S253574

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,

Plaintiffs and Appellants,

v.

FONSECA MCELROY GRINDING CO., INC., ET AL.,

Defendants and Respondents.

AFTER A DECISION BY THE NINTH CIRCUIT COURT
OF APPEALS
CASE NO. 17-15221

RESPONDENTS' ANSWER BRIEF ON THE MERITS

Paul. V. Simpson, State Bar No. 83878
Sarah E. Lucas, State Bar No. 148713
Simpson, Garrity, Innes & Jacuzzi, P.C.
601 Gateway Boulevard, Ste. 950
South San Francisco, California 94080
Telephone: (650) 615-4860
Facsimile: (650) 615-4861
E-mail: psimpson@sgijlaw.com

Attorneys for Defendants/Respondents
FONSECA MCELROY GRINDING,
CO., INC. and GRANITE ROCK
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601 Gateway Boulevard, Ste. 950
South San Francisco, California 94080
Telephone: (650) 615-4860
Facsimile: (650) 615-4861
E-mail: psimpson@sgijlaw.com

Attorneys for Defendants/Respondents
FONSECA MCELROY GRINDING,
CO., INC. and GRANITE ROCK
COMPANY

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I. ISSUE CERTIFIED FOR REVIEW

This Court has granted the request of the Ninth Circuit Court of Appeals, made pursuant to California Rule of Court 8.548, to decide the following question of California law:

Is operating engineers' offsite "mobilization work" – including the transportation to and from a public works site of roadwork grinding equipment – performed "in the execution of [a] contract for public work," Cal. Lab. Code §1772, such that it entitles workers to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to section 1771 of the California Labor Code?

II. STATEMENT OF THE CASE

On October 26, 2016, the U.S. District Court for the Northern District of California, the Honorable William H. Orrick, heard the parties' cross-motions for partial summary judgment on Plaintiff's claim for failure to pay the prevailing wage rate in violation of California Labor Code sections 1771 and 1774. ER 19-36. The District Court found that none of the mobilization work performed by Plaintiffs was not an integrated aspect of the flow process of construction under the public works contracts and that, therefore, Plaintiffs are not entitled to the prevailing wage rate for mobilization work. ER 3, 18. Accordingly, on November 28, 2016, the District Court granted FMG's and Granite Rock's motion for partial summary judgment and denied Plaintiff's cross-motion. *Id.*

Plaintiffs' remaining claims were dismissed or resolved, and on January 12, 2017, the District Court entered final judgment on behalf of Granite Rock and against Plaintiffs. ER 1-2.

Plaintiffs appealed to the Ninth Circuit Court of Appeals. Finding no controlling precedent on the issue of whether offsite mobilization work

in connection with a public works contract is performed "in the execution of a contract for public work," such that it entitles workers to prevailing wages pursuant to the California Labor Code, the Ninth Circuit certified the question to this Court. Order Certifying Question to the California Supreme Court, dated Jan. 15, 2019.

III. SUMMARY OF ARGUMENT

California's prevailing wage law requires that contractors and subcontractors pay prevailing wages to all workers they employ on public works. Labor Code §§ 1771, 1772. The law's text, structure and legislative history unequivocally establish that the off-site mobilization work performed by Plaintiffs—the offsite readying and transportation of a roadwork grinding or "milling" machine to and from a public works construction site—is not within the scope of the prevailing wage law.

The scope of the prevailing wage law is delineated through the term "public works" as defined in Article 1 of the law, Labor Code section 1720 *et. seq.* Labor Code sections 1772 and 1774, found in Article 2 of the prevailing wage law, do not operate to define or expand the law's scope. The Legislature has chosen to extend the scope of the prevailing wage law under Article 1 to off-site work only in limited circumstances, such as the off-hauling of refuse to a public disposal site and the delivery of ready-mixed concrete, and has specifically declined to extend prevailing wage requirements to other off-site work. See, Labor Code §§1720.3, 1720.9. Despite numerous amendments to the prevailing wage law over the past three quarters century, the Legislature has never seen fit to expand its coverage to off-site work generally or to mobilization work specifically.

Even assuming arguendo, it is proper to focus on Sections 1772 and 1774 to determine the scope of the prevailing wage law coverage, Plaintiffs' off-site mobilization work is not "in the execution of" a contract for public work under those provisions. The California courts have

repeatedly held that off-site work is in the execution of a public works contract only when it is integral to or an integrated aspect of the flow process of construction. Plaintiffs off-site work associated with readying the milling machine at Defendant's permanent yard for use and transport to and from a public works construction site is not integrated into the flow process of construction because it is performed at a permanent yard or storage facility which is not exclusively dedicated to any particular public works project and there is no evidence that this preparatory work was performed in fulfilment of any provision of the public works contract. Similarly, there is no evidence that Plaintiffs' off-site work of hauling the milling machines by semi-truck from the Defendant contractors' yard or other off-site storage locations to a public works construction site was required to carry out a term of the public works contract. Finally, transport of the milling machine after work is completed at the public works construction site back to the yard or other off-site storage location is not integrated into the flow process of construction. Applying the "integrated aspect" test articulated by the California courts, these key facts establish that none of the three distinct components of Plaintiffs' off-site mobilization work is "in the execution" of a contract for public work.

Plaintiffs' proposed novel expansive interpretation of the prevailing wage law – covering all activities that are "necessary" to perform work on the public works construction site—contravenes both case law authority and the legislative history of California's prevailing wage law. Nor is there any statutory, case law or administrative authority supporting Plaintiffs' position that they should be paid prevailing wages for their off-site mobilization related work tasks simply because they also performed work on the public work construction site. Plaintiffs' proposed extension of the prevailing wage law is best left to the Legislature to assess. Under the

current statutory framework and case precedent, Plaintiffs' off-site mobilization work is not within the law's scope.

IV. STATEMENT OF FACTS

Granite Rock is a closely-held construction materials company that provides asphalt, concrete, and other building materials for public and private commercial and residential construction projects. ER 3, 301. Defendant Fonseca McElroy Grinding Co. Inc. ("FMG") was a construction company specializing in road work. In or about April 2014, FMG was acquired by and merged with Granite Rock. At all times material, FMG and Granite Rock were signatory parties to the Operating Engineers Local No. 3 Master Agreement for Northern California ("Master Agreement"). ER 4, 301.

In or about September 2010, FMG entered into a Memorandum of Agreement ("MOA") with Operating Engineers Local No. 3, which provided for a "Lowbed Transport" wage rate for off-site mobilization work. The MOA provided for an hourly wage and fringe package for off-site mobilization work lower than Master Agreement rates for the work of operating heavy equipment, such as a milling machine, on construction sites. Granite Rock was also signatory to the MOA. The MOA supplemented the Master Agreement and applied to the distinct mobilization work performed by Appellants.[1] ER 4, 301.

Plaintiffs/Appellants Leopoldo Pena Mendoza, Elviz Sanchez and Jose Armando Cortes ("Plaintiffs") are union members of Operating

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[1] Given the uncertainty related to prevailing wage coverage for the mobilization work covered by the MOA, the collective bargaining parties agreed that if during the term of the MOA the California Department of Industrial Relations ("DIR") determined that the rates set forth in the MOA were not in compliance with the law that they would return to the bargaining table. ER 301-302, 402. The DIR never made any such determination.

Engineers Local No. 3 who worked for FMG and then Granite Rock following its acquisition of FMG. At various times during their employment, Plaintiffs were employed by FMG or Granite Rock on "public works" construction projects as defined in California Labor Code Section 1720 (a)(1). ER 4, 301. FMG/Granite Rock paid Plaintiffs a prevailing wage rate as published by the California Department of Industrial Relations ("DIR") for the construction craft classification determination of operating engineer for all work performed at the site of construction on public works construction projects, including the operation of a milling machine used in breaking up asphalt and concrete on streets, roads and pavement. ER 4, 302, 405.

The public works contracts under which Plaintiffs worked did not specify the daily schedule for Granite Rock's workers, including Plaintiffs, or their place of reporting for work. ER 4, 302. Accordingly, Granite Rock determined whether Plaintiffs would report directly to the construction jobsite or to the company's yard or other off-site storage location to perform mobilization work prior to operating equipment at the construction jobsite. Granite Rock also determined what tasks, if any, Appellants would perform after completing their jobsite work, including assigning them to drive a transport truck transporting the milling machine back to Granite's yard or other off-site storage location.[2] ER 4, 302.

Plaintiffs were not paid a prevailing wage rate for the DIR classification determination of operating engineer while performing off-site "mobilization work" covered by the MOA. The mobilization work performed by Plaintiffs consisted of: loading a milling machine -- which

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[2] The milling machines, like other equipment, material and supplies delivered to a construction job site could remain on the construction jobsite for use on multiple days. On such days, Plaintiffs' workday began and ended at the construction jobsite rather than at the off-site yard or storage location. ER 29, 30.

was stored at FMG's or Granite Rock's permanent yard or other off-site storage locations -- onto a lowbed trailer, tying down or otherwise securing the heavy equipment onto the lowbed trailer and performing a light, brake and fluid level check of the semi-truck used to transport the milling machine before the transport truck left the yard. ER 5, 302, 91. The off-site locations where Plaintiffs performed certain off-site "mobilization" work tasks do not depend on any particular public works project for their existence. ER 5, 302. Plaintiffs then drove a transport truck transporting the milling machine from the yard or off-site storage location to a construction jobsite. At some point, depending on the duration of the job, Plaintiffs would drive the transport truck to haul the milling machine from the site of construction back to FMG's or Granite Rock's permanent yard of off-site storage location. ER 5, 302.

V. LEGAL ARGUMENT

A. Off-Site Mobilization Work Is Not Within The Scope Of The Prevailing Wage Law.

1. The scope of California's prevailing wage law is set forth in Article 1, not Article 2, of the law's statutory scheme.

Article 1 of California's prevailing wage law, Labor Code section 1720 *et. seq.* -- entitled "Scope and Operation" -- defines the scope of prevailing wage coverage through the definition of "public works." Section 1720 (a)(1) generally defines "public works" as the following types of work: "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." Section 1720(a) also establishes that certain on-site preconstruction and post-construction work is within the law's scope by providing that "construction" includes "work performed during the design and preconstruction phases of construction, including, but not limited to inspection and land surveying work, and work performed during the post-

construction phases of construction, including, but not limited to, all cleanup work at the jobsite." Labor Code §1720(a).

Section 1720 further sets the scope of the prevailing wage law by defining "public work" to include, *inter alia*, the following specific types of work: (1) work done for irrigation, utility, reclamation and improvement districts; (2) street, sewer and other improvements; (3) the laying of carpet done under a building lease-maintenance contract or in a public building done under contract and paid for out of public funds: and (4) tree removal work done in the execution of a project under Section 1720(a)(1). Labor Code § 1720(a)(2)-(5), (8).

Article 1 also extends prevailing wage coverage to certain specific and limited types of off-site work. Labor Code section 1720.3 provides that, for the purpose of Article 2 (payment of wages), the term "public works" includes the hauling of refuse from a public works site to an outside disposal location. Section 1720.9 provides that the hauling and delivery of ready-mixed concrete to carry out a public works contract is also included in the meaning of "public works" for purposes of Article 2.

Whereas Article 1 defines the scope of the prevailing wage law, Article 2, Labor Code section 1770 *et. seq.*—aptly entitled "Wages" -- addresses the wages to be paid to workers performing work within the law's scope as established by Article 1. Pursuant to the provisions of Article 2, workers employed by contractors or subcontractors on public works shall be paid at least the general prevailing rate for work of a similar character in the locality in which the public work is performed. Labor Code § 1771. Workers employed "in the execution of any contract for public work" are deemed to be employed upon a public work and are thus entitled to payment of prevailing wages. Labor Code §§ 1772, 1774. The Director of the Department of Industrial Relations is tasked with determining the general prevailing rate of per diem wages for each craft,

classification and type of worker that performs work within the prevailing wage law's scope. Labor Code §§ 1770, 1773, 1773.1, 1773.9. The Director has no authority under the prevailing wage law to extend prevailing wage coverage to types of work beyond that are not within the law's scope.

Article 2 further establishes the framework for ensuring employer compliance with the prevailing wage law. Labor Code section 1771.1 sets forth a registration requirement for contractors bidding on public works projects. Labor Code section 1776 requires employers to maintain and furnish certified payroll records showing actual per diem wages paid to each worker on a public works project. Labor Code section 1771.2 provides for a right of action against employers who fails to pay required prevailing wages or provide required payroll records. Labor Code section 1775 requires the payment of penalties by a contractor or subcontractor who fails to pay its workers prevailing wages. Thus, Article 2 establishes workers' entitlement to prevailing wages when performing the types of work within the scope of the prevailing wage law as defined in Article 1, establishes the authority and methodology for determining the general prevailing wage rate, and establishes a mechanism for ensuring those prevailing wages are paid. Nothing in Article 2 purports to set or expand the scope of the prevailing wage law beyond that established by Article 1.

2. Contrary to Plaintiffs' assertion, Labor Code sections 1772 and 1774 do not expand the scope of the prevailing wage law.

Plaintiffs' attempt to expand the scope of the prevailing wage law to include their off-site mobilization work by arguing that such work is "in the execution of" a public works contract under Labor Code sections 1772 and 1774. Plaintiffs' argument is fundamentally flawed because Sections 1772 and 1774 are set forth in Article 2 of the prevailing wage law and therefore, as discussed above, play no role in setting the scope of prevailing wage

coverage. These Article 2 provisions cannot be used, as Plaintiffs propose, to extend the prevailing wage law beyond the scope established by Article 1, which does not include off-site mobilization work. In construing the prevailing wage law, the Court must give effect to the Legislature's clear intention to delineate the scope of the prevailing wage law through the definition of "public work" in Article 1. *Pac. Palisades Bowl Mobile Estates, LLC v. City of L.A.* (2012) 55 Cal. 4th 783, 803 ("[I]n any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose") (quoting *In re C.H.* (2011) 53 Cal.4th 94, 100.)

Further, Sections 1772 and 1774 -- referencing workers employed "in the execution of any contract for public work" -- must be read in conjunction with and harmonized with the provisions of Article 1, Labor Code section 1720 *et. seq.*, which define "public work." *Sheet Metal Workers Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal. App. 4th 192, 200 (prevailing wage statute should be construed with reference entire prevailing wage scheme to harmonize its various elements); *see also, Morgan v. Beaumont Police Dept.* (2016) 246 Cal. App. 4th 144, 1521 (the words of a statute must be construed in context, and "provisions relating to the same subject matter must be harmonized to the extent possible"). Sections 1720.3 and 1720.9 set forth the specific and limited types of off-site work that are encompassed within the definition of "public work, " i.e. the hauling of refuse from a public works site to an outside disposal location (Section 1720.3) and the hauling and delivery of ready-mixed concrete to carry out a public works contract is also included in the meaning of "public works" (Section 1720.9). These provisions vividly demonstrate that when the Legislature has sought to expand prevailing wage coverage to work that is not performed on the public work site of construction , it has made its intent clear by expanding the definition of

"public works" to include those specific and limited activities. See, Labor Code §§1720.3, 1720.9. Because the Legislature has chosen to specify the types of work that are subject to prevailing wage coverage by including them in the definition of "public works,' it would be utterly inconsistent with the overall prevailing wage scheme to construe the term "in the execution of" a public works contract as including other types of off-site work such as mobilization work, which are not identified in Article 1.

Moreover, under the maxim of statutory construction *expressio unius est exclusio alterius* (to express one thing is to exclude others), by expressly stating the particular types of offsite work that are public works and therefore subject to prevailing wage requirements, the statutory prevailing wage scheme implicitly excludes any other off-site activities. *See, Kunde v. Seiler* (2011) 197 Cal. App. 4th 518, 531; *see also, Soto v. Motel 6 Operating, L.P.,* (2016) 4 Cal. App. 5th 885 (observing that that "[w]hen a statute omits a particular category from a more generalized list, a court can reasonably infer a specific legislative intent not to include that category within the statute's mandate"). The Legislature has demonstrated its clear intention to expressly subject certain off-site work to prevailing wage requirements, demonstrating an unequivocal intention to exclude other types of off-site work. See, Labor Code §§1720.3, 1720.9. It has not included any of off-site mobilization work at issue in this case among the types of off-site activities for which prevailing wages must be paid. As this Court has recognized, "'[c]ourts will liberally construe prevailing wage statutes [citations], but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act [citation].'" *City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal. 4th 942, 950, citing *McIntosh v. Aubry* (1993) 14 Cal.4th 1576, 1589.

3. The legislative history of the prevailing wage law confirms that off-site mobilization work is not within the law's scope.

a. The Legislature has never used Labor Code Sections 1772 or 1774 to define the scope of the prevailing wage law.

The legislative history of the prevailing wage law further demonstrates that the definition of "public works" in Article 1 – not the phrase "in the execution of" in Sections 1772 and 1774 – controls the scope of prevailing wage laws. When the Legislature has expanded the application of the prevailing wage law, it has done so by changing the definition of public works to include, *inter alia*, "alteration" and "demolition" (Stats. 1953 ch. 717); the hauling of refuse from public works sites (Stats. 1976 ch. 1084, enacting section 1720.3); work performed during the design and preconstruction phase of construction, such as inspection and land surveying (Stats. 2000 ch. 881); installation (Stats. 2001 ch. 93 8), and later the assembly of modular office systems (Stats. 2012 ch. 810); work performed during the post construction phase, such as cleanup work at the jobsite (Stats. 2014 ch. 900); the hauling and delivery of ready-mixed concrete to public works sites (Stats. 2015 ch. 739, enacting section 1720.9); and tree removal at public works sites (Stats. 2017 ch. 616). *See* Deering's Ann. Labor Code (Amendments) §§ 1720, 1720.3, 1720.9 (Lexis Nexis 2006 & Supp. 2019) (summarizing amendments to each statute).

Nothing in the prevailing wage law's legislative history indicates that the phrase "in the execution of" has ever been understood or intended to delineate the scope of the law. Since Section 1772 was enacted in 1937, it has been amended just once—a non-substantive amendment in 1992 to substitute "workers" for "workmen" (Stats. 1992 ch. 1342). Section 1774 has ***never*** been amended. By contrast, sections 1720 – 1720.9, which

collectively define "public works," have been amended a dozen times since 2010 to create a detailed and specific framework for determining the types of work that are within the law's scope and subject to a prevailing wage. Thus, the law's legislative history confirms that the scope of the prevailing wage law cannot be expanded, as Plaintiffs' propose, through the phrase "in the execution of" in Sections 1772 and 1774.

b. The Legislature has refused to extend the prevailing wage law to cover off-site work generally.

Plaintiffs' proposed expansive interpretation of the prevailing wage law--to include off-site mobilization work which is "necessary" for the performance of covered work --would grant prevailing wage coverage for work beyond that which the Legislature has expressly considered and deliberately excluded from the scope of the prevailing wage law. The Legislature rejected the notion that off-site work should generally be included when extending the reach of prevailing wage law to the preconstruction phase. Early versions of Senate Bill 1999, to amend the definition of "public works" set forth in Labor Code section 1720, would have added a separate subsection with a free-standing category of public works: "architectural, engineering, and inspection services," as specified in Government Code 4525(d) – (f). (*See*, Respondents' Motion For Judicial Notice (MFJN) Ex. A, SB 1999, as amended Aug. 18, 2000; MFJN Ex B, Assembly Comm. Lab. Emp. Rep., Aug. 18, 2000.) As drafted, the bill would have "codifie[d] current Department practice by including inspectors and surveyors among those workers deemed to be employed upon public works," and also "expand[ed] the definition of 'public works' to include architects, engineers, general contractors and others in their employ . . . including those services performed in connection with project development and permit processing." In response to objections that the bill included "traditionally white collar workers such as architects and engineers and

others in their employ *who primarily work off-site*," the bill was scaled back so that it merely specified that "construction" in Section 1720 included on-site preconstruction work such as inspection and land surveying. (*See,* MFJN Ex. C, SB 1999, as amended Aug 23, 2000; *see also,* MFJN Ex. D, Assembly Floor Analysis, Aug. 23, 2000.)

Further, when the Legislature broadened the definition of "public works" in 2015 to include the hauling and delivery of ready-mixed concrete, it expressly declined to extend prevailing wage law to drivers of asphaltic concrete.[3] Early versions of Assembly Bill 219, which was eventually enacted into law as Labor Code section 1720.9, would have broadened the definition of "public works" to include "the hauling and delivery of ready-mixed concrete *or asphaltic concrete* to a public works site." (See, Assembly Appropriations Comm. Rep. (May 4, 2015); *Allied Concrete & Supply Co. v. Baker* (9th Cir. 2018) 904 F.3d 1053, 1059 ("Before adopting the final bill, the California Legislature considered a version of AB 219 that would have required payment of prevailing wages to asphalt delivery drivers as well, but ultimately limited the expansion to ready-mix concrete drivers.") Despite the Legislature's decision that drivers of asphaltic concrete would ***not*** be entitled to prevailing wage, they would nevertheless receive prevailing wage under Plaintiffs' expansive interpretation of Sections 1772 and 1774. In short, Plaintiffs' proposed interpretation of the prevailing wage law would sweep into a regulatory net of prevailing wage coverage work that the Legislature never intended to be covered.

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[3] Plaintiffs' attempt to analogize their hauling of the milling machine with the delivery of ready-mixed concrete is not only factually flawed, it wholly ignores the fact that the only reason the delivery of ready-mixed concrete is subject to prevailing wage requirements is because the Legislature expressly extended the prevailing wage law to cover such work.

c. The Legislature's failure to adopt the federal "site of the work" language does not evidence an intention to extend prevailing wage coverage to off-site work generally.

The federal Davis Bacon Act provides that prevailing wages shall be paid to all workers "employed directly on the site of the work" (40 U.S.C. §3142(c)(1)), while California's prevailing wage law does not contain any similar express geographical limitation. Plaintiffs argue that the Legislature's failure to include an explicit geographical limitation in the prevailing wage law, such as that in the Davis Bacon Act, must be construed as a rejection by the Legislature of any geographical limitation. They contend that because California's prevailing wage law was codified in 1937 (upon the establishment of the Labor Code), two years after the "the site of the work" language first appeared in the federal law, the Legislature's omission of similar language was an explicit rejection of any geographic limitation. However, Plaintiffs offer no legislative history or other evidence that the Legislature considered and rejected the federal geographic limitation in 1937 or that it did anything more than recodify the 1931 Public Wage Rate Act. In fact, as Plaintiffs acknowledge, when the Legislature established the Labor Code in 1937, it simply replaced the Public Wage Rate Act with no substantive changes. *Star Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal. 4th 547, 555 (Appellants' Opening Brief, p. 26). Thus, [t]here is no clear indication the Legislature rejected some geographical restriction on its application. *Sheet Metal Workers, supra,* 229 Cal. App. 4th at 211.

In support of their argument that the Legislature did not intend to impose any geographical limitation on prevailing wage coverage, Plaintiffs also note that the Legislature has had 83 years since Congress enacted the "site of the work" standard to adopt the federal limitation but has not done so. This argument fails because it wholly ignores what the Legislature has

done during that time, which is to expressly extend the scope of prevailing wage requirements to certain specific off-site activities while declining to extend it to other off-site activities. See, Labor Code §§720.3, 1720.9; *see also*, SB 1999, as amended Aug 23, 2000; Assembly Appropriations Comm. Rep., Aug. 20, 2000 (Labor Code §1720 scaled back to include only on-site construction activities in response to objections that previously proposed definition of "public works" would include those who primarily work off-site). Despite numerous amendments to the prevailing wage law over the past quarter-century, the Legislature has not seen fit to expand the prevailing wage coverage more generally to off-site work. In short, neither the circumstances surrounding the Legislature's adoption of the prevailing wage law nor the amendments it has made to the law since create an inference that the Legislature has rejected the imposition of any geographical limitation on the law's scope.

B. Plaintiffs' Off-site Mobilization Work Is Not Subject to Prevailing Wage Requirements Because It Was Not Performed In The Execution of A Contract for Public Work.

1. The California courts have consistently applied the "integral" or "integrated aspect" test to determine whether off-site work is in the execution of a public works contract.

Even if Labor Code sections 1772 and 1774 are construed to operate to expand the scope of the prevailing wage law beyond that set forth in Article 1, those provisions have never been interpreted in a manner that would include the off-site mobilization work performed by Plaintiffs. The California appellate courts have consistently held that off-site work is "in the execution" of a contract for public work under Sections 1772 and 1774 only when it is integrated into the flow process of construction. Applying the analytical framework developed by the courts in the few decisions concerning off-site work, there can be no doubt that the off-site

mobilization work performed by Plaintiffs is not "in the execution of" the public works contract and therefore is not prevailing wage work.

In the first of the off-site work cases, *O. G. Sansome Co. v. Dept. of Transportation* (1976) 55 Cal. App. 3d. 434 ("*Sansome*"), the court considered whether truck drivers who hauled aggregate subbase to a public works construction site were entitled to prevailing wages. In determining whether the drivers were employed "in the execution" of the public works contract, the court analyzed whether the truckers were material suppliers conducting an operation independent of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract. After reviewing cases interpreting the material supplier or "materialman" exception to the Davis Bacon Act, the court concluded that the materialman exception did not apply because (1) the hauled materials were not obtained from an independent material supplier but rather were acquired from third parties under private borrow agreements and (2) the hauled materials were "taken from locations adjacent to and established exclusively to serve the project site." *Id.* at 443. The *Sansome* court thus concluded that the truckers performed an "integral part" of the primary contractors' obligations under the public works contract and were thus were subcontractors entitled to payment of prevailing wages. *Id.* at 445.

More than thirty years later, in *Williams v. SnSands Corp.* (2007) 156 Cal. App. 4th 742, the court analyzed whether the prevailing wage requirements extended to the off-hauling of materials from a public works site. The court focused its analysis on the meaning of the term "in the execution of any contract for public work" in Labor Code section 1772, finding that "execution" as used in the statute means the carrying out and completion of all provisions of the contract. 156 Cal. App. 4th at 749-750. Thus, the court concluded that the role of off-site work in the performance

or execution of the public works contract is the critical factor in determining whether the work is subject to prevailing wage requirements. *Id.* at 752. Following *Sansome*, the court thus set forth three factors to be considered in assessing whether off-hauling activities are integral to the performance of the public works contract and therefore "in the execution" of the contract: (1) 'whether the transport was required to carry out a term of the public works contract;" (2) "whether the work was performed on the project site or another site integrally connected to the project site;" and (3) "whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract." *Ibid.* The court concluded that the prevailing wage requirements did not apply to the off-hauling of materials from a public works site in that case because there was no evidence that the public works contracts for the project required the contractor to off-haul generic building material and, therefore, no evidence that the off-hauling was "an integrated aspect of the 'flow' process." 156 Cal. App. 4th at 754.[4]

Finally, in *Sheet Metal Workers, supra*, the court used the analytical framework set forth in *Sansome* and *Williams* to hold that fabrication work performed at a permanent, off-site fabrication facility "does not constitute an integral part of the process of construction at the site of the public work." 229 Cal. App. 4th at 212. The court found that the fabrication work performed at the off-site facility was "independent of the performance of the construction contract because the facility's existence and operations do not depend upon a requirement or term in the public works contract." *Id.*

Plaintiffs attempt to discredit the "integrated aspect" test by claiming that, in developing that test, the California courts improperly relied in part

[4] As noted *supra*, in *Sansome*, the court found that the borrow pit from which the materials were hauled was established specifically for and in close proximity to the construction site. 55 Cal. App. 3d at 443.

on decisions interpreting the federal Davis-Bacon Act. However, as discussed above, the fact that the Legislature has not adopted the federal law's "site of the work" language, does not equate to wholesale rejection of any geographical limitation in California's prevailing wage law. Accordingly, "[t]he lack of express geographical limitation in California's prevailing wage law does not preclude looking to the Davis-Bacon Act for guidance." *Sheet Metal Workers,* 229 Cal. App. 4th at 211."[5] ER 12.

Moreover, the Legislature has long been aware of the distinction drawn by the courts in *Sansome*, *Williams,* and *Sheet Metal Workers*—i.e., that off-site work is only subject to prevailing wage requirements when the work is integrated into the flow process of construction. Labor Code section 1720.9 was enacted for the specific purpose of creating an exception to *Sansome* and *Williams*, which are discussed extensively in the legislative history. (*See, e.g.,* Assembly Lab. Emp. Comm. Rep. (April 20, 2015) at 3-4). The Legislature noted that ready-mixed concrete drivers employed by third parties would not be entitled to prevailing a wage under *Sansome* and *Williams* and it enacted Section 1720.9 for the specific purpose of "expanding the prevailing wage to all ready-mix drivers serving public works," notwithstanding the holdings in those decisions. *Id.* By creating an exception to the rule set forth in *Sansome* and *Williams* for ready-mixed concrete drivers, the Legislature implicitly adopted the rule for other off-site work. In other words, the Legislature has demonstrated its acceptance of the "integrated aspect" test articulated by the courts, making exceptions to that rule where it deems appropriate.

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[5] Plaintiffs curiously rely on *Sparks & Wiewel Const. Co. v. Martin* (Ill. App. Ct. 1993) 620 N.E.2d 533, to argue that even in states where the prevailing wage law contains geographically limiting language, the mobilization work at issue here would be covered because Plaintiffs subsequently performed work at the site. In *Sparks & Wiewel* the court analyzed the specific language of the Illinois prevailing wage law, which unlike California's prevailing wage law, expressly applies to "workers and mechanics engaged in the transportation of materials and equipment to and from the site." *Id.* at 538, 541.

2. The mobilization work performed by Plaintiffs is not integral to the flow process of construction.

a. Granite Rock's permanent off-site yard and storage facility is not integral to the flow process of construction.

None of the mobilization work performed by Plaintiffs at Granite Rock's permanent yard and storage facilities is an integral part or aspect of the construction at the site of public work. Granite Rock's yard and off-site storage locations do not depend upon any particular public works project for their existence. ER 5, 302. Significantly, the work performed at Granite Rock's permanent yard and off-site storage location associated with Plaintiff's work of readying the milling machine for use and transport to the public works construction site is not connected to and does not depend upon any public works project site or another site integrally connected to the project site.[6] ER 302; *Williams, supra*, 156 Cal.App.4th at 752. As such, the work performed by Plaintiffs at Granite Rock's permanent off-site locations is in marked contrast to the borrow pits "located adjacent to and established exclusively to serve the [public work] project site." *O. G. Sansome, supra,* 55 Cal.App.3d at 443. Because the permanent yard and storage facilities at which Plaintiffs worked were not exclusively dedicated to the public works projects at which Plaintiffs worked, they were not a sufficiently integrated aspect of the project to extend prevailing wage coverage.

Further, there is no evidence that the work performed by Plaintiffs at the permanent yard was necessary to fulfill any requirement or provision of

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[6] Plaintiffs wrongly suggest that, "as a practical manner," Granite Rock's storage facility had to be located in close proximity to the public works construction site. Appellants' Opening Brief at p. 8. There is no evidence to support such speculation. Rather the CBA, including the MOA, under which Plaintiffs were employed and Granite Rock operates, encompassed construction projects throughout Northern California. *See, Master Agreement §2.07.00*, ER 328.

the public works contract. *Williams, supra*, at 752; *Sheet Metal Workers, supra*, 229 Cal. App. 4th at 212. Rather, it was discreet preparatory work akin to the work involved in ensuring that tools are in proper working order prior to transporting them for use at the site of construction. As the District Court properly concluded, there is "no evidence of any public works contract or industry practice that requires the payment of the prevailing wage rate for the type of work performed in Granite's permanent yard...." ER 15.

There is no California case law or administrative opinion extending prevailing wage coverage to work performed at a material supplier's or contractor's permanent yard. The fact that Plaintiffs were later engaged at the site of construction operating heavy construction equipment subject to prevailing wage requirements does not juristically transmute the work tasks performed at Granite Rock's yard or off-site equipment hauling to or from the construction site into public work subject to California's prevailing wage requirements any more than a production worker's time spent fabricating sheet metal products at an off-site fabrication facility for installation on a public works construction project is subject to prevailing wage coverage because the same production worker later installs the fabricated products at the construction site. *See, Sheet Metal Workers, supra*. It is the role of the off-site work in the performance of the public works project, not the individual who performs it, that determines whether it is subject to prevailing wage requirements. *See, Williams, supra*, at 752. It is axiomatic that a worker may perform some work during their workday that is subject to prevailing wage requirements and some that is not.[7]

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[7] It is indisputable that Plaintiffs would not be entitled to prevailing wages for on-site construction work performed on a private job even though they worked part of their day on a public works construction site for which they were entitled to be paid prevailing wages. *See, State of California Public Works Manual* §3.2.7. ER 152 (discussing how to calculate overtime for employees who work part of the workday at the

b. The transporting of milling machines to and from the public works construction site is not integral to the flow process of construction.

The analytical framework articulated by the California courts also supports the District Court's determination that prevailing wage requirements do not extend to Plaintiffs' off-site work of hauling the milling machines by semi-truck from Granite Rock's yard or other off-site storage locations to a public works construction site and then back to the yard or other off-site storage locations after the equipment is no longer needed at a construction site. In finding that truck drivers off-hauling materials from a public works construction site were not entitled to the payment of prevailing wages for their off-site hauling activities, the court in *Williams, supra*, noted that "the parties did not provide evidence of the public works contracts for which the drivers did the off-hauling work or the custom and practice of a public works contactor to remove unused materials form the jobsite." 156 Cal App 4th at 753. The court thus concluded that there was an absence any of evidence that the material off-hauling performed by the drivers was an integrated aspect of the flow process of construction and, therefore, determined that the drivers were not entitled to the prevailing wage because the off-hauling was "unrelated to the performance of prime public works contract." *Id.* Similarly, here, there is "no evidence of governing public works contracts" nor "evidence of custom or practice of the industry regarding transportation of heavy equipment to the public works project site." ER 13. Thus, as the District Court properly concluded "there is nothing to support a conclusion that "'the transport was required to carry out a term of the public works contract.' *Williams,* 156 Cal. App. 4th at 156." ER 13.

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prevailing wage rate and part of the day at a lower rate on a private works project).

Moreover, the hauling of the milling machine is unlike the hauling of materials in *Sansome* from a dedicated borrow pit adjacent to the public works construction site, which were found to be an integrated aspect of the flow process of construction. In *Sansome*, aggregate subbase was hauled from a site established exclusively for the public works project and furnishing the materials was a term of the contract. 55 Cal. App. 3d at 439, 443. Here, in contrast, the off-site locations to and from which Plaintiffs hauled the milling machine are not dependent on any particular public works project for their existence. ER 5, 302.

Plaintiffs argue that the "exclusively dedicated" analysis employed by the courts should not apply to their off-site mobilization tasks because they also performed covered work on the public works construction site. In other words, Plaintiffs contend that because they are transporting machinery for their own on-site use, the prevailing wage requirements should also apply to their distinct off-site mobilization work.[8] [9] This argument fails because there is no evidence that the transport of the milling machine to and from the construction site can only be performed by the same workers who operate the machine at the site. Given that the public works contracts under which Plaintiffs worked did not specify the daily schedule for Granite Rock's workers or their place of reporting for work, Granite Rock certainly could have required Plaintiffs to report directly to

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8 Plaintiffs expressly conceded at oral argument that "[i]f this was a rental company hired to deliver a piece of equipment and drops it off at the site... that's not a public works...that not a prevailing wage violation." ER 30. Plaintiffs thus conceded that if they had not then gone on to perform work on the public works construction site, the mobilization tasks would not be subject to prevailing wage requirements.

9 Plaintiffs also make the nonsensical contention that if the same work was performed by Plaintiffs on the public works site, there would be no question that they would be entitled to payment of prevailing wages. By its very nature, the readying and hauling of equipment to and from the site of construction is off-site work.

the construction site while it had the milling machine delivered to and picked up from the construction site as needed by another worker who never performed any work on the site. ER 4, 302. As the District Court correctly observed, "overall the mobilization work consists of discrete tasks independent from plaintiffs' construction duties at the worksite." ER 14. [10]

Plaintiffs' hauling of equipment is also distinctly different than the hauling of materials which have been found to be an integral aspect of the construction process because they are immediately dumped and used in the construction process. *See, Sansome, supra*, at 444. (discussing facts in *Green v. Jones* (Wis. 1964) 23 Wis. 2d 551.) Plaintiffs attempt to argue that the milling machines they transported were required to be transported to and from the construction site on a daily basis and thus their transport was an integral part of the use of those machines on the public works project. Once again, there is no evidence that the public works contract required the machinery to be transported daily or on any particular schedule; nor is there any evidence of the custom or practice of doing so. Granite Rock certainly had its own interests in transporting its machinery between the public works site and its permanent yard or storage facility, including the security of the equipment and use of the equipment at other jobsites. Indeed, when secure storage was available at the job site, the milling machine would be left on site during the course the job. Thus, to the extent that Plaintiffs transported the milling machines back and forth, it was in the interest of the contractor, not the interest of the public works project.

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[10] As noted *supra*,Plaintiffs' reliance on *Sparks & Wiewel Const. Co. v. Martin* (Ill. App. Ct) 620 N.E.2d 533 (1993), to argue that, even where the prevailing wage law contains geographically limiting language, the mobilization work at issue here would be covered because Plaintiffs subsequently performed work at the site misses the mark entirely. In *Sparks & Wiewel* the court analyzed the specific language of the Illinois prevailing wage law, which unlike California's prevailing wage law, expressly applies to "workers and mechanics engaged in the transportation of materials and equipment to and from the site." *Id.* at 538, 541.

Plaintiffs' effort to claim a temporal requirement to the transport of the machines is without merit.

3. Plaintiffs' proposed interpretation of the prevailing wage law is overly expansive and has no basis in law.

Plaintiffs argue that the transport of the milling machine to and from the public works construction site is "in the execution of" the public works contract because it is a necessary prerequisite to their onsite work. Plaintiffs' proposed interpretation would do nothing less than open up the proverbial floodgates, sweeping in to the prevailing wage law's coverage all preconstruction and preliminary activity required so that work can be performed on a public works site, no matter how remote the activity is to the performance of the public works contract. [11]

In *Sheet Metal Workers, supra*, the court properly rejected such an overly expansive interpretation by which "nearly any activity related to the completion or fulfillment of a public works contract would be to the prevailing wage law regardless of where it takes place or whether it plays a substantial role in the process of construction." 229 Cal. App. 4th at 202. The District Court agreed, noting that this argument "could be used to justify the application of the prevailing wage law to the transportation of many things needed for a public works construction job, such as 'tools, portable toilets, generators, potable water, lumber, asphalt steel ... cranes etc.'" ER 14. Plaintiffs' proposed standard arguably would further extend prevailing wage coverage to the manufacture of all tools and equipment used on the public works site, since those items are also necessary for the performance of covered work.

[11] Even Plaintiffs must concede that transporting the milling machine back to an off-site yard or other storage location after work has been completed at the public works site is not "necessary" to perform the work at the public works site.

Thus, not only is plaintiffs' proposed extension of the prevailing wage law unworkably broad, it also expands the scope of prevailing wage coverage far beyond the types of work included in the definition of "public works," set forth in Article 1 of the law. In fact, Plaintiffs' proposed interpretation would render both Labor Code sections 1720.3 (hauling of refuse to outside disposal site) and 1720.9 (hauling of ready-mixed concrete) entirely superfluous as these types of work would already be subject to prevailing wage coverage since they are in some sense "necessary" to the on-site "work. The statutory phrase "in the execution of" is not a talisman for magically synthesizing a "common law" of prevailing wage which is far more expansive than that delineated by the Legislature.

C. The DIR's Travel and Subsistence Determinations Do Not Require a Finding That Mobilization Work is Subject to Prevailing Wage Requirements.

Plaintiffs' wrongly contend that prevailing wage requirements apply to their off-site hauling of machinery to and from the public works site based on the fact that the Director of Industrial Relations is tasked with issuing travel and subsistence wage rate determinations for various craft classifications on public works.[12] Plaintiffs argue that because the Director has not issued a separate travel and subsistence rate for operating engineers, they must be paid the general prevailing wage rate for their travel (i.e. hauling the milling machine) between the yard or storage location and the public works construction site. This argument was properly rejected by rejected by the District Court. It both puts the cart before the horse and wrongly conflates a prevailing wage rate determination with a determination that certain work is covered by the prevailing wage law. The Director has the authority, upon request, to determine the types of work

[12] Plaintiffs do not argue that the travel and subsistence determinations render their preparatory work at the yard or storage location subject to prevailing wage requirements.

encompassed by Labor Code section 1720 *et seq.* subject to prevailing wage coverage. Labor Code §1773.5(b)(c)(d).[13] This function is separate and distinct from the Director's authority to make prevailing wage rate determinations, including for travel and subsistence pay. Labor Code §1773.9(a). In properly debunking this same misguided argument, the District Court explained that the "DIR's wage determinations, including the travel and subsistence provisions, do not determine the type of work subject to prevailing wage requirements....[but] only specify the craft classification to be used and wage to be paid *if* a type of work performed by the worker is covered by the prevailing wage requirements." (Emphasis added.) ER 17. In this instance, the Court correctly concluded that the mobilization work at issue here was not "in the execution of the public works contract and is not covered by the prevailing wage rate." ER 18.

Moreover, Plaintiffs' argument based on the Director's travel and subsistence determinations directly conflicts with the DIR's own public statements regarding the travel time spent off-hauling from a public works site. On its website, the DIR states under the heading "Legal Background Regarding Coverage of Off-Site Hauling" that; "*[o]ff-the-site hauling is not generally covered work but has been found to be covered work in limited and specific circumstances by the Director of Industrial Relations, the courts and where covered by Labor Code section 1720.3.*" ER 81. Thus, the fact that the DIR is authorized to issue travel and subsistence wage rate determinations has properly played no role in its analysis of whether such work is subject to prevailing wage requirements.

VI. CONCLUSION

California's prevailing wage law, the legislative history of the law, and court precedent all compel the same conclusion: the scope of the

[13] No request for a coverage determination was made by any party regarding mobilization work.

prevailing wage law does not extend to any of the off-site mobilization work performed by Plaintiffs. Accordingly, this Court should hold that FMG and Granite Rock are not required to pay prevailing wages to Plaintiffs for that work.

Dated: September 11, 2019

SIMPSON, GARRITY, INNES & JACUZZI, P.C.

By: _____

Paul V. Simpson
Sarah E. Lucas
Attorneys for Defendants/Respondents
Fonseca McElroy Grinding Co. Inc. and
Granite Rock Company

CERITIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Respondents' Answer Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 9678 words, according to the counter of the word processing program with which it was prepared.

Dated: September 11, 2019

SIMPSON, GARRITY, INNES & JACUZZI, P.C.

By: _____

Paul V. Simpson
Sarah E. Lucas
Attorneys for Defendants/Respondents
Fonseca McElroy Grinding Co. Inc. and
Granite Rock Company

PROOF OF SERVICE

I, Estelle M. Franklin, am employed in the County of San Mateo, California. I am over the age of 18 years and not a party to the within action. My business address is 601 Gateway Boulevard, Suite 950, South San Francisco, California 94080. On September 11, 2019, I served the **RESPONDENTS' ANSWER BRIEF ON THE MERITS** by mailing a copy by first class mail in separate envelopes addressed as follows:

United States Court of Appeals for the
Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
Tel: (415) 355-8000

Case No.: 17-15221

Hon. William H. Orrick
District Judge
United States District Court for the
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
Tel: (415) 522-2000

Case No.: 3:15-cv-05143-WHO

Tomas E. Margain, Esq.
Justice at Work Law Group
84 West Santa Clara Street, Ste. 790
San Jose, California 95113
Tel: (408) 317-1100
E-mail: Tomas@jawlawgroup.com

Attorneys for Plaintiffs/Appellants
Leopoldo Pena Mendoza, Elviz Sanchez
and Jose Armando Cortes

Stuart B. Esner, Esq.
Holly N. Boyer, Esq.
Esner, Chang & Boyer
234 East Colorado Boulevard, Ste. 975
Pasadena, California 91101
Tel: (626) 535-9860
E-mail: sesner@ecbappeal.com;
hboyer@ecbappeal.com

Attorneys for Plaintiffs/Appellants
Leopoldo Pena Mendoza, Elviz Sanchez
and Jose Armando Cortes

I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed for collection and deposit with the United States Postal Service that same day in the ordinary course of business. The above-referenced document(s) were placed in (a) sealed envelope(s) with postage thereon fully prepaid,

addressed to each of the below listed parties and such envelope(s) was (were) placed for collection and deposit with the United States Postal Service on the date listed below at South San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 11, 2019, at South San Francisco, California.

Estelle M. Franklin