No. S253574

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, et al.,

Petitioners and Appellants,

vs.

FONSECA MCELROY GRINDING INC., ET AL,

Defendant and Respondent

After Decision by the United States Court of Appeals for the Ninth Circuit,
Case No. 17-15221

AMICUS CURIAE BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA

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Associated Builders and Contractors of California ("ABC California") respectfully submits this amici curiae letter in support of Fonseca McElroy Grinding Co., Inc. and adopts and relies upon its brief and positions and authorities cited therein.

I. OVERVIEW

This case comes before the Court under unusual circumstances.

U.S. Court of Appeals for the Ninth Circuit in *Mendoza v. Fonseca McElroy Grinding Co., Inc., et al.*, No. 17-15221 (January 15, 2019), requested that the California Supreme Court decide the following question:

Is operating engineers' offsite "mobilization work"—including the transportation to and from a public works site of roadwork grinding equipment—performed "in the execution of [a] contract for public work," California Labor Code section 1772, such that it entitles workers to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to section 1771 of the California Labor Code?

Missing from implicit in the stated question are the following necessary questions for resolution:

(1) Did the contract for public work include offsite mobilization work? (It did not).

(2) Since the published prevailing wage, even if applicable, did not include mobilization, can the Court permissibly interpret prevailing wage law using the phrase "in the execution" to infer that it does?

Of equal import, the impact of consideration of this putatively narrow question is the structural scope of what the California legislature intended when it enacted a public works law otherwise known as prevailing wage.

The principal parties supported here make it clear that public works law is a statute of specific, individuated application and exclusion and

cannot otherwise be expanded beyond clear statutory mandates by applying the out of context analysis suggested by Plaintiffs premised on the concept of "in the execution".

(3) How does the Court best reconcile its own precedent and that of lower California appellate court decisions which reject the "in the execution" approach?

A. *Interest of Amicus Curiae* Associated Builders and Contractors of California

Associated Builders and Contractors of California, Inc. ("ABC California") is a California non-profit organization and a federation of the ABC Chapters in California. The ABC Northern California, ABC Southern California, ABC LA Ventura Chapter and ABC Central California Chapter and San Diego Chapters work together to carry forward a common voice on common issues that impact Merit Shop Contractors, principally in the California Legislature and before regulatory Agencies. With a shortage of a skilled construction workforce in California, each ABC Chapter operates a workforce development training center that educates the construction workforce of tomorrow. As a sponsor of approved apprenticeship programs, we support training of California workers on public works projects.

The structure set out by the Legislature is determining what wages and classification are prevailing is not based on wage surveys, but primarily on specific labor union contracts, as describe in more detail below.

Our non-union members are uniquely dependent on this statutory structure, premised on terms set by labor contracts they do not negotiate, For this reason, their role in this action is to inform the Court of how the law functions so that it does not apply the law of unintended consequences instead of the labor code.

ABC of California's role as an amicus includes the following in the development of the primary precedential decisions in this area of law:

Filed an amicus curiae brief and participated in the oral argument team in 2004 to the California Supreme Court in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 concerning the definition of a public work.

Filed an amicus brief and participated in oral argument team presenting argument comparing and contrasting the roles and rights of a government as a market participant and as a regulator to the U.S. Supreme Court in *Chamber of Commerce v. Brown* (2008) 554 U.S.60 in which the Court struck down California's Assembly Bill 1889 (Cal. Govt. Code Ann. §§16645–16649 (West Supp. 2008) which prohibited businesses from using money earned from state contracts to "support or deter union organizing."

Filed an amicus curiae brief in 2010 and participated in the oral argument team before the California Supreme Court in *State Building and Construction Trade Council of California, AFL-CIO v. Vista* (2012) 54 Cal.4th 547, concerning the extent to which a charter city can establish its own policies concerning government-mandated construction wage rates on purely municipal public works projects.

Filed an amicus brief and consulted in and was present for oral argument in *Sheet Metal Workers' International Association, Local l04 v. Duncan* (2014) 229 Cal.App.4th 192.)

The undersigned amicus was privileged to be a voice before this Court on this issue and on oral argument. They also, brought their experience to bear in underlying court of appeal cases and in hearings conducted by the DIR.

In the years since, the California Legislature has never crafted any legislation that changes the present structure of limited legislative intent as to how, where and why prevailing wage requirements apply.

II. ARGUMENT

In the leading Court of Appeal case *Sheet Metal Workers' International Association, Local 104 v. Duncan* 229 Cal.App.4th 192 (2014) ("*Russ Will*") the appellate court heard briefing from the undersigned that in the sheet metal industry there was a dividing line between labor contracts and factory manufacturing labor contracts. Prevailing wage law in California depend on the specific areas of coverage set out in Labor Code section 1720 and the further application of collectively barging labor agreement which, as they satisfy the modal rate test in 1720, define the specific application, classifications and rates that are prevailing to covered work, as ably set put in the principal briefing from Fonseca McElroy Grinding Co., Inc. In this context, it is important to note that this matter does not present any union versus non-union issues. To the contrary; union contracts often differentiate between different types of work including some excluding others and having different wage scales none of which has ever been certified as prevailing.

So why are we here? Simply put, Russ Will Mechanical, as the leading California case on off-site work was never appealed. Accordingly, this Court is left to determination of the subtexts from Russ Will and the precedential effects of this Courts earlier decision about the structure of prevailing wage law in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 ("*Long Beach*"), *State Building and Construction Trade Council of California, AFL-CIO v. Vista* (2012) 54 Cal.4th 547 ("Vista").

California public works laws regulate wages of construction workers in the public works construction industry. Prevailing wages are based on labor contracts in the construction industry. (See California Labor Code section(s) 1771; 1773.9). Except for minimum wages applicable to all Californians, there is no statutory basis in California law by which public

works law authorizes the Department of Industrial Relations ("DIR") to establish or regulate wages in the private fabrication and manufacturing industries or on private construction projects not funded with public funds. Indeed, even on public projects such power is circumscribed by constitutional limitations that relate to charter cities and other entities with independent constitutional funding sources, such as the University of California.

The precise structure and function of California prevailing wage requirements derive from the job-site construction site and the workers employed on it.

Construction workers' wages are generally based on the job-site construction labor contract. California Code of Regulations Title 8, section 16200 states that "the single rate (modal rate) being paid to the greater number of workers is prevailing." By this tool, preference is given to information gathered by the Department of Industrial Relations, Division of Labor Statistics and Research that establishes the largest number of construction workers paid the same prevailing wage. In practice, this statistical approach institutionalizes the wages in job-site collective bargaining agreements negotiated between labor unions and contractor trade associations, as only in a fixed-labor contract are workers paid exact specified wages.

When a wage from a construction collective bargaining agreement becomes accepted as the modal prevailing wage, the terms and conditions, as well as geographical jurisdiction of the individual contracts, become the scope of that particular prevailing wage. While the published prevailing wages appear to be geographically centered, i.e., there are wages that are statewide, northern or southern California based, or county by county, in every case, the geographical scope of those wages are set by the ways in which the jurisdiction of the union signatory to the collective bargaining

agreement was negotiated. For example, the California Department of Industrial Relations, Division of Labor Statistics and Research ("DLSR") lists ten construction trades with statewide basic trade determinations because the applicable labor union negotiates a statewide collective bargaining agreement. (See General Prevailing Wage Determinations. www.dir.ca.gov/dlsr/PWD/index.htm).

Thus, if a union, like the Ironworkers, negotiates statewide agreements, then there is a statewide rate for Ironworkers. If trade unions like Laborers or Carpenters or Operating Engineers designate their jurisdiction by the 46 Northern California counties, or the southern counties or San Diego, that becomes the scope for then the prevailing wage is just that - local and not statewide at all.

The published prevailing wages specifically include the scope of the covered work which is published on the DLSR website. The specific detailed descriptions of covered work copied from the construction collective bargaining agreement that becomes prevailing in a particular location for a particular location are published verbatim along with the wage. This is where "mobilization" work would be defined and listed. (See https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=1720).

Where travel compensation is required, those determinations set the rates and separately list them as to included jobsite work

A convenient source for evaluating the statutory framework may be found in a compliance manual issued by California Department of Industrial Relations ("DIR"), cited here for convenience as a relevant treatise. (See Department of Industrial Relations Public Works Manual www.dir.ca.gov/dlse/PWManualCombined.pdf).

Actual published prevailing wages, classifications and working conditions are found here: www.dir.ca.gov/oprl/2019-2/PWD/index.htm.

It bears noting that no party to this action has argued that the Operating Engineers' published labor agreements apply to mobilization work off the construction job-site. Were this the case, such rates and coverage could simply be found on the foregoing website and there would be no need for the instant action.

California Labor Code section 1720 and 1720.1 define the scope of the application of prevailing wage with specific reference to the construction projects to which they apply and then separately, in sections 1770 and 1771, apply the coverage to workers employed on those projects. Section 1776 details the process by which construction labor contracts become the prevailing wage for that work. It is certainly correct that the California Legislature has added specific provisions expanding prevailing wage to specific site-related subject areas such as installation and testing, but, there is no provision that add mobilization or other off-site work such as fabrication and manufacturing.[1]

In this context, the legal arguments that such phrases reflect intent to create a broader interpretation of public works law are functionally inaccurate and irrelevant, except to the extent that this additional language returns the Court to examining what the applicable construction job-site actually is. [2]

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[1] The case law interpreting "in the execution" where it is used in prevailing wage law is understandably sparse, See *Sharif v. Young Brothers, Inc.* (Tex. Ct. App. 1992) 835 S.W.2d 221 for a situation that where a jurisdiction has added phraseology such as "in the execution of the contract," that additional language still requires a determination of what the construction job-site is.

[2] It is important to note that there is no pending coverage determination pending with the Department of Industrial Relations, nor a Petition for a survey to determine a wage for mobilization. The Department is not authorized to issue advisory opinions absent invocation of their statutory responsibilities.

The present posture of the issue largely arises from a California appellate court case in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742. That Court's opinion stands for the limited proposition that the actual contract for construction is as important as determining its scope, including which services are covered by public works law. However, Williams did not stand for the global exploration of the term "integrated" for the purpose of establishing some functional connection with the construction work that, without legislative authorization, could be morphed into an expansion of public works law.[3]

III. CONCLUSION

The Court is urged to adopt an attitude of judicial restraint consistent with its precedent, and defer to the legislative scheme of how public works coverage and wages are set sensitive to the fact that any other choice would ineluctably undermine the statutory preference for negotiated labor contracts and their relationships to prevailing wage coverage on which the undersigned amici and its member companies necessarily depend.

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Dated: December 2, 2019

By: _____
Robert Fried
Attorneys for ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA, Amicus Curiae

[3] In *Associated Builders & Contractors of Southern California, Inc. v. Nunn* (9th Cir. 2004) 356 F.3d 979, the Ninth Circuit Court of Appeals held that an attribute of California's prevailing wage law, its apprenticeship regulations, was implicitly not a matter of statewide regulatory concern.

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(D)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 2,666 words.

Dated: December 2, 2019

Robert Fried, Esq.

PROOF OF SERVICE
[C.R.C. 8.212(C)]

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I am employed in the County of Alameda, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 5075 Hopyard Road, Suite 210, Pleasanton, CA 94588.

On December 2, 2019, I served the following document(s) described as **AMICUS CURIAE BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF CALIFORNIA** on the interested parties in this action as follows:

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☑ **BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. 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 a sealed envelope with postage fully prepaid.

Executed on December 2, 2019, at Pleasanton, California.

Lorine Sharp