Supreme Court Number S251135

In the Supreme Court of the State of California

JOHN BUSKER,

Plaintiff and Appellant,

v.

WABTEC CORPORATION, ET AL.,

Defendants and Respondents,

On Certified Question
from the United States Court of Appeals
For the Ninth Circuit, Case No. 17-55165
Judge Otis D. Wright, II
No. 2:15-cv-08194-ODW-AFM

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION and AMERICAN PUBLIC TRANSPORTATION ASSOCIATION

IN SUPPORT OF RESPONDENTS WABTEC CORPORATION AND MARK MARTIN

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant California Rules of Court, rule 8.520(f), the League of California Cities (League), California State Association of Counties (CSAC), the California Association of Sanitation Agencies (CASA), California Special Districts Association (CSDA), and the American Public Transportation Association (APTA) respectfully request permission to file the attached amici curiae brief in support of defendants and respondents Wabtec Corporation and Mark Martin (collectively Wabtec).[1]

The League of California Cities (League) is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. These cities regularly engage in publicly funded projects and have a significant interest in the sound and equitable development of California prevailing wage law. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The

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[1] The League, CSAC, CASA, CSDA and APTA certify that no person or entity other than the League, CSAC, CASA, CSDA and APTA and their counsel authored this proposed brief in whole or in part and that no person or entity other than the League, CSAC, CASA, CSDA, and APTA and their members or their counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The California Association of Sanitation Agencies (CASA) represents over 100 public agencies engaged in the collection, treatment or disposal of wastewater, resource recovery or water recycling. CASA provides trusted leadership, advocacy, and information to members, legislators and the public on clean water and renewable resource legislation and law.

The California Special Districts Association (CSDA) is a California non-profit corporation consisting of approximately 1,000 special district members throughout California. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution, sewage collection and

treatment, fire suppression and emergency medical services, recreation and parks, security and police protection, solid waste collection, transfer, recycling and disposal, library, cemetery, mosquito and vector control, road construction and maintenance, pest control and animal control services, and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA had identified this case as having statewide significance for special districts.

The American Public Transportation Association (APTA) is a nonprofit international association of 1,500 public and private sector organizations representing a $71 billion-dollar industry that directly employs 430,000 people and supports millions of private sector jobs. APTA's member organizations include public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and state departments of transportation. APTA monitors litigation of concern to its members and identifies cases that have national significance. APTA has determined that this case has national significance because it could impact how other states define "public works."

Amici have a direct interest in the outcome of this case. The appellant's position that all work performed pursuant to a

government contract requires payment of a prevailing wage, even if the work performed is not public work, will likely affect all transit services and public entities providing transit services under publicly funded contracts. Further, a decision that creates uncertainty or confusion about the types of work that constitutes "public works" creates uncertainty for all public agencies and entities and threatens to disrupt long-planned and budgeted city, county and district projects designed to serve the public. As the Ninth Circuit Court of Appeals recognized in certifying the question to this Court, the resolution of the statutory interpretation issues presented in this matter conceivably "will have profound legal, economic, and practical consequences for employers and employees who work on publicly-funded projects in the state of California." Amici are among those who may be profoundly affected by the decision in this case.

Amici agree with and support Wabtec's position that construction or installation on rolling stock does not qualify as "public work" because it is not attached to realty and further, the onboard work was not integral to completion of the field work that does constitute a public work. As Wabtec explained in its briefing on the merits, adoption of plaintiff's position would effectively eliminate the requirement that the work be necessary to construction of a public work and would expand prevailing wage coverage beyond the Legislature's intent.

The League, CSAC, CASA, CSDA and APTA believe their proposed amici curiae brief will assist the Court in deciding this case. Not only does it advise the Court of the practical and economic impact of the Court's decision, but it offers a different perspective on the issues the parties raise. (See *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 77 [denying motion to strike arguments in amici brief].)

Accordingly, amici respectfully request that this Court accept and file the attached amici curiae brief.

DATED: July 12, 2019

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AMICI CURIAE BRIEF

INTRODUCTION

California's prevailing wage laws have their origin in public works affixed to realty such as buildings, highways, bridges and streets. As the definition of public works has been refined by the Legislature over the years since the enactment of the Labor Code in 1937, the definition has always been tethered to construction of a fixed public work. Work performed on rolling stock, including locomotives and rail cars, however, has not been subject to the application of prevailing wage laws.

The position advocated by plaintiff—that installation work performed on rolling stock is subject to the prevailing wage requirements—is unsupported by the historical origins of the prevailing wage laws and decades of existing precedent and long-standing quasi-legislative interpretations by the Department of Industrial Relations ("DIR")—the very agency the Legislature charged with making prevailing wage determinations. Under plaintiff's vague proposed rule, all publicly owned transit vehicles could be considered public works. Even routine maintenance or upgrade work performed on buses, vans, trolley cars could be subject to the prevailing wage laws. And, the laws could be interpreted as even applying to vehicles used only for support services by cities, counties, special districts and other local agencies could be considered public works subject to the prevailing wage laws. That was never the intent of the Legislature. Such a rule constitutes a radical departure from longstanding precedent relied on by

local governments in planning, budgeting and funding future services involving transit vehicles that are designed to serve their communities.

Furthermore, adoption of a rule interpreting work on rolling stock as requiring payment of prevailing wages will create uncertainty, increased litigation and increased public liability. For all of these reasons, the court should decline to stray beyond the ordinary meaning of public works as construction projects or infrastructure on realty in answering the certified question.

I. Plaintiff's interpretation of the application of the prevailing wage law to the onboard work Wabtec performed breaks with the long-standing understanding of public works.

A. Public works are consistently defined as works on realty.

In this statutory interpretation case, the goal is to ascertain the intent of the Legislature so that the Court may adopt the construction that best effectuates the purpose of the law. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087.) In interpreting California Labor Code §1720(a)(1), the historical origins of California's prevailing wage laws are an important consideration in determining the Legislature's purpose.[2] Tracing the origins of the statute demonstrates the

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[2] Unless otherwise indicated, all statutory references are to

deeply rooted connection of the prevailing wage laws to physical works of construction on realty.

The need for establishing a minimum wage was driven by the glut of workers caused by the Great Depression and the ability of unscrupulous contractors on government building contracts to import migratory labor at far below local rates to underbid local contractors. (*U.S. v. Binghamton Construction Co.* (1954) 347 U.S. 171, 176-177, 98 L.Ed. 594, 599, 74 S.Ct. 438.) In 1931, the federal government commenced an extensive public building program to benefit the country at large through distribution of construction throughout the country. (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, 1921).)

Congress also enacted the Davis-Bacon Act (40 U.S.C. §§ 3141-3148) to establish minimum wages to be paid for "construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government. . . ." (*Id.* at § 3142.)

Under the Davis-Bacon Act, "construction" was defined as: "All type 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

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the Labor Code.

C.F.R., subd. 5.2(j)(1).) [3]

For the same reasons as did the federal government, California concurrently enacted its own Public Works Wage Rate Act applicable to laborers, workmen and mechanics engaged in construction of public works. (Stats. 1931, ch. 397, p. 910; *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 294-295.) California's prevailing wage laws' historical focus on construction-related activity on physical structures on realty has been consistent and long-standing.

A year after they were enacted, the California Supreme Court upheld the prevailing wage laws as constitutional in *Metropolitan Water Dist. v. Whitsett (Whitsett)* (1932) 215 Cal. 400. In *Whitsett,* the court described the character of the work that the prevailing wage law was intended to apply to as work performed by "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." (*Id.* at p. 415.) Plainly, these occupations perform construction work on physical facilities affixed to

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[3] California courts have regularly turned to the Davis-Bacon Act for guidance on issues not clearly answered by California authority. (*Mendoza v. Foseca McElroy Grinding Co.* (2019) 913 F.3d 911, fn. 6.)

realty.

Almost 40 years later, the court in *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, reaffirmed that the prevailing wage legislation, its history, and cases interpreting California's prevailing wage law and the Davis-Bacon prevailing wage law "show clearly that prevailing wage legislation was designed to benefit the *construction worker on public construction projects*." (*Id.* at p. 461, italics added.)

Currently, the Department of Industrial Relations' website hosts lists of the prevailing wage determinations made by the Director of Industrial Relations for journeymen and apprentices. (See, https://www.dir.ca.gov/OPRL/DPreWageDetermination.htm.) These lists reflect occupations that remain very much in line with those the court in *Whitsett* described in 1932 as plainly within the scope of the prevailing wage law. And, just as in 1932, the occupations listed relate to physical construction of works on realty, including such occupations as building inspectors, cement masons, elevator constructors, landscape laborers, pile drivers, traffic control laborers, and tunnel workers. (See, e.g. https://www.dir.ca.gov/OPRL/2019-1/PWD/Northern.html; https://www.dir.ca.gov/OPRL/2019-1/PWD/Southern.html.) None of the existing wage determinations relate to work on moveable objects such as rolling stock.

Later additions to the statutory definition of public work in section 1720(a), which historically originated in construction of infrastructure attached to realty, are likewise confined by the common thread of relating to fixed works performed on realty. As originally enacted in 1937, public works was defined in section 1720 as, (a) construction or repair work, (b) work done for irrigation, utility, reclamation and improvement districts, and (c) street, sewer or other improvement work. (§ 1720 (a)-(c).) Later statutory amendments to the definition of public works in section 1720 likewise were tied to work fixed to realty. These include the of laying of carpet in a building, public transportation demonstration projects (construction of highway, public street, rail, or related facilities), infrastructure project grants and tree removal work.(§ 1771, subds. (a)(4)-(8).) Although the Legislature has shown its ability to clarify the definition of public works to include the construction of rail facilities, it has not extended the definition of public works to work performed on rolling stock.

Interpretations that stray from the plain language of prevailing wage statutes should be rejected. Here the interpretation offered by plaintiff is at odds with the statutory language defining public works in sections 1771(a) and 1772. This Court should not adopt an interpretation that is inconsistent with what the Legislature has said in the statutory language and what it could have said, but did not. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950 [courts "cannot interfere where the

Legislature has demonstrated the ability to make its intent clear and chosen not to act."] (internal quotation marks omitted); *State Bldg., supra,* 162 Cal.App.4th at p. 324.).)

Furthermore, the Legislature bestowed on the Department of Industrial Relations "quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws." (§ 1773.5, subd. (d).) As Wabtec discusses, the DIR has consistently specifically determined that maintenance/repair of rolling stock is not covered under the prevailing wage laws. (ABOM 27.) Indeed, the DIR has denied prevailing wage coverage on two occasions for nearly identical work to that performed by plaintiff here—"installation of equipment in District trains, buses and other vehicles"—because that work is "not covered work under the Labor Code." (Robbins, Counsel for Department of Industrial Relations, *Southern California Rapid Transit District — Transit Radio System* (Dec. 28, 1987) [10 ER 2139]; Robbins, Counsel for Department of Industrial Relations, *Response to Contract Management Transportation Division, Westinghouse Electric Corporation* (Dec. 11, 1987) [10 ER 2140].) As Wabtec points out in its answering brief, subsequent DIR interpretations have made coverage determinations that consistently exclude rolling stock, including not only work on trains, but on such transit vehicles as police motorcycles, ships and barges. (ABOM 28 and DIR interpretations cited therein.)

The DIR's interpretations should be given heavy weight in ascertaining the Legislature's intent. Indeed, the DIR is the very agency charged with deciding whether work is subject to the payment of prevailing wage or not. (See § 1773.5 (d) ["The director shall have quasi-legislative authority to determine coverage of projects or types of work."].) The DIR must also determine what the prevailing wage should be. (§ 1773.) Furthermore, cities, counties, districts and agencies rely on the DIR's wage determinations both with respect to coverage of the work and the prevailing rate for that work in planning, budgeting and contracting for their projects. Predictability is critical to the ability of numerous governmental entities providing important public services to plan and budget for the cost of those services.

Even if not given deference (as these determinations should be), the DIR's interpretations are at the very least a useful "interpretive tool" that is helpful in understanding the definition of public works as meaning those physical infrastructures that are attached to realty. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951.) The DIR's coverage determinations have consistently affirmed that placing equipment on rolling stock is not a public work. A different interpretation would, as the 9th Circuit Court of Appeals noted in its order certifying the question to this Court, "arguably require an extension of the state law (and implicit disapproval of the interpretation of the state agency tasked with enforcing the law). . . ." If such an extension were

to be made, it should be made by the Legislature.

B. Plaintiff's test strays far from the original intent and purpose behind the prevailing wage laws.

Plaintiff seeks to impose prevailing wage requirements on the placement of equipment on rolling stock even though the work being performed is not integral to the flow process of construction of a public work. Plaintiff advocates for an unwarranted and extraordinarily broad test that looks at whether the onboard work constitutes public work because it is integral to or necessary for completion of the PTC system called for in the general contract. Plaintiff proposes that the test should be, "[W]hether the subject work was required to be performed under the general contract and was integral to the functional completion of the public works aspect of the project." (RBOM 21.)

Naturally, all work subcontracted under a general contract is work that is required to be performed under the general contract. However, here, the public works aspect of the PTC project consisted of field installation work, i.e. construction work on realty. Plaintiff's work was not necessary for the completion of the field work. Neither the Legislature or any California court has interpreted the test for public works as broadly as plaintiff proposes and for good reason. Under plaintiff's broad test, the work being performed could be unrelated to the construction process. Plaintiff's interpretation would guarantee a prevailing wage to workers who are not

performing public work. Plaintiff's interpretation of the prevailing wage law exceeds the statutory purpose of providing for prevailing wages to employees employed in the execution of a contract for construction of a public work. The potential reach and implications of such a broad rule are vast and unbounded by any statutorily tethered limitation.

III. Plaintiff's expansive interpretation of public works would disrupt city projects and impair the ability of cities, counties and special districts to fund future projects to the detriment of their communities.

As discussed above, plaintiff's expansive interpretation of public works to apply to any subcontract for work "integral to the functional completion of the public works aspect of the project" is a sharp departure from the interpretation of the prevailing wage law that has consistently been applied in the past. Cities, special districts and other public entities rely on long standing case law and agency decisions in their planning, budgeting and contracting for their projects. Plaintiff's new test, which so dramatically departs from consistent past tests for whether work is a public work subject to prevailing wage laws, would disrupt existing projects and burden local governments' ability to fund future projects designed to benefit their communities.

Transportation costs are a large part of already burdened public entities. State and local government spending on transportation infrastructure was in the range of $342 billion in 2017. (Congressional Budget Office publication available

online at https://www.cbo.gov/publication/54539.) Of the six types of transportation and water infrastructure paid for largely by the public sector, mass transit rail is the third largest component (after highways and water utilities). (*Ibid.*)

The overall cost increase incurred by already strapped public entities by compliance with prevailing wage laws if all work on rolling stock is considered public work will be significant. Application of prevailing wage requirements can increase costs by 15% to 25% or more. In California alone, more than 100 public transit and bus districts serve individual cities, entire counties, or regions with bus, rail, trolley and ferry service.(https://www.energy.ca.gov/almanac/transportation_data/transit.html.)

At least some portion of the cost increases to these public transit services will be passed on to the Americans who in 2018 nationally took over 9.9 billion trips on public transportation. (https://www.apta.com/news-publications/public-transporation-facts/.) About 5.3 percent of Californians commute to work by public transit, which works out to millions of people each year. (*Ibid.*)

Transportation spending, which includes spending on public transportation, is already the second largest household expenditure after housing. (www.bts.gov/browse-statistical-products-and-data.) An expansive interpretation of the prevailing wage law as proposed by plaintiff will only add to the transportation expenses of residents of California. The

balancing of labor interests and the costs of public transportation should be performed by the Legislature, not the courts.

Further, there are potential unintended consequences of plaintiff's proposed expansive interpretation that demand a narrower rule that is true to the statutory origins of the prevailing wage laws. For example, prevailing wage laws might be construed as applying to all publicly owned vehicles which, under plaintiff's test, could be considered "public works." Rolling stock is a broadly defined term.[4] Thus, plaintiff's proposed test could be interpreted as applying to such publicly owned vehicles as support vehicles used by agencies to provide services. Under plaintiff's test, such commonly performed work as work by mechanics on public entity-owned trucks or fleet vehicles could be subject to prevailing wage requirements. Non-transit, publicly owned vehicles, at the very least, should not be considered public works subject to prevailing wage laws.

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[4] For example under the Buy America regulations (49 C.F.R. Part 661.3) rolling stock is defined as including transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and ferry boats, as well as vehicles used for support services, and train control, communication and traction power equipment.

IV. Plaintiff's interpretation of the prevailing wage law creates substantial uncertainty about what constitutes "public works," which increases the risk of public litigation and liability.

The test plaintiff proposes creates uncertainty about the scope of work that might be defined as subject to the prevailing wage laws. Plaintiff proposes application of the prevailing wage laws to all work done in completing a "project" or "system" that is publicly funded. This interpretation is untethered to any existing statutory language. If adopted, it creates uncertainty about the application of prevailing wage laws to employees who happen to perform work in a publicly funded facility or improvement. This is likely to spawn more litigation, including class action litigation, by workers never historically considered to be covered by prevailing wage laws. The prospect of increased litigation and exposure of public entities to liability for the wide range of work performed by employees at public works is significant. Defining a public work generally as any contract involving a "project" or "system" in applying the prevailing wage law unnecessarily and improperly creates potential liability far beyond the purpose of the prevailing wage laws.

CONCLUSION

The test plaintiff proposes is an expansive interpretation of the prevailing wage law without appropriate limiting principles. Adoption of such a test will disrupt long planned projects, increase the cost to users of public transportation as well as potentially other important public services provided to

communities in this state, and create disincentives to future improvements to public transportation and services. Amici respectfully request the Court to answer the certified question by concluding that prevailing wage laws do not apply to work performed on rolling stock.

DATED: July 15, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: Lann McIntyre
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CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Lann G. McIntyre, declare that:

1. I am a partner in the firm of Lewis, Brisbois, Bisgaard & Smith LLP, counsel of record for Amici Curiae California State Association of Counties, League of California Cities, California Association of Sanitation Agencies, and American Public Transportation Association.

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 3,877 words, including footnotes.

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

Executed at San Diego, California, on July 15, 2019.

/s/ Lann G. McIntyre
Lann G. McIntyre

PROOF OF SERVICE
Busker v. Wabtec Corp.
California Supreme Court, Case No. S251135

I, Sherry Bernal, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 701 B Street, Suite 1900, San Diego, California 92101.

On July 15, 2019, I served the following document described as **BRIEF OF AMICI CURIAE NATIONAL CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES and AMERICAN PUBLIC TRANSPORTATION ASSOCIATION** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

On July 15, 2019, I served the following document described as **BRIEF OF AMICI CURIAE NATIONAL CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AND AMERICAN PUBLIC TRANSPORTATION**

ASSOCIATION by placing a true copy enclosed in a sealed envelope addressed as stated on the attached service list. I am readily familiar with the firm's practice for collection and processing correspondence for regular and overnight mailing. Under that practice, this document will be deposited with the Overnight Mail provider and/or U.S. Postal Service on this date with postage thereon fully prepaid at San Diego, California to addresses listed on the attached service list in the ordinary course of business.

Executed on July 15, 2019, at San Diego, California.

Sherry Bernal

Sherry Bernal

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Molly Dwyer, Clerk of the Court
United States Court of Appeals
For the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
Appellate Court

Judge Otis D. Wright II
United States District Court Central
District of California
First Street Courthouse – Ctr 5D, 5th Floor
350 W. 1st Street
Los Angeles, CA 90012
Trial Court