S253574

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.

Plaintiffs and Appellants,

v.

FONSECA MCELROY GRINDING CO., INC., ET AL.

Defendants and Respondents.

AFTER A DECISION BY THE NINTH CIRCUIT COURT OF APPEALS, CASE NO. 17-15221
JUDGE WILLIAM H. ORRICK, CASE NO. 3-15-cv-05143-WHO

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF UNITED CONTRACTORS IN SUPPORT OF RESPONDENTS FONSECA MCELROY GRINDING CO., INC. AND GRANITE ROCK COMPANY

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Pursuant to rule 8.520(f) of the California Rules of Court, the Engineering & Utility Contractor Association doing business as United Contractors ("UCON"), respectfully requests permission to file the attached amicus curiae brief in support of Respondents Fonseca McElroy Grinding Co., Inc. and Granite Rock Company.

UCON is a California non-profit corporation organized to advance the interests of the unionized heavy civil engineering industry in California.[1] UCON is comprised of over 500 industry-affiliated companies, including over 300 union contractors which perform critical infrastructure work embracing grading, paving, utility bridge pipelines, power, water,

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[1] UCON certifies that no person or entity other than UCON and its counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

transit rail, airports and more. UCON routinely advocates the interests of union affiliated contractors in the state of California through labor representation, lobbying and government advocacy, industry-specific training and education, regulatory and safety services, and amicus curiae briefs in cases involving issues of vital concern to its members.

Like many California union contractors, UCON members perform public works projects as defined by California Labor Code Sections 1720 through 1720.9. UCON members rely on the fact that "public works" is limited to onsite "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds..." Labor Code §1720. Expanding the requirement to pay prevailing wages on public works to any worker employed by a contractor "in the execution of any contract for public work" will open a Pandora's box of lawsuits claiming prevailing wages for work never intended to be considered prevailing wage work. Such a ruling will diminish or eliminate a contractor's ability to determine which tasks performed "in the execution of any contract for public work" will be subject to prevailing wages. It will be devasting to California contractors who perform public work. Contractors, large and small, will be faced with consuming and potentially destructive expensive court litigation. This will harm not only UCON members, but the entire construction industry which performs public works, including their employees, customers and the State economy as a whole.

UCON is thus deeply interested in how this Court decides the question presented in this case, specifically, whether "offsite 'mobilization work ...'" performed "in the execution of '[a] contract for public work,'" 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 was performed" pursuant to Section 1771 of the California Labor

Code." Accordingly, UCON respectfully requests that this Court accept and file the attached amicus curiae brief addressing the impact the Appellants' proposed broad interpretation and expansion of prevailing wage law will have on the construction industry in California.

Dated: November 27, 2019

SWEENEY, MASON, WILSON & BOSOMWORTH

By: _____

ROGER M. MASON, ESQ.
Attorneys for Amicus Curiae
UNITED CONTRACTORS

AMICUS CURIAE BRIEF

I. INTRODUCTION

This Court granted the request of the Ninth Circuit Court of Appeals made pursuant to California Rule of Court 8.548, to decide the following question of California law:

> Is operating engineers' offsite "mobilization work" - - including the transportation to and from a public works site of road work grinding equipment - - performed "in the execution of [a] contract for a 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?

United States District Judge William H. Orrick correctly answered the question certified by the Ninth Circuit when he explained that "[t]he mobilization work was not an integrated aspect of the flow process of construction under the public works contracts. It consisted of discrete job tasks independent from the construction work performed by plaintiffs at the public works site. There is no evidence of the public works contract or industry custom and practice that shows that the transportation of heavy equipment was 'in the execution' of a public works contract." ER 3, 18.

Plaintiffs' appeal seeks to broadly expand the definition of "public works" to include offsite work performed by a contractor "in the execution of any contract for public work." Labor Code §1772. In essence, Plaintiffs ask this Court to expand California prevailing wage law to include any work necessary to complete a public works contract. Plaintiffs' proposed

expansion of the definition of "public works" not only ignores over 80 years of California law, it will render it impossible for contractors to know when they are performing public work requiring payment of the prevailing wage.

II. LEGAL ARGUMENT

California's prevailing wage law requires that contractors pay prevailing wages to all workers they employ on public works. Labor Code §§1771, 1772. The scope of "public works" is defined in Article 1 of the California Labor Code at §§1720, et seq. Contrary to Plaintiffs' argument, Labor Code §§1772 and 1774, found in Article 2 of the prevailing wage law, do not attempt to define the definition of "public works."

A. Labor Code Sections 1720-1720.6

1. Department of Industrial Relations

The California Department of Industrial Relations Public Works Manual states in material part:

> "**Public Works" defined:**
>
> Labor Code §§1720-1720.6 contained within their provisions all of the basic facts and conditions which must be present for a work of improvement to fall within the statutory definition of "public works." If those facts and conditions do not exist, the statutory enforcement mechanism available to the Labor Commissioner under Labor Code §1741 cannot be used to recover unpaid wages or penalties authorized by the prevailing wage laws.

Plaintiffs Request for Judicial Notice (Dkt No. 33-1) ("Public Works Manual") at p. 4, §2.4.

2. California Legislature

It has always been the intent of the California legislature that prevailing wages be paid only to workers who perform work at the site of construction. The legislature never intended to extend prevailing wage work to cover all offsite work. In fact, the only arguable exception to this concept is the hauling and delivery of ready-mixed concrete, which will be incorporated to and become part of the completed public work, to public works sites. (Stats. 2015 ch. 739, enacting Section 1720.9). Otherwise, Labor Code §§1720 through 1720.9 define public works to include only work that is performed at the public work jobsites.

B. Impact on the Construction Industry

Plaintiffs' proposed expansive interpretation of the prevailing wage law to include any and all work which is necessary to complete the work included in a public works contract will result in an explosion of litigation over which work performed by offsite employees in the execution of a public works contract is subject to the payment of prevailing wages. As Respondents point out, Plaintiffs' "proposed interpretation would do nothing less than open up the proverbial floodgates, sweeping in to the prevailing wage law's coverage all preconstruction and preliminary activity required so that work can be performed on the public works site, no matter how remote the activity is to the performance of the public works contract." Respondents Answer Brief on the Merits, Section V. B. 3, pg. 32. The District Court similarly noted in its opinion that Plaintiffs' argument "could be used to justify the application of the prevailing wage law to the transportation of many things needed for a public works construction job,

such as 'tools, portable toilets, generators, potable water, lumber, asphalt, steel ... cranes, etc.'" ER 14.

C. Where Will It End?

If this Court adopts Plaintiffs interpretation of "public work," what happens if a Project Manager, whose job duties are limited to the coordination of subcontractors and suppliers at the project and maintaining the project schedule, happens to visit the public works project and bring with him or her a set of revised plans necessary for the construction of one of the buildings on the project? Is s/he then entitled to payment of prevailing wages? Clearly, the visit to the project was necessary to the execution of a contract for public work.

What if an employee, whose job duty is limited to delivering paychecks to workers at various company jobsites, delivers paychecks to a public works project? Has that employee now performed work in the execution of a contract for public work?

Extending Plaintiffs' argument to its most illogical extreme, will the manufacturer of the milling machine used in breaking up asphalt and concrete on public works streets, roads and pavement be required to pay its employees prevailing wage in light of the fact that their equipment might be used in the execution of a public works contract?

If this Court adopts Plaintiffs' proposed standard, contractors may expect to be confronted with claims from their office employees and the employees of third-party suppliers and manufacturers of tools and equipment used on a public works site that they, too, are required to be paid prevailing wage, since they performed work necessary to the execution of a contract for public work.

III. CONCLUSION

For the foregoing reasons, in addition to those set forth in Respondents Fonseca McElroy Grinding Co., Inc. and Granite Rock Company's Answer Brief on the Merits, this Court should hold that offsite mobilization work performed in the execution of a contract for public work does not entitle workers to be paid the prevailing rate of per diem wages pursuant to California Labor Code Section 1771.

Dated: November 27, 2019

SWEENEY, MASON, WILSON & BOSOMWORTH

By: _____

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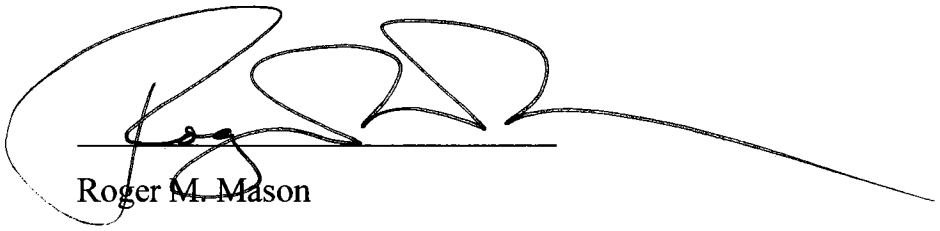
CERTIFICATION OF WORD COUNT

This amicus curiae brief contains 1,834 words per a computer-generated word count.



Roger M. Mason

PROOF OF SERVICE

I declare that I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and not a party to this action; my business address is 983 University Avenue, Suite 104C, Los Gatos, California 95032. Upon this day, I served the following:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF UNITED CONTRACTORS IN SUPPORT OF RESPONDENTS FONSECA MCELROY GRINDING CO., INC. AND GRANITE ROCK COMPANY

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[X] **VIA FIRST CLASS MAIL– CCP §§1013(a), 2015.5:**
By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection and mailing on the date below following ordinary business practices. I am readily familiar with my firm's business practice of collection and processing of correspondence for mailing. Correspondence placed for collection and mailing is deposited with the United States Postal Service, with postage thereon fully prepaid, that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on ~~November~~ December 2, 2019, at Los Gatos, California.

/s/
Christine Hilton