S251135

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN BUSKER,

Plaintiff-Appellant,

v.

WABTEC Corporation, et al.,

Defendants-Respondents.

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

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Nothing in the amicus curiae briefs detracts from the conclusion that work on rolling stock is not public work subject to prevailing wages. Plaintiff's amici devote most of their briefs to arguing about factual circumstances not present here that raise concerns not implicated here. Citing cases that address off-site fabrication and hauling of materials, amici contend that contractors should not be permitted to evade the statute's coverage by performing construction work off-site or by subcontracting it to others. But no such issue is presented here. Wabtec's work on the railcars falls outside the statute not because it was done off-site or by Wabtec rather than Parsons. Instead, it is not covered because, under the statute's text and longstanding administrative rulings applying that text, such work is not a public work at all, no matter where it is done or who does it.

Amici also rely on cases holding that a project owner may not circumvent the statute by segregating construction activities into separate contracts and ascribing public funding to only one of those contracts. No such manipulation is involved here. This case does not involve any segregation of construction activities into separate contracts. Wabtec's railcar work is not construction activity at all under the statute. And that is true without regard to whether the work is specified in a single contract along with work that does qualify as a public or whether it is specified in a separate contract. Either way, the contractual obligation Wabtec was fulfilling was to complete railcar work, which is not a public work to begin with, regardless of its funding.

Amici's remaining arguments are also groundless. They invoke "policy," asserting that broad application of the prevailing wage law will serve the "public interest." But balancing the costs of and benefits of mandatory wage levels is a matter for the Legislature, not the judiciary.

Here, the Legislature has not extended the prevailing wage requirement to work on railcars, as shown by the statutory text, common usage, the longstanding and consistent rulings of the Department of Industrial Relations, and the Legislature's own acquiescence in those rulings. Those are the dispositive factors, and amici make no meaningful effort to address them. Amici provide no basis for finding in plaintiff's favor.

ARGUMENT

I. AMICI FAIL TO ADDRESS—LET ALONE REFUTE—THE BASES OF WABTEC'S POSITION.

Plaintiff's amici are noticeably silent on the basic points that, as explained in Wabtec's answer brief, establish that work on rolling stock—here, placing equipment on trains—is not a "public work" under the Labor Code. *First*, work on trains is not a public work because it is not "construction" or "installation" under Labor Code section 1720(a). Such public work refers to work on realty, not trains. *Second*, work on trains is not a public work because it is not work done "in the execution" of a "contract for a public work" that would have brought it within prevailing wage coverage under section 1772.

With respect to the first point, none of the amici contests Wabtec's textual interpretation and structural analysis demonstrating that work on rolling stock fails to qualify as "construction" or "installation." (Ans. Br. 18–25.) None addresses the multiple court precedents supporting that conclusion. (*Id.* at pp. 25–26.) None addresses the many consistent and longstanding agency determinations confirming that conclusion or explains why respect should not be accorded those agency determinations. (*Id.* at pp. 26–37.) And none explains why the Legislature, in the face of this unbroken line of agency determinations, would have failed to override these determinations, unless it intended for work on rolling stock to fall

outside public works coverage; the Legislature clearly did so intend. (*Id.* at pp. 37–40.)

The amicus briefs are similarly deficient regarding the second point. None of the amici addresses Wabtec's textual interpretation and structural analysis of section 1772 showing that the work here was ***not*** done "in the execution" of a "contract for public work." (Ans. Br. 42–46.) None disputes that precedent requires that work be "integrated into the flow process of construction" to qualify as public work under section 1772 and that this requirement is not satisfied here (which is why amici argue strenuously, but mistakenly, that such precedent should be overruled). (Ans. Br. 46–48.) None addresses the on-point agency rulings concluding that the same kind of work done here, even though necessary for the operation of a communications network for a transportation system, is not a public work. (*Id.* at pp. 48–50.) And none can cure the flaw inherent in all of amici's proposed alternatives to Wabtec's clear position—namely the lack of a limiting principle and failure to provide clear guidance to courts and parties subject to the public works law. (*Id.* at pp. 50–54; *infra*, at pp. 16–22.)

II. AMICI'S DISCUSSION OF COURT OF APPEAL PRECEDENT IS IRRELEVANT AND INCORRECT.

Rather than dispute these dispositive points that compel the conclusion that work on rolling stock is not public work, amici argue at length about a purported conflict among court of appeal decisions. But that purported conflict is irrelevant here because Wabtec's work is not covered even under the approach amici say should be followed. And amici are incorrect in any event that any conflict exists.

A. This Case Does Not Involve Any Issue of Evading Statutory Coverage by Shifting Work Off-Site or to Separate Contracts.

The cases on which amici rely addressed three factual scenarios, none of which is at issue here: (1) hauling materials on or off a project site (*O.G. Sansone Co. v. Dep't of Transp.* (1976) 55 Cal.App.3d 434, and *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742); (2) fabricating components off-site (*Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192); and (3) entering separate contracts for a single construction project (*Oxbow Carbon & Minerals, LLC v. Dep't of Indus. Relations* (2011) 194 Cal.App.4th 538, and *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194).

In the hauling and offsite fabrication cases, the courts focused primarily on whether the prevailing wage law has a geographical limitation, and on whether the law extends to materials suppliers. As to both issues, the courts concluded that the resolution turns at least in part on whether the workers at issue (or their workplace facilities) were exclusively dedicated to the public work construction or whether they were simply providing supplies to the public work on the same basis as to the public generally.

In *O.G. Sansone*, the court ruled that the workers were covered by the prevailing wage law because they were hauling materials from a location the general contractor established exclusively to supply the road construction project at issue. (55 Cal.App.3d at p. 445.) In *Williams*, the court ruled that the prevailing wage law did not apply because the general contractor did not dictate the location to which the off-hauled materials were to be delivered or how they would be used. (156 Cal.App.4th at p. 753.) And in *Sheet Metal*, the court concluded that the off-site fabrication work was not covered because it was done at a permanent

facility that was not dedicated to the public work construction at issue. (229 Cal.App.4th at p. 214.)

As Wabtec has demonstrated (Ans. Br. 46–48), these holdings support finding that the prevailing wage law does not apply to the on-board work here. Unlike in *O.G. Sansone*, the on-board work here was not necessary to the completion of the public work construction, and Wabtec's employees and equipment were not dedicated at all—let alone exclusively—to any part of the trackside work. And Wabtec's work had even less connection to the public work construction than the work that was found ***not*** to be covered in *Williams* and *Sheet Metal.* Wabtec was not hauling away materials from the trackside work. Nor was it making or supplying parts necessary to the completion of the trackside work.

Local 104 argues that *Sheet Metal* is inconsistent with *Williams* and *O.G. Sansone* because it gave "controlling weight" to whether the fabrication work was part of the "*flow process* of construction" rather than to whether it was "integral to the performance" of the public works contract. (Local 104 Br. 15.) According to Local 104, *Sheet Metal*'s ruling "creates incentives for public works contractors to shift work off-site to low-wage areas of the state." (*Id.* at p. 7.) Local 104 asserts that the public works contractors should not be able to "avoid the law's protections by performing construction work in the contractor's shop." (*Id.* at p. 20.)

Whatever validity these concerns may have in the context of hauling and off-site work, however, they are not relevant here. The reason Wabtec's work is not covered by the prevailing wage law is not that it was off-site or on-site or in a contractor's shop. Rather, Wabtec's work is not covered because it played no role at all—direct or indirect, remote or proximate—in the completion of the public work. The determinative question here is not where the railcars were located when the work was done, or whether Parsons did the work itself or subcontracted it to Wabtec.

It does not matter if the railcars had been located "on-site"—*i.e.*, in the same railyard where the track work was being done—or if Parsons had performed the work itself. The on-board work would still not be a public work. It is the character of the on-board work itself—not who did it or where it was done—that takes it outside of the statute.

For this reason, even if the Court were to conclude that the question is whether the work is "integral to the performance of the public works contract" (as Local 104 says *Williams* held) rather than whether the work was part of the flow process of construction, Wabtec's work would still be outside of the statute because it does not fall within either formulation.

The other line of cases on which amici rely—the separate contract cases (*Oxbow* and *Cinema West*)—are similarly irrelevant. The issue in those cases was determining when construction work should be treated as having been funded "in whole or in part by public funds" as provided in section 1720(a)(1). Both cases involved construction that had been separated into two contracts—one ostensibly funded by public funds and one ostensibly funded only by private funds. *Oxbow* involved two contracts to renovate a conveyor-and-storage facility for petroleum coke. The facility's owner entered one publicly funded contract to build a roof enclosure over the storage facility and a separate privately funded contract to build a new conveyor system to bring the coke into the facility. (194 Cal.App.4th at p. 543.) *Cinema West* involved two contracts to develop a site for a movie theater—a privately funded contract to build the theater and a publicly funded contract to build a parking lot to provide the necessary parking spaces for theater patrons. (13 Cal.App.5th at pp. 199–200.)

In both cases, the court found that, for purposes of deciding whether the project was funded in whole or in part by public funds, the work required by these separate construction contracts should be deemed to be a single construction project. The courts relied on the general understanding

of "'construction'" as "'ordinarily [encompassing] the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure.'" (*Oxbow*, *supra*, 194 Cal.App.4th at p. 549 [quoting *Priest v. Housing Auth.* (1969) 275 Cal.App.2d 751, 756]; *Cinema West*, *supra*, 13 Cal.App.5th at p. 211 [same].) Thus, in both cases, the work at issue was construction work that fell within the statute on its own accord, with the only question being whether it was publicly funded. Treating these individual construction activities as not being publicly funded merely because they were covered by separate contracts "would encourage parties to contract around the prevailing wage law by breaking up individual tasks into separate construction contracts." (*Oxbow*, *supra*, 194 Cal.App.4th at p. 550.)

No such concern is implicated here. The on-board work Wabtec performed was not construction work that was segregated into a separate privately funded contract to circumvent the statute's coverage. It was work that was not covered by the statute to begin with (regardless of its funding or which contract called for it) because it fell outside the statute's definition of public work. The contracting parties here were thus not seeking to contract around the statute. Again, it is the character of Wabtec's work, not any contractual provision, that takes it outside the statute.

Amici assert that *Oxbow* and *Cinema West* hold that any work that is necessary to the operation or functioning of a public work is also a public work. But those cases cannot bear that reading—and nothing in the statute supports such a rule. The statute extends coverage only to work that is in execution of a contract for a public work. (Cal. Lab. Code § 1772.) *Oxbow* and *Cinema West* did not even purport to construe that statute. At most, the work in *Oxbow* and *Cinema West* might be said to fall within that test because the public work there included all of the construction activities

necessary to complete the construction of the public work itself. A theater without parking is no more completed construction than a house without a garage or without sewer connections. And building a parking lot or a garage is properly treated as component of public construction because those activities are themselves construction activities. Here, the on-board work was neither a public work in its own right nor necessary to completion of the only public work at issue.

Adopting amici's integral-to-the-public-work's-function test would extend the statute's reach far beyond any permissible reading of the statutory language. A movie theater's operation requires movies that can be shown in the theater. But no one would contend that workers employed in producing movies to be shown at publicly funded movie theaters are covered by the statute—and that would be true even if the movies were specially produced to be shown at that particular theater. A commuter rail system requires railcars, fire stations require fire engines, airports require airplanes, retail stores require merchandise, and a communications tower requires mobile phones or other receivers to serve its communications function. But no authority suggests that manufacturing railcars, fire engines, airplanes, retail merchandise, or mobile phones is a public work, even if such manufacturing is part of a broader contract that contains a public work and even if public funds are used to make them. The statute covers work to execute a contract for a public work. It does not cover every activity necessary to the operation of that public work once it is completed.

Indeed, the Department has already rejected amici and plaintiff's approach on facts materially identical to the facts here: the placement of "equipment in District trains, buses, and other vehicles is not covered" even though such equipment would be necessary for the operation "of the transit radio system." (Ans. Br. 53–54 [citing 10 ER 2139].) Nor was placing

"ATC carsets on BART cars" covered work even though such work was integral to the operation of the Automatic Train Control System. (Ans. Br. 54 [citing 10 ER 2140].) Amici ignore these determinations.

In short, amici's arguments fail because they are based on a false premise. There is no issue here of trying to turn covered public work into non-covered work by shifting it to other contractors, locations, or contracts. Wabtec's railcar work was not covered work to begin with, and it did not become covered work merely because the railcar equipment operated together with something that was a public work.

B. No Conflict Exists Among the Court of Appeal Decisions.

Even if the purported conflict that amici say exists among the court of appeal decisions were relevant to this case, amici's arguments would still fail because no conflict in fact exists. As noted, amici assert that *Sheet Metal* was incorrectly decided and is inconsistent with the other decisions that have addressed similar issues. (Local 104 Br. 15; Local 6 Br. 11.) That assertion cannot withstand scrutiny.

As explained, *Sheet Metal* held that fabricating materials at a permanent off-site location—materials used to complete the heating, ventilation, and air conditioning components of a building renovation project for a community college district—was not a public work subject to prevailing wages. (*Sheet Metal, supra*, 229 Cal.App.4th at p. 214; Ans. Br. 46–47.) The offsite location was "not exclusively dedicated to the project" and thus, the court concluded, was not "integrated into the flow process of construction" of the public work—the controlling test for whether a work is integrally related to a public work to require the payment of prevailing wages under section 1772. (*Sheet Metal, supra*, 229 Cal.App.4th at pp. 196, 206; Ans. Br. 47.)

Sheet Metal arrived at that correct conclusion after carefully analyzing precedent—namely, *O.G. Sansone, supra,* 55 Cal.App.3d 434,

and *Williams, supra,* 156 Cal.App.4th 742. Although the court understood that those cases were factually distinct, involving "on-hauling" of materials to be used at a public work site (*O.G. Sansone*) and the "off-hauling" of materials from a public work site (*Williams*), the court nevertheless recognized that those cases "set forth a general framework for considering whether certain functions are integral to the performance of a public works contract." (*Sheet Metal, supra*, 229 Cal.App.4th at pp. 205–06.) "Of particular importance," the court said, "is whether an operation is truly independent of the contract construction activities—*i.e.*, whether it is *integrated into the flow process of construction.*" (*Id.* at p. 206 [citing *Sansone* and *Williams*; emphasis added].)

Thus, contrary to amici's contention that *Sheet Metal* "represents a significant divergence from" *Sansone* and *Williams* (Local 104 Br. 15; see also Local 6 Br. 11), *Sheet Metal* faithfully applies those cases. Both *Sansone* and *Williams* asked whether the work at issue was "an integrated aspect of the 'flow' process of construction." (*O.G. Sansone, supra*, 55 Cal.App.3d at p. 444 [citing *Green v. Jones* (1964) 23 Wis.2d 551]; *Williams, supra*, 156 Cal.App.4th at pp. 753–54 [recognizing that the Department of Industrial Relations employed "[a] similar analytical framework"].) *Sheet Metal*, adhering to those cases, applied the same, well-established "flow process of construction" test. And here, as discussed, plaintiff does not satisfy the test: the work on the trains was not integrated into the flow process of construction, because such work was not necessary to the construction of the field installation work along the tracks. (Ans. Br. 46–48.)

Amici's other critiques of *Sheet Metal* fare no better. Local 104 asserts that the "flow process of construction" concept must be limited to "the context of highway construction," because otherwise it will become "hopelessly vague" in application. (Local 104 Br. 16 n.2.) But nothing in

the cases that applied the rule indicated that it had such a one-off application, and, as shown, its application is not "hopelessly vague" in this context but quite straightforward.

Local 104 also incorrectly faults *Sheet Metal* for relying on longstanding Department guidance that fabrication at a permanent off-site location is excluded from public works. (Local 104 Br. 17.) Local 104 contends that the Department's guidance relies exclusively on federal law, which contains an "on-site" limitation, whereas state law does not. (Local 104 Br. 17.) But that description of Department guidance is wrong. Although the Department found that fabrication at permanent off-site locations is excluded from coverage, it "reached a different conclusion in cases in which offsite fabrication takes place in a temporary facility established specifically for the public works project instead of at a permanent offsite facility." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 209 [citing coverage determinations] [emphasis added].) Thus, the Department did not exclude all off-site work from coverage in exclusive reliance on federal law.

Amici's errors do not end there. Urging the Court to apply *Williams* (and not *Sheet Metal*), amici mischaracterize *Williams* as strongly suggesting that, if a work is necessary to carry out a term of the contract, that work is subject to prevailing wages. (Local 104 Br. 10–11; Local 6 Br. 10–11). Citing *Williams*, Local 104 asserts that the "proper analysis" is to ask "'whether the [work] was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; [or] whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.'" (Local 104 Br. 11 [quoting *Williams*, supra, 156 Cal.App.4th at p. 752].)

But amicus fails to mention that *Williams* expressly cabined these considerations to the specific facts of its case. *Williams* distinguished "off-hauling" cases from "on-hauling" cases (such as *O.G. Sansone*), stating that "[t]he 'off-hauling' question must be analyzed anew." (156 Cal.App.4th at p. 752.) *Sheet Metal* thus properly recognized these factors as considerations specific to the factual context of "off-hauling" in *Williams* in the same way that *Williams* recognized that certain factors discussed in *O.G. Sansone* were specific to the factual context of "on-hauling." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 206 ["[T]he factors arose and were applied in the context of off-hauling and necessarily were tailored to that activity. Hauling and fabrication are distinct activities that give rise to different concerns in the context of the prevailing wage law."].) Work on rolling stock is distinct, too, and thus the *Williams* factors do not control.

In any event, *Williams* expressly *rejected* the position urged by amici that any work necessary to fulfill a public works contract is automatically subject to prevailing wages. (156 Cal.App.4th at p. 754 n.4 ["a term in the public works contract governing the off-hauling activity . . . is but a factor and *is not necessarily determinative*"] [emphasis added]; *see also Sheet Metal, supra*, 229 Cal.App.4th at p. 201 n.4 ["The *Williams* court . . . specifically noted that an activity is not necessarily subject to the prevailing wage law simply because a term in a contract requires a subcontractor or contractor to carry out that activity to fulfill the contract"].)

Thus, far from contradicting *Williams* (Local 104 Br. 15–16; Local 6 Br. 11), *Sheet Metal* made clear what was already implicit in that case: that an "expansive interpretation" of section 1772 in which "nearly any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law, regardless of where it takes place or whether it plays a substantial role in the process of construction" would be legally unsound and practically untenable. (229 Cal.App.4th at pp. 201–

202.) Because a "task that could be considered necessary to fulfill a contract might nonetheless have little relation to the flow of the construction process" (*id.* at p. 206–07), amici's position that any work in the contract is subject to prevailing wages must be rejected.

In the end, Local 104 (and other union amici) seek a do-over after Local 104's failure to prevail in *Sheet Metal*. But as much as they scorn *Sheet Metal*—even going so far as to denounce those who adhere to it as "low-road contractors" (Local 104 Br. 5)—the case correctly states the law for the reasons stated above. It remains good precedent—this Court denied Local 104's petition for review, which raised the same arguments Local 104 recycles in its current brief. (*Sheet Metal*, Docket No. A131489 [Petition for Review Denied on Nov. 20, 2014]; *Sheet Metal*, Local 104's Petition for Review, No. S221696, p. 32–37.) Amici identify no basis for a different result now.

III. AMICI'S POSITION IS UNCERTAIN AND CONTAINS NO LIMITING PRINCIPLE

a. Amici's position is uncertain. In some places, amici advance the breathtaking and discredited position that *any* work in a general contract also containing public work is subject to prevailing wages. (Local 104 Br. 7–8, 10–11; Local 6 Br. 10–11; *supra*, at pp. 15–16.) In other places, they contend that work that is necessary for the "functioning" or "operation" of the "Positive Train Control system" or "project" is subject to prevailing wages. (Local 104 Br. 11, 15; Local 6 Br. 6, 10.) And in still other places, amici cite a mash of factors blending these two positions, the application of which lacks the "certainty and clarity" necessary for parties to "'be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent.'" (*Sheet Metal, supra*, 229 Cal.App.4th at p. 213 [quoting *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1593]; *see also* Local 104 Br. 11; Local 6 Br. 10.) One amicus claims to have

crafted a "straightforward" test, declaring that work that is "substantially similar" to work "done at trackside" or "work of a mixed character done for a common 'integrated object'" should be covered. (Local 11 Br. 14.) But that test is not clear at all—what is "substantially similar" and what is a "work of a mixed character"? The sheer vagueness of this proposal and others like it refutes them.

Amici's proposed tests mirror the imprecise and equivocal tests plaintiff advances. (See Reply Br. 6, 11, 12 [sometimes arguing that work "critical to the completion of [the general] contract" (even if the contract contains both public and non-public work) is subject to prevailing wages, and at other times arguing that work that is "integral" to the "functional completion" of the PTC "system" or "project" is subject to prevailing wages.) As Metrolink cogently points out, plaintiff "never really articulates" with precision "the new standard he wants this Court to adopt" and "most revealing is [plaintiff's] sharp criticism of Wabtec's effort to identify and respond to his position." (Metrolink Br. 14–15.)

None of the various, shifting positions has merit. (Ans. Br. 50–56.) With respect to amici's "completion of the contract" argument, again under *Sheet Metal* and *Williams*, not every work under a contract that also contains a requirement to carry out a public work is necessarily itself a public work. (Ans. Br. 50–51; *supra*, at pp. 15–16.) And with respect to the "functional completion" argument, the test is not whether the work would render a "system" or "project" operational or functional. Rather, as explained, the proper test is whether the work is integral to the "flow process of *construction*"—not *operation*—of an undisputed public work. (Ans. Br. 51–52.) Here, contrary to amici's argument, the undisputed public work is the wayside work, not the PTC "project" or "system." (Ninth Cir. Cert. Request [requesting certification on whether the on-board work was "integral to other work performed for the PTC project *on the*

wayside (i.e., the *'field installation work'*)."] [emphasis added].) And as Wabtec's answer brief showed, the terms "system" and "project" are far too vague—a "system" or "project" consists of multiple parts and can involve public work (such as constructing buildings) or non-public work (such as installing software or placing equipment on trains). (Ans. Br. 52–53.) Determining whether work on a "system" or "project" constitutes public work thus requires an analysis of what portions of the "system" or "project" constitute a public work. (*See Oxbow, supra*, 194 Cal.App.4th at p. 552 ["a determination of 'public work' pursuant to section 1720, subdivision (a)(1) must be based on the actual terms in the section, and analyzing whether something is a 'project' paid for by public funds to the exclusion of analyzing whether it is 'construction' paid for by public funds would be improper"]; *Sheet Metal, supra*, 229 Cal.App.4th at p. 196 [denying coverage to a "component of the project" to erect a public structure where the general contract encompassed subcontracting work that was not a public work]; *Rosedale Project, City of Asuza* (July 2, 2008) PW 2005-038 at p. 7 ["only that portion of the Project encompassing the Public Facilities is subject to prevailing wage requirements].)

Amici and plaintiff ignore that necessary analysis. And on that analysis, Wabtec prevails: the PTC project consists of "several different types of work," as even plaintiff must admit. (Pl. Open. Br. 25.) The on-board work is a different type of work from the wayside work. Only the wayside work qualifies as public work as a work of "construction." And thus, for the on-board work to be subject to prevailing wages, it must have been integrated into the flow process of construction of the wayside work—*i.e.*, it must have been at least necessary to the completion of the construction of the wayside work. But the on-board work was not necessary to the wayside work, and accordingly, is not subject to prevailing wages.

b. In addition to being uncertain, amici's position contains no limiting principle. Amici fail to advance a position with clear limits concerning what constitutes work done in the execution of a contract for public work. And if amici and plaintiff now disclaim the breadth of their position, they have not explained what principles limit it. Would software creation and software installation for a project be subject to prevailing wages? (Ans. Br. 53–54.) Would the repair of publicly owned vehicles be subject to prevailing wages? (Cal. State Ass'n of Counties, et al. Br. 22.) Under amici and plaintiff's approach, such tasks—so far removed from constructing a public work—might be covered. As Metrolink correctly states, plaintiff (and amici) fail to "explain how courts might differentiate between integral work and other activities in future cases" and so their position on prevailing wages remains potentially unbounded. (Metrolink Br. 15.) By contrast, Wabtec's principle—grounded in text and precedent—is clearly bounded: if work is not necessary to the construction of a public work, it is not a public work.

As amici supporting Wabtec convincingly explain, plaintiff and his amici's indeterminate and ad hoc approach presents grave problems for current and future public construction projects. Metrolink cites several projects throughout the State that would be jeopardized if plaintiff's approach were adopted. (Metrolink Br. 16–21.) Metrolink and other public bodies have relied on settled court and agency precedent establishing that work on rolling stock falls outside coverage and have structured their projects accordingly. (*Ibid.*) A break from current law and settled expectations would "throw these existing contracts into turmoil, potentially generating budget shortfalls either for Metrolink or the contractors and putting those projects at risk, and delaying much-needed projects," not to mention "the detriment [to] tax payers in the Los Angeles region" and "riders of the Metrolink service." (Metrolink Br. 19, 21.) California

counties and cities have also made clear that a sharp departure from the current rule would significantly increase the costs borne by "already strapped public entities" seeking to comply with prevailing wage laws. (Cal. State Ass'n of Counties, et al. Br. 20–21.)

Disregarding such consequences, amici argue that the prevailing wage law must be read as "broadly" as possible, because that is purportedly what its purposes demand. (Local 6 Br. 17; Local 11 Br. 9, 11) Not so. Although courts "'liberally construe prevailing wage statutes,'" the "rule of liberal construction *is subject to an important proviso*: . . . 'they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act.'" (*State Bldg. & Constr. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 324; *City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 950 [emphasis added] [quoting *McIntosh, supra*, 14 Cal.App.4th at p. 1589].) And here, as explained in the answer brief, the Legislature has made clear its intent to exclude work on rolling stock from public works coverage. (Ans. Br. 38–40.) The Legislature has amended the public works statute on multiple occasions, but it has never done so to include work on rolling stock. Nor has the Legislature ever sought to override the longstanding administrative rule that excludes rolling stock. The long history of prevailing-wage regulation shows "that the Legislature has been attentive" to the issue and fully "capable of studying the range of possible solutions." (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 2019 WL 3820000, at p. *12.) "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." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 207.) No amici dispute that the Legislature was aware of the longstanding

administrative rule excluding rolling stock. And it plainly intended to preserve the rule.

Local 104 asserts that "academic research" shows that the "public interest" would be best served if its expansive interpretation of the statute's reach were adopted. (Local 104 Br. 23–26 [attaching a 257-page appendix containing policy articles].) It claims that prevailing wage laws facilitate apprentice programs, enhance worker safety, bolster the middle class, and reduce cost overruns. (*Ibid.*) But these disputed questions of public policy are not a proper basis for resolving statutory interpretation questions.[1] Not only is this Court not in a position to evaluate whether amici's assertions are correct as a factual matter (or whether competing negative effects of mandating above-market wages outweigh any such purported benefits), but weighing such questions of societal costs and benefits is a matter of "high public policy" that "is the essential function of the Legislature, not a court." (*State Bldg. & Constr. Trades Council of California, supra*, 162

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[1] Studies critiquing the policy research cited by Local 104 and questioning the purported benefits of expanding prevailing wages abound. (Dunn, Quigley, and Rosenthal, *The Effects of Prevailing Wage Requirements on the Cost of Low-Income Housing*, Industrial and Labor Relations Review 153 (2005) ["low-income housing projects were significantly more expensive if developers were required to pay prevailing wages"]; G. Leef, *Prevailing Wage Laws: Public Interest or Special Interest Legislation?* 3–6 (Cato J. 2010) ["Numerous studies have examined the impact of prevailing wage laws and found that they add significantly to the cost of government construction projects; conversely, when such laws are suspended or repealed, costs fall"]; *id.* at 6 [stating that the University of Utah study (cited by Local 104) "has come under severe criticism" and that the premises of the paper purporting to show that prevailing wages increase worker safety are either "grossly misleading" or "demonstrably wrong" and that its statistical projections have been "refuted by actual data from the Occupational Safety and Health Administration"] [citing A. Thieblot, *A New Evaluation of Impacts of Prevailing Wage Law Repeal*, J. of Labor Research (1996); Roistacher, Perine, and Schultz, *Prevailing Wisdom: The Potential Impact of Prevailing Wages on Affordable Housing* (2008)].)

Cal.App.4th at p. 324.) "The appellate courts have 'neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature[.]' Judicial intervention in complex areas of economic policy is inappropriate." (*Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554, 562 [citations omitted].) As this Court has made clear in describing its duty: "[o]ur role is confined to ascertaining what the Legislature has actually done, not assaying whether sound policy might support a different rule." (*Gen. Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 790.) Here, the Legislature has excluded work on rolling stock from coverage.

CONCLUSION

This Court should hold that Wabtec is not required to pay prevailing wages for work performed on rolling stock.

Dated: October 1, 2019

Respectfully submitted,

JONES DAY

Counsel for Defendants-Respondents
WABTEC Corporation, et al.

No. S251135

RULE 8.520(C)(1) CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the foregoing Answer to Amicus Curiae Briefs contains 5,890 words.

Craig E. Stewart

Counsel for Defendants-Respondents
WABTEC Corporation, et al.

PROOF OF SERVICE

I, Margaret Landsborough, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On October 1, 2019, I served a copy of the within document(s):

RESPONDENTS' ANSWER TO AMICI CURIAE BRIEFS

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

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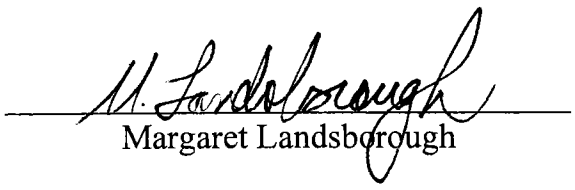

Margaret Landsborough

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