Case No. S253574

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,
Plaintiffs and Appellants,

vs.

FONSECA MCELROY GRINDING CO., INC., ET AL.,
Defendants and Respondents.

AMICUS CURIAE BRIEF OF CONSTRUCTION EMPLOYERS' ASSOCIATION IN SUPPORT OF FONSECA MCELROY GRINDING CO., INC.

After a Decision by the Ninth Circuit Court of Appeals
Case No. 17-15221

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL	FOURTH APPELLATE DISTRICT, DIVISION TWO	COURT OF APPEAL CASE NUMBER: 17-15221
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: Paul Aherne (SBN 106887) / Alyssa Roy (SBN 300859) FIRM NAME: RUTAN & TUCKER, LLP STREET ADDRESS: 455 Market Street, Suite 1870 CITY: San Francisco STATE: CA ZIP CODE: 94105 TELEPHONE NO.: (650) 263-7900 FAX NO.: (650) 263-7901 E-MAIL ADDRESS: paherne@rutan.com; aroy@rutan.com ATTORNEY FOR (*name*): Construction Employers' Association		SUPERIOR COURT CASE NUMBER: S253574
APPELLANT/ PETITIONER: Leopoldo Pena Mendoza, et al. RESPONDENT/ REAL PARTY IN INTEREST: Fonseca McElroy Grinding Co., Inc., et al.		

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Construction Employers' Association

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Construction Employers' Association	Amicus Curiae
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 27, 2019

Alyssa Roy
(TYPE OR PRINT NAME)

▶ Alyssa Roy
(SIGNATURE OF APPELLANT OR ATTORNEY)

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AMICUS CURIAE BRIEF

I. STANDING

The Construction Employers' Association (CEA) is comprised of over 100 of the premier unionized contractors (primarily non-residential and multi-family housing general contractors) who perform building construction work in Northern California. CEA members collectively perform over $18 billion in public and private building construction volume and employ in excess of 20,000 employees annually in California. CEA's general contractors build educational facilities, commercial buildings, government buildings, healthcare facilities, multi-family housing projects, energy and power projects, laboratory and technology projects, sports stadiums, water infrastructure projects, parking structures, and more. Although CEA as an organization is specifically focused on the Northern California building construction market, many of its members perform work throughout California and the United States. As general building contractors, CEA members routinely subcontract with numerous subcontractors on their projects.

II. ISSUE PRESENTED

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 questions 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?"

III. 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 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 District Court of Appeals. Finding

no controlling precedent on the issues 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.

IV. SUMMARY OF LEGAL 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.

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 is best left to the Legislature to address. Under the current statutory framework and case precedent, Plaintiffs' off-site mobilization work is not within the law's scope.

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.

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.[1]

Finally, in *Sheet Metal Workers Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th at 211, 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

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[1] 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.

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 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.[2] 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.,

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[2] Plaintiffs curiously rely on *Sparks & Wiewel Const. Co. v. Martin* (Ill. App. Ct. L993) 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 prevailing wage law, expressly applies to "workers and mechanics engaged in the transportation of materials and equipment to and from the side." *Id.* at 538, 541.

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.

V. CONCLUSION

California's prevailing wage law, the legislative history of the law, and court precedent all compel the same conclusion: the scope of the prevailing wage law does not extend to any of the off-site mobilization work performed by Plaintiffs.

Dated: November 27, 2019

Respectfully submitted

RUTAN & TUCKER, LLP

By: Alyssa Roy
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Attorneys for
Construction Employers'
Association

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type including footnotes and contains approximately 2,757 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 27, 2019

RUTAN & TUCKER, LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed by the law office of Rutan & Tucker, LLP in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 455 Market Street, Suite 1870, San Francisco, CA 94105.

On November 27, 2019, I served on the interested parties in said action the within:

AMICUS CURIAE BRIEF OF CONSTRUCTION EMPLOYERS' ASSOCIATION IN SUPPORT OF FONSECA MCELROY GRINDING CO., INC.

as stated below:

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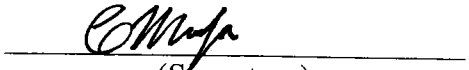
I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 27, 2019, at San Francisco, California.

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

Clarissa Mendoza
(Type or print name)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