No. S173586

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioner,

v.

THE CITY OF VISTA, et al.,

Respondents.

After Decision by the Court of Appeal Fourth District – Division 1
Case No. D052181

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

ANSWER TO PETITION FOR REVIEW

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PROOF OF SERVICE
Code of Civil Procedure § 1013

STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, AFL-CIO
Supreme Court Case No. S173586
California Court of Appeal, 4th Appellate District, Division 1
Case No.: D052181
Superior Court of San Diego Case No. 37-2007-00054316-CU-WM-NC

I am employed in the City of El Cajon, County of San Diego, California. I am over the age eighteen years and not a party to the above-referenced action. My business address is 460 North Magnolia, El Cajon California. On June 25, 2009, I served the following documents:

ANSWER TO PETITION FOR REVIEW

on the parties, through their attorneys of record by placing true copies 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 on June 25, 2009 in El Cajon, California.

Kathleen L. Day

No. S173586

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A. INTRODUCTION

For more than 75 years, all California courts have held that charter cities have a constitutionally protected right (Cal. Const. Art. XI § 5) to determine how to spend local money on local projects, and do not need to comply with state prevailing wage laws (Labor Code § 1720, et. seq.) Having voted to tax themselves and relying on this three-quarter century history of constitutional interpretation, the people of Vista became a charter city in order to get the best value for their taxpayer dollar. By rejecting Petitioner's challenge to this charter provision, the Court of Appeal's opinion fits precisely into this stable stream of judicial opinions. Relying on a lone justice's dissent, however, Petitioner seeks to overturn this three-quarter century line of authority and erode Vista's popularly-supported exercise of local authority.

This case is brought as a facial challenge with no administrative record. As such, it is not an appropriate vehicle for reconsidering this long line of cases. Petitioner would only be able to prevail if there is *no circumstance whatsoever* where a charter city could avoid prevailing wage laws. If the Court were to reconsider the extent of charter cities' authority to control contracting, it would be more productive to select a case that includes an administrative record and a specific project that would provide this Court with other options than the all-or-nothing choice it would face if it heard this facial challenge.

Further, review in this case is inappropriate because there are a number of other issues presented here that the Court of Appeal did not need to consider since it affirmed the judgment. If this Court were to overrule all existing precedent and hold that prevailing wage laws are a matter of statewide concern in all circumstances within the meaning of Article XI, § 5(a), it would still have to decide (1) whether this facial challenge without first seeking relief from the Department of Industrial Welfare was ripe; (2) whether Article XI § 5(b) (giving charter cities plenary authority to determine who to hire and how to compensate them) bars imposition of prevailing wage laws; and (3) whether imposing prevailing wage laws on charter cities constitutes an unfunded mandate under Article XIIIB § 6.

Given the peculiar procedure under which Petitioner brought this challenge and the multitude of issues presented by this case, it is unlikely to be a useful means for reexamining this Court's three-quarter century long constitutional interpretation.

QUESTION PRESENTED:

"Should this Court overturn a well-established line of cases holding a charter city has the authority to determine how to spend local funds for a local public works project under Article XI, § 5(a) of the California Constitution?" *(City of Pasadena v. Charleville* (1932) 215 Cal. 384, 392 (overruled on other grounds related to the hiring of aliens); *Vial v. City of*

San Diego (1981) 122 Cal. App. 3d 346, 348; *Regents of University of California v. Aubry* (1996) 42 Cal. App. 4th 579, 586-592.)

Additional Questions for Review:

If this Court reviews this matter, Respondents request that the following issues be considered:

"Does Article XI, § 5(b), allowing charter cities to choose their employees and levels of public employment compensation, apply to labor costs and decisions over whether to hire apprentices when a charter city hires labor on public works projects?"

"Does Article XIII § 6 require the state to reimburse a charter city for mandates imposed by requiring payment of prevailing wages and requiring the hiring of apprentices for locally funded public works projects using local funds, and does it evidence an intent of the voters to make local control of the expenditure of local tax revenues a matter of statewide concern?"

B. SUMMARY OF FACTS

This is a facial challenge to a charter that allows the City of Vista (Vista) to choose not to require prevailing wages on construction projects for two fire stations, a City Hall, a sports park and theater facilities. The voters of Vista adopted a 1/2-cent general sales tax increase based on a City Council adopted capital construction and financing plan to pay for these improvements.

Petitioner is a labor federation that represents labor unions throughout the State of California. Respondents are the City of Vista, a Charter City located in north San Diego County, and certain city officials.

After much study, the City Council placed a proposal to become a charter city on the June 2007 ballot. (Court of Appeal Joint Appendix ("JA") 1:21- 33.) The June ballot pamphlet contained the proposed charter and arguments in favor of the measure (no arguments were filed against the measure). (JA 1:35-39.) The previously approved local sales tax increase and the City Council capital program were to provide for the basic needs of a growing city. The charter was adopted by sixty-seven percent (67%) of the voters. The main issue of the campaign was the authority to forego "prevailing wages" when a local project is funded from local funds. (JA, 2:314:2-5; 2:340.) After the vote, the City Council adopted an ordinance which requires the payment of "prevailing wages" for public works contracts that include any state or federal funds. (JA 1:291-305, 304; Vista Municipal Code § 3.08.160(A)(1).)

C. PROCEDURAL HISTORY

The State Building Construction and Trades Council of California, AFL-CIO ("Petitioner") sought a writ to invalidate the charter provision and implementing ordinance allowing public works contracts for certain local projects to be let without requiring prevailing wages and apprenticeship programs. Petitioner asserted that PWL is a "statewide

concern" regardless of the type of project or its funding source. Petitioner's facial challenge did not target any specific Vista public works project.

The petition for writ of mandate named the City of Vista, Mayor Morris B. Vance, and City Manager Rita Geldert ("the City"). (JA 1:1-59.) The City demurred to this petition. (JA 1:60-62.) In response, Petitioner filed a first amended petition. (JA 2:245.) Respondents answered, raising a variety of affirmative defenses, including the issues raised now. (JA 2:307.)

Before Respondents answered, Petitioner filed a motion for peremptory writ of mandate. (JA 1:92-94.) There was no discovery or testimony taken. (JA 3:691-692.) Since there was no challenge involving a particular project, the record contains no factual determinations from the Department of Industrial Relations ("DIR"). The record includes a declaration by an officer of Petitioner stating that construction labor markets are regional, but the record contains no evidence of regional impacts caused by charter city local projects paid for with local money. Judge Dahlquist denied the writ based upon the *Vial* decision. (*Vial v. City of San Diego* (1981) 122 Cal. App. 3d 346.) Judgment was entered on December 21, 2007. (JA 3:696-700.) An appeal followed.

On April 28, 2009, the Court of Appeal upheld the denial of the writ. The majority relied upon Article XI, § 5(a) to hold that prevailing wages are not a statewide concern. The court did not reach other arguments

regarding Article XI, § 5(b) and Article XIIIB, § 6 concerning the prohibition of "state mandates." Petitioner did not seek rehearing.

D. ARGUMENT

I. Review is Unnecessary since the Appellate Decision Affirms Existing Law.

This case does not present an opportunity to secure uniformity of decision among California Courts. (California Rules of Court ("CRC"), Rule 8.500(b)(1).) The Court of Appeals decision is consistent with longstanding precedent and correctly identified no significant changes in the Legislature's scheme of regulation since the last time this issue was addressed. (*Regents of University of California v. Aubry* (1996) 42 Cal. App. 4th 579, 586-592.)

a. Constitutional Requirements

In 1879, the Constitution was amended to allow charters for local governance. After making several adjustments, California settled on a strong "home rule" provision with the adoption of Article XI, § (1896). (*See,* Sato, "*Municipal Affairs" in California*, 60 Cal.L.Rev. 1050 (1972).)

In 1914, the Constitution was amended to allow a charter city to make and enforce all laws with respect to "municipal affairs," subject only to the limitations provided in their charters and for all other matters to be controlled by general laws. (Cal. Const. Art. XI § 6.) This allowed charter cities to have broad, residual powers. (*See, City of Long Beach v. Lisenby*

(1917) 175 Cal. 575 (1896 version); *West Coast Advertising Co. v. City and County of San Francisco* (1939) 14 Cal.2d 516.) This authority carried forward into the latest revision of the Constitution in 1970.

This Court has consistently held that one of the most important powers possessed by charter cities is the power to control expenditures. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-171; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 407; *Loop Lumber Co. v. Van Loben Sels* (1916) 173 Cal. 228, 232; *Department of Water & Power of the City of Los Angeles v. Inyo Chemical, Co.* (1940) 16 Cal.2d 744; see also *Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 535.)

The appellate court relied primarily upon guidance from two of this Court's opinions. (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 3d 1, 16 ("*Cal Fed*"); *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404-405 ("*Johnson*").) These cases hold that the "municipal affairs" doctrine does not partition off any particular area of regulation as being solely a "municipal affair" or a "statewide concern." Since the case law has evolved on an *ad hoc* basis, general rules are hard to establish. However, the courts have looked at the external impacts of municipal regulation, the scope of statewide interests and its potential impact on the internal procedures of a charter city. (Sato, *"Municipal Affairs" in California*, 60 Cal.L.Rev. 1052, 1055 (1972); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 Minn. L.

Rev. 643 (1964) .)

b. Prevailing Wages Laws.

The majority opinion reviewed cases analyzing PWL and concluded it was not of "statewide concern." The most obvious reason for the decision is the limited scope of PWL. The majority opinion:

> "The protection which the PWL provides to workers is plainly not so vital a part of the state's overall goal of protecting the state's workers that it applies generally to all construction contracts. Thus, at its most basic level, the dimensions of the policies advanced by the PWL are limited. (*Maj. Op.* p. 24.)

As opposed to other labor protections (minimum wage and worker's compensation), PWL does not have universal scope. (*City of Sacramento v. Industrial Accident Commission of California* (1925) 74 Cal. App. 386; Cal. Const. Art. XIV, Sec. 1.) The Labor Code specifically states that its purpose is the protection of all workers in the state. (Labor Code Sec. 90.5(a); *Maj. Op.* pp. 21-22.) The PWL purpose is "considerably narrower" than protection of all state workers. (*Maj. Op.* p. 22.) "The overall purpose is to protect and benefit employees on public works projects". (*Maj. Op.* p. 22, citing *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458.)

The majority opinion specifically highlighted many exceptions to the general PWL rule. (*Maj. Op.* pp. 23-28; *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950 ("*Long Beach*") (lack of

public funds for a public use project); *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 324 (state tax credits); *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576,1586-1587 (residential care facility); *International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556, 562 (oil drilling in tidelands).) Other recent exceptions include low and moderate income housing projects (Stats. 2002, c. 1938 (S.B. 975 § 2)); non-profit self help housing projects (Stats. 2002, c. 1048, § 1 (S.B. 972)) and volunteer labor (Stats. 2004, c. 330, § 2 (A.B. 2690)).

The Court stated that, despite the Legislature's finding of "statewide concern," it has been willing to make exceptions for numerous public policy reasons. The majority opinion characterized the Legislature's approach as follows:

> [T]he Legislature has been willing to permit not only private agreements which do not comply with the PWL, but also a fairly substantial number of publicly-supported contracts which do not comply with the requirements of the statute. Thus, not only are the dimensions of the policy the PWL seeks to advance limited in that the statute only applies to the public-sector portion of the larger building industry but, even with respect to public-sector construction, application of the policy is fairly elastic. (Maj. Op. pp. 27-28.)

The majority opinion applied the same logic to the apprenticeship programs. (Maj. Op. p. 36.) In contrast, Petitioner relies upon the size of the regional construction market to justify Legislative intrusion into local fiscal affairs. In discussing the exceptions to the PWL, the petition for review states as follows:

> "The Court of Appeal majority reasoned that any statewide interest in prevailing wage law was undermined not just by the limitation of the law to public projects but also by 'exceptions.' Maj. Op. at 30. But there are no exceptions from the law's core requirement that prevailing wages must be paid on public projects. **The prevailing wage law covers *all* public construction projects by *all* state agencies and *all* political subdivisions.** (*Petition for Review*, filed June 8, 2009, at p. 20 ("*Petition*") (emphasis added).)

This statement simply ignores the numerous exceptions established by the Legislature and fails to recognize that courts use a scalpel in adjudicating whether an aspect of PWL is a matter of statewide concern. The Legislature continues to make exceptions, while simultaneously declaring a statewide concern. While some of these exceptions do not involve direct payments of public monies (*i.e.,* tax credits), they all involve direct public benefits to projects dedicated to a public purpose, including this Court's *Long Beach* decision in 2004. An example is the oil and gas lease issue. (*International Brotherhood of Electrical Workers v. Board of Harbor Commissioners* (1977) 68 Cal.App.3d 556, 562.) The public entity

chose to lease the public resource in exchange for payments of royalties using facilities constructed to benefit the public. This method differs little from awarding public works contracts to build the facilities and running it with an independent contractor.

The majority opinion followed existing case law and pointed out the lack of any record that the PWL has increased in scope since 1996. (*Regents of University of California v. Aubry* (1996) 42 Cal. App. 4th 579, 586-592.) This case and others are now a part of the PWL. (*People v. Hallner* (1954) 43 Cal.2d 715, 721; *Gray v. Brunold* (1903) 140 Cal. 615, 621.) The Labor Code is intended to protect all workers in the State. However, the scope of the PWL is far less than the Labor Code's stated, all-inclusive purpose. PWL does not regulate all state construction workers. It even fails to regulate all publicly funded or supported construction workers due to Constitutional and statutory exceptions. There is no split of published authority on these issues.

II. The Majority Opinion More Than Adequately Addresses The Statewide Concern/Municipal Affairs Issue Regarding Prevailing Wage.

The decision of the Court of Appeal, adequately addresses the significance of the issue. It finds no recent changes to PWL that remove the exceptions and finds no factual record to support a change in existing case law.

Essentially, there is no necessity for this Court to hear the matter just to

confirm existing law. (*Bohn v. Better Biscuits* (1938) 26 Cal.App.2d 61).

a. The Majority Opinion Applied The Appropriate Standard.

The majority opinion relied on this Court's cases to reach its result, *i.e., California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1 (*Cal Fed*); *Johnson v. Bradley* (1992) 4 Cal.4th 389 (*Johnson*). In *Cal Fed* and *Johnson*, this Court upheld one local regulation and rejected another involving the City of Los Angeles. *Cal Fed* rejected a city tax and *Johnson* upheld public campaign finance using the same analysis followed by the majority opinion in this case.

First, a court must look to whether there is an actual conflict between the state statute and the charter city's measure. (*Cal Fed* (1991) 54 Cal. 3d at p. 16; *Johnson* (1992) 4 Cal. 4th at p. 400.) Here, the majority opinion found an actual conflict between the prevailing wage law and the City of Vista's charter.

Next, the inquiry is whether the statute in question qualifies as a "statewide concern." (*Johnson* at p. 404; *Cal Fed* at p. 17.) In the *Cal Fed* case, this Court found a statewide concern. *Cal Fed* cited tax uniformity laws and the significant trial court record documenting statewide concerns. Among factors that weighed in favor of finding a statewide concern was a Constitutional provision requiring taxation uniform with other states. Article XIII, § 27 states as follows:

> The Legislature, a majority of the membership of each house concurring, may tax corporations, including state and national banks, and their franchises by any method not prohibited by this Constitution or the Constitution or laws of the United States. **Unless otherwise provided by the Legislature, the tax on state and national banks shall be according to or measured by their net income and shall be in lieu of all other taxes and license fees upon banks or their shares**, except taxes upon real property and vehicle registration and license fees. (emphasis added)

While taxation is considered a significant local concern, this Court cautioned against "compartmentalizing" any specific area of regulation on either side of the equation. (*Cal Fed* at pp. 15-18.) Hence, if the statewide concern is both legally related to the resolution of the concern and narrowly tailored, state law will prevail. (*Johnson* at p. 404, *Cal Fed* at p.17.) *Cal Fed* showed that the scope of the regulation (entire banking industry), the record established in the case (need for uniformity with other states) and the tailoring of the legislation to meet those interests moderated in favor of finding statewide regulation. A strong factual record, specific Constitutional authority and a comprehensive regulatory scheme necessitated supersession of a core municipal affair (taxation).

In *Johnson*, this Court found a conflict, saw a statewide concern, and eventually found that it was not reasonably related to resolve the matter of

statewide concern. (*Johnson* at pp. 410-411.) Elections Code § 85300 was not reasonably related to the statewide concern of "enhancing the integrity of the electoral process." Therefore, it was not necessary to determine whether the statute was narrowly tailored.

Here, the Court of Appeal stopped the analysis at the "statewide concern" stage. The majority stopped at this point because prevailing wage laws and apprenticeship standards were not of sufficient statewide coverage to be considered a "statewide concern." In *Cal Fed*, the state regulations applied to all financial institutions across the state in an effort to achieve the constitutional tax uniformity standard. Here, the prevailing wage laws are not applicable to the private sector, which is by far the largest portion of the construction industry, or to large portions of the public sector as noted above. The record in question is devoid of any evidence showing impact by the small subset of charter city local projects financed with local funds. This subset concerns only charter cities who made the choice not to require prevailing wages, and it leaves out cities such as Los Angeles and San Francisco who voluntarily follow PWL (San Francisco *Charter*, Appendix "A", sec. A7.204(b); Los Angeles *Administrative Code,* Sec. 337.).

This case parallels the 1996 *Aubry* case, not the *Cal Fed* case. There, the University of California constructed housing using non-State appropriated funds. The *Aubry* project was a strictly local need of the University and paid for with University-generated funds. Here, the funds in

question were derived solely from a sales tax override measure approved by Vista voters. They are being spent on local projects such as fire stations, a city hall and local recreational facilities. In both this case and the *Aubry* case, the local projects were paid with local funds. The State had no money and no direct interest in the projects. This contrasts with the financial interests of the state in an entire industry shown in the *Cal Fed* situation. Taxation by the City of Los Angeles in *Aubry* was in direct conflict with the Constitutionally-based statewide scheme of regulations.

b. The trend of regulation of public works projects shows lesser impact from PWL as other protections have come into being.

The petition also claims that changes over time resulted in a stronger PWL. However, the trend is actually in the opposite direction with new exceptions and a shrinking public purpose. PWL was originally intended to combat the practice of certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country "picking" off a contract here and a contract there.' (*Southern Cal. Labor Mgmt. Operating Eng'rs Contract Compliance Comm. v. Aubry* (1997) 54 Cal.App.4th 873, 882, citing *Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 773-774.) The original application was, in part, to ensure that state and local government was provided quality work by reputable contractors. The payment of higher guaranteed wages was one of the first tools used by the Legislature to accomplish this goal. (*City of*

Long Beach v. Dept. of Industrial Relations (2004) 34 Cal. 4th 942, 949; *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.) It has now become an income shifting device and a private training program at government expense.

The state sets wages for particular jobs, based on negotiated union contracts around the state. (Labor Code §§ 1773, 1777.5.) The State imposes those extra costs on the local governments who bid out construction contracts. For general law cities or projects funded by the state, the social policy is assertedly based on a regulatory or fiscal interest of the state. For charter city projects funded by local dollars, the State has neither a monetary nor regulatory purpose. The end result in overturning the Court of Appeal's decision would be to implement the Legislature's social policy without a regulatory or fiscal underpinning.

Over the last fifty years, the Legislature has used other methods to ensure quality public construction. The advent of Uniform Building Codes has led to an increased quality of construction workmanship for both public and private projects. (Health & Safety Code § 17921, *added* Stats 1961 ch. 1844 § 8.) In 1984, the Public Contracts Code established a comprehensive system of contracting procedures meant to accomplish the same goal. (*i.e.,* Public Contracts Code § 1100.7; added Stats 2001 ch. 832 § 1 (SB 974).)[1]

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[1] Under SB 974 (Torklason), the Legislature declared that charter cities were not subject to general laws with regard to the bidding of public works

The payment of higher wages and the apprentice training program are no longer the only methods of providing the government a higher quality work product. The social purpose today is a public sector-only minimum wage program.

Since 1996, the Legislature has not enacted any substantive law with respect to prevailing wages that changes the current balance between state and local authority. (*Regents of University of California v. Aubry* (1996) 42 Cal. App. 4th 579.) The dissent looks to the recent Legislative findings rather than substantive legal changes. (*Dissent* p. 11-13.) The dissent ignores the exceptions and gives significant weight to a single, self-serving declaration. The declaration of the President of the Petitioner ("Baglenorth") indicates that the construction market is a regional market. However, as the majority opinion points out, the Baglenorth declaration does not contain any evidence of the impact of the subset of public construction contracts that are let by charter cities, and that do not require prevailing wages or apprenticeship programs. No statistics show what percentage these contracts are of the general construction or public

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contracts. The legislative findings states as follows: "This bill would further state, with regard to charter cities, that this code applies in the absence of an express exemption or a city charter provision or ordinance that conflicts with that code. The bill would state that these provisions are declaratory of existing law." Charter cities can make themselves exempt from state public bidding rules. (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38.)

construction industry. After comparing the detailed trial court record in the *Cal Fed* case on the regional impact of universal banking regulations to the one declaration in this case, the majority opinion stated:

> Here, in contrast, the factual record presented by SBCTC offers no evidence which suggests the contracting activity of municipalities materially impacts regional labor markets. (Maj. Op. p. 40.)

Both the apprenticeship and prevailing wage programs have survived for decades with charter city fiscal sovereignty. The purpose of the local control provisions under the Constitution is to allow local governments to decide what to do with their own money. It is clear that prevailing wage laws increase the price of public facilities. According to a University of California study, the costs of government funded housing increased by 17.5% in San Francisco and 21.3% in Los Angeles due to prevailing wage requirements. (Dunn, Quigley & Rosenthal, *The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing*, 39 Industrial and Labor Relations Review 141, 144 (October 2005) .) While some charter cites (*e.g.*, Los Angeles & San Francisco, *supra*) have chosen to require PWL in all contracts, other charter cities have not. There is a reason the Constitution gives charter cities the right to choose. **They are deciding how to spend their own money.**

c. The Majority correctly interpreted Art. XI, § 5(a).

The majority opinion, quoting from the *Cal Fed* and *Johnson v.*

Bradley cases, established the standard of review as follows:

> If the state law does not qualify as a matter of statewide concern, the conflicting city measure is a "'municipal affair' and 'beyond the reach of legislative enactment.' "(*Id.* at p. 17.) On the other hand, if the state statute qualifies as a statewide concern, a court must next consider whether it is both reasonably related to resolution of that concern, and (ii) narrowly tailored to limit incursion into legitimate municipal interests. (*Maj. Op.* at p. 14.)

In applying the law to the facts at hand, the majority noted that the main difference between the PWL/Apprenticeship laws and other similar laws is the absence of applicability to the private sector. The majority opinion discussed exceptions to the PWL as follows:

> The major exception to application of the PWL is the statute's obvious exclusion of private construction contracts which do not involve the expenditure of public funds. (See *City of Long Beach v. Department of Industrial Relations, supra*, 34 Cal.4th at p. 954; see also *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 754.) This basic exception to application of the law is, for us, telling. The protection which the PWL provides to workers is plainly not so vital a part of the state's larger overall goal of protecting the state's workers that it applies generally to all construction contracts. Thus, at its most basic level, the dimensions of the policies advanced by the PWL are limited. (pp. 23-24.)

The general tenor of the majority opinion is based on the principles established by this Court and applicable to situations that do not address truly "statewide concerns". The Labor Code was established to address

issues of "all" state workers. The PWL/apprentice requirements do not fit this mold.

1. The Majority opinion correctly points out that *Ericsson* and other cases do not find a "statewide concern"

In addition to the exclusion of purely private construction contracts, the Legislature has also excluded from application of the PWL a number of agreements between public agencies and private entities which involve substantial levels of construction activity and public support. (*State Building & Construction Trades Council of California v. Duncan, supra*, 162 Cal.App.4th at p. 324.)

The Legislature has made exceptions to the general applicability of PWL/Apprenticeship rules for governmental entities that would otherwise be covered. The exceptions include redevelopment agencies (low and moderate income housing), volunteer work, and extra-territorial water and sewer facilities for selected cities to name a few.

Because the majority did not find a "statewide concern", it did not go beyond the first part of the test. This result is consistent with the case law and does not set new precedent as asserted by the dissent. (*See*, *Dissent* at pp. 9-10; *Regents University of California v. Aubry* (1996) 42 Cal. App. 4th 579; *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114.)

In *Ericsson*, the Fourth District held that a contract of the University

of California did not involve a constituionally protected "internal educational affair" and, therefore, did not raise a constitutional question. The contract was for a campus-wide phone system paid with state-appropriated funds and the UC contract with Ericsson specified that prevailing wages were required. The *Ericsson* court stated as follows:

> We hold the university is subject to the public works prevailing wage laws designed to protect private sector employees on public works **which do not involve the internal affairs of the university.** (*Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 117.) (*emphasis added.*)

The holding is limited to projects that do not fall within the University of California's "internal university affairs" constitutional exception. (Cal. Const. Art. IX, § 9.) The dissent interpreted *Ericsson* without considering the "internal university affairs" exception. Neither the University of California nor a charter city can use state appropriated funds without following state laws. The majority's holding is consistent with *Ericsson.*

2. *Aubry* is correctly followed in the Court of Appeal opinion and is applicable to this situation.

The dissent also rejected the logic of the most recent case on point. (Dissent, pp. 9-10; *Regents University of California v. Aubry* (1996) 42 Cal.App. 4th 579.) The dissent seeks to overturn the result in *Aubry* that reaffirmed the right of the University of California to govern its own

"internal university affairs." The *Aubry* case observed that, while the University followed other laws of general application,it was not required to follow PWL. The Court stated as follows:

> "(I)t is well settled that general police power regulations governing private persons and corporations may be applied to the university. [Citations.] **For example, workers' compensation laws applicable to the private sector may be made applicable to the university."** (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788, 789.) (*Regents University of California v. Aubry* (1996) 42 Cal. App. 4th at p. 586.) (citations omitted.) (emphasis added.)

In the area of public contracting, *Aubry* and *Ericsson* support the prevailing view that legislation, to be of statewide concern, must usually be of statewide application. The PWL/Apprenticeship laws are not. As stated above, public contracting laws are subject to local control. When a Charter City bids a contract, it requires worker's compensation coverage and payment of minimum wages, like all employers. However, all employers do not have to pay prevailing wage. Until this threshold is passed, the fiscal sovereignty of a Charter City and the University of California still governs.

Petitioners are attempting to thread a needle with a facial attack that does not include the "internal university affairs" of the University of California. As shown above, cases involving the University of California

and Charter Cities, on this topic, have been interchangeable. The purpose of a facial attack is to address a law that can have no application, no matter the circumstance. If an exception exists that allows an exemption for an entire level of government, it can hardly be considered a "statewide concern" subject to a facial challenge.

The Petition also largely ignores the exceptions that have been written into the law by the Legislature. The Petition considers apprenticeship and PWL as statewide concerns when they are applicable only to certain public sector construction contracts that do not implicate issues that the Legislature has carved out based on its own superseding policy reasons. The PWL is not a truly statewide or even regional, all-encompassing law.

The Petition and the dissent hypothesize that public sector construction contracts are an important enough subset of the regional economy to be considered matters of statewide concern. The logical extension of Petitioner's argument would include core "municipal affairs" such as finance and public contracting. This bold position should be tempered by reviewing other labor laws that are of "statewide concern".

Since 1925, the Courts have held that workman's compensation benefits are a matter of public policy of the state. (*City of Sacramento v. Industrial Accident Commission of California* (1925) 74 Cal. App. 386.) The minimum wage is applicable to public and private sectors. (Const. Art.

XIV, § 1 (1872).)

Collective bargaining also has universal application. The private sector follows the national Labor Relations Act, 29 U.S.C. §§ 151-169, ("NLRA") and the public sector follows the Myers-Milias-Brown Act (Government Code § 3500 *et. seq.)*, which was patterned after the NLRA. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 73, fn. 3.)

Unlike collective bargaining, the Legislature has not made public works contracting a matter of "statewide concern." The Public Contracts Code applies only to charter cities that wish to follow its rules. (Public Contracts Code § 1100.7.) Public contracting is still a "municipal affair." (*Smith v. City of Riverside* (1973) 34 Cal. App. 3d 529.)

Furthermore, the fiscal affairs of a charter city are normally considered a core "municipal affair." (*Rothschild v. Bantel* (1907) 152 Cal. 5; *Cramer v. City of San Diego* (1958) 164 Cal.App.2d 168.) The *Cal Fed* case is a logical exception. As stated above, this Court noted the strong record developed at the trial court showing the need for uniform regulations for the financial industry. The Legislature made significant findings of the need to make banks competitive on a national basis. Finally, the California Constitution required taxing uniformity for banks. (Const. Art. XIII, § 27.)

Here, the petition seeks to take the law beyond its traditional

confines based on illusive externalities. This is not a rule of general application. It regulates in areas that are traditionally considered "municipal affairs" (public contracting/construction, fiscal affairs). It does not apply to many types of construction projects that benefit from public subsidies. It only benefits a small sector of the economy that is a subset of the general construction industry. How big a percentage we do not know because of the lack of a record developed by Petitioner.

One of the primary reasons for a lack of a record is the adverse costs that a true analysis of the impact of prevailing wages would have on charter city projects. While the Petition cites studies showing the "benefits" of PWL, **the bottom line is that PWL raises the costs of local projects.** The "prevailing wage" legislation shifts local funds from the end product to be constructed (*i.e.,* fire station or low income housing) to the workers who construct the facilities. (Dunn, Quigley & Rosenthal, *The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing*, 39 Industrial and Labor Relations Review 141 (October 2005) (impacts of the "prevailing wage" on California low-income housing production). The neutral University of California (Berkeley) study showed that from 1996 to mid-2002, estimates of additional construction costs for "prevailing wage" projects added 9% to 37% to the cost of housing and lowered the number of units built in the California.

The right of charter cities to choose whether to require prevailing

wages is consistent with other similar constitutionally guaranteed sovereign powers. Petitioner urges a reversal of this precedent would have to be based on the regional impact rationale. But the record in this case is devoid of showing that the failure to pay prevailing rates has any adverse impact in the region. In fact, some of the largest Charter Cities require prevailing wages despite the high cost of the program. The bare record in this case does not furnish a basis to reverse decades of precedent. A reversal would take this area of law from its current "bright line" test based on the non-universal scope of the state regulation and replace it with a determination based on undefined regional impacts. The same could be said of any "municipal affair" since every action of local government can be construed to have some regional impacts.

III. Article XI, § 5(b), giving charter cities control over employee compensation, prevents application of prevailing wage laws to charter cities.

Article XI, § 5(b) of the Constitution forbids legislative interference with a Charter City's determinations of whom it will hire or how it will compensate them. (*See, e.g., County of Riverside v. Superior Court,* (2003) 30 Cal.4th 278.) When backed by a sufficiently important state purpose, state laws may impose only minor, procedural intrusions on charter cities' section 5(b) authority. (*People ex rel. Seal Beach Police Officers Association v. City of Seal Beach,* (1984) 36 Cal.3d 591; *Baggett v. Gates,* (1982) 32 Cal.3d 128.)

This Court has already held that a similar structure for the University of California prohibited the Legislature from imposing prevailing wage laws, which were neither minor nor procedural. (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785.) Prevailing wage laws serve essentially as a price floor for public works projects. The Court held that price ceilings imposed on charter cities' authority over employee compensation are impermissible, because the price of employment is one of the most important factors in an employment agreement. (*Sonoma County Organization of Public Employees v. County of Sonoma*, (1979) 23 Cal.3d 296.) Price floors are no different than price ceilings because they restrict a charter city's authority to negotiate with the person the charter city wants to hire. The apprenticeship aspect of prevailing wage laws is even more problematic, because it requires that 1/6 of the workforce on a public works project be people a city might otherwise not hire, with lesser qualifications than other workers.

The fact that prevailing wage laws affect those hired by contract rather than those hired as employees is immaterial. First, the distinction between contractors and employees is blurred when most cities' employees have their wages, hours, and working conditions established in contracts between their collective bargaining units and the city. (Government Code § 3500 et. seq.) Second, the text of the constitutional provision seems to

indicate that cities should determine who works on city-funded projects, without concern for whether they are employed through a letter of hire or via contract. Third, public contracting is a municipal affair in its own right, (*Bishop v. City of San Jose*, (1969) 1 Cal.3d 56), and the price of the contract is also a municipal affair. Respondents request that any review include application of Art. XI, § 5(b).

IV. Constitutional Unfunded Mandate Prohibitions Should Be Considered If Review Takes Place.

Proposition 1A (November 2004) was intended to prevent the Legislature, or any other state agency, from passing unfunded state mandates or higher program costs to local governments. (Cal. Const. Art. XIIIB, § 6.) It passed with 83.7% of the statewide vote.[2] This new constitutional provision is a direct impediment to Legislative intrusion into local affairs. If review is granted, the Court should decide what impact this new constitutional protection of local government has on Petitioner's request.

There are three possible impacts. First, the measure elevates local government fiscal protection to a "statewide concern." Second, it prevents the imposition of PWL/apprentice requirements on charter cities after the effective date of the constitutional amendment. Third, if this Court rules for Petitioner, charter cities will seek reimbursement from the State

[2]*See:* www.sos.ca.gov/elections/elections

Mandates Commission in return for paying prevailing wages.

a. General rules regarding mandates under Proposition 1A.

Under Proposition 1A, the Legislature cannot, without compensating cities for the increased program costs, adopt legislation that mandates the payment of "prevailing wages" by Charter Cities for projects using local funds. (Cal. Const. Art. XIIIB, § 6(a).) According to the Legislative Analyst, it would result in "significant changes to state authority over local finances." [3]

Thus proposition 1A, in addition to requiring the State to pay for new mandates, shows the intent of the People, using their reserved power to protect the fiscal integrity of local governments. The approval of the proposition to protect local fiscal integrity must be seen as intent to keep the municipal fiscal affairs at the highest level of importance. Article XIIIB, § 6(a) states as follows:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior

[3] *Id.*

> to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

This new protection of local government prevents "any state agency" from imposing "new programs" or an "increased level of service" without reimbursement. The first test of this Constitutional amendment demonstrated the breadth of its coverage as follows:

> The subvention requirement of article XIIIB, section 6 applies "[w]henever the Legislature or any state agency mandates a new program or higher level of service . . . ." The all-encompassing "any state agency" language defeats any perceived presumption that the electorate intended to incorporate into article XIIIB, section 6 the exclusion of a particular state agency, e.g., the Regional Water Board, from its subvention requirement. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919.)

A state court declaring that the Legislature has preempted local regulation would trigger the protections of Art. XIIIB, § 6(b). Courts and the Legislature are state agencies. (*Sacramento & San Joaquin Drainage Dist. v. Superior Court* (1925) 196 Cal. 414; *Greater Los Angeles Council on Deafness v. Zolin* (9th Cir. 1987) 812 F.2d 1103, 1110.) Proposition 1A contains only three exceptions. None of them apply in this case. The provisions of the Constitution require the Legislature to fund any mandates imposed by a "state agency." (Cal. Const. Art. XIIIB § 6(b) (1).)

The purpose of section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIIIA and XIIIB impose." (*County of San Diego v. State of California* (1991) 15 Cal.4th 68, 81; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.) The section, even before it was strengthened in November 2004, "was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-85.)

b. The Potential Impact of Art. XIIIB, § 6 on State Action that attempts to impose new costs on Charter Cities.

The election of November 2004 brought a change to the fundamental relationship between state and local government in California. With the adoption of Cal. Const. Art. XIIIB, § 6(b), the State may no longer impose new costs on local government to fund Legislative priorities. Under Petitioner's reasoning, the mandate would be (1) higher costs for public works contracts that are 100% funded by local government to further a Legislative goal, (2) higher salaries, and (3) a training program for private workers.

The determination of a "statewide concern" usually encompasses a discussion of the intent of the Legislature. Here, it is the People under their reserved power.

> (W)here the matter implicates a "municipal affair" and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted. If the subject of the statute fails to qualify as one of statewide concern, then the conflicting charter city measure is a "municipal affair" and "beyond the reach of legislative enactment." (citation omitted) itself is the paradigm of a legislative effort to prescribe a core municipal activity-local taxation-without support originating in identifiable statewide concerns. If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution, then the conflicting charter city measure ceases to be a "municipal affair" pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments. (*Cal Fed* at p. 18.)

Here, the inquiry should be different in two significant respects than *Cal Fed.* First, the fiscal interest protected in the State Constitution is local rather than regional. Second, the approval is by Initiative rather than statute. However, the review by this Court should be the same. Therefore, the question should be whether the Legislature can intrude into an area of identifiable statewide concern (local fiscal affairs) identified in the

November 2004 ballot measure.[4]

Does an action by a State Agency to impose new costs on Charter Cities after November 2004 violate Proposition 1A? If review is granted, the Court should consider whether the actions at the November 2004 ballot make protection of local fiscal affairs a matter of "statewide concern" and not subject to regulation by the Legislature. Without question, paying higher wages costs more. Local public works contracts with prevailing wage and apprenticeship requirements will raise the cost of charter city local programs.

A final question on the impact of Const. Art. XIIIB, § 6(b) is, if this Court imposes PWL and apprenticeship requirements on charter cities, can the cities seek cost reimbursement through the State Mandates process? (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.) The payment of prevailing wages by contractors in local public works projects will raise the cost of local projects. It is requested that the Court consider this issue, as well as the other Constitutional reimbursement/mandate issues, if the Court decides to hear this matter.

V. The Petition is a Facial Attack that Fails to Recognize the Exceptions Written into the Law.

The petition for review is brought as a facial attack instead of a wage claim with an administrative record. (See, *e.g. City of Long Beach v. Dept.*

[4] See: www.sos.ca.gov/elections/elections

of Industrial Relations (2004) 34 Cal. 4th 942, 948-949.) No evidentiary link between any of Vista's local projects and the regional market was produced by Petitioner. The majority opinion correctly noted that, while construction workers may drive great distances to work, there was no evidence that the competitively bid wages paid by some charter cities have any "significant" influence over the regional public and private construction market. (*Cal Fed* at p. 17.) The result of a facial attack is that all local and UC contracts will have to require prevailing wages. If there are any exceptions to the rule, the facial attack does not succeed. (*Pac. Civic Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181)

This raises a question as to the scope of Petitioner's attack. They have not addressed the ability of the University of California to continue to contract for construction of projects that fall under the "internal university affairs" protection of the Constitution. (Cal. Const. Art IX, sec. 9.) It is requested that, if this Court decides to hear this case, they consider the issue of whether the facial attack of Petitioner, that leaves out a challenge to the University of California exception and ignores other Legislative exceptions, can succeed.

Another issue raised by a facial attack is the underlying rationale for the petition. Petitioner seeks a writ to declare that the regional impacts of local projects lead to the application of PWL/apprenticeship rules. If, on a case-by-case basis, some local projects do not have regional impacts,

should those projects be exempt? If so, a case-by-case analysis cannot be jusitfied under a facial attack.

E. CONCLUSION

The Petition for review attacks a decision that is consistent with long-standing precedent. While the question, by this Court's own past pronouncement, is an "important" issue, the majority opinion carefully navigates the record and the law and arrives at the legally compelled conclusion. Even if this Court wishes to revisit the issue of whether PWL is a matter of "statewide concern," the record in this case is not appropriate to do so.

Since this issue was last fully visited by an appellate court in 1996, one cannot say that the Legislative record has significantly changed. The Legislature continues to make exceptions, while declaring otherwise. Governors have vacillated from the Davis Administration that issued the DIR ruling in the *Long Beach* case to the Schwarzenegger Administration that follows *Vial*. (*See, Long Beach* at p. 949; Department of Industrial Relations, *Public Works Case No. 2007-018: Zoo Improvements City of Merced*, dated May 2, 2008, pp. 7-8.)

To date, the application of public sector-only regulations has been generally limited to procedural issues such as the Tort Claims Act (Government Code § 800 *et. seq.*), Brown Act (Government Code § 54950 *et. seq.*), and Public Records Act (Government Code § 6250 *et. seq.*). This

rule would impact local projects using local tax money. These areas are normally only subject to regulations of general applicability. The record in this case does not pass that test.

The Petition has failed to present a sufficient record to prevail. The citizens of this state have declared the importance of "local fiscal affairs." At a time when all levels of governments are struggling for funds, this Petition, and its state mandated costs, could not be more out of step with "statewide concerns". The Petition for Review should be denied.

Dated: June 24, 2009

McDOUGAL, LOVE, ECKIS, SMITH BOEHMER & FOLEY

By: _____
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Dated: June 24, 2009

CITY OF VISTA

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CERTIFICATE OF WORD COUNT

I certify pursuant to CRC § 8.204(c)(1) that City of Vista's Answer to the Petition for Review is proportionally spaced, has a typeface of 13 points or more, and contains 8,336 words, excluding the cover, the tables, signature bloc and this certificate, which is less than permitted by the Rules of Court. Counsel relies on the word count feature of the word processing program used to prepare the brief.

Dated: June 24, 2009

McDOUGAL, LOVE, ECKIS,
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