CIVIL NO. S253458

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DAVID KAANAANA *et.al.*,

Plaintiffs and Respondents,

vs.

BARRETT BUSINESS SERVICES, INC., *et.al.*,

Defendants and Appellants.

AFTER A DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
Case Nos. B276420, B279838

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the phrase "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type" in *Labor Code* section 1720(a)(2) of California's Prevailing Wage Law ("PWL") (found in *Labor Code,* sections 1720-1861) should be interpreted to cover any type of work performed under contract for public entities regardless of its

nature, funding, purpose or function, including routine belt sorting at recycling facilities?

INTRODUCTION

This proceeding arises from a representative action brought on behalf of individuals ("Respondents") employed by Defendant and Appellant Barrett Business Services, Inc. ("BBSI") to conduct belt sorting operations at two recycling facilities owned and operated by the County Sanitation District No. 2 of Los Angeles County (the "Sanitation District"). Respondents asserted that their routine trash sorting activities constituted "public work" under the PWL and sued BBSI seeking, *inter alia*, wages at the prevailing rate.

The PWL governs wages and conditions of employment on California's public works projects. [*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 981 (*"Lusardi"*).] *Labor Code* section 1771 mandates that, except for projects costing $1,000 or less, "all workers employed on public works" must be paid the general prevailing rate of *per diem* wages "for work of a similar character in the locality in which the public work is performed."

The compass of "public work" under the PWL is addressed in *Labor Code* section 1720 ("Section 1720"). At issue in this case is whether there is any interplay between Section 1720(a) subdivisions (1) and (2) in defining what work performed for districts like the Sanitation District constitutes public works

subject to the PWL. The term "public works" is defined in eight subsections of Section 1720(a) starting with (a)(1) and (a)(2):

> (1) ***Construction, alteration, demolition, installation, or repair work*** done under contract and paid for in whole or in part out of public funds ...
>
> (2) ***Work done*** for irrigation, utility, reclamation, and improvement districts, and other districts of this type... (emphases supplied.)

Respondents contend that their trash-sorting work for BBSI, even though not "construction, alteration, demolition, installation, or repair work" under subsection 1720(a)(1), was "work done" for the Sanitation District and therefore "public work" under subsection 1720(a)(2) for which prevailing wages had to be paid. In contrast, Appellants contend that "work done" in subsection 1720(a)(2) is limited to work related to the "construction, alteration, demolition, installation, or repair work" described in subsection 1720(a)(1).

Respondents lost their bid for prevailing wages at the trial court level. The trial court ruled that, in light of the PWL's purpose of benefitting the construction worker on public construction projects, the phrase "work done" in subsection 1720(a)(2) qualifies as "public work" only if it involves "construction, alteration, demolition, installation, or repair work"

described in subsection 1720(a)(1). Since sorting recyclables on a belt did not meet this criteria, the trial court concluded that it did not trigger the application of the PWL. [C.T.2. at 365]

The Court of Appeal reversed in a published opinion. Adopting the broad and literal construction urged by Respondents, the appellate court found Respondents' belt sorting work to be public work compensable at prevailing rates under subsection 1720(a)(2) simply because it was "work done" for a district that the Court of Appeal determined, without discussion or citation to any evidence, was of the same "type" as "irrigation, utility, reclamation, and improvement districts."

This unbounded reading of subsection 1720(a)(2) is a radical departure from decades of precedent and is unjustified by the PWL's history, purpose and intent. The PWL was originally enacted in 1931 to protect local construction wage standards by preventing itinerant contractors from under-bidding local contractors on publicly-financed projects using cheap, bootleg labor. [*State Building & Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 294-295 ("*Duncan*").]

In keeping with this purpose, the scope of "public works" covered by the PWL was historically confined to construction or repair work on public infrastructure projects. While the scope of "public works" has been clarified in recent years to include, for example, work done in the pre- and post-construction phases of a construction project, the Legislature has never strayed from its original intent. All of the amendments to the statute have

involved work on, affecting or relating to the construction, alteration, demolition, installation, or repair of public infrastructure.

The Court of Appeal, however, would extend the PWL's reach indiscriminately to any and all work done for the affected districts, without regard to the relationship of the work to public infrastructure and would include even routine operations like trash sorting that happen to be performed in public facilities. The Court of Appeal's opinion must be reversed because it is anomalous and is without support in the statutory scheme, the history, the purposes and the policies underlying the PWL. As Justice Elizabeth Grimes cogently points out in her dissent, the majority's decision is:

> ...*untethered to the decades-long history* during which prevailing wage requirements have been applied to various kinds of work *involving or affecting physical facilities or infrastructure* - but never, until now, to the routine operations that may be performed inside but not affecting these facilities.

[*Kaanaana, supra* 29 Cal.App.5th at p.819 (emphases supplied).]

If allowed to stand, the appellate decision would have profound and far-reaching economic implications for thousands of

districts, their contracts, the workers provided by contract for public entities and for the Department of Industrial Relations ("DIR"), the agency charged with enforcement of the PWL.

For many types of work, prevailing wages are higher than the wages on typical private projects. The sweepingly broad interpretation of the nature of "public work" provided by the Court of Appeal threatens to exponentially increase the labor costs of the affected districts for even their routine operations. [*Lusardi, supra* 1 Cal.4th at p. 981.]

The DIR, in turn, would have to determine concomitant rates for a panoply of activities which in the PWL's nearly 90-year history have never been deemed public work, performed by personnel the PWL was never designed to protect. [*Labor Code*, §§1773, 1773.9.] This decision implicates wage rates for contract janitors, security officers, food service workers, temporary administrative or clerical personnel and even contract lawyers, engineers and/or accountants, which thousands of publicly funded districts currently use on a regular basis. These persons have never before been covered by prevailing wage laws, are not the persons intended to be covered by the statutory scheme, and for those reasons, are not included in the DIR's existing wage rate classifications.

None of these sweeping ramifications are warranted by the PWL's purpose or intent. Unlike the field of public construction, there is and can be no argument that the wage rates for Respondents' trash recycling activities or other routine

operations of special districts are in need of protection from predatory pricing behavior by shady contractors. Although the PWL is to be liberally construed, this rule "should not blindly be followed so as to eradicate the clear ... purpose of the statute and allow eligibility for those for whom it was obviously not intended." [*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 903.] The principle of liberal construction does not warrant application of the PWL to routine work done by contract workers as part of the operations of a district that has nothing to do with the infrastructure that constitutes the public works project.

Nor does the Court of Appeal explain why the contracts of "irrigation, utility, reclamation, improvement and similar districts" should be targeted for more stringent treatment than that of any other political subdivision under the PWL. If the Court of Appeal's decision is followed, all of the contracts entered into by special districts will be subject to the PWL and therefore considerably more expensive than those of other public agencies. Again, Justice Grimes' dissenting opinion correctly observes that there is no justification for such an anomaly, stating that there is:

> ...no evidence the Legislature intended that all work done for improvement districts, without limitation - *unlike that for all other public agencies* - was to be compensated at prevailing wage rates,

> and I can think of no reason justifying such an anomalous result.

[*Kaanaana, supra* 29 Cal.App.5th at p. 819 (emphasis supplied)]

It is presumed that the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences. [*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.] "Fidelity to the literal language of a statute cannot stand where, as here, a literal construction results in absurd and unintended consequences." [*People v. Broussard* (1993) 5 Cal.4th 1067, 1071. For the foregoing reasons and upon the following discussion, reversal is compelled.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Recycling Facilities

The Sanitation District owns and operates the Downey Area Recycling and Transfer Facility ("DART") and the Puente Hills Materials Recovery Facility ("MRF") in California. [1 C.T. 70, 72; 2 C.T. at 341, ¶¶d-f.] The DART and MRF are materials recovery and transfer facilities that receive and sort recyclable materials and then transfer the residual waste to landfills.

Daily, MRF receives and processes approximately 500 tons of commercial waste from local businesses, offices and commercial buildings including cardboard, paper, plastics, scrap wood, scrap metal and concrete. [1 C.T. at 70.] DART, on the

other hand, separates residential commingled curbside recyclable materials and green waste such as yard trimmings, vegetation, untreated plant and wood waste. [1 C.T.1. at 70-71.]

In June 2007, BBSI contracted with the Sanitation District to staff and operate the material recovery portions of DART and MRF. [1 C.T. at 70-71.]

B. The Class Action Suit

On November 12, 2012, Respondents instituted this class action against BBSI and Michael Alvarez, one of its former managers, on behalf of all "belt sorters employed by [BBSI] at DART and MRF between April 15, 2011 and September 30, 2013". [1 C.T. at 15.] The Third Amended Complaint ("TAC") was the operative pleading.

C. BBSI's Motion To Strike and Order Thereon

On October 13, 2015, BBSI successfully moved to strike all references to the "prevailing wage rate" from the TAC and any other allegations appurtenant thereto. [1 C.T. at 31-41.]

The trial court, in granting the motion, concluded that sorting recyclables for recycling facilities did not come within the definition of public works under the PWL simply because it was work done for the Sanitation District. The trial court relied on a coverage opinion by the DIR in *The Hauling of Biosolids from Orange County*, PW 2005-039 (Cal. Dept. of Indus. Relations, April 21, 2006)(the "*Biosolids* Ruling"), where the Director said:

> ...[f]inding the reach of 1720(a)(2) to be unlimited in scope would be illogical and [would] create prevailing wage obligations for any type of work performed under contract for a district regardless of the nature of that work.
>
> Given the general purpose of California Prevailing Wage Law 'to benefit the construction worker on public construction,' the most reasonable way to define the scope of section 1720(a)(2) is to require that the work fall within one of the types of covered work enumerated in section 1720(a)(1).

[2 C.T. at 367-368 (emphasis supplied).]

D. Appellate Court Decision

The appellate court reversed, finding that subsection 1720(a)(2) covers recycling work done for a Sanitation District even if it does not fit the categories identified in subsection 1720(a)(1). [*Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 797.]

In the Court of Appeal's view, subsection 1720(a)(2) can and should be given effect independent of the strictures of subsection 1720(a)(1) because it is not a mere subdivision of 1720(a)(1) but one of eight equal subdivisions which together

constitute the definition of "public works" under the PWL. [*Kaanaana, supra* 29 Cal.App.5th at p. 791.]

Turning to its history, the Court of Appeal found it significant that in the original version of 1720(a)(2), the Legislature defined "public works" as "*[c]onstruction* work done for irrigation, utility, reclamation, improvement and other districts (emphasis supplied)" but later removed "construction" as a qualifier in the 1937 enactment of the current Labor Code. [*Kaanaana, supra* 29 Cal.App.5th at p. 793.]

While acknowledging the PWL's original purpose as aimed at assisting the construction industry in recovering from the Great Depression, the Court of Appeal, citing to *Lusardi,* observed that the overall purpose of the present-day PWL has been broadened to benefit and protect employees on public works projects. [*Kaanaana, supra* 29 Cal.App.5th at pp. 792-793 citing to *Lusardi, supra,* 1 Cal.4th at p. 987.] These benefits, according to the Court, should not be denied employees contracted to work for special districts simply because they are not working on construction projects. [*Id.* at p. 793.]

The Court of Appeal also found significance in the fact that Section 1720's definition of "public works" applied to all articles within the chapter on "Public Works" in the Labor Code including to those sections requiring worker's compensation insurance, prohibiting discrimination and penalizing the charging of placement fees for public work laborers. "We see nothing in the legislation that suggests public works in these contexts apply

only to construction-related activities." [*Kaanaana, supra* 29 Cal.App.5th at pp. 791-792.]

LEGAL ARGUMENT

I. THE PWL'S INTENT AND PURPOSE LIMITS THE SCOPE OF SUBSECTION 1720(A)(2) TO CONSTRUCTION AND INFRASTRUCTURE-RELATED ACTIVITIES

A. Subdivision 1720(a)(2) Contains a Latent Ambiguity

The role of all statutory construction is "to divine and give effect to the Legislature's intent." [*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 507-508.[Statutory terms are given their plain meaning unless an ambiguity appears. [*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493.] A statute is ambiguous if it is capable of two constructions, both of which are reasonable. [*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 358–359.]

In *Azusa Land Partners v. Department of Industrial Relations* (2011) 191 Cal.App.4th 1 ("*Azusa*"), the court in interpreting section 1720(a), cautioned that, "[s]tatutory language which seems clear when considered *in isolation*, may in fact be ambiguous or uncertain when considered *in context*. [*Id.*, 191 Cal.App.4th at 16 (emphases supplied).] Section 1720, the *Azusa* court noted, "is one of those cases." [*Id.*, at p.16.] "If Section 1720 is considered straightforward in operation,

analytically, it is anything but... [the statute] is hardly a triumph of the drafter's art." [*Id.*, 191 Cal.App.4th at pp.15-16 (emphasis supplied).]

Historical context exposes a latent ambiguity in the meaning to be given to the phrase "work done" in subsection 1720(a)(2) which is not readily apparent from its text. According subsection 1720(a)(2) what it deemed was that subsection's plain and ordinary meaning, the Court of Appeal held that all work done for the enumerated districts can properly be characterized as public work.

This interpretation is not sustained by the PWL's history, background, purpose or statutory scheme. Instead, as the following discussion will make plain, these legislative intent markers lead to the opposite conclusion – *i.e.*, that subsection 1720(a)(2) was intended and must be restricted in its application to construction and physical infrastructure-related activities. [*Smith, supra* 29 Cal.4th at pp. 358–359; *Stanton v. Panish* (1980) 28 Cal.3d 107, 115.]

B. The Legislature Intended Subsection 1720(a)(2) to Apply Only to Construction and/or Infrastructure-Related Activities

In 1931, Congress enacted the Davis-Bacon Act (40 U.S.C., §§ 3141-3148) which provides in pertinent part that any contract by the Federal Government over $2,000:

> ...for *construction, alteration, or repair, including painting and decorating,* of public buildings and public works of the Government...and which requires or involves the employment of *mechanics or laborers* shall contain a provision stating the minimum wages to be paid...

[40 U.S.C., §3142 (emphases supplied.)]

At the time, the federal government had embarked on an extensive ten-year, half-a-billion dollar public building program intended to benefit the country at large through distribution of construction. [H.R. Rep. No. 2453 on H. R, 16619, House Committee on Labor, 71st Cong., 3d Sess., 2 pp. (January 31, 1931); S. Rep. No. 1445 on S. 5904, Senate Committee on Manufacturers, 71st Cong. 3d Sess., 2 pp (February 3, 1931).]

Unfortunately, the glut of workers caused by the Depression allowed unscrupulous contractors to underbid local contractors for these lucrative government building contracts by importing migratory labor and paying them wages far below local rates. [*Id.*; see also *International Union of Operating Engineers v. Arthurs* (W.D.Okla. 1973) 355 F.Supp. 7, 8-9.] The Davis-Bacon Act sought to put a stop to this practice by "fixing a floor under wages on Government projects." [*U.S. v. Binghamton Construction Co.* (1954) 347 U.S. 171, 176-177, 98 L.Ed. 594, 599, 74 S.Ct. 438.]

For purposes of the Davis-Bacon Act, the United States Secretary of Labor defined "*construction*" as: "All types of work done on a particular building or work at the site thereof ... by laborers and mechanics employed by a construction contractor or construction subcontractor ... ." [29 C.F.R., subdivision 5.2(j)(1) (emphasis supplied).]

Concurrent with the Davis-Bacon Act and for the same reasons, California enacted its own Public Works Wage Rate Act [Stats. 1931, Ch. 397, p. 910 (the "1931 Act")]. [*Duncan, supra* 162 Cal.App.4th at 294-295.] Like the Davis-Bacon Act, Section 1 of the 1931 Act (now substantially embodied in *Labor Code*, §1771) provided:

> Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed . . . shall be paid to all ***laborers, workmen and mechanics employed by*** or on behalf of the State of California, or by or on behalf of any county, city and county, city, town, *district* or other political subdivision of the said state, ***engaged in the construction of public works***, exclusive of maintenance work... (emphases supplied.)

Section 4 of the 1931 Act was the precursor to present-day *Labor Code* section 1720. It provided:

> ***Construction work done for irrigation, utility, reclamation, improvement and other districts***, or other public agency, agencies, public officer or body, as well as street, sewer and other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision, district or municipality thereof operates under a freeholder's charter heretofore or hereafter approved or not, ***also any construction or repair work done under contract***, and paid for in whole or in part out of public funds . . . shall be held to be public works' within the meaning of this act.
>
> The term "locality in which the work is performed shall be held to mean the city and county ...in which ***the building, highway, road, excavation or other structure, project, development or improvement*** is situated in all cases in

> which the contract is awarded by the state. (emphases supplied.)

The PWL's focus on construction-related activity was evident from the Supreme Court's opinion in *Metropolitan Water Dist. v. Whitsett* (1932) 215 Cal. 400, 408, 417 ("*Whitsett*"), where the court upheld the PWL's constitutionality against attacks by the Metropolitan Water District that it was void for uncertainty. The *Whitsett* court rejected the Water District's assertion that the phrase "*work of a similar character*" in Section 1 of the 1931 Act was unconstitutionally vague, saying:

> The character of the work to be performed on the proposed road *or on any of the construction work to be done by the district* in carrying out the object of its creation would not appear to be so extraordinary as not to permit a ready classification of the employees ...
>
> The law was *intended for the benefit of the great body of laborers and mechanics* to be employed on the job. There would seem to be no difficulty in classifying such employees as blacksmiths, bricklayers, carpenters, concrete mixer operators, crane operators, hod carriers, iron workers -- *structural, reinforcing and ornamental* -- laborers, lathers, marble

> workers, mechanics, painters, pile driver men, plasterers, powder men, traction operators, truck drivers, teamsters, etc.

[*Whitsett, supra,* 215 Cal. at p. 415 (emphases supplied.).]

The *Whitsett* court also found the phrase "*locality in which the work is performed*" in Section 1 of the 1931 Act to be sufficiently certain. It referred, the court said, to "the city and county, county, or counties in which the *improvement is to be constructed* in all cases in which the contract is awarded by the state..." *Whitsett, supra.*, 215 Cal. at p. 417 (emphases supplied.)

Almost half a century after the PWL's 1931 enactment, the Second Appellate District determined in *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 459-461 ("*O.G. Sansone*"), that "[t]he statutory scheme, the cases decided under the California prevailing wage law and under the Davis-Bacon Act, as well as the legislative history available with respect to the Davis-Bacon Act *show clearly that prevailing wage legislation was designed to benefit the construction worker on public construction projects.*" [*Id.*, 55 Cal.App.3d at p. 461 (emphasis supplied.)]

Because California's PWL is similar to the federal act and shares its purposes, the California Supreme Court more recently in *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942 also opined that the fact that federal law generally confines its prevailing wage law to

"*situations involving actual construction activity*" carries weight in construing "the pre-2000 version of the PWL." [*Id.*, 34 Cal.4th at pp. 951-954.]

Clearly, the phrase "work done" in subsection 1720(a)(2), as originally enacted, was meant to and covered only *construction work* and *construction workers*. Indeed, from 1931 until now, no court has interpreted subsection 1720(a)(2) to apply to routine operations unrelated to construction or infrastructure

C. The 1937 Enactment of Subsection 1720(a)(2) did not Effect Any Substantive Change in its Scope

California's 1931 Public Wage Rate Act was replaced by the current version of the PWL (*Labor Code* sections 1720, *et seq.*) in 1937. [Stats. 1937, Ch. 90.] [*California Division of Labor Standards Enforcement v. Dillingham Construction N.A. Inc.* (1997) 519 U.S. 316, 319, 117 S.Ct. 832, 835.]

The question in this proceeding is whether the 1937 codification of the Labor Code effected any substantive change in the scope of subsection 1720(a)(2). The appellate court answered this question in the affirmative. This is unsupported by the available record.

Although research has not yielded any surviving documentation on the consideration of Assembly Bill 2100 [later enacted as the Labor Code ("AB 2100")], the 1937 Report of Timothy A. Reardon, Director of Industrial Relations, to the

Governor (the "Reardon Report") described the objective of AB 2100 as follows:

> ...[I]n 1937, under the sponsorship of the Department of Industrial Relations, in cooperation with the Legislative Counsel, Assembly Bill No. 2100 was introduced, which, having been passed by the Legislature and signed by Governor Frank F. Merriam is now known as the Labor Code of California.
>
> In this Code are all of the laws affecting the labor relationships in industry and employment throughout the State.
>
> Prior to 1937, these laws were scattered throughout the Civil Code, Code of Civil Procedure, Penal Code, General Laws and Political Code, which, as can be readily seen, made it extremely arduous for an interested party to become properly informed. The Labor Code as now compiled...has all these laws in a single compilation...

[Request for Judicial Notice, Exhibit "A"]

As the Reardon Report explained, before the enactment of the 1937 Labor Code, the "public works" definition in Section 4 of

the 1931 Act had counterparts in the Public Works Alien Employment Act of 1931 as well as in the Penal Code. Like Section 4 of the 1931 Act, Section 653c of the Penal Code mandating an eight-hour workday for employees at public work projects defined "public works" as including: "...Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type..." The Public Works Alien Employment Act of 1931, which prohibited the employment of aliens on public work, also had the identical provision in its definition of public work. [Stats. 1931, Ch. 398.]

The 1937 codification was an effort to consolidate these and other discrete provisions into one section of the Labor Code. Thus, the 1937 version of subsection 1720(a)(1) and (2) provided:

> (1) Construction or repair work done under contract and paid for in whole or in part out of public funds...
>
> (2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type...

The appellate court predicated its decision on this 1937 omission of the word "construction" from subsection 1720(a)(2), reasoning that it "had the effect of broadening the definition of 'public works' beyond simply construction work as it applied to the prevailing wage law." [*Kaanaana, supra* 29 Cal.App.5th at p. 795.]

However, apart from this ambiguous deletion, there is no evidence that in codifying AB 2100, the Legislature intended to enlarge subsection 1720(a)(2)'s application beyond requiring prevailing wages only for publicly funded construction or repair projects to requiring the same rates for any and all work done for special districts. Such a sea change, barely six years after the PWL's original enactment would, as the dissenting opinion aptly notes, have been accompanied by a clear statement of legislative intent and rationale. [*Kaanaana, supra* 29 Cal.App.5th at p. 816.]

Yet, no statement of the sort exists. Rather, all of the relevant official pronouncements on the issue, even in the Labor Code itself, uniformly state that there was no intent to change the substance of the Labor law statutes, only to consolidate them. The 1937 Reardon Report took pains to point out, for example, that:

> ... However, and for immediate and general information, it might be well to state that the compilation of all the laws in a Labor Code *has not in any way changed the originals.*

[Request for Judicial Notice, Exhibit "A"]

The Department of Industrial Relations' Report to the Governor's Council, dated September 1936, similarly described the Labor Code's codification process and ultimate goal as making no change to existing substantive law:

> In preparing the code, the Commission has deleted superfluous language, reduced lengthy provisions to short, concise paragraphs which may be conveniently cited, deleting features of the law that have since been held unconstitutional, *so that the ultimate code will present nothing but the present law in concise form without any change of the substantive law.*

[Request for Judicial Notice, Exhibit "B" (emphasis supplied).]

Most importantly, the Legislature itself in Section 2 of the Labor Code's "General Provisions," cautioned that the changes were not new enactments:

> The provisions of this code, in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed *as restatements and continuations thereof and not as new enactments* (emphasis supplied).

The same conclusion was reached by the Attorney General in analyzing the 1937 revisions to section 4 of the PWL [now subsections 1720(a)(2) and(3)] to determine its applicability to a flood control district:

> Section 4, although broadly drafted, was primarily *a supplement to the sweeping coverage of section 1.* The process of codification may have somewhat obscured this original purpose, *but no change in substantive meaning was intended* (*Labor Code* §2)."

[1960 Cal. AG LEXIS 1, *2-9, 35 Ops.Cal.Atty. Gen. 1 (emphases supplied).]

Although opinions of the Attorney General are not binding, they are entitled to considerable weight, especially when, as here, the Attorney General regularly advises agencies that administer the law and the opinion is consistent with a long line of authority both before and after its issuance. [*Cal. ex rel. State Lands Com v. Superior Court* (1995) 11 Cal.4th 50, 71.]

Even the California Supreme Court in *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, in the course of an opinion dealing with the respective powers of the State and Charter cities, had occasion to note that no changes were made in the substantive law when the Labor Code was established in 1937:

> When the California Legislature established the Labor Code in 1937, it replaced the 1931 Public Wage Rate Act *with a revised, but substantively*

> *unchanged version of the same law.* (Stats. 1937, ch. 90, § 1720 et seq., pp. 241–246.) ... As a result of a 1976 amendment, the prevailing wage law now requires that local wage rates be determined by the Director of California's Department of Industrial Relations ... (Stats. 1976, ch. 281, § 2, p. 587), *but the prevailing wage law's general purpose and scope remain largely unchanged.*

[*Vista, supra,* 54 Cal.4th at p. 555 (emphases supplied).]

In contrast, nothing in the PWL's codification furnishes a basis for the appellate court's theory that the Legislature intended to enlarge its scope. By all indications, the codification of the 1931 Act into the present day Labor Code was ***not*** meant to overhaul existing law in general, or subsection 1720(a)(2) in particular.

Courts should not lightly conclude that the Legislature intended to effect such a substantial statutory change in so cryptic a fashion. At the federal level, the United States Supreme Court has observed that "'Congress...does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" [*Whitman v. American Trucking Assns., Inc.* (2001) 531 U. S. 457, 468.]

California courts have adopted a similar skepticism. In *Garcia v. McCutchen* (1997) 16 Cal.4th 469, the court said: "We are not persuaded the Legislature would have silently, or at best obscurely, decided so important... a public policy matter and created a significant departure from the existing law." [*Id.*, 16 Cal.4th at p.482.] Here, where a similar legislative vacuum exists, the same skepticism applies to defeat the enlargement of subsection 1720(a)(2) espoused by the Court of Appeal.

II. THE PWL'S STATUTORY SCHEME EVINCES A LEGISLATIVE INTENT TO LIMIT SUBSECTION 1720(A)(2) TO CONSTRUCTION AND/OR INFRASTRUCTURE- RELATED ACTIVITIES

In trying to divine legislative intent, courts must first examine the statutory language, giving it a plain and commonsense meaning. [*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.] However, the meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.]

Referring to subsection 1720(a)(2), the court in *Azusa,* expressly counseled against "pars[ing] the language of [subsection 1720(a)(2)] in isolation [and] disregarding the other subdivisions of section 1720 and the context of the overall statutory scheme to which it belongs." [*Azusa, supra,* 191

Cal.App.4th at p. 22.] This sentiment was echoed in *Duncan,* where the court likewise instructed that a proper interpretation of section 1720 was not to be "reached by examining bits and pieces of the statute, but after a consideration of all parts of section 1720 in order that we may effectuate the Legislature's intent." [*Duncan, supra* 162 Cal.App.4th at p. 310.] These principles militate against the "plain-meaning" construction adopted by the Court of Appeal.

A. Section 1720(a)'s Public Works Categories are Limited to Construction and/or Infrastructure-Related Activities

Additional evidence that subsection 1720(a)(2) is to be circumscribed by the parameters set forth in subsection 1720(a)(1) is found in the overall scheme of the PWL. To begin with, the very nature of and commonality between the activities the Legislature has chosen to include as "public works" in section 1720(a) reflects an unmistakable purpose to limit public works to construction and infrastructure related undertakings. Labor Code section 1720(a) in its entirety defines eight categories of public works, all involving construction or infrastructure states:

> As used in this chapter, "public works" *means*:
>
> (1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part

out of public funds... For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction ... and...post-construction ...

(2) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type.

(3) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any ...political subdivision or district thereof...

(4) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(5) The laying of carpet in a public building done under contract and paid for ...out of public funds.

(6) Public transportation demonstration projects ... pursuant to Section 143 of the Streets and Highways Code.

> (7)(A) Infrastructure project grants... pursuant to Section 281 of the Public Utilities Code...
>
> (8) Tree removal work done in the execution of a project under paragraph (1).

[*Labor Code*, §1720.]

At the threshold of section 1720(a), the Legislature already signaled its intent to curtail the scope of "public works" by prefacing its enumeration with the word "*means*," an accepted term of *limitation*, instead of "includes," a term of enlargement. [*Duncan, supra* 162 Cal.App.4th at p. 304.]

Further, section 1720(a), considered as a whole, demonstrates that the common thread that distinctly binds its categories of public work together is that each describes activities which consists of or is closely allied with the "construction, alteration, demolition, installation, or repair" of public infrastructure.

Subdivisions (a)(1), (3), (6) and (7), for instance, refer to public construction; street, sewer or similar improvement work; public transportation and public utility projects. All of these activities are classic works of public infrastructure. The "tree removal" category in subdivision (a)(8), meanwhile, must, by express statutory language, be done in "execution of" "construction, alteration, demolition, installation or repair work"

set forth in subsection 1720(a)(1). Finally, the carpet laying work addressed in subdivisions (a)(4) and (a)(5) falls under the "installation" work category of subdivision (a)(1).

The close kinship between these categories establishes a legislative purpose to restrict public works to affiliated activities. It is a cardinal rule of construction that *words grouped in a list should be given related meaning.* [*Third National Bank v. Impac Limited, Inc.* (1974) 432 U.S. 312, 322, 53 L.Ed.2d 368, 376, 97 S.Ct. 2307] These activities are public works "projects," rather than activities involving the operation of the entity or its facilities. It would therefore be anomalous to break subsection 1720(a)(2) from the rest of the pack and imbue it with a significantly different and far more expansive scope than these related subdivisions, as the Court of Appeal has done. [*Third National Bank, supra* 432 U.S. at 322.]

B. Other Sections of the PWL Limit Public Works to Construction and Infrastructure-Related Activities

"Other statutes dealing with the same subject as the one being construed- commonly referred to as statutes in *pari materia*- comprise another form of extrinsic aid useful in deciding questions of interpretation." [*People v. Honig* (1996) 48 Cal.App.4th 289, 327-328.] "Statutes are considered *in pari materia* when they relate to the same person or thing, to the same class of persons [or] things, or have the same purpose or object." [*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 124, fn.

4.] When statutes are *in pari materia*, they should be construed together as one statute. [*City of Huntington Beach v. Board of Administration* (1992) 4 Cal. 4th 462, 468.]

It is telling that elsewhere in Chapter 1 of the Labor Code dealing with "Public Works," statutes *in pari materia* to section 1720(a) uniformly define "public works" using one or all of subsection 1720(a)(1)'s descriptors:

> Section 1720.2: *"Public works" As Including Construction Work Done Under Private Contract.* "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means any *construction work* done under private contract..."
>
> Section 1720.3: *Public Works as including Hauling of Refuse.* "(a) For the limited purposes of Article 2 (commencing with Section 1770), "public works" also means the hauling of refuse from a public works site to an outside disposal location... (b) For purposes of this section, the "hauling of refuse" includes...*hauling soil, sand, gravel, rocks, concrete, asphalt, excavation materials, and construction debris...*"

> Section 1720.6: *"Public Work".* "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public work" also means any *construction, alteration, demolition, installation, or repair work done under* private contract."
>
> Section 1720.7: *Meaning of "Public Work" for Purposes of Article 2.* "For the limited purposes of Article 2 (commencing with Section 1770) of this chapter, "public works" also means *any construction, alteration, demolition, installation, or repair work done* under private contract on a project for a general acute care hospital..."
>
> Section 1750: *Action for Damages.* "(b)(1) "Public works project" means the *construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement, or renovation of a public building or structure.*"

All of these factors reinforce the correctness of the interpretation that confines subsection 1720(a)(2) to construction and/or infrastructure related work.

C. "Public Works" in Other Statutes are Limited to Construction and Infrastructure Related Activities

"Public works" and "public works contracts" are not exclusive to the Labor Code. For at least a century, the basic term "public works" as used in the PWL and in statutes at large, has been a term of general usage.

Even outside the PWL, "public works" has always been used and understood in California statutes to mean the *construction of works to be owned by and used for the benefit of the public.* [*Cutting v. McKinley* (1933) 130 Cal.App. 136, 138 (public works as "all fixed works constructed for public use").] The following are a few of them:

> (i) *Public Contract Code* section 7103(e) provides that "public work" includes the "erection, construction, alteration, repair or improvement of any state structure, building, road, or other state improvement of any kind."
>
> (ii) *Public Contract Code* section 1101 provides: "'Public works contract'... means an agreement for the erection, construction, alteration, repair, or improvement of any public structure,

building, road, or other public improvement of any kind."

(iii) *Public Contract Code* section 22200 contains a similar provision: "As used in this part: (a) 'Public works contract' means ... a contract ... for the erection, construction, alteration, repair, or improvement of any kind upon real property."

Additionally, a wide range of statutes outside of the PWL independently require the payment of prevailing wages. Each of them requires such wage rates only in the context of construction related programs:

(i) *Health & Safety Code* section 50675 "Multifamily Housing Program": This program provides bond financing to pay for low-income housing. Section 50675.4 states that construction related to this program must comply with Labor Code Section 1720 *et seq.*

(ii) *Health & Safety Code* section 50898.2(E) "Downtown Rebound Program": This program uses funds awarded under Item 2240-107-0001 of Section 2.00 of the Budget Act of 2000 to

rehabilitate urban cities. Participants agree to pay prevailing wages on construction projects financially assisted by this program.

(iii) *Health & Safety Code* section 125290.65 "Scientific and Medical Facilities Working Group": This program establishes the composition of The Scientific and Medical Research Facilities Working Group which makes recommendations to the ICOC concerning standards of application, facility milestones, priority applications and the awarding of grants. Those standards include compliance with Section 1720, *et. seq.*

(iv) *Public Utilities Code* section 3354 "Compliance with Public Works and Public Agencies": Provides that any construction of a generation facility must comply with the PWL.

(v) *Government Code* section 63036 "Coordination with Growth Management Strategies": Under this program, the California Infrastructure and Economic Development Bank's activities are to be

coordinated with future legislative plan involving growth. All public works projected funded via this program must comply with Section 1720, *et. seq.*

(vi) *Government Code* section 5956.8 "Plans and Specifications": A facility subject to this chapter and leased to a private entity will be deemed a public property and all work performed pursuant to this section must comply with the PWL.

(vii) *Streets and Highways Code* section 27189 "Repair or Replacement of Structures": This section provides that, in the case of an emergency, the board of directors of a highway or bridge district may immediately replace or repair a structure, roadway or property made unsafe or unusable. Such labor must comply with Section 1720, *et. seq.*

(viii) *Fish and Game Code* section 1350 "Construction of Facilities": This section authorizes the construction of facilities "suitable for the purpose for which the real property or rights in real property or water, or water rights were acquired." All

construction work must comply with the PWL.

These provisions from other sections of the PWL and other statutory schemes in California establish that the California Legislature has consistently defined "public work" in terms of construction and infrastructure-related activities and has applied prevailing wage requirements to only those types of activities. There is no legitimate reason to deviate from this time-tested application in interpreting subsection 1720(a)(2).

III. THERE IS NO LEGAL OR FACTUAL RATIONALE FOR THE DIFFERENTIAL TREATMENT OF SPECIAL DISTRICTS BY THE COURT OF APPEAL

A. The Court of Appeal Offers No Justification forTreating Special Districts Differently Under the PWL

Under the meaning ascribed to subsection 1720(a)(2) by the Court of Appeal, special districts would bear prevailing wage obligations for all work done within their jurisdictions by any contract worker be they public employees or privately contracted; without regard for the type of work being performed or how the work was paid for. In contrast, other government entities would bear the same prevailing wage obligations only if the restrictive criteria in subsection 1720(a)(1) are met.

The Court of Appeal looks to *Azusa* as support for its position. But *Azusa* actually sheds no light on any legitimate

rationale for drawing a distinction between special districts and other political subdivisions vis-à-vis the PWL. Beyond observing that compared to the language of subsection 1720(a)(1), the text of "[s]ubdivision (a)(2) has no similar limitations as to the type of work that may be performed for improvement districts" *Azusa,* offers no insight as whether and why the Legislature would have singled out special districts and saddled them with a public contracting burden heavier than any other governmental entities when it codified the PWL. [*Azusa, supra* 191 Cal.App.4th at p. 20.] The Court of Appeal opinion is equally bereft of an explanation.

Legislative classification must rest upon some substantial and intrinsic difference which suggests a reason for and justifies the particular legislation. *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784. There is no natural, intrinsic distinction between special districts and other political subdivisions as to merit substantially different treatment under the PWL. Nor has the Court of Appeal pointed to any evolving reality or burgeoning issue that would be remedied by the distinction or any reason for assuming that the Legislature intended such disparate treatment. This Court should reject the Court of Appeal's attempt to foist disparate burdens on certain public entities where no distinction is justified.

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B. The Court of Appeal Offers No Justification for Abrogating the Distinction Between Public Works Contracts and General Public Contracts by Special Districts for Purposes of the PWL

The Court of Appeal appears to have been led to its conclusion in part by a concern that laborers contracted to work for irrigation, utility, and similar districts should receive the benefits of the PWL even though they "are not working on construction projects." *Kaanaana, supra* 29 Cal.App.5th at p. 793.

In other words, as to special districts, the Court of Appeal would abrogate any distinction between traditional public works contracts and public contracts in general in the payment of prevailing wages.

The fallacy of this view is that the Legislature can, as it did in the PWL, constitutionally single out a particular segment of industry for regulation and properly draw distinctions between different groups of individuals, provided that, at a minimum, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *O. G. Sansone Co., supra* 55 Cal.App.3d at pp. 458-463.

In *O.G. Sansone,* the court rebuffed an equal protection challenge to the PWL, holding that "there is a natural, intrinsic distinction between public works contracts, on one hand and other public contracts, on the other, and "the Legislature having ascertained the existence of a situation in the field of construction

of public works which called for remedial action could properly act to remedy that situation without making the legislation applicable to every public contract." *Id.*, 55 Cal.App.3d at pp. 458-463.

In sum, while the appellate court's "plain-meaning" construction has superficial appeal if the statutory text is read in isolation, such appeal dissolves rapidly in the face of contrary legislative intent evident in the statutory scheme, its history, background and affiliated sections. This unmistakable intent to protect only work related to construction, alteration, demolition, installation, repair and/or public infrastructure in the PWL prevails over the letter of subsection 1720(a)(2), and the letter should be read as to conform to the spirit of the Act. *Lungren, supra* 45 Cal.3d at p. 735.

As the *Azusa* court urged with specific reference to subsection 1720(a)(2), courts must "choose the construction that comports most closely with the Legislature's apparent intent, and endeavor to promote rather than defeat the statute's general purpose." *Id.*, 191 Cal.App.4th at p. 22. Here, circumscribing the meaning of "work done" in subsection 1720(a)(2) to activities relating to construction, alteration, demolition, installation, repair work or work affecting public infrastructure most rationally dovetails with the PWL's purpose and intent. The Court of Appeal's judgment to the contrary must be reversed.

CONCLUSION

For the foregoing reasons, Defendants and Appellants respectfully request that this Court reverse the judgment of the Court of Appeal.

DATED: May 10, 2019

HINSHAW & CULBERTSON LLP

By: _____
Filomena E. Meyer

Attorneys for Defendants and Appellants

BARRETT BUSINESS SERVICES and MICHAEL ALVAREZ

CERTIFICATE OF COMPLIANCE WITH RULE 8.520

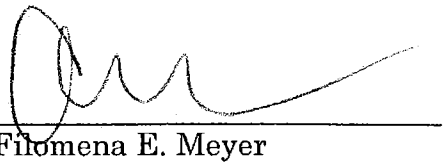
I, the undersigned, Filomena E. Meyer, declare that:

1. I am an attorney licensed to practice in all courts of the state of California and an attorney in the law firm of Hinshaw & Culbertson LLP.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13 point Century Schoolbook typeface. The brief contains 7,791 words, including footnotes, as counted by Microsoft Word 2002, the word-processing program used to generate the brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on May 10, 2019.

By: 

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PROOF OF SERVICE

CASE NAME: KAANAANA, ET AL. V. BARRETT BUSINESS SERVICES, ET AL.
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
CASE NO. S253458

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare as follows: at the time of service, I was at least 18 years of age and not a party to the within action. I am a resident or employed in the county where the within-mentioned service occurred. My business address is 11601 Wilshire Blvd., Suite 800, Los Angeles, CA 90025

On May 10, 2019, I served the foregoing **OPENING BRIEF ON THE MERITS** on the following parties.

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☐ **(BY ELECTRONIC FILING SYSTEM, COURT OF APPEAL):** I caused such document(s) to be delivered electronically via CM/ECF as noted herein.

I declare under penalty of perjury under the laws of the State Of California that the foregoing is true and correct.

Executed this 10th day of May 2019, at Los Angeles, California.

VERONICA PEREZ

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