Case No. S251135

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN BUSKER,

Plaintiff-Appellant,

v.

WABTEC COPORATION, ET AL.,

Defendants-Respondents;

On Certification from the
United States Court of Appeals for the Ninth Circuit, Case No. 17-55165
Judge Otis D. Wright, II, Case No. 2-15-cv-08194-ODW-AFM

APPLICATION OF SHEET METAL WORKERS' LOCAL 104 FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT JOHN BUSKER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520, the International Association of Sheet Metal, Air, Rail & Transportation Workers, Sheet Metal Workers' Local Union No. 104 ("Local 104") respectfully requests leave to file the attached amicus curiae brief in support of appellant John Busker.

Local 104 is a labor organization that represents approximately 10,000 sheet metal workers throughout northern and central California. Local 104's members perform hundreds of thousands of hours of work each year on publicly-funded construction projects subject to California's prevailing wage law. The primary mission of Local 104 is to improve the health, safety, and economic conditions of its members, and to raise labor standards in the sheet metal industry.

Local 104 has a strong interest in ensuring that the prevailing wage law is applied in accordance with the intent of the Legislature. Under a cramped reading of the prevailing wage law, contractors could avoid paying prevailing wages to their employees for a portion of every project simply by shifting the performance of some essential project work to their permanent shops and then installing the constructed items on the job site, or by contracting separately for different parts of the same project. Local 104's signatory contractors that pay prevailing wages to their employees regardless of where construction work is performed would be unable to bid for public work on a level playing field with low-road contractors that try to avoid their prevailing wage obligations.

Local 104's proposed amicus brief will assist the Court in evaluating the language and purpose of the prevailing wage law, and understanding how the narrow interpretation that appellee Wabtec Corporation advances

would adversely affect California's construction workforce, government entities, and the public fisc.

Pursuant to Rule of Court 8.520(f)(4), Local 104 affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the foregoing reasons, the Court should grant Local 104 leave to file the attached amicus brief.

Dated: July 15, 2019

Respectfully submitted,

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PROPOSED AMICUS CURIAE BRIEF

I. INTRODUCTION

The certified question is "[w]hether work installing electrical equipment on locomotives and rail cars ... falls within the definition of 'public works'" under California's prevailing wage law "either (a) as constituting 'construction' or 'installation' under the statute or (b) as being integral to other work performed for the PTC project on the wayside." Cert. Order at p.4. Wabtec Corporation relies heavily on the First District Court of Appeal decision in *Sheet Metal Workers' International Association, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 204, to argue that John Busker's electrical work was not covered by the prevailing wage law. *See* Answering Brief ("AB") at pp. 46-48. But *Sheet Metal*, which held that off-site sheet metal fabrication work performed in a contractor's permanent shop was not subject to the prevailing wage, is both wrong and inconsistent with the precedent upon which it purportedly relies, and creates incentives for public works contractors to shift work off-site to low-wage areas of the state, undermining the purposes of the prevailing wage law.

In answering the certified question, the Court should take the opportunity to bring clarity to this area of law by rejecting Wabtec's reliance on *Sheet Metal* and articulating a clear standard under which lower courts may determine whether the prevailing wage law extends to work performed away from the site of a public works project.[1] Amicus proposes that the test articulated by the Court of Appeal in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, best reflects the language and purposes

[1] This Court has also agreed to decide a closely related certified question in *Mendoza v. Fonseca McElroy Grinding*, Case No. S253574.

of the prevailing wage law. *Williams* requires the payment of prevailing wages for any work that is "integral to the performance of th[e] general [public works] contract," and directs courts to consider "the role the [work] plays in the performance or 'execution' of the public works contract," including whether the work is performed pursuant to specifications in the contract and whether it is necessary to fulfill the contract. *Id.* at 752. The *Williams* test is consistent with the second line of Court of Appeal authority identified by the Ninth Circuit's certification order in this case, under which the prevailing wage law may apply to a privately-funded construction contract that is integral to a publicly-funded construction project.

As discussed below, the test suggested by Wabtec, relying on the *Sheet Metal* decision, is inconsistent with the language and purpose of the prevailing wage law, and contrary to the public interest as recognized by the Legislature.

II. ARGUMENT

A. All work performed "in the execution of" a public works contract is covered by the prevailing wage law, regardless of where that work is performed.

The California Labor Code requires that "all workers employed on public works" be paid the prevailing wage rate as determined by the Department of Industrial Relations ("DIR"). Labor Code §§ 1770, 1771. In defining "workers employed on public works," the statute states that "[w]orkers employed by contractors or subcontractors *in the execution of* any contract for public work are *deemed* to be employed upon public work." *Id.* §1772 (emphasis added). The two provisions read together demonstrate the Legislature's intent that workers who perform work "in the execution of" a public works contract, be "deemed to be employed *upon*

public work," *id.* (emphasis added), and therefore treated the same for prevailing wage purposes as "workers employed *on* public works," *id.* §1771 (emphasis added). The location where the work is performed is thus not determinative of prevailing wage coverage, as long as the work is performed "in the execution of" the public works contract.

In determining whether work is performed "in the execution of" a public works contract, the proper test is whether the work at issue is "integral to the performance of th[e] general [public works] contract." *Williams*, 156 Cal.App.4th at 752. That inquiry, as applied by the Courts of Appeal, considers a range of factors bearing on the relationship between the work performed and the public works contract.

The standard was first announced in *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, in which the Second District Court of Appeal considered whether employees of a company transporting construction materials to a highway construction site were covered by the prevailing wage law. *Sansone*'s conclusion that hauling materials from an off-site location to the project site was covered by the prevailing wage law was not based on any single factor, but rather on several factors relevant to the relationship between the work performed and the public works contract: *first*, the fact that the public works contract included specifications regarding the materials to be hauled; *second*, that the contractor "did not furnish [these] materials by securing them through a standard commercial supplier," (e.g. buying construction materials off the rack at Home Depot); and *third*, that the materials were "transported from sites designed to supply the public works site and located adjacent to the site." *Id.* at 443, 445. Based on the combination of these factors, the *Sansone* court found that the delivery of the materials was "*an integral part*

of" the on-site contractor's "obligation under the prime contract," and therefore covered by the prevailing wage law. *Id.* at 445 (emphasis added). The Court did not indicate that the location or nature of the site from which the materials were shipped was an essential requirement for coverage, but rather one of several factors to consider.

Then, in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, the First District Court of Appeal held that employees hauling material *off* a public works site were not employed "in the execution of " the public works contract, Labor Code §1772, and therefore not entitled to prevailing wages. The *Williams* court considered the dictionary definition of "execution," and concluded that "the use of 'execution' in the phrase 'in the execution of any contract for public work,' plainly means the carrying out and completion of all provisions of the contract." 156 Cal.App.4th at 750. Under this definition, a worker employed to carry out a provision of the public works contract is entitled to prevailing wages.

In determining that the off-hauling employees were not entitled to prevailing wages, *Williams* discussed *Sansone* at length and concluded that "[c]ritical to *Sansone*'s analysis ... was whether the trucking companies were bona fide material suppliers conducting an operation truly independent of the ... general contract for public work, as opposed to conducting work that was integral to the performance of that general contract." *Id.* at 752. Accordingly, *Williams* concluded that "[w]hat is determinative" in analyzing whether the prevailing wage law applies "is the role the [work] plays in the performance or 'execution' of the public works contract." *Id.* The proper analysis is to ask:

> whether the [work] was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; [or] whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.

Id.

Because in *Williams* there was neither evidence that the work was performed pursuant to specifications in the contract, nor evidence that the prime contractor directed any details regarding the off-hauling, the court concluded that the off-hauling work was "no more an integral part of the process of the public works project than the delivery of generic materials to the public works site by a bona fide material supplier." *Id.* at 753; *see also id.* at 754 (distinguishing a case in which the "public works contract obligated the prime contractor to remove the excavated pavement and dirt" and thus "off-hauling was specifically incorporated into the public works project"). Accordingly, the prevailing wage law did not apply to the employees who performed this work. *Id.*

Together, *Sansone* and *Williams* direct the courts to examine the nature of the work performed and the requirements of the public works contract to determine whether the off-site work is integral to the performance of the public works contract, and therefore entitled to prevailing wage coverage. Here, there can be no dispute that Metrolink's Positive Train Control system could not function unless components of the system were installed in both the trackway and the rail cars, and there is no dispute that the trackway work was subject to the prevailing wage law. Thus, because the off-site rail car work was integral to and performed in accordance with the specifications of the prime public works contract, it should be covered by the prevailing wage law under the *Williams* standard.

B. The *Williams* standard is consistent with the second line of authority identified in the Ninth Circuit's certification order.

The standard developed in *Sansone* and *Williams* is consistent with the standard that has been applied in the second line of prevailing wage cases, which have construed the term "public works" in Labor Code §1720 when considering whether the prevailing wage law applies to a privately-funded construction contract that is related to a publicly-funded construction contract. Wabtec dismisses this second line of cases as "inapposite" because those cases concern a project's source of funding and the term "public works" in Labor Code §1720, whereas this case concerns the nature of the work and the definition of "in the execution of" in Labor Code §1772. AB at p. 55. But both lines of authority wrestle with the question of whether an aspect of a project that might not, on its own, be covered by the prevailing wage law is indeed covered because of its relationship to other work that is undisputedly "public work." The *Williams* test, which asks whether the work at issue is necessary to accomplish or fulfill the purpose of the public works contract, is equally applicable whether a court is analyzing Labor Code §1720 or §1772.

Labor Code §1720 defines "public works" to mean "[c]onstruction ... work done under contract and paid for in whole or in part out of public funds." The Legislature broadly defined phrase "paid for in whole or in part out of public funds" to include both direct and indirect subsidies, with a narrow exception where the "public subsidy to a private development project ... is de minimis in the context of the project." Labor Code §1720(c)(3). Twice in the past eight years, a Court of Appeals has considered whether a construction contract paid for entirely by private funds should nonetheless be deemed "public works."

In *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 547, the project owner, Oxbow, entered into two separate contracts related to the construction on a building used for shipping and storing petroleum coke: a publicly-funded contract for the construction of coke "conveyors" and a privately-funded contract for the construction of a roof to cover the conveyors. In holding that the prevailing wage law applied to both contracts, the Second District Court of Appeal relied on "the concept that construction is the creation of the whole—the 'complete integrated object'—which is composed of individual parts." *Id.* at 549.

The court rejected Oxbow's position that the existence of separate contracts should be determinative, because "an awarding body and a contractor often have strong incentives to avoid the prevailing wage law and thus may structure their contracts to circumvent it." *Id.* at 550; *cf. Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 987-88 ("[B]oth the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.").

Like *Williams*, the *Oxbow* court engaged in a functional analysis of the project and concluded that "no matter what the terms of the [contracts] were, the purpose and end result of the construction was a functioning coke

receiving and storage facility." *Oxbow*, 194 Cal.App.4th at 550. Because the conveyors and the roof were necessary to form a "complete integrated object" — in that case, a fully functional coke storage facility that could lawfully operate pursuant to its permit — the prevailing wage law applied to the whole project, including the privately funded portion of the project. *Id.* at 549.

Similarly, in *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 210-12, the First District Court of Appeal followed *Oxbow* and held that the prevailing wage law applied to both parts of a redevelopment project involving construction of a privately-funded movie theater and a publicly-funded parking lot. The court rejected Cinema West's argument that "'the parking lot was entirely unnecessary to the operation of the Theater, and the Theater was entirely unnecessary to the operation of the parking lot.'" *Id.* at 213. The court concluded that Cinema West was merely "attempt[ing] to segment the development into separate components so as to avoid application of the [prevailing wage law] to construction of the theater." *Id.* But the public works contract itself described the parking lot "as *necessary to serve* the proposed 12-screen theater," *id.* (emphasis added), leading the court to conclude that the theater and parking lot "were part of a 'complete integrated object,'" subject to the prevailing wage law, *id.* at 215.

Like *Williams*, this second line of authority teaches that application of the prevailing wage law requires a functional analysis of the project and whether the privately-funded and publicly-funded parts of a project are sufficiently integrated so as to make both "public works." Under that standard, the rail car work performed by Mr. Busker forms a "'complete integrated object'" with the trackway work, both parts of which are

necessary to have a functioning Positive Train Control system. As in *Oxbow*, both parts were therefore covered by the prevailing wage law.

C. Wabtec's reliance on *Sheet Metal* is misplaced.

It is clear that under the *Williams* and *Oxbow* lines of authority, Mr. Busker's off-site work would be covered by the prevailing wage law. Wabtec nonetheless relies on *Sheet Metal* to support its contention that even though Mr. Busker's electrical work was performed pursuant to specifications in the public works contract and was necessary to create the "complete integrated object" (the Positive Train Control system) called for by the contract, it was not covered by the prevailing wage law because that work was performed off-site in a permanent yard. *See* AB at pp. 46-48.

But the *Sheet Metal* decision is wrong, and represents a significant divergence from the other cases in this area. *Sheet Metal* involved a subcontractor's off-site fabrication of HVAC ductwork to be installed on a public works construction project. The court acknowledged that the fabrication of these custom items was not "independent of the performance of" the public works contract because "the work ... performed involved the fabrication ... in accordance with the plans and specifications set forth in the contract documents for the project." *Sheet Metal*, 229 Cal.App.4th at 197. But the court held that off-site fabrication work is not covered by the prevailing wage law unless it is "integrated into the *flow process* of construction," a factor not previously given controlling weight. *Id.* at 206 (emphasis added). Instead of applying *Williams*' "integral to the performance of [a public works] contract" analysis, which looks at the nature of the work in question and its relationship to the public works contract, 156 Cal.App.4th at 752, the *Sheet Metal* court focused on the location where the work was performed and its relationship to the "flow

process of construction," a term the court never defined, 229 Cal.App.4th at 206.[2]

Sheet Metal held that "[f]abrication ... at a permanent off-site facility is independent of the ... construction contract because the facility's existence and operations do not depend upon ... the public works contract." *Id.* at 212. That holding suggests that off-site fabrication at a permanent facility can *never* be subject to the prevailing wage law regardless of the nature of the work or its relation to the public works contract; but the identical work performed at a temporary facility set up solely to supply the specific public works project would be subject to the prevailing wage law. Nothing in the text of Labor Code §1772 or the analysis in *Sansone* or *Williams* supports such a distinction.

In holding that the worker's location was determinative, the *Sheet Metal* court relied on what it believed to be DIR's longstanding view regarding application of the prevailing wage law to off-site fabrication

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[2] The "flow process of construction" is a concept that entered California prevailing wage jurisprudence in the context of highway construction, and is hopelessly vague unless cabined to that context. *Sansone*, a case about the hauling of roadbed materials onto a highway construction site, borrowed the term from *Green v. Jones* (Wis. 1964) 128 N.W.2d 1, which arose in the identical context. *Sansone*, 55 Cal.App.3d at 444. In *Green*, the Wisconsin Supreme Court ruled — under a Wisconsin highway construction prevailing wage statute that the court expressly held applied, like the federal Davis-Bacon Act, only to work performed on the construction site — that the prevailing wage applied to the on-hauling of roadbed materials that were immediately dumped and spread into the roadbed by the drivers. 128 N.W.2d at 6-7. Those materials included aggregate that had to be immediately mixed into ready-mix concrete and spread in the roadbed. *Id.* In context, the "flow process" of highway construction refers to the immediate incorporation of materials transported to the site into the ultimate product of a highway, as compared to materials that are dropped off by the drivers and only later used by other workers. *Sansone*, 55 Cal.App.3d at 444-45. There is no comparable generally accepted definition of the "flow process of construction" in the context of building construction, where few components need to be immediately incorporated into a structure upon delivery to the jobsite.

work. But there was no such longstanding administrative interpretation; DIR's position on off-site fabrication work has vacillated over the years. DIR's position at the time of the *Sheet Metal* case was that, with respect to off-site fabrication, California's prevailing wage law should be interpreted to be consistent with regulations implementing the federal Davis-Bacon Act (the federal prevailing wage law applicable to federally-funded projects). *Sheet Metal*, 229 Cal.App.4th at 207-08.

But the federal Davis-Bacon Act by its terms applies only to workers "employed directly on the site of the work," 40 U.S.C. §3142(c)(1), while California's prevailing wage law contains no such limitation. The Davis-Bacon Act "unambiguously restricts ... coverage ... to ... the geographical confines of the ... project's jobsite." *Bldg. & Constr. Trades Dep't v. Dep't of Labor* (D.C. Cir. 1991) 932 F.2d 985, 986. Under California's prevailing wage law, by contrast, *all* "[w]orkers employed by contractors or subcontractors *in the execution of* any contract for public work are deemed to be employed upon public work," Labor Code §1772 (emphasis added), a formulation that is not consistent with any situs limitation. Therefore, it made no sense for DIR to rely on a *federal* regulation that interprets the *federal* statutory phrase "directly on the site of the work" to limit the reach of a *state* prevailing wage law that contains no comparable situs limitation. *See, e.g., Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 593-94 (rejecting argument that a state wage law with broader coverage language should be interpreted consistently with a federal wage law); *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 ("federal authorities are of little assistance, if any, in construing state laws and regulations that provide greater protection to workers").

Indeed, the portion of the federal regulation that *Sheet Metal* relied

on does not apply to federal prevailing wage statutes that, like the California law, do not contain Davis-Bacon's "directly on the site of the work" limitation.[3] And courts in other states have rejected the argument that the federal "situs" limitation applies to state prevailing wage laws that have different wording. *See, e.g., Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.* (Wash. 1998) 748 P.2d 1112, 1114; *Sharifi v. Young Bros., Inc.* (Ct. App. Tex. 1992) 835 S.W.2d 221, 223.[4]

For example, in *Everett*, the Washington Supreme Court unanimously held that that fabrication of custom items is part of the construction of a public works project, regardless of where it is performed, and absent an explicit statutory exclusion prevailing wage requirements apply. Washington's statute provided that workers must receive prevailing wages for work performed "upon all public works." *See Everett*, 748 P.2d at 1113. The Washington Supreme Court held that "[u]pon all public works" "must be construed to require application of the prevailing wage

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[3] *See* 29 C.F.R. §5.2(j) (excluding work done under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, which do not have the "directly on the site of the work" limitation).

[4] *Sheet Metal* also misconstrued the legislative history. Although the court "agree[d] that some significance should be attached to the fact that [California's] prevailing wage law does not use the 'directly on the site' language employed in the Davis-Bacon Act," the court refused to infer from such omission that the California Legislature did not want to impose the same geographical limitation, noting that Davis-Bacon's situs limitation first appeared in 1935, while the initial versions of Davis-Bacon and California's prevailing wage law (without the limitation) "were passed at roughly the same time in 1931." 229 Cal.App.4th at 203. But California's prevailing wage law, though first enacted in 1931, was codified in 1937, *after* Davis-Bacon was amended to include the situs limitation. And although the 1937 Legislature made some changes to the language and structure of the prevailing wage law, including changes to the coverage provisions at issue here, *compare* 1931 Cal. Stat. ch. 397, §§1–4, *with* 1937 Cal. Stat. ch. 90, §§1770–1772, the Legislature chose not to substitute Davis-Bacon's 1935 amended language, "directly on the site" then or at any time thereafter.

requirement to off-site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way, the use of cheap labor from distant areas is avoided and the purpose of [the law] is not circumvented." *Id.* at 1118. *Everett* rejected the argument accepted by the *Sheet Metal* court that it should rely on regulatory interpretations of Davis-Bacon to impose a situs limitation. *See id.* at 1115 ("[A] court need not adopt the construction placed on a similar statute ... if the language of the statute ... is substantially different from the language in the original statute. ... The Washington Legislature departed from the language of the Davis–Bacon Act when it enacted RCW 39.12."). *Everett* is thus consistent with this Court's refusal in *Morillion* to give weight to federal authority in the absence of evidence that California intended to adopt the federal standard.

As the Washington Supreme Court did in *Everett*, this Court should interpret California's prevailing wage law as encompassing off-site work that meets the test laid out in *Williams*, particularly since the California prevailing wage law makes clear in Labor Code §1772 that off-site work *is* covered because any worker employed "in the execution of" a public works contract is "deemed to be employed upon public work," and prevailing wages must "be paid to all workers employed on public work." Labor Code §1771. And "deemed" necessarily refers to workers employed *off-site* since the Legislature had no need to "deem" workers employed at the site of the project as being "employed on public works."

In short, *Sheet Metal* diverges from the other California authorities, misconstrues the California prevailing wage law, and gives undue deference to a DIR opinion that itself was based not on the governing statutory language, but on a federal regulation interpreting federal statutory

language that is not contained in California's prevailing wage law. It is time for this Court to disavow *Sheet Metal*.

For these reasons, Wabtec's reliance on *Sheet Metal* to argue that Mr. Busker is not entitled to prevailing wages because his electrical work was performed off-site is misplaced. Under the plain language of Labor Code §1772 ("[w]orkers employed by contractors or subcontractors *in the execution of* any contract for public work are *deemed* to be employed upon public work"), as interpreted by *Williams*, Mr. Busker's work is covered by the prevailing wage law.

D. Adoption of the *Williams* test and rejection of *Sheet Metal* furthers the purposes of the prevailing wage law.

Moreover, Wabtec's interpretation would undermine the prevailing wage law by enabling and encouraging project contractors to avoid the law's protections by performing construction work in the contractor's shop.

The proper interpretation of the prevailing wage law must be guided its broad primary purpose to "protect and benefit employees on public works projects." *Lusardi*, 1 Cal.4th at 985. That "general objective subsumes ... a number of specific goals," first and foremost "to protect employees from substandard wages." *Id.* at 987. Other goals are "to benefit the public through the superior efficiency of well-paid employees" and "to permit union contractors to compete with nonunion contractors." *Id.* Because the prevailing wage law "was enacted to protect and benefit workers and the public ... [it] is to be liberally construed." *City of Long Beach v. DIR* (2004) 34 Cal.4th 942, 950. Wabtec's proposed narrow construction (borrowing from *Sheet Metal*) would threaten each of these legislative purposes.

Items made in accordance with plans and specifications in a public

works contract and then installed at the site of the project frequently must be fabricated at off-site facilities because of the size or technological sophistication of the items, or the machinery needed to build them. The sheet metal industry provides an instructive example. Approximately 18 to 25 percent of all hours for sheet metal work performed for public works projects in California is done at off-site facilities. Historically, fabricating ductwork or architectural sheet metal pieces to a project's specifications was often performed by hand on the construction site. Ductwork was also assembled on site. But with technological advances, much of this fabrication and assembly work has migrated into contractors' permanent off-site shops — often the shops of the same contractors whose employees then install the finished product on the project. In some cases, the same employees fabricate the sheet metal products, assemble them, and then install them. The amount of time spent that must be spent in on-site project work has accordingly diminished.

Under Wabtec's proposed interpretation of Labor Code §1772 (relying on *Sheet Metal*), these workers would not be entitled to prevailing wages for any of their off-site work — though it is undisputed that the identical work, if performed on-site or in a temporary facility set up solely to service the public works project, would be covered. *Sheet Metal*'s rule is not based in the statutory language — under which all work performed "in the execution of" the public works contract should be covered — and is directly at odds with the intent of the Legislature as articulated by this Court in *Lusardi*.

If the prevailing wage law does not apply to any work performed off-site, contractors in the area of the project will be pressured to fabricate essential project items at facilities located in low-wage areas of the state in

order to lower their costs when bidding on public works projects. As a result, workers in the area of the project will perform less project work, and they, and their families, will be adversely affected. These workers, in turn, will be pressured to accept reduced wages and benefits for off-site fabrication, so that they can be competitive with employees in low-wage areas. Thus, prevailing wages in the area of the project will be depressed, contrary to the "specific goals" of the Legislature "to protect employees from substandard wages." *Lusardi*, 1 Cal.4th at 987.

Moreover, a narrow interpretation of the prevailing wage law is inconsistent with the law's purpose of "permit[ting] union contractors to compete with nonunion contractors." *Id.* Employers that are required by union contracts to pay prevailing wages for all work, regardless of whether it is covered by the prevailing wage law, will be at a competitive disadvantage when bidding public works projects because they, unlike their non-union competitors, will pay prevailing wages for all off-site fabrication required by a public project, even if the prevailing wage law does not cover such work.

As union signatory contractors become unable to compete on a level playing field with non-union employers, these union contractors would be less willing to submit bids for public works projects. Thus, public entities will receive fewer bids from qualified union contractors that employ skilled workers. The result would be lower quality work at public projects and more cost overruns that will offset savings incurred by utilizing lower paid but less trained, skilled, and efficient workers, thus undermining the intent of the Legislature "to benefit the public through the superior efficiency of well-paid employees." *Id.*

E. Academic research supports the conclusion that weakening the prevailing wage law will undermine the public interest.

As technological change allows more project-specific construction work to be performed off-site, an interpretation of the prevailing wage law that excludes such work from coverage of the prevailing wage law and thus advantages contractors who shift their work off-site could weaken the prevailing wage law and have substantial negative impacts on California's construction workforce in the areas such as apprenticeship training, workplace safety, middle class economic development, without even lowering construction costs.

Adopting Wabtec's proposed narrow construction of the prevailing wage law will adversely affect "the public policy of this state to encourage the utilization of apprenticeship as a form of on-the-job training." Labor Code §3075.1. The Legislature recognizes that "[a]n in-state workforce of skilled construction workers who can complete projects in a streamlined manner benefits the state's economy," and that "maintaining that workforce requires the continual training of new workers to replace the aging workforce." Stats. 2013, Ch. 794, §1(a). Moreover, apprenticeship provides a pathway to skilled, well-paying careers for thousands of young people in California.

Public works provide a large share of training for apprentices in California because the Legislature has encouraged their employment on public works projects by allowing employers to pay apprentices wages below those required by the prevailing wage law for more experienced workers. Labor Code §1777.5(b)-(c). "This wage savings [under the prevailing wage law] creates a high demand for apprentices on public works projects that drives skill development for the entire construction

industry."[5] If Wabtec's interpretation were adopted, and public work is increasingly shifted to off-site facilities not covered by the prevailing wage law, employers will employ fewer apprentices on public works projects, and apprenticeship programs will not be able to train as many apprentices. Indeed, academic research shows a direct link between the repeal of a state's prevailing wage law and a 40 percent decline in the state's apprenticeship training programs.[6] Wabtec's proposed weakening of the prevailing wage law would therefore likely undermine apprenticeship training in California.

Allowing more work to escape coverage of the prevailing wage laws also undermines worker safety, another strong policy interest of the State. "Numerous academic researchers have linked ... prevailing wage laws with positive construction worker occupational health outcomes."[7] For example, an recent analysis of 17 years of Bureau of Labor Statistics data found that repealing state prevailing wage laws increases construction injury rates by more than 11 percent.[8] Strong prevailing wage laws lead to lower injury rates because these laws encourage safety training and the retention of

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[5] Duncan, Kevin (2018) *Implications of Clarifying the Definition of Public Works and Prevailing Wage Coverage in New York: Effects on Construction Costs, Bid Competition, Economic Development, and Apprenticeship Training* at 58 (included in Appendix as Exhibit 1).

[6] Philips, Peter et al. (1995) *Losing Ground: Lessons from the Repeal of Nine "Little Davis-Bacon" Acts* at 52 (apprenticeship training programs decrease by 40 percent following repeal of prevailing wage laws) (included in Appendix as Exhibit 2).

[7] Littlehale, Scott (2019) *Rebuilding California: The Golden State's Housing Workforce Reckoning* at 39 (collecting studies) (included in Appendix as Exhibit 3).

[8] Li, Zhi et al. (2019) *The Effect of Prevailing Wage Law Repeals and Enactments on Injuries and Disabilities in the Construction Industry* at 1 (included in Appendix as Exhibit 4).

experienced workers.[9]

Weakening the prevailing wage law is also directly contrary to the legislative goal of "maintain[ing] construction work as an occupation that provides middle-class jobs to hundreds of thousands of California workers, enabling the workers to support families." Stats. 2013, Ch. 794, §1(c), (d). Prevailing wages support middle class construction careers in local communities where public works are built, adding to the local economies. A recent study concluded that repealing Wisconsin's prevailing wage law could lead to a 14.1 percent wage cut for construction workers, which would generate, for an average worker's family, $17,502 in *increased* state and federal assistance expenditures and *decreased* tax revenues.[10] Between 4 and 12 percent of the state's construction workers would newly qualify for government assistance (e.g. health care subsidies, food stamps) as a result of the loss of prevailing wages.[11] The study determined that any decrease in the cost of public construction, itself a disputed proposition, would be greatly offset by more than $224 million dollars per year in lost tax revenue and increased social services.[12]

Finally, weakening the prevailing wage law by allowing employers to avoid their prevailing wage obligations by shifting work off-site may also harm California's construction budget. Although researchers have reached different conclusions about the effect of prevailing wage laws on

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[9] *Id.* at 3.

[10] Manzo, Frank IV and Jill Manzo (2017) *The Social Costs of Repealing Wisconsin's Prevailing Wage Law* at 7 (included in Appendix as Exhibit 5).

[11] *Id.* at 11.

[12] *Id.* at 8.

construction costs, in the decade following Utah's repeal of its prevailing wage law, public entities were faced with three times as many cost overruns as compared to the previous decade.[13] The study suggests that the shift to a less skilled labor force reduces productivity, leading to the observed project delays and cost overruns.

III. CONCLUSION

For the foregoing reasons, the Court should adopt the test for prevailing wage coverage set forth in *Williams* and disavow the decision in *Sheet Metal.*

Dated: July 15, 2019

Respectfully submitted,

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[13] Philips, (*supra* n.6) at 13-15 (Appendix, Exhibit 2).

CERTIFICATE OF WORD COUNT

I certify that this brief was produced on a computer and contains 5,749 words.

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PROOF OF SERVICE

Case: *Busker v. Wabtec Corp., et al.*, Supreme Court Case No. S251135

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 15, 2019, I served the following document(s):

APPLICATION OF SHEET METAL WORKERS' LOCAL 104 FOR LEAVE TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT JOHN BUSKER

APPENDIX OF AMICUS CURIAE SHEET METAL WORKERS' LOCAL 104

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 15, 2019 at San Francisco, California.

McKenzie Langvardt