Case No. S253574

IN THE SUPREME COURT OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,

Plaintiffs and Appellants,

v.

FONSECA MCELROY GRINDING, INC. ET Al.,

Defendants and Respondents.

After Decision by the United States Court of Appeals for the
Ninth Circuit, Case No. 17-15221
Judge William H. Orrick, Case No. 3-15-CV-05143-WHO

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF APPELLANTS

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State of California, Department of Industrial Relations

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF APPELLANTS

The Division of Labor Standards Enforcement (DLSE or Labor Commissioner's Office) respectfully requests permission to file an *amicus curiae* brief in this matter. (Cal. Rules of Court, rule 8.520(f).) The DLSE, a division of the California Department of Industrial Relations (DIR), is the lead agency for enforcement of prevailing wages obligations under California law. (Lab. Code, §§ 79, 1741; Cal. Code Regs., tit. 8, § 16100, subd. (a).)

The question of whether offsite mobilization work is subject to California's prevailing wage law and thus requires payment of prevailing wages is of great and direct importance to the Labor Commissioner's Office and the people of the State of California. This type of work, referred to here as offsite "mobilization work," regularly arises in the context of the Labor Commissioner's enforcement of California's prevailing wage law and how the Court rules on this issue will have far-reaching impact on California's workers. A Court conclusion that offsite mobilization work performed by workers who also perform covered work on a public work project site is not subject to California's prevailing wage law would negatively impact the Labor Commissioner's enforcement, particularly regarding broad categories of work for which the regulated public has historically paid prevailing wages.

No party or party's counsel authored any portion of the brief and no person or entity outside of the DLSE contributed money to fund the preparation or submission of this brief.

The DLSE respectfully requests that the Court grant leave to file the following *amicus* brief submitted in support of the Appellants Leopoldo Pena Mendoza, Jose Armando Cortes and Elviz Sanchez.

DATED: January 10, 2020

Respectfully submitted,

By _____ SBN 103570

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BRIEF OF AMICUS CURIAE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF APPELLANTS

I.

INTRODUCTION.

Before the Court is the question of whether operating engineers who work on a public works construction site should be paid the prevailing wage under California law for their offsite "mobilization work." (*Mendoza v. Fonseca McElroy Grinding Co.* (9th Cir. 2019) 913 F.3d 912, 912-913 (hereafter *Mendoza*).) As the Ninth Circuit defined it, such mobilization work includes various preparatory tasks after the operating engineers "report[] to a designated yard," including the "transportation to and from a public works site of roadwork grinding equipment." (*Id.* at p. 913.)

As discussed below, California law requires that this offsite "mobilization work" by a construction contractor's onsite workers be compensated at the prevailing wage rate. First, under the relevant Industrial Welfare Commission (IWC) Wage Order, the preparatory mobilization work that the Ninth Circuit described as beginning at the employer's yard is "travel time." And, under that Wage Order and the prevailing wage determination for operating engineers, such travel time must be compensated at the prevailing wage rate.

Second, in performing the "mobilization work" at issue, Appellants performed mobilization and transport work that was an integral part of the flow of the construction process and necessary for the execution of the contracts for public work. Without the roadwork grinding equipment, the contracts for public work could not have been completed. Accordingly, the operating engineers were "[w]orkers employed by contractors or subcontractors in the execution of [a] contract for public work," and therefore subject to California's prevailing wage law. (Lab. Code, § 1772.)

Consistent with the above, the Director of the Department of Industrial Relations and the DLSE have long regarded the type of mobilization work described in *Mendoza* as subject to California's prevailing wage law. Concluding that the mobilization work performed by Appellants is not subject to prevailing wages would undermine the goals of prevailing wage law at the expense of workers. Indeed, holding that this mobilization work is not subject to the prevailing wage would further encourage attempts to limit the obligation to pay prevailing wages by separating out and subcontracting work necessary for the execution of a contract for public work for less than the required prevailing wage.

Thus, for the reasons discussed in further detail below, the operating engineers' mobilization work requires payment at the prevailing wage rate.

II.

BACKGROUND.

A. California's Prevailing Wage Law Serves to Protect and Benefit Workers on Public Works Projects.

California's prevailing wage law (PWL) is a minimum wage law, the central purpose of which is to protect and benefit employees on public works projects. (*Metro. Water Dist. of S. California v. Whitsett* (1932) 215 Cal. 400, 417; *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 985 (hereafter *Lusardi*).) Given that the overarching purpose of the PWL is to protect and benefit employees on public works projects, courts are to construe it liberally. (*City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 949-950 (hereafter *City of Long Beach*).)

Both the Director of the Department of Industrial Relations (Director) and the Labor Commissioner play a role in enforcing the PWL. The Director determines (1) whether a particular type of work is covered by the prevailing wage law, and (2) if so, what the prevailing wage for that type of work should be. (*Indep. Roofing Contractors v. Dep't of Indus.*

Relations (1994) 23 Cal.App.4th 345, 352 (hereafter *Indep. Roofing*).) With respect to setting the prevailing wage for the work, the Director considers whether payments related to "travel" and "subsistence" are required. (Lab. Code, § 1773.1.)

The Director's authority to set prevailing wage rates is "quasi-legislative," with the Director having "legislative discretion with respect to such decisions." (*California Slurry Seal Ass'n v. Dep't of Indus. Relations* (2002) 98 Cal. App.4th 651, 662.) That legislative discretion is broad and substantial, cabined by the statutory requirement that the Director conduct a "critical review" of collective bargaining agreements and other information obtained from relevant stakeholders. (*Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1468; *Indep. Roofing*, *supra*, 23 Cal.App.4th at pp. 354-356; see also Lab. Code § 1773.9.)

The Labor Commissioner – who leads DLSE, a division within DIR (Lab. Code, §§ 21, 79.) – investigates prevailing wage violations. If the Labor Commissioner determines that there has been a violation of the PWL, she issues a written civil wage and penalty assessment against the contractor. (Lab. Code, § 1741.) The contractor may seek review of the assessment by the Director, who appoints an impartial hearing officer to conduct a hearing as necessary. (Lab. Code, § 1742.)

B. For Decades, the Director Has Required Employers to Pay the Determined Prevailing Wage for Time an Onsite Employee Works After Reporting to an Employer-Designated Offsite Yard.

The Director has repeatedly enforced the PWL as requiring employers to pay the prevailing wage for the hours public works employees work after reporting to an employer-designated offsite yard, often defining such work as "travel time" to the worksite.

For instance, over 30 years ago, an employers' association sought guidance regarding whether employees transporting equipment from a yard

were subject to the PWL. (DLSE's Motion for Judicial Notice (hereafter MJN) Ex. A, Feb. 19, 1989 DIR Letter re: Transport of Construction Equipment.) Representing the Director, the Director's Legal Unit responded affirmatively, explaining,

> The transport of construction equipment from a storage/service yard and throughout the project location is clearly work subject to the prevailing wage laws *as this Department has consistently enforced and applied them.*

(*Ibid.*, italics added.) The Director further explained that employees "should receive the prevailing wage for the work they perform in this job," a position the Director has consistently reinforced. (*Ibid.*; see also MJN Ex. B, Dec. 31, 1990 DIR Coverage Determination, Case No. 90-059 at p. 1 ["Prevailing wages are required for employees of a contractor or subcontractor for the delivery and removal of construction equipment[.]"]); MJN Ex. C, Sept. 21, 1999, DIR Coverage Determination, Case No. 99-015 at p. 2 [drivers of onsite contractor "must be paid prevailing wages while hauling equipment . . . to the public work sites" from the employer's yard].)

The Director echoed this enforcement position in August 2002 in addressing the broader category of "travel time." (MJN Ex. E, Aug. 19, 2002, Director Letter re: Travel Pay.) IWC Wage Order 16, which regulates wages in the construction industry, requires,

> All employer-mandated travel that occurs after the first location where the employee's presence is required by the employer shall be compensated at the employee's regular rate of pay.

(Cal. Code Regs., tit. 8, § 11160, subd. (5)(A).) The Director explained that, for this travel time that onsite employees spend between a worksite and an employer's yard, the regular rate of pay "would be . . . the prevailing rate, if the worker is employed in the execution of a public work." (MJN

Ex. E, *supra*, at p. 2.) Applying this rule to various scenarios, the Director provided the following question-and-answer:

> Q4) On travel from a public works project to the contractor's shop/yard, is the worker entitled to the prevailing wage? If so, would it be payable at the worker's last classification/rate of pay? If not what rate would apply?
>
> A4) Prevailing rate based on worker's classification.

(*Id.* at p. 1.)

Given the Director's longstanding enforcement of the PWL as covering time at an employer's yard and the subsequent travel to a public work site, the Director's decision in *In re Kern Asphalt Paving & Sealing Co.*—a decision the Ninth Circuit cited—was not surprising. There, the Director considered at what rate a paving crew should be paid for their time in, as required by the employer, reporting at the employer's offsite shop and being transported to the public works site. (MJN Ex. F, *In re Kern Asphalt* Director's Decision (hereafter *Kern Asphalt*), Case No. 04-0117-PWH at p. 2.) After the workers arrived at the offsite shop, the employer gave "the workers instructions and dispatch[ed] them to their jobs." (*Id.* at p. 13.) Even though the workers were free to "use any means to get to the construction work site and could stop for breakfast along the way," the Director found that such time constituted "travel time." (*Id.* at pp. 12-13.) Because the prevailing wage determination that applied to the workers "contain[ed] no special rate for travel time," the Director required that the time be "*payable at the same prevailing rates*" that applied to the workers' other duties. (*Id.* at p. 13, italics added.)

Complementing the Director's decades-old determination that the PWL requires employers to pay the prevailing wage for the time that accrues after a public works employee reports to an employer's yard, the Labor Commissioner investigates and issues citations against employers

that fail to pay the prevailing wage for such time. Demonstrating this, the Labor Commissioner's Public Works Manual (Manual), citing *Kern Asphalt*, instructs that travel time "is payable at not less than the prevailing rate based on the worker's classification, unless the Director's wage determination for that classification specifically includes a lesser travel time rate." (MJN Ex. G, Public Works Manual (hereafter Manual) § 4.1.5 at p. 42 [citing *Kern Asphalt*]; see also Manual § 1.1 at p. 1.) The Manual explains that compensable travel time begins "after a worker reports to the first place at which his or her presence is required by the employer . . . , and includes travel **to a public work site**, whether from the contractor's yard, shop, another public work site, or a private job site." (*Id.* at p. 42, original emphasis.) Such travel time "must be paid at the same prevailing wage rate required for the work actually performed by the worker **at the public works site.**" (*Ibid.*, original emphasis.)

C. The Director's Determination for the Operating Engineer Classification Provides that Travel Time Shall Be Paid at the Prevailing Wage.

During the relevant period, the Director's prevailing wage determination for operating engineers required contractors to "make travel and/or subsistence payments to each worker to execute the work." (MJN Ex. H, Operating Engineer Prevailing Wage Determination Issued Aug. 12, 2012 at p. 39; Ex. I, Operating Engineer Prevailing Wage Determination Issued Feb. 22, 2015 at p. 39.) The Director determined that such payments included travel time, which was to be paid pursuant to the below:

> On any day on which an *Employee is required to report to the yard, the Employee's time will start at the yard.* On any day on which the Individual Employer requires an Employee to return to the yard and when, absent a pre-arrangement to cover transportation under 11.03.01, an *Employee is required to report to the yard on that date, an Employee's time will end at the yard.*

(MJN Ex. I, 2012 Operating Engineer Travel and Subsistence Provision, § 11.04.00 at p. 40; Ex. J, 2015 Operating Engineer Travel and Subsistence Provision, § 11.04.00 at p. 41, italics added.)

Unlike other determinations,[1] the Director's determination for operating engineers provides only one wage rate for all work performed. Like the prevailing wage determination at issue in *Kern Asphalt*, the Director's determination for operating engineers did not contain a special prevailing wage rate for travel time.

III.

ARGUMENT.

Because the mobilization work at issue constitutes both "travel time" and work performed "in execution of [a] contract for public work," the Court should conclude that this work must by paid at prevailing wage rates under California law.

Such a conclusion would follow how the Director has consistently enforced the PWL for decades, which should be afforded deference. (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192 at p. 207 (hereafter *Sheet Metal*) ["An agency's interpretation is . . . given greater credit when it is consistent and long-standing[.]"]) "A long-standing and consistent interpretation should generally not be disturbed unless it is clearly erroneous." (*Ibid.*) This deference is particularly warranted here where the Legislature has not taken contrary action. (*Ibid.*) In the over 30 years the Director has enforced this position, no legislative action has been taken to modify the PWL to indicate that Labor Code section 1772 does not cover preparatory work performed at a contractor's yard or time spent transporting equipment or personnel to

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[1] For instance, the Director's prevailing wage determination for laborers specifies a special rate for travel time. (See Appellants' Opening Brief on the Merits at pp. 33-36.)

and from the yard to the project site. "Because the Legislature is presumed to be aware of a long-standing administrative practice, the failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent." (*Ibid.*)

A. Mobilization Work Constitutes "Travel Time" for Which Operating Engineers Must be Paid the Prevailing Wage Rate.

The work the Ninth Circuit described as "offsite mobilization work, performed by workers who are otherwise employed on a public works project" (*Mendoza, supra*, 913 F.3d at p. 920) falls squarely within the scope of the well-understood construct of "travel time." Such travel time, as explained below, must be paid at these workers' prevailing wage rates.

1. The Time Operating Engineers Work After Reporting to the Employer-Designated Yard and in Traveling to the Public Works Site Falls Within the Definition of Travel Time.

Compensable travel time, which is a well-understood concept in the wage-and-hour context, begins when the employer requires an employee to report to a designated location and then travel to the ultimate worksite. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587 (hereafter *Morillion*).) This concept is reflected in the applicable IWC Wage Order, which requires compensation of "[a]ll employer-mandated travel that occurs after the first location where the employee's presence is required." (Cal. Code Regs., tit. 8, § 11160, subd. (5)(A).) Mirroring this requirement, the prevailing wage determination for operating engineers also contains a travel time provision, stating that "[o]n any day on which an *Employee is required to report to the yard, the Employee's time will start at the yard.*" (See, *supra*, § II.C.)

As defined by the Ninth Circuit, mobilization work entails operating engineers (1) reporting to the employer's designated yard, (2) preparing and loading their equipment for transport, (3) transporting the milling

equipment to the public works site, and (4) returning the equipment back to the yard after work was complete for the day. (*Mendoza*, *supra*, 913 F.3d at p. 913.) This mobilization work falls squarely within this Court's, the IWC Wage Order's, and the prevailing wage determination's definition of "travel time."

That the mobilization work entails more duties than simply traveling to the worksite does not take it out of the category of travel time. As the Public Works Manual explains, "no additional facts, such as whether tools or supplies are being delivered by the worker to the site, need be present" for the hours worked to be treated as compensable travel time. (MJN Ex. G, Manual, *supra*, at p. 42.) Indeed, as was the case in both *Morillion* and *Kern Asphalt*, the time the workers spent after reporting to a designated location was nevertheless considered compensable travel time even though the workers could spend that time not performing duties for the employer. (*Morillion*, *supra*, 22 Cal.4th at p. 586 [rejecting argument that, because workers could read or sleep, time was not compensable as travel time]; MJN Ex. F, *supra*, *Kern Asphalt* at pp. 12-13 [rejecting argument that time was not compensable as travel time because employees "could stop for breakfast."].) If an employer can be liable for travel time when an employee performs no productive work for the employer, that employer is plainly liable when it requires the employee to be productive during such time.

2. Operating Engineers' Mobilization Work Was Subject to the Prevailing Wage.

Turning to the rate at which such travel time must be compensated, consistent with the Director's longstanding enforcement position, the controlling IWC Wage Order requires that such time be compensated at the prevailing wage rate. (See, *supra*, § II.B.)

During the relevant period, the relevant IWC Wage Order required that travel time "shall be compensated at the employee's regular rate of

pay." (Cal. Code Regs., tit. 8, § 11160, subd. (5)(A); see also *Burnside v. Kiewit Pac. Corp.* (9th Cir. 2007) 491 F.3d 1053, 1062.) The phrase "regular rate" is a term of art in the wage-and-hour context, reflecting "all remuneration paid to, or on behalf of, the employee." (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 903 [adopting federal definition of "regular rate" for IWC Wage Orders].) "If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his 'regular rate.'" (*Id.* at p. 905 [citation omitted].)

There is no dispute that, for the work they performed on the public works site, the operating engineers received the prevailing wage rate. Thus, under the Wage Order, the operating engineers must be paid the prevailing wage rate for their travel time as it constitutes the required regular rate. As noted above, the Director has consistently reinforced the principle, both in the August 2002 letter and in *Kern Asphalt*. (MJN Ex. E, *supra*, Director Letter re: Travel Pay; MJN Ex. F, *supra*, *Kern Asphalt* at p. 13.)

That there was a separate agreement containing a lower rate for "Lowbed Transport" is irrelevant to the rate at which mobilization work must be paid at a public works site. Public policy dictates that "parties may not contract around the prevailing wage law." (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 553.) Respondents and Local No. 3 attempted to do exactly that by executing a Memorandum of Agreement (MOA) providing for a "Lowbed Transport" rate for the "mobilization work" that was lower than the prevailing wage.[2] The obligation of a contractor on a public works project

[2] Not coincidentally, the MOA included a provision specifying that if the Director determined that the "Lowbed Transport" wage rates did not comply with PWL, the parties would meet to address the issue. (See *Mendoza v. Fonseca McElroy Grinding Co.* (N.D. Cal. Nov. 28, 2016) 2016 WL 6947552, at p. *1.) As described *ante*, the transport work is specifically included in the operating engineers' prevailing wage

to pay the prevailing wage flows from the *statutory duty* to pay the prevailing wage imposed on the contractor *independent of any contractual requirement.* (*Lusardi, supra*, 1 Cal.4th at p. 987, italics added.) The MOA therefore has no effect on Respondents' statutory obligation to pay Appellants the prevailing wage rate, which is the *minimum wage* for the operating engineers' work. Permitting Respondents to pay its workers less than the prevailing wage based on the MOA directly contravenes the purpose of the PWL and would encourage employers to contract around the prevailing wage law in order to gain a competitive advantage at the expense of workers. (*Ibid.*)

B. Operating Engineers' Mobilization Work is Subject to the Prevailing Wage Law Because It Was Performed in Execution of the Public Works Contract and Was Integral to the Process of Construction.

In addition to being "travel time" covered by the Director's prevailing wage determination, the operating engineers' "mobilization work" is done "in execution of [a] contract for public work," and therefore independently subject to the prevailing wage requirements on that basis. (Lab. Code, § 1772.) California courts apply an "integrated aspect" test to determine whether work performed falls within Labor Code section 1772's "in the execution of" requirement. Respondents are an onsite public works contractor, and their operating engineers performed preparatory mobilization work that was an integral part of the flow of the construction process. Accordingly, those workers perform work that is subject to prevailing wage requirements.

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determination. The fact that the MOA is a blatant attempt to circumvent PWL is also supported by the fact that neither the contractor nor union petitioned the Director for a coverage determination for the specified work prior to the start of the public works project.

California's seminal case interpreting section 1772, *O.G. Sansone Co. v. Dep't of Transportation* (1976) 55 Cal.App.3d 434 (hereafter *Sansone*), held that the third-party hauling companies were subcontractors subject to the prevailing wage requirements because their delivery of the materials was an "integral part of [the prime contractor's] obligation under the prime contract." (*Id.* at p. 445.) Under *Sansone*, offsite work is considered "in execution of" a contract for public work if it is an "integrated aspect of the 'flow' process of construction." (*Id.* at p. 444.) Thirty years later, in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742 (hereafter *Williams*), the court held that whether material was on-hauled or off-hauled mattered little to the analysis – what is "determinative is the role the transport of the materials plays in the performance or 'execution' of the public works contract." (*Id.* at p. 752.) Distilling the analyses in *Sansone* and *Williams*, the *Sheet Metal* court's inquiry focused on whether an operation is truly independent of the contract construction activities or integrated into the flow of construction. (*Sheet Metal*, *supra*, 229 Cal.App.4th at p. 206.)

Sansone, *Williams* and *Sheet Metal* examined factors specific to work involving on-hauling, off-hauling and off-site fabrication of materials. However, the work performed by the operating engineers here — preparing equipment and transporting it for use at the work site — did not involve the same on-hauling, off-hauling, or off-site fabrication of materials that was at issue in those cases, so those cases do not strictly control here. As the Ninth Circuit explained, "the distinctions between *Williams* and *Sheet Metal Workers* and this case are significant." (*Mendoza*, *supra*, 913 F.3d at p. 918.) Instead, this Court's analysis should focus on the rule articulated in those cases – whether work is an integrated aspect of the construction process as a whole.

The preparatory mobilization and transport of equipment at issue here play an even more integral role to the performance of the public works contract than hauling of materials to or from the site because they were necessary and uniquely performed to accomplish the contract. The operating engineers prepared and transported machinery between Respondents' yard or storage facilities and the project sites so that it could be utilized on the public works projects. (*Mendoza, supra*, 913 F.3d at p. 912.) Construction would grind to a halt if the equipment did not arrive promptly and work properly. (See *Id.* at p. 917, fn. 5.) The machines were then operated by Appellants at the jobsites to break up and crush asphalt roadbeds. (*Id.* at p. 913.)

This work is markedly different from a "materials supplier" or an independent trucking company dropping off generic materials or supplies, such as portable toilets, generators, or even asphalt, the examples supplied by the district court. A "materials supplier" sells supplies to third parties who may have no relationship to the public works project and does not perform work on those materials or integrate them into the public works project. (See *Williams, supra*, 156 Cal.App.4th at p. 752.) By contrast, the operating engineers were employed directly by the onsite contractor. They prepared and transported the equipment but also operated it once they arrived at the public works site to build new roads. There is no evidence in the record that the milling machines could have been procured, prepared, and delivered from a separate supplier or that an alternative source would have prepared the machines to the specifications necessary for the public works contract at issue here. Rather, the record suggests that "[t]he heavy equipment was specifically tailored to perform the type of work required by the project, and unlike other construction tools, was not widely usable in other contexts." (*Mendoza, supra*, 913 F.3d at p. 917, fn.5.)

The Director's determination in *Sacramento State Capitol Exterior Painting Project* (July 18, 2002) Dept. Pub. Works, case No. 2002-034, illustrates this distinction. (MJN Ex. D, July 18, 2002, DIR Coverage Determination, Case No. 2002-034.) In that case, a trucking company transported cast iron decorative elements back and forth between the public works site and an offsite repair facility where the cast iron elements were restored. The Director determined that the work was performed "in the execution of a public works contract within the meaning of section 1772" and had to be paid at the prevailing wage. (*Id.* at p. 7.) The Director reasoned that the workers "play[ed] an integral role in the execution of the public works contract" and that "[e]ssential performance of the public works contract occurs at both locations." (*Ibid.*) Here, too, the operating engineers' mobilization work was integral to the construction of the roads, and the public contract could not have been performed without the preparation work at the yard. In this way, the operating engineers' work more closely resembles the work performed by the trucking company in *Sacramento State Capitol Exterior*, to which the prevailing wage applied, than to a "material supplier."[3]

Nor does the operating engineers' work implicate any of the policy considerations that the Director and the court considered in determining

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[3] The district court distinguished between materials, on the one hand, and tools, on the other. (*Mendoza, supra*, 2016 WL 6947552, at p. *7). But the Director's determinations have never turned on such a distinction. And doing so would only create further incentives for employers to require tool preparation to be performed prior to reporting to the public works site. Moreover, a rule that turned on the distinction between a "material" and a "tool" would pose significant administrative challenges for enforcement and lead to absurd consequences. No party contends that the repair or calibration of a tool during construction falls outside the prevailing wage, so it makes little sense that the payment of the prevailing wage for this same work would turn on whether or not the task is performed before reporting to the public works site.

that offsite fabrication was not entitled to the prevailing wage. As the *Sheet Metal* court explained, the Department's position that offsite fabrication was not entitled to the prevailing wage was based on three main policy considerations: First, "extending coverage to offsite fabrication would not significantly protect local labor markets because fabrication does not necessarily take place in the local labor market." (*Sheet Metal*, *supra*, 229 Cal.App.4th at p. 208.) Second, "because offsite fabrication facilities could be located anywhere in the country, expanding the law to offsite fabrication would frustrate the law's administration and adversely affect enforcement by greatly expanding the reach of the prevailing wage law." (*Ibid.*) Those concerns are simply not present here because the mobilization work is performed by the same workers who perform the grinding work on the roadbeds and is necessarily proximal to the public works site. There is no evidence that mobilization work occurs outside of the state or even outside of the local market of the public works site. And finally, the Department's concern that it was "highly unlikely that the Legislature could have intended such an application of jurisdiction," (*ibid.*) is similarly inapplicable given the Legislature's longstanding acquiescence in the Department's view that such work is covered. (See, *supra*, § III.) For these reasons, *Sheet Metal* should not control here.

The Appellants are entitled to a prevailing wage because they were employed by Respondents to perform preparatory mobilization and transport of the milling equipment that was essential to executing the public works contracts for construction of new roadbeds.

C. Applying the Prevailing Wage Here Advances the Statutory Purpose of the PWL.

The Court must liberally interpret application of the prevailing wage law to provide greater protection and benefit to workers in the absence of contrary legislative intent. (*City of Long Beach*, *supra*, 34 Cal.4th at p. 950;

see *Lusardi*, *supra*, 1 Cal.4th at p. 987.) The facts in the present matter establish that Appellants were entitled to the payment of prevailing wages because mobilization work is travel time under the Director's applicable prevailing wage determination for operating engineers. Further, Appellants performed work on and offsite that was necessary to fulfill the public works contracts as part of an integrated whole. The preparatory mobilization and transport work performed by Appellants was necessary to complete Respondents' public works contracts. Ruling otherwise would encourage contracting around the PWL because contractors would simply employ a different set of workers for the mobilization work.

Additionally, applying the prevailing wage here ensures clarity and predictability to both workers and employers in light of the Department's longstanding interpretation. (See *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1593.) Holding that the prevailing wage does not apply would disrupt the long-held understandings of workers and employers alike and infringe upon the role of the Legislature, which has long acquiesced in the Department's position on preparatory and transportation work.

Under these circumstances, the specified prevailing rate provided by law should protect and benefit the workers for all of the hours that they engaged in both aspects of their jobs on the public works projects.

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Under these circumstances, the specified prevailing rate provided by law should protect and benefit the workers for all of the hours that they engaged in both aspects of their jobs on the public works projects.

IV. CONCLUSION

For the foregoing reasons, this Court should take the opportunity this case presents to provide clarity to the regulated community and ensure that California's workers are protected by the prevailing wage law. The DLSE urges the Court to find that preparatory mobilization and transport work require payment of the prevailing wage as established by the Director.

DATED: January 10, 2020

Respectfully submitted,

SBN 103570

By _____

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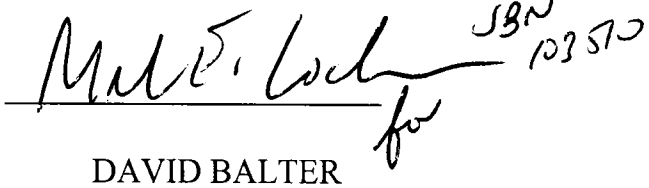
CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204(c), the undersigned counsel hereby certifies that the foregoing brief on behalf of the Division of Labor Standards Enforcement as amicus curiae is one and one half spaced, printed in Times New Roman 13-point text, and contains 4,858 words. The above word count was determined using the Word Count function of the Microsoft Word 2010 program, and excludes words in this certificate, the Table of Contents and the Table of Authorities.

DATED: January 10, 2020



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PROOF OF SERVICE

I, MaryAnn Galapon, am employed in the State of California, County of San Francisco. I am over the age of 18 years old and not a party to the within action. My business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California 94102.

On January 10, 2020, I served the foregoing document(s) described as:

1. **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE DIVISION OF LABOR STANDARDS ENFORCEMENT IN SUPPORT OF APPELLANTS**

on the interested parties to this action by delivering a copy thereof in a sealed envelope at the following addresses:

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Mary Ann Galapon

MaryAnn Galapon

Declarant

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Leopoldo Pena Mendoza, et al. v. Fonseca McElroy Grinding, et al.
(S253574 | 17-15221)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT The James R. Browning Courthouse 95 7th Street San Francisco, CA 91403 Tel: (415) 355-8000	***Appellate Court*** Case No.: 17-15221
Hon. William H. Orrick District Judge UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA 450 Golden Gate Avenue San Francisco, CA 94102 Tel: (415) 522-2000	***Trial Court*** Case No.: 3:15-cv-05143-WHO
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