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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

AFTER A 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

APPELLANTS' OPENING BRIEF ON THE MERITS

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ISSUE CERTIFIED FOR REVIEW

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

INTRODUCTION

As this Court has long recognized, California's prevailing wage law ("PWL") is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. (Lab. Code §§ 1720-1861; *Lusardi Construction Co. v. Lloyd W. Aubry, Jr.* (1992) 1 Cal.4th 976, 985.) The PWL was enacted to protect and benefit workers and the public and is to be liberally construed. Under Labor Code section 1772, so long as the subcontract is "in the execution of any contract for public work," plaintiff is "deemed to be employed upon public work" and entitled to prevailing wages. (*Ibid.*) Under controlling case law, this determination turns on whether the subcontract was "integral" to the general contract.

The question presented here is whether employees who perform work at a construction site for which they are unquestionably entitled to a prevailing wage, are also entitled to a prevailing work for the "mobilization work" they performed away from the construction site. In this case, that mobilization work primarily consisted of transporting heavy equipment (milling machines) to the work site so that these same employees could then use those machines in their construction work.

In concluding that this is an issue warranting this Court's attention, the Ninth Circuit referenced a series of Court of Appeal opinions arising in the context of hauling materials to or from a construction site or the off site fabrication of materials to be used at the construction site. These cases conclude that, because the work in question is being performed off-site, the work must emanate from a facility that was exclusively dedicated to the particular public works project in question for section 1772 to be implicated. Since the storage yards in this case were not all exclusively

dedicated to the subject construction project, the Ninth Circuit concluded assistance by this Court was needed.

As explained below, regardless whether these hauling and off-site fabrication cases were correctly decided in their factual context, their analysis has no application here. First, the focus on where the work is performed for purposes of determining whether section 1772 applies, runs afoul of fundamental rules of statutory construction. The federal Davis-Bacon Act expressly requires that the prevailing wage be paid to all workers "employed directly on the site of the work." (40 U.S.C. § 3142(c)(1).) California's PWL has no similar geographic limitation. Nevertheless, the California courts which have developed the exclusively dedicated standard to determine whether off-site work is entitled to a prevailing wage, have relied on decisions from other jurisdictions which interpret the Davis-Bacon Act. The fact that California's Legislature has never enacted such a geographic limitation – although it has had ample time to do so – is testament to the fact that California has no similar limitation.

In any event, the rationale why the California Court of Appeal cases have developed the exclusively dedicated standard as to certain off-site work is (1) to ensure that prevailing wages are required for only that work furthering the purposes of the PWL and (2) to ensure that there are some limitations as to when a prevailing wage must be paid to contractors. These concerns – even if they are a valid reason for recognizing a limitation not imposed by the PWL itself – have no application here. Mobilization work such as that being performed by these plaintiffs is by definition exclusively tethered to the public work being performed at the construction site. Mobilization work, by its very nature, is to ensure that resources and manpower are transferred to a construction site for the completion of the work being performed there. In other words, absent the construction work at the job site, there is no mobilization work to begin with. And because of

the nature of that mobilization work, it is necessarily the case, that there is already a geographic relationship between the construction site and the mobilization work. This case presents a prime example.

As described, the principal mobilization work performed by plaintiffs was transporting heavy equipment they were going to use, to the construction site. As a practical matter, since this equipment needed to be transported to the site each day and transported back to the storage yard each night, the storage yard had to be in close proximity to the construction site. Otherwise, the employees would spend a significant part of their workday transporting the machinery rather than using it at the construction site.

In addition, it is not disputed that this machinery was necessary for these very employees to perform their public work duties at the construction site. Unless they performed the mobilization work, they would not have been able to perform their work at the construction site for which they were unquestionably entitled to a prevailing wage. Under any definition, this work was therefore "integral" to the work at the construction site and thus was "in the execution of any contract for public work," under section 1772, entitling plaintiffs to a prevailing wage.

It is clear, that if this same work had been performed at the construction site, plaintiffs would have been paid a prevailing wage. The mere fact that the same mobilization work was performed elsewhere should not matter.

In short, in keeping with the text and purpose of the PWL, plaintiffs urge the Court to rule: When a worker performs on-site construction entitling him or her to a prevailing wage for that work, then that worker is also entitled to a prevailing wage for his or her "mobilization work" away from the construction site which is necessary for the worker to be able to perform work at the construction site after he or she arrives there. This

includes the mobilization work transporting machinery or equipment the worker must use at the work site which cannot be stored there. Under this standard, these plaintiffs were entitled to be paid a prevailing wage for their off-site mobilization work as well as for their work at the construction site.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

This matter was presented to the Ninth Circuit following competing summary judgment motions which were largely based on stipulated facts appearing at Excerpts of Record ("ER") 300. In its certification opinion, the Ninth Circuit set forth the following factually summary:

"Plaintiffs-Appellants Leopoldo Pena Mendoza, Elviz Sanchez, and Jose Armando Cortes (Plaintiffs) are operating engineers and members of Operating Engineers Local No. 3. They worked on grinding crews, using milling equipment to break up and crush asphalt roadbeds so that new roads could be constructed. At times, their work duties included what they referred to as "mobilization" work, 'which entailed loading milling machines, which w[ere] stored at [a] permanent yard or in offsite storage locations, onto a lowbed trailer; tying down or otherwise securing the heavy equipment onto the lowbed trailer; performing a light, brake, and fluid level check of a semi-truck used to transport the heavy equipment; driving a transport truck transporting the milling machine to a construction jobsite; and driving the transport truck transporting the milling machine back to [the] permanent yard.'

"As part of this mobilization process, Plaintiffs reported to a designated yard where the equipment was housed, and then performed the maintenance and transportation work. Neither the permanent yard nor the offsite storage locations depended on any public works project for their existence.

"Defendant-Appellee Fonseca McElroy Grinding Co. Inc. (FMG), a roadwork construction company, was acquired by Defendant-Appellee Granite Rock Company (Granite Rock, and together with FMG, Defendants) in 2014. FMG and Granite Rock were both signatory parties to the Operating Engineers Local No. 3 Master Agreement for Northern

California (Master Agreement). In 2010, FMG entered into an additional Memorandum of Agreement (MOA) with Local No. 3, which provided for a "Lowbed Transport" wage rate for mobilization work; this rate for offsite work was lower than the Master Agreement rates for onsite construction. Granite Rock was also a signatory to the MOA.

"Plaintiffs worked for FMG and then Granite Rock, including on public works construction projects, and received compensation based on the Master Agreement and MOA. Accordingly, although they received a prevailing wage for onsite construction on public works projects, they were not paid a prevailing wage for offsite mobilization work. Plaintiffs estimate that "[t]he ballpark difference between the two overtime rates in August [] 2012 was $67.72 (prevailing wage) and $23.89 (lowbed transportation) for an underpayment of $38.38 in the base pay. Defendants note that "[t]he public works contracts under which Plaintiffs worked did not specify the daily schedule for Granite Rock's workers," and "[t]hus Granite Rock determined whether [they] would report directly to the construction jobsite or its yard" and "what tasks, if any, [they] would perform after completing their jobsite work."

"On November 9, 2015, Mendoza brought claims under the Fair Labor Standards Act and California labor laws for nonpayment of wages. Three months later, he, along with Sanchez and Cortes, filed an amended complaint.

"The parties addressed the dispute that forms the basis of this appeal through cross-motions for partial summary judgment, which the district court heard on October 26 2016. On November 28, 2016, the court entered an order in which it concluded that the offsite mobilization of equipment was not "in the execution" of a public works contract." (*Mendoza v. Fonseca McElroy Grinding Co.* (N.D. Cal. Nov. 28, 2016) No. 15-cv05143-WHO, 2016 WL 6947552, at *1.) Following this determination,

the parties settled all remaining issues, except the dispute now before us. (*Mendoza v. Fonseca McElroy Grinding Co., Inc.* (9th Cir. 2019) 913 F.3d ¶11, 913-914.)

ARGUMENT

I. SINCE PLAINTIFFS' OFF-SITE MOBILIZATION WORK WAS "IN EXECUTION" OF THEIR WORK AT THE CONSTRUCTION SITE, THEY WERE ENTITLED TO A PREVAILING WAGE UNDER LABOR CODE SECTION 1772 REGARDLESS WHETHER THAT WORK WAS PERFORMED AWAY FROM THE CONSTRUCTION SITE.

A. California's Prevailing Wages Law.

"When the California Legislature established the Labor Code in 1937, it replaced the 1931 Public Wage Rate Act with a revised, but substantively unchanged, version of the same law. (Stats.1937, ch. 90, § 1720 et seq., pp. 241–246.)" (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) The 1931 enactment was "contemporaneous with enactment of its federal counterpart, the Davis–Bacon Act (codified at 40 U.S.C. §§ 3141–3148). Prevailing wage laws were enacted in response to economic conditions resulting from the Depression, when the oversupply of labor due to the virtual cessation of private construction was exploited by unscrupulous contractors to win government contracts. (See *Universities Research Assn. v. Coutu* (1981) 450 U.S. 754, 774, 101 S.Ct. 1451, 67 L.Ed.2d 662.)" (*Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 14.)

The California prevailing wage law ("PWL") is a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds. (Lab.

Code §§ 1720-1861; *Lusardi Construction Co., v. Lloyd W. Aubry, Jr.* (1992) 1 Cal.4th 976, 985.) The PWL was enacted to protect and benefit workers and the public and is to be liberally construed. (*Lusardi Construction Co.* at 985; *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458; and *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1583.) Under the PWL, all workers employed on public works projects costing more than $1,000 must be paid not less than the general prevailing rate of per diem wages as determined by the Director of the Department of Industrial Relations for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work. (*Lusardi* at 987; Lab. Code §§ 1770, 1771, 1772 & 1774.) A contractor for a public works project that fails to pay the prevailing rate to its workers is liable for the deficiency and is subject to a statutory penalty. (Lab. Code § 1775.)

The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Lab. Code § 90.5, subd.(a).) The duty to pay the prevailing wage to employees on a public works project extends to both the prime contractor and all subcontractors. (Lab. Code § 1774; *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 776.)

Under California's PWL, "public works" is generally defined as "[c]onstruction, alteration, demolition, installation, or repair work done

under contract and paid for in whole or in part out of public funds." (Lab. Code § 1720(a)(1).)[1]

As the Ninth Circuit framed the issue in its certification opinion: "Plaintiffs' performed work on the public works site that indisputably qualified for the prevailing wage, leaving us to determine whether work they performed offsite in connection with those efforts should be similarly compensated [under section 1772]." (Slip Opinion 14.) As now explained, they should be.

B. An Employee's "Mobilization Work" Which Is Necessary For The Employee To Be Able To Perform His Or Her Construction Work At A Public Works Site Is, By Its Very Nature, "In Execution Of A Public Works Contract" Under Section 1772.

Initially, there is no question that plaintiffs were entitled to be paid a wage of some amount for their "mobilization work." (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582–583 [Agricultural workers entitled to pay for travel time while on employer supplied buses.]; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840–841 [Security guards entitled to be paid for their on-call hours].) The only question is whether they were entitled to a prevailing wage for that work.

Section 1772 provides: "Workers employed by contractors or subcontractors *in the execution* of any contract for public work are deemed to be employed upon public work. (Italics added.) A number of California cases have concluded that under section 1772, the critical inquiry in

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[1] All further statutory references are to the California Labor Code unless otherwise indicated.

determining whether one's work on a subcontract "'in the execution of [a] contract for public work' (§ 1772) [is] whether [the subcontractors] were . . . conducting an operation truly independent of the performance of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract.'" (*Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752; see also *O. G. Sansone Co. v. Dep't of Transp.* (1976) 55 Cal.App.3d 434, 445 [finding that § 1772 was met when the general contractor contracted with a subcontractor to "perform an integral part of [the general contractor's] obligation under the prime contract"]; *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 212-14 [same].)

The language of section 1772 and the cases interpreting it establish that the determination whether work performed away from the public works site is "in execution of a public works contract" entitling the employee to a prevailing wage, is dependent upon the relationship between that off-site work and the work performed at the construction site. In particular, the cases have focused on the use of the word "execution."

The familiar meaning of "execution" as used in section 1772 is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect" (Black's Law Dict. (8th ed.2004) p. 405, col. 1); or "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, 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, regardless whether that work would constitute a public works if it were viewed independently.

In this case, plaintiffs were working at the job site performing tasks which, as the Ninth Circuit recognized, entitled them to a prevailing wage. The issue here, therefore, is whether their off-site work was in the "execution" of the work they were performing at the road construction site to entitle them to a prevailing wage for that work as well. As now explained, it was.

Mobilization work is generally defined as "Activation of a contractor's physical and manpower resources for transfer to a construction site until the completion of the contract." (http://www.businessdictionary.com/definition/mobilization.html.) Under this general definition, mobilization work is work which by its very nature is exclusively dedicated to the performance of construction work at the construction site. Here Plaintiffs' off-site "mobilization work" falls squarely within this definition as it was activity necessary to "carry into effect" or "accomplish" the public works they were to perform at the construction site. The primary aspect of the mobilization work being performed here was transporting the grinding machines which plaintiffs needed to use once they arrived at the public works construction site. Without the grinding machinery plaintiffs were inspecting and hauling to the work-site, it would have been impossible for them to perform their road-grinding work once they arrived. Accordingly, that mobilization work was the very essence of work "in the execution of [a] contract for public work" under section 1772.

While no case appears to have directly addressed this issue, the DIR recognizes that the work being performed by plaintiffs here falls within section 1772.

The DIR's official Public Works Policy and Procedures Manual states the following:

> Compensable Travel Time. Travel time related to a public works project constitutes "hours worked" on the project, which 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. (See Director's Decision in *In the Matter of Kern Asphalt Paving & Sealing Co., Inc.* (March 28, 2008), Case No. 04-0117-PWH. (See also *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575).) *Travel time required by an employer after a worker reports to the first place at which his or her presence is required by the employer is compensable travel time, and includes travel to a public work site, whether from the contractor's yard, shop, another public work site, or a private job site. All such compensable 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. No additional facts, such as whether tools or supplies are being delivered by the worker to the site, need be present.*

(ER Vol II at 168, italics added.)

In its certification opinion, the Ninth Circuit referenced this statement by the DIR, and explained:

> Given that DIR decisions, while not binding, are at the very least revealing, this provision seems to favor Plaintiffs' position. This is particularly true because the provision was undergirded by the DIR's decision in *In re Kern Asphalt Paving & Sealing Co.*, No. 04-0117-PWH, in which it concluded that travel time was compensable at the prevailing Case: 17-15221, 01/15/2019, ID: 11153038, DktEntry: 41-1, Page 16 of 20 wage for employees' work on a public jobsite. With regard to the prevailing wage, the DIR wrote:
>
> The relevant prevailing wage determinations contain no special rate for travel time. In the absence of any evidence to the contrary, the required travel time must be regarded as incidental to the workers' regular duties and payable at the same prevailing rates that apply to the classification associated with those duties. [The employer] has presented no argument or evidence supporting a different rate outside of its contention that it was not obligated to pay for the travel time at all. (footnote omitted). Although this determination supports Plaintiffs' position, DIR determinations must be designated as precedential in order "to be relied upon in subsequent

> determinations," *State Bldg. & Constr. Trades Council of Cal. v. Duncan*, 76 Cal. Rptr. 3d 507, 515 (Ct. App. 2008) (citing Cal. Gov't Code § 11425.60), and *Kern Asphalt* was not so designated. See Director's Prevailing Wage Enforcement Decisions (Labor Code section 1742) (2007 to present), Dep't of Indus. Relations, http://www.dir.ca.gov/oprl/PrevWageEncDecision.htm (last visited Jan. 7, 2019) (listing *Kern Asphalt* among decisions that "have not been designated precedential and, therefore, . . . cannot be relied on as authority in future cases"). Nevertheless, the reasoning and conclusion of *Kern Asphalt* are instructive, if not binding, even though the courts bear the ultimate responsibility for interpreting the statutory language of the prevailing wage law. . . .

(Slip Opinion 16-17.)

In short, under the clear terms of section 1772, plaintiffs were entitled to a prevailing wage for their mobilization work in execution of their public works activity at the road construction site. In concluding that certification to this Court was nevertheless warranted, the Ninth Circuit referenced the standard that has been employed by California courts in hauling and off-site fabrication cases to limit the application of section 1772 in those settings, and questioned whether, under that standard, a prevailing wage would be owed for plaintiffs' mobilization work here. As now explained, plaintiffs urge this Court to conclude that the standard employed in this case (even if it is appropriate in the setting of hauling or off-site mobilization work) has no application here.

C. The "Exclusively Dedicated" Analysis Employed In Hauling And Off-Site Fabrication Cases Should Not Be Applied Here.

If plaintiffs moved milling machines while on the job at the work site, or even conducted a safety check once on the job site, no one would argue that they were owed a prevailing wage.

The only reason this issue nevertheless arises here is because plaintiffs' mobilization work commenced at remote storage locations, some used exclusively for this job and some not. As the Ninth Circuit recognized in its opinion certifying this matter to this Court (Slip Opinion 7-10), the California cases concerning section 1772 have largely been decided in the setting of hauling materials either to or from the public work site or the off-site fabrication of materials that are used at the public work site. (See *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434; *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742; *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192.)

The Ninth Circuit further recognized that "California courts have not previously addressed the applicability of the prevailing wage statute to offsite mobilization work performed by workers employed on public work projects" (Slip Opinion 7) and opined that "[t]he outcome of this appeal might depend on whether [the above cases] apply in this context." (Slip Opinion 11.) However, for the reasons now explained, plaintiffs urge this Court to conclude that the standard developed to limit the scope of section 1772 in the context of cases discussing pure hauling activity or off-site fabrication activity, has no application here.

1. **The standard employed in the hauling and off-site fabrication cases was borrowed from the federal Davis-Bacon Act which, unlike California's PWL, has a "directly on the site of the work" requirement.**

The standard employed in California's hauling and off-site fabrication cases can be traced to *O. G. Sansone Co. v. Department of Transportation*, 55 Cal.App.3d 434, and in particular its reliance on *Green v. Jones* (Wisc. 1964) 128 N.W.2d 1, a decision of the Wisconsin Supreme Court and *H. B. Zachry Co. v. U. S.* (Ct. Cl. 1965) 344 F.2d 352, 360. Both of these decisions applied the standard under the federal Davis-Bacon Act. In *Sansone,* the employees drove trucks delivering subbase materials to a public works job site where the materials were used to perform work under a public works contract. The parties stipulated that "'[t]he subbase materials hauled by [the trucking companies] were taken from locations adjacent to and established exclusively to serve the project site, though not located physically on the project site, and were delivered by the said firms to the project site.'" (*Id.* at p. 443.)

The *Sansone* Court concluded that the employees of the subcontractors hauling the materials were entitled to a prevailing wage, reasoning: "In the case presently before this court [the general contractors] contracted to furnish the subbase material. In order to fulfill the contract, [the general contractors] entered into private borrow agreements with third parties so as to obtain borrow sites designed to supply the project site exclusively with subbase materials and [the general contractors] contracted with Wright to haul the material to the adjacent project site. Wright and Heck were not materialmen or employees of materialmen. Rather, [the general contractors] contracted with Wright to perform an integral part of

[the general contractors'] obligation under the prime contract. The trial court properly determined that under the circumstances of the instant case Wright and Heck were subcontractors [entitled to be paid a prevailing wage]." (*Id.* at p. 445.)

As described, in reaching this conclusion, the *Sansome* Court looked to *Green v. Jones, supra,* 128 N.W.2d 1. There, a contractor delivered roadbed materials to be used on a public works road project. The issue was whether the drivers delivering those materials to the job site were entitled to a prevailing age. In resolving this question, the *Jones* Court explained that "[i]t is clear that the [Wisconsin] legislature has adopted the functional 'work on the site' test of coverage incorporated in the Davis-Bacon Act, federal legislation authorizing the Secretary of Labor to predetermine minimum wage rates for 'mechanics and laborers' on federal construction projects." (*Id.* at p. 6.)

Applying that test, the *Green* Court agreed with an earlier decision by the Wisconsin Attorney General concluding that "'[i]f certain materials were stockpiled at the site, then coverage depended upon whether the materials were hauled from a commercial pit operating continuously, in which event there would be no coverage, or whether the materials were hauled from a pit opened solely for the purpose of supplying materials, in which event there would be coverage. (Fn. omitted.) However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material.'" (*Id.* at p. 6.)

As *Sansome* explains, "[t]he Wisconsin court decided that Jones' employees were covered because under the facts of that case the materials hauled were dumped or spread directly on the roadbed and were immediately used in the construction of the project. Thus, the court stated (128 N.W.2d at p. 7): 'In the instant case, although the drivers hauled materials from both commercial and 'ad hoc' pits, such materials were

immediately distributed over the surface of the roadway. The drivers' tasks were functionally related to the process of construction." (*O. G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d at pp. 443–444.)

Next, in *H. B. Zachry Co. v. U. S.* (Ct. Cl. 1965) 344 F.2d 352, the second case on which *Sansone* relied, the prime construction contractor Zachry executed a "[s]ubcontract" with an independent trucking company to transport building materials from the supplier to the project site. (344 F.2d at p. 354.) The Court noted that under the Davis-Bacon Act, the Secretary of Labor had long excluded from prevailing wage coverage employees of bona fide material suppliers who sold building materials to a contractor engaged in a public works project, if the material suppliers had to be selling supplies to the general public, his plant could not be established specially for the particular public works contract, and his plant could not be located at the project site.

The Court concluded that the trucker's employees in that case were not covered by the labor laws "because of the nature of the function [the trucking company] performed, namely, the delivery of standard materials to the site—a function which is performed independently of the contract construction activities. We think this decision is a logical extension of the congressional intent to exclude employees of materialmen from the coverage of the Davis–Bacon Act." (*Id.* at p. 361.)

The cases following *Sansone* (in either the hauling or the offsite fabrication context) have adapted a similar standard to determine whether the work involved in those cases was in execution of a public works. For instance, in *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, the issue was whether a subcontractor who fabricated materials which were to be then used by the general contractor, was required to pay a prevailing wage when that subcontracted work was at "a

permanent offsite manufacturing facility that is not exclusively dedicated to the project." (*Ibid.*) The Court agreed with the administrative appeal decision that "'prevailing wages do not apply to work performed at a permanent fabrication plant when the location and existence of the plant are determined wholly without regard to any particular public works project.'" (*Id.* at p. 198.)

Likewise, in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752, the employees drove trucks to off-haul materials from a public works site to a remote location. As described in *Sheet Metal Workers' Internat. Assn., Local 104, supra,* 229 Cal.App.4th 192, 205, the *Williams* Court "focused on the meaning of the 'in the execution of' language in section 1772 and primarily relied upon the analysis in *Sansone* and the cases relied upon by that decision. (156 Cal.App.4th at pp. 749–752.) The court noted that the critical factor in the analysis was whether a trucking company was 'conducting an operation truly independent of the performance of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract." (*Id.* at p. 752, 67 Cal.Rptr.3d 606.)

"The *Williams* court held that the off-haul work at issue in that case was not covered by the prevailing wage law, reasoning that it was not integrated into the flow process of construction. (*Id.* at p. 754, 67 Cal.Rptr.3d 606.) Among other things, the court emphasized that the trucking company off-hauled 'generic materials to a locale bearing no relation to the public works project site' (*id. at p. 753*, 67 Cal.Rptr.3d 606) and that the prime contract did not require the contractor to off-haul general building materials from the site (*id.* at p. 754, 67 Cal.Rptr.3d 606). According to the court, the off-hauling of generic materials was no more an integral part of the construction process than the delivery of generic

materials by a bona fide material supplier." (*Id.* at p. 753, 67 Cal.Rptr.3d 606.)

The Ninth Circuit recognized that the outcome of this appeal may depend on whether the analysis in these cases apply here. It should not. As just described, the standard employed in these cases has its genesis in the federal Davis-Bacon Act. That Act, however, expressly requires that the prevailing wage be paid to all workers "employed directly on the site of the work." (40 U.S.C. § 3142(c)(1); see also *Building & Constr. Trades Dep't v. Dep't of Labor* (D.C.Cir.1991) 932 F.2d 985, 990 [holding that the quoted language "clearly connotes ... a geographic limitation"].)

In turn, the applicable federal regulation provides the framework that was adopted by the above California Court of Appeal cases. That regulation provides that "[n]ot included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract." (29 C.F.R. § 5.2 (l)(3).)

The Davis–Bacon Act was enacted in 1931, and California passed its PWL a few years later, in 1937. (See An Act of March 3, 1931, ch. 411, 46 Stat. 1494; West's Ann. Cal. Labor Code § 1771.) This sequence suggests that California's omission of the Davis–Bacon Act's explicit geographic

limitation was deliberate. Moreover, this divergence between California's PWL and the federal Davis–Bacon Act means that case law or regulations interpreting the federal act are of little or no help to a court construing the geographic scope of the PWL.

In *Sheet Metal Workers' International Association, Local 104, supra,* 229 Cal.App.4th at pp. 211–212, the Court considered a similar argument with respect to the language in the then-existing version of the Davis Bacon Act that had an express geographic restriction. The Court explained that "we agree that some significance should be attached to the fact that the [California] prevailing wage law does not use the "directly on the site" language employed in the Davis-Bacon Act. . . ." *(Ibid.)* However, the Court discounted that distinction because, while the Davis-Bacon Act and the California Act were "passed at roughly the same time in 1931" and "the Davis-Bacon Act did serve as a model for California's law," "the federal law as originally enacted in 1931 did not contain the 'directly on the site' geographical limitation that now appears in the statute." *(Id.* at 203.) "Instead, the statute referred to "laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract...." (Id., § 1.) The "site of the work" phraseology *first appeared in the Davis-Bacon Act in 1935.* *(Ball, Ball & Brosamer v. Reich* (D.C.Cir.1994) 306 U.S. App.D.C. 339 [24 F.3d 1447, 1453, fn. 3].)" *(Id.* at p. 203, italics added.)

However, *Sheet Metal Workers'* loses sight of the fact that "[w]hen the California Legislature established the Labor Code in 1937, it replaced the 1931 Public Wage Rate Act with a revised, but substantively unchanged, version of the same law. (Stats.1937, ch. 90, § 1720 et seq., pp. 241–246.)" *(State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555.) Thus, two years after the federal amendment adding the "site of work" language, the California Legislature

revised the California act without adding that language. In any event, even if this 1937 re-enactment had not taken place, the *Sheet Metal Workers'* analysis would still be flawed.

The analysis employed in *Sheet Metal Workers'* means that it was appropriate to borrow the federal "site of the work" standard enacted in 1935, the regulations promulgated under that standard and the cases interpreting that standard, even though in the 83 years after Congress enacted that standard, the California Legislature has not followed suit. The sole basis for the Court's conclusion is that the federal amendment occurred approximately four years after the 1931 enactment of California's PWL. But, rather than focus on the four years preceding the federal amendment, the Court should have instead focused on the 83 years following that amendment. In 1935, Congress concluded that it was necessary to amend the Davis-Bacon Act to limit its application to employees who are "employed directly on the site of the work." Without that amendment, the regulation excluding permanent off-site facilities and spawning the exclusively dedicated standard developed in the federal regulations and case law, would never have come into existence. There is therefore no basis to conclude that this federal standard – tethered exclusively to language not enacted in California – should nevertheless apply under the circumstances here. If such a requirement is to be imposed, it should be accomplished by the Legislature and not the courts.

Other states which have addressed this issue have concluded that similar "site of the work" exclusion precludes payment of a prevailing wage unless the worker transporting materials also performs work at the construction site. For example, in *Sparks & Wiewel Const. Co. v. Martin* (Ill. App. Ct. 1993) 620 N.E.2d 533, 541, there was a general public works contract for roadway work. The general contractor then contracted with the operator of a rock quarry, to supply dirt and stone to the project. That

quarry operator then contacted with a trucking company to deliver the materials to the work site. Certain of the truck drivers claimed a prevailing wage. In rejecting this claim, the Court referenced the applicable Illinois statutes which provides: "'Only such laborers, workers and mechanics as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job, and laborers, workers and mechanics engaged in the transportation of materials and equipment to or from the site, but not including the transportation by the sellers and suppliers or the manufacture or processing of materials or equipment, in the execution of any contract or contracts for public works with any public body shall be deemed to be employed upon public works.'" (*Id.* at p. 538.)

The Court explained: "The statute is unambiguous and clear in answering this question. Those employed by sellers or suppliers engaged in the transportation of materials are excluded from coverage. The truck drivers fell specifically within the exemption. The fact that they dumped the material where it would be used is not dispositive. They did not perform actual construction work on the site of the construction project. Rather, any "spreading" done by them was a result of the unloading process and was the final act of unloading; they did not get out of their trucks and spread the material; all handling of the material was done by other workers on the project. The statutory language is clear and will be given effect." (*Id.* at p. 541.)

Here, California's PWL does not have the limiting language contained in the Illinois statute, again reflecting that such limitations were not intended in this State. But, since these plaintiffs actually performed work at the road construction site and therefore were not employees of subcontractors whose sole function was delivery of tools or materials, even

under the analysis employed where such limiting language exists, plaintiffs were entitled to a prevailing wage.

2. The rationale why California's Courts borrowed the federal standard in hauling and off-site fabrication cases, has no application here.

The above California cases, which have borrowed the federal standard even though California's PWL has no geographic restriction, have done so (1) to ensure that prevailing wages are required for only that work furthering the purposes of the PWL and (2) to ensure that there are some limitations as to when a prevailing wage must be paid to contractors. These concerns – even if they are a valid reason for recognizing a limitation not imposed by the PWL itself – have no application here.

First, application of the PWL to plaintiffs' mobilization work furthers the legislative goals of that Act. This is demonstrated by the Legislature's enactment of Labor Code section 1720.9 effective January 1, 2016. That section provides in pertinent part that "'public works' also means the hauling and delivery of ready-mixed concrete to carry out a public works contract. . . ."

In *Allied Concrete and Supply Co. v. Baker* (9th Cir. 2018) 904 F.3d 1053, 1063, the Court turned back a challenge to that statute brought by mixed concrete suppliers who argued that this section violated equal protection because there were supposedly no legitimate justification for distinguishing between ready-mix concrete drivers and other delivery drivers. First, the Court explained that "'[t]he overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects.' *Lusardi*, 4 Cal.Rptr.2d 837, 824 P.2d at 649. In extending the prevailing wage law to benefit ready-mix drivers, the legislature could have

rationally decided that the delivery of ready-mix to a public work is part of the 'flow of construction' and should be compensated as such. Not only would this protect the ready-mix drivers, but if the legislature believed that the ready-mix drivers were actually more integrated in construction, the payment of prevailing wages could increase efficiency in public works projects by attracting higher-skilled workers." (*Ibid.*)

As already explained, precisely the same thing is true of the mobilization work involved here. Just as the ready mix drivers must perform skilled work so that the materials they are delivering to the construction site are suitable for use, plaintiffs here were required to conduct skilled work preparing and transporting heavy machinery for it to be used by them at the construction site.

In addition to furthering the goal of the PWL, the payment of prevailing wages for plaintiffs' mobilization work does not create the risk that the proverbial flood gates would be swung open to include workers who are only remotely connected to the public works construction project.

This is not a case where the issue is whether a prevailing wage must be part for the mere maintenance of tools or equipment that are to be ultimately used at a construction site or for their simple delivery to that site. Under those circumstances, it might be relevant to inquire whether the facility where the tools or equipment were stored or maintained, was dedicated to the performance of the public works job. That inquiry may ensure that there is a sufficiently close connection between that site and the construction site. If that site was created to exclusively service the public work site then it could be assumed that the storage site is in close proximity to the job site and that the work being performed there was closely connected to the work being performed at the job site.

However, such an inquiry is unnecessary if the employee maintaining the equipment and delivering it to the job site is also the

employee that is using the equipment at the job site. Under these circumstances, even if the employee's storage site was not created to exclusively service the construction site, it will almost certainly be the case that the storage facility will be located close to the job site. In order to be functional, a storage facility housing large equipment that must be brought to the construction site and taken back each day will not be a long distance from the job site. Likewise, there is no need to ask whether the mobilization work is closely connected to the work the employee is performing at the job site. As already explained, the very nature of mobilization work means that is the case. That work is lazar focused on the work the employee is performing at the construction site. The equipment that is being maintained and transported is the very equipment that the employee must use to complete his or her assigned tasks at the construction site. There is therefore a close and direct correlation between that mobilization work and the public work that is being performed at the job site. Certainly, the nature of the mobilization work is such that there could be no serious question but that it was in the execution of a public works contract under section 1772.

The fact that plaintiffs were delivering heavy equipment and not materials to the construction does not affect their entitlement to a prevailing wage. In its certification opinion, the Ninth Circuit addressed the District Court's reasoning that plaintiffs were simply delivering tools to the worksite which served to distinguish their work from the delivery of materials that were integrated into the work site. The Ninth Circuit explained the difference between what plaintiffs were doing and the delivery of generic tools, reasoning: "Drawing a bright line between materials and tools in this way is plausible, but not obvious. On the one hand, because materials are integrated into a jobsite and are not reusable, they are exclusively devoted to a public works project in a way that tools

are not. This "exclusivity" is an ongoing theme in the relevant case law, as demonstrated, for example, by the focus on whether an offsite facility was created for a public works project, or whether a materialman also sold supplies to the general public. See, e.g., O. *G. Sansone*, 127 Cal. Rptr. at 803–04. Tools do not have this inherent characteristic of exclusivity: the reason for a tool to come and go from a jobsite may be for its protection or alternative use, which serves the contractor's interest, not the interest of the public works project. On the other hand, the milling machines that Plaintiffs." (*Mendoza,* supra, 913 F.3d. at p. 917, fn. 5.)

As the Ninth Circuit described, the sole basis for distinguishing between tools (including the unique heavy machinery involved here) and materials is again based on the exclusivity standard recognized in cases involving hauling and offsite fabrication. As already explained, that exclusivity analysis should play no role in determining whether an employee is entitled to a prevailing wage for mobilization work (including preparation and drive time) by an employee who is performing public works at the construction site.

In short, the language and purpose of California's PWL support payment of a prevailing wage for mobilization work being performed by employees who are also performing public work activity at a construction site.

Accordingly, plaintiffs urge this Court to rule: When a worker performs on-site construction entitling him or her to a prevailing wage for that work, then that worker is also entitled to a prevailing wage for his or her "mobilization work" away from the construction site which is necessary for the worker to be able to perform work at the construction site after he or she arrives there. This includes the mobilization work transporting machinery or equipment the worker must use at the work site which cannot be stored there. Under this standard, these plaintiffs were entitled to be

paid a prevailing wage for their off-site mobilization work as well as for their work at the construction site.

II. A PREVAILING WAGE IS OWED FOR TRAVEL TIME BASED ON THE TRAVEL AND SUBSISTENCE DETERMINATIONS AS PUBLISHED BY THE STATE OF CALIFORNIA.

The Ninth Circuit certified the question of when off site "mobilization" work was covered by prevailing wage obligations. In resolving this issue, the Court should be aware that the narrower aspect of mobilization involving actual travel time, is covered by prevailing wage obligations as seen by the various "Travel and Subsistence" determinations published by the State of California.

The State is charged with publishing Prevailing Wage Determinations mandating among other things, the wage rates, travel and substance and scope of work on public works construction. The State's "Travel and Subsistence" published determination for operating engineers do not contain the rates in "Lowbed Transport" agreement signed by Defendant FMG. (ER Vol II at 230-239.) Both published Operating Engineer Determinations, 2012 and 2015, however, contain the following salient provisions on "travel time" at paragraph 11.04.00:

> *11.04.00 Travel Time.* 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 11.03.0 I, an Employee is required to report to the yard on that date, an Employee's time will end at the yard.

(ER Vol II at 242, 253.)

The State publishes "Travel and Subsistence" determinations for every craft and classification of covered work on public works. Some of these determinations contain specific wage rates for travel. For example, the Laborers Travel and Subsistence Determination for 2012 contains the following travel language:

> Any employee operating or responsible for the control of a company vehicle being used to transport personnel, equipment and/ or supplies from the employer's regularly established shop or yard to a jobsite shall be compensated at a rate of fifteen dollars and ninety-three cents ($15.93) per hour. Any employee who is a passenger in and not directly responsible for the control of a company vehicle is deemed to be in the vehicle voluntarily and is not subject to compensation other than discussed above. Employees assigned company vehicles will not be compensated for travel to and from the project to their homes unless it is in excess of sixty (60) miles from the regularly established shop or yard.
>
> Travel & Driving time is not subject to Section 28 (Fringe Benefits).

(ER Vol II at 266.)

The Laborers 2015 "Travel and Subsistence" determination contains even more specific travel pay language as a "Supplement No. 7" special travel & driving time rates. (ER Vol II at 282.) These rates vary from $17.91 to $19.16 an hour and are less than the prevailing wage a laborer receives on public works. Essentially, this published determination lowers the prevailing wage for a laborer for travel and driving to and from public works jobs. With respect to roadwork, Laborers who perform "lane closure" work are paid for their travel time at a specific prevailing wage rate that is lower than the prevailing wage rate while performing traffic control. (ER Vol II at 102.) This payment of a different travel rate than the general prevailing wage also is found in this determination for Laborers who perform "Traffic Stripping and Traffic Delineating Devices." (ER Vol II at 103.)

A review of published prevailing wage determinations found in the Requests for Judicial Notice introduced before the District Court show that mobilization is part and parcel of a contractor's prevailing wage obligations. Of note, a published determination is not a legal opinion or a position statement. The State is charged with publishing prevailing wage determinations as to the wage rates, "scope of work" and "travel and subsistence" which become the rules of the road. (See Labor Code § 1773; *State Bldg. & Constr. Trades Council of Cal. v. Duncan* (2008) 162 Cal.App.4th 289, 295.)

Operating engineers must be paid when they arrive at an employer's yard and when they return to the yard. (ER Vol II at 242, 253.) Neither the Travel and Subsistence Determination, nor the published prevailing wage determinations say anything about lowering the prevailing wage for an operating engineer for this work. (ER Vol II at 230-258.)

Defendants may respond that there are no alternative "travel" rates because this is simply not covered work or work "in the execution of the contract." However, a cursory review of published travel and subsistence determinations show that such an argument upends several travel and subsistence determinations published by the State. For example, "Laborers" on public works construction enjoy at least three specific types of travel pay in published prevailing wage determinations. The 2012 published Travel and Subsistence Determination states "[a]ny employee operating or responsible for the control of a company vehicle being used to transport personnel, equipment and/ or supplies from the employer's regularly established shop or yard to a jobsite shall be compensated at a rate of fifteen dollars and ninety-three cents ($15.93) per hour." (ER Vol II at 266.) The 2015 published Travel and Subsistence Determination, specific to the concrete modification industry posit rates in effect for travel from 2014 through 2018 which are lower than the general prevailing wage. (ER

Vol II at 282.) Finally, Laborers who perform flagging and lane closures also have travel rates that are lower than the general prevailing wage for their craft. (ER Vol II at 102-3.) Any argument by defendants that travel pay is simply not recognized as covered work would render these three published determinations void.

CONCLUSION

For the foregoing reasons, plaintiffs urge this Court to conclude that plaintiffs' offsite "mobilization work"—including the transportation to and from a public works site of roadwork grinding equipment—performed is "in the execution of [a] contract for public work," Cal. Lab. Code § 1772, such that it entitles them to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to section 1771 of the California Labor Code.

Dated: June 11, 2019

JUSTICE AT WORK LAW GROUP

ESNER, CHANG & BOYER

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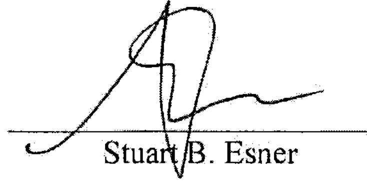
This opening brief on the merits contains 8,741 words per a computer generated word count.



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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **APPELLANTS' OPENING BRIEF ON THE MERITS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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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 and that this declaration was executed on June 11, 2019, at Pasadena, California.

Marina Maynez

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