S251135

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN BUSKER,
Plaintiff and Appellant,

v.

WABTEC CORPORATION, et al.,
Defendants and Respondents,

On Certification from the United States Court of Appeals for the Ninth Circuit
Case No. 17-55165

Judge Otis D. Wright, II, Case No. 15-cv-08194-ODW-AFM

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE*; BRIEF OF *AMICUS CURIAE* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 6 IN SUPPORT OF PLAINTIFF AND APPELLANT.

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.520 of the California Rules of Court, the International Brotherhood of Electrical Workers, Local Union No. 6, as an interested party to this action, hereby applies for permission to file the attached amicus curiae brief in this case.

I. INTEREST OF THE APPLICANTS

The International Brotherhood of Electrical Workers, Local Union No. 6 ("IBEW") is an unincorporated association representing over two thousand electricians in San Francisco, California. The right of those members to be paid the prevailing wage on public works projects will be directly affected by this action.

Countless electricians work in facilities maintained off-site of a public works project, performing work which is essential and integral to the public works project. This Court's disposition of the issue of whether off-site work performed on a prevailing wage project is subject to the prevailing wages will affect all electricians in California, and the IBEW is thus greatly interested in the outcome of this case.

II. HOW THE PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTER

IBEW will present arguments and clarifications that will assist the Court in appreciating the full history and context surrounding California's prevailing wage jurisprudence. The proposed brief will focus on the

question of whether work performed off site is subject to the prevailing wage law, and thus must be compensated at the prevailing wage rate.

The proposed brief will discuss the evolution of the California courts' prevailing wage jurisprudence, as applied to off-site work on public works projects. The discussion will focus on the history and context of the two lines of cases identified by the Ninth Circuit in its order certifying the question to this Court. *Busker v. Wabtec* (9th Cir. 2018) 903 F.3d 881, 885-886. The proposed brief will discuss how the Court of Appeal's decisions can be reconciled to present a single "integration" test, which should be confirmed by this Court.

The proposed brief will also explain how the "integration" test, which was first described by the Court of Appeal in *O.G. Sansone Co. v. Dept of Transp.* (1976) 55 Cal.App.3d 434, was misapplied and misused in *Sheet Metal Workers Intl Assn v. Duncan* (2014) 229 Cal.App.4th 192. That misapplication and misuse has led to the confusion experienced by the Ninth Circuit, and thus this Court should disavow *Duncan* and affirm the otherwise consistent application of the "integration" test.

III. CRC 8.520(f)(4) DISCLOSURE

The proposed *amicus* brief was authored by the individuals identified on the cover caption. No entity or person, other than *amicus*, has made a monetary contribution intended to fund the preparation or submission of the brief.

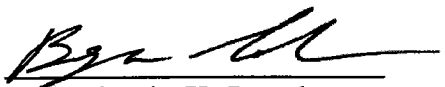
IV. CONCLUSION

For the aforementioned reasons, *Amicus Curiae* International Brotherhood of Electrical Workers, Local Union No. 6 respectfully requests that the Court accept the enclosed brief for filing and consideration.

Dated: June 14, 2019

Respectfully submitted,

NEYHART, ANDERSON
FLYNN & GROSBOLL

By: 
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PROPOSED AMICUS CURIAE BRIEF

I. INTRODUCTION

The Ninth Circuit certified two questions to this Court: whether the work performed by plaintiffs falls within the definition of public works under Labor Code § 1720(a)(1), as either "construction" or "installation" work or, in the alternative, whether the work falls within that definition in that it is integral to the other work performed on the project. *Busker v. Wabtec* (9th Cir. 2018) 903 F.3d 881, 883.

This brief examines the second question – whether work performed off-site from a public works project falls within the definition of public works under Labor Code § 1720(a)(1) in that it is integral to other work performed on the project.

In certifying this question to this Court, the Ninth Circuit described its dilemma as stemming from what it saw as two divergent lines of cases on the subject. Per the Ninth Circuit, the first line of cases begins with *O.G. Sansone Co. v. Dept of Transp.* (1976) 55 Cal.App.3d 434, continuing to *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742 and culminating in *Sheet Metal Workers v. Duncan* (2014) 229 Cal.App.4th192.

The second purported lines of cases begins with *Oxbow Carbon v. Dept of Indus. Relations* (2011) 194 Cal.App.4th 538 and continues to *Cinema West v. Baker* (2017) 13 Cal.App.5th 194. The Ninth Circuit described the first line of cases as asking whether "the work in question is

truly independent of the contract construction activities – i.e. whether it is integrated into the flow process of construction." *Wabtec*, 903 F.3d at 886. The Ninth Circuit describes the second line of cases as asking whether "the work at issue and the work that is indisputably covered by the prevailing wage law together result in a 'complete integrated object.'" *Id.*.

Amicus submits that this is a false dichotomy. As discussed herein, both lines of cases describe the test for prevailing wage coverage as a test of integration.

This Court has not had cause to consider the application of the prevailing wage law to off-site work, and this case represents an opportunity for the Court to define the scope of the prevailing wage law. That scope should be in keeping with this Court's prior pronouncements as to the purpose of the prevailing wage law:

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

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987

As discussed herein, the broad integration test developed by the Courts of Appeal beginning with *O.G. Sansone* should be adopted by this Court and applied in this case. This Court should disavow the contrary reading of *Sheet Metal Workers v. Duncan* and conclude that the off-site work in this case, as it was an integral aspect to the system being constructed or installed, constitutes work covered by the prevailing wage law.

II. ARGUMENT

A. The History and Evolution of the "Integration" Test

As discussed above, *amicus* maintains that the Courts of Appeal have developed a single and consistent line of interpretation as to the coverage of off-site work, with the exception of the decision in *Sheet Metal Workers v. Duncan.*

The test was first described as a test of whether the work was an "integrated aspect of the 'flow' process of construction." *O.G. Sansone Co. v. Dept of Transp.* (1976) 55 Cal.App.3d 434, 444. Applying the test, the *O.G. Sansone* court concluded that "on-hauling" work which was an "integral part of plaintiffs' obligation under the prime contract" was covered by the prevailing wage law. *Id.* at 445. Relying on and applying the *Sansone* test, the court in *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742 concluded that the test required addressing following factors:

> [W]hether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.

Id. at 752.

The *Williams* court applied the above-quoted factors in order to determine if the "off-hauling" work in question qualified as an "integrated aspect of the flow process of construction." *Id.* at 754. While the *Williams* court concluded that there was insufficient evidence to conclude that the work at issue in *Williams* was subject to the prevailing wage law, it endorsed two prevailing wage determinations made by the Department of Industrial Relations (DIR). *Id.* at 753-754.

In endorsing those two DIR decision, the *Williams* court applied two of the three factors, concluding that off-hauling was covered by the prevailing wage law (and thus an "integrated aspect of the flow process of construction") in two scenarios: (1) when the off-hauling was "specifically incorporated into the public works project" and (2) when the off-hauling was "functionally related to the process of the particular works project." *Id.* at 754.

The *Williams* court did not provide an example of a scenario in which the prevailing wage law applied because "the work was performed on the project site or another site integrally connected to the project site."

However, the *Williams* court did state that "What is determinative is the role the transport of the materials plays in the performance or 'execution' of the public works project." *Id.* at 752.

Thus, *Williams* stands for the proposition that if any of the three factors it describes are present, then the work in question is an "integrated aspect of the flow process of construction" and the prevailing wage must be paid for that work.

Following *Williams*, the Court of Appeal next considered the scope of what constitutes a public work[1] in *Oxbow Carbon & Minerals v. Dept of Indus. Relations* (2011) 194 Cal.App.4th 538. The *Oxbow* court, in considering the scope of § 1720(a)(1), concluded that "construction" means the creation of a "complete integrated object." *Id.* at 549. In reaching that conclusion, the *Oxbow* court relied on this Court's approving citation of several dictionary definitions which define "construction" as "the act of putting parts together to form a complete integrated object" and "the action of framing, devising or forming, by the putting together of parts; erection;

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[1] Cases interpreting the scope of Labor Code § 1720(a)(1) should be read no differently than cases interpreting Labor Code § 1771 or § 1772. Because § 1771 and § 1772 apply to workers employed on "public works," the scope of the term "construction" as used in § 1720 to define "public works" have a direct effect on cases brought under § 1771 or § 1772. *See, Reliable Tree Experts v. Baker* (2011) 200 Cal. App. 4th 785, 795 ("Read together, section 1720 and 1771 both define the scope of what constitutes a 'public work.'").

building." *City of Long Beach v. Dept of Indus. Relations* (2004) 34 Cal.4th 942, 951.

While the *Oxbow* court does not rely on *Sansone* or *Williams*, it interprets the scope of Labor Code § 1720(a)(1) in a manner consistent with those cases. The *Oxbow* court described its interpretive approach as follows:

> This approach is consistent with the term 'construction' throughout section 1720. Numerous subdivisions refer to construction in terms of a complete product, **and none limits the term to the formation of individual pieces of a whole.**

Oxbow, 194 Cal.App.4th at 549 (emphasis added).

The *Oxbow* court thus reads the term "construction" broadly,[2] encompassing individual pieces of a whole, and emphasizes the determination of whether the work in question resulted in a "complete integrated object." *Cinema* follows this same approach and finds that " the parking lot was necessary to the theater just as the new conveyors were to the roof enclosure in *Oxbow*" in completing the public works project.

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[2] Broad readings of the prevailing wage law are commonly made by the Courts of Appeal, following this Court's directives in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987. *See, e.g. Plumbers & Steamfitters v. Duncan* (2007) 157 Cal.App.4th 1083, 1089 ("Any construction work" as used in Labor Code § 1720.2 includes not only construction of a new building, but also renovation of an existing structure.")

Cinema W., LLC v. Baker (2017) 13 Cal. App. 5th 194, 214, 220.*Oxbow and Cinema* are in line with *Sansone* and *Williams'* focus on the "flow process of construction." Reading *Sansone, Williams* and *Oxbow* together leads to the conclusion that the "flow process of construction" relied upon by *Sansone* and *Williams* results in the "complete integrated object" relied upon by *Oxbow.*

This is demonstrated by examining the three factors identified by the *Williams* court:

> (1) Whether the transport was required to carry out a term of the public works contract;
>
> (2) Whether the work was performed on the project site or another site integrally connected to the project site;
>
> (3) Whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.

See, Williams v. SnSands Corp. (2007) 156 Cal.App.4th 742, 752.

When circumstances arise such that a factor is satisfied, and thus prevailing wages are due, the factor is satisfied precisely because it results in a "complete integrated object." If the work is required to carry out a term of the contract, then carrying out that work is necessarily integral to the project, and results in a complete integrated object. If the work is performed on the project site it is naturally integral to completing the integrated object. If the work is performed off-site and is necessary to

fulfill the contract, that work is necessarily integral to the completion of the final project – the integrated object itself.

Thus, this Court should affirm the evolution of the "flow process of construction" standard established in *Sansone*, and conclude that if work is performed off-site, which is integral to the system being constructed, resulting in a complete integrated object, then it falls within the scope of § 1720(a)(1), and must be compensated at the prevailing wage rate per § 1771 or § 1772.

B. *Sheet Metal Workers v. Duncan* Conflicts with the Purpose of the Prevailing Wage Law

The above discussion notably excludes a single case – *Sheet Metal Workers v. Duncan* (2014) 229 Cal.App.4th 742. That is by design. This Court should disavow *Sheet Metal Workers*, as it deviates from *Sansone* and *Williams*, and conflicts with *Oxbow* and *Cinema West*, as well as this Court's conclusions in *City of Long Beach v. Dept of Indus. Relations* (2004) 34 Cal.4th 942. Allowing *Sheet Metal Workers* to stand would undermine the very purpose of the prevailing wage law, as described by this Court in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.

This Court has described the purpose of California's prevailing wage law (Labor Code §§ 1720 – 1861) as follows:

> The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: **to protect employees from substandard**

> **wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors**; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 987 (emphasis added)

The decision in *Sheet Metal Workers v. Duncan* directly undermines at least two of the goals identified in *Lusardi*. It allows non-union contractors to establish permanent, off-site fabrication facilities, and then pay employees at those facilities low wages to process materials and fabricate components or assemblies which are specific and integral to the public works project. This undermines the ability of union contractors to compete with non-union contractors, as union contractors contractually agree to pay all employees at the union wage rate[3], while non-union contractors can pay as little as minimum wage to employees fabricating components essential to the project.

In the electrical context, this type of off-site fabrication work can be extensive. Electrical workers perform work on electrical conduits, cable trays, junction boxes, and other materials, fixtures, and equipment, each of which may be specially formed, altered, combined, or otherwise processed

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[3] The union wage rate is typically the prevailing wage rate.

in a manner specific to the public works project. This fabrication work can be performed on or off-site. A union contractor must pay the union wage rate for such fabrication work, whether performed on-site or off-site. However, a non-union contractor may evade the prevailing wage rate by simply establishing a permanent fabrication facility in a low wage area, and then send specifications from the public works project to the facility, for fabrication at low wages.[4]

This scenario further undermines the purpose of the prevailing wage law as expressed in *Lusardi* in that it accomplishes what *Lusardi* forbids – the recruitment of labor from distant cheap-labor areas. In this case, the work itself is moved off-site of the public works project, and relocated to the cheap-labor area, for the purpose of evading the prevailing wage.

Furthermore, enabling a scheme by which certain employees, who otherwise would be employed on the public works site itself, are allowed to be paid low wages undermines the central purpose of the prevailing wage law: protecting and benefitting employees on public works projects.

Endorsing such a scheme does not comport with the Legislative admonition to "protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by

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4 *Amicus* is familiar with non-union contractors employing this precise strategy to pay low wages for the fabrication of essential components of electrical systems in public works projects.

failing to comply with minimum labor standards." Labor Code § 90.5(a); *See also, Lusardi,* 1 Cal.4th at 985.

C. *Sheet Metal Workers v. Duncan* Misreads *Sansone* and *Williams*

Despite ostensibly applying the test and factors of *Sansone* and *Williams*, *Sheet Metal Workers v. Duncan* misreads those cases. The *Sheet Metal Workers* court initially admits that *Sansone* and Williams "set forth a general framework for considering whether certain functions are integral to the performance of a public works project." *Id.* at 205-206. The *Sheet Metal Workers* court highlights the question of whether "an operation is truly independent of the contract construction activities – i.e., whether it is integrated into the flow process of construction." *Id.* at 206.

However, while the *Sheet Metal Workers* court initially discusses *Sansone* and *Williams*, it ultimately concludes that those cases are not dispositive, but only provide "useful general guidelines." *Id.* at 207.

In reaching that conclusion, the *Sheet Metal Workers* court flatly misreads the import of the three factors identified in *Williams* and discussed above. *Williams* make it clear that if any one of the three factors are satisfied, then the work in question is integrated into the flow process of construction. *Williams* endorsed two prevailing wage determinations made by DIR, and each determination rested on a different factor identified by the *Williams* court. *Williams,* 156 Cal.App. at 753-754.

Sheet Metal Workers, to the contrary, erroneously suggests that all Williams factors must be satisfied. *Id.* at 206. That court stated that the union "seems to ignore the first two factors . . . and instead focuses almost exclusively on the third – whether the offsite work was 'necessary to accomplish or fulfill the contract." *Id.* at 206. The court further states that the third factor, "considered alone," provides "little or no more guidance" than the statutory language of § 1772. *Id.* at 206.

This constitutes a fundamental misreading of *Williams*. Under *Williams*, each factor stands alone as a separate basis to conclude that work is integrated into the flow process of construction, and thus covered by the prevailing wage law. This misreading is compounded by the *Sheet Metal Workers* court when it writes that a "task that could be considered necessary to fulfill a contract might nonetheless have little relation to the flow of the construction process." *Id.* at 206-207.

If work is necessary to fulfill a public works contract, and that work forms an integral part of the completed public work (resulting in a "complete integrated object"[5]), then the work was part of the flow process of construction.

For example, in the electrical context, the bending, cutting, coupling, and support of conduit to fit in the physical environs of the public work are

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5 *City of Long Beach v. Dept of Indus. Relations* (2004) 34 Cal.4th 942

integral parts of the contractor's obligation under the public works contract. So is the wiring of electrical panels and junction boxes.

Just because some of the work is relocated to a remote facility to avoid paying the prevailing wage does not disqualify it for coverage, as it is done in parallel with work on site, with coordinated drawings and specifications. It is done in preparation for final assembly within the public work. These types of specialized items processed off site are an integral part of the contractor's obligation under the public work contract, and contrary to *Sheet Metal Workers,* are part of the flow process of construction.

Sheet Metal Workers cautions against interpreting prevailing wage law broadly in fear that "any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law, regardless of where it takes place or whether it plays a substantial role in the process of construction." *Id.* at 201-202. This warning overlooks the fact that off-site work often plays an integral role in public work projects.

There is no question that if materials are fabricated on site, the workers employed are entitled be paid the prevailing wage. If that work is moved off site, and fabricated in parallel and specifically for the public work, there should be no difference in the wage treatment for those employees.

D. Just As This Court Has Prohibited Contracting Around the Prevailing Wage, It Should Prohibit Migrating Work Off-Site to Evade the Law

In *Lusardi*, this Court rejected an effort to contract around the prevailing wage law, stating:

> To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. **To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.**

Id. at 987-988 (emphasis added).

This principle, to read the coverage of the prevailing wage law broadly, and reject arguments that provide for end-runs around the prevailing wage law, has been followed by the Courts of Appeal. *See, e.g., State Building & Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 324 (liberal construction of prevailing wage law leads to low income tax credits being treated as public funds for prevailing wage purposes); *Azusa Land Partners v. Dept of Indus. Relations* (2010) 191 Cal.App.4th 1, 36 ("According to *Lusardi*, however, the PWL does not permit parties to an agreement to carve up the individual components of an overall project into publicly and privately financed pieces).

That principle should apply equally to an employer migrating work off the site of a public works project, for the purpose of evading its

prevailing wage obligations. Just as an employer cannot structure its contracts with a public entity to evade paying the prevailing wage, an employer should not be permitted to structure the location of work, which is essential and integral to the completed public work, to evade paying the prevailing wage.

III. CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court conclude that off-site work which is integral to the system being constructed is covered by the prevailing wage law, and disavow *Sheet Metal Workers v. Duncan* (2014) 229 Cal.App.4th 192.

Dated: June 14, 2019

Respectfully submitted,

NEYHART, ANDERSON,
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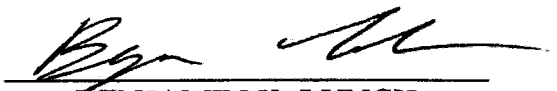
No. 6

STATEMENT AS TO LENGTH OF BRIEF

Pursuant to Rules 8.520 of the Rules of Court, counsel for *Amicus Curiae* hereby certify: this brief was produced on a computer using Microsoft Word. The word count for the brief, in reliance on the computer program used to produce this brief is 4,350 words, including footnotes.

Dated this 14th day of June, 2019



BENJAMIN K. LUNCH

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 369 Pine Street, Suite 800, San Francisco, California 94104. On June 14, 2019, I served the within:

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE*; BRIEF OF *AMICUS CURIAE* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 6 IN SUPPORT OF PLAINTIFF AND APPELLANT

on the parties in said cause following our business practice, with which I am readily familiar. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I placed a true copy of the within document enclosed in a sealed envelope with first class postage thereon fully prepaid for collection and deposit on the date shown below in the United States mail at San Francisco, California addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 14, 2019 at San Francisco, California.

Tonie Bouyer

Tonie Bouyer

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