No. S173586

SUPREME COURT COPY

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

Consol. to Pet. Lim

REPLY IN SUPPORT OF PETITION FOR REVIEW

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ARGUMENT

I. THIS COURT'S REVIEW IS NECESSARY TO RECONSIDER THE HOLDING OF *CHARLEVILLE.*

The City does not contest that *City of Pasadena v. Charleville* (1932) 215 Cal. 384 rested on an outdated *Lochner*-era view of the Legislature's police power to set labor standards. That being so, the City's observation that lower courts continue to follow *Charleville's* holding only reinforces the point that review by this Court is necessary because only this Court has authority to overrule its own holding and thereby clear away a vestige of pre-New Deal jurisprudence.

Nor is it just "a lone justice's dissent" (Answer at 1), that recognizes that a prevailing wage law for private contractors on public work addresses significant extra-municipal concerns. That is also the view of:

- Every other state supreme court to consider this issue after *Charleville. See* Petition at 16-17 (collecting cases). The City does not dispute the uniformity of out-of-state authority on whether prevailing wage laws address concerns of extra-municipal dimension.

- The trial court, which held that "if this Court were free to decide the matter without having to follow [existing precedent] the Court would be inclined to find that (1) the prevailing wage law properly reflects a matter of statewide concern, and (2) the City of Vista is required to follow the prevailing wage law in connection with its pending public projects." JA 699.

- The California Legislature, which made the prevailing wage law applicable to projects awarded by all public bodies and adopted statutory findings and a concurrent resolution expressing its view that the law addresses important statewide concerns. *See* Petition at 1-2, 13. The Legislature's actions are recounted in an *amicus* letter from the Speaker of

the Assembly and Senate President Pro Tempore that asks the Court to hear this case.

- The California Attorney General, who filed an *amicus curiae* brief in the Court of Appeal arguing that the prevailing wage law addresses concerns of extra-municipal dimension, so it should apply to contractors on charter city projects. The Attorney General has also submitted an *amicus* letter in support of the Petition for Review.

- The three Court of Appeal justices in *City of Long Beach v. Department of Industrial Relations* (2003) Cal.Rptr.3d 837, superceded by grant of review, who concluded that because of "changes in the law and the nature of the work force over the past 70 years what may once have been strictly a municipal affair has now become a matter of statewide concern and, therefore, chartered cities must comply with the state prevailing wage law when they engage private sector employees on public works." *Id.* at 853.

- The three Court of Appeal justices in *DLSE v. Ericsson Information Sys.* (1990) 221 Cal.App.3d 114, 123-24, who concluded that, in "contrast to the essentially internal nature of the wages paid to [public] employees, . . . the protection afforded private sector employees working on public projects is a matter of statewide concern. . . ."

- Three California Supreme Court justices in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, who urged that "*City of Pasadena v. Charleville* should . . . be overruled." 1 Cal.3d at 70 (Peters, J., dissenting).

Additionally, while the City praises the decision by the two-justice majority in this case, the majority stated that the "biggest hurdle" to ruling in the SBCTC's favor was this Court's decision in *Charleville* and the lower court decisions following *Charleville*. Maj. Op. at 33. Review by

this Court is necessary to clear away anachronistic precedent and decide the undisputedly important question presented.

II. THIS CASE PRESENTS THE IDEAL VEHICLE FOR DECIDING THE QUESTION PRESENTED.

The City also contends that this case is not appropriate for review because it presents a "facial" challenge without an "administrative record." Answer at 1. This contention makes no sense. This case presents the ideal vehicle for answering the legal question the Court left open in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 947. There are no facts in dispute, and the legal question whether the prevailing wage law applies to private contractors on projects awarded by charter cities was the only issue decided by the Court of Appeal.

By a "facial" challenge, the City apparently means that the question before the Court of Appeal was whether the *subject* of the prevailing wage law is one of extra-municipal dimension, making the law applicable to contractors on charter city projects without the need for an inquiry into whether each particular *project* presents a statewide concern. That was indeed the question before the Court of Appeal as that is the proper inquiry in assessing whether a state statute trumps the conflicting ordinance of a charter city. *See, e.g.*, *California Fed. Sav. & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17 (holding that a statute adopted by the California Legislature will trump the conflicting ordinance of a charter city, even if the city ordinance deals with what otherwise would be a "municipal affair," "[i]f . . . *the subject of the state statute* is one of statewide concern and . . . the statute is reasonably related to its resolution.") (emphasis added); *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 292 ("[T]here are innumerable authorities holding" that State 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.") (emphasis added).

According to the City, the subject of the prevailing wage law is *not* of statewide concern and, therefore, the applicability of the prevailing wage law must be assessed on an *ad hoc*, project-by-project basis, based on whether each particular construction project is a matter of statewide concern. But that contention assumes the City is correct on the very legal issue to be decided. It provides no basis for denying review. For the same reason, the City's claim that deciding this case requires an "administrative record" about a particular construction project does not make sense. Nor does the City's contention that the SBCTC should first seek "relief from the Department of Industrial Welfare (sic)." Answer at 2. There is no such obligation, nor does the City provide authority to the contrary.

The City also errs in claiming a lack of evidence regarding the effect of a prevailing wage law for public projects on the construction labor market. There is a record on this issue and it is uncontradicted: "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 114-115. This same point is made in numerous published academic studies. *See, e.g.*, Rodger Dillon, *Potential Economic Impact: Proposals of the Department of Industrial Relations to Alter*

Methodology Relating to Prevailing Wages 21 (California Senate Office of Research 1996) ("wage reductions would filter down to all construction workers"); Michael Reich, *Prevailing Wage Laws and the California Economy* 4-6 (Inst. of Indus. Relations, Univ. of California, 1996) (explaining that when prevailing wage laws were repealed in other states, "the wage reduction spilled over to *all* construction workers in the state, not just those on publicly financed projects.").

Even if the test were whether the applicability of the prevailing wage law to charter cities alone (as opposed to all public entities) affects the broader labor market, there can be no serious dispute that charter cities are major players in the construction market. The City of Vista alone is engaged in a *$100 million* capital project program. JA 42. There are 114 charter cities in California, including the largest cities in the State, with a collective population exceeding 17 million, and they award many billions of dollars in construction work to outside contractors. Further, more than 300 general law cities could follow Vista's lead by adopting charters that would permit them to avoid the application of the State's prevailing wage law. Because labor markets are regional, and the workers on a city project would not all live in that city (JA 112-113), the Legislature could (and did) reasonably conclude that the coverage of charter cities is necessary to address extra-municipal concerns. *Cf. Baggett v. Gates* (1982) 32 Cal.3d 128, 140 (deferring to Legislature's judgment that labor relations for local law enforcement officers is a matter of extra-municipal concern).

III. THE CITY'S DEFENSE OF THE COURT OF APPEAL MAJORITY OPINION JUST HIGHLIGHTS THE NEED FOR REVIEW.

A. The Answer does not cite a single case that supports the Court of Appeal's reasoning that the prevailing wage law cannot apply to

contractors on charter city projects because the law does not apply to contractors on private projects. As pointed out in the Petition, this Court has held in many other cases that a law need *not* apply universally to address concerns of extra-municipal dimension. *See* Petition at 17-21. The City's failure to address seriously this contrary authority highlights the need for review.

B. The City also is completely wrong in its claim that the California Legislature has backtracked on the requirement that prevailing wages must be paid to construction workers on all government projects. Answer at 15-18. The prevailing wage law applies to every type of public facility, from schools and courthouses to bridges and highways. The prevailing wage law also applies to projects awarded by the State and all its political subdivisions. The Legislature has not provided exceptions for any government projects.

As explained in the Petition, what the City (and the Court of Appeal) mistakenly characterize as retractions of the prevailing wage law actually involve significant *extensions* of the law to cover certain construction by *private* developers that is subsidized by the public. *See* Petition at 20-21. The Legislature's decisions on how far to extend the prevailing wage law to private construction also reflect statewide policy judgments; the City does not and cannot point to any exceptions made by the Legislature for any individual project or individual locality.

C. The City's claim that the prevailing wage law impermissibly impinges on municipal spending authority (Answer at 7) also is at odds with precedent. Most laws that apply to government entities have some fiscal impact, and that has never been the relevant test of their applicability to charter cities. *Cf. Dept. of Water and Power v. Inyo Chemical Co.* (1941) 16 Cal.2d 744, 753-54 ("Though it is true that the payment of funds of a

municipal corporation is a municipal affair because it affects its fiscal policy and management, this does not mean that a state statue concerning a matter of general state concern is not applicable to a charter city."). The Court made clear in *California Federal* that, apart from the specific matters as to which municipalities are granted plenary authority in the Constitution, no subject areas are immune from state regulation if the statute addresses extra-municipal concerns. *California Federal*, 54 Cal.3d at 16-17.[1]

D. Finally, the City errs by equating the issue whether a state law applies to charter cities with the issue whether a state law applies to the Regents of the University of California, and then criticizing the SBCTC for not addressing an issue not presented by this case.

The test for whether a state law applies to the University of California is different from the test for whether a state law applies to charter cities. Under Article IX, section 9 of the California Constitution, "legislation regulating public agency activity not generally applicable to the

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[1/]The City's claim that a prevailing wage law significantly increases the overall costs of government construction projects is at odds with most of the empirical evidence. Higher-wage workers tend to be more skilled, enabling them to get the job done 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 to a few studies to support its position, but those studies are decidedly in the minority. Most studies have *not* found a significant increase in total construction costs. *See* Nooshin Mahalia, *Prevailing Wages and Government Contracting Costs: A Review of the Research* (Economic Policy Institute, 2008), available at www.epi.org/content.cfm/bp215 (last visited July 6, 2009) (summarizing many studies on the impact of prevailing wage laws on construction costs).

The government also receives significant offsetting financial benefits from a prevailing wage law, which the City fails to acknowledge. Workers who receive higher wages will wind up paying more to the government in taxes. Workers who receive employer-paid health benefits also are less likely to require health care for themselves and their families at government expense.

public may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs." *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 789. Thus, the state legislation applicable only to public agencies must meet *two* criteria to be applicable to the University: it must (1) address a matter of statewide concern and (2) not involve an internal university affair. By contrast, legislation that addresses statewide concerns need not meet any other criteria to be applicable to a charter city. *See California Fed.*, 54 Cal.App.3d at 17. Because the tests are different, caselaw about the University is not interchangeable with caselaw about charter cities.

IV. THE COURT SHOULD REJECT THE CITY'S PROPOSED ADDITIONAL QUESTIONS FOR REVIEW.

A. Article XI, §5(b) Has No Bearing On Whether Private Contractors on Charter City Projects Must Comply With The Prevailing Wage Law.

The City argues that, if the Court grants review, the Court should consider whether the application of the prevailing wage law to contractors on charter city projects conflicts with Article XI, §5(b) of the California Constitution. Answer at 26-28. That provision authorizes city charters to provide for the compensation of "the several municipal officers and employees whose compensation is paid by the city" and of the "deputies, clerks and other employees that each shall have."[2] But the prevailing wage

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[2] Article XI, §5(b) provides in pertinent part that "plenary authority is hereby granted, subject only to the restrictions of this article, to provide [in a city charter] or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their

(continued...)

law does not apply to municipal employees, so there is no substantial question for review.

This Court already held in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56 that the prevailing wage law does not apply to public employees, and Labor Code §1771 now states expressly that the prevailing wage law does not apply to public employees. Public employees typically enjoy job protections, regular schedules, health and pension benefits, and paid sick leave and vacations, that would be the envy of construction workers who move from job to job for private contractors. *See Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 (explaining that one of the purposes of the prevailing wage law is to protect private sector employees who lack such benefits and protections).

The City apparently contends that there should be no distinction between a local government's plenary constitutional authority over the compensation, hiring and firing of *its own* employees and its authority regarding *private* employees of outside contractors. Yet that precise distinction is made by the plain language of Article XI, §5(b) itself, which grants charter cities plenary authority over the "compensation," "tenure" and "removal" of their own employees only. The City presents no authority for interpreting Article XI, §5(b) otherwise (and such an interpretation would bring the provision into conflict with the National Labor Relations Act, among many other federal and state laws that apply to private sector employees).

[2/](...continued)
compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

B. Article XIIIB, §6 Has No Bearing on Whether Private Contractors on Charter City Projects Must Comply With The Prevailing Wage Law.

The City also asks the Court to decide whether the prevailing wage law violates Article XIIIB, §6 of the Constitution, which addresses state "mandates" on local governments (not just charter cities). Again there is no substantial issue presented for review. Even if the prevailing wage law met the Article XIIIB, §6 definition of "mandate" (and it does not), the Constitution does not *invalidate* mandates but instead provides for local governments to receive a subvention of state funds to compensate for the mandates. Claims for compensation must be presented first to the Commission on State Mandates. Gov. Code §17552 ("This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for cost mandated by the state as required by Section 6 of Article XIIIB of the California Constitution.").

Section 6 of Article XIIIB states that, subject to certain exceptions, when "the Legislature or any state agency mandates a new program or higher level of service on any local government" (not just charter cities), "the State shall provide a subvention of funds" to cover the costs. This provision is implemented by the Commission on State Mandates, which receives claims from local governments, determines the amount (if any) of subvention funds owed to the local government, and provides a report to the Legislature, so the Legislature can appropriate the funds. *See* Gov. Code §§17500-17700. The Legislature then has a choice between appropriating funds or suspending the mandate. Gov. Code §17581.

Contrary to the City's contention (Answer at 29-31), Proposition 1A (2004) did not change, in any pertinent way, the standard for determining whether local governments are entitled to a subvention of funds. What

Proposition 1A addressed was the State's delay in paying the full subvention claims of counties, cities and special districts. The State had stretched out funding because of budget shortfalls caused in part by the State's decision to reduce the vehicle license fee. Proposition 1A added Article XIIIB, § 6(b) to preclude the Legislature from stretching out payments in the future.

The City asks the Court to decide whether the prevailing wage law imposes a "mandate" on local governments for which they are entitled to receive subvention funds. The answer to that question would be "no," because the prevailing wage law requires outside contractors, not government entities, to pay prevailing wages and hire apprentices; this statutory obligation applies to private contractors even if local governments do not include prevailing wage specifications in their contracts. *See Lusardi*, 1 Cal.4th 987. Even more to the point, the subvention question is not properly before the courts now because it must be presented first to the Commission on State Mandates. Judicial review is then available from Commission decisions. *See* Gov. Code §17559.[3]

[3/] The Commission already has rejected subvention claims based on the prevailing wage law because whether to undertake a construction project, and whether to use a private contractor to perform that work, are discretionary decisions by local governments. *See* SBCTC's Request for Judicial Notice to the Court of Appeal (July 25, 2008), Ex. E; *see also City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783 (statute that increased the costs of exercising the eminent domain power, but did not require local governments to use their eminent domain power, was not a mandate within meaning of Art. XIIIB, §6); *Dept. of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735 (statute that increased school district's costs of implementing a program but did not require district to implement the program was not a mandate within meaning of Art. XIIIB, §6).

In sum, Article XIIIB, §6, does not affect the legal analysis of whether a state law trumps the conflicting ordinance of a charter city. The legislative power of the State is vested in the California Legislature, so a state statute adopted to address concerns of extra-municipal dimension will trump the ordinance of a particular city.

CONCLUSION

For the foregoing reasons and the reasons stated in Petition, the Court should grant review.

Dated: July 6, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify pursuant to CRC 8.204(c)(1) that this Petition for Review is proportionally spaced, has a typeface of 13 points or more, and contains 3,443 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.

Dated: July 6, 2009

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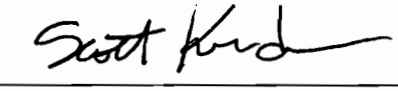
By: 
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PROOF OF SERVICE
Code of Civil Procedure §1013

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 July 6, 2009, I served the following document(s):

REPLY IN SUPPORT OF PETITION FOR REVIEW

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:

By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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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 July 6, 2009, at San Francisco, California.

Jean Perley