Supreme Court Number S253458

In the Supreme Court of the State of California

DAVID KAANAANA, et al.,

Plaintiffs and Appellants,

v.

BARRETT BUSINESS SERVICES, INC., et al.,

Defendants and Respondents,

On Review from a Published Decision by the Court of Appeal, Second Appellate District, Division Eight; Case Nos. B276420, B279838

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF AMICI CURIAE COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CALIFORNIA SPECIAL DISTRICTS ASSOCIATION, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AND ASSOCIATION OF CALIFORNIA WATER AGENCIES

IN SUPPORT OF RESPONDENTS BARRETT BUSINESS SERVICES, INC. and MICHAEL ALVAREZ

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant California Rules of Court, rule 8.520(f), the County Sanitation District No. 2 of Los Angeles County ("District No. 2"), League of California Cities (the "League"), California State Association of Counties ("CSAC"), the California Association of Sanitation Agencies ("CASA"), California Special Districts Association ("CSDA"), and the Association of California Waters Agencies ("ACWA") respectfully request permission to file the attached amicus curiae brief in support of defendants and respondents Barrett Business Services, Inc. and Michael Alvarez (collectively "BBSI").[1]

District No. 2 is the administrative district for a confederation of 24 independent county sanitation districts that provide a regional system of wastewater treatment, sanitary landfill, and other refuse transfer and disposal facilities that meet the wastewater and solid waste management needs for approximately 5.7 million people in Los

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[1] District No. 2, the League, CSAC, CASA, CSDA and ACWA certify that no person or entity other than District No. 2, the League, CSAC, CASA, CSDA and ACWA and their counsel authored this proposed brief in whole or in part and that no person or entity other than District No. 2, the League, CSAC, CASA, CSDA, and ACWA 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).)

Angeles County. The service area for these districts covers approximately 820 square miles and encompasses 78 cities and unincorporated territory within Los Angeles County. Collectively, the districts contract for millions of dollars annually for labor and professional services.

The 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 finance and contract for public 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, which is comprised of 24 city attorneys from all regions of the State. The 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.

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.

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.

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.

ACWA is a non-profit corporation that represents the interests of its more than 450 California public water agency members, which range in size from small irrigation districts to some of the largest urban water wholesalers in the nation.

ACWA's members develop, manage, treat, and distribute water to rural communities, farms, industries, and major cities in California, and develop and operate vital flood projects. ACWA coordinates, develops, and implements innovative statewide water policies and initiatives, and routinely represents the collective interests of its member agencies before the California Legislature, and numerous California and Federal regulatory bodies, as well as supporting these agencies as amicus curiae in judicial matters.

Amici have a direct interest in the outcome of this case. Plaintiffs' position is that *all* operational work performed for irrigation, utility, reclamation and improvement districts, and other districts of this type ("districts"), regardless of the districts' nature, purpose, funding or function, requires payment of a prevailing wage. The result of that interpretation will be significant adverse financial and administrative impacts for both districts providing important public services and their customers. Further, a decision that creates uncertainty or confusion about the types of work that constitute "public works" threatens to disrupt long-planned and budgeted public projects and services. Resolution of the statutory interpretation issues presented in this matter will have profound legal, economic, and practical consequences for hundreds of potentially impacted districts and public agencies in the state of California. Amici and their members are among those who may be profoundly affected by the decision in this case.

Amici support BBSI's position that prevailing wage laws should apply only to work done for districts involving construction or infrastructure work. As explained in BBSI's briefing on the merits, application of prevailing wage laws to *all* work done for districts, regardless of its nature, funding, purpose or function, would expand prevailing wage coverage beyond the policies and intent behind the public works legislation and would single out districts from all other public entities to bear the burden of increased wages and regulation without a rational justification for doing so.

District No. 2, the League, CSAC, CASA, CSDA and ACWA believe their proposed amicus 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 than those raised by the parties. (See *Cornette v. Dept. 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 amicus curiae brief.

DATED: September 18, 2019 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

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AMICUS CURIAE BRIEF

INTRODUCTION

California's prevailing wage laws have their origin in public works affixed to public property such as buildings, highways, bridges and streets. As the definition of public works has been refined by the Legislature since the first prevailing wage legislation in 1931, the enactment of the Labor Code in 1937, and subsequent revisions, the definition has always been tethered to the construction of a fixed public work or work on infrastructure. Routine operational work performed within public works infrastructure, including that performed for or by irrigation, utility, reclamation and improvement districts, and other districts of this type ("districts"), has not been subject to the application of prevailing wage laws for the past 80 years. Indeed, for the past 80 years, the Department of Industrial Relations has never regulated the type of work performed by belt sorters or other operational workers in a manner consistent with that promoted by plaintiffs, nor has it been asked to.

The position advocated by plaintiffs—that the definition of public works should cover routine operational work of districts for purposes of prevailing wage laws—is unsupported by the historical origins of the prevailing wage laws and by 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. For 80 years, the

well-settled, universally shared understanding among thousands of California public agencies, the business community, and relevant regulatory agencies has been the opposite of what plaintiffs propose. Under plaintiffs' vague proposed rule, all operational work would be considered public works subject to payment of prevailing wages. The scope of operational work could include even security workers, food service workers, outside consultants, attorneys, accountants, and auditors who are contracted to perform work for districts. And, the laws could be interpreted as also applying to information technology professionals, engineers, campground hosts, park rangers and concession workers, who could be considered to be performing public works subject to the prevailing wage laws. Such a rule constitutes a radical departure from longstanding precedent and was never the intent of the Legislature. Such an interpretation would undermine the efforts of districts and other public agencies in planning, budgeting and funding future services serving their communities.[2]

Furthermore, adoption of a rule interpreting all operational work done for districts as requiring payment of prevailing wages will create uncertainty, increased litigation and increased public liability. For all of these reasons, the

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[2] Notably, no public agency or district was a party to the underlying litigation or appeals below and the lower courts did not have the benefit of their perspective in deciding the issues presented.

court should decline to stray beyond the ordinary and time-honored meaning of public works as work involving construction or infrastructure work.

LEGAL ARGUMENT

I. Plaintiffs' Interpretation of the Application of the Prevailing Wage Law to Belt Sorting Activities Breaks with the Traditional and Current Understanding of Public Works.

A. The legislative history does not support plaintiffs' expansive interpretation of the coverage of Labor Code section 1720(a)(2).

In 1931, before enactment of the Labor Code, the Legislature enacted the Public Works Alien Employment Act. This act was introduced to the Legislature by Senate bills, driven by concerns, at a time of high levels of unemployment during the Great Depression, that foreign-born, non-citizen workers were being employed by unscrupulous contractors on public works because they were willing to work for lower wages than American citizens. The result was downward pressure on the standard of living for American citizens. In an effort to regulate that pressure and to provide for additional employment opportunities, Senate Bill No. 26 was introduced to address prevailing wage laws. After several amendments, Senate Bill No. 26 was enacted as Chapter 397, Statutes of 1931. (Amici's Motion for Judicial Notice, Ex. A, pp. 12-41.)

As introduced, Senate Bill No. 26 imposed the requirement of paying the "highest prevailing rate" for laborers

employed by or on behalf of the State of California or other public entities. The bill, as originally introduced, defined the scope of the prevailing wage law as applying to:

> 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 supervision/direction of state, political subdivision, district or municipality. . . .

(Amici's Motion for Judicial Notice, Ex. A, p. 14.)

But, Senate Bill No. 26 was amended to specify the prevailing wage laws on public works applied only to construction or repair work:

> *Construction or repair work* done under contract for irrigation, utility, reclamation and improvement districts, or other districts of this type, as well as street, sewer and other improvement work done under supervision/direction of state, political subdivision, district or municipality thereof shall be held to come under the provisions of this act.

(Amici's Motion for Judicial Notice, Ex. A, p. 23, italics added.)

Yet another amendment to this section of the bill became the final version of what was enacted in 1931 as Chapter 397 as the Public Wage Rate Act. The final amendment deleted the inclusion of "repair" and the provision regarding work

"performed under contract." The final version provided as follows:

> Construction work done for irrigation, utility, reclamation, improvement and other districts, or other public agencies, public officer or body, . . . shall be held to be 'public works' within the meaning of this act.

(Amici's Motion for Judicial Notice, Ex. A, p. 40.)

The progression of amendments to Senate Bill No. 26 to the final version enacted in Statutes 1931, Chapter 397, demonstrates the Legislature's intent to move from the general phrase "work done for" to the more specific definition of public works for districts: "*construction* work done for" those districts.

In 1931, the Legislature also voted on Senate Bill No. 83—the Public Works Alien Employment Act. This bill addressed the prohibition against employment of aliens by a contractor or subcontractor on public works. The bill provided that "work done for irrigation, utility, reclamation, improvement, or other districts. . ." fell within the prohibition against alien employment on public work performed by a contractor or subcontractor. (Amici's Motion for Judicial Notice, Ex. B, pp. 42-44.)

Thus, while prevailing wage laws were limited to construction work done for districts, the prohibition on alien employment applied more generally to "work done for" districts. Application of prevailing wage laws only to construction or infrastructure work is consistent with

California's effort at the time to help alleviate unemployment and the downward pressure on wage rates by speeding up the number of public works projects, such as state schools, hospitals, bridges and highways, among others, and imposing a floor on the wage rates paid for such work. The application of prevailing wage laws on public works of construction, combined with a general and broader prohibition against employment of aliens to perform any work on public works, worked together to accomplish the dual goals of the Legislature.

In 1937, the California Code Commission proposed a code that combined and consolidated existing statutes relating to the subject of labor in a single Labor Code. Labor Code section 1720, defined "public works" in three categories: (a) construction or repair work done under contract and paid for out of public funds; (b) work done for irrigation, utility, reclamation and improvement districts, and other districts of this type; and (c) street, sewer or other improvement work done under direction of a public body.[3] (Amici's Motion for Judicial Notice, Ex. C, p. 63.)

The Code Commission's note to the proposed code explains how the commission arrived at the proposed Labor Code language. It explains that it included the provisions common to five existing definitions of public works, consisting of: statutes relating to prevailing wages (Amici's Motion for

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[3] All subsequent statutory references shall be to the Labor Code unless otherwise specified.

Judicial Notice, Ex. A, p. 40) and employment of aliens (Stats. 1931, ch. 398), and Penal Code sections 653c (hours of labor), 653d (retaining employee wages), and 653g (fees for obtaining work). The Code Commission further explained:

> Subdivision (b) at present appears in substance in all statutes listed above and the exception is from the last clause of the last par. of sec. 653c Pen. C. *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. 653d (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.

(Amici's Motion for Judicial Notice, Ex. D, p. 79, italics added.)

Thus, proposed section 1720, subdivision (b) excepted from the definition of public work the operation of irrigation or drainage systems of any irrigation or reclamation district for purposes of the statutes regulating employment of aliens and retaining wages. Because the prevailing wage statute (ch. 397), hours of work statute (Pen. Code, § 653c), and fees for obtaining work statute (Pen. Code, § 653g) already expressly exempted such operation or used the words "construction and repair work," it was not necessary to expressly exempt operations from the public works definition; operations work was already exempt.

Accordingly, the Code Commission made clear that the words "construction and repair work" excludes operations work. Although the words in Chapter 397 that the Code Commission acknowledged expressly excluded operations work—"construction and repair"—were not carried over into section 1720, subdivision (b) regarding districts, the Code Commission note demonstrates the limitation still applied to work done for districts. The notion that *all* work done for districts, including routine operations work, was intended to be considered "public work" subject to the prevailing wage laws is incorrect. The Code Commission's note reflects the contrary interpretation it held when proposing the definition of public works. The definition of "public works" in Labor Code section 1720 could not have been intended to include day-to-day operational work done for districts.

B. Department of Industrial Relations prevailing wage interpretations consistently limit the scope of coverage to activities involving realty or infrastructure.

The Legislature bestowed on the Department of Industrial Relations ("DIR") "quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws." (Lab. Code, § 1773.5, subd. (d).) Using its authority, the DIR has squarely determined on at least three occasions over a period of 15 years, that the phrase "work done for" in section 1720, subdivision (a)(2) must be and most reasonably can be limited by the "construction, alteration,

demolition, installation, or repair work" definition contained in section 1720, subdivision (a)(1).

In *The Hauling of Biosolids from Orange County; The Application of Hauled Biosolids on Farmland in Kern and Kings Counties* (Apr. 21, 2006) (*Biosolids I*), Public Works No. 2005-009, the DIR determined that the hauling of biosolids from a water treatment facility and application of the hauled biosolids to farmland as soil amendment was not public work subject to the payment of prevailing wage. The DIR first determined the work did not constitute "alteration" work and thus did not fall within section 1720, subdivision (a)(1). (Cal. Dept. of Industrial Relations, *Biosolids I* (Apr. 21, 2006) Public Works Case No. 2005-009, at <https://www.dir.ca.gov/OPRL/coverage/year2006/2005-009.pdf> [as of Sept. 18, 2019], pp. 2-3.) The DIR also determined the District's water treatment facility was not a "public works site," but merely a public facility, and thus did not fall within section 1720.3, which addresses hauling refuse from a public works site to a disposal location. (*Id.* at p. 3.)

Finally, the DIR considered whether the hauling work fell within section 1720, subdivision (a)(2). The DIR noted that "unlike section 1720(a)(1), section 1720(a)(2) does not enumerate any particular type of covered work." (*Id.* at p. 3.)

The DIR reasoned that giving the type of work covered unlimited scope was too broad an interpretation:

> Finding the reach of 1720(a)(2) to be unlimited in scope would be illogical and create prevailing wage obligations for any type of work performed under contract for a district regardless of the nature of that work.

(*Id.* at p. 4.)

Considering the general purpose of the prevailing wage laws as being "to benefit the construction worker on public construction," (citing *O.G. Sansone v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 461) the DIR concluded "the most reasonable way to define the scope of section 1720(a)(2) is to require that the work fall within one of the types of covered work enumerated in section1720(a)(1)." (*Id.* at p. 4.) The DIR concluded it was not "construction, alteration, demolition, installation or repair work" under section 1720(a)(1). Therefore, hauling biosolids was not "public work" under section 1720(a)(2). (*Ibid.*)

The same analysis was applied to find the scope of section 1720(a)(2) was limited to the original intent that public works consists of "construction, alteration, demolition, installation or repair work" in *Removal & Hauling of Biosolids, Irvine Ranch Water District* (Jan. 12, 2007), Public Works No. 2006-022. The DIR determined that the removal and hauling of biosolids from the Irvine Ranch Water District's reclamation plant is not public work. The DIR concluded, consistent with

its prevailing wage determination in *Biosolids I,* that the scope of work in section 1720(a)(2), although not specified, must be interpreted as meaning the work must fall within one of the types of covered work described in section 1720(a)(1). (Cal. Dept. of Industrial Relations, Public Works Coverage Determinations, Removal and Hauling of Biosolids - Irvine Ranch Water District (Jan. 12, 2007) Public Works Case No. 2006-022, at <https://www.dir.ca.gov/OPRL/coverage/year2007/2006-022.pdf> [as of Sept. 18, 2019], p. 4.)

In 2007, the DIR again addressed the scope of the "work performed" language in section 1720(a)(2) in deciding whether the construction and installation of electrical facilities at the Kiwi substation was public work subject to prevailing wage requirements. (Cal. Dept. of Industrial Relations, Public Works Coverage Determinations, Kiwi Substation - Orange County Water District (Apr. 25, 2007) Public Works Case No. 2005-039, at <https://www.dir.ca.gov/OPRL/coverage/year2007/2005-039.pdf> [as of Sept. 18, 2019].) The DIR first concluded that the public utility exception in section 1720(a)(1) did not apply to work done by contractors, only to work done directly by the utilities' employees. (*Id.* at pp. 6-7.)

The DIR also analyzed whether section 1720(a)(2) applied to the work because it was done for a utility district. The DIR concluded section 1720(a)(2) did not apply to work performed by the utility's own employees. The DIR reasoned that section 1720(a)(2) "does not list the type of work done for districts that qualifies as public work." (*Id.* at p. 7.) In

conducting its analysis, the DIR affirmed that "[i]t is axiomatic that section 1720(a)(2) cannot be read in isolation, for it is part of a statutory scheme and, alone, does not define what type of work done for a district is 'public work.'" (*Ibid.*) The DIR agreed with the *Biosolids I* determination that reference must be made to section 1720(a)(1) to define the scope of the work that would be covered by section 1720(a)(2). (*Id.* at p. 8.) As the DIR put it, "[h]armonizing the two sections of the statute in this way comports with basic rules of statutory construction. (*Id.* at p. 7.) The DIR accomplished that harmonization by concluding that section 1720(a)(2) did not provide an independent ground for finding the work done directly by SCE employees to be public work. (*Ibid.*)

These decisions demonstrate the Department's consistent history of construing the scope of work defined in section 1720(a)(2) as commensurate with the definition in section 1720(a)(1).

The 2016 decision *Public Works Contractor Registration Requirement for Maintenance Work* (Feb. 5, 2016), Public Works No. 2015-016, does not represent a reversal of the DIR's historical interpretation of the scope of work performed for districts. The DIR addressed whether maintenance work done on equipment installed at a water district's waste water treatment facility is public work. (Cal. Dept. of Industrial Relations, Public Works Coverage Determinations, Public Works Contractor Registration Requirement for Maintenance Work - Western Municipal Water District, Riverside (Feb. 5,

2016) Public Works Case No. 2015-016, at <https://www.dir.ca.gov/OPRL/coverage/year2016/2015-016.pdf> [as of Sept. 18, 2019].) The DIR noted that maintenance work is "without qualification" a type of public work subject to prevailing wages. (*Id.* at p. 2.) (See, Lab. Code, § 1771; Cal. Code Regs., tit. 8, § 16000.) The DIR concluded, without analysis of the term "work done for," that the maintenance and repair work was done for a utility district and therefore qualified as "public work" under section 1720(a)(2). (*Id.* at p. 3.) Significantly, however, the DIR also considered the work covered as work performed on equipment permanently attached to a building or realty as a fixture. (*Ibid.*)

Further, the DIR concluded the repair and maintenance work is "craft work designed to preserve WMWD facility, a publicly owned and operated facility." (*Id.* at p. 4.) Therefore, the DIR determined the maintenance work is a public work subject to prevailing wage requirements. (*Id.* at p. 5.) The facts are inapposite to those involved here, where the purportedly "public work" is belt sorting of recyclables by contract employees.

Given the absence of any analysis of the scope of the language of section 1720(a)(2), this 2016 DIR determination carries no weight on that issue and certainly does not represent a "reversal" in the DIR's otherwise consistent interpretation of the type of work that falls within the scope of section 1720(a)(2).

The Legislature has bestowed upon the DIR quasi-legislative authority to determine what the prevailing wage should be. (Lab. Code, § 1773.5, subd. (d) ["the director shall have quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws of this chapter"].) Furthermore, the statutory scheme makes clear that cities, counties, districts and agencies are entitled to 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. The DIR is charged with determining the prevailing wage rate on public works: "The Director of the Department of Industrial Relations shall determine the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773." (Lab. Code, § 1770.) Section 1773 requires the body awarding any contract for public work or otherwise undertaking any public work, to obtain from the Director of Industrial Relations the general prevailing rate in the locality whether the public work is to be performed. "These rules exist so that awarding bodies and competing bidders can estimate labor costs and enjoy pre-bid certainty." (Cal. Dept. of Industrial Relations, Public Works Coverage Determinations, Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge (Jan. 23, 2006) Public Works Case No. 2004-023, at <https://www.dir.ca.gov/OPRL/coverage/year2006/2003-046and2004-023.pdf> [as of Sept. 18, 2019], p. 7.)

In addition to the authority to determine rates, the Director's authority also includes the determination of coverage of types of work under the prevailing wage laws. (Lab. Code, §§ 1770, 1773.5.) The DIR plays a central role in determining the prevailing wage and "is vested with authority to render opinions as to whether a specific project or type of work requires compliance with the [prevailing wage law]." (*Asuza Land Partners v. Dept. of Industrial Relations* (2016) 191 Cal.App.4th 1, 15, quotation marks omitted; *Oxbow, Carbon & Minerals v. Dept. of Industrial Relations* (2011) 194 Cal.App.4th 538, 547 ["the Director . . . has the initial authority to determine whether a specific project is public work subject to the prevailing wage law"].)

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 wages or not. (See Lab. Code, § 1773.5, subd. (d) ["The director shall have quasi-legislative authority to determine coverage of projects or types of work"]; Cal. Code Regs., tit. 8, § 16303 [declaring that "[t]he authority of the Director to establish the prevailing wage for any craft, classification, or type of worker is quasi-legislative"].)

Even if not given deference (as these determinations should be), the DIR's interpretations are at the very least a useful "interpretive tool" that are helpful in understanding the definition of public works as meaning those physical infrastructures that are attached to realty. (*City of Long Beach*

v. Dept. of Industrial Relations (2004) 34 Cal.4th 942, 951.) The DIR's coverage determinations have consistently affirmed that the scope of covered work for districts is limited to construction, alteration, demolition, installation or repair work, as defined in section 1720(a)(1). A different interpretation would require an extension of state law. It would also involve implicit disapproval of the interpretation of the state agency tasked with interpreting and enforcing the prevailing wage law. If such an extension were to be made, it should be made by the legislature, not the judiciary.

C. Other sources reflect the common understanding of public works as involving construction or infrastructure work, not routine operations work.

California's public works statutes were modeled after the federal Davis-Bacon Act (40 U.S.C. §§ 3141-3148), enacted in 1931. After instituting a huge public building program to stimulate the economy in light of the Great Depression, the federal government enacted the Davis-Bacon Act to regulate wages and assure a "floor under wages on Government projects." (*U.S. v. Binghamton Construction Co.* (1954) 347 U.S. 171, 176-177, 98 L.Ed. 594, 599, 74 S.Ct. 438.) The Davis-Bacon Act defined the work subject to prevailing wages as construction work "done on a particular building or work at the site thereof . . . by laborers and mechanics employed by a construction contractor or construction subcontractor. . . ." (29 C.F.R. § 5.2(j)(1).) Although not controlling, the Davis-Bacon Act is frequently relied upon for guidance by California courts.

(*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 200.)

California enacted the Public Works Wage Rate Act at the same time as the Davis-Bacon Act, to provide the same type of wage regulation for work done on its own accelerated public works construction program. (Stats. 1931, Ch. 397, p. 910.)[4] The Davis-Bacon Act's focus on construction and infrastructure-related activities provides more contextual confirmation of the Legislature's intent that it was construction and infrastructure-related activities that were the subject of California's newly enacted Labor Code.

Similarly, other California statutes addressing public works confirm the legislation's focus on work involving construction or infrastructure work. Government Code section 4002 defines "public work" as "the construction of any bridge, road, street, highway, ditch, canal, dam, tunnel, excavation, building or structure within the State by day's labor or force account." Public Contract Code section 1101 defines a public

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[4] A Department of Public Works publication at the time described the many millions of dollars worth of increased spending on public works projects such as highways, bridges, hospitals, state colleges and other schools, for which the Department was preparing to strictly enforce the "labor bills"—Chapter 397 and Chapter 398. "Summing up, the Department of Public Works is right up to its schedule of activities, drawn up under Governor Rolph's program of speeding up public improvements as a means of alleviating unemployment." (Amici's Motion for Judicial Notice, Ex. E, p. 83.)

works contract as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind." The definitions in these frequently cross-referenced statutory schemes provide additional validation that the legislature intended public works to mean work related to construction of infrastructure attached to realty.

The Attorney General has also confirmed the understanding that "public work" means construction projects or infrastructure of a substantial nature. (See AG Op. 11-304 (Dec. 24, 2012) 95 Ops Cal. Atty. Gen. 102 [stating that the definitions in the Labor Code, Government Code, and Public Contract Code refer to the same common understanding of public works and the term public works "appears consistently to signify construction projects on a substantial scale"].)

Interpretation of section 1720(a)(2) to apply to construction and infrastructure work done for districts is overwhelmingly affirmed by the historical origins of the prevailing wage laws and the consistency in the statutory treatment of public works contracts as those involving construction or infrastructure work. (*O.G. Sansone v. Dept. of Transportation, supra,* 55 Cal.App.3d at p. 461.)

II. Plaintiffs' Interpretation Strays Far from the Original Intent and Purpose Behind the Prevailing Wage Laws and Creates Unbounded Application of Those Laws.

Plaintiffs advocate for an unwarranted and extraordinarily broad test that would impose prevailing wage requirements on all contract employees working at districts, regardless of the nature, funding, purpose or function of the work performed. Plaintiffs deny seeking an interpretation that would cover any type of work other than operation work. (Answer Brief on Merits (ABOM), pp. 9, 16, fn. 1.) But, plaintiffs' analytical framework provides for no such limitation. Indeed, plaintiffs broadly argue that the Legislature intended not to limit the definition of public works to "construction and repair work." (*Id.* at p. 9.) Plaintiffs' novel interpretation, however, would create an analysis that turns not on the nature of the work, but rather on the identity of the public agency that pays for the work.

Plaintiffs contend the contracted employees called "belt sorters" are subject to prevailing wage laws because they are performing work at the "core" of the District's statutory duties. (ABOM, pp. 10, 18.) However, District No. 2 uses contracted employees to perform many functions, including sorting materials into bins or piles for the district to ship to market. (1 CT 72.) Are these employees performing "core" functions? District No. 2, as do many other districts, also uses contracted employees as security guards, outside attorneys, accountants, and consulting engineers. Are these functions part of the core

work entrusted to the Districts? Where is the line to be drawn? Neither the Legislature nor any California court has interpreted the test for public works as broadly as plaintiffs propose. Plaintiffs' vaguely-defined test is potentially unlimited in scope and offers no discernible principle for limiting application of the prevailing wage laws.

Predictability is critical to the ability of numerous districts providing important public services to plan and budget for the cost of those services. Districts negotiate multi-million dollar contracts with contract workers to perform a wide range of functions. None have been classified before as workers subject to prevailing wage laws. A test that limits the application of prevailing wage laws to those performing work on infrastructure is consistent with the origins of and original reasons for regulating wages on public works and provides certainty for districts.

III. Plaintiffs' Expansive Interpretation of Public Works Would Disrupt Public Projects and Impair the Ability of Cities, Counties and Districts to Fund Future Projects to the Detriment of Their Communities.

Plaintiffs' expansive interpretation of "public works" to apply to all operational work for districts is a sharp departure from the interpretation of the prevailing wage law that has consistently been applied in the past. Districts rely on long-standing case law and agency decisions in planning, budgeting and contracting for their projects. Plaintiffs' novel new test would disrupt existing projects and burden local governments'

ability to fund future projects designed to benefit their communities.

Under plaintiffs' proposed interpretation of section 1720(a)(2), some districts could be required to pay prevailing wages for all contract-based employees, such as contract janitors, security officers, food service workers, temporary clerical workers, and other workers supplied to public agencies by contract employers. Yet, other districts might not. And yet others might have to pay prevailing wage rates to some of their contracted employees and not others.

There are over 2300 special districts in California. In addition to irrigation, utility, reclamation, and improvement districts, these districts provide a range of services from fire protection, mosquito abatement and waste disposal to park services, hospitals, airport, cemetery, park and water conservation services. A definition of the application of prevailing wage laws by the type of district for which the work is performed, creates tremendous uncertainty and will spawn extensive litigation as the phrase "other districts of this type" in section 1720(a)(2) has not been addressed.

Some special districts that could potentially fall within the category of districts listed in section 1720(a)(2) also provide services that are not defined similarly. For example, the El Dorado Irrigation District (EID) is an irrigation district, but also owns and operates hydro-electric generating facilities. These facilities are licensed by the Federal Energy Regulatory

Commission (FERC). EID's FERC license (and that of other similarly-situated irrigation districts) requires it to operate its hydro-electric generating facilities for recreational purposes, which include boating, camping, hiking, and equestrian riding, among other activities. These districts must employ campground hosts, park rangers, entrance fee attendants, janitorial and landscape attendants, among others. Most of these employees are temporary seasonal employees hired through a temporary staffing agency (contract-based employees). Under plaintiffs' interpretation, these employees could be subject to prevailing wage requirements.

Further, some FERC licenses also require districts to operate their hydro-electric generating facilities for recreational purposes in coordination with the California Department of Parks and Recreation, which provides staffing to some of the district campground and/or boating facilities. The California Department of Parks and Recreation often contracts out the staffing of recreational facilities to private companies though concession contracts. The districts have no control over what such employees are paid.

The operation of hydro-electrical generation facilities involves a host of additional types of workers. These facilities depend on a significant communication network, both hard wire and microwave transmission in the event wires go down. Snow removal services are used for access to the hydro-electrical facilities. Sometimes helicopter services are used to access some of the facilities in the winter when they are made

completely inaccessible by vehicle due to snow and sometimes landslides. At some of the more remote district buildings, they rely on contracts for services such as HVAC servicing, septic tank clean-out, and propane delivery. Application of prevailing wage rates to all of this work has enormous implications, both financial and administrative, and far exceeds the purpose of the prevailing wage laws as originally enacted.

Most districts and special districts employ a large number of temporary, contract-based workers (beyond their permanent employee work forces) to provide the operational and administrative work associated with delivering their services. The 24 districts that comprise the confederation of districts for which District No. 2 serves as the administrative district, alone, contracts for millions of dollars annually in contract labor and professional services that do not involve performance of construction or infrastructure work. The impact of an expansive reading of the prevailing wage law's scope, untethered to the statutory purpose of the prevailing wage laws, is enormous.

In addition to increased payroll costs, districts would be required to create and maintain additional records, including certified payroll records for scores of additional workers who are often temporary or seasonal workers. In addition, agencies would have to ask the DIR to set prevailing wages for a wide gamut of workers. They would also need to revamp well-established and previously lawful procurement and contracting processes. This would in turn limit the willingness of firms,

especially smaller firms, to contract with local agencies. That leads to less choice and higher prices overall. Each of these processes would consume a huge amount of time and lead to uncertainty and expense. At least some of these burdens and increased costs would likely be borne by customers, taxpayers and property owners.

In addition, the DIR has no classification for belt sorters or a myriad of other workers used by districts that could be covered under plaintiffs' proposed test, nor do any apprenticeship programs exist for such workers. The DIR would be required to conduct wage surveys for a wide range of workers in a given geographic area to determine a prevailing wage for these previously unclassified workers.[5] This work will impose added burdens on the DIR, which depends on the state's general fund for funding its operations.

The Labor Commissioner's Office would also be required

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[5] The DIR describes its methodology for determining the prevailing wage rate as follows: "The prevailing wage rate is the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area (if a majority of such workers are paid at a single rate). If there is no single rate paid to a majority, then the single or modal rate being paid to the greater number of workers is prevailing." (Cal. Dept. of Industrial Relations, Frequently Asked Questions - Prevailing Wage, Q1. What is the methodology for determining the prevailing wage rate?, at <dir.ca.gov/OPRL/FAQ_PrevailingWage.html#q1> [as of Sept. 18, 2019].)

to expend additional resources to monitor and enforce compliance with the new prevailing wage determinations. District Attorneys' offices around the state, which prosecute violations identified by the Labor Commissioner, including worker misclassification, would also be burdened.

The overall cost increase incurred by already strapped districts in complying with prevailing wage laws under the rule proposed by plaintiffs will be significant. Application of prevailing wage requirements could increase labor costs by 15 to 25 percent or more. At least some portion of the cost increases to these districts will be passed on to the residents, landowners and consumers of the services provided by these districts. The expansive interpretation of the prevailing wage law proposed by plaintiffs will only add to the already high cost of living for residents of California. The balancing of labor interests and the costs of the services provided by districts should be performed by the Legislature, not the courts.

IV. Plaintiffs' 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 plaintiffs propose creates uncertainty about the scope of work that might be defined as subject to the prevailing wage laws. The definition of what constitutes operational functions and what does not creates additional uncertainty about the application of prevailing wage laws to employees who happen to perform work at a publicly-funded district facility or

improvement.

Furthermore, there is no discernible reason for treating the districts enumerated in the statute differently from similarly-situated cities, counties, and special districts such as hospital districts, lighting districts, and park districts, which provide similar public services. The Legislature could not have intended to create such an arbitrary application of the prevailing wage law. Plaintiffs' interpretation of section 1720(a)(2) as requiring irrigation, utility, reclamation and improvement districts and "other districts of this type" to pay prevailing wages for their contract operational work, but not other special districts or cities, counties or other public entities providing public services is an absurd result that could not have been intended.

There are also situations where one of the enumerated districts is a subsidiary of a city or county. The city or county could be required to pay prevailing wages to some of their contract operational workers, but not others, even though they all are performing core operations work. And, some contract employees work for both a city and a district. These situations will impose burdensome administrative difficulties on cities by requiring them to parse out the hours worked for each public entity and determine which hours are subject to prevailing wage and which are not.

The ambiguity created by an interpretation that carves out "operational" work for the enumerated districts for special

application of prevailing wage rates 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 for districts is significant. Defining public works generally as any work for, or even any "operation" work for, a district unnecessarily and improperly creates uncertainty and potential liability for public entities and districts far beyond the purpose of the prevailing wage laws.

CONCLUSION

The test plaintiffs propose is an expansive interpretation of the prevailing wage law without appropriate limiting principles. Adoption of such a test will disrupt long-planned projects and increase the cost to users of the services provided by districts as well as other important public services provided to communities in this state. It will also create disincentives for future improvements by districts to the services they offer. Amici respectfully request the court reverse the Court of

Appeal and affirm that the definition of publics works remains true to its origins in construction and infrastructure work.

DATED: September 18, 2019 LEWIS BRISBOIS BISGAARD & SMITH LLP

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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 County Sanitation District No. 2 of Los Angeles County, League of California Cities, California State Association of Counties, California Special Districts Association, California Association of Sanitation Agencies And Association of California Water Agencies.

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

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 7,173 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 September 18, 2019.

Lann G. McIntyre

PROOF OF SERVICE

Kaanaana, et al. v. Barrett Business Services, Inc., et al..
California Supreme Court, Case No. S253458

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 September 18, 2019, I served the following document described as **BRIEF OF AMICI CURIAE COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES and ASSOCIATION OF CALIFORNIA WATER AGENCIES; MOTION FOR JUDICIAL NOTICE** 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 September 18, 2019, I served the following document described as **BRIEF OF AMICI CURIAE COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, CALIFORNIA STATE ASSOCIATION OF**

COUNTIES, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES and ASSOCIATION OF CALIFORNIA WATER AGENCIES 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 September 18, 2019, at San Diego, California.

Sherry Bernal

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