S253574

IN THE SUPREME COURT 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

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF RESPONDENTS FONSECA MCELROY GRINDING CO., INC. ET AL.

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CONTRACTORS ASSOCIATION,
INC.

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MODULAR BUILDING INSTITUTE, NORTHERN ALLIANCE OF ENGINEERING CONTRACTORS, and WESTERN ELECTRICAL CONTRACTORS ASSOCIATION, INC.

WECA is a statewide non-profit organization serving merit shop electrical contractors, their employees and the industry suppliers that support them. WECA represents nearly 200 independent electrical contractors employing approximately 6000 general and residential electricians, as well as apprentices, throughout California. Many of these electricians work on public works projects throughout California.

The disparate parties represented in this Petition – union and non-union alike – all have a uniform interest in seeing that California's Prevailing Wage Laws evolve through the proper legislative or administrative process with certainty, predictability, and stability, so all affected parties are able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law and prevailing wage requirements.

The represented Amici are particularly concerned that Petitioners' proposed reinterpretation of the prevailing wage law – to include off-site mobilization work and transportation of equipment – does not satisfy this objective. Appellants proffered rule introduces a nebulous standard for future application and will result in confusion, uncertainty, and an increase of litigation associated with the corresponding retroactive wage liability.

II. THIS BRIEF WILL ASSIST THE COURT IN MAKING ITS DECISION

This amicus brief will assist the Court in the above captioned matter because, for the reasons stated above, the Amici are familiar with the issues before the Court and believe that further briefing is necessary to address matters not fully addressed by the parties' briefs, with particular emphasis on the historical interpretation the prevailing wage requirements of the Labor Code, and ensuring that California's prevailing wage laws evolve with clarity and predictability, through the proper legislative and administrative processes that take account of all the affected interests.

III. PREPARATION OF THE BRIEF

No party or counsel for a party to this matter has authored any part of this brief, and no party or counsel for a party has made any monetary contribution to fund the preparation or submission of this brief.

IV. CONCLUSION

For the foregoing reasons, the amici curiae respectfully request that the court accept the attached brief for filing in this case

DATED: November 27, 2019 COOK BROWN, LLP

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BRIEF OF AMICI CURIAE

I. INTRODUCTION

Amici, represent union and merit shop companies and modular building manufacturers and contractors working on public works throughout California, have a uniform interest in seeing that the application of California's Prevailing Wage Laws evolves through the proper legislative or administrative process, with certainty, predictability, and stability, so all affected parties are able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law and applicable prevailing requirements. Petitioners' proposed interpretation of the prevailing wage law – to include off-site mobilization an transportation of equipment – upends the existing understanding of the law and will only create confusion and uncertainty.

Petitioners' interpretation seeks to expand the prevailing wage to work the District Court described as "mobilization work consist[ing] of discrete tasks independent from plaintiffs' construction duties at the worksite." ER 14. The District Court further 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 yards..." ER 15. Indeed, 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 California Courts have repeatedly held that work is in the execution of the public works contract only when it is integral to, or an integrated aspect of, the flow process of construction, or is effectively performed on the job site. Petitioners argue that the mobilization and transport of the milling machine between the contractor's permanent yard

and the public works construction site is "in the execution of" the public works contract because it is a necessary prerequisite to their onsite work. In *Sheet Metal Workers Internat. Association v. Duncan* (2014) 229 Cal.App.4th 192, 202, ("Russ Will Mechanical") the court warned that under an expansive interpretation of the phrase "in the execution of" as used in sections 1772 and 1774, nearly any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law, regardless of where it talks place or whether it plays a substantial role in the process of construction. Likewise, the court noted that "[a] task that could be considered necessary to fulfill a contract might nonetheless have little relation to the flow of the construction process." (*Id.* at 207)

The *Sheet Metal Workers* Court accurately articulated the position of the Amici when it recognized that "[p]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." A nebulous standard or set of factors governing whether offsite work is covered by the prevailing wage law would create confusion and uncertainty:"

> If [Plaintiff] seeks to expand the coverage of the prevailing wage law, the issue and the associated public policy questions are best left to the Legislature. []
>
> .....
>
> "[T]he California legislature has long been aware of the industry custom and administrative interpretation [governing offsite fabrication], and has not seen fit to mandate coverage for off-site fabrication in permanent shops, despite numerous amendments to the [prevailing wage law] over the past quarter-century." The Legislature is in the best position to judge the effects of extending the prevailing wage law and has done so when appropriate.

(*Id.* at 213-14). Petitioners' proposed interpretation, applying the prevailing wage laws to off-site work of mobilizing and transporting

equipment, contravenes this admonition by usurping the power and function of the Legislature and Department of Industrial Relations without articulating a workable test for future application. For this reason, the Amici respectfully request that the Court decline Petitioners' request for an expansion of the prevailing wage law to cover off site mobilization and transportation of equipment.

A. The California Prevailing Wage Law Does Not Cover Off-Site Transportation

Petitioner alleges that the work of maintaining, loading and transporting equipment between their employer's permanent equipment yard and a public works site is an integral part of the project and consequently, is covered under the Prevailing Wage Law ("PWL"). This position misstates California law.

Neither "transportation" or "trucking" are included in the definition of public works in Section 1720(a), and not surprisingly, neither term is defined in the statute or applicable regulations. However, the California Supreme Court has determined that the word "construction" is to be given its ordinary and plain meaning. In *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 953-954, the Court excluded architectural design, project management, legal services and fees, surveying services and fees, and insurance coverage from construction and held that construction was the actual construction or building of the facility or public work of improvement.

Transportation, on the other hand, is a separate process. As noted in the parties, the transportation at issue was performed off-site, and began at Respondents' permanent yard or other facility not related to the public work. ER 5, 91, 302. Neither transportation itself, nor the equipment which is transported, are immediately utilized or immediately incorporated into the construction process.

The issue of whether off-site transportation work is subject to the California Prevailing Wage Law has arisen in part because of the difference in statutory language between the California statute and the Davis-Bacon Act ("DBA"). (40 U.S.C. Section 3141 et seq.) The DBA states that federal public works contracts shall contain a stipulation stating that prevailing wages are to be paid to laborers and mechanics "employed directly on the site of the work." This provision has been interpreted to mean that off-site transportation is not subject to the DBA. (*Ball, Ball & Brosmer, Inc.* (DC Cir. 1994) 24 F.3d 1447, 1453.)

The distinction between California law and the DBA was analyzed in *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434. In that case, trucking companies "hauled Class 3 aggregate subbase materials from locations not on the project site, but locations adjacent to and established exclusively to serve the project site pursuant to private borrow agreements between plaintiffs [prime contractors] and third parties [property owners]." (*Id.* at 439.) The court was called upon to deal with the issue of whether the trucking companies were subcontractors or material suppliers noting that bona fide material suppliers are exempt from coverage under the federal DBA. (*Id.* at 441-442.) The court initially applied the analysis used in *H.B. Zachary Company v. United States* (1965), 344 F.2d 352, and stated that the trucking companies therein did not obtain materials from established independent material suppliers, but transported materials from locations adjacent to and "established exclusively to serve the project site." (*O.G. Sansone Co.*, 55 Cal.App.3d. at 443.)

Next, the *Sansone* court examined *Green v. Jones*, (1964) 23 Wis.2d 551 and distinguished between the delivery of materials to be stockpiled on the jobsite and materials that were "immediately utilized" on the jobsite. The delivery of material that was dumped in the roadbed and immediately

pushed, spread and leveled and the delivery of aggregate that was immediately mixed with cement and poured on the highway "was an integrated aspect of the 'flow' process of construction."

Ultimately, the *Sansone* court found that transporting materials from locations "adjacent to and established exclusively to serve" the project site and delivering those materials for immediate spreading and compaction with no re-handling out of the flow of construction was functionally related to the process of construction, and thus, work of subcontractors and not material suppliers. (*Id.* at 444-445.) In so ruling, the court thereby treated the borrow pits created for the job site as an extension of the job site, with the coverage question turning on the fact that the workers were moving materials from one portion of the project site to another, as part of the flow of construction.

Thus, it is the process of integration into the immediate flow of construction, and whether the work is effectively performed on the job site, that determines whether work described in the contract documents is the type of work subject to coverage. The opposite is true in this case, and the permanent yard or shop where equipment is stored is not a site "established exclusively to serve the project site," and should not be treated as an extension of the job site. Contract documents also describe management, financing, insurance, administration, clerical work, engineering, and supervision, but these activities are not covered because they are not performed on site and functionally integrated into the construction process. Similarly, material suppliers' work which occurs off-site and is not functionally integrated into the construction process is not subject to the Act. (*Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742.)

Amici submit that the Director of Industrial Relations' past Coverage Determinations establish the correct analytical framework for determining on a case-by-case basis whether off-site transportation is

covered under the California Prevailing Wage Law. Thus, if the nature of the work is such that it is not integrated in the flow process of construction, or it is not effectively performed on site, the work is not subject to coverage.

B. Petitioner's Effort to Expand Coverage under the Prevailing Wage Law Directly Conflicts with the Statutory Process to Determine Classifications and Rates of Pay

Under the statutory scheme, Petitioners had several ways to present their claim that they were paid less than the applicable prevailing wage rate and allow the DIR to utilize its statutory authority and expertise. They could have filed a complaint with the DIR on a specific project and sought the issuance of a civil wage and penalty assessment against his employer. (Labor Code § 1741.) As interested parties, they could have filed a verified petition to review the General Area Determination under Labor Code section 1773.4 and DIR regulation Section 16301 "to determine coverage under the prevailing wage laws regarding . . . [the] type of work to be performed which the party believes may be subject to or excluded from coverage. . ." (Cal. Code Regs tit. 8 § 16001(a).) They also could have initiated a review with the DIR as recognized in *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651, discussed below, seeking modifications to the General Area Determinations referenced above. They did none of these.

Instead, Petitioners have attempted to bypass the administrative processes established by the Labor Code and seek to have the court take jurisdiction over their claim, and determine that the DIR's discretion should have been exercised in a particular way. Not only does the Prevailing Wage Law set forth a methodology for determining classifications and wage rates, the DIR is uniquely qualified to investigate claims that existing classifications do not reflect industry practice. (See *Sharon S. v. Superior*

Court (2003) 31 Cal.4th 417, 436 (great weight and respect accorded to administrative interpretation by agency charged with enforcement).) The establishment of the Driver (On/Off-Hauling To/From Construction Site) classification is an excellent example of this. Prior to 2009, no classification existed for mixer trucks and dump trucks, but the DIR had issued coverage determinations indicating that some off-site trucking indeed was within the Prevailing Wage Law. To rectify this anomaly, the DIR conducted an investigation and issued this new classification and rate of pay on a county-by county basis. (See Request for Judicial Notice ("RJN") Ex. A "February 22, 2009 Important notice regarding the prevailing wage determinations for the craft of driver on/off hauling to/from construction site.")

The Labor Code sets forth a quasi-legislative process for the DIR to determine classifications and rates of pay in these circumstances. Section 1770 mandates that "The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773, and the director's determination in the matter shall be final except as provided in Section 1773.4." The DIR does so by issuing General Area Determinations for a county or group of counties or Special Determinations applicable to a specific project. (8 C.C.R. §§ 16201, 16202.) The determination of whether a classification or type of work is subject to the Prevailing Wage Law is an integral part of wage determination process which is part of the DIR's quasi-legislative function delegated to it by the Legislature. (8 C.C.R. §§ 16303; *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-127. See also, *California Slurry Seal Association,* 98 Cal.App.4th at 662 (mandate inappropriate to compel the DIR to exercise its discretion in a particular way).)

The DIR follows a structured process for determining work classifications and rates of pay. First, the Director of Industrial Relations "shall ascertain and consider" wage rates established by local collective bargaining agreements and those predetermined under the Davis-Bacon Act for federal public works within the locality and in the nearest labor market area. Second, when these rates do not constitute the actual prevailing wage rates in the locality, the director is to "obtain and consider" further data from the labor organizations, employers, and employer associations "including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved." By statute, "The rate fixed for each craft, classification, or type of work shall be not less than the prevailing rate paid in the craft, classification, or type of work." (Labor Code § 1773.)

The statute also provides for a specific method permitting "Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body" to seek review of any wage determination "upon the ground that they have not been determined in accordance with the provision of Section 1773." This provision sets forth a procedure for challenging the scopes of work and prevailing rates in a call for bids. It has been recognized with approval that the DIR uses this procedure for general challenges to the issuance of wage determinations. (*California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.)

In citing *Hoffman v. Pedley School Dist.* (1962) 210 Cal.App.2d 72, the court in *California Slurry Seal Association* noted that a union filed a complaint challenging a wage rate being paid under a public works contract, but had not filed a petition under Section 1773.4 challenging the prevailing rate stated in the call for bids. The union passed over this step and filed a lawsuit shortly after the call for bids was published and a

contract for the public work was signed. The lower court denied the union's motion for a temporary restraining order to block the expenditure of public funds on the contract and the appellate court affirmed on the basis of failure to exhaust administrative remedies.

> Clearly, the statute was designed to protect against exactly the sort of challenge the union representative brought. (*Hoffman*, at p. 75.) As the court there explained, the statutory 'procedure' is reasonably prompt and efficacious and eliminates unconscionable delays in getting public work done." (*Id.* at p. 76.) It sets forth a particular manner and a specific period of time in which a challenge may be made, and limits the number of days for the Department to render its decision. The purpose is for the rates as determined by the Department in response to the petition to be included in the contract, so the work thereunder can be performed promptly. (*Id.* at pp. 75-76; § 1773.4.)

(*California Slurry Seal Association*, 98 Cal.App.4th at 659.)

For example, on August 12, 2012, the DIR issued a General Area Determination for the Operating Engineer covering Northern California Counties. ER 320. The scope of work is extensive and includes twenty (20) groups, fifty (183) sub-classifications and fifty (40) rates of pay dependent upon the location of the work. Nowhere in the Determination has the Director determined at off-site hauling of equipment is work performed by an operating engineer subject to prevailing wage. ER 230-31.

Similarly, the General Area Determination for the Teamster classification adopted in 2012, while not a comprehensive as the Operating Engineer Determination, also includes eight (8) groups, seventy-six (76) sub-classifications and several rates of pay. Importantly, however, the DIR has stated in writing on the top of the determination that it "APPLIES ONLY TO WORK ON THE CONSTRUCTION SITE." (emphasis in the original) (RJN Ex. B.)

Since at least February 2009, the DIR has issued a General Area Determination called "Driver (On/Off-Hauling To/From Construction Site)" which applies to those driving either a dump truck or mixer truck. (RJN Ex. C.) As with the Operating Engineer and Teamster classifications, this classification also has several components and rates of pay which vary county to county based on the DIR's investigation conducted under Section 1773 and 1773.9. (*Id.* at p. 2-3). This classification applies to "hauling of refuse from a public works site to an outside disposal location" under Section 1720.3 as well as transporting material to a public works site to be immediately incorporated in the flow process of construction as discussed in *Sansone*. There is nothing in the scope of work for these sub-classifications indicating that they apply to transporting equipment to and from an equipment yard to a public work site.[1] (*Id.* at p. 1-3)

Through this lawsuit, Petitioner is asking the Court to conduct an "end run" around this statutory process. In essence, the Complaint seeks a court order revising the Operating Engineers Wage Determination by modifying the scope of work to include off-site mobilization and driving a truck and lowbed trailer to haul equipment to and from a public works site. Alternatively, Petitioner requests the court to establish a new classification and rate of pay despite the fact that the DIR has decided not to include this

[1] The work of a concrete mixing truck driver is described in part in the determination as "Drives truck equipped with auxiliary concrete mixer to deliver concrete mix to job sites: Drives truck under loading hopper to receive sand, gravel, cement, and water and starts mixer. Drives truck to location for unloading. Moves levers on truck to release concrete down truck chute into wheelbarrow or other conveying container or directly into area to be poured with concrete." RJN Ex. C at p. 8. The work of a dump driver is described in part as "Drives truck equipped with dump body to transport and dump loose materials, such as sand, gravel, crushed rock, coal, or bituminous paving materials: Pulls levers or turns crank to tilt body and dump contents. Moves hand and foot controls to jerk truck forward and backward to loosen and dump material adhering to body. May load truck by hand or by operating mechanical loader." RJN Ex. C at p. 10.

function in the Operating Engineers, Teamsters or Driver (On/Off-Hauling To/From Construction Site) Wage Determinations. Instead, the proper method for establishing a new classification and rate of pay is to present a petition to the DIR asking for an investigation to determine whether the nature of the work subjects it to the Prevailing Wage Law. If the work is covered, the DIR first determines whether an existing classification and rate of pay applies to the work. If the work is covered and no existing classification applies, the DIR is directed by statute to "ascertain and consider" relevant information leading to the issuance of a General Area (or Special) Determination. (Labor Code § 1773; Cal. Code Regs. tit 8 §§ 16201, 16202.) This process may include conducting an area survey. (Labor Code § 1773.9; Cal. Code Regs. tit 8 §§ 16200, 16201.) (See RJN Ex. A ("February 22, 2009 Important Notice" after DIR conducted a wage investigation to determine the rate).) Litigation seeking back wages, on the other hand, should not be used or permitted to usurp the quasi-legislative authority of the DIR in issuing classifications and rates of pay, and retroactively modify the wage obligations of public works contractors.

C. Any Expansion of the Scope of the Prevailing Wage Law Should Be Left to the Legislature

Petitioner argues that off-site work to prepare and haul equipment to and from a public works site should be included in the scope of work for operating engineers, but the Director and the Court "are not authorized to rewrite Section 1720 to conform to an assumed intent the Legislature did not express." (*State Building and Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 319-320.) The plain reading of the statute reveals that transporting equipment to and from a public works site is not the type of work subject to coverage as public works under the Labor Code.

Labor Code Section 1771 states that "all workers employed on public works" are to be paid prevailing wages, and contractors are required to pay prevailing wages "to all workmen employed in the execution of the contract" pursuant to Section 1774. Under Labor Code Sections 1770 and 1773, the Director determines the applicable prevailing wages for each craft, classification, or type of worker needed to execute the public works contract, describing the scope of work of each. Prevailing wages include the basic hourly wage rate, other employer payments (often referred to as fringe benefits) and holiday and overtime rates for each craft, classification, or type of worker under Section 1773.9. The public entity awarding the contract specifies in the calls for bids, bid specifications and public works contract the prevailing wages for each craft, classification, or type of worker pursuant to Section 1773.2. Within this statutory framework, the Director has been delegated the authority to determine whether specific project or type of work is "subject to or excluded from coverage as public works under the Labor Code." (8 C.C.R. Section 16001(a)(1); *Lusardi Construction v. Aubry* (1992) 1 Cal.4th, 976, 988-989.)

Over the years, the Department of Industrial Relations has interpreted this language to apply the PWL to construction work performed on the site of construction and in some limited instances, to work performed off-site. Off-site fabrication, for instance, is subject to the PWL when it is done at a temporary facility established to serve a particular public works project. (RJN Ex. F at p. 3-4 (Department of Industrial Relations' Decision on Administrative Appeal, Imperial Prison II, South, PW Case No. 92-036 (April 5, 1994) (PWL applying to off-site fabrication at yard established exclusively for the public works project)).) Transporting material to a public works site is also covered if the material is immediately incorporated into the flow of construction. (ER 73 Department of Industrial Relations, Directors Decision 04-0180-PWH,

Triple E Trucking (11/13/2008) (work covered if hauler participates in the immediate incorporation of materials).) These administrative interpretations, dependent upon whether particular facilities should be treated as an extension of the project site, or work is effectively being performed on site, have been upheld by the courts. (See generally *Sheet Metal Workers Internat. Assn., Local 104*, 229 Cal. App. 4th 192; *SnSands Corp.*, 156 Cal. App. 4th 742; *O.G. Sansome Co.*, 55 Cal. App. 3d. 434.)

The court's objective in interpreting a statute is to determine and effectuate legislative intent. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) In deciding whether the Legislature intended hauling of equipment to and from a public works site is the type of work subject to coverage as public works, the court will first look to the words of the statute, "because they generally provide the most reliable indicator of legislative intent." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, quoting *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) "If the statutory language is clear and unambiguous our inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*Id.* at 1103 (internal citations omitted).)

As previously noted, the DIR has issued Wage Determinations limiting the Teamster classification to work performed on the site of construction and creating the Driver (On/Off-Hauling To/From Construction Site) classification and extending it to truckers who drive

dump trucks and mixer trucks.[2] Similarly, the DIR has also published an extensive Wage Determination for Operating Engineering, but has not permitted this classification to be used for either on-site or off-site hauling.

These DIR decisions and actions have provided clear guidance to contractors, employees and other interested parties with respect to hauling to and from a public works site, and when the payment of prevailing wage is required. Given the serious consequences of noncompliance, including financial penalties, debarment and criminal sanctions (Labor Code §§ 1742.1, 1771.2, 1775, 1777, 1777.1, 1777.7), certainty as to applicable wages is critical element to a contractor's bid price and wage compliance efforts.[3]

The Legislature has the right, which it has often exercised, to amend the PWL to change the definition of public works and public funds or to expand coverage. Thus as recently as 2011, the Legislature amended Labor Code Section 1720.3 to redefine "hauling of refuse" to include hauling of rock, sand, gravel, and other subbase material, but at the same time, exempt the hauling of recyclable metals separated at the jobsite and sold for fair market value to a bona fide purchaser. (RJN Ex. D. (Assem. Bill No. 514

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[2] The wage rate for the Driver classification is the Teamster rate in some counties. (RJN Ex. A (February 22, 2009 DIR Important Notice to Awarding Bodies).)

[3] The laws regarding whether a project is deemed a "public work,' the prevailing wage determinations governing whether a particular type of work is subject to prevailing wage, and the applicable wage rates, are frozen as of the "benchmark" event for the project, providing certainty as to the public works contractors. (See e.g., *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal. 4th 942, 946 (applicability of prevailing wage depended upon "the law in effect when the contract at issue was developed."), *Vector Resources, Inc. v. Baker* (2015) 237 Cal. App. 4th 46, 51 ("Contractors must use the prevailing wage determinations in effect on the bid the bid advertisement date of the public works project.")) Retroactively changing what is considered to be covered work creates liability that did not exist at the time the contract was entered.

(2011-2012 Reg. Sess.) § 1, CH. 676.)) Over time the Legislature has also amended Section 1720(a) to add preconstruction activities to the definition of construction and reworked Section 1720(b) to expand the definition of public funds to include rents paid, reduced, charged at fair market value, waived or forgiven by the state or political subdivision.

Recognizing the need for stability and predictability of the PWL, the courts on several occasions have noted that it is for the Legislature, and not the courts, to expand coverage. In *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, the court concluded the County's decision to forgo rent along with offering other financial inducements did not amount to the payment of public funds under the PWL. "A theme recurrent in plaintiffs' briefing is that aspects of this case (rent forbearance, inspection costs, bond premiums, public purpose) have a "cumulative" effect warranting public-works status even if the individual aspects do not. We reject that approach as unworkable. Parties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent. Subdivision (a) of section 1720 would become a quagmire under plaintiffs' approach, the only certain result being constant litigation. The Legislature has formulated precise criteria tailored to many situations in this area ... and is uniquely suited to balance and address the several policy concerns raised here." (*McIntosh,* 14 Cal.App.4th at 1593 (internal citations omitted).)

In *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, the court held that the allocation of state low income housing tax credits (LIHTCs) was not the expenditure of public funds under the PWL. The court acknowledged divergent public policy between increasing affordable housing and paying prevailing wages on public works. "There are weighty arguments and worthy goals arrayed on each side. Trades Council and the State Treasurer, citing the rule of

liberal construction traditionally afforded the Prevailing Wage Law ... see the issue as the threatened frustration of the clear statutory mandate to apply the Prevailing Wage Law to a category of residential construction that would not exist but for the gift of LIHTCs. The Director, Housing Development, the Building Industry Association, and the Redevelopment Association are eloquent in describing what they perceive will be the adverse impact of extending the Prevailing Wage Law to future projects, thereby reducing the willingness of developers to expand the stock of low-income housing. These are issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court. 'Our role is confined to ascertaining what the Legislature has actually done, not assaying whether sound policy might support a different rule.'" (*General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 790, (internal citations omitted)).

This theme was repeated in *Sheet Metal Workers' International Association, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192 ("Russ Will Mechanical") where the court was asked to extend the PWL to reach off-site fabrication of sheet metal products. In declining to do so, the court recognized that the administrative acts and interpretations of the DIR comported with the statute and provided certainty and clarity to affected parties. Quoting *McIntosh*, it stated all "'[p]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent.' A nebulous standard or set of factors governing whether offsite work is covered by the prevailing wage law would create confusion and uncertainty. If [plaintiff] seeks to expand the coverage of the prevailing wage law, the issue and the associated public policy questions are best left to the Legislature." (*Id.* at 213-214.)

In *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, this court has also applied this rule of statutory construction

in the context of interpreting the PWL. There, the court concluded that the word "construction" in the statute at the time did not include preconstruction activities.[4] While stating that "Courts will liberally construe prevailing wage statutes" it also noted that "they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act" citing *McIntosh* with approval on this point. (*Id.* at 950.)

In this instance, the Legislature will need to balance the public policy of free flow of intra- and interstate trucking with extending the PWL to cover off-site transportation of equipment and all of its attendant administrative and financial consequences. By its very nature transportation primarily occurs off-site and only loading and unloading happen on the jobsite. A driver will spend the vast majority of time driving, maintaining and performing safety checks on the truck and trailer off the jobsite. Construction work is systematic and scheduled whereas driving on highways is fraught with delays and difficulties. Historical practice is for drivers to be paid by the load which includes a rental value for the truck. The Legislature will need to decide whether it will attempt to set a fair market rental rate for the truck and whether this action will be preempted by federal law. Prevailing wages are determined based on those that prevail in the locality of the public works project. Equipment, on the other hand, can and is transported from various locations and may come from long distances and possibly out of state or out of country. The Legislature will need to determine whether, when, and how to impose prevailing wage and rental rate obligations on truck drivers coming from various locations none of which is actuality the site of the public works

[4] In 2000, after the public works contract at issue in *City of Long Beach* was executed, the Legislature exercised its prerogative to expand the PWL to preconstruction activities through the passage of Senate Bill 1999. (See RJN Ex. E (Senate Bill 1999 (1999-2000 Regular Session), Ch. 881).

project. The PWL also includes extensive apprenticeship obligations implicated by an expansion to cover off-site work. (Labor Code § 1777.5.) The Legislature is in the best position to decide from a policy perspective whether to extend apprenticeship to the construction trucking industry.

II. CONCLUSION

Petitioners' proposed interpretation represents a radical departure from California's current prevailing wage law, and seeks to supplant the administrative and legislative processes through which it evolves with litigation and damages. Such an interpretation would introduce confusion, uncertainty and a corresponding increase in litigation. Historically, the Legislature has demonstrated its clear intention to expressly subject certain off-site work to prevailing wage requirements while, at the same time, excluding others. Such decisions, along with the methodologies employed, are best left to the Legislature.

DATED: November 27, 2019

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By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately 13 point Times New Roman Typeface. According to the "Word Count" feature in Microsoft Word for Windows software, this brief contains 5438 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 27, 2019.

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PROOF OF SERVICE

I, Linda Johnston, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Cook Brown, LLP, 2407 J Street, Second Floor, Sacramento, California 95816.

On November 27, 2019, I served the within documents described as: **APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF RESPONDENTS FONSECA MCELROY GRINDING CO., INC. ET AL.** by mailing a copy by First Class Mail in separate envelopes addressed as follows:

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Case No.: 17-15221

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid.

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 27, 2019, at Sacramento, California.

LINDA JOHNSTON