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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*

Bradley Medlin, WSBA No. 43486
Karanjot Gill, WSBA No. 59606
ROBBLEE DETWILER PLLP
2101 Fourth Avenue, Suite 1530
Seattle, Washington 98121
(206) 467-6700

Attorneys for Amicus Curiae
Washington State Building and
Construction Trades Council,
AFL-CIO

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INTRODUCTION AND IDENTITY OF AMICUS CURIAE

The Washington State Building and Construction Trades Council, AFL CIO (“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 Association 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 principal issue in this case is the constitutionality of Substitute Senate Bill 5493 (“SSB 5493”), which amended the Prevailing Wage on Public Works Act (“PWA”) by changing the method by which employee wages are calculated. *See* RCW 39.12.015.

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 portion of Washington’s construction industry includes public work projects, and the Council represents many of the workers on those projects through its affiliated unions. Consequently, the Council is an “interested party” under the terms of the statute.

Additionally, in the interest of improving construction workers’ well-being, the Council advocates on behalf of its union affiliates before the executive, legislative, and judicial branches of State government. Through such campaigning, the Council was instrumental in the drafting and passage of SSB 5493.

For the foregoing 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 who work on “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 the prevailing wage rate. RCW 39.12.015(1); *See* RCW 39.12.050, .065.

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 work classifications recognized by L&I); *Scopes of Work*, WASH. STATE DEP'T OF LABOR AND INDUS., <https://lni.wa.gov/licensing-permits/public-works-projects/scopes-of-work> (last visited Nov. 17, 2023) (listing job classifications that must be paid a prevailing wage). Workers who perform in any of the sixty-five trades must receive the prevailing wage rate. *See id.* L&I calculates over 20,000 prevailing wage rates. CP 1889, 2124.

Prior to the passage of 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 compiled data from both unionized and non-unionized workforces, for the various trades. *See* CP 129, 2563; WAC 296-127-019 (detailing the

wage and hour survey methodology); WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 3-4 (2015); *Wage and Hour Surveys Schedule*, WASH. STATE DEP'T OF LABOR AND INDUS., <https://lni.wa.gov/licensing-permits/public-works-projects/prevailing-wage-rates/wage-and-hour-surveys-schedule> (last visited Nov. 17, 2023) (detailing two rounds of surveys within a calendar year).

In 2018, however, the State Legislature changed how L&I calculated the prevailing wage rate by requiring it to adopt wage rates listed in collective bargaining agreements (“CBA”). Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a). It instructed 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 legislative authority” under the State Constitution and remanded to the Court of Appeals. *Associated General Contractors of Wash. v. State*, 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. Associated General Contractors of Wash. v. State, 2023 WL 2983114 at *6-8 (2023).

On September 6, 2023, the Washington Supreme Court granted review of this matter. This is the Council’s Amicus Curiae in Support of the State’s Supplemental Brief.

ARGUMENT

I. STRIKING RCW 39.12.015(3) IS CONTRARY TO THE LEGISLATURE’S INTENT IN ADOPTING SSB 5493 AND THE PUBLIC POLICY BEHIND THE PWA.

In passing SSB 5493, the Legislature recognized the inherent limitations baked into using wage and hour surveys and how it frustrated the PWA’s policy goals. As such, any reversion to calculating prevailing wage rates with only wage and hour surveys will conflict with both the Legislature’s decision and the PWA’s policy objectives.

The PWA’s chief policy goal is simple: ensure fair wages for those working on state-funded construction projects. Specifically, the PWA seeks 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* Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300 (2000) (“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); Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157 (1998) (“The [State] Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages”).

When it undertook amending the statute, the Legislature recognized the PWA’s important policy objectives. *See* H.R. Rep., S.B. 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.”).

At the same time, the Legislature recognized the limitations inherent to wage and hour surveys. *See* S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 3 (Feb. 12, 2018) (“Surveys have always been a problem. [SSB 5493] simplifies the process and makes it less complicated than dealing with surveys.”); H.R. Rep., SB 5493, 65th Leg., Reg. Sess., at 3 (Feb. 28, 2018) (“The prevailing wage system is broken...”).

Aware of failings in wage and hour surveys to promote the PWA’s policy objectives, the Legislature passed SSB 5493 to deliberately move away from surveys as the primary method of calculating prevailing wages. *See* Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(a). Instead, wage and hour surveys would be limited to only those circumstances when there was no CBA wage rate in a specific county. *See* Laws of 2018, ch. 248, § 1; RCW 39.12.015(3)(b). As such, striking SSB 5493 will undermine the Legislature’s decision, along with the PWA’s policy goals.

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II. THERE ARE MANY LIMITATIONS BUILT INTO WAGE AND HOUR SURVEYS, CHIEF AMONG THEM IS THE FACT THAT PREVAILING WAGE RATES FOR MANY JOB CLASSIFICATIONS REMAIN STAGNANT FOR YEARS.

The Legislature decided to move away from wage and hour surveys given their numerous problems and constraints – chief among them, the stagnant rates that prevailed among many job classifications. Assessing L&I’s rate history data easily illustrates this point.

The Council accessed L&I’s records – limiting its search to King County only – to survey the change (or lack of change) in the rate of pay. What we found was that for a surprising forty one (41) classifications – between September 1, 2010 and March 3, 2018 – prevailing wage rates did *not* change:

Trade	Job Classification	2010 Wage Rate¹	2018 Wage Rate²
Cabinet Makers (In Shop)	Journey Level	\$ 22.74	\$ 22.74
Electricians - Motor Shop	Craftsman	\$ 15.37	\$ 15.37

¹ Wage Update Publication, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <https://secure.lni.wa.gov/wagelookup/wageupdatepublication.aspx?PubCtlId=1> (published Aug. 2, 2010) (Journey Level Rates for King County).

² Wage Update Publication, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <https://secure.lni.wa.gov/wagelookup/wageupdatepublication.aspx?PubCtlId=140> (published Feb. 1, 2018) (Journey Level Rates for King County).

Trade	Job Classification	2010 Wage Rate	2018 Wage Rate
Electricians - Motor Shop	Journey Level	\$ 14.69	\$ 14.69
Electronic Technicians	Journey Level	\$ 31.00	\$ 31.00
Fence Erectors	Fence Erector	\$ 15.18	\$ 15.18
Inspection/Cleaning/Sealing Of Sewer & Water Systems By Remote Control	Cleaner Operator, Foamer Operator	\$ 31.49	\$ 31.49
Inspection/Cleaning/Sealing Of Sewer & Water Systems By Remote Control	Head Operator	\$ 24.91	\$ 24.91
Inspection/Cleaning/Sealing Of Sewer & Water Systems By Remote Control	Technician	\$ 19.33	\$ 19.33
Inspection/Cleaning/Sealing Of Sewer & Water Systems By Remote Control	Tv Truck Operator	\$ 20.45	\$ 20.45
Landscape Construction	Irrigation Or Lawn Sprinkler Installers	\$ 13.56	\$ 13.56
Landscape Construction	Landscape Equipment Operators Or Truck Drivers	\$ 28.17	\$ 28.17
Landscape Construction	Landscaping or Planting Laborers	\$ 17.87	\$ 17.87
Metal Fabrication (In Shop)	Fitter	\$ 15.86	\$ 15.86
Metal Fabrication (In Shop)	Machine Operator	\$ 13.04	\$ 13.04
Metal Fabrication (In Shop)	Welder	\$ 15.48	\$ 15.48
Modular Buildings	Cabinet Assembly	\$ 11.56	\$ 11.56
Modular Buildings	Electrician	\$ 11.56	\$ 11.56
Modular Buildings	Equipment Maintenance	\$ 11.56	\$ 11.56

Modular Buildings	Plumber	\$ 11.56	\$ 11.56
Modular Buildings	Tool Maintenance	\$ 11.56	\$ 11.56
Modular Buildings	Utility Person	\$ 11.56	\$ 11.56
Modular Buildings	Welder	\$ 11.56	\$ 11.56
Residential Carpenters	Journey Level	\$ 28.20	\$ 28.20
Residential Cement Masons	Journey Level	\$ 22.64	\$ 22.64
Residential Insulation Applicators	Journey Level	\$ 26.28	\$ 26.28
Residential Laborers	Journey Level	\$ 23.03	\$ 23.03
Residential Marble Setters	Journey Level	\$ 24.09	\$ 24.09
Residential Painters	Journey Level	\$ 24.46	\$ 24.46
Residential Plumbers & Pipefitters	Journey Level	\$ 34.69	\$ 34.69
Residential Terrazzo/Tile Finishers	Journey Level	\$ 21.46	\$ 21.46
Sign Makers & Installers (Electrical)	Sign Installer	\$ 22.92	\$ 22.92
Sign Makers & Installers (Electrical)	Sign Maker	\$ 21.36	\$ 21.36
Sign Makers & Installers (Non-Electrical)	Sign Installer	\$ 27.28	\$ 27.28
Sign Makers & Installers (Non-Electrical)	Sign Maker	\$ 33.25	\$ 33.25
Solar Controls For Windows	Journey Level	\$ 12.44	\$ 12.44
Stage Rigging Mechanics (Non Structural)	Journey Level	\$ 13.23	\$ 13.23
Street And Parking Lot Sweeper Workers	Journey Level	\$ 19.09	\$ 19.09
Telecommunication Technicians	Journey Level	\$ 22.76	\$ 22.76
Well Drillers & Irrigation Pump Installers	Irrigation Pump Installer	\$ 17.71	\$ 17.71
Well Drillers & Irrigation Pump Installers	Oiler	\$ 12.97	\$ 12.97
Well Drillers & Irrigation Pump Installers	Well Driller	\$ 18.00	\$ 18.00

Even after SSB 5493’s implementation – moving to CBA-set rates – survey-based prevailing wage rates for four of these jobs remained stagnant:

Trade	Job Classification	2010 Wage Rate³	2018 Wage Rate⁴	2023 Wage Rate⁵
Cabinet Makers (In Shop)	Journey Level	\$ 22.74	\$ 22.74	\$ 22.74
Street And Parking Lot Sweeper Workers	Journey Level	\$ 19.09	\$19.09	\$ 19.09
Well Drillers & Irrigation Pump Installers	Irrigation Pump Installer	\$ 17.71	\$ 17.71	\$ 17.71
Well Drillers & Irrigation Pump Installers	Well Driller	\$ 18.00	\$ 18.00	\$ 18.00

That is a staggering *thirteen-year* period in which four classification’s wage rates remained frozen. L&I’s survey and classification updating simply did not happen. Note as well that the Council’s data review is confined only to King County. We did not

³ *Supra* note 1.

⁴ *Supra* note 2.

⁵ Wage Update Publication, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <https://secure.lni.wa.gov/wagelookup/wageupdatepublication.aspx?PubCtlId=187> (published Aug. 1, 2023) (Journey Level Rates for King County).

canvass wage rate data for the remaining thirty-nine Washington counties (which likely show similar troubling wage stagnation).

This review of L&I's own wage history illustrates the primary reason why the Legislature chose to move away from surveys as the primary method for determining rates. In the examples above, market conditions – and related costs of living – were quite different in 2010 than they were in 2018⁶, yet the prevailed rate took no consideration of this. Inflationary pressure only increased further between 2018 and 2023.⁷ Hence, using the surveys to calculate prevailing wages had real world negative consequences for workers and local communities – de facto suppression of local wages.

Beyond frozen prevailing wage rates, there are numerous other problems associated with the surveys. For instance, the surveys are – and always have been – completely voluntary, meaning participation

⁶ See *BLS Data Viewer*, U.S. BUREAU OF LABOR STATISTICS, <https://beta.bls.gov/dataViewer/view/timeseries/CUUR0400SA0> (last visited Nov. 17, 2023) (demonstrating increase in consumer price index for all urban consumers in the West region, including Washington State, from Jan. 2010 to Dec. 2018).

⁷ See *BLS Data Viewer*, U.S. BUREAU OF LABOR STATISTICS, <https://beta.bls.gov/dataViewer/view/timeseries/CUUR0400SA0> (last visited Nov. 17, 2023) (demonstrating increase in consumer price index for all urban consumers in the West region, including Washington State, from Jan. 2018 to Oct. 2023).

from union and non-union contractors is never guaranteed. Given this, L&I “encourages but does not require participation.” WASH. STATE DEP’T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 3 (2015). “On average, about 20-25% of survey recipients respond.” *Id.*; *see also* S.B. Rep., SB 5493, 65th Leg., Reg. Sess., at 2 (Feb. 12, 2018) (testifying that “[i]t is an effort for contractors to fill out the surveys.”).

Even when a contractor or labor organization submits data, this does not guarantee L&I will consider it. L&I disregards survey data where the submitter did not follow survey instructions, improperly completed the survey, provided irrelevant information, or submitted its survey after the deadline. WASH. STATE DEP’T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4-5 (2015). Such a limited, voluntary response fails to comprehensively reflect employee wages, resulting in a lower prevailing wage rate, and therefore does not protect employees working on public projects from substandard compensation.

Moreover, each survey requests wage rate data for only a fraction of the sixty-five trades affected by the PWA. *See* RCW 49.04.141 (findings) (directing L&I to “[e]stablish a goal of conducting surveys for each trade every three years” in order to “enhance the response of

businesses and labor representatives to the prevailing wage survey process”); WAC 296-127-019(3)(b) (providing that L&I “annually shall mail to statewide trade associations and statewide labor organizations a proposed schedule of trades intended to be surveyed during the upcoming fiscal year”).⁸ Consequently, wages remain frozen in time – divorced from prevailing market conditions at the time they are actually used. By using stale data, the survey wages ignore changing market conditions and inflation, penalizing workers over time and, ultimately, depressing local wages.

Even after wage and hour surveys are conducted, there are additional issues with the data itself. Specifically, the collected data is largely retrospective as it takes L&I about six to twelve months to

⁸ See also *Wage and Hour Surveys Schedule*, WASH. STATE DEP’T OF LABOR AND INDUS., <https://lni.wa.gov/licensing-permits/public-works-projects/prevaling-wage-rates/wage-and-hour-surveys-schedule> (last visited Nov. 17, 2023) (displaying L&I’s 2023-2024 wage and hour survey schedule where three trades were surveyed between Jan. 2023 to April 28, 2023, seven trades were surveyed in Summer 2023, seven trades will be surveyed in early 2024, and three trades will be surveyed in summer 2024); *Contractors/Employers*, WASH. STATE DEP’T OF LABOR AND INDUS., <https://lni.wa.gov/licensing-permits/public-works-projects/contractors-employers/hour-survey> (last visited Nov. 17, 2023) (“The Prevailing Wage Program has started new wage and hour surveys to set prevailing wage rates for several residential construction trades...[t]he first round of surveys included three trades...”).

assemble it. *See* WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 4 (2015). L&I also spends additional time reviewing the data for accuracy and completeness. *See id.* at 4-6; CP 2555-2556. With such a lag, the collected data again fails to account for any intervening change in market conditions, especially inflation.

Furthermore, the collected data is likely skewed as surveys collect information from employers who do not necessarily have a unionized workforce. *See* CP 129, 2563; WAC 296-127-019; WASH. STATE DEP'T OF LABOR AND INDUS., PREVAILING WAGE POLICY MEMORANDUM 3-4 (2015). Such data is not a product of mutual bargaining between the employer and employees and is, therefore, one-sided, inequitable, and may lead to lower prevailing wage rates.

In fact, when wage and hour surveys are conducted, some employers with a unionized workforce deliberately do not respond to the surveys; instead, they rely on employers with non-union workers to report their workers' data. This is because union wages are generally higher than non-union wages.⁹ By purposefully failing to report higher

⁹ *See* U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, USDL-23-0071, UNION MEMBERS – 2022 1 (2023) (“[n]onunion

wages, the employers ensure that the prevailing wage is lower than it ought to be and, therefore, allows employers to underpay their workers.

For the foregoing reasons, using solely wage and hour surveys was not the best method of calculating prevailing wage rates. The Legislature recognized the surveys' limitations and chose to implement SSB 5493. *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 “[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). As such, the Legislature’s decision should be accorded due consideration by the Court. *See e.g.*, Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 300 (2000).

CONCLUSION

In its review of this matter, the Court should weigh the many limitations and resulting problems associated with using wage and hour surveys, the Legislature’s public policy decision to use CBAs, and the goals underlying the Prevailing Wage on Public Works Act. The State Supreme Court should affirm the Superior Court’s decision.

workers had median weekly earnings that were 85 percent of earnings for workers who were union members” in 2022).

I certify this amicus brief contains 3,042 words, in compliance
with RAP 18.17.

DATED this 8th day of December, 2023.



Bradley Medlin, WSBA No. 43486
Karanjot Gill, WSBA No. 59606
ROBBLEE DETWILER PLLP
2101 Fourth Avenue, Suite 1530
Seattle, Washington 98121
Phone: (206) 467-6700
bmedlin@unionattorneysnw.com
kgill@unionattorneysnw.com

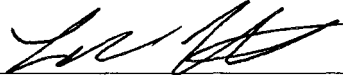
Attorneys for Amicus Curiae
Washington State Building and
Construction Trades Council,
AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 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::

Darren Anthony Feider	dfeider@sbj.law
Paul Michael Weideman	paul.weideman@atg.wa.gpv
James Mills	james.mills@atg.wa.gov
Anastasia R. Sandstrom	Anastasia.sandstrom@atg.wa.gov
Seattle Labor and Industries	Iniseaeservice@atg.wa.gov
	LITacCal@atg.wa.gov

DATED this 8th day of December, 2023.



LeRoux Matau
Legal Assistant
Robblee Detwiler PLLP
2101 Fourth Avenue, Suite 1000
Seattle, Washington 98121
Phone: (206) 467-6700
lmatau@unionattorneysnw.com

ROBBLEE DETWILER & BLACK

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