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

CITY OF VISTA'S ANSWER BRIEF ON THE MERITS

DAROLD PIEPER (#49702)
City Of Vista
600 Eucalyptus Avenue
Vista, California 92084
Telephone: (760) 639-6119
Facsimile: (760) 639-6120

JAMES P. LOUGH (#91198)
DAVID M. STOTLAND (#206514)
McDougal, Love, Eckis, Boehmer,
Foley & Lough
460 North Magnolia Avenue
El Cajon, CA 92020-1466
Telephone: (619) 440-4444
Facsimile: (619) 440-4907

T. PETER PIERCE (#160408)
Richards Watson & Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071
Telephone: (213) 626-8484
Facsimile: (213) 626-0078

ATTORNEYS FOR RESPONDENTS

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QUESTION PRESENTED

Does prevailing wage law (Labor Code Sec. 1720 *et. seq.*) apply to a charter city when it contracts to construct public works projects with municipal funds?

INTRODUCTION

The Petition is a challenge to the heart of the "Home Rule" provision of the California Constitution. (Cal. Const. Art. XI, §5.) This facial challenge seeks to overturn precedent protecting municipal sovereignty that dates to the original prevailing wage laws. It asserts that charter cities have to fund the extra costs of state-established prevailing wages and training programs in projects that use only their local tax revenue. (Labor Code §§ 1720-1781.)

This Court has adopted standards to determine "municipal affair/statewide concern" disputes. First, a court must see if there is an actual conflict between the state statute and the charter city's measure. Next, the inquiry is whether the statute in question qualifies as a "statewide concern." If a "statewide concern" is determined to exist, then the legislation must be reasonably related to the resolution of the "statewide concern". Finally, if all other tests are met, the court needs to determine whether the statute was narrowly tailored to meet the "statewide concern" without unduly interfering with local concerns.

Without evidence, Petitioner claims adverse extraterritorial impacts from Vista's decision to forego payment of prevailing wages, which supposedly, would cripple the State's prevailing wage and apprenticeship programs ("PWL"). While the Petitioner points to general legislative findings, it fails to show any substantive change in the law since previous judicial declarations on the subject. (*San Francisco Labor Council v. University of California* (1980) 26 Cal.3d 785 ("*San Francisco Labor Council*"); *Regents of University of California v. Aubry* (1996) 42 Cal. App. 4th 579, 586-592 ("*Aubry*").) Petitioner doesn't demonstrate the necessary "changed circumstances" and ignores other legislative priorities, which the Legislature found important enough to carve out in numerous exceptions to PWL. Since the adoption of PWL, other legislation has been added to address the legislative goals of "quality work product" and "skilled workers" with less intrusion upon local government. What Petitioner wishes to be left with is a state mandated wage support and training program paid for by local government from local tax revenues to benefit other parts of the economy—and other units of state and local government—that are exempt from these mandates.

The Legislature has demonstrated that PWL is not a truly "statewide concern" because, while it has attempted to force the PWL on charter cities, it has specifically recognized exempt projects conducted by the University of California. Notwithstanding this Court's decision in *San*

Francisco Labor Council holding that the Constitutional charter-city "municipal affairs" protection is coextensive with the University of California's "educational affairs" protection, the Legislature has tried, by resolution, to apply PWL to charter cities, but expressly exempts the University. If the Legislature truly believed PWL to be a "statewide concern", it would have attempted to apply PWL in a more rational, uniform manner, rather than riddling it with exceptions for pet projects or constituencies.

Even if it is a "statewide concern", PWL would significantly impinge upon charter city fiscal affairs in an unreasonable manner. City funds would be required to pay for a state economic goal that is not implementing typical "statewide concerns" such as national defense, uniform procedural rules or constitutional protections. (*i.e., County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287-289; *People ex. rel. v. City of Seal Beach* (1984) 36 Cal. 3d 591; *Baggett v. Gates* (1982) 32 Cal.3d 128; *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 22.) The Legislature has decided that the private sector and other government priorities are exempt. This type of selective fiscal intrusion is exactly why the state's voters approved a "state mandates" prohibition. (Cal. Const. Art. XIIIB, § 6.)

The citizens of Vista approved a sales tax measure and a charter with the intent of funding much needed public facilities. Without a record

of the impact on construction wages in the state economy, Vista would bear a significant burden of using its own funds to further the State's only real goal, which is to "not undermine the wage base" of certain private construction workers. According to one academic study, this cost to charter cities would be significant in that it would raise project costs by 9%-37%. (*Infra at pp 19, 27.)*

The Petitioner's opening brief ("POB") argues that a declaration of "statewide concern" is sufficient to overcome the core "municipal affairs" of public contracting and basic fiscal integrity. This argument was rejected in *Bishop v. San Jose* (1969) 1 Cal.3d 56, 63. Essentially, Petitioner urges a revision of the standards set out in *Bishop* and followed in *California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 3d 1("*Cal Fed*") and *Johnson v. Bradley* (1992) 4 Cal. 4th 389 ("*Bradley"*). However, a matter of "statewide concern" cannot contain so many deliberate exclusions from its coverage without a change to the method of analysis by this Court.

If the Legislature could occupy a field of regulation by stating it intends to do so, the "municipal affairs" test and the preemption analysis under Article XI, § 7 would be indistinguishable. To do so would strip charter cities of their ability to self-govern in areas of core municipal values and charter cities would become subject to the general laws of the state. The approach of Petitioner would amount to a judicial repeal of Art. XI, §

5(a) since legislative findings standing alone would override charter cities' Constitutional rights.

The right of a charter city to follow its own rules when constructing public improvements has long been recognized. (*Mesmer v. Board of Public Service Com. of City of Los Angeles* (1913) 23 Cal.App. 578.) The methods of public bidding and contracting are left to charter cities. (*See,* Public Contracts Code § 1100.7; *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650; *Piledrivers' Local Union No. 2375 v. City of Santa Monica* (1984) 151 Cal.App.3d 5090. Local control of fiscal affairs is constitutionally protected and should be jealously guarded. (Art. XI, §5; Art. XIIIB, § 6.)

BACKGROUND

1. Statement of Facts

Petitioner is a non-profit labor federation representing trade unions. Respondent Vista is a charter city in northern San Diego County. Mayor Morris Vance and City Manager Rita Geldert are also Respondents.

This suit stems from a charter measure adopted by voters to pay for city facilities in this growing community of 95,000 people. The measure was intended to give Vista flexibility in spending locally approved sales taxes on a $100 million dollar capital improvement program intended for building needed infrastructure, including two needed fire stations in high

risk fire areas. (JA 1:42,169-170.) The proposal was placed on the June 2007 Ballot. (JA 1:21- 33.) The citizens were well aware of the added costs that would be avoided for locally funded construction if the charter passed. (JA 1:38, 42-43.)

The Proposition was adopted by sixty-seven percent of the vote where the main issue of the campaign was the ability to determine contracting rules for locally funded projects including prevailing wages. (JA, 2:314:2-5; 2:340.) The City Council adopted an Ordinance on June 26, 2007, which requires paying "prevailing wages" for public works contracts that involve any state or federal funds. (JA 1:291-305, 304; Vista Municipal Code § 3.08.160(A)(1).)

At the time of the filing of this Petition, the City had planned and has since begun constructing several projects which would traditionally be considered within the realm of "municipal affairs" paid for through a local sales tax. (JA 2:349-350; Request for Judicial Notice ("RJN"), Exhibit "1" (Sales Tax Measure "L").) These projects included a City Hall, two Fire Stations, Park and Amphitheatre. This action was filed on July 11, 2007. (JA 1:1-59.) Petitioner asks for a declaration that Vista Ordinance No. 2007-9 is invalid. (JA 2:260:23-27.)

The Joint Appendix mostly consists of City public records. There are no facts in the record of economic impact of Vista's construction projects on the local region. There are no facts showing the economic

effect of charter cities on regional wages versus other public and private construction projects that do not require prevailing wages. The record does show the voters were well aware of the substantial cost increase in public works projects if prevailing wages and apprenticeship requirements were imposed on local projects. (JA 1:38, 42.)

As its only factual support, Petitioner submitted a declaration from one of its officers. This declaration stated that construction workers sometimes travel great distances for jobs. (JA 1:110-118.) The declaration did not provide any specific information showing any state or regional impact of any of Vista's projects. The declaration did not provide any evidence regarding the effect of charter city, locally-funded public works on the wage rates of the construction industry in general. No economic information is provided showing the impact of charter cities, which have voluntarily decided to pay for prevailing wage programs. The lack of a record differentiates this case from other recent Article XI, Section 5 cases. (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal.4th 942; *Johnson v. Bradley* (1992) 4 Cal.4th 389; *California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 24.) Here, the Writ was sought six days before an answer was filed to limit opportunities to develop a proper record. (JA 1:92-93, 2:307-318.)

2. Procedural History

Petitioner filed its petition for a writ of mandate (Code of Civil Procedure § 1085) on July 11, 2007. (JA 1:1-59.) The City demurred. (JA 1:60-62.) After the filing of the demurrer, Appellant filed a First Amended Petition. (JA 2:245.) This is a facial attack on charter cities intended to impose the prevailing wage and apprenticeship requirements on all locally funded projects.

On October 17, 2007, Respondents answered and raised a variety of affirmative defenses, including Constitutional issues under Article XI, Section 5 and Article XIIIB, Section 6. (JA 2:307-318.) After Petitioner waived oral argument, the writ was denied in its entirety on December 7, 2007. (JA 3:691-692.) In his tentative ruling, Judge Dahlquist cited *Vial v. City of San Diego* (1982) 122 Cal. App. 3d 346. Judgment was entered on December 21, 2007. (JA 3:696-700.) An Amended Notice of Appeal was filed on January 3, 2008. (JA 3:707-711.) The parties filed a Joint Appendix.

The Court of Appeal issued a 2-1 decision on April 23, 2009. Justice Benke wrote the majority opinion, joined by Justice Huffman. She found no basis for changing the current state of the law and noted the lack of breadth of prevailing wage laws as the primary reason why they cannot be considered a matter of "statewide concern." Although, the Labor Code is intended to protect all of the state's workers, prevailing wage laws apply

only to a small portion of the state's construction industry. In its application to the public sector, Justice Benke pointed out many PWL exceptions. Justice Irion dissented. She opined that the prevailing wage laws were a "statewide concern" relying upon a previous Fourth District case involving the University of California. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114 .) This Court granted Petitioner's request for review.

3. Standard of Review.

This is a challenge to Art. XI., §5 authority and the application of state legislation. This Court's review is *de novo* when interpreting state "prevailing wage" laws and the Constitution. The Petitioner has the burden of overcoming the correctness of the judgment by providing an adequate factual record demonstrating reversible error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) This Court must look to the trial court record and not facts raised for the first time in its opening brief. (*See,* POB pp. 7, 19 & 20; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294.)

The case is a facial challenge to Vista and all other charter cities in claiming the California Constitution Art. XI., §5 is no longer applicable to public works contracts for locally funded projects. A facial attack bears a heavy burden:

> Rather, Appellants must demonstrate that the act's

> provisions inevitably impose a present total and fatal conflict with applicable constitutional provisions. (*Pac. Civic Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181)

Petitioner must show that there is **no instance** where a government in California can contract for a public works project, under Labor Code § 1720, without paying state established prevailing wages and participating in state-mandated apprenticeship programs. (*See, Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084-1085.) Petitioner must demonstrate "changed circumstances" which would require this Court to declare PWL a matter of "statewide concern". It must also show that the application to charter cities is reasonable and does not impinge on "municipal affairs" to a significant degree.

ARGUMENT

1. Petitioner's Claim Ignores California's Strong Tradition of Home Rule.

Originally, California made cities "subordinate subdivisions of the State Government under the 1849 Constitution." (*San Francisco v. Canavan* (1872) 42 Cal. 541, 557.) The 1879 Constitution still required all cities to comply with general state laws. (*People v. Hoge* (1880) 55 Cal. 612, 618; *see also* Comment, *Municipal Home Rule: Municipal Market as a Public Purpose* (1923) 11 Cal.L.Rev. 446.) The 1879 Constitution was

similar to the sampling of states cited by Petitioner allowing state laws to supersede any local laws. (POB, p. 21.) [1]

In 1896, the Constitution was amended to strengthen the authority of Home Rule ("Charter") cities. Former Article XI, § 6 exempted all charter cities from laws that interfered with local "municipal affairs." (*Fragley v. Phelan* (1899) 126 Cal. 383; *Ex Parte F.W. Braun* (1903) 141 Cal. 204, 207-213 ("*Braun*").) *Braun* upheld one of the most fundamental elements of "municipal affairs," the power to tax. Subsequent case law reinforced this "fiscal affair" component of Home Rule by also recognizing that one of the core values of managing "fiscal affairs" is the power over expenditure of funds. (*Rothschild v. Bantel* (1907) 152 Cal. 5 (custody of municipal funds); *Los Angeles Gas & Elec. Corp . v. City of Los Angeles* (1922) 188 Cal. 307, 317-318 (constitutional credit prohibitions do not

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[1] Petitioner cites cases from jurisdictions that do not have strong "Home Rule" provisions. (POB, p. 21.) 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). (ALASKA CONST. art. X, §§ 10-11; ARK. CONST. OF 1874, art. XII, §§ 3 & 6; CONN. CONST. art. X, §§ 1-2 ; DEL. CONST. art. IX, § 1; HAW. CONST. art. VIII, §§ 1-2; ILL. CONST. art. VII, § 6(i); Ind. Code Ch. 36-1-3; KY. CONST. pt. II, § 156b; MD. CONST. art. XI-E, §§ 3 & 6; MASS. CONST. art. LXXXIX of Articles of Amendment, §§ 2, 6, 8, & 9; MICH. CONST. art. VII, §§ 22 & 34; MINN. CONST. art. XII, §§ 2, 4; MO. CONST. art. VI, § 19(a); MONT. CONST. art. XI, § 6; NEV. CONST. art. XIII, § 8; N.J. CONST. art. IV, § VII, para. 9 ; N.M. CONST. art. X, § 6, subd.D; N.Y. CONST. art. IX, § 2 ; OHIO CONST. art. XVIII, §§ 18.03 & 18.07; PA. CONST. art. IX, §2; R.I. CONST. art. XIII, § 2; TENN. CONST. art. XI, § 9; WASH. CONST. art. XI, § 10; WYO. CONST. 97-13-001(c); *Niklaus v. Miller* (1954) 159 Neb. 301, 309, 66 N.W.2d 824, 829 (Charter prevails over prevailing wage law for local project).) (*See*, RJN, Exhibits "2"- "26".)

bind charter cities); *In re: Work Uniform Compensation Cases* (2005) 133 Cal.App.4th 328 (expenditures on public employee wages); *Mullins v. Henderson* (1946) 75 Cal.App.2d 117, 129-130 (charter cities may pay private employees to operate a street railway).)

The Home Rule section was amended again in 1914, with the final change coming on June 2, 1970. (Cal. Const. Art. XI, Sec. 5.) California is still the state with the strongest Home Rule tradition.[2] This constitutional provision states, in part, that charter city authority "with respect to municipal affairs shall supersede all laws inconsistent therewith."

Applying the "municipal affairs" rule has been difficult at best since the 1914 amendment. Courts reviewed "municipal affairs" issues on an *ad hoc* basis. This led to confusion over whether there is a unifying standard for determining what a "municipal affair" is. One justice referred to the definition of "municipal affairs" as "loose, indefinable, wild words." (*Braun* (1903) 141 Cal. at p. 214.) This *ad hoc* process is contrary to usual methods of statutory construction. (*See e.g., Estate of Horman* (1971) 5 Cal.3d 62; *Maples v. Kern County Assessment Appeals Bd.* (2002) 103 Cal.App.4th 172,) To determine whether local rules govern a "municipal affair," courts will look at the wisdom of the measure over the passage of time as established by the evidentiary record. (*Bishop v. City of San Jose*

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[2] Sato, *"Municipal Affairs" in California,* 60 Cal.L.Rev. 1055 (1972) ("Sato"); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643 (1964).

(1969) 1 Cal.3d 56.) In *Bishop,* this Court held that the Legislature's intent in adopting general laws could lead courts to the conclusion that the matter is of statewide rather than local concern. However, a Legislative declaration, standing alone, is not determinative of the state/local authority issue. (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 286.)

In the *Bishop* dissent, Justice Peters argued the "inquiry ends once the statewide concern is found, and there is no need to weigh the state and municipal concerns or to determine which should predominate." (*Bishop* at p.66.) Petitioner also wishes to look strictly to state concerns, as expressed solely by the Legislature, to determine whether or not they supersede even strongly founded municipal affairs. Justice Peters' approach is more like the "preemption" test that governs general law cities rather than one that reflects the true constitutional grant of authority given to charter cities. (*See, e.g., Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 708.) Under preemption, the Court looks solely at whether the Legislature has occupied the field of regulation.

The *Bishop* decision is still a great influence on subsequent decisions in the area of "municipal affairs." (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16 ("*Cal Fed*").) This doctrine does not designate any particular area of regulation as being solely a "municipal affair" or a "statewide concern." However, the method of analysis is key. Since the case law is made on an *ad hoc* basis, general

rules are hard to establish. Typically, courts have looked at the external effects of municipal regulation, the scope of statewide interests and the effects on the internal procedures of a charter city. (*See*: Sato, *"Municipal Affairs" in California*, 60 Cal.L.Rev. 1055 (1972) (*"Sato"*); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 Minn. L. Rev. 643 (1964) .) This Court follows *Bishop* to this day and still makes an independent determination using the record before it.

Since *Bishop*, this Court has further refined these standards, primarily in two cases. (*See, Johnson v. Bradley* (1992) 4 Cal.4th 389; *California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1.) *Cal Fed* rejected a city tax and *Bradley* upheld public campaign finance using the same analysis.

First, a court must look to whether there is an actual conflict between the state statute and the charter city's measure. (*Bradley* (1992) 4 Cal.4th at p. 400; *Cal Fed* (1991) 54 Cal.3d at p. 16.) Next, the inquiry is whether the statute in question qualifies as a "statewide concern." (*Bradley* at p. 404; *Cal Fed* at p. 17.) In *Cal Fed*, 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 limits taxation of banks to a state tax based on "net income" and is "in lieu of all other taxes

and license fees."

While taxation is 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 (1) related to the resolution of the concern and (2) narrowly tailored, state law will prevail. (*Bradley* at p. 404, *Cal Fed* at p.17.) In *Cal Fed,* the Legislature regulated the entire banking industry. The record established the need for uniformity with other states. The Legislature had tailored the legislation to meet those interests. A strong factual record, specific Constitutional authority, and a comprehensive regulatory scheme justified supersession of a core municipal affair.

In *Bradley*, this Court found a conflict, saw a statewide concern, but eventually found that Elections Code § 85300 was not reasonably related to the statewide concern of "enhancing the integrity of the electoral process" or preventing conflicts of interest. (*Bradley* at pp. 410-411.) Therefore, it was not necessary to determine whether the statute was narrowly tailored. In *Bradley*, this Court looked at the broad purposes of the Elections Code rather than trying to parse a narrower "goal". (*Bradley* at pp. 406-408.)

To see whether a law is narrowly tailored, the Court must look at the level of intrusion into the "municipal affairs" of a charter city. Here, mandatory higher costs are imposed on locally funded construction. It is not merely a procedural intrusion or a law designed to establish uniform

standards to meet constitutional due process or equal protection minimums. Even assuming a "statewide concern", Petitioner must show PWL is a minimal intrusion into the contracting and fiscal affairs of charter cities by the PWL. (*i.e., County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287-289.) That is not possible since PWL's purpose is to raise wages at local expense. Petitioner did not contest that there are significantly higher costs for "prevailing wages" and "apprenticeship' requirements making it difficult to pass the last two parts of the test. The record shows that cost was a significant factor on the Vista voters' minds. (JA 1:38, 42.)

Since these three cases (*Bishop, Cal Fed,* and *Bradley*) were decided, courts have relied upon this analysis to determine Section 5(a) questions (*i.e., Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 586-592). Courts have also relied upon strong trial court records showing more than legislative pronouncements to find a "statewide concern."

2. PWL is not of "Statewide Concern".

Case law interpreting Article XI, Section 5(a) may be divided into some general patterns. Generally, there are four types of cases: (1) extraterritorial concerns; (2) laws of universal application; (3) intracorporate issues of governance; and (4) need for uniformity to protect

constitutional rights such as due process and equal protection.[3]

a. This Case does not demonstrate any "Substantial Externalities" Implicating a "Statewide Concern".

Case law has shown that a traditional "municipal affair" can turn into a "statewide concern" if it exports "substantial externalities" throughout a region. An example of this is the *Cal Fed* case. (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 3d 1.) In *Cal Fed*, this Court struck down a business license tax that was assessed against savings banks based on gross receipts of the entire annual business activity of the entity. The tax conflicted with a State law that was established to equalize the tax burden on a corporation so that it could compete equally with competitors. (*Id at pp. 7-10.*) This state law expressly preempted local regulation so that all similar corporations had the same tax burden. This Court looked beyond the fact that fiscal affairs (taxation) was a charter city core function because of very serious national implications for all banks and savings banks throughout the State and the United States. This Court reasoned as follows:

> Centralized command over the intrastate tax burden on savings banks thus provides an additional and increasingly important regulatory lever, one of several ways by which government can exert heightened control over conditions

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[3] Generally, these categories were discussed in a 1972 law review article attempting to discern general rules involving "municipal affairs/statewide concern" determinations. (Sato, *"Municipal Affairs" in California*, 60 Cal. L.Rev. 1055 (1972).)

> affecting failing financial health of a critical segment of the state's economy. Aggregate taxes – including those imposed under the Los Angeles and like municipal tax schemes – have thus acquired a regulatory dimension they might not possess under different economic and competitive conditions affecting the savings and loan industry. And because the comprehensive regulation of savings banks takes place almost entirely at state and federal levels, these regulatory aspects of taxation necessarily transend local interests; they become, in other words, a subject of statewide concern. (*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 23.)

The savings bank tax conflicted with the state and federal regulatory interests that governed all savings banks and were meant to bring them into regulatory parity with banks in other states. The strong taxation interest of the charter cities gave way to a uniform law meant to bring California into parity with the rest of the country. The external impacts of taxing a savings bank based on its gross receipts for its entire business activity (not just within the boundaries of Los Angeles) went beyond the normal "municipal affairs" taxation impact. Based on these "extramural" impacts, this Court took the unusual step of striking down this tax regulation. (*Cal Fed*, 54 Cal. 3d, at p. 24.) A cumulative local tax created an unfairness that put California banks, as an industry, at a disadvantage compared to those in the rest of the country. Contrary to PWL, which applies only to certain government projects, these rules applied to charter cities and the private banking industry throughout the state and affected a national market.

Here, the PWL does not address the same type of extraterritorial concerns as the banking regulations. Except for the lack of a "statewide concern" here, this situation is closer to *Bradley's* campaign regulations (*Johnson v. Bradley* (1992) 4 Cal.4th 389.) In *Bradley*, this Court found that the state campaign rules were not reasonably related to resolving a matter of "statewide concern". (*Johnson v. Bradley* at pp. 410-411.) Elections Code § 85300 was not reasonably related to the broad statewide concern of "enhancing the integrity of the electoral process." Although persons from outside of the City contributed to campaigns, the local campaign rules of the City of Los Angeles were not of sufficient extraterritorial scope. The broader purposes of the Election Code "integrity" were not furthered by the statute restricting local campaign rules found in Los Angeles. Similarly, the broader purpose of the Labor Code, to protect all of the workers of the state, is not furthered by PWL. It targets only a small portion of the statewide workforce.

At the trial court, there was no evidence showing PWL impinged only "to a limited extent" on the fiscal and contractual affairs of Vista and other charter cities. (*i.e., County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287-289; *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 789-791.)[4] The only

[4] *Riverside* was a "substantial interference" case involving the Legislature requiring cities to delegate authority to set wages. *San Francisco Labor*

contracts at issue here are ones for local projects using local funds. No evidence was placed in the record at the trial court showing the effect of any charter city's locally funded local projects on the overall wage structure. Absent constitutional and statutory exemptions, public works contracts follow PWL. There was no evidence in the record showing the impact of charter cities versus the impact of other constitutional or legislative exceptions. (*See, infra*, pp. 35-53.) However, all of the extra costs are to be borne by the charter cities. This is a significant intrusion with no evidence of any impact on the statewide construction market in the record. Since the standard set by this Court requires changes over time to transmute a traditional "municipal affair" into a "statewide concern", there is nothing in the trial court record to support such a finding. (*Bishop v. San Jose* (1969) 1 Cal.3d 56, 63.)

Essentially, granting the writ would change the law and make a "statewide concern" out of any legislative intervention into almost any area of municipal governance on extraterritorial grounds. The current rule requires a determination that the extraterritorial impact of charter cities, using their taxing, fiscal and contracting authority, interferes with the state

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Council involved legislation mandating prevailing wages for employees of the University of California. Unlike charter cities, the UC system does not have specific constitutional protections related to the setting of employees wages above the minimum wage. (*Compare*: Cal. Const. Art IX, § 9 & XI, § 5(b).) The *San Francisco Labor Council* decision was based on general language closer to that found in 5(a).

policy to keep wages high. Without a record showing interference here, this Court cannot make a determination that the extraterritorial impacts justify a shift in the division of power between local government and the state.

These same policy decisions were made by the Legislature when creating the state's apprenticeship training program. (*See* Labor Code § 1777.5 et seq.) The private sector and the numerous exceptions do not undermine the program, as currently constituted, and the constitutional exception has not been shown to have a greater extraterritorial impact than the other exceptions.[5]

An officer of Petitioner, Robert Baglenorth, submitted the only declaration in support of the Petition. It contended that construction workers often drive long distances to work. (JA 1:113:1-9.) It also argued that the labor agreements are not restricted to city boundaries and set up

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[5] Petitioner cites various studies that were not introduced at the trial court. (POB, pp. 7, 19 & 20.) These studies extoll the virtues of PWL and contain controversial statements of the "benefits" of PWL. As such, they must be rejected. (Evidence Code § 1341.) However, they have one thing in common with the study prepared by UC Berkeley economists referenced herein. (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).) They show that PWL costs local government more money and can only be considered for this fact of general notoriety and interest. (Evidence Code § 1341.) While Petitioner may argue other benefits, the added costs are not denied and is the primary legislative purpose behind PWL. Even if considered, Petitioner's studies do not address the central question of the impact to PWL goals from charter city local projects versus the impact on PWL goals of exceptions for the private construction industry and other government projects.

regional hourly wages. (JA 1:113:21-27.) The declaration also talks about how the state Director of Industrial Relations sets wage rates on a regional basis. However, nothing was presented in the record to show how charter cities have extraterritorial impacts and frustrate the PWL's legislative purpose. This differs from *Cal Fed* where the trial court record had several days of testimony showing how the local tax would frustrate the state-wide banking regulations. (*See, Cal Fed, supra*, 54 Cal.3d at p. 20, fn. 16.)

The prevailing wage issue can be differentiated from the banking issue in *Cal Fed*. The tax in *Cal Fed* put restrictions on an entire industry. This industry was heavily regulated by the state to ensure uniformity with other states also subject to federal laws. The PWL apply only to state and federally funded public works projects. The private sector is not subject to these restrictions. Local decisions will not conflict with a nationwide industry to the same level as the banking industry in *Cal Fed.*

The PWL does not mirror the other "substantial externality" cases that establish uniform laws or are of a quasi-constitutional nature. There is no due process interest or access to governmental program issues implicated by the PWL. The PWL does not benefit a broad segment of the population. It only benefits the economics of a small segment of the construction industry (those working on some public works projects for state or local governments). The state interest here is not akin to the interest in the state transportation network where there is a physical

connection of "major highways". (*Committee of Seven Thousand v. City of Irvine* (1988) 45 Cal.3d 491, 506; *Wilson v. City of San Bernadino* (1960) 186 Cal.App.2d 603, 611.) In fact, some charter city extraterritoriality has been allowed in the area of economic regulation. A charter city "living wage" ordinance was allowed to cover businesses that contract with the city, but are located outside of its boundaries. (*See, Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157.) All actions of a city have some external effect. This does not by itself make them subject to state control.

Petitioner spends much of its brief discussing the benefits of PWL. (POB, pp. 11-31.) Respondents do not quarrel that these state programs may have economic benefits for a certain segment of the workforce. The quarrel is with imposing their costs on a charter city when so many exceptions to PWL exist. The Legislature has decided there are other issues that are more important than PWL and that is why a number of exceptions have been created. Petitioner has no analysis of the exceptions, such as low and moderate-income housing, which makes up at least twenty percent of the budgets of all redevelopment agencies. (Health & Safety Code § 3334.3.) With so many exceptions and a trial court record devoid of evidence on the point, how can Petitioner show the external impact of Vista on the surrounding labor market? Bringing in after-the-fact studies cannot make the case. Vista's projects are not regional and their impact was never shown to be so. To find extraterritorial impact on this record

would truly be *ad hoc* decision making. The impacts of the charter city local projects and some University of California projects on the surrounding region have not been shown to create a "statewide concern" under this facial attack.

b. State Laws Imposing Significant Economic Costs Must Be Applied to Both Public and Private Sectors

The PWL applies only to select governmental projects. This distinction sets it apart from other laws of universal application that have been applied to charter cities. Professor Sato put the issue into context as follows:

> " First, the state is at least as concerned with the welfare of the people as is a chartered city. Second, a state policy is pervasive when manifested by its applicability to both the public and private sectors. When the state has indicated a deep concern for the welfare of the people by adopting a pervasive policy, such policy ought not to be frustrated by deference to local determination. The converse of this is that state policies directed only to the public sector, absent externalities, lack the strength to override the value of local determination; such policies seek to reach only the relationship between the governmental entity and the individual, and this relationship ought to be determined by the local electorate who has opted for autonomy. (Sato, *"Municipal Affairs" in California*, 60 Cal. L.Rev. 1055 (1972) (footnote omitted); *see also,* Dyson, *Ridding Home Rule of its Local Affairs Problem,* 12 Kan. L. Rev. 367, 381 (1964).)

The economic interest of the State (to keep wages high in a portion of the construction sector) cannot be strong, if the legislation is not of general application. While there are exceptions for issues involving substantial

external impacts (*supra*), the principles suggested by Professor Sato are borne out in cases before this Court. It has been stated:

> "Second, it is well settled that general police power regulations governing private persons and corporations may be applied to the university. (*Regents of University of California v. Superior Court, supra.* 17 Cal.3d 533, 536-537; *City Street Imp. Co. v. Regents* (1908) 153 Cal. 776, 778 *et. seq.* [96 P. 801]; *Estate of Royer* (1899) 123 Cal. 614, 624 [56 P. 461].) 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, 789.)

The worker's compensation system mandated that all employers provide coverage to their employees. (*Sacramento v. Industrial Accident Commission* (1925) 74 Cal.App. at pp. 395.) This rule also applies to the University of California despite a similar Constitutional grant of authority ("internal university affairs"). (Cal. Const. Art. IX, § 9.)

When a rule has only limited application, it should not be considered a matter of "statewide concern" without showing substantial externalities. In an effort to contradict this general rule of universal application, Petitioner has cited case law where larger constitutional or federal concerns outweigh the local "municipal affair" issue. (*i.e., Bowers v. City of San Buena Ventura* (1977) 75 Cal.App.3d 65, 71 (national security and civil calamity); *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 22 (housing discrimination).) Cases cited by Petitioner imposed uniform procedural requirements that did not undermine, in a substantial manner, the authority

of local government or significantly impact the fiscal affairs of charter cities. (*i.e., Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295; *Baggett v. Gates* (1982) 32 Cal.3d 128, 136 -139.) However, none of these cases stand for the proposition that the Legislature can impose significant costs for an economic program that is of limited application yet is intended to serve a large policy purpose (keeping regional wages high).

While as a general rule, the Legislature is given leeway in crafting economic legislation, this rule is not applicable when it significantly impinges on the economic affairs of a constitutionally protected government. Petitioner cites no case where purely economic regulation imposes significant fiscal costs on charter cities while making numerous exceptions for other government projects and the private sector. PWL is not a procedural rule, and does not involve the application of uniform due process-type standards, or an issue of national defense. It is the State using its legislative power to require charter cities to expend extra funds to meet a state goal where the state makes exceptions for goals it deems more important.

For example, collective bargaining is a right that applies to both the public and private sector. This Court has ruled that, while a "municipal affair" includes the right to retain and pay employees, the State could apply collective bargaining rights to personnel as part of a general scheme of

regulation. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276.) This Court cited the legislative policy of protecting the bargaining rights of all employees, public and private, as an indicator of intent to consider collective bargaining a matter of "statewide concern." (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295.) This Court stated:

> The total effect of all this legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state. As such, the legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of statewide concern. Labor relations are of the same statewide concern as workmen's compensation, liability of municipalities for tort, perfecting and filing claims, and the requirement to subscribe to loyalty oaths (citation omitted), all of which have been held to be governed by general law in contravention of local regulation by chartered cities. (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295.)

Whether under the Meyers-Milias-Brown Act (Gov. Code § 3500 et. seq.) or the National Labor Relations Act (29 U.S.C. §§ 151-169; 152(2)), collective bargaining rights have universal application. "Prevailing wage" for construction workers on public works projects using local funds does not have universal application.

This case involves public contracting rules, which do not apply to the private sector. The Legislature recently recognized this distinction. Public Contract Code 1100.7 states as follows:

> This code is the basis of contract between most public entities in this state and their contractors and subcontractors. With regard to charter cities, this code applies in the absence of an express exemption or a city charter provision or ordinance which conflicts with the relevant provision of this code. (Public Contracts Code § 1100.7, added by Stats. 2001, (c. 832 SB 974), § 1; see also, *Howard Contracting Inc. v. G.A. MacDonald Construction Co., Inc.* (1998) 71 Cal. App. 4th 38.)

The Legislature has expressly stated that charter cities are outside the scope of the Public Contract Code regarding manner and method of bidding, awarding, and administering public works contracts throughout the state. A charter city may exempt itself from any or all of these rules. This issue deals directly with the same subject matter as the PWL. Both apply to public works contracts of general law cities. The Public Contract Code ("PCC") was also designed to eliminate fraud, shoddy workmanship, and any problems with contracting by the public sector. (PCC § 100 (added by Stats. 1984, c.42, § 1; amended by Stats. 1990, c.485 (S.B.2290), § 2).) The policy goal of a better work product is the same as PWL, yet charter cities set their own rules.

The Legislature explicitly wrote in the PCC (acknowledging and implicitly approving *Bishop*) that charter cities have the right to exempt themselves from the code's coverage. Like the PWL, the Public Contracts Code is designed to prevent fraud and shoddy workmanship, and like the PWL, charter cities are exempt from its coverage because of those cities' constitutionally protected right to control their own money.

This study was prepared by three economists at UC Berkeley using a federal grant. It is cited for one purpose; to show the added costs of PWL. Added costs are not disputed by Petitioner. While Petitioner claims there are other benefits from PWL, the economic impacts on charter cities are inescapable. The main purpose of PWL is to prop up the construction worker wage base over an entire industry.

Perhaps for that reason, Petitioner moved forward at the trial court level without giving either party a chance to develop a record. (JA 2:307-318, 1:92-93.) If a record had been developed, it would have shown significantly higher costs for charter cities in their locally funded construction projects rather than a regulation that "impinges 'to a limited extent'". (*Baggett v. Gates* (1982) 32 Cal.3d 128, 139.)

The economic regulations here differ from cases that apply state regulations only to government. There are no mandates for the private sector. The Legislature is not protecting a fundamental right belonging to the public. It is not putting uniform procedural requirements in place. Here, it is using local funds to push a state economic priority that it does not apply to the UC system, the private sector or to numerous governmental programs the Legislature feels are more important than PWL.

The lack of application to the private sector prevents PWL from becoming a matter of "statewide concern." Even if a "statewide concern,"

the number of exceptions make it unreasonable to ask charter cities to bear the burden not borne by others. The rule would significantly impinge on the fiscal and contractual integrity of charter cities as a state mandate to meet a purely state goal.

c. Matters of intracorporate structure and process designed to make an institution function are generally deemed a municipal affair.

The majority of situations involving the internal affairs of local government are not considered of "statewide concern". The expansion of the PWL in public works contracts involving purely local expenditures would be a significant intrusion into the intracorporate affairs of local charter cities.

Labor issues are traditonally affairs. In the labor arena, civil service is considered a "municipal affair". (*Cunningham v. Hart* (1947) 80 Cal.App.2d 902.) State law notwithstanding, charter cities need not reimburse their employees for the cost of purchasing, replacing, cleaning, and maintaining required work uniforms. (*In re Work Uniform Cases* (2005) 133 Cal.App.4th 328.) The issue of public employee wages and terms of compensation are matters of local, not statewide, concern. While the state has an interest in funds that are paid by the state, the interests of the state does not extend to funding the internal operation of a charter city. Essentially, there is no distinction between wages paid to a construction worker working on a public works job and the city employee performing

public works tasks on a city payroll. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296.)

Intrusions into the local labor arena have been infrequent and either reflect (1) national interests, or (2) due process protections with minimal overall fiscal impact. One such case involved public employees who were members of the California National Guard. (*Bowers v. City of San Buenaventura* (1986) 75 Cal.App.3d 65.) The law requiring all public employers to pay for a maximum of thirty days pay per year to National Guard members and Army Reservists was found to be of "statewide concern". The purpose of the law was to support "national defense" and prevent "civil calamity, " by encouraging public employees to join the Guard. (Mil. & Vet. Code §§ 128, 146; *Bowers v. City of San Buenaventura* (1986) 75 Cal.App.3d 65, 70.) The intrusion and the cost (maximum thirty days salary) were considered minimal when compared to the general goal of national defense.

Here, the facilities being constructed by Vista are traditionally considered to be "municipal affairs." Parks, hospitals, housing, libraries, and city halls are all considered municipal affairs. (*City of Sacramento v. Southgate Recreation and Park District* (1964) 230 Cal.App.2d 916; *Wiley v. City of Berkeley* (1955) 136 Cal.App.2d 10; *City of Pasadena v. Paine* (1954) 126 Cal.App.2d. 93; *Beard v. City and County of San Francisco* (1947) 79 Cal.App.2d. 753; *Willmon v. Powell* (1928) 91 Cal.App. 1; *Bank*

v. Bell (1923) 62 Cal.App. 320.)

In the construction of these facilities, the competitive bidding process has been considered a municipal affair. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161; *Piledrivers' Local Union No. 2375 v. City of Santa Monica* (1984) 151 Cal.App.3d 509; *Dairy Belle Farms v. Brock* (1950) 97 Cal.App.2d 146; 29 Ops Atty. Gen. 39 (1957).)

The application of state law to the internal fiscal and contracting powers of a charter city only applies to rare instances where uniformity is required to meet some constitutional value or overarching national goal. This case involves two intracorporate issues, fiscal and public contracting. Public contracting has been recognized by the Legislature as an internal "municipal affair". Fiscal affairs are one of the most jealously guarded rights of a charter city and only extraordinary "statewide concerns" have overcome a significant impairment of this self-governing right.

The internal affairs of a charter city are traditionally off-limits to state regulation. Public contracting and the expenditure of local funds fall within this category. Petitioner claims that PWL falls outside of this category because the workers who ultimately receive the extra money or mandated training are private workers. It cites for this assertion two cases that are universal procedural protections rather than a state mandated economic program to set higher wages. (POB, p. 26; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294-295;

Baggett v. Gates (1982) 32 Cal.3d 128, 139 -140.) However, the city interest is governed through a public contract and paid for with public funds. Petitioner states PWL does not prevent a charter city from awarding a contract "in whatever manner they choose." (POB, p. 26.) However, it is seeking a writ that would prohibit a charter city from awarding a contract for a local funded municipal project without state mandated wage and apprenticeship requirements. These are not procedural requirements like *Professional Fire Fighters* or *Baggett.* They change the substance of the contract and make it more expensive in order to meet a state economic goal. Even assuming a "statewide concern", such a mandate is not reasonably related to the state's overall goal of benefit to the state workforce. (Labor Code § 90.5.) Furthermore, it is not narrowly tailored because it forces charter cities to bear the burden of helping maintain the overall wage structure of a region using local tax revenues. The test relates to "municipal affairs" in relation to the state interest, not the interests of those who will receive higher pay courtesy of local taxpayers.

d. PWL is not a basic protection of due process rights.

There have been situations where uniform state standards apply to the internal operations of charter cities. Examples include eminent domain, the judicial system, tort claims, tort liability, property liens, public records and open meetings. (*i.e., Helbach v. City of Long Beach* (1942) 50 Cal.App.2d 242 (tort liability); *Platnauer v. Sacramento County* (1924) 65

Cal.App. 666 (judicial system); *City of Los Angeles v. Koyer* (1920) 48 Cal.App. 720 (eminent domain); Government Code §§ 6252(a), 54951.)

These rules have a common thread. They allow uniformity for basic due process, and they set baseline rules for all citizens to have access to their government. None of the cases are analogous to PWL. PWL benefits a small portion of the public and serves a purely economic purpose.

Overall, the PWL does not fall under any of the four categories discussed herein. It has no more extraterritorial impact than the general construction industry. It does not apply to all sectors of the construction industry and therefore fails the "universal application" test. It interferes with the rights of charter cities to govern their own internal public contracting procedures at a significantly higher expense. Lastly, the PWL is not of benefit to the general population like other general "access to government" legislation. Therefore, the PWL does not qualify as a "statewide concern."

3. <u>Prevailing Wage Laws have not become a "Statewide Concern".</u>

a. Legislative efforts to improve construction work product.

Since PWL's adoption, the Legislature has taken other steps to protect construction workers and ensure that a quality work product has been produced. State Contractor Licensing requirements have added new protections over the same time period. (*e.g.*, *State Contractors' License*

Law, Business & Professions Code § 7000 *et. seq., Stats. 1961, c. 1822, p. 3889,* § 2; amended by Stats. 1984, c. 193, § 1.) These rules are intended to protect all persons in the state from dishonest and incompetent contracting services. (*Hunt Building Corp. v. Bernick* (2000) 79 Cal.App.4th 213.) These increasing standards also require contractors to hire a more competent workforce or face the consequences. Because of its universal application, contractor licensing rules are a "statewide concern." (*Agnew v. Culver City* (1958) 51 Cal.2d 1.) They help raise the quality of the work product and set minimum qualifications for contractors.

In addition, construction standards have improved with Uniform Building Codes. (Health & Safety Code §17921 (originally added by Stats.1961, c. 1844, p. 3920, § 8).) These codes apply to both public and private construction in order to provide uniform building safety standards throughout the state. Building codes are readopted every few years through an iterative process that toughens building standards over time. (Health & Safety Code §17922.) A building code violation can be subject to criminal liability. (*e.g.,* Health & Safety § 17995.)

Civil liability for faulty construction is another area where the Legislature has continued to address the quality of construction work. (*e.g.*, Civil Code § 895 *et. seq.* (construction defect regulations after 2002).) In general, builders are liable if they knew or should have known of a dangerous condition as a result of faulty construction. (*Hale v. Depaoli*

(1948) 33Cal.2d 228, 231.) Liability applies without privity of contract between the builder and the owner. (*Stewart v. Cox* (1961) 55 Cal.2d 857.) In 1975, contributory negligence was abolished. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 824.) This eliminated a defense used by all defendants, including the construction industry, and apportions fault based on degree of culpability. Throughout the years, the financial and legal consequences for shoddy construction have become more severe. These remedies accomplished the health and safety goals of the Legislature without imposing extra costs on or otherwise discriminating against cities.

b. The Legislature has not changed the scope of the PWL.

California courts have consistently held charter city contracting issues to be a "municipal affair" since *Charleville*. (*City of Pasadena v. Charleville* (1932) 215 Cal. 384, 392 (disapproved on other grounds, city hiring of aliens) in *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 585); *see, generally*: *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785, 790; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 316-317; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56; *Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 586-592; *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348; *Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 535.) The Legislature is presumed to have knowledge of this fact. (*Gray v. Brunold* (1903) 140 Cal. 615, 621.)

Petitioner argues a non-binding resolution declares the Legislature's intent to apply prevailing wage laws to charter cities. (POB, p. 12; Senate Concurrent Resolution No. 49, filed September 18, 2003.) This resolution predates this Court's *Long Beach* decision and was presumably intended to influence that case's outcome. (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal. 4th 942.)

However, a concurrent resolution is not binding law. (*See generally, County of Nevada v. MacMillen* 11 Cal.3d 662, 675; *County of Sacramento v. State of California* (1982) 134 Cal.App.3d 428,433, *fn.* 5; *Mesmer v. Board of Public Service Com'rs* (1913) 23 Cal.App. 578, 580-581.) While the Legislature may express its wishes, the concurrent resolution cannot legally be used to declare what is or is not a "municipal affair". (*Bishop v. City of San Jose* (1980) 1 Cal.3d 56, 63.) In order for a bill to become law, the Governor must sign it or the Legislature overrides a veto by a two-thirds vote. (Cal. Const. Art. IV, § 10(a).) At present, the Executive branch does not apply PWL to locally funded charter city projects as they attempted to do prior to *Long Beach.* (RJN, Exhibit "27", Department of Industrial Relations, *Public Works Case No. 2007-018: Zoo Improvements City of Merced*, dated May 2, 2008, pp. 7-8.) Senate Concurrent Resolution No. 49 neither changes the law nor binds the City of Vista.

The operative section controlling the PWL's scope is Labor Code Section 1720. It was first enacted, largely in current form, in 1937. (Stats.

1937, c. 90, p.241, Sec. 1720.) Since the 1981 *Vial* decision, it has been amended four times. (Stats. 1989, c. 278 (A.B. 2483), § 1, eff. August 7, 1989; Stats. 2000, c. 881 (S.B. 1999), § 1; Stats. 2001, c. 938 (S.B. 975), § 2; Stats. 2002, c. 1048 (S.B. 972), § 1.) None of these amendments have expanded the law in any appreciable manner. The first change to 1720 after *Vial* was in 1989. (Stats. 1989, c. 278 (A.B. 2483), § 1.) AB 2843 included public transportation demonstration projects (Streets & Highways Code § 143) under the definition of "public works." The bill addressed situations when a private vendor would construct a freeway on state property and the cost would be borne through tolls collected by the vendor.

AB 2843 did not expand the term "public works" beyond the construction of a state or regional roadway built through a slightly different agreement structure than the typical bid-build model. Labor Code Section 1720 still applied only to projects that were a part of the state roadway system.

S.B. 1999 applied the PWL to certain preconstruction and design work. (Stats. 2000, c. 881 (S.B. 1999), § 1.) It brought in land surveyors and certain inspection work under the definition of "public works". However, it did not change the type of project or expand the type of entity covered. It did determine that the bill was a state mandate and authorized a one million dollar limit to "cover" the costs. (Stats. 2000, c. 881 (S.B. 1999), § 2.)

In 2001, S.B. 975 required public works financed through the California Industrial Development Financing Act to pay prevailing wages. (Stats. 2001, c. (S.B.975) § 1.) However, the bill concurrently made exceptions from PWL for residential housing projects built on private property. Low and moderate income housing projects of redevelopment agencies were also exempted from PWL. Housing funds account for at least 20% of the expenditures of all redevelopment agencies. (Health & Safety Code § 3334.3.)

The most recent bill amending Section 1720 was S.B. 972 passed in 2002. (Stats. 2002, c. 1048 (S.B. 972), § 1.) Continuing the pattern of creating exclusions from the PWL, it exempted "self-help housing projects, operated on a not-for-profit basis as housing for homeless persons, or that provide for housing assistance." (*Ibid*, *Preamble*.) No additional coverage was added by the bill.

In other recent legislation not cited by Petitioner, the Legislature adopted a "volunteer" exception. In this bill, the Legislature created a new Labor Code section that exempted additional projects from the scope of the "public works" – "prevailing wage" definitions. (Stats. 2004, c. 330, § 2 (A.B. 2690).)

In 2005, the Legislature approved an uncodified provision in an obscure "Public Resources" bill, which allowed two cities to extend utility services beyond their corporate boundaries without paying prevailing

wages or meeting apprenticeship requirements. (Stats. 2005, c. 383, § 29 (S.B. 1110).) In 2009, S.B. 1110 appeared to have been modified to allow a city with a "disadvantaged community" designation to be exempt from PWL. (Stats. 2009, ch. 7, §§ 1(c) & 20 (S.B. X2 9).)

S.B. X2 9 allowed all charter cities with disadvantaged areas to contract outside of their municipal boundaries for extensions of water services without being subject to PWL. (Stats. 2009, ch. 7, §§ 1(c) & 20 (S.B. 9 X2).) This legislation creates an exception that normally does not apply to extraterritorial utility services. For example, a city entering into a joint powers agreement to build a regional sewage treatment plant was considered a statewide concern because of its extraterritorial impacts. (*Santa Clara v. Von Resfeld* (1970) 3 Cal.3d 239, 246-248.) Cities that pass initiatives that interfere with the state highway system are also subject to state control. (*Committee of Seven Thousand v. City of Irvine* (1988) 45 Cal.3d 491, 506.) Like extraterritorial utility services or the state highway system, by their physical nature, they require uniform regulation.

c. The legislation cited by Petitioner does not demonstrate a "statewide concern".

Petitioner's opening brief points to legislation that it claims makes the PWL a "statewide concern." However, the bills mostly relate to matters that are either not applicable to charter cities or govern state funded projects. The first bill mentioned is for projects funded by the "The Safe,

Reliable High-Speed Passenger Train Bond Act for the 21st Century." (POB, p. 9; Stats. 2003, ch. 851, § 1 (A.B. 1506).) This Bill requires a labor compliance program for projects using bond funds on this statewide transportation measure. This type of program has never been considered a "municipal affair" because of its regional scope. (*Committee of Seven Thousand v. City of Irvine* (1988) 45 Cal.3d 491 (fees for the construction of part of a regional transportation network, POB, pp. 2, 14 & 27-28); *City of San Mateo v. Railroad Commission* (1937) 9 Cal.2d 1; *compare, Mullins v. Henderson* (1946) 75 Cal.App.2d 117 (street railway within city boundaries a municipal affair).) The Bill's preamble includes language showing there are "certain exceptions" to PWL. (Stats. 2003, ch. 851, *preamble* (A.B. 1506).) The legislative findings state that the purpose of PWL is that public works projects "should never undermine the wage base of a community." (Stats. 2003, ch. 851, Section 1(a)(2).) It is also intended "to attract the most skilled workers" and "ensure the highest quality is performed on those projects." (Stats. 2003, ch. 851, Section 1(a)(1).)

The "Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002" sets conditions for disbursing state water bond proceeds. (AOB, p. 9; Stats. 2002, ch. 892, § 1 (S.B. 278).) The bill required labor compliance programs for recipients of the funds. The same three reasons were given for the program requirements: (1) "to attract the most skilled workers"; (2) "ensure the highest quality is performed on those

projects"; and (3) to not "undermine the wage base". (Stats. 2002, ch. 892, §1(a)(1)& (2) (S.B. 278).)

Finally, the "Kindergarten-University Public Education Facilities Bond Act of 2004" is cited as a declaration that PWL "is a matter of statewide concern." (POB, p. 9; Stats. 2002, ch. 868, § 1 (A.B. 1506).) This bill applies to the campuses of the California State University and local school districts which are subdivisions of the state. These colleges are not part of the University of California system and cannot take advantage of the University's constitutional "educational affairs" protection. (*Regents of the University of California v. Aubry* (1996) 42 Cal.App.4th 579, 586-592.) In fact, the bill recognizes the constitutional exception for the University of California as follows:

> (e) It is the further intent of the Legislature **to preserve the constitutional autonomy of the University of California**, as described in Section 9 of Article IX of the California Constitution, by providing that this act apply to that university only to the extent that the university chooses to use funds described in the act. (Stats. 2002, ch. 868, § 1(e) (A.B. 1506) (*emphasis added*).)

The Legislature saw fit to recognize the University of California's ability to waive PWL as its constitutional right. Yet one year later, the Legislature passes Senate Concurrent Resolution 49 finding PWL is a "statewide concern" as applied to charter cities only, ignoring that same constitution. (POB, p. 12; Senate Concurrent Resolution No. 49, filed Secy. of State

September 18, 2003.) This is a contradiction that is hard to escape in a facial challenge.

Since *Aubry*, the Legislature has adopted at least six bills regarding the scope of "prevailing wages". Rather than expanding the PWL's scope, these bills have repeatedly reduced the scope of the PWL. The Legislature continues to make exceptions to the PWL for various public policy reasons. Volunteer workers, public utility projects, and housing projects have also been exempted during the time period in which The UC system's constitutional exemption was specifically protected by the Legislature. However, Petitioner claims the opposite trend. Since 1981, except for state funded projects, no public projects have been added to the PWL, nor have any private-sector projects.

Given this recent history, great weight must be given to the actions of the Legislature rather than their pronouncements. (*Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 63.) Recently, the Legislature uses the same three reasons for turning PWL into a "statewide concern". (POB, pp. 15-16.) The findings state that the purpose of PWL is that public works projects "should never undermine the wage base of a community." (*e.g.* Stats. 2003, ch. 851, Section 1(a)(2) (A.B. 1506).) This finding is consistent with previous understandings of the purpose of the prevailing wage laws. (*O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458.) It is also intended "to attract the most skilled workers" and "ensure

the highest quality is performed on those projects." (Stats. 2003, ch. 851, § 1(a)(1).)

On the issues of "skilled workers" and "high quality" work, there have been numerous other legislative enactments over the years that have satisfied these purposes. None were discussed in the Petitioner's brief. For example, state contractor licensing, uniform building codes, and tort reform (*e.g.,* comparative fault and strict products liability) meet these goals for all construction, not just PWL projects. These changes in the law post-date PWL and should be considered when the Court looks at changes in conditions over time. (*See,* Argument 3 (a) & (b), above.) The goals of a high-level, skilled work force and quality of construction are also met through the public contracting process, which is a "municipal affair". In other words, there are many more broad-based protections of public and private projects in place to ensure that contractors and workers produce quality work than there were in 1931. Petitioner ignores all of these developments in its opening brief.

What we are left with is a program intended to prevent the "wage base of a community" from being lowered. In other words, Petitioner's argument is that the the Legislature's determination to raise wages for construction workers on some public projects, but not for the private construction industry, the University of California, or numerous other public projects, is a "statewide concern." This essentially amounts to a

targeted wage support program that lacks universal application. (*Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 588.) The application of PWL to charter cities, when using their own funds, cannot be considered a "statewide concern" in that it intrudes into the inner workings of municipal governance of a charter city. PWL does not apply to the private sector, unlike minimum wage laws, and the Legislature essentially uses an unfunded mandate to require this program be implemented by charter cities.

Petitioner also fails to mention the constitutional exception applicable to the University of California even though it has argued in the past for application of PWL to the UC system. (*See, Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 585, fn. 3 .) A recent legislative finding indicates that this effort to make PWL a "statewide concern" applies to one constitutionally protected class (charter cities), but not to another (University of California). (*See* Stats. 2002, ch. 868, § 1(e) (A.B. 1506).) This bill specifically recognizes the University of California is exempt from PWL for the purpose of "preserving" the constitutional integrity of the University. It is difficult to see a "statewide concern" can be targeted at one constitutional grant of authority but not another. This petition would have the effect of eliminating the protections of Article XI, § 5(a). At the same time, the University of California would keep their exemption under Article IX, § 9.

A rule requiring charter cities to follow the PWL, while exempting the University of California, would not be reasonable, much less narrowly tailored to an important state purpose. Ensuring that wages are not depressed is arguably an important state interest. However, the law isn't narrowly tailored because it applies to small contracts of one thousand dollars or greater. (Labor Code § 1720.) It poses undue fiscal and administrative burdens on charter cities. It isn't the least intrusive means because it conscripts local government but not the private sector. It would apply to charter cities, but not to the UC, and it's riddled with exceptions.

Since *Charleville*, it has been presumed that the construction placed on the scope of the prevailing wage law is limited in its application by the Constitution. Charter cities and the University of California are constitutionally excluded from PWL. The Legislature presumably has knowledge of existing judicial construction of these statutes. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.) Despite this presumed knowledge, the Legislature made no substantive changes indicating intent to amend the PWL to make PWL a truly "statewide" concern. In *Aubry*, the Court reasoned that the PWL was not of sufficient scope to be considered a "statewide concern":

> The prevailing wage law is not universally applied. Chartered cities are exempt from it, at least in areas not involving statewide concern. While such cities may choose to pay prevailing wages in such situations, they are free to balance the competing policies of paying prevailing wages

> against those of serving public needs at lower costs by not doing so. Likewise, UC may further its core educational function by not paying prevailing wages, as in this case. (*Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 590-591

The *Aubry* court also relied on this Court's precedent to find that PWL is not universally applied. This Court, in *San Francisco Labor Council,* stated:

> Prevailing wage regulations are substantially different from minimum wage statutes. A prevailing wage is in the nature of an average wage, and private persons and corporations will pay both above and below the average. Although, as petitioners point out, the Legislature and some local agencies have adopted statutes and ordinances requiring payment of prevailing wages by some governmental agencies and some of their contractors, a number of governmental agencies are not required to pay the prevailing wage. (*Bishop v. San Jose* (1969) 1 Cal.3d 56, 63 et seq.) There is no showing that prevailing wage requirements have been made generally applicable to private persons and corporations. (*San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785, 790.)

The recent legislative history favors retaining the current state of the law. There are no laws which indicate a substantive attempt to change the nature of the PWL. Petitioner's attempts to bootstrap PWL using the constitutional minimum wage requirement are unavailing. (POB pp. 13, 34.) PWL is not a minimum wage but an average wage intended to raise the bar. Raising the bar, in this case, would be at local taxpayers' expense without their permission.

d. Judicial decisions have resisted efforts to expand PWL.

The PWL is part of the Labor Code, which is meant to protect all public and private workers in the state. (Labor Code § 90.5.) It protects employers who follow the law and employees from substandard conditions. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) However, PWL is more limited in scope and other judicial efforts to expand it have not been successful. Courts have prevented the extension of prevailing wage and apprenticeship to situations where the public and private sectors work together outside of the normal bid-build situation.

For example, the Petitioner sought expansion of PWL to cover acquisition and rehabilitation of an apartment complex using financing received from a redevelopment agency and state low income tax credits. (*State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289 ("*Duncan*").) SBCTCC sought an extension claiming a rule of liberal construction be afforded PWL. In *Duncan,* Petitioner argued that failing to apply PWL would frustrate the law's purpose because the project would not exist without the public funding. However, the court held that the Legislature was entitled to make the policy call to make exemptions. (*Duncan,* 162 Cal.App.4th at p. 324.) The state chose this exception to further another policy goal it ranked higher, producing low-income housing. (*Duncan,* 162 Cal.App.4th at p. 297.)

In another attempt to extend PWL, Riverside County wanted to

encourage the establishment of a private residential care facility for disturbed and abused minors. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.) The county gave land to the facility for a twenty-year period in exchange for the facility. The county also placed children in the facility and paid the private owner for their care. The suit intended to impose PWL on the facility, arguing that the public funding made the project a "public work." The Court refused to extend the law despite the public funding.

Another case upholding an exception for a publically funded project involved an oil and gas lease (*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. Despite the end result, the Court construed the lease method as not being a "public work" covered by PWL.

The case law shows that private projects with substantial public financial support do not have to comply with PWL. The cited projects differ little from the traditional bid-build scenario. In addition to the exclusion of the private sector in a way that sets PWL apart from minimum wage, worker's compensation and other general worker protections, the policy is "fairly elastic" when it comes to public sector construction.

This Court has prevented expansion of PWL to University of California employees. (*San Francisco Labor Council v. University of California* (1980) 26 Cal.3d 785, 790.) This Court held that unlike a minimum wage statute, which applies to both public and private employers, a prevailing wage statute is not generally applicable to private employers. (*Id.*) This Court found no difference between various types of exempt governments citing an earlier decision, *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296. (*Id.*)

This protection was applied to the UC even though Article IX, § 9(a) specifically provides that the Legislature may establish public works bidding rules for the University. In addition, the UC system does not have specific language in Article IX, § 9 protecting its ability to set compensation for its employees like Article XI, § 5(b), which specifically gives charter cities power to hire and compensate its employees. (*Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296.) In fact, the Legislature has control over appropriations to pay UC employees and cannot be compelled to make appropriations. (*California State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 233; *California State Employees' Assn. v. State of California* (1973) 32 Cal.App.3d 103,109.)

The differences in the language between the UC and charter city constitutional provisions set up an interesting comparison. Charter cities

can set their own bidding rules, but the UC system is subject to state control on its procedures. (*People v. McCune* (1875) 57 Cal. 153; *People v. Lynch* (1875) 51 Cal. 15; *Smith v. City of Riverside* (1973) 34 Cal.App.3d 529; Art. IX, § 9(a).) In approving the 1970 amendment to Article 5, the voters confirmed the charter city exemption as spelled out in *Bishop* the year before. Article XI, §5(b), adopted in 1970, added specific language protecting charter city sovereignty over employee compensation. Yet, both the UC system and charter cities are given the same protections against application of PWL to their employees. If the protection is stripped from the contracting power of charter cities, there is no specific protection of UC sovereignty over compensation of its employees like Article XI, §5(b). They would be subject to the same challenge as this case if the Legislature enacts another prevailing wage bill for UC employees. (*San Francisco Labor Council v. University of California* (1980) 26 Cal.3d 785.)

In *Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 590-591*)*, the Petitioner argued in an amicus brief that the University of California is subject to PWL for public works contracts when the University used its own funds. This action raises the same issues as *Aubry*. Does a constitutionally protected government have the right to determine the conditions it imposes through its public works projects? Since the decision in *Aubry*, Petitioner makes the same arguments here and ignores the result of the UC case.

Excluding the University of California, while including charter cities, leads to three possible outcomes. First, PWL, if selectively enforced, is not of sufficient scope to be considered a "statewide concern". Second, the PWL is not "reasonably related" to a statewide policy goal when it excludes one and includes another. Third, PWL is not "narrowly tailored" to meet its purpose if it applies to one constitutional government but not another.

3. State Mandate Reform Recognizes the Importance of Local Control of Funds.

With the adoption of Cal. Const. Art. XIIIB, § 6(b) ("Proposition 1A"), the State may no longer impose new costs on local government to fund Legislative priorities. The purpose of this initiative was to recognize the importance of local control and slow down or stop the Legislature from passing on its legislative priorities to local government without funding the mandate. As the initiative process has put more pressure on the State to fund its priorities, the State has routinely passed its fiscal and policy responsibilities to local government. The Legislative Analyst explained the proposed mandate changes under the Initiative, in part, as follows:

> **State Mandates**
>
> Specifically, beginning July 1, 2005, the measure requires the state to either fully fund each mandate affecting cities, counties, and special districts or suspend the mandate requirements for the fiscal year. ...

> The measure also appears to expand the circumstances under which the state would be responsible for reimbursing cities, counties, and special districts for carrying out new state requirements. Specifically, the measure defines as a mandate state actions that transfer to local governments financial responsibility for a required program for which the state previously had complete or partial financial responsibility. (http://vote2004.sos.ca.gov/voterguide/propositions/prop1a-analysis.htm)

The People, under their reserved power, have protected local governments from the "mandates" of cost increasing programs forced on them by the state. By an 83.7% vote, this Initiative was approved to act as a spending control on the California Legislature. (http://vote2004.sos.ca.gov/voterguide/propositions/prop1a.htm)

This action should be viewed as state policy with more weight than a non-binding resolution. It should be considered as a brake on legislative intrusion into an area of "municipal affairs" when the Legislature votes to spend local tax dollars for its own priorities.

Petitioner argues that the Proposition 1A process would not stop the implementation of a mandate, but would allow for reimbursement. (POB, pp. 40-42.) If it is viewed in this manner, all charter cities will be able to file claims for extra project costs incurred if this writ is granted. While the Court did not grant review of this question, nothing would prevent a charter city from filing a claim with the State Mandates Commission. Did the

Legislature intend to apply PWL to charter cities if the Legislature has to pay for the added costs?

This new constitutional measure must also be viewed as an important state policy to protect local revenues and local control over expenditure of funds. As a constitutional protection, this new policy should be given great weight when determining whether an economic regulation should be considered a "statewide concern".

CONCLUSION

May a charter city constitutionally contract for the construction of local public works projects without regard to the general law of prevailing wages? No.

Petitioner has brought an action which, to be successful, requires this Court to completely re-write its approach to "municipal affairs." Looking at substantive changes to PWL, legislative history does not help Petitioner. The law is not of universal application and the Legislature continues to carve out exceptions to meet its other priorities. Relying on Legislative pronouncements, rather than concrete legislation, would essentially reduce 'municipal affairs" from Article XI, § 5, to a "preemption" test from Article XI, § 7, applicable to all local governments. "Municipal affairs" could be superseded by laws of limited scope that pass on state mandated costs based on legislative policies not important enough for the Legislature to fund. In the meantime, a similar constitutional protection of the University of

California would be kept in place.

Even if this Court finds changed circumstances and determines PWL is a "statewide concern", the application to charter cities is not reasonably related to its stated goal of raising construction wages and providing a quality work product. It is unreasonable to extend PWL to charter cities while exempting the University of California and numerous other obviously more important legislative priorities. As a state mandated cost, it is *per se* unreasonable to allow the Legislature to extend the cost without providing a funding source to pay for its regulation.

Prevailing Wage Law is not narrowly tailored to meet its goals. It expends local government funds without a method for them to recover their costs. This is not a narrow impairment of a procedural policy with constitutional underpinnings. It is a substantive cost to local government that will raise the cost of every locally funded charter city construction project from this point forward. This request comes at a time when attempts to expand PWL into other areas have failed. It also comes at a time when the Legislature cannot balance its own books and looks to local government to close the gap. As this Court has stated:

> " [W]e can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions." (*Bradley* (1992) 4 Cal.4th at p. 407.)

This Court would have to take the far reaching step of declaring PWL a

"statewide concern" without a real substantive change in the law. It would impose an intrusive set of costly conditions to be paid with local tax money. Granting the writ would require a change in the way Article XI, § 5(a) is interpreted rather than any change in circumstances presented by the record.

The City of Vista, Mayor Morris Vance, and City Manager Rita Geldert respectfully request that this Court affirm the denial of Petitioner's writ of mandamus and uphold nearly a century of precedent supporting charter cities' constitutionally-protected rights to control how they spend local funds on local projects.

Dated: 11/30/09

McDOUGAL, LOVE, ECKIS, SMITH BOEHMER, FOLEY & LOUGH

By: _____
James P. Lough

CERTIFICATE OF WORD COUNT

I certify pursuant to CRC § 8.204(c)(1) that City of Vista's Respondent Brief is proportionally spaced, has a typeface of 13 points or more, and contains 13,250 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: November 29, 2009

McDOUGAL, LOVE, ECKIS, SMITH
BOEHMER, FOLEY & LOUGH

By: _____
James. P. Lough
Attorneys for Respondent,
City of Vista,
Mayor Morris Vance, and
City Manager, Rita Geldert.

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 December 2, 2009, I served the following documents:

CITY OF VISTA'S ANSWER BRIEF ON THE MERITS

RESPONDENTS' REQUEST FOR JUDICIAL NOTICE OF OTHER STATES CONSTITUTIONAL PROVISIONS AND CODES

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

BY OVERNIGHT DELIVERY. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 2, 2009 in El Cajon, California.

Kathleen L. Day

SERVICE LIST

Stephen P. Berzon
Scott A. Kronland
Peter E. Leckman
ALTSHULER BERZON, LLP
177 Post Street, Ste. 300
San Francisco, CA 94108
Attorneys for Appellant

Darold Pieper, City Attorney
CITY OF VISTA
600 Eucalyptus Avenue, Bldg. A
Vista, CA 92084
Attorneys for Respondent

T. Peter Pierce
RICHARDS WATSON & GERSHON
355 South Grand Avenue,
40th Floor
Los Angeles, CA 90071
Attorneys for Respondent

Edmund G. Brown, Jr.,
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Ste 125
Sacramento, CA 95814
Amicus Curiae:
State of California

John J. Davis, Jr.
DAVIS, COWELL & BOWE, LLP
595 Market Street, Ste. 1400
San Francisco, CA 94105
Amicus Curiae:
Contractors' Association

Sandra Rae Benson
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway #200
Alameda, CA 94501
Amicus Curiae:
Northern California Basic Crafts Alliance

Robert Fried
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
5776 Stoneridge Mall Road #200
Pleasanton, CA 94588
Amicus Curiae:
Associated Builders & Contractors Association

Office of the Clerk
CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE
Symphony Towers
750 B Street, Ste. 300
San Diego, CA 92101

Office of the Clerk
San Diego Superior Court
North County Regional Center
325 South Melrose Drive
Vista, CA 92081