S253458

IN THE SUPREME COURT OF CALIFORNIA

DAVID KAANAANA et al.,

Plaintiffs-Appellants,

v.

BARRETT BUSINESS SERVICES, INC., et al.,

Defendants-Respondents.

ANSWER BRIEF ON THE MERITS

Second Appellate District, Division Eight-Nos. B276420, B279838
Los Angeles County Superior Court-No. BC496090
The Honorable John Shepard Wiley, Jr., Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes and Statutes

Legislative Materials

Other Authorities

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, subdivision (a)(2) of California's Prevailing Wage Law (Labor Code §§ 1720 et seq.) should be interpreted to cover any type of work regardless of its nature, funding, purpose or function, including belt sorting at recycling facilities.

INTRODUCTION

By its text, subdivision (a)(2) of Labor Code section 1720 ("subdivision (a)(2)" or "the Statute") covers "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type," but excludes "the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages." The Statute should be construed to cover, at the very least, the operation work of the covered districts. Otherwise, the exclusion of "the operation of the irrigation or drainage system" would be meaningless, and the exception to the exclusion would mean that "the operation of the irrigation or drainage system" is the only type of operation work for which the taking of workers' wages is felonious under Labor Code section 1778. When the "work done for" phrase is read in conjunction with this exclusion, it is apparent that the Legislature intended for prevailing wages to be paid when contractors do the operation work of the covered districts "for" (i.e.,"in place of") the districts, unless that work involves operating an irrigation or drainage system.

It is undisputed that the belt sorting work here is operation work of the two recycling facilities. This case does not, therefore, present the question whether the Statute should be interpreted to cover any other types of work.

Construing subdivision (a)(2) to cover operation work gives effect to the Legislature's intent in codifying the language in question in the 1937 Labor Code. The Legislature knew that the then-existing California statutes that had not limited their definitions of "public works" to "construction and repair work" were broad enough to include "operation work." The Legislature also knew that those statutes were not prevailing wage laws but instead regulated hours of labor and employment of aliens.

Still the Legislature chose to import from those statutes the "work done for" phrase now in subdivision (a)(2), and to apply that phrase not just to the articles on "Working Hours" and "Employment of Aliens" but to the "Public Works" chapter as a whole, including the article on "Wages" in which the prevailing wage law, section 1771, was codified. By structuring the statutory scheme this way, the Legislature made the prevailing wage law applicable to public work that previously had only been subject to restrictions regarding hours of labor and employment of aliens. The Legislature acknowledged as much, revising its description of the work subject to the prevailing wage law from *construction of* public works to *employment on* public works, and redefining "the locality in which the public work is performed" from the place where *the building or other structure is situated* to the county in which *the public work is done.*

To be sure, the 1937 codification of the State's labor and employment statutes largely restated existing law. This Court has recognized, however, that sometimes the alterations made through codification results in a change in meaning. By consolidating and revising the then-existing definitions of "public works" in the manner in which it did in the Labor Code, the Legislature changed the meaning of the term vis-à-vis its meaning in the predecessor prevailing wage law.

Construing the Statute to cover operation work also furthers the purposes of the prevailing wage law. When covered districts contract out operation work, they transfer to nonpublic employees work at the core of their statutory duties, work that otherwise would have been performed by their own employees. The specific goals of the prevailing wage law include compensating nonpublic employees with higher wages for the absence of protections enjoyed by public employees and benefiting the public with superior efficiency through a well-paid workforce. Requiring payment of prevailing wage rates serves these goals where, as here, nonpublic employees operate the systems that enable the districts to fulfill their public function.

STATEMENT OF FACTS

A. The Work at Issue

County Sanitation District No. 2 of Los Angeles County (the "District") is a "county sanitation district" organized under the County Sanitation District Act, Health and Safety Code, section 4700 *et seq.*, which "provides for the raising of funds by means of a bonded indebtedness to meet the expense of

improvements made" by the districts. (*Inglewood v. County of Los Angeles* (1929) 207 Cal. 697, 701.) The Act further "provides that the district may levy taxes 'sufficient to meet' its bonds and 'all other expenses incidental to the exercise' of its powers." (*County Sanitation Dist. Number One v. Humeston* (1951) 103 Cal.App.2d 301, 306-307.) This includes the power to "maintain and operate within the district boundaries a system for transfer or disposal of refuse, or both." (Health & Saf. Code, § 4741.)

The District maintains and operates such a system for transfer and disposal of refuse at the Downey Area Recycling and Transfer Facility in the City of Downey and the Puente Hills Materials Recovery Facility near the City of Whittier. (1 CT 70.) Both facilities operate similarly. (1 CT 72.)

Trucks dump incoming loads of refuse onto the facility's "tipping floor." (1 CT 72.) Some of those loads are directly transferred to a landfill for disposal while other loads are selected for recovery of recyclables. (1 CT 72.) With respect to the loads selected for recovery of recyclables, the District's own employees spread out the loads to expose recyclable materials such as scrap wood, scrap steel, cardboard, mixed paper, concrete, and asphalt. (1 CT 72.) Contracted employees sort these materials into bins or piles for the District to ship to market. (1 CT 72.)

The remainder of the load is then placed onto a conveyor belt where contracted employees called "belt sorters" are stationed. (1 CT 72.) There are sorting stations along the conveyor belt. (2 CT 341.) The belt sorters stand at the sorting stations along the conveyor belt sorting through the materials

that pass by on the belt. (2 CT 342.) Belt sorters remove recyclable materials from the conveyor belt and place them into receptacles at their sorting station. (2 CT 342.) These materials include cardboard, newspaper, mixed paper, office paper, aluminum cans, plastic film and containers, and glass. (1 CT 72.) The residual waste not recovered from the conveyor belt is transferred to a landfill for disposal. (1 CT 72.)

In 2007, the District requested proposals for labor services for operating the materials recovery system at both facilities. (1 CT 67-117.) Barrett Business Services, Inc. ("BBSI") was awarded the contract for that operation work. (2 CT 265-266.) The purchase order issued by the District described the work to be performed by BBSI as "labor services for staffing and operating" the facilities "as needed for the separation of recyclable materials." (2 CT 260.) The contract was extended in 2009 and again in 2011. (2 CT 277, 292.)

B. The Procedural History

Plaintiffs were appointed to represent a certified class of belt sorters employed by BBSI between April 15, 2011 and September 30, 2013. (2 CT 342.) As relevant here, Plaintiffs alleged that the class of belt sorters should have been paid prevailing wage rates "because they performed work for County Sanitation District No. 2 of Los Angeles County, which is an 'improvement district' or 'other district of this type' within the meaning of Labor Code section 1720(a)(2)." (1 CT 18-19.) BBSI moved to strike the prevailing wage allegations. (1 CT 31-33.)

The trial court granted BBSI's motion. (2 CT 363-368.) It reasoned that subdivision (a)(2) did not apply "because sorting recyclables on a belt was not '[c]onstruction, alteration, demolition, installation, or repair work[.]' (Lab. Code, § 1720, subd. (a)(1).)" (2 CT 368.)

The court of appeal reversed. (*Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 798.) It held that "the 'construction' language limiting the definition of 'public works' in subdivision (a)(1) of section 1720 does not also limit the definition of 'public works' in subdivision (a)(2) of that statute." (*Ibid.*)

The court of appeal also rejected BBSI's argument "that the 'operations' exception applies." (*Id.* at p. 797.) BBSI had argued that "[e]ven if this Court were to adopt the construction of 'work done' proffered by Plaintiffs, it avails them nothing since the belt sorting activity in this case constituted 'operation' of the recycling facilities" and subdivision (a)(2) "exempts from the definition of 'public work' the operational work of an eligible district." (Defs.' Ct. App. Br. at p. 36.) In support of this argument, BBSI represented that "there is nothing more endemic to the operation of a recycling center than the process of sorting and separating recyclables" and that "'operations' is precisely how the Contract between BBSI and the District characterizes the services being undertaken by BBSI's employees at the facilities." (*Ibid.*)

The court of appeal found this argument to be "foreclosed by the plain language of the statute." (*Kaanaana, supra*, 29 Cal.App.5th at p. 798.) The court explained that "the operations

exception applies only to the specific 'operation of the irrigation or drainage system of any irrigation or reclamation district,' not the operation of all of the identified districts in general. (§ 1720, subd. (a)(2).)" (*Ibid.*) Because "[t]he operation of a recycling system for a sanitation district is not the operation of an irrigation or drainage system of an irrigation or reclamation district[,]" the court found the exception inapplicable. (*Ibid.*)

ARGUMENT

"In interpreting a statute," the Court begins "with its text, as statutory language typically is the best and most reliable indicator of the Legislature's intended purpose." (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 157.) The Court considers "the ordinary meaning of the language in question as well as the text of related provisions, terms used in other parts of the statute, and the structure of the statutory scheme." (*Ibid.*) If, after having considered the statute's text and structure, "the statutory language in question remains ambiguous," the Court "may look to various extrinsic sources, such as legislative history, to assist ... in gleaning the Legislature's intended purpose." (*Id.* at p. 158.)

Labor Code section 1771 requires that "all workers employed on public works" be paid "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." (Lab. Code, § 1771.) Subdivision (a)(2) is one of several alternative definitions of "public works" in the Labor Code for which a prevailing wage rate must be paid. (See Lab. Code, §§ 1720,

subds. (a)(1)-(a)(8); 1720.2; 1720.3; 1720.6; 1720.7; 1720.9.) The Statute defines "public works" as:

> Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" does not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(Lab. Code, § 1720, subd. (a)(2).)

While there are now many additional definitions of "public works" in the Labor Code, when the Legislature enacted the language in question as subdivision (b) of section 1720 in 1937, it had just three:

> (a) Construction or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Railroad Commission or other public utility.
>
> (b) Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in sections 1850 to 1854 of this code relating to employment of aliens, and section 1778 relating to retaining wages.
>
> (c) Street, sewer or 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 or district thereof, whether such political subdivision or district operates under a freeholder's charter or not.

(Stats. 1937, ch. 90, § 1720, p. 241.) Subdivision (b) was renumbered (a)(2) in 2001. (Stats. 2001, ch. 938, § 2, p. 7510.) Because the language in question here was enacted in 1937, that Legislature's intent is controlling. (*People v. Williams* (2001) 26 Cal.4th 779, 785 ["As always, we begin with the statute and seek to ascertain the Legislature's intent at the date of enactment."].)

As established below, the ordinary meaning of the language in question and the text of related provisions, the structure of both the "Public Works" chapter and section 1720 of the 1937 Labor Code, and the legislative origin and history of the Statute's phraseology all support construing subdivision (a)(2) to cover the operation work of the covered districts not expressly excluded.[1]

I. THE ONLY WAY TO GIVE MEANINGFUL EFFECT TO EVERY PART OF SUBDIVISION (a)(2) IS TO CONSTRUE THE "WORK DONE FOR" PHRASE TO COVER OPERATION WORK.

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.) "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted;

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[1] As noted, BBSI argued below that "the belt sorting activity in this case constituted 'operation' of the recycling facilities." (Defs.' Ct. App. Br. at p. 36 ["There is nothing more endemic to the operation of a recycling center than the process of sorting and separating recyclables."].) Accordingly, this case does not present the question whether the Statute should be interpreted to cover any types of work other than operation work.

and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (Code Civ. Proc., § 1858.)" (*Ibid.*; see also *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284 ["In interpreting that language, we strive to give effect and significance to every word and phrase."].)

Because "the Legislature does not engage in idle acts, and no part of its enactments should be rendered surplusage if a construction is available that avoids doing so" (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087), the phrase "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type" should be construed to cover the operation work of the covered districts. If the phrase did not at least include operation work, there would have been no necessity for the Legislature to exclude "the operation of the irrigation or drainage system of any irrigation or reclamation district," and it "cannot [be] assume[d] that the Legislature intended to do a useless thing." (*Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, 652.)

This construction also gives meaningful effect to the clause "except as used in Section 1778 relating to retaining wages." Labor Code section 1778 makes it a felony to, "in connection with services rendered upon any public work," take "any portion of the wages of any worker." (Lab. Code, § 1778.) If the "work done for" phrase in subdivision (a)(2) did not cover operation work, then "the operation of the irrigation or drainage system" would be the only type of operation work for which it would be a felony under

section 1778 to take workers' wages. There is no apparent reason why the Legislature would have intended that bizarre result. That the clause was drafted as an exception to an exclusion to coverage makes it far more likely that the Legislature intended to subject all operation work to section 1778's criminal prohibition of wage theft.[2]

The nature of the work excluded gives meaning to the "work done for" phrase. Operation of the covered districts' systems is not just any work but the *very* work that the Legislature entrusted to the districts. It "connotes the day-to-day business of running the system" and "is frequently done by employees of the district." (*Reclamation Dist. No. 684 v. Department of Industrial Relations* (2005) 125 Cal.App.4th 1000, 1006.) When that work is contracted out, nonpublic employees do the work that enables the districts to fulfill their public function.

In this context, the word "for" is most reasonably construed to mean "in place of" or "instead of" rather than a "recipient of."

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[2] As originally enacted, the clause provided "except as used in sections 1850 to 1854 of this code relating to employment of aliens, and section 1778 relating to retaining wages." (Stats. 1937, ch. 90, § 1720, subd. (b), p. 241.) Labor Code section 1850 prohibited employment "on public work any alien" subject to very narrow exceptions. (Stats. 1937, ch. 90, § 1850, p. 246.) There is no apparent reason why the Legislature would have intended that broad prohibition to apply to "the operation of the irrigation or drainage system" but not to other types of operation work. In 1969, this Court struck down Labor Code section 1850 on constitutional grounds. (*Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566.) Thereafter, the Legislature repealed Labor Code sections 1850 to 1854, and amended the Statute to delete the cross-reference to those laws. (Stats. 1970, ch. 652, § 1, p. 1276; Stats. 1973, ch. 77, § 19, pp. 129-130.)

This accords with the understanding of the word "for" at the time of the Statute's enactment. (Webster's Inter. Dict. of the English Lang. (1907) p. 581 ["Indicating that in place of or instead of which anything acts or serves, or that to which a substitute, an equivalent, a compensation, or the like, is offered or made; instead of, or in place of."].) When the word "for" is given its proper meaning, it is apparent that the Legislature intended subdivision (a)(2) to apply when a covered district "contracts out all or portions of the operation of its ... system in lieu of using its own employees to operate it." (*Reclamation Dist., supra*, 125 Cal.App.4th at p. 1006, fn. 8.)

BBSI argues that subdivision (a)(2) should be interpreted to cover only construction and infrastructure work. That interpretation, of course, renders the Statute's exclusion surplusage. If construction and infrastructure work are the only types of covered work, then the Legislature engaged in an idle and useless act when it excluded certain "operation" work. Such an interpretation that makes part of a statute meaningless or inoperative is precluded. (*Manufacturers Life Ins., supra*, 10 Cal.4th at p. 274.)

Moreover, because the words "construction" and "infrastructure" are not used anywhere in subdivision (a)(2), BBSI's argument requires the Court, "under the guise of construction," to "rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) Had the Legislature in 1937

intended to limit the Statute to construction and infrastructure work, "it could have readily done so." (*Ibid.*) Indeed, because the Legislature *did* do so in subdivision (a) of section 1720, now codified as subdivision (a)(1), "it should not be implied where excluded." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118.)

To embrace BBSI's interpretation, the Court would have to engraft onto subdivision (a)(2) the limitations that the Legislature explicitly included in subdivision (a)(1) but did *not* include in subdivision (a)(2). The Court has declined to do so in such circumstances. (E.g., *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 727.) This is because "[w]hen language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful" (*In re Ethan C.* (2012) 54 Cal.4th 610, 638), and "[a] court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73-74.)

II. THE STRUCTURE OF BOTH THE PUBLIC WORKS CHAPTER AND SECTION 1720 OF THE 1937 LABOR CODE IS INDICATIVE OF THE LEGISLATURE'S INTENT TO REQUIRE PREVAILING WAGES FOR PUBLIC WORK THAT PREVIOUSLY HAD ONLY BEEN SUBJECT TO RESTRICTIONS ON HOURS OF LABOR AND EMPLOYMENT OF ALIENS.

Chapter 1 of Part 7 of Division II of the 1937 Labor Code governed "Public Works." (Stats. 1937, ch. 90, p. 241.) The chapter was divided into four articles: Article 1 defined the

chapter's "Scope and Operation;" Article 2 governed "Wages;" Article 3 governed "Working Hours;" and Article 4 governed "Employment of Aliens." (*Id.* at pp. 241-246.)

In Article 1 defining the chapter's "Scope and Operation," the Legislature decided that a single definition of "public works" should apply to the entire chapter. (*Id.* at § 1720, p. 241 ["As used in this *chapter* 'public works' means:"], emphasis added.) This was a marked departure from the Legislature's then-existing regulation of public works, which had consisted of a patchwork of subject-matter-specific statutes each of which defined "public works" somewhat differently. (See Stats. 1931, ch. 397, § 4, pp. 911-912; Stats. 1931, ch. 398, § 3, p. 914; Stats. 1931, ch. 1144, p. 2432; Stats. 1933, ch. 174, p. 621.)

In 1931, for example, the Legislature had simultaneously enacted the Public Wage Rate Act and the Public Works Alien Employment Act. (Stats. 1931, ch. 397, p. 910; Stats. 1931, ch. 398, p. 913.) The former statute required payment of prevailing wages to workers "engaged in the construction of public works."[3] (Stats. 1931, ch. 397, § 1, p. 910.) The latter statute prohibited "upon any public work" the employment of aliens. (Stats. 1931, ch. 398, § 1, p. 913.) While both statutes regulated "public works," each used different language to define the term.

The Public Wage Rate Act provided:

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[3] The Public Wage Rate Act was not the State's first public works minimum wage law but instead "replaced a law from the late 19th century that required payment of at least $ 2 per day for labor on public works. (Stats. 1897, ch. 88, § 1, p. 90.)" (*State Building & Construction Trades Council v. City of Vista* (2012) 54 Cal.4th 547, 554, fn. 2.)

> Construction work done for irrigation, utility, reclamation, improvement and other districts, or other public agency or 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, whether such 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, other than work done directly by any public utility company pursuant to order of the railroad commission or other public authority, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds, shall be held to be "public works" within the meaning of this act.

(Stats. 1931, ch. 397, § 4, pp. 911-912.)

The Public Works Alien Employment Act provided:

> Work done for irrigation, utility, reclamation, improvement and other districts, or other public agency or 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, whether such political subdivision, district or municipality thereof operates under a

> freeholder's charter heretofore or hereafter approved or not, other than work done directly by any public utility company pursuant to order of the railroad commission or other public authority, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds, shall be held to be "public works" within the meaning of this act.

(Stats. 1931, ch. 398, § 3, p. 914.)

Other public works statutes used even different language. Former Penal Code section 653c, which restricted the hours of labor "upon any public works" to eight in one day, provided:

> Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type, as well as street, sewer or other improvement work done under the direction and supervision of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not, shall be held to come within the provisions of this section; provided, however, that nothing in this section shall apply to the operation of the irrigation or drainage system of any irrigation or reclamation district.

(Stats. 1931, ch. 1144, p. 2432.)[4]

Former Penal Code section 653g, which prohibited charging "a fee or valuable consideration" for securing employment on public work, stated:

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[4] Former Penal Code section 653c is discussed in greater detail in Part III, *infra*, at pp. 30-34. As is evident from the statute's text, it is the origin of the language now in subdivision (a)(2).

> The term "public work" as used in this section means and includes the construction, alteration, addition to, repair or improvement of any public building, highway, road, tunnel, sewer, excavation, irrigation project or other structure, project, development or improvement, and includes also construction, alteration and repair work done for irrigation, utility, reclamation and improvement districts, and other districts of this type, as well as street, sewer and other improvement work, done under the direction and supervision of the State, or of any political subdivision, district or municipality thereof, whether such political subdivision, district or municipality operates under a freeholder's charter heretofore or hereafter approved or not.

(Stats. 1933, ch. 174, p. 621.)

In codifying the Labor Code, the Legislature jettisoned this patchwork quilt in favor of a seamless web. Instead of making one definition applicable to Article 2 governing "Wages," another definition applicable to Article 3 governing "Working Hours," and yet another definition applicable to Article 4 governing "Employment of Aliens," the Legislature crafted a single integrated definition taken from parts of these statutes and made it applicable to the "Public Works" chapter as a whole. (See Stats. 1937, ch. 90, § 1720, p. 241; California Code Commission, Proposed Labor Code (1936) p. 85 (hereafter "Code Commission Note") ["The provisions common to all these definitions have been placed in the above section."].) Indeed, the Legislature itself described its work as "[a]n act to establish the Labor Code,

thereby consolidating and revising the law relating to labor and employment relations, and to repeal acts and parts of acts specified herein." (Stats. 1937, ch. 90, p. 185, emphasis added; cf. *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1194-1195 [citing analogous language in the Insurance Code in support of the statement that "in enacting the code the Legislature actually revised the law relating to insurance."].)

When the Legislature intended to retain parts of the quilt, it stated that intention explicitly. Thus, the Legislature stated that a broader definition of "public works" applied to certain Labor Code provisions relating to employment of aliens and retaining wages. (Stats. 1937, ch. 90, § 1720, subd. (b), p. 241.) The Legislature did not, however, state that a narrower definition of "public works" applied to Labor Code section 1771, requiring payment of prevailing wage rates. (*Id.*, § 1720, p. 241.)

The Legislature also structured the integrated definition so that its three parts were coequal and operated independently of each other. (*Ibid.*) By codifying the definitions as subdivisions (a), (b) and (c) of section 1720, and not subordinating any one subdivision to any other, the Legislature precluded a construction whereby the words in one subdivision operate to modify or limit the words in another. (Accord *Estate of Earley* (2009) 173 Cal.App.4th 369, 375 [A subdivision's language is not affected by a "separate and coequal part" of a statute that the subdivision "is not subordinate to, or a subpart of."].)

The Legislature's structuring of the statutory scheme in this manner, together with its simultaneous repeal of the Public

Wage Rate Act (Stats. 1937, ch. 90, p. 328), "strongly suggests the Legislature intended to change the law" (*People v. Mendoza* (2000) 23 Cal.4th 896, 916) to require payment of prevailing wages for public work that previously had only been subject to restrictions regarding hours of labor and employment of aliens. (*Kaanaana, supra*, 29 Cal.App.5th at pp. 794-795 ["When the Labor Code was codified in 1937, the Legislature put multiple provisions applicable to 'public works' in the same place, and combined their definitions of 'public works.' This had the effect of broadening the definition of 'public works' beyond simply construction work as it applied to the prevailing wage law."].)

This intention is reflected in the prevailing wage law itself. Whereas the Public Wage Rate Act had been limited to workers "*engaged in the construction of* public works" (Stats. 1931, ch. 397, § 1, p. 910, emphasis added), the Legislature enlarged the prevailing wage law in the Labor Code to include workers "*employed on* public works." (Stats. 1937, ch. 90, § 1771, p. 243, emphasis added.) Similarly, whereas the Public Wage Rate Act had defined the "locality in which public work is performed" to mean the place where "*the building, highway, road, excavation, or other structure, project, development or improvement is situated*" (Stats. 1931, ch. 397, § 4, p. 912, emphasis added), the Legislature redefined that term in the Labor Code to mean "*the county in which the public work is done.*" (Stats. 1937, ch. 90, § 1724, p. 241, emphasis added.) "When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that

the Legislature intended a difference in meaning." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 463.)

It is, of course, true that codification of the prevailing wage law generally resulted in "a revised, but substantively unchanged, version of the same law." (*State Building & Construction Trades Council, supra*, 54 Cal.4th at p. 555.) Thus, "[t]he 1937 law, like the 1931 law, directed the 'body awarding any contract' to 'ascertain the general prevailing rate of per diem wages in the locality ... for each craft or type of workman needed to execute the contract.' (Stats. 1937, ch. 90, § 1773, p. 243; see Stats. 1931, ch. 397, § 2, p. 910.)" (*Ibid.*) But the fact that "the prevailing wage law's *general* purpose and scope remain[ed] *largely* unchanged" following codification (*ibid.*, emphasis added), does not mean that in every case the prevailing wage provisions of the Labor Code must be construed identically to the Public Wage Rate Act, regardless of any linguistic differences.[5]

This Court rejected a similar argument in *In re Trombley* (1948) 31 Cal.2d 801, disagreeing with the lower court's holding that a wage payment statute "had not been changed by codification" in the 1937 Labor Code. (*Id.* at p. 807.) That case concerned a constitutional challenge to Labor Code section 216

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[5] The Legislature in 1937 intended for the provisions of the new code to be construed as restatements and not new enactments only "*in so far as they are substantially the same as existing provisions relating to the same subject matter.*" (Stats. 1937, ch. 90, § 2, p. 185, emphasis added.) For the reasons discussed *supra*, the definition of "public works" in the Labor Code is not "substantially the same as" the definition in the Public Wage Rate Act, and thus may be construed as a new enactment.

alleging that it conflicted with the prohibition against imprisonment for debt. Labor Code section 216 had made it a misdemeanor for any person who:

> (a) Having the ability to pay, wilfully refuses to pay wages due and payable when demanded.
>
> (b) Falsely denies the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due.

(*Id.* at p. 805.)

This Court noted that "[t]he former statute was construed to require a wrongful intent to defraud the employee where the employer was charged, as here, with having the ability to pay and wilfully refusing to pay wages, and it was held that the statute did not conflict with the constitutional guaranty against imprisonment for debt." (*Id.* at p. 806.) Nevertheless, this Court rejected the attorney general's argument that Labor Code section 216 should be given the same construction. The Court explained:

> Ordinarily, a mere change in phraseology or punctuation in the codification of an existing law will not be construed to have changed its meaning since the principal objects of the code commission in revising the statutes are to restate and clarify existing law and to correct inadvertent errors. Sometimes, however, the language of the prior statute is altered so as to change the meaning placed upon

> the former statute with the result that a change in the law is made through codification. We are faced with that situation here.
>
> The making of two subdivisions out of the former section, the placing of a period between those subdivisions, and the deletion of the word "or" between the acts of wilfully refusing to pay and falsely denying the amount or validity of wages have made it impossible for subdivision (a) to be modified by the last clause of subdivision (b) which requires an intent "to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due." As the section is now cast in the Labor Code, under subdivision (a), an employer, "having the ability to pay," who "wilfully refuses to pay wages due and payable when demanded" is guilty of a misdemeanor, and under subdivision (b), an employer, *regardless of ability*, who "falsely denies the amount or validity" of a claim for wages "or that the same is due" with the intent specified therein is guilty of a misdemeanor. *In re Trombley*, 78 Cal.App.2d 528 [178 P.2d 510], proceeded on the theory that the statute had not been changed by codification, and the holding in that case must, therefore, be disapproved.

(*Id.* at pp. 806-807, internal citations omitted, emphasis in original.)

The same is true with respect to the definition of "public works" codified in Labor Code section 1720 vis-à-vis the definition in the Public Wage Rate Act. By adopting a single integrated

definition of "public works" derived from statutes including, but not limited to, the Public Wage Rate Act; by structuring that definition so that its parts were coequal and operated independently of each other; and by making that definition applicable to the "Public Works" chapter as a whole including the article on "Wages" and section 1771 in particular, the Legislature "made it impossible" to limit the construction of "public works" in the 1937 Labor Code to how the term had been defined in the Public Wage Rate Act.

III. THE LEGISLATURE KNEW THE "WORK DONE FOR" PHRASE INCLUDED "OPERATION WORK" YET DECLINED TO LIMIT THE PREVAILING WAGE LAW TO "CONSTRUCTION AND REPAIR WORK."

In arriving at the definition of "public works" in the 1937 Labor Code, the Legislature relied on the work of the California code commission, which had been mandated by statute "to immediately enter upon a revision of all the laws of this state." (Stats. 1929, ch. 750, § 2, p. 1428.) The code commission, in turn, considered how the term had been defined in five then-existing California statutes. (Code Commission Note, *supra*, [explaining that "[t]he term 'public work' is defined in" Stats. 1931, ch. 397, p. 910 "re prevailing wages on public work;" Stats. 1931, ch. 398, p. 913 "re employment of aliens on public work;" Stats. 1931, ch. 1144, p. 2430 "re hours of labor on public work;" Stats. 1933, ch. 154, p. 606 "re retaining wages of employees;" and Stats. 1933, ch. 174, p. 620 "re fees for obtaining work."].) While only one of the statutes concerned prevailing wages, "[t]he provisions common to all these definitions" were included in the definition of

"public works" in section 1720 of the 1937 Labor Code.[6] (*Ibid.*)

The "work done for" phrase at issue in this case first entered the public works lexicon in 1929 as an amendment to former Penal Code section 653c. (Stats. 1929, ch. 793, p. 1602.) Enacted at the turn of the last century, former Penal Code section 653c prohibited the government and its contractors "upon any public works" from requiring or permitting "any laborer, workman, or mechanic" to work more than "eight hours during any one calendar day." (Stats. 1905, ch. 505, p. 666.) The statute did not originally define the "public works" that were subject to its eight hour limitation. (*Ibid.*)

In 1920, before the statute was amended to include the "work done for" phrase in dispute here, this Court affirmed a judgment holding that the statute did not apply to city firefighters. (*Danielson v. Bakersfield* (1920) 184 Cal. 262.) In a terse opinion, this Court construed the statute to apply "to persons engaged as workmen of some kind upon public work or employed by some city or other public authority and actually engaged in labor." (*Id.* at p. 263.)

In 1929, the Legislature introduced a bill to amend former Penal Code section 653c. The bill proposed that the statute be amended to provide:

> Work done for irrigation, utility, reclamation and improvement districts, and other districts of this type, as well as street, sewer or other improvement work done under the direction

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[6] The retaining wages statute did not actually define the term. (See Stats. 1933, ch. 154, p. 606.) The definitions in the other statutes are quoted in the body of Part II, *supra*, at pp. 21-24.

> and supervision of the state, or of any political subdivision or district thereof, whether such political subdivision or district operates under a freeholder's charter or not, shall be held to come under the provisions of this section.

(Assem. Bill No. 132 (1929 Reg. Sess.), as introduced Jan. 10, 1929.)

Prior to its enactment, the Legislature amended the bill to add the following proviso:

> provided, however, that nothing in this section shall apply to the operation of the irrigation or drainage system of any irrigation or reclamation district.

(*Ibid.*, as amended May 1, 1929; Stats. 1929, ch. 793, p. 1602.)

The addition of this proviso indicates that the original authors of the "work done for" phrase understood it to cover operation work. (*People ex rel. Happell v. Sischo* (1943) 23 Cal.2d 478, 493 ["It is an accepted rule of statutory construction that a proviso is used to limit and qualify that which immediately precedes it and to expressly negative a construction that would prevail in the absence of the proviso. Likewise, the general rule is that that which is excepted from the operation of the statute by the proviso would, in the absence of the proviso, have been included within the general words of the statute."].)[7]

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[7] When the proviso was codified in the Labor Code, the words "provided, however, that nothing in this section shall apply to" were replaced by the words "[p]ublic work' shall not include." (See Stats. 1937, ch. 90, § 1720, subd. (b), p. 241.) But that was not intended to change the function of the proviso. (See Code Commission Note, *supra*, [explaining that "the exception" in subdivision (b) was taken from former Penal Code section 653c].)

Two years later, the Legislature employed substantially the same "work done for" phrase in the Public Works Alien Employment Act. (Stats. 1931, ch. 398, § 3, p. 914.) The Legislature did not, however, include the proviso from former Penal Code section 653c excluding the operation of the irrigation or drainage system. (*Ibid.*)

In a note following the "public works" definition in the proposed Labor Code, the code commission explained:

> The only definitions which seem broad enough to include as public work the operation of irrigation and drainage districts, are D. A. 6430 (aliens) and Pen. C. 653(d) (retaining wages). *The other statutes have either expressly exempted such operation or by the use of such words as "construction and repair work" have excluded operation work.*

(Code Commission Note, *supra*, emphasis added.)[8]

Prior to enacting the language in question in the 1937 Labor Code, the Legislature was thus made aware that statutes like former Penal Code section 653c and the Public Works Alien Employment Act were broad enough to cover "operation work" because they had not used words such as "construction and repair work." Despite that awareness, the Legislature opted to use the same "work done for" phrase from those statutes in defining the

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[8] The Court "will consider the code commissioners' notes when they do not conflict with other persuasive evidence of legislative intent and particularly where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill." (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 125.)

work that would be subject to the code's prevailing wage requirements. Construing the Statute's "work done for" phrase to cover operation work is, therefore, consistent with the Legislature's understanding of the phrase at the time of its enactment. (See *People v. Cruz* (1996) 13 Cal.4th 764, 775. ["The words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment."].)[9]

In arguing that the Legislature intended to limit subdivision (a)(2) to construction and infrastructure work, BBSI relies on what the Legislature intended when it enacted the Public Wage Rate Act in 1931, what Congress intended when it enacted the federal Davis-Bacon Act, and what future Legislatures intended when they subsequently enacted various other statutes in various other contexts. But those pieces of legislation are not indicative of what the Legislature intended in 1937 when it codified the language in question in the Labor Code. (*People v. Frawley* (2000) 82 Cal.App.4th 784, 793 ["Questions of legislative intent must be considered as of the time when the enactment under scrutiny was adopted."].)

The Legislature settled on that language after considering the five California statutes identified by the code commission. (Code Commission Note, *supra*.) There is no indication that the

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[9] The Statute was amended in 1973 to delete the cross reference to sections 1850 to 1854 and in 2002 to substitute the word "does" for the word "shall." (Stats. 1973, ch. 77, § 19, pp. 129-130; Stats. 2002, ch. 1048, § 1, p. 6778.) The Legislature's failure to make any changes to the "work done for" phrase on those occasions "is indicative of an intention to leave the law unchanged in that respect." (*Bishop v. San Jose* (1969) 1 Cal.3d 56, 65.)

Legislature ever considered the Davis-Bacon Act. (*Ibid.*) And each of the other statutes on which BBSI relies, with the sole exception of the Public Wage Rate Act, was enacted decades later and does not purport to amend subdivision (a)(2).[10] Because "[t]he task of the courts is to determine what the Legislature intended at the time it enacted a statute, not to speculate on what the Legislature might have done had it enacted the statute at a later time when other factors were present" (*People v. Bonnetta* (2009) 46 Cal.4th 143, 151), these subsequently enacted statutes shed no light on the meaning of subdivision (a)(2).

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[10] See Stats. 1957, ch. 754, § 1 [adding what is now section 1350 to the Fish and Game Code]; Stats. 1957, ch. 1455, § 1 [adding section 27189 to the Streets and Highways Code]; Stats. 1972, ch. 717, § 1 [amending Labor Code section 1720 to include laying of carpet now codified in subdivisions (a)(4) and (a)(5)]; Stats. 1974, ch. 1027, § 1 [adding section 1720.2 to the Labor Code]; Stats. 1976, ch. 1084, § 1 [adding section 1720.3 to the Labor Code]; Stats. 1982, ch. 1120, § 3 [adding section 1101 to the Public Contract Code]; Stats. 1989, ch. 278, § 1 [amending Labor Code section 1720 to include public transportation demonstration projects now codified in subdivision (a)(6)]; Stats. 1991, ch. 906, § 1 [adding section 1750 to the Labor Code]; Stats. 1994, ch. 94, § 1 [adding section 63036 to the Government Code]; Stats. 1996, ch. 1040, § 1 [adding section 5956.8 to the Government Code]; Stats. 2000, ch. 957, § 1 [amending section 50675.4 of the Health and Safety Code]; Stats. 2001, ch. 10, § 1 [adding section 3354 to the Public Utilities Code]; Stats. 2001, ch. 938, § 2 [amending Labor Code section 1720 to include installation work in subdivision (a)(1)]; Stats. 2011, ch. 698, § 1 [adding section 1720.6 to the Labor Code]; Stats. 2014, ch. 900, § 1.5 [amending Labor Code section 1720 to include infrastructure project grants codified in subdivision (a)(7)]; Stats. 2015, ch. 745, § 1 [adding section 1720.7 to the Labor Code]; Stats. 2018, ch. 92, § 160 [amending Labor Code section 1720 to include tree removal work codified in subdivision (a)(8)].

BBSI's reliance on the in pari materia canon of statutory construction is unavailing. Even accepting the assertion that each of the various later-enacted statutes is in pari materia with subdivision (a)(2),[11] that would simply require that they "be construed together so that all parts of the statutory scheme are given effect." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091.) While "[i]dentical language appearing in separate provisions dealing with the same subject matter should be accorded the same interpretation" (*Walker, supra*, 47 Cal.3d at p. 132), none of those statutes uses the same language as subdivision (a)(2) in defining "public works." (See statutes cited *supra* note 10.) Thus, construing subdivision (a)(2) to cover operation work does no violence to those statutes.

BBSI seems to be arguing that to the extent those statutes apply only to construction and infrastructure work, subdivision (a)(2) must be "harmonized" so that it too applies only to construction and infrastructure work. But harmonization "does not authorize courts to rewrite statutes." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956.) "[T]he requirement that courts harmonize potentially inconsistent

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[11] This Court has explained that "different statutes should be construed together only if they stand in pari materia." (*Walker, supra*, 47 Cal.3d at p. 124, fn. 4.) "Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person of things, or have the same purpose or object." (*Ibid.*) "Characterization of the object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other." (*Ibid.*) "It has been held that where the same subject is treated in several acts having different objects the statutes are not in pari materia." (*Ibid.*)

statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." (*Ibid.*) Because the Legislature defined "public works" differently in subdivision (a)(2), it cannot be redefined under the semblance of "harmonization." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328 [similar statutory terms defined differently "should not be rewritten under the guise of an in pari materia construction."].)

IV. CONSTRUING SUBDIVISION (a)(2) TO COVER OPERATION WORK FURTHERS THE OBJECTIVES OF THE PREVAILING WAGE LAW TO ENCOURAGE SUPERIOR EFFICIENCY AND TO COMPENSATE NONPUBLIC EMPLOYEES FOR DOING THE CORE WORK OF THE DISTRICTS' PUBLIC FUNCTION.

The general purpose of the prevailing wage law "to benefit and protect employees on public works projects" includes within it the specific goals "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* (1992) 1 Cal.4th 976, 987.) These goals are served by requiring payment of prevailing wages when a covered district "contracts out all or portions of the operation of its ... system in lieu of using its own employees to operate it." (*Reclamation Dist., supra*, 125 Cal.App.4th at p. 1006, fn. 8.)

In such circumstances, covered districts in effect transfer their statutory responsibilities to nonpublic employees. While that choice is theirs to make, they must pay those nonpublic employees higher wages to encourage superior efficiency for the public's benefit and to compensate them for doing the core work

of the districts' public function without the protections and benefits afforded public employees.

The court of appeal articulated this principle in *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785. That case involved a contract with the California Department of Transportation to prune trees along state highways. In finding that work to be "maintenance" work covered by the prevailing wage law, the court reasoned:

> Caltrans is responsible for maintaining thousands of miles of paved roads and highways. For reasons not disclosed in the record, it has elected not to do all of that maintenance with its own personnel. Having chosen to employ civilian contractors to perform that work, Caltrans is in effect sharing its statutory responsibility. This type of decision is clearly compatible with the Prevailing Wage Law, for otherwise the statute would be meaningless: if a state or local agency used its own employees, there would never be a need for a contract with a private party.

(*Id.* at pp. 796-797, internal citations omitted.)

This principle applies with particular force here because, as noted, operation work "connotes the day-to-day business of running the system" and "is frequently done by employees of the district." (*Reclamation Dist.*, *supra*, 125 Cal.App.4th at p. 1006.) If covered districts could instead delegate such work at the core of their public function to nonpublic employees without paying prevailing wage rates, then the prevailing wage law's "objectives would be defeated" and subdivision (a)(2) would be reduced "to

merely an advisory expression of the Legislature's view." (*Lusardi*, *supra*, 1 Cal.4th at pp. 987-988.)

CONCLUSION

This Court should interpret subdivision (a)(2) to cover the operation work of the covered districts not expressly excluded.

Dated: July 17, 2019

Respectfully submitted,

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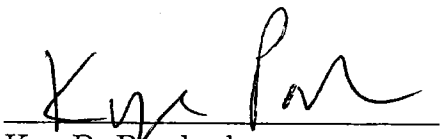
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the foregoing Answer Brief on the Merits contains 8,377 words.



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PROOF OF SERVICE

I, Kye D. Pawlenko, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen and not a party to this action. My business address is 595 East Colorado Boulevard, Suite 303, Pasadena, California 91101.

On July 17, 2019, I served this **ANSWER BRIEF ON THE MERITS** by enclosing the document in a sealed envelope with the postage fully prepaid and depositing it with the United States Postal Service addressed as set forth below.

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

7/17/19	Kye D. Pawlenko	Kye D. Pawlenko
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)