Case No. S253574

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

APPLICATION TO FILE AMICUS BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA IN SUPPORT OF RESPONDENTS FONSECA McELROY GRINDING, CO., INC. AND GRANITE ROCK COMPANY;

PROPOSED BRIEF OF *AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

California Cases

California Statutes

Other Authorities

APPLICATION FOR PERMISSION TO FILE

AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.520(f) of the California Rules of Court, proposed *amicus curiae* Associated General Contractors of California ("AGC") respectfully requests permission to file the enclosed *amicus curiae* brief in support of respondents Fonseca McElroy Grinding Co., Inc. and Granite Rock Company. The proposed *amicus curiae* brief offers a unique perspective on why the Court should conclude that off-site mobilization work, including the transportation to and from a public works site of roadwork grinding equipment – is not performed in the "execution of [a] contract for public work," Cal. Labor Code § 1772, such that it entitles workers to be paid at the applicable prevailing wage rate pursuant to Labor Code section 1771 of the California Labor Code.

AGC does not seek to merely repeat the arguments in Respondents' brief. Rather, AGC presents additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

STATEMENT OF INTEREST

AGC is an organization of construction firms and industry-related companies that has been the voice of the construction industry since 1920. It represents more than 1,500 individuals and companies in California, and its members are union and non-union general contractors, subcontractors, and material suppliers who perform construction work for public entities throughout California. AGC's Mission Statement provides as follows: "The mission of the Associated General Contractors of California is to be the recognized leader in providing business opportunities, education, training, resources, and advocacy for its members while advancing sound public policy for the construction industry."

As an advocate for its members, AGC is involved with legislation concerning all aspects of the construction industry, including California's prevailing wage laws. It also monitors lawsuits concerning the construction industry and has been involved as *amicus* in many significant construction-industry cases, including *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.*, 4 Cal. 5th 1082 (2018); *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352 (1999); *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, 34 Cal. 4th 960 (2004); *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016 (2007); and *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012). Because of its experience in construction-

industry cases, AGC is distinctively able to assess both the impact and implication of the issues presented in cases such as this one.

No current party in this case, or counsel for any party in this case, authored the proposed *amicus curiae* brief or any part of the brief. No person or entity other than AGC contributed any money to fund the preparation or submission of this brief.

Accordingly, AGC respectfully requests that the Court accept the enclosed *amicus curiae* brief for filing and consideration.

Dated: December 2, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: _____

Robert R. Roginson
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AMICUS CURIAE BRIEF

I. PRELIMINARY STATEMENT

This case presents a significant opportunity for this Court to bring clarity and guidance concerning how construction employers on public works projects may pay their employees for off-site work without running afoul of California's prevailing wage laws. It has long been common practice in the construction industry that with very few exceptions, off-site work is not work for which the payment of prevailing wages is required. This practice is consistent with the definition and scope of "public works" found in the prevailing wage statute, which the California Legislature revises on a frequent basis. Indeed, each year, the Legislature considers several bills seeking to expand the definition of "public works" to include new work or projects as "covered" by the prevailing wage laws. The Legislature has been very engaged in this area and active in revising and expanding the scope of the prevailing wage statute. Since 2010, the Legislature has expanded the scope of "public works" on at least *10 different occasions*. This year, again, the Legislature expanded the prevailing wage laws to cover pre-construction work.[1] Significantly, in the 82 years since the prevailing wage laws were first introduced, and the last nine years in which the law was expanded a dozen times, the Legislature

[1] 2019 Cal. Legis. Serv. Ch. 719 (A.B. 1768).

has not applied the prevailing wage law to the off-site mobilization work at issue here.

With the exception of hauling of refuse, Cal. Labor Code § 1720.3, and hauling and delivery of ready-mixed concrete, Cal. Labor Code § 1720.9, the Legislature has not seen fit to expand the prevailing wage statute to include off-site work or time spent mobilizing equipment. Despite the clarity of the statute, Appellants now seek a ruling expanding the prevailing wage statute to any off-site "mobilization work" and to the transporting of that equipment or machinery by on-site construction workers that is "necessary for the worker to be able to perform work at the construction site after he or she arrives."

No statutory authority exists to support such an expansive interpretation. Instead, Appellants rely on an extraordinarily broad interpretation of both Labor Code section 1772 and the Division of Labor Standards Enforcement's ("Division") guidance set forth in its manual regarding travel time to support their position. Appellants' position, however, would lead the Court to expand California's prevailing wage laws in a manner that is inconsistent with the Legislature's consistent, incremental expansion of the statute. Indeed, the Legislature is in the best position to expand the prevailing wage laws, as it has done for decades.

Even if the Court looks beyond the definition of "public works" found in the statute, it will find that the off-site mobilization work and

transport of equipment at issue in this case is not subject to California's prevailing wage laws. The off-site mobilization work has not been considered covered work under case law or administrative guidance. To reach a contrary conclusion would be incompatible with the prevailing wage statute. Because the off-site mobilization work is not covered, the transport of the equipment to and from the jobsite is necessarily not covered as well. This result is also in line with the realities of off-site work as well as analogous federal regulations. Off-site work typically has a lower wage rate than onsite prevailing wage rates because off-site work at permanent yards is more stable than onsite construction contracting and typically requires less skill and training and is less hazardous.

Finally, to the extent the Court finds that the off-site mobilization work at issue is subject to the payment of prevailing wages, then that holding should be on a prospective basis only. It is vital for construction contractors on public works projects to know and be able to ascertain the specific prevailing wage requirements *before* they bid on contracts. A holding on a prospective basis only furthers those goals and is consistent with this Court's past precedent.

II. ARGUMENT

A. The California Legislature Has Not Expanded The Prevailing Wage Laws To Include Off-Site Mobilization Work Or Transportation Of Equipment.

Appellants ask the Court to do something that the Legislature does on a nearly yearly basis, which is to expand the application of California's prevailing wage requirements. The Legislature has considered and amended the definition of public works on a frequent basis. Here, any additional expansion beyond what is in the statute is best left to the Legislature. *See Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan*, 229 Cal. App. 4th 192, 213 (2014) ("If Local 104 seeks to expand the coverage of the prevailing wage law, the issue and the associated public policy questions are best left to the Legislature."). As described more fully below, the Legislature has minutely described the definition of "public works" in such a detailed manner and expanded it incrementally when it saw fit in such a way that the major expansion that Appellants seek from this Court would run afoul of the Legislature's steady expanding of the law.

By way of background, California Labor Code section 1771 provides that not less than the general prevailing rate of per diem wages "shall be paid to all workers employed on public works." Since 2010, the Legislature has amended the definition of "public works" no less than 12

times with respect to the definition of public works. Notably, section 1720 has been expanded at least six times as follows:

- In 2012, the definition of "installation" was revised to include "*the assembly and disassembly of freestanding and affixed modular office systems*," 2012 Cal. Legis. Serv. Ch. 810 (A.B. 1598) (WEST);
- In 2014, the definition of "construction" was revised to include "*work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite*," 2014 Cal. Legis. Serv. Ch. 964 (A.B. 26) (WEST);
- In 2014, the definition of "public works" was revised to include "*[i]nfrastructure project grants from the California Advanced Services Fund pursuant to Section 281 of the Public Utilities Code*," 2014 Cal. Legis. Serv. Ch. 900 (A.B. 2272) (WEST);
- In 2015, the definition of "public works" was revised to include "*construction, alteration, demolition, installation, or repair work on the electric transmission system located in California*," 2015 Cal. Legis. Serv. Ch. 547 (S.B. 350) (WEST);

- In 2017, the definition of "public works" was revised to include "*tree removal work done in the execution of a project*," 2017 Cal. Legis. Serv. Ch. 610 (A.B. 199) (WEST); and
- In 2019, the definition of "public works" was expanded to include *work during site assessment or feasibility studies and the Legislature also specified that preconstruction work is deemed to be part of a public work.* 2019 Cal. Legis. Serv. Ch. 719 (A.B. 1768).

Several other provisions of the prevailing wage statutory scheme have also been expanded or restricted with respect to the definition of "public works":

- In 2011, the Legislature amended section 1720.3 to specify that the definition of "public works," which also means "*hauling of refuse," includes "hauling soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris" but does not include "the hauling of recyclable metals such as copper, steel, and aluminum that have been separated from other materials at the jobsite prior to transportation and that are to be sold at fair market value to a bona fide purchaser.*" 2011 Cal. Legis. Serv. Ch. 676 (A.B. 514) (WEST).

- In 2015, the Legislature amended section 1720.4 to provide that the provisions that *public works do not apply to volunteers, volunteer coordinators, or members of the California Conservation Corps or a community conservation corps would be extended to January 1, 2024.* 2015 Cal. Legis. Serv. Ch. 53 (A.B. 327) (WEST).
- In 2018, the Legislature added section 1720.5, which *exempted from the requirement to pay prevailing wages for graffiti abatement work performed pursuant to a contact between the City of Los Angeles and a nonprofit, community-based organization if the work was performed by certain specified individuals.* 2018 Cal. Legis. Serv. Ch. 200 (S.B. 913) (WEST).
- In 2011, the Legislature added section 1720.6, which expanded the definition of "public works" to include *construction, alteration, demolition, installation, or repair work done under private contract that satisfies specified conditions related to energy.* 2011 Cal. Legis. Serv. Ch. 698 (S.B. 136) (WEST).
- In 2015, the Legislature added section 1720.7
- , which expanded the definition of "public works" to include *construction, alteration, demolition, installation, or repair*

work done under private contract on a project for a general acute care hospital when the project is paid for in whole or in part with the proceeds of conduit revenue bonds. 2015 Cal. Legis. Serv. Ch. 745 (A.B. 852) (WEST).

- In 2015, the Legislature added section 1720.9, which expanded the definition of "public works" to include the "*hauling and delivery of ready-mixed concrete to carry out a public works contract.*" 2015 Cal. Legis. Serv. Ch. 739 (A.B. 219) (WEST).

Despite the Legislature's activity in recent years with respect to what constitutes a "public works," Appellants invite the Court to use a broad interpretation of section 1772's phrase "in the execution" of a public works contract based on common-law interpretations of the statute found in case law and by the Director of the Department of Industrial Relations in its coverage determinations.[2] The Court should decline. Specifically, in *Williams v. SnSands Corp.*, 156 Cal. App. 4th 742, 750 (2007), the court of

[2] Although the Director has authority to issue coverage determinations as to either a specific project or type of work pursuant to 8 CCR § 16001, it does not have authority to expand the definition of public works. Notably, section 16001(a) provides that "State prevailing wage rates apply to all public works contracts as set forth in Labor Code Sections 1720, 1720.2, 1720.3, 1720.4, and 1771." Sections 1772 and 1774 are not cited in 8 CCR § 16001, which further highlights that the Legislature did not intend Labor Code sections 1772 and 1774 to expand public works or to even be considered in coverage questions. Rather, they simply affirm the obligation that for workers performing covered work, they are entitled to payment of prevailing wages.

appeal noted that "the use of 'execution' in the phrase 'in the execution of any contract for public work,' plainly means the carrying out and completion of all provisions of the contract." The problem with utilizing this broad interpretation of section 1772 is that it renders the definition of "public works" in Article 1 of the public works statute nearly meaningless. Notably, in *Sheet Metal Workers' International Association*, the court of appeal cautioned against the effect of such an expansive interpretation of sections 1772 and 1774: "Under an expansive interpretation of the phrase 'in the execution of' as used in sections 1772 and 1774, nearly any activity related to the completion or fulfillment of a public works 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." 229 Cal. App. 4th at 201-02.

Such an interpretation is clearly not what the Legislature intended by amending the statute and the definition of what constitutes a "public works" on a recurring basis. Indeed, the expansion Appellants seek of the prevailing wage laws, specifically, that (1) off-site mobilization work and (2) that the transport of the equipment for workers who perform work on public works projects constitute a "public works," is exactly the type of amendment to the statute that is best left to the Legislature. In the limited circumstances in which the Legislature did seek to have work off the site

fall within the ambit of the prevailing wage laws, first with the off-hauling of refuse in section 1720.3 and second with the hauling and delivery of ready-mixed concrete in section 1720.9, the Legislature made those amendments.

This interpretation is consistent with this Court's stated purpose of the prevailing wage statute:

> The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; *to permit union contractors to compete with nonunion contractors*; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry, 1 Cal.4th 976, 987 (1992) (emphasis added). Notably, one of the chief purposes of the prevailing wage laws is to allow union contractors to compete on a level playing field with nonunion contractors. This is accomplished primarily through Labor Code section 1773, which provides, in part, that in determining the applicable

prevailing wage rate, the "Director of Industrial Relations shall ascertain and consider the applicable wage rates *established by collective bargaining agreements* and the rates that may have been predetermined for federal public works[.]" Thus, the applicable prevailing wage rates are those found and established in collective bargaining agreements.

Here, in this case, the Respondents entered into memoranda of agreement with Operating Engineers Local No. 3 providing for lower rates for the mobilization work than in the applicable master collective bargaining agreements that were utilized to establish the applicable prevailing wage rates. Thus, the conclusion that off-site mobilization work is not within the definition of "public works" was ratified by Local No. 3 given that it did not require the rate set forth in the master agreements for the off-site mobilization work.

B. The Decision In *Sheet Metal Workers*, Which Ultimately Left The Expansion of Public Works To The Legislature, Is Instructive In Its Reasoning And Should Be Applied Here.

It cannot be seriously disputed that the off-site mobilization work at issue in this case is not subject to California's prevailing wage laws. The reasoning and holding in *Sheet Metal Workers' International Association*, 229 Cal. App. 4th 192 (2014), concerning off-site fabrication work, is instructive and should be applied in this case.

In that case, a contractor entered into a public works contract to modernize a building at a community college in Santa Clara County. *Id.* at 196. Russ Will Mechanical, Inc. ("Russ Will") was the subcontractor for the heating, ventilation, and air conditioning part of the project. *Id.* For 14 years before it entered into the contract, Russ Will had fabricated materials at a permanent, off-site facility, which was not established for the project at issue. *Id.* Rather, the off-site facility had been used to manufacture materials for a variety of public and private projects. *Id.* Further, Russ Will did not sell any of its materials to the general public. *Id.*

An employee of Russ Will filed a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE"), claiming that he should have been paid prevailing wages for his work fabricating sheet metal at Russ Will's permanent, off-site facility. *Id.* at 196-97. After initially determining that Russ Will was required to pay prevailing wages for the off-site fabrication work, on appeal, the Department reversed its decision and, relying on federal regulations specifying that prevailing wages do not apply to work performed at a permanent fabrication plant whose existence and location were determined without reference to any public works project, held that the work at issue was not subject to prevailing wage laws. *Id.* at 197. After the trial court

reversed,[3] the issue of whether off-site fabrication work constituted a "public works" went to the court of appeal for decision. *Id.* at 198.

On appeal, Local 104 contended that the reach of the prevailing wage laws is broad "and without geographical limitation because of language in section 1772 and 1774 extending the law's scope to all those employed 'in the execution' of a public works contract." *Id.* at 201. In response, Russ Will argued that the reference to being employed "on" public works found in section 1771 meant that employees must be "physically present on the site of the public works project to qualify for prevailing wages." *Id.* at 202. Like Appellants in this case, Local 104 claimed it was of note that the California Legislature chose not to adopt the federal Davis-Bacon Act's application of the prevailing wage laws to "mechanics and laborers employed directly on the site of the work." *Id.* at 202-03. The court did not find this omission to be outcome determinative, stating that "the Legislature's intent concerning geographical limitations on the application of the prevailing wage law is ambiguous" and then looking at California case law concerning off-site application of the prevailing wage laws.

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[3] Sheet Metal Workers' International Association Local 104 ("Local 104") submitted a position statement at the invitation of the DLSE and then filed a petition for writ of mandate in the superior court challenging the department's decision. *Id.* at 197-98.

After reviewing California decisions concerning drivers who haul materials to or from the site of a public works project,[4] as well as coverage determinations issued by the DIR, the court noted that "there is a lack of clear and authoritative guidance concerning whether fabrication is subject to the prevailing wage law when performed in a permanent offsite facility of a contractor or subcontractor that does not sell supplies to the general public." *Id.* at 210.

The court then turned to the federal regulations defining "site of the work" under the Davis-Bacon Act, which provides that "site of the work" does not include "permanent . . . fabrication plans . . . 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." *Id.* (citing 29 C.F.R. § 5.2(l)(3).) The court noted that California courts routinely "have turned to the Davis-Bacon Act for guidance on issues not clearly answered by California authority," and cited to the California Supreme Court's decision in *City of Long Beach v. Department of Industrial Relations*, 34 Cal. 4th 942, 954 (2004), that "California's prevailing wage law is similar to the federal act and share its purposes." *Sheet Metal Workers*, 229 Cal. App. 4th at 211.

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[4] The court reviewed *Sansone Co. v. Dep't of Trans*, 55 Cal. App. 3d 434 (1976), and *Williams v. SnSands Corp.*, 156 Cal. App. 4th 742 (2007).

Significantly, the court also noted that coverage determinations by the DIR had reached the conclusion that work performed at permanent, off-site, nonexclusive manufacturing facilities does not constitute an integral part of the process of construction. *Id.* at 212.

Ultimately, the court recognized that it is for the Legislature to expand the coverage of prevailing wage laws, stating that "[t]he Legislature is in the best position to judge the effects of extending the prevailing wage law and has done so when appropriate." *Id.* at 214. It held as follows:

> Offsite fabrication is not covered by the prevailing wage law if it takes place at a permanent offsite manufacturing facility and the location and existence of that facility is determined wholly without regard to the particular public works project. Because the offsite fabrication at issue here was conducted at Russ Will's permanent offsite facility, and that facility's location and continuance in operation were determined wholly without regard to the project, the work was not done "in the execution" of the contract within the meaning of section 1772.

Id. at 214. This Court denied review of the *Sheet Metal Workers* decision. The rationale of the *Sheet Metal Workers* case applies in this case as well.

Here, the off-site mobilization work at issue consisted of loading milling machines, tying down the equipment and securing it to low-bed

trailers, and performing light, brake, and fluid checks of semi-trucks utilized to transport the heavy equipment. The milling machines were stored at Respondents' permanent yards or in off-site storage locations. The yards and off-site storage locations did not depend on any particular public works project. Because the mobilization work at issue took place at permanent yards or in off-site storage facilities that were "determined wholly without regard to the particular public works project," the work is not covered by California's prevailing wage laws. This result is consistent with the reasoning in *Sheet Metal Workers* given that it adheres to the maxim that expansion of prevailing wage laws should be left to the Legislature.[5]

It is also harmonious with the Davis-Bacon Act. Indeed, the applicable federal regulations provide that the term "site of the work" does not include "permanent home offices, branch plant establishments, . . . tool yards, etc. of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular . . .

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[5] With respect to off-site fabrication work, like many coverage issues, the Director has taken a frequently inconsistent position. As early as 1984, the Director held that "prevailing wages need not be paid to those workers doing solely off-site fabrication." (Ex. A.) Then, as detailed in the underlying administrative decision in the *Sheet Metal Workers* case, the Director in 2003 issued two determinations finding off-site fabrication to be covered. (Ex. B at 7 n.5.) On May 3, 2004, the Director changed course again, issuing a Notice that the two decisions would be immediately withdrawn. (Ex. C.) Because of its inconsistent positions, the Director's coverage determinations are not entitled to deference.

contract or project." 29 C.F.R. § 5.2(l)(3). In their briefs, Appellants contend that "California's omission of the Davis-Bacon Act's explicit geographic limitation was deliberate" and that the "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." (Opening Brief at 25-26.) This ignores, however, that because California's prevailing wage laws and the Davis-Bacon Act share "purposes," *Southern California Labor Management etc. Committee v. Aubry*, 54 Cal. App. 4th 873, 882 (1997), it is in fact appropriate for this Court to look to the federal regulations.

C. Appellants Are Not Entitled to Prevailing Wages For The Transportation Of Roadwork Grinding Equipment.

Appellants also contend that prevailing wage laws apply to a worker's transport of milling machines to and from the construction jobsite when the worker is performing onsite construction work. This ignores that the only "transportation" work that falls within the definition of "public works" as specified by the Legislature is the hauling of refuse found in Labor Code section 1720.3 and the hauling and delivery of ready-mixed concrete found in section 1720.9. Because Appellants cannot rely on the language of the statute in furtherance of their position that the transport of milling machines is work that is covered by California's prevailing wage laws, Appellants point to the travel and subsistence provisions published by

the Department of Industrial Relations in support of their contention. As described below, the travel and subsistence provisions do not support Appellants' position.

Labor Code section 1773.1 provides that *per diem* wages to be paid to workers on public works projects include employer payments for travel and subsistence. Section 1773.1(f)(1) provides, in part, that "[f]or the purpose of determining those per diem wages for contracts, the representative of any craft, classification, or type of worker needed to execute contracts shall file with the Department of Industrial Relations fully executed copies of the collective bargaining agreements for the particular craft, classification, or type of work involved." Notably, travel and subsistence are not within the definition of "public works," but rather the Director has authority under sections 1773 and 1773.1 to make determinations as to the applicable travel and subsistence provisions. Several crafts, but not all, have travel and subsistence provisions, and, the provisions vary by craft and locality. Thus, any interpretation of travel and subsistence provisions must be read narrowly and in conjunction with the parties' intent in seeking determinations of the applicable rates.

The travel and subsistence provisions do not determine if a specific type of work is covered by prevailing wage requirements and, as Appellants note, frequently specify rates that are much lower than the applicable prevailing wage rate. This alone demonstrates that travel time does not fall

within the definition of "public works." Nevertheless, because the applicable travel and subsistence provision for Operating Engineers did not specify a rate for travel time, Appellants contend that the applicable rate must be the prevailing wage rate and that the travel time is necessarily covered work. The silence as to the rate, however, does not indicate that the appropriate rate is the prevailing wage rate.[6] Indeed, the travel time provision states as follows:

> 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 . . . an employee's time will end at the yard.

(Appellants' Opening Brief at 33.) This provision, however, does not establish what is covered work subject to California's prevailing wage laws. This is buttressed by the fact that the Director specifically utilized Local No. 3's Master Agreement in providing for the applicable travel and subsistence provisions in this case and Local No. 3 did not seek to have the transportation of roadwork grinding equipment at issue included in the

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[6] In another portion of the travel and subsistence provisions for Operating Engineers performing off-shore work, it specifies that time spent traveling be at an amount equal to the straight-time rate. The use of the term "straight-time rate" for off-shore work highlights that if Local No. 3 had intended for travel time to be paid at the prevailing wage rate, then they would have utilized the term "straight-time rate" in the travel provisions at issue in this case.

travel and subsistence provisions, thereby taking that work outside the travel and subsistence provisions.

An illustrative hypothetical sheds light on the fallacy of Appellants' position. Take the example of a contractor, whose employees are classified as Operating Engineers, requiring the employees to report to the company's permanent offices for company mandated safety training directly related to their work at the project before going to a public works project. Such time spent in the mandatory safety training as well as the travel time to the jobsite is clearly compensable time under California's minimum wage laws. No argument could be seriously made, however, that the employees would be entitled to be paid at the prevailing wage rate for either the safety training course or the travel time to the public works site from the yard. This is because the employees' attendance at a safety-training course is not work subject to the payment of prevailing wages. Similarly, because the off-site mobilization work at issue does not fall within the ambit of California's prevailing wage laws, the transport of the equipment is also not work subject to the prevailing wage laws.

D. The Reasoning And Conclusion of *Kern Asphalt* Are Not Instructive To This Case.

Appellants base their contention that the prevailing wage rate is the appropriate rate largely on the DIR's Public Works Manual, which states as follows:

> 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.

(Appellants' Reply at 17.) The DIR's reliance on the *Kern Asphalt* decision, however, is misguided.

In *Kern Asphalt*, Case No. 04-0117-PWH, an enforcement decision of the Director of Industrial Relations, Kern Asphalt Paving & Sealing

Company ("Kern Asphalt") used paving crew members who did grading and paving at the construction site. *Id.* at *1. The paving crew members would on most days report to Kern Asphalt's shop in Bakersfield, where they were required to punch in and then were transported in company vehicles to the construction site. *Id.* at *3. Kern Asphalt's vice president testified at the hearing on the merits that workers would be briefed on the day's activities and then dispatched to their job sites. *Id.* at *4. The trip travel time was estimated to be between 1.5 and 3 hours and the workers were paid at their regular, non-prevailing wage, overtime rates. *Id.* The Director held as follows in finding that the workers were entitled to prevailing wages for travel time between Kern Asphalt's shop and the project sites:

> The other question raised is what rate applies to the travel time. 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 associates with those duties.

Id. at *13.

The Director's enforcement decision is not well reasoned and should not be relied upon by this Court in deciding this case. First, the Director

has not designated its enforcement decisions as precedential, and, thus, under the Administrative Procedures Act's Administrative Adjudication Bill of Rights, the *Kern Asphalt* decision cannot be relied on as authority in any future cases. *See* Cal. Gov. Code § 11425.60(a) ("A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency."). Second, the Director did not refer to and did not cite the applicable travel and subsistence provisions. Significantly, the Director did not perform any analysis concerning the rate of pay for travel as laid out in the applicable travel and subsistence provision. Indeed, nowhere in the text of the decision or in the record cited is there any indication as to how the Director reached the conclusion that the prevailing wage rate was the applicable rate for travel time. Third, the Director's finding that "the required travel time must be regarded as incidental to the workers' regular duties" was conclusory and not based on any evidence in the record. In short, the decision is severely flawed in its omissions. Although courts "will respect" agency interpretations "as one of several interpretive tools that may be helpful" in construing a statute, *City of Long Beach*, 34 Cal. 4th at 951, here, the Director's decision is owed little weight in light of the cursory analysis performed by the Director in reaching this decision.

Similarly, the DLSE itself concedes that its statement in its Public Works Manual that workers are entitled to be paid at the applicable

prevailing wage rate for travel time is owed little weight in light of its reliance on the *Kern Asphalt* decision. *See* Public Works Manual § 1.1 ("To the extent the Manual's text might be viewed as purporting to establish rules of general application, but fails to present interpretations as a restatement or summary of existing laws, regulations or judicial and administrative decisions, it is invalid and should not be relied upon for that purpose. The Manual's text, standing alone, is therefore not binding on the enforcement activities of the Labor Commissioner, or the Department of Industrial Relations ("DIR"), in subsequent proceedings or litigation, or on the courts when reviewing DIR proceedings under the prevailing wage laws.").

E. To The Extent The Court Finds That Off-Site Mobilization Work Is Covered Under California's Prevailing Wage Laws, Its Ruling Should Apply On A Prospective Basis Only.

Finally, to the extent that this Court finds that the off-site mobilization work is covered under California's prevailing wage laws, its ruling should apply on a prospective basis only. California courts have consistently held that "[p]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent." *McIntosh v. Aubry*, 14 Cal. App. 4th 1576, 1593 (1993), *superseded by statute as stated in State Building & Construction Trades*

Council of California v. Duncan, 162 Cal. App. 4th 289 (2008). The predictability of consequences of actions taken is particularly important in the public works context, when contractors at all levels bid on public works projects based on the applicable prevailing wage determinations and rates.

A holding that off-site mobilization work is subject to California's prevailing wage laws would have no previous precedent and present considerable challenges to contractors if the Court's holding is retroactive. Indeed, given the length of many public works projects, which can go on for years, it is particularly important that contractors understand and can comply with prevailing wage laws before bidding on a contract. It is for this reason that questions of coverage should not be determined to apply to existing projects. Further, issuing a decision that is prospective only is consistent with published standards of this Court. *See Claxton v. Waters*, 34 Cal. 4th 367, 378-79 (2004) ("Although as a general rule judicial decisions are to be given retroactive effect, there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied. Considerations of fairness and public policy may require that a decision be given only prospective application. Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the changes as substantive or procedural, retroactivity's effect on the administration of justice, and the purposed to be served by the new rule."). It is also aligned with the

precedent of the Legislature, which routinely specifies that any expansions of the prevailing wage laws apply prospectively only. For example, when the Legislature expanded the definition of "public works" to include the hauling and delivery of ready-mixed concrete, it specified that it would "not apply to public works contracts that are advertised for bid or awarded prior to July 1, 2016." Labor Code § 1720.9(g).

For all these reasons, if the Court holds that the off-site mobilization work is covered under California's prevailing wage laws, its ruling should apply only prospectively.

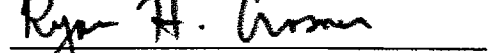
III. CONCLUSION

For the reasons related above, this Court should hold that off-site mobilization work, including the transportation of equipment to and from a jobsite, is not covered by California's prevailing wage laws. To the extent the Court holds otherwise, its ruling should apply prospectively only.

Dated: December 2, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: 

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California

CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amicus curiae* Associated General Contractors of California certifies that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 5,811 words, exclusive of the title pages, tables, this certificate, and proof of service, pursuant to California Rule of Court 8.204(c).

Dated: December 2, 2019

Ryan H. Crosner

40897345.1

EXHIBIT A

OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

ARTMENT OF INDUSTRIAL RELATIONS
GOLDEN GATE AVENUE
FRANCISCO 94102

ADDRESS REPLY TO:
P.O. BOX 603
San Francisco 94101

November 20, 1984

Ms. Judy Whitmire
L & P Mechanical
9155 Archibald Avenue, Suite 201
Rancho Cucamonga, CA 91730

Dear Ms. Whitmire:

As we discussed in a telephone conversation on November 19, 1984, the off-site fabrication of heat ducts to be installed in a school building is not a "public work" within the meaning of Labor Code subsections 1720(a) or (b).

Prevailing wages need not be paid to those workers doing solely off-site fabrication.

Very truly yours,

James M. Robbins,
Counsel
Department of Industrial Relations

JMR/bn

EXHIBIT B

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2007-008
Russ Will Mechanical, Inc. – Off-site Fabrication of HVAC Components

The Decision on Administrative Appeal, dated May 3, 2010, in PW 2007-008, Russ Will Mechanical, Inc. -Off-site Fabrication of HV AC Components, was affirmed in a published First District Court of Appeal opinion dated August 27, 2014. (See *Sheet Metal Workers' International Association, Local l04 v. Duncan* (2014) 229 Cal.App.4th 192.)

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. PW 2007-008
RUSS WILL MECHANICAL, INC.
OFF-SITE FABRICATION OF HVAC COMPONENTS

I. INTRODUCTION

On November 13, 2008, the Director of the Department of Industrial Relations (the "Department") issued a public works coverage determination (the "Determination") in the above referenced matter finding that, under the facts of the case, certain off-site fabrication work performed in the permanent shop of the on-site heating, ventilating and air conditioning ("HVAC") subcontractor was done in the execution of a contract for public work within the meaning of Labor Code section 1772,[1] and was therefore subject to prevailing wage requirements.

On December 18, 2008, the subcontractor, Russ Will Mechanical, Inc. ("RWM"), timely filed a notice of administrative appeal of the Determination (the "Notice of Appeal"). RWM also requested a hearing on the appeal. At the Department's invitation, on February 13, 2009, RWM filed a supplemental brief stating in further detail the grounds for its appeal. On or before April 17, 2009, responsive papers were submitted by the Division of Labor Standards Enforcement ("DLSE"), and other interested parties as follows: Associated General Contractors of California ("AGC"), Construction Employers Association ("CEA"), Associated Builders and Contractors of California ("ABC"), Precast/Prestressed Concrete Manufacturers Association of California ("PCMAC"), and Association of Engineering Construction Employers, Inc. ("AECE") submitted argument in support of the appeal. Local Union No. 104 of the Sheet Metal Workers' International Association ("Union") submitted argument in opposition to the appeal.

With regard to the request for hearing, California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing regarding a coverage appeal is within the

[1]All subsequent section references are to the Labor Code unless otherwise indicated.

Director's sole discretion. Here, the facts set forth in the Determination material to the coverage question are not in dispute. Because the issues raised in the appeal are solely legal, no hearing is necessary. It should, however, be noted that the coverage issue arises in the context of the adjudication of a request for review under section 1742. RWM is entitled to a hearing on its request for review, and it is the responsibility of the hearing officer to define the issues to be heard. Cal. Code Regs., tit. 8, § 17243(d).

All of the submissions have been considered carefully. For the reasons set forth in the Determination, which is incorporated into this Decision, and for the additional reasons stated below, the appeal is granted and the Determination is reversed.

II. POSITIONS OF THE PARTIES

A. Arguments In Support Of The Appeal

The arguments of RWM and the interested parties in support of the appeal may be summarized as follows:

1. The Determination is contrary to *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434 and other applicable case law;
2. The Determination is contrary to longstanding Department interpretation of the California Prevailing Wage Law (the "CPWL") limiting coverage to on-site construction work;
3. Principles of statutory construction support limiting coverage to on-site work and making the interpretation of the CPWL consistent with the federal prevailing wage law, the Davis-Bacon Act (40 U.S.C.A. § 3142) (the "DBA");
4. The CPWL covers only work required to be performed under a state contractor's license;
5. The Determination is an invalid underground regulation because it was not adopted in conformity with the California Administrative Procedure Act (Govt. Code, § 11340 et seq.) (the "APA");
6. The Determination constitutes a violation of due process by imposing a new enforcement policy retroactively;
7. Article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause") precludes application of the CPWL to out-of-state work; and

8. The Determination is contrary to desirable public policy objectives, and will produce impractical results.

B. Arguments In Opposition To The Appeal[2]

The arguments of DLSE and Union may be summarized as follows:

1. The Determination is consistent with applicable case law;
2. Past determinations by the Department have concluded that certain off-site work is within the CPWL's ambit;
3. Because the language of the CPWL differs from that of the DBA, coverage under the former is broader than coverage under the latter;
4. Coverage under the CPWL should not be determined by reference to the contractor licensing law because the two statutory schemes have different purposes;
5. The Determination is not an invalid underground regulation because coverage determinations are authorized by the CPWL;
6. RWM has cited no authority for its due process argument, and a similar argument was rejected in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976;
7. Because section 1773.2 mandates inclusion of prevailing wage requirements in public works contracts, the Commerce Clause does not preclude enforcement of those requirements with regard to work done outside the state "in the execution of" those contracts; and
8. The Determination will not produce impractical results.

III. DISCUSSION

A. The Determination Correctly Found That RWM Was A Subcontractor Within The Meaning Of The Labor Code, And Did Not Meet The Criteria For The Material Supplier Exemption.

Because the case law recognizes an exemption from prevailing wage requirements for bona fide material suppliers, RWM and other parties supporting its appeal contend that RWM performed the off-site fabrication in the capacity of a material supplier. It is therefore necessary to examine RWM's status in light of that case law.

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[2]The arguments enumerated here have been carefully considered. For reasons of brevity and continuity, some sections of this Decision on Administrative Appeal respond to multiple arguments.

The Determination focused on the facts regarding RWM's role in the DeAnza College Administration Building Modernization (the "Project") and carefully analyzed the relevant contract documents. Because RWM entered into a written subcontract with prime contractor Trident Builders, Inc., requiring, among other things, that RWM fabricate and install ductwork needed for the Project, the Determination found specifically that RWM was therefore an on-site contractor. RWM performed the off-site fabrication in question in its own off-site shop, which was not established specially for the Project. This shop did not produce products for sale to the general public. The Determination concluded that under these specific facts, RWM was a subcontractor performing the off-site fabrication work in the execution of a contract for public work within the meaning of section 1772, and that RWM did not meet the criteria for the material supplier exemption recognized in applicable case law.

The central issue in this appeal is whether the Determination correctly interpreted the CPWL in light of existing case law, especially *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, and *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d 434. In arguing against the Determination, RWM maintains that it performed the off-site fabrication as a material supplier, rather than as a subcontractor.[3] The *Williams* court addressed this distinction, albeit in the context of off-hauling:

> "Contractor" and "subcontractor," for purposes of the prevailing wage law, include "a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works ...." (§ 1722.1.) Workers "employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." (§ 1772.)
>
> Here, we must interpret and apply these statutory provisions to resolve whether workers performing S&S Trucking's agreements to *off*-haul material from a public works site were employed "in the execution" (§ 1772.) of the public works contract.
>
> ...

[3]RWM argues that the terms "contractors" and "subcontractors" in section 1772, "must be defined in accordance with the requirements of the state contractor's license board." Union argues persuasively why those requirements, found in the Business and Professions Code, are not germane to this case. It is unnecessary to resort to the Business and Professions Code, because section 1722.1 defines "contractor" and "subcontractor" more broadly to "include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, *when working on public works* pursuant to this article and Article 2 (commencing with Section 1770)." (Emphasis supplied.) Moreover, it is undisputed that RWM *is* a licensed contractor, and functioned as an on-site subcontractor on this Project. For these reasons and the additional ones stated by Union, RWM's licensing argument is without merit.

> The analysis in [*Sansone*] of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Williams, supra, 156 Cal.App.4th at pp. 749-750 (emphasis in original).

Those parties supporting the appeal tend to minimize the significance of *Williams.* AGC argues that *Williams* should be accorded no weight because it was decided without the Department's participation, concerns trucking, and (in AGC's view) applies a flawed analysis. None of these points justifies the Department ignoring a published decision of the Court of Appeal. Unless overruled by the California Supreme Court, the case is binding precedent in identical fact situations.

While the CPWL lacks any express exclusion for material suppliers, the courts have interpreted the statutory use of the terms "contractor" and "subcontractor" to exclude bona fide material suppliers when the work performed is "truly independent of the performance of the general contract for public work," and was not "integral to the performance of that general contract." *Williams, supra,* 156 Cal.App.4th at p. 752. In applying the criteria for the exemption articulated in *H.B. Zachry Co. v. United States* (Ct.Cl. 1965) 344 F.2d. 352, and adopted in *Sansone*, the *Williams* court explained: "To qualify for the exemption, 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." *Williams, supra,* 156 Cal.App.4th at pp. 750-751.

CEA argues that RWM functioned in a dual capacity, serving as both a subcontractor performing on-site construction, and a material supplier fabricating products in its off-site shop. CEA finds support for this argument in a passage from *Zachry, supra,* 344 F.2d at p. 360:

> [T]he Solicitor has introduced a functional distinction between "materialmen" and "subcontractors", or has separated work involved in the materialman's function from work done under the contract. In two opinions, he has held that where a contractor covered by the statute is also an established materialman selling to the general public, the employees of his supply operation, including those who are engaged in the delivery of materials to the federal construction project, are not subject to the Davis-Bacon Act.[4]

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[4]The Solicitor opinions discussed by the *Zachry* court are Op. Sol. Lab. to Alex M. Barman, Jr., October 6, 1960; Op. Sol. Lab. to Charles A. Horsky, November 27, 1957; see also Op. Sol. Lab. No. DB-36, June 24, 1963.

CEA argues that, with respect to the off-site fabrication, RWM was a material supplier selling to the general public, drawing an analogy to PW 2009-035, *Sunset Garden Apartments, Imperial County Housing Authority* (May 28, 2008). The analogy, however, is imprecise. In *Sunset Garden*, as CEA notes, a company engaged in the off-site prefabrication of roof trusses and other products for sale to contractors and builders was determined to be a material supplier. The firm in question performed no on-site work and did, in fact, sell its products to the on-site contractor (which happened to be a related company) as well as to other customers in the construction industry. Here, in contrast, RWM performed on-site work, did not sell its products to an on-site contractor, and, does not sell products to the "general public."

Sunset Garden did not address the question presented in this case: whether RWM's use of such a permanent off-site facility for its fabrication work qualifies it for the material supplier exemption irrespective of its lack of sales to the general public. There is no California case law suggesting that an entity may be a bona fide material supplier in the absence of sales to the general public, and the Director will not speculate whether sales to the general public is an optional criterion for qualifying as a material supplier. Accordingly, it is unnecessary to determine whether, as CEA, argues there are circumstances in which an entity may function in a dual capacity as subcontractor and material supplier for the same project.

For the reasons discussed above, the Determination was correct in characterizing RWM as a subcontractor on the Project. As discussed below, however, it does not necessarily follow from this characterization that the off-site fabrication was subject to prevailing wage requirements.

B. While Prevailing Wages Have Been Required For Certain Off-Site Work Done At A Temporary Site Specially Established For A Public Works Project, Prevailng Wages Have Not Been Required For 0ff-Site Work Done In The Permanent Shop Of A Subcontractor.

Parties seeking reversal of the Determination contend that the Department previously has not required payment of prevailing wages for off-site work under circumstances similar to the facts of this case. It is therefore necessary to examine the Department's past determinations, although such determinations do not have precedential effect.[5]

[5]As was noted in the Determination here at issue, while this matter was pending, the Department decided it would discontinue its prior practice of designating certain public works coverage determinations as "precedential" under Government Code section 11425.60. Public notice of the Department's decision to discontinue the use of

The Department has consistently required prevailing wages to be paid in limited circumstances when the work did not qualify for the material supplier exemption under *Sansone*. In past determinations finding such work to be covered, the off-site fabrication was performed at a temporary yard established specially for the project in question, not in a subcontractor's own permanent shop.[6] Thus, in PW 92-036, *Imperial Prison II, South* (April 5, 1994), the Department determined that prevailing wage requirements applied to the off-site fabrication of concrete panels at a yard established exclusively for the public works project. Similarly, in PW 99-032, *San Diego City Schools, Construction of Portable Classrooms* (June 23, 2000), the Department determined that the off-site construction of portable classrooms was subject to prevailing wage requirements because the work was performed in a dedicated yard, and the employer was therefore a contractor and not a material supplier.

On the other hand, as early as 1984, the Department has determined that off-site work done by a bona fide material supplier is not subject to prevailing wage requirements. CEA cites the determination in *Russell Mechanical, Inc.*, dated September 17, 1984, together with the Opinion on Reconsideration in that case, dated September 11, 1985. In that case, the Department determined that the off-site fabrication of a fume recovery hood for the Rancho Seco Nuclear Power Plant, by a "standard supplier of sheetmetal products to the public at large," was not subject to prevailing wage requirements. The Opinion on Reconsideration at page 4 applied the *Sansone* analysis and found that "Russell is a standard supplier of sheetmetal products to the public at large, that Russell has long been such a vendor independent of the SMUD Rancho Seco project, and that Russell Mechanical is not located on or near the site of the SMUD project." Similarly, in PW 2005-037, *Jurupa Unified School District-Glen Avon High School* (January 12,

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precedent decisions can be found at www.dir.ca.gov/DLSR/09-06-2007(pwcd).pdf. Consequently, prior determinations are discussed herein only for purposes of addressing the arguments raised by the parties, and are not cited as precedent.

[6]In 2003, the Department did issue two determinations finding off-site fabrication by subcontractors in their permanent shops to be covered. PW 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work* (March 4, 2003); PW 2002-064, *Off-Site Fabrication by Helix Electric, City of San Jose/SJSU Joint Library Project* (March 4, 2003). On May 3, 2004, however, the Department issued Decisions on Appeal in both cases, stating that: "[E]ffective immediately, the determinations are withdrawn. The prior precedential public works coverage determinations and decisions on appeal concerning the issues in these determinations control. (See, *Imperial Prison II, South*, PW 92-036 (April 5, 1994) and *San Diego City Schools/Construction of Portable Classrooms*, PW 1999-032 (June 23, 2000).)"

2007), prevailing wages were not required for the testing of materials done off-site in a structural steel supplier's shop.

In *Imperial Prison II* and *San Diego City Schools*, as in *Russell Mechanical* and *Jurupa Unified School District*, the Department applied the *Sansone* test, albeit with different results. Thus, the Department has consistently applied the *Sansone* analysis in determining whether off-site work is subject to prevailing wage requirements. The outcomes have varied because of the facts of the individual cases. The problem is that neither *Sansone*, *Williams*, nor any other California case has addressed the specific issue posed by this case, i.e., whether fabrication is subject to prevailing wage requirements when done in the permanent off-site shop of a subcontractor who is not selling materials to the general public. To answer this question, it is therefore necessary to look beyond state court decisions and administrative determinations.

C. In The Absence Of Legislative Or Judicial Guidance, It Is Appropriate To Interpret The CPWL Consistently With Federal Regulations Applicable To Shop Work Performed By Subcontractors.

Parties seeking reversal of the Determination argue that the CPWL should be interpreted consistently with the federal Davis-Bacon Act. In the absence of contrary authority, there is merit in this argument.

In *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883, the court stated: "The PWL and DBA each carry out a similar purpose. ... Read as a unit PWL and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts." *Accord, City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 954. The parallels between the two statutory schemes are exemplified by section 1773, which requires that: "In determining the [prevailing wage] rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements *and the rates that may have been predetermined for federal public works*, within the locality and in the nearest labor market area." (Emphasis supplied.)

The language of the CPWL differs in some respects from its federal counterpart. Thus, for purposes of state prevailing wage requirements, section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." The DBA requires prevailing wages for "all

mechanics and laborers employed directly upon the site of the work ... ." 40 U.S.C.A. § 3142(c)(1). Union argues that the Department should follow the lead of courts in other states that have cited similar differences in statutory language as a basis for extending coverage under state prevailing wage laws to off-site work that would not be covered under the DBA.[7]

Decisions from the courts of other states, while not binding precedent, may nonetheless be instructive. The problem with Union's argument, however, is that the California courts have not interpreted the CPWL more broadly than the DBA on the basis of out-of-state authority. Instead, they have relied upon federal cases interpreting the DBA, resulting in interpretations of the CPWL that are in harmony with the DBA.[8] Moreover, the California Supreme Court looked to federal regulations defining the scope of the DBA in construing the CPWL: "Although the Legislature was free to adopt a broader definition of 'construction' for projects that state law covers, certainly the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity is entitled to some weight in construing the pre-2000 version of the statute." *City of Long Beach, supra,* 34 Cal.4th at p. 954.

Accordingly, it is appropriate to consider the federal regulation defining "site of the work" as used in the DBA. Code of Federal Regulations, title 29, section 5.2 provides in part:

> (3) *Not 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. (Emphasis supplied.)

Thus, the Department of Labor has by regulation established a test for off-site work by contractors and subcontractors similar to the *Sansone-Williams* test for off-site work by material

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[7]The cases cited by Union are *State of Nevada v. Granite Constr. Co.* (Nev. 1992) 40 P.3d 423, 427; *Everett Concrete Prods., Inc. v. Dep't of Labor & Industrial Relations* (Wash. 1988) 748 P.2d 1112, 1113-1115; *Long v. Interstate Ready-Mix, L.L.C.* (Mo. App. W.D. 2002) 83 S.W.3d 571, 578.

[8]This Department has also looked to relevant federal authorities in interpreting the CPWL. See, e.g., PW 2008-022, *On-Site Heavy Equipment Upkeep and Repair for the Interstate 80 Soda Springs Improvement Project, State of California Department of Transportation* (November 13, 2008).

suppliers, in that to be exempt from coverage, the work must be done away from the public works site at a permanent facility. As neither the legislature nor the courts of California have formulated any other test to be applied to factual situations such as the one at hand, it is appropriate to look to the above federal test for guidance. This has the practical advantage of promoting harmony between the federal and state statutory schemes, and thus is in the spirit of the California cases discussed above.

The off-site fabrication at issue here was done in the permanent shop of RWM, a subcontractor, and that shop's location and continuance in operation were determined wholly without regard to a particular public works contract or project. Therefore, contrary to the conclusion reached in the Determination, the off-site fabrication was not done in the execution of the contract for public work within the meaning of section 1772.

D. Because The Determination Was Not A Standard Of General Application, It Was Not An Underground Regulation And The Rulemaking Procedures Of The Administrative Procedure Act Are Inapplicable.

RWM contends that the Determination was an invalid underground regulation as it was not adopted in conformity with the APA. Government Code section 11340.5, subdivision (a) provides that: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation ... , unless the ... rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Government Code section 11340.9, subdivision (i) provides that: "This chapter does not apply to ... A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." Thus a principal identifying characteristic of a rule subject to the APA is that it must be intended to apply generally, rather than only in a specific case. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

Here, the Determination lacked that fundamental identifying characteristic of a regulation subject to the APA in that it was not intended to apply generally, but rather only to a specific case. It was directed to a specifically named legal person, RWM, and thus was exempted from APA rulemaking requirements by Government Code section 11340.9, subdivision (i).

Moreover, the authority of the Director to make coverage determinations was upheld in *Lusardi, supra*, 1 Cal.4th at p. 989. In the numerous court challenges to coverage determinations since, no court has ever found that authority lacking, or suggested that it is subject to the APA.

For these reasons, the Determination was not subject to the APA rulemaking requirements and was not an underground regulation.

E. The Determination Did Not Enforce A New Rule Retroactively So As To Deny RWM A Property Interest Without Due Process Of Law.

Article 1, section 7 of the California Constitution provides that: "A person may not be deprived of life, liberty, or property without due process of law ... ." In its Notice of Appeal RWM asserts, without authority, that: "The coverage determination constitutes a violation of due process by imposing a new DIR coverage policy retroactively ... ." RWM did not expand on this argument when given a chance to do so.

The California Supreme Court rejected a similar argument when it held that a prevailing wage coverage determination is not "an 'adjudication' resulting in a deprivation requiring procedural due process." *Lusardi, supra*, 1 Cal.4th at p. 990. The Court of Appeal rejected a similar argument in *Sansone, supra*, 55 Cal.App.3d at p. 455: "An involuntary burden was not placed upon plaintiffs by virtue of the legislation reviewed herein. Plaintiffs' execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the provisions now challenged." The holding in *Lusardi* requires rejection of RWM's due process argument, which, in any case, is rendered moot by this Decision.

F. The Determination Does Not Infringe Upon The Commerce Clause.

The Commerce Clause provides that: "Congress shall have Power ... [t]o regulate Commerce ... among the several States." CEA asserts that attempts to apply the CPWL to out-of-state workers would pose potential violations of the Commerce Clause, citing the plurality opinion in *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642-643 ["The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside the state's borders, whether or not the commerce has effects within the state."].

Edgar has no bearing on the facts of this case, which involve only activities wholly within California, and indisputably subject to California labor standards. Rather, CEA's argument entails hypothetical efforts to impose California prevailing wages on out-of-state

employers. Given that the Determination in question was limited to the specific facts this case, speculation regarding hypothetical attempts to apply the CPWL extraterritorially is beyond the scope of this appeal. For these reasons, CEA's Commerce Clause argument would be without merit even if it were not moot.

G. Social And Economic Policy Decisions Are The Province Of The Legislature, Not The Department.

Several interested parties argue that implementation of the Determination would lead to a host of impractical or undesirable consequences. Typical of such arguments are the assertions by PCMAC that requiring prevailing wages for off-site fabrication would impair the emerging "green or sustainable building movement," which favors the use of pre-fabricated components. PCMAC further contends that the Determination, if affirmed, would "even threaten the very viability of industries like ours while favoring out-of-State and out-of-Country manufacturers who are not subject to California prevailing wage rules and enforcement."

These arguments are erroneous for at least two reasons. First, they incorrectly assume that the Determination announced a rule of general application requiring prevailing wages for off-site fabrication in all cases, when in reality it was limited to the specific facts of this case. Second, the role of the Department is limited to interpreting and enforcing the Labor Code as enacted by the legislature. It would be an improper usurpation of the legislative function for the Department to impose its own social and economic policy judgments under the guise of statutory interpretation. See, *State Building Trades, supra*, 162 Cal.App.4th at p. 324 ["These are issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court."].

IV. CONCLUSION

For the reasons set forth in the Determination and in this Decision on Administrative Appeal, the appeal is granted and the Determination is reversed. This Decision constitutes the final administrative action in this matter.

Dated: 5/3/10

John C. Duncan, Director

EXHIBIT C

STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

May 3, 2004

IMPORTANT NOTICE

DECISIONS ON APPEAL

TO AWARDING BODIES AND OTHER INTERESTED PARTIES CONCERNING THE APPLICATION AND SCOPE OF PUBLIC WORKS COVERAGE DETERMINATIONS:

PW CASE NO. 2000-027: CUESTA COLLEGE/OFF-SITE FABRICATION OF SHEET METAL

AND

PW CASE NO. 2002-064: CITY OF SAN JOSE/SJSU JOINT LIBRARY PROJECT/ OFF-SITE FABRICATION OF ELECTRICAL COMPONENTS

On March 4, 2003, the Acting Director of the Department of Industrial Relations issued the above-referenced precedential public works coverage determinations concerning public works coverage of off-site fabrication. As a result of the filing of administrative appeals from these determinations pursuant to 8 California Code of Regulations, section 16002.5, the implementation of the public works coverage tests enunciated in the determinations was stayed effective March 4, 2003.

The appeals are decided and, effective immediately, the determinations are withdrawn. The prior precedential public works coverage determinations and decisions on appeal concerning the issues in these determinations control. (See, *Imperial Prison II, South, PW 92-036* (April 5, 1994) and *San Diego City Schools/Construction of Portable Classrooms, PW 1999-032*(June 23, 2000).)

/s/John M. Rea
John M. Rea
Acting Director

CERTIFICATE OF SERVICE

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Los Angeles in the office of a member of the bar of this court at whose direction the service was made. My business address is 400 S. Hope Street, Suite 1200, Los Angeles, California 90071.

On December 2, 2019, I served the following document(s):

APPLICATION TO FILE AMICUS BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA IN SUPPORT OF RESPONDENTS FONSECA MCELROY GRINDING, CO., INC. AND GRANITE ROCK COMPANY; PROPOSED BRIEF OF *AMICI CURIAE*

by placing ☒ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as stated on the attached mailing list.

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in Los Angeles, California, for collection and mailing to the office of the addressee of the date shown herein.

☐ **BY MAIL:** I deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid at 400 S. Hope Street, Suite 1200, Los Angeles, California 90071.

☒ **BY OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Ogletree, Deakins, Nash, Smoak & Stewart P.C., Los Angeles, California. I am readily familiar with Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery.

☐ **BY FACSIMILE** by transmitting a facsimile transmission a copy of said document(s) to the following addressee(s) at the following number(s), in accordance with:

☐ the written confirmation of counsel in this action:

☐ [State Court motion, opposition or reply only] in accordance with Code of Civil Procedure section 1005(b):

☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person[s] at the e-mail addresses listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 2, 2019, at Los Angeles, California.

Elizabeth Mendoza

Type or Print Name

Signature

SERVICE LIST

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

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Office of the Clerk U.S. Court of Appeals For the Ninth Circuit The James R. Browning Courthouse 95 Seventh Street San Francisco, CA 94103 Telephone: 415.355.8000 Case No. 17-15221 (Via U.S. Mail)	Hon. William H. Orrick District Judge UNITED STATES DISTRICT COURT OF CALIFORNIA Northern District of California 450 Golden Gate Avenue San Francisco, CA 94102 Telephone: 415.522.2000 Case No. 3:15-cv-05143-WHO (Via U.S. Mail)

Supreme Court of California
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