No. S173586

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO,

Petitioner and Appellant,

v.

CITY OF VISTA, *et al.*,

Respondents.

After Decision by the Court of Appeal
Fourth Appellate District, Division One
Case No. D052181

On Appeal from the Superior Court
for the County of San Diego
Case No. 37-2007-00054316-CU-WM-NC
Hon. Robert P. Dahlquist, Presiding

REPLY BRIEF

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INTRODUCTION

The City of Vista ("City") does not dispute that *City of Pasadena v. Charleville* (1932) 215 Cal. 384 was premised on a long-since discredited *Lochner*-era view of legislative authority to set labor standards. That being so, it is common ground that the California Legislature has the constitutional authority through its police power to establish labor standards to protect workers.

The City also abandons its prior argument that the Prevailing Wage Law (which sets wage and apprenticeship standards for *private* employers) impermissibly conflicts with Article XI, Section 5(b) of the State Constitution (which grants charter cities authority to set the compensation of their own *public* employees). *Cf.* Answer to the Petition for Review at 26-28.

Accordingly, the only issue remaining for resolution is whether the Prevailing Wage Law – which supports area labor standards and apprenticeship training for construction workers in regional labor markets – is reasonably related to addressing concerns of extra-municipal dimension. If so, the state law trumps the conflicting enactments of a charter city, and charter city officials lack the power to exempt employers from the obligation to comply with the state law.

The City's arguments on this sole remaining issue boil down to the assertion that the Legislature lacks authority to apply the Prevailing Wage Law to contractors performing work on charter city projects because the Legislature did not extend the law to all projects. We demonstrated in our Opening Brief, and demonstrate further below, that there is no such limitation on the California Legislature's authority to deal with matters of extra-municipal concern. The City might have a point if the Legislature had

singled out contractors on Vista's projects (or even local government projects) for special regulation. But the Prevailing Wage Law is a general statute applicable to all private construction contractors on all public work. The Legislature's decisions not to extend the law to private projects, and to adopt special rules for determining whether certain affordable housing projects are "public" projects, have a substantial basis in statewide policies. Those decisions do not negate that the Prevailing Wage Law has significant and legitimate extra-municipal purposes.

In addition to responding below to the City's legal arguments, we also correct the City's many errors in describing the coverage of the Prevailing Wage Law. Among other things, legislative policy is *not* "fairly elastic when it comes to public sector construction." Respondents' Answering Brief on the Merits ("RB") at 50. The same Prevailing Wage Law sets labor standards for contractors on all public work, whether awarded by the State itself or by any local government entity.

ARGUMENT

I. The City Relies on the Wrong Analysis for Determining Whether State Laws Trump the Conflicting Ordinances of Charter Cities.

This action is not a "challenge to the heart of the 'Home Rule' provision of the California Constitution," as the City boldly asserts at the start of its brief. RB at 1. The Court is merely being called upon to apply an established test for resolving conflicts between state laws and charter city ordinances. Under that test, charter cities cannot exempt themselves (or private employers within their jurisdiction) from state laws if the "subject of the state statute is one of statewide concern," which the Court has defined as a concern "of sufficient extramural dimension to support legislative

measures reasonably related to its resolution." *California Fed. Sav. & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17, 24.

Nor do we contend that, under this test, the Legislature's findings that the Prevailing Wage Law addresses matters of statewide concern are dispositive. RB at 13. While those findings are important to consider and entitled to deference, what ultimately matters is the purpose and effect of the state statute itself. As we have demonstrated, the Prevailing Wage Law supports area labor standards and apprenticeship training for construction workers who move from project to project and often from employer to employer. We also have demonstrated that those purposes have significant extra-municipal dimensions because labor markers for journey-level and apprentice construction workers are much larger than individual cities. Opening Brief on the Merits ("OB") at 15-25. We have also demonstrated that, in the absence of a Prevailing Wage Law, public projects would undermine rather than reinforce collectively bargained labor standards because union-signatory contractors are bound in advance to regional collective bargaining agreements and would have difficulty bidding for public work on a level playing field. *Id.* It therefore follows that charter cities cannot exempt employers from the state law and thereby deprive workers of the state law's protections.[1]

[1/] The City accuses us of advocating an analysis for resolving the conflict between state laws and charter city ordinances that was rejected in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56. RB at 13. Not so. The *Bishop* majority actually decided the case on statutory grounds so there was no holding on the statewide-concern issue. Moreover, this Court later set out in *California Federal* the proper analysis for resolving conflicts between state laws and charter city ordinances, so it is not necessary to attempt to construct such an analysis from *dicta* in *Bishop*.

(continued...)

The City does not dispute that this Court's 75-year old holding in *Charleville* about prevailing wages rested on now-outdated reasoning about legislative authority to set labor standards. The City also does not point to *any* other precedent that would be affected if that anachronistic holding is overruled. That being so, the City's rhetoric about the erosion of the core home-rule powers of cities is misplaced. The core of the home-rule doctrine does not consist of depriving construction workers of decent pay and benefits and driving down area labor standards. By contrast, the City, in groping for a rationale to preserve the outdated holding of *Charleville*, urges a change in the home-rule doctrine that *would be* inconsistent with modern precedents and would strike at the heart of the Legislature's authority to act in the best interests of the *entire* state.

[1/](...continued)

The City also suggests that cases in this area are decided on an *ad hoc* basis such that there is *no* principled basis for decisions and judges must apply their views of the "wisdom" of state statutes. RB at 12-14. To the contrary, while the law has developed on a case-by-case basis, the principle is now well established that a state statute reasonably related to addressing concerns of extra-municipal dimension will prevail over the conflicting ordinance of a charter city. Accordingly, no subject area can be regarded as exclusively a "municipal affair," as some older decisions assumed. *California Fed.*, 54 Cal.3d at 16 ("[O]ur decisions have . . . strived to confine the element of judicial interpretation by hedging it with a decisional procedure intended to bring a measure of certainty to the process, narrowing the scope within which a sometimes mercurial discretion operates."). It is also well established that the Court does not pass on the wisdom of state statutes. *Id.* at 24.

A. Laws that address statewide concerns supercede the ordinances of charter cities even if the state laws do not apply universally.

The City's main argument is that the Legislature cannot apply the Prevailing Wage Law to contractors working on the projects of charter cities because the Legislature chose not to apply the law to all contractors on all projects. As pointed out in the Opening Brief, the rule the City advocates is contrary to numerous precedents and to the well-established constitutional rule that, so long as distinctions have a rational basis, the Legislature is not obligated to extend its regulations to cover all cases. OB at 28-29.

The City simply ignores, for example, the Court's holding in *Charleville* itself that the Public Works Alien Employment Act could not be superceded by a charter city. 215 Cal. at 398-400. That statute applied to public work only and therefore was co-extensive in scope with the Prevailing Wage Law at issue here.

The City also errs in attempting to distinguish *Baggett v. Gates* (1982) 32 Cal.3d 128 as merely extending to local public employees a "uniform" protection that already applied to other workers. RB at 3, 25-26. *Baggett* actually involved the Public Safety Officers' Procedural Bill of Rights Act, which granted certain public employees special protections that go well beyond those provided by law to private-sector employees. This Court nonetheless recognized that the Act addressed statewide concerns and, therefore, could not be superceded by a charter city.

Nor is the City persuasive in its attempt to distinguish *Baggett* (and other cases holding that laws granting rights to public employees apply to charter cities) on the theory that those cases involve "procedural" rights.

RB at 25-26, 33-34 (citing *Baggett* and *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276). The Court discussed the procedural/substantive dichotomy in those cases only because Article XI, Section 5(b) of the State Constitution gives charter cities "plenary authority" over the compensation and tenure of their *own* employees. Because the state laws were procedural, there was no conflict with Section 5(b). The procedural/substantive dichotomy is not relevant to whether a state law addresses concerns of extra-municipal dimension. A law that sets strict workplace safety requirements for dealing with hazardous chemicals, for example, unquestionably addresses statewide concerns even though it is not "procedural."

The City apparently contends that all other public-sector-only laws that address statewide concerns are distinguishable from the Prevailing Wage Law because they address "due process" or "national defense" or other subjects the City considers to be more worthy of legislative attention than labor standards. RB at 32-35. But the courts must "defer to legislative estimates regarding the significance of a particular problem and the responsive measures that should be taken toward its resolution." *California Fed.*, 54 Cal.3d at 24. The California Constitution explicitly gives the Legislature authority to "provide for minimum wages and for the general welfare of employees" (Cal. Const., Art. XIV, §1), so the Legislature's exercise of such authority cannot be dismissed as of less constitutional significance than other legitimate exercises of legislative authority.

The City might have a point in focusing on the projects to which the Prevailing Wage Law does *not* apply if the Legislature had adopted a special rule that applied only to contractors on Vista's projects. But Prevailing Wage Law is a general statute applicable to contractors on all

public work, including projects awarded by the State and all its agencies. The City does not dispute that the federal government and the majority of other states also have adopted minimum labor standards applicable to public works projects only, demonstrating that the distinction between public and private construction is eminently rational. OB at 21. Indeed, the California Constitution makes the same distinction between public and private work by imposing a constitutional limitation on work hours that is applicable to public projects only. *See* Cal. Const., Art. XIV, §2.[2]

The City also has not disputed that there are very significant counterveiling state interests that the Legislature could have relied upon in deciding not to apply the Prevailing Wage Law to private work, including an interest in reinforcing rather than supplanting the unique collective bargaining process in the construction industry. *See* OB at 29. As for the City's contention that the Legislature has made significant exceptions to the Prevailing Wage Law's coverage of *public* work, the City is simply wrong.

The Legislature did *not* "expressly exempt[]" (RB at 2-3) contractors of projects awarded by the UC Regents from the Prevailing Wage Law, and

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[2/] In addition to the examples cited in the Opening Brief (OB at 27-28), there are many other examples of laws that address statewide concerns but apply only to the public sector. *See*, *e.g.*, Gov. Code §21151(a) (California Environmental Quality Act requires all local governments – including charter cities – to prepare "an economic impact report on any project they intend to carry out or approve which may have a significant effect on the environment"); Gov. Code §65300 (requiring the planning agency for each county and city – including charter cities – to "adopt a comprehensive, long-term general plan for the physical development of the county or city").

no such exemption appears anywhere in the statute.[3] The Prevailing Wage Law certainly would apply to contractors on the great majority of UC construction projects, which are funded with state general fund or bond money. Whether the Prevailing Wage Law also would apply (over the objection of the UC Regents) to contractors on UC projects that are funded solely with student fees and private donations (which arguably are not "public funds") is a question that implicates the constitutional autonomy of the UC Regents under Article IX, Section 9 of the State Constitution and that is not before the Court.[4] For purposes of this case, it is sufficient to

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[3/] The City misreads an uncodified section of AB 1506 (Stats. 2002, ch. 868, §1(e)) as a statutory exemption from the Prevailing Wage Law for contractors on UC projects. The substantive provisions of AB 1506 actually deal with a different issue, the requirement that public agencies using money from the Kindergarten-University Public Education Facilities Bond Act of 2004 adopt "labor compliance programs" to enforce Labor Code requirements (not just the Prevailing Wage Law) on those projects. These labor compliance programs are monitoring programs undertaken by public agencies for certain projects, and the lack of a special monitoring program does not relieve contractors of the obligation to pay prevailing wages and hire apprentices. AB 1506 required the UC Regents to operate a labor compliance program for projects receiving bond money. *See* Labor Code §1777(c)(2). The uncodified intent language merely clarifies that the statute does not require the UC Regents to adopt such monitoring programs on other projects.

[4/]Article IX, Section 9(a) of the California Constitution provides in pertinent part: "[UC] shall constitute a public trust ... with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of [UC] and such competitive bidding procedures as may be made applicable to [UC] by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services . . . ."

The test for whether state statutes apply to the Regents is not the

(continued...)

observe that *the Legislature* did not include any statutory exception from the Prevailing Wage Law for contractors on UC projects, so the City's repeated accusation that *the Legislature* granted preferential treatment to contractors on UC projects is completely inaccurate.[5]

The City also loses the forest for the trees in focusing on exemptions from the Prevailing Wage Law for a narrow subset of affordable housing projects that are typically built by private developers but receive some public subsidies. (This issue is discussed further at pp. 25-26, *infra.*) Few laws, including labor standards laws, are of truly universal application. There are many exceptions, for example, to the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, and the National Labor Relations Act, 29 U.S.C. §151 *et seq.* Yet those laws still address concerns of national significance,

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[4](...continued)
same as the test for whether they apply to charter cities. If the test were the same, then the Regents would have no autonomy, because education is a statewide concern. The Regents also receive money from private donations and student fees, unlike other public entities. That being said, the City's reliance on *Regents v. Aubry* (1996) 42 Cal.App.4th 579, a case that dealt with the application of the Prevailing Wage Law to a UC project built with "non-state-appropriated money" (*id.* at 582), fails to acknowledge that the reasoning of that case is based in part on *Charleville*, which the Court of Appeal was required to follow. Even the City does not defend the reasoning of *Charleville*.

[5] The City also errs in referring to *San Francisco Labor Council v. University of California* (1980) 26 Cal.3d 785 as a case that concerned the application of the Prevailing Wage Law. RB at 51. That case dealt with the Legislature's attempt to set the wages of UC employees, an internal matter for the UC Regents, not with the Prevailing Wage Law applicable to construction workers employed by private contractors. The Court's discussion of prevailing wages in *San Francisco Labor Council* must be understood in that context.

just as the Prevailing Wage Law addresses concerns of statewide significance.

B. This Court already has rejected the project-based analysis proposed by the City.

Instead of focusing on whether the "subject of the [Prevailing Wage Law] is one of statewide concern" (*California Fed.*, 54 Cal.3d at 17), the City urges the Court to consider – on a project-by-project basis – "the effect of any charter city's locally funded projects" on statewide concerns. RB at 20. That project-by-project approach gets matters backward. The Court has repeatedly held that the subject of the state statute – not the particulars of the charter city ordinance – is what courts must analyze. *See, e.g.*, *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 292 ("[T]here are innumerable authorities holding that general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern."). Thus, in *Professional Fire Fighters,* for example, the Court did not look for evidence as to whether the failure of each particular city fire department to extend collective bargaining rights to its firefighters would have a statewide impact, such that the state law might apply to some cities but not others. In *Baggett v. Gates* (1982) 32 Cal.3d 128, the Court did not look to whether the demotion of the four particular police officer plaintiffs was a matter of statewide concern. The Court looked to the purposes of the state law itself.

The City's proposed project-based approach also makes no sense because the policies furthered by the Prevailing Wage Law are independent of the particular project under construction. As the Arizona Supreme Court explained in holding that a prevailing wage law applied to contractors on

the projects of home-rule cities: "Our Legislature . . . undoubtedly had under consideration the general public policy of a minimum wage for all mechanical and manual labor employed by the state or its political subdivisions, and not the particular kind of work to be done, or the physical result to be reached thereby." *Arizona v. Jaastad* (Ariz. 1934) 32 P.2d 799, 801. Likewise, California's Prevailing Wage Law sets minimum standards for contractors on all types of public work, from highways and bridges to courthouses and schools.

The City bases its proposed analytical framework on a 1972 law review article that was critical of then-existing precedents. RB at 16-35 (relying on Sato, *"Municipal Affairs" in California* (1972) 60 Cal.L.Rev. 1055). The Court has never adopted the framework Professor Sato advocated in that article; rather, the only time the Court addressed his analysis at all was to reject it:

> In *Century Plaza Hotel Co. v. City of Los Angeles* (1970) 7 Cal.App.3d 616, the court enjoined enforcement of a City excise tax levied on retail sales of alcohol consumed on the premises. After finding a state statute imposing a tax on the sale of alcohol in lieu of all county and municipal sales taxes to be in "irreconcilable conflict" with the charter city tax ordinance, the court identified substantial statewide interests sufficient to justify legislative supersession and the negation of the conflicting charter city tax ordinance. (*Id.* at 624-626.) *Although its evaluation of the strength of the state's interests has been criticized (Sato, "Municipal Affairs" in California (1972) 60 Cal.L.Rev. 1055, 1099-1104), the methodology employed by the Court of Appeal in Century Plaza is the correct one . . . .*

California Fed. Savings & Loan Assn., 54 Cal.3d at 14 n.12 (emphasis added).

Even under Professor Sato's proposed framework, moreover, "[s]tate laws should prevail where such laws deal with substantial externalities of municipal improvements, services or other activities, regardless of whether the general laws are directed only to the public sector." 60 Cal. L. Rev. at 1076. The Prevailing Wage Law deals with the functioning of regional labor markets for journey-level and apprentice construction workers and, therefore, with a matter that involves "substantial externalities" rather than the parochial concerns of a single city. *See* OB at 27. The City does not seriously dispute this.

In light of the interplay between the Prevailing Wage Law and regional collective bargaining for construction work, Professor Sato's framework (even if it had been adopted) would not support the City's position. Professor Sato also was writing before the California Constitution was amended in 1976 to give to "the Legislature" the *explicit* authority to "provide for minimum wages and for the general welfare of employees." Cal. Const., Art. XIV, §1. His article therefore could not have considered that the Constitution itself now recognizes that setting labor standards to protect employees is a proper subject of statewide concern.

C. Laws that address statewide concerns supercede the ordinances of charter cities even if the state laws impose some economic costs.

The City offers much rhetoric about the Prevailing Wage Law "interfering" with "fiscal affairs of charter cities" (RB at 26), "internal fiscal and contracting powers" (*id.* at 33), and the "inner workings of municipal governance of a charter city" (*id.* at 46). This rhetoric does not match reality. The law does not require charter cities to pay prevailing

wages and benefits to their employees or to train apprentices. The law sets minimum standards only for private contractors.

The most that can be said about the effect of the Prevailing Wage Law on municipal autonomy is that, if a city could exempt contractors from having to follow the state law, the city might receive lower bids. The same would be true if the city could exempt contractors from having to comply with workplace safety laws that require scaffolding and harnesses, or from having to pay the minimum wage. In terms of the effect (or lack thereof) on the "inner workings of municipal government," there is no difference between the Prevailing Wage Law and countless other laws that have an impact on outside contractors' costs.

As *California Federal* makes clear, apart from the matters as to which municipalities are granted plenary authority in the California Constitution, no subject areas are cordoned off from regulation by the Legislature. *California Federal*, 54 Cal.3d at 16-17. Thus, the City's proclamation that "public contracting" is a municipal affair (RB at 27-28) does not mean that a municipality can exempt its contractors from complying with state laws that address concerns of extra-municipal dimension. The City does not contend, for example, that it can exempt municipal contractors from complying with licensing laws, building codes, health and safety requirements, or environmental laws.

Nor is it unusual that a state law may result in charter cities spending more money than they might spend in the absence of the law. In *Bowers v. City of San Buenaventura* (1977) 75 Cal.App.3d 65, for example, a charter city was required to comply with a statute mandating that public employers provide *paid* leave to National Guardsmen called to duty. The city argued that by requiring the city "to pay plaintiff while he is on temporary military

leave[,] the state compels City to expend money which does not benefit City's citizens, in effect requiring City to make a 'gift' of public funds for a nonmunicipal purpose." *Id.* at 72. The Court held that the law applied despite the added costs because the law served a "general statewide purpose of encouraging membership in the military reserve organizations." *Id.* at 71; *see also Murdy v. City of Los Angeles* (1962) 201 Cal.App.2d 468 (charter city must credit public safety employees for time spent in military service for retirement purposes under state law); *City of Downey v. Bd. of Admin.* (1975) 47 Cal.App.3d 621 (charter cities must pay into state retirement system); *City of Sacramento v. Indus. Accident Comm'n of Cal.* (1925) 74 Cal.App. 386 ("conclud[ing] that the making of compensation to the dependents of employees is a matter of public policy of the state, as contradistinguished from municipal affairs" and upholding use of state commission to award money to wife of deceased charter city employee); *Kelso v. Bd. of Ed. of City of Glendale* (1941) 42 Cal.App.2d 415 (charter city could not impose shorter statute of limitations on tort or contract claims against city, notwithstanding that the longer period exposed the city to greater financial liability).

The proper balancing of costs and benefits is an issue for the California Legislature. Nonetheless, it is worthy of mention that the City's estimate of the size of the cost impact of the Prevailing Wage Law is at odds with most empirical evidence. Higher-wage workers tend to be more skilled, enabling them to perform their work more efficiently; and construction contractors who employ the most skilled workers are less likely to produce sub-standard work or create project delays. The City cites one study to support its position that prevailing wage laws significantly increase total construction costs, but that study is in the minority; most

empirical studies have found any cost increase to be minimal once all of the relevant factors are considered. *See* Nooshin Mahalia, *Prevailing Wages and Government Contracting Costs: A Review of the Research* (Economic Policy Institute, 2008) (cited in OB at 7, n.7) ("*Prevailing Wages and Government Contracting Costs*") (summarizing numerous studies on the impact of prevailing wage laws on construction costs).[6]

The City also fails to acknowledge the significant offsetting financial benefits from a Prevailing Wage Law. For example, workers who receive higher wages will wind up paying more to the government in taxes. *See* OB at 19-20. Workers who receive employer-paid health benefits also are less likely to require health care for themselves and their families at government expense. *Id.* That the Prevailing Wage Law encourages the use of the most highly skilled workers on public projects should lead to better quality construction and, therefore, fewer expensive maintenance and repair problems in the future.

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[6] The study relied upon by the City examined construction costs for residential projects built by private developers, some of which were subject to a prevailing wage requirement because the developers received government subsidies. *See* Dunn, Quigley & Rosenthal, *The Effects of Prevailing Wage Requirements on Cost of Low-Income Housing* (October 2005) 39 Indus. and Labor Rev. 141. It may be that the effect of prevailing wage laws on such projects is more significant than for typical government projects. Residential work typically does not require the same skills as commercial construction, so the wage differential may be higher. *See Prevailing Wages and Government Contracting Costs* at 7 (speculating as to why results of the Dunn study are out of synch with "the rest of the current literature").

D. Out-of-state decisions holding that prevailing wage laws further statewide concerns are instructive.

The City errs in dismissing the out-of-state decisions that have held that a prevailing wage law for construction workers on public projects applies to "home-rule" cities. According to the City, these decisions are irrelevant because California's home rule doctrine is "strong[er]." RB at 11, n.1. But the test consistently applied by those other state courts – whether the state law addresses concerns of significant extra-municipal dimension – is the same test used in California, so those decisions are persuasive.

In the Court of Appeal, the City argued that California's constitutional home-rule provision was modeled on the home-rule provision in the Missouri Constitution. Respondents' Court of Appeal Brief, at 8. Now, having considered the Missouri Supreme Court's holding that Missouri's prevailing wage law applies to charter cities (*City of Joplin v. Industrial Comm'n of Missouri* (Mo. 1959) 329 S.W.2d 687, 693-94), the City has abandoned that argument, which had some historical basis. Instead, the City now touts Nebraska as the only state with a similar constitutional home-rule provision to California's. RB at 11 n.1 ("Except Nebraska, these states do not have a similar system to California and require cities to follow the general laws of the state, and none have provisions like Article XI, Section 5(a)."). This is nonsense. Nebraska's constitutional home rule provision is substantively indistinguishable from the equivalent provisions of many other state constitutions, including the home-rule

provisions of states whose supreme courts have held that the prevailing wage law applies to charter cities.[7]

The City touts Nebraska as a constitutional model only because it has dug up a 1954 decision in which the Nebraska Supreme Court stated, as an alternative holding, that Nebraska's prevailing wage law did not apply to a charter city's construction of a local reservoir. *Niklaus v. Miller* (1954) 159 Neb. 301, 309. The issue whether charter cities could exempt contractors from the prevailing wage law was not, however, the focus of that half-century old decision, nor was the issue even necessary to the case itself. *See id.* at 309. The Nebraska Supreme Court appears to have considered (in its single sentence of reasoning on this issue) whether *the reservoir* was a statewide concern rather than whether the prevailing wage law addressed

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[7] *Compare* NEB. CONST., Art. XI, §2 ("Any city having a population of more than five thousand inhabitants may frame a charter for its own government, *consistent with and subject to the constitution and laws of this state*, . . .") (emphasis added) *with* ARIZ. CONST., Art. XIII, §2 ("Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government *consistent with, and subject to, the Constitution and the laws of the State*.") (emphasis added); KAN. CONST., Art. XII, §5(c)(1) ("Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, *other than enactments of statewide concern applicable uniformly to all cities*, . . . shall not apply to such city.") (emphasis added); MO. CONST., Art. VI, §19(a) reads: "Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, *provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute*.") (emphasis added); OHIO CONST., Art. XVIII, §3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws*.") (emphasis added).

statewide concerns. California law requires the Court to apply the latter approach, which is also the approach the Arizona, Missouri, Kansas, Ohio, and Illinois supreme courts have taken when holding that their states' prevailing wage laws apply to contractors on charter city projects *See* OB at 22-23 (collecting cases). The City has not cited any out-of-state cases that reached a contrary conclusion after applying the correct approach to the statewide-concern issue.

E. The California Legislature's findings that the Prevailing Wage Law addresses statewide concerns are entitled to consideration.

The City's suggestion that the Legislature may not have intended for the Prevailing Wage Law to apply to charter cities is baseless. *See* RB at 38-39. The Legislature made the statute applicable to work performed on projects awarded by the state and every political subdivision, including "any . . . city." Labor Code §1721. The City does not contend that the statutory language, "any . . . city," fails to include the City of Vista. Rather, the City's contention is that, notwithstanding the language of the Prevailing Wage Law, the California Constitution precludes the application of the law to *some* charter city projects, *i.e.* those projects determined, on a project-by-project basis, to be just municipal affairs. That is a contention about constitutional law, not legislative intent.

There is no requirement that the Legislature make explicit findings that a statute addresses statewide concerns. In this case, however, the Legislature *did* make explicit findings that it is a matter of statewide concern that the Prevailing Wage Law apply to "every public agency." *See* Stats. 2003, ch. 851, §1 (A.B. 1506); Stats. 2002, ch. 892, §1 (S.B. 278); Stats. 2002, ch. 868, §1 (A.B. 1506). The City argues that those statutes do

not single out cities. But "*every* public agency" necessarily includes every city. Further, after Division Seven of the Second Appellate District ruled in *City of Long Beach v. Department of Industrial Relations* (2003) 1 Cal.Rptr.3d 837, *superceded by grant of review*, that the Prevailing Wage Law applies to all charter city projects, the Legislature adopted a joint resolution to endorse the reasoning of the case and set out, again, its view as to why the law addresses statewide concerns. JA 126-27 (Stats. 2003, ch. 135 (S.C.R. 49)). The Legislature's intent is clear.

Ultimately the courts must decide whether a state law is reasonably related to the concerns of "extra-municipal dimension." But the City does not provide a good reason for the Court to depart from precedent requiring respectful consideration of the Legislature's views. *See* OB at 14-15.

II. The Record Establishes That The Prevailing Wage Law Addresses Concerns of Significant Extra-Municipal Dimension.

The Court has held that the "hinge of the decision" whether a general law supersedes a contrary ordinance of a charter city, is "the identification of a convincing basis for legislative action originating in extramunicipal concerns . . ." *California Fed.*, 54 Cal.3d at 18. The City largely ignores the portion of our Opening Brief that demonstrates why the main concerns addressed by Prevailing Wage Law – supporting high labor standards for construction workers and promoting apprenticeship training – are concerns of significant extra-municipal dimension. OB at 16-25. The City limits itself to arguing that 1) the record does not support such a conclusion, 2) other laws make a Prevailing Wage Law unnecessary, and 3) the Prevailing Wage Law is not reasonably related to the statewide concerns the Legislature identified. None of these points is well taken.

A. In the first place, the City misplaces its focus in asking whether there is specific evidence about the consequences of "Vista's decision to forego payment of prevailing wages." RB at 2. The Prevailing Wage Law is not solely applicable to Vista or solely to a particular Vista project. The relevant issue is whether the subject of the Prevailing Wage Law is of statewide concern. *See* pp. 10-11; *supra.*

On the relevant issue, the record evidence is *undisputed* that labor markets for journey-level and apprentice construction workers are much larger than individual cities, so supporting labor standards and apprenticeship training are not just municipal concerns. *See* JA 112-113. The evidence supporting this proposition does not merely consist of a statement that "construction workers sometimes travel great distances for jobs." RB at 7. Rather, the evidence shows that: collective bargaining in the construction industry takes place on a regional basis; union-signatory contractors are bound in advance to regional labor agreements that set uniform wages and benefits; hiring halls dispatch workers throughout regional labor markets; apprenticeship training takes place on a regional basis; and prevailing wage rates are determined on a regional basis. JA 112-116; *see also* http://www.dir.ca. gov/dlsr/DPreWageDetermination.htm (current State prevailing wage determinations). The prevailing wage rates that apply to projects in the City of Vista, for example, also apply across all 18 cities within San Diego county. JA 114. The City has never disputed any of this evidence.

On the issue whether the Prevailing Wage Law supports area labor standards for construction workers generally – rather than construction workers on public work projects only – the evidence also is *undisputed*:

> Absent the prevailing wage law, union-signatory contractors would have difficulty competing for work on public projects, which often must be awarded to the lowest bidder. That would lead to downward pressure on construction wages and benefits throughout the labor market area, because union-signatory contractors would seek concessions to remain competitive on public work. There would be a 'race to the bottom' in which union contractors that offer good wages and health and pension benefits would lose market share to contractors that pay low wages and offer no health and pension benefits.

JA 114-15.

Although the City has never disputed any of these facts, the City seeks to belittle the evidence now by pointing out that it was presented by declaration testimony from Robert L. Balgenorth, one of Petitioner's officers. RB at 7. But Mr. Balgenorth, in addition to serving as President of the State Building and Construction Trades Council of California since 1993, also has served as Chairperson of the California Transportation Commission, as a Commissioner of the California Apprenticeship Council, and as a member of the California Workforce Investment Board, and he has negotiated labor agreements for major construction projects throughout California. JA 111-112. As such, he is eminently qualified to offer testimony on the size and structure of labor markets for construction workers and apprentices in California.[8]

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[8] Mr. Balgenorth's undisputed testimony that the Prevailing Wage Law supports area labor standards throughout the construction industry is also confirmed by academic studies. For example, economists at the University of Utah, who examined data from states that repealed their prevailing wage laws for public work, concluded that wages declined throughout the construction industry. Phillips, Magnum, Waitzman and

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The City argues that the Petitioner should have introduced *more* evidence on the same points. But the City did not offer any evidence to the contrary, and the trial court agreed that the Prevailing Wage Law addresses statewide concerns: "The Court believes that the payment of the prevailing wages for modern public works, and the public policies underlying the prevailing wage statute, are properly considered matters of statewide concern." JA 699-700. All that being so, the City's complaints about the lack of a record that the Prevailing Wage Law addresses statewide concerns cannot be accepted.

B. The City also claims that the Prevailing Wage Law may once have had statewide importance but that the subsequent adoption of other statutes now makes the law unnecessary. RB at 28, 35-37. This is properly a consideration for the Legislature. In any event, the City is wrong because the other statutes it cites do not deal with the same concerns as the Prevailing Wage Law.

The Public Contract Code provisions regarding local government contracting are intended to avoid the waste of funds that can occur when contracts are awarded based on subjective processes that allow for "favoritism, fraud and corruption." Pub. Contract Code §100(d). The provisions have nothing to do with area labor standards or apprenticeship training. It makes perfect sense that the Legislature would not impose the Public Contract Code requirements on charter cities because cities

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[8/](...continued)
Yeagle, "Losing Ground: Lessons from the Repeal of Nine Little Davis-Bacon Acts," Department of Economics, University of Utah, 1995 (available at http://www.econ.utah.edu/philips/soccer2/Publications/Prevailing%20Wages/History/Losing%20Ground.pdf); *see also* OB at 19.

themselves would bear the consequences if they chose to pursue an inefficient contracting process. By contrast, the overall purpose of the Prevailing Wage Law is to protect and benefit construction workers who earn their livelihoods by working on jobs as they become available, which often means traveling throughout regional labor markets. *See Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 987. The concerns addressed by the Prevailing Wage Law are extra-municipal.[9]

The City also contends that there is no need for a Prevailing Wage Law "to ensure that a quality work product has been produced" because other laws already ensure construction quality. RB at 35-37 (citing contractor licensing requirements, civil liability for faulty construction, and Uniform Building Codes). But improved quality is a byproduct of the Prevailing Wage Law, not its primary purpose. The main purpose of the law is to support high labor standards for construction workers and apprenticeship training. While laws that promote construction quality may indirectly lead contractors to pay higher wages, the Legislature could easily have concluded that they are not sufficient for that purpose.

C. Contrary to the City's contention, this case is nothing like *Johnson v. Bradley* (1992) 4 Cal.4th 389, 411, which involved an initiative measure that banned public financing of elections. In *Johnson*, the Court

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[9/] We have no quarrel with the City's observation that the "manner" in which municipalities contract with outside companies generally is a "municipal affair." RB at 5. In the event of a conflict, however, between a charter city ordinance addressing a municipal affair and a state statute that is reasonably related to addressing matters of statewide concern, the latter must prevail. The municipal decisions to demote police officers in *Baggett* and to impose taxes in *California Federal* plainly addressed municipal affairs, but they still had to yield to conflicting state laws adopted by the Legislature to address concerns of extra-municipal dimension.

found that the asserted purpose of the initiative – "enhancing the integrity of the electoral process" – is a statewide concern, but that the initiative's ban on public financing of elections was "not reasonably related to [that] statewide concern." 4 Cal.4th at 408-409 ("[T]he use of public funds for campaign financing will not, almost by definition, have a corrupting influence.") (internal quotation removed). Accordingly, the Court concluded that the initiative did not preclude a charter city's scheme for public financing of elections.

In this case, by contrast, the City does not dispute that, by requiring outside contractors on public work to pay prevailing wages and train apprentices, the Prevailing Wage Law supports area labor standards and apprenticeship training for a group of workers who move from project to project throughout regional labor markets. The statute is "reasonably related" (*Johnson*, 4 Cal.4th at 400) to addressing these extra-municipal concerns and "narrowly tailored" (*id.*) to avoid interference with the internal concern of how local governments compensate their own employees.

III. The City Makes Serious Errors in Describing the Coverage of The Prevailing Wage Law.

The City seeks to diminish the importance of the Prevailing Wage Law by asserting that the Legislature applies the law selectively. Although we do not believe this issue ultimately matters to the outcome of this case, the City's discussion of the coverage of the Prevailing Wage Law is filled with errors, so we are compelled to correct them.

A. As an initial matter, the City could not be more wrong than in claiming that the legislative policy is "fairly elastic when it comes to public sector construction." RB at 50. The Legislature requires contractors on all

projects that would be considered traditional "public work" – *i.e.* projects awarded by public bodies – to pay their workers prevailing wages and to train apprentices. The same Prevailing Wage Law applies to contractors when they are working on projects awarded by the State and "any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts." Labor Code 1721. The same Prevailing Wage Law applies to these contractors whenever they are performing "[c]onstruction, alteration, demolition, installation, or repair work." Labor Code §1720(a).

The Legislature has *not* made exceptions for contractors on particular "pet projects" (RB at 3), and it is *not* true that contractors for "other units of state and local government . . . are exempt from" from the Prevailing Wage Law (*id.* at 2). Nor is the Prevailing Wage Law's core protection of labor standards for construction workers on public projects "riddl[ed] . . .with exceptions" (RB at 3). Contractors on the City's projects have not been singled out for special treatment – they would be required to pay prevailing wages and train apprentices if these projects had been awarded by any other city, county, school district, or state agency.

B. The City loses the forest for the trees in discussing the application of the Prevailing Wage Law to a subset of affordable housing projects. Those projects are typically built by *private* developers. When the Legislature amended the Prevailing Wage Law in 2001 to include a very broad definition of "paid for in whole or in part out of public funds" (Labor Code §1720(a)), the Legislature decided not to extend the Prevailing Wage Law this subset of affordable housing projects because there were counterveiling statewide policy interests.

The development of the current statutory coverage can be traced to *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576. In that case, the Court of Appeal considered whether private construction was "paid for . . . in part out of public funds" when a County assisted the non-profit corporation that was building a residential care facility by subleasing land at less than fair market value, absorbing inspection costs, and making a loan. The *McIntosh* Court interpreted the statutory phrase "paid for . . . out of public funds" to encompass only actual payments of public funds, not other types of subsidies, so the contractor was not obligated to pay prevailing wages on this private project. The Legislature responded to *McIntosh* by amending the Prevailing Wage Law in 2001 so that the law would also cover private projects receiving the type of subsidies at issue in *McIntosh* case. *See* Stats. 2001, ch. 938 (SB 975); Labor Code §1720(b)(1)-(6).

At the same time that the Legislature expanded the definition of "paid for . . . out of public funds," the Legislature provided that a subset of affordable housing projects would not become covered by the law even if the projects fell within the newly expanded coverage of the statute. *See* Labor Code §1720(c), (d). These projects typically involve subsidies to private developers in exchange for guarantees that a minimum number of residential units will be reserved for low- or moderate-income families. The City misreads the bill that overruled *McIntosh* as a contraction of the Prevailing Wage Law, but it actually was a significant *expansion* of the law's coverage that was supported by labor organizations.[10]

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[10]/*See* Senate Floor Analysis of SB 975 (Sept. 5, 2001) at p. 1, 6, available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_975_cfa_20010905_133912_sen_floor.html. SB 975 was

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C. The City also offers an inaccurate and misleading account of the history of the Prevailing Wage Law, asserting that, "[s]ince 1981, except for state funded projects, no public projects have been added to the PWL, nor have any private sector projects." RB at 44. With regard to traditional public sector construction, however, the Prevailing Wage Law's statutory coverage could not have been expanded because it already applied to *all* construction awarded by public entities. *See* pp. 24-25, *supra.*

In 2000, however, the term "construction" itself was expanded to also include "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." Labor Code §1720(a); Stats. 2000, ch. 881 (SB 1999). This was an expansion of the law that applied to all public projects, state and local.

With respect to private sector construction, the adoption of SB 975 (Stats. 2001, ch. 938) in 2001 (described above) significantly expanded the Prevailing Wage Law by attaching prevailing wage requirements to certain non-cash subsidies for private development projects, thereby overruling the holding of *McIntosh v. Aubry*.[11]

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[10](...continued)
followed the following year by a bi-partisan cleanup bill supported by building trades unions and affordable housing advocates. *See* Stats. 2002, ch. 1048 (SB 972); Senate Floor Analysis of SB 972 (Aug. 26, 2002) at p. 3, available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_972_cfa_20020826_122948_sen_floor.html.

[11]As one of the City's counsel in this case previously explained, "SB 975 . . . greatly expanded the statutory definition of public works." Richards, Watson & Gershon, Advisor (Winter 2002) at p. 13, available at http://www.rwglaw.com/pdf/WinterRWGAdvisor02.pdf. Compare RB at 39 ("None of these amendments have expanded the law in any appreciable manner").

The City misreads AB 2690 (Stats. 2004, ch. 330) as "exempting additional projects" from the Prevailing Wage Law. RB at 40. That bill (adopted by unanimous vote of the Legislature) merely clarified that bona fide *volunteers* who perform work without pay for non-profit organizations are not "employees" covered by the Prevailing Wage Law (just as they would not be employees within the meaning of the Fair Labor Standards Act), and adopted standards to define "volunteer" status to employees could not be exploited. *See* Labor Code §1720.4; *cf.* 29 U.S.C. §203(e)(4), (5); 29 C.F.R. §553.101.

In sum, there is no "pattern of creating exclusions from the PWL," (RB at 40), and the City's inaccurate historical narrative should not be relied upon.

D. As discussed above, the City is also wrong that the Legislature exempted contractors on projects awarded by the UC Regents from the coverage of the Prevailing Wage Law. *See* pp. 7-9, *supra.*

CONCLUSION

The Court should reverse the decision below.

Dated: December 22, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify pursuant to CRC 8.520(c)(1) that Appellant's Reply Brief is proportionally spaced, has a typeface of 13 points or more, and contains 8,099 words, excluding the cover, the tables, the signature block and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the word-processing program used to prepare this brief.

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PROOF OF SERVICE

Code of Civil Procedure §1013

CASE: *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista, et al.*

CASE NO: California Supreme Court, Case No. S173586
(California Court of Appeal, 4th App. Dist., Div. One, Case No. D052181;
San Diego County Superior Court (North County), Case No. 37-2007-00054316-CU-WM-NC)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On December 22, 2009, I served the following document(s):

Reply Brief

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this December 22, 2009, at San Francisco, California.

J Perley

Jean Perley