting SSB 5493 – the CBA rate method – would bolster its existing policies. *See* Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a); H.R. Rep., SB 5493, 65th Leg., Reg. Sess., at 2 (Feb. 28, 2018) (testifying that "[u]sing these wages will reflect the true long-term costs of a project and establish a steady reliable wage rate that will provide consistency."); S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 3

(Feb. 12, 2018) (testifying that "[s]etting a rate to the CBA rate…imbeds the true cost of work."). The Legislature's public policy decisions should have been accorded consideration – and deference – by the Court.

A. Reverting to the Use of the Wage and Hour Surveys as the Primary Method of Establishing the Prevailing Wage Rate Does Not Honor the Public Policy of the PWA and the Legislature's Intent in Adopting SSB 5493

By invalidating RCW 39.12.015(3)(a), the Court of Appeals effectively requires L&I to revert to wage and hour surveys, rather than CBAs for calculating prevailing wages. This retreat subverts the public policy behind the PWA, affecting the public interest.

Practically, there are numerous shortcomings baked in to wage and hour surveys. Namely, they fail to ever account for *current* market conditions. They also include information and data from employers who do not necessarily have a unionized workforce, meaning their wages are one-sided, rather than the product of mutual bargaining. *See* WAC 296-127-019; CP 129, 2563. Such wages are not necessarily the fairest nor equitable, given they are purely employer set. Conversely, CBA negotiated wages are the product of bargaining, including employee considerations. *See* RCW 49.32.020. In this way, CBA rates

better reflect market conditions in employees' favor and their use better implements the PWA's policy over survey data.

The Legislature acknowledged this reality – that CBA rates better reflect living wages – when it considered and passed SSB 5493. *See* H.R. Rep., SB 5493, 65th Leg., Reg. Sess., at 2 (Feb. 28, 2018) (testifying that "[t]he collectively bargained wage is a negotiated wage and best represents area standard wages."); S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 3 (Feb. 12, 2018). The Legislature's decision should have been accorded consideration. *See e.g.*, Drinkwitz, 140 Wn.2d at 300.

Another drawback to wage surveys – as recognized by the Legislature – is that they are largely retrospective, capturing old data rather than contemporary compensation. This is best illustrated by the ponderous process involved in actually collecting survey data. *See* CP 2555-2556; WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4-6 (2015) (providing that the period for employer and labor organizations to report data for the wage and hour surveys is usually "six to twelve months" and describing how L&I processes submitted data before publishing its biannual report). Such a lag ensures that workers are penalized with wages that fail to account

for any inflation in the intervening months. This is especially salient in moments like the present, when inflation rates are precipitously high in Washington State and Seattle.[1]

Conversely, CBA wage rates are prospective – having built in wage increases automatically triggered over time, thereby better mitigating a rise in living costs. The Legislative rightly acknowledged and adopted this reasoning. It is why RCW 39.12.015(3)(a) became the preferred method of setting wage rates and directed L&I to use surveys only when no CBAs exist. The Court's disregard of this important policy choice naturally affects the public interest.

B. Invalidating RCW 39.12.015(3)(a) May Revert Workers' Wages to their Pre-2018 Levels, Effectively Imposing a State-Wide Pay Cut.

By invalidating RCW 39.12.015(3)(a), and reimposing wage and hour surveys, the Court of Appeals has effectively invalidated all

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[1] *See* U.S. BUREAU OF LABOR STATISTICS, *Western Consumer Price Index Card*, https://www.bls.gov/regions/west/cpi-summary/ro9xg01a.htm#monthly (last visited July 6, 2023) (stating that, between May 2022 and May 2023, the CPI-U in the West region, which includes Washington State, increased by 4.5 percent); U.S. BUREAU OF LABOR STATISTICS, *Seattle Area Economic Summary*, https://www.bls.gov/regions/west/summary/blssummary_seattle.pdf (last updated June 5, 2023) (stating that, between April 2022 and April 2023, the CPI-U in the Seattle area increased by 6.9 percent).

prevailing wages calculated by CBAs since 2018. This directly contravenes the public policy behind the PWA – impacting the public interest.

There are currently over 20,000 prevailing wage rates and 130,000 intent and affidavits forms filed by employers. CP 1889, 2124, 2518. Thus, the impact on workers is presumed. One of the main reasons wage rates may revert to pre-2018 levels is the simple fact that L&I will need considerable time to perform new wage and hour surveys for every applicable trade. *See* CP 2555-2556; WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4-6 (2015). Such a possibility will reduce wages for countless workers across Washington State and severely harm workers, especially, given that inflation has rapidly increased since 2018. Such an outcome would contravene the PWA's policy to protect workers and preserve local wages.

Additionally, surveys are not an ideal method to collect real world wage data. They are exceedingly laborious and bureaucratic. Even when a craft is selected for examination, it still necessitates "six to twelve months," to collect sufficient data. WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4

(2015). Further, L&I requires additional time to review, check, and complete the reported data for its biannual reports. *See* CP 2555-2556; WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4-6 (2015) (describing how L&I validates and, if feasible, repairs submitted survey data before publishing report). Such lengthy delays in collecting, processing, and publishing the prevailing wage rates effects workers, whose trade-specific data is being gathered, by providing them with an already outdated, lower prevailing wage rate.

Another consideration is that surveys are – and always have been – entirely voluntary. Participation is not guaranteed and responses from contractors – even union ones – is not assured. "L&I encourages but does not require participation" in the wage and hour surveys and "[o]n average, about 20-25% of survey recipients respond." WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 3 (2015); *see also* CP 2553-2554; S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 3 (Feb. 12, 2018) (testifying that "[i]t is an effort for contractors to fill out the surveys.").

Hence, holding SSB 5493 unconstitutional does not further the Legislature's purpose behind the PWA. *See* AGC II, 2023 WL 2983114

(2023). On the contrary, by requiring the use of wage and hour surveys and possibly reverting wages, the decision fails to "protect employees on public work projects and preserve local wages" throughout the State. *See* Silverstreak, Inc., 159 Wn.2d at 880; *see also* State v. Watson, 155 Wn.2d at 577. Refusing to promote the public policy behind the PWA is an issue of public interest – warranting Supreme Court review.

CONCLUSION

By plainly ignoring the fundamental policy behind the PWA and the intentions of the Legislature, along with negatively impacting workers' wages by reverting to wage and hour surveys, the Court of Appeals' decision constitutes a matter of public interest. The State Supreme Court should accept review to correct this error.

I certify this amicus brief contains 2,450 words, in compliance with RAP 18.17.

DATED this 17th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2023, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** and **BRIEF OF AMICUS CURIAE** 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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SIGNED this 17th day of July, 2023.

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