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File No. 11.9

VIA ELECTRONIC SERVICE (TrueFiling)

Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Kaanaana v. Barrett Business Services, Inc., et al.***
Request for Depublication of Opinion
(Cal. Rules of Court, rules 8.1125, 8.1105(e))
Supreme Court Case No. S253458
Second Civil Nos.: B276420, B279838 - Opinion Filed November 30, 2018
Presently Reported at: *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778

Dear Chief Justice Tani G. Cantil-Sakauye and Associate Justices of the California Supreme Court:

This letter is submitted on behalf of County Sanitation District No. 2 of Los Angeles County, California Association of Sanitation Agencies, League of California Cities, California State Association of Counties, and the California Special Districts Association requesting depublication of *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778 (*Kaanaana*).

County Sanitation District No. 2 of Los Angeles County (the "District") 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 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 labor and professional services in an amount greater than $50 million.

The California Association of Sanitation Agencies ("CASA") is an association dedicated to protecting public health and the environment through effective wastewater treatment. CASA promotes sustainable practices including water recycling, biosolids management, and renewable energy production. CASA represents over 100 public agencies in California and focuses on advocacy, education and leadership.

The League of California Cities is an association of 475 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. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of California. 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.

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 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 District, CASA, the League of California Cities, CSAC, and CSDA request that this court depublish the Court of Appeal's above-referenced opinion in *Kaanaana, supra*, 29 Cal.App.5th 778. As explained more fully below, the opinion is seriously flawed for the following reasons and the court is urged to depublish the opinion, or alternatively, grant review:

I. Depublication Standards.

"The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published." (Cal. Rules of Court, rule 8.1105(e)(2).) "Any person may request the Supreme Court to order that an opinion certified for publication not be published." (Cal. Rules of Court, rule 8.1125(a)(1).)

An opinion should be depublished where: "(1) the opinion does not meet the publication criteria of Cal Rules of Ct 8.1105(c); (2) the opinion, even if correct in result, contains misleading or incorrect language that might cause confusion; or (3) the opinion is incorrect or unnecessarily creates a conflict. . . ." (Cal. Civil Appellate Practice (Cont.Ed.Bar. 3d ed. 1996) Publication and Citing of Opinions, § 21.17.)

Depublication most commonly occurs where the opinion is wrong in significant part. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 11:180.1, p. 11-75.) Depublication is also proper where the opinion's analysis is too broad and can lead to unanticipated misuse as precedent. (*Ibid.*)

II. Facts and Procedural History.

The District owns and operates two recycling facilities. Barrett Business Services, Inc. ("Barrett") provides staffing and management services. Barrett provided employees ("belt sorters") to the District to sort recyclables at one of the District's two facilities. In a representative action, plaintiffs, former Barrett employees, sued Barrett seeking prevailing wages under California's prevailing wage law, Labor Code sections 1720-1861.[1] Plaintiffs alleged their trash sorting activities were "public work" for

[1] Further statutory references are to the Labor Code unless otherwise specified.

which prevailing wages must be paid because they were performed under contract for the District. Plaintiffs also asserted they had been deprived of required meal breaks because they were required to report back to their sorting stations a few minutes before their full 30-minute meal break elapsed.

The trial court struck the prevailing wage claim, concluding the work plaintiffs performed sorting recyclables did not come within the definition of "public works" under the prevailing wage law because it was not in the nature of construction work. (*Kaanaana, supra*, 29 Cal.App.5th at pp. 787, 789.) The trial court also found that meal break premium pay under section 226.7, subdivision (c) and section 558 penalties were owed, but rejected the employees' claims for additional wages and penalties. (*Id.* at p. 788.)

The Court of Appeal reversed both holdings. The Court of Appeal concluded, based on its interpretation of the statutory scheme, that plaintiffs' belt sorting work constituted "public works" under section 1720, subdivision (a)(2), even though it was not construction work.[2] (*Kaanaana, supra*, 29 Cal.App.5th at p. 798.) The court also concluded additional wages and penalties applied to the improperly shortened meal periods and remanded the case to the trial court to address the calculation of minimum wages owed, civil penalties, reconsideration of waiting time penalties and to allow plaintiffs to pursue their prevailing wage law claim. (*Id.* at p. 811.)

In a concurring and dissenting opinion, Justice Grimes agreed with the meal period wage claim holding, but disagreed with the application of prevailing wage law to the work performed by plaintiffs because they were not engaged in "public works" within the meaning of the prevailing wage law. (*Kaanaana, supra*, 29 Cal.App.5th at p. 811.) Justice Grimes concluded that the work was routine work performed inside a publicly-owned or operated facility having nothing to do with the physical facility or infrastructure itself, and thus should not be subject to the prevailing wage law. (*Ibid.*)

This depublication request is based solely on the prevailing wage law issue.

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[2] The Court of Appeal's opinion presumes, without analysis, that a county sanitation district is an irrigation, utility, reclamation, or improvement district, "or other districts of this type" as described in section 1720, subdivision (a)(2).

III. Depublication Should Be Ordered Because the Opinion Is Incorrect and Inconsistent with the Statutory Scheme and Legislative Intent Behind the Public Works Statute.

Kaanaana is the first case to address the precise issue of whether plaintiffs' belt sorting work at a sanitation district constitutes "public work" under section 1720, subdivision (a)(2). (*Kaanaana, supra*, 29 Cal.App.5th at p. 789.) The Court of Appeal rejected the trial court's conclusion that the Barrett employees' work for the District was not public work "because it was not in the nature of construction work" as too narrow. (*Ibid.*) Instead, the court applied the broadest possible construction of the statute by concluding the term "public works" includes *all* work done for districts of the same "type" as irrigation, utility, reclamation and improvement districts, and was not limited to construction work. (*Id.* at p. 798.) This conclusion is unnecessarily broad and is untethered to the statutory scheme and legislative intent behind the public works statute. It also creates confusion and uncertainty where predictability is necessary to the proper operation of districts affected by prevailing wage law.

In *Kaanaana,* the Court of Appeal first erred in its analysis of the structure of the statutory scheme. The definition of "public works," for which a prevailing wage must be paid, is found in section 1720. Subdivision (a) states that "'public works' means: . . . " and lists eight activities in subdivisions (a)(1) through (a)(8) that constitute public works. Seven of the eight categories described as public works specifically describe publicly-funded work on a physical facility or infrastructure. While the work defined as "public work" is not necessarily limited to construction work, each of the categories *are* limited to work on a physical facility or infrastructure.

Subdivision (a)(1) defines as public works, "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, ..." Subdivision (a)(2), defines as public works:

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

Subdivision (a)(3) defines street, sewer, or other improvement work as public works. Subdivisions (a)(4) and (a)(5) define laying of carpet under a publicly-funded maintenance contract or in a public building paid for out of public funds as public works. Subdivision (a)(6) involves public transportation demonstration projects and

subdivision (a)(7) addresses infrastructure project grants. Finally, subdivision (a)(8) defines tree removal work done in execution of a project under paragraph (a)(1) as public works.

On its face, each category of work defined as public works in section 1720 involves work performed on or affecting a physical facility or infrastructure.

The Court of Appeal criticized defendant Barrett's argument that subdivision (a)(2) was a subset of subdivision (a)(1) for failing to give effect to subdivision (a)(2) as a separate subdivision. (*Kaanaana, supra*, 29 Cal.App.5th at pp. 790-791.) But, in violation of the rules of statutory construction, the opinion, while purporting to view all subsections as "equal," gives a meaning to subdivision (a)(2) that is fundamentally different from the meaning of the remaining seven subdivisions. The rules of statutory construction require the court not to "construe statutes in isolation, but rather [to] read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.'" (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530.) The court's statutory interpretation does violence to the rules of statutory construction by creating a disharmony between one of the activities and all the rest of the activities defined as public works in section 1720.

The court's analysis also violates the principle of *noscitur a sociis*—a word is known by the company it keeps. In ignoring the common feature of all of the other subsections defining public works, the opinion fails "to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth'" to the statute. (*Yates v. United States* (2015) 574 U.S. ___, ___ [135 S.Ct. 1074, 1085, 191 L.Ed.2d 64, 79-80]; see also *United States* v. *Williams* (2008) 553 U.S. 285, 294 ["a word is given more precise content by the neighboring words with which it is associated"].) The neighboring categories of activity listed in section 1720, subdivision (a) are all limited to infrastructure work or work on the physical facility.

As a result, the opinion creates broad prevailing wage liability for employees performing *any* kind of work for these kinds of districts, singling out for different treatment work performed at districts described in section 1720, subdivision (a)(2), from all other work on publicly-funded projects.

Plainly, the court's construction creates a disharmony in the statute as a whole as now one of the categories of public work is not like any of the others. (See generally Sesame Street, One of These Things (Is Not Like the Others), The Sesame Street Book

& Record (Columbia Records 1970).) There is no justification for singling out work performed for districts for a broader application of prevailing wage law and thus increasing the cost of contracts entered into by the enumerated districts.

The opinion also strays far from the legislative history of the statute defining public works. The original purpose of the prevailing wage law enacted in 1931 was to protect workers involved in construction of public projects during the Depression from unscrupulous wage practices. As the majority acknowledges, the Public Wage Rate Act was enacted in 1931 "'in response to the economic conditions of the Depression, when the oversupply of labor was exploited by unscrupulous contractors to win government contracts when private construction virtually stopped. [Citation.]'" (*Kaanaana, supra*, 29 Cal.App.5th at p. 792, quoting *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 294.)

The Labor Code, enacted six years later in 1937, replaced this law. (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555 ["[w]hen the California Legislature established the Labor Code in 1937, it replaced the 1931 Public Wage Rate Act with a revised, *but substantially unchanged*, version of the same law"], italics added.) The Court of Appeal opinion, however, necessarily concludes just the opposite by imbuing the meaning of "public work" for a district with a substantially different meaning. The opinion veers sharply away from the general purpose of California's prevailing wage law "to benefit the construction worker on public construction projects." (*O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434, 461.)

It is true that the purpose of the prevailing wage law has since been expanded to the broader objective of benefitting and protecting employees on public works projects, not just those involved in construction activities. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.) But, the *Kaanaana* opinion incorrectly relies on the notion of a historical expansion of the definition of public works as a launching point to catapult to the conclusion that all work of *any kind* for a district of the "type" of those described in subdivision (a)(2) "public work." According to the opinion, it matters not whether the work involves infrastructure work, work related to the physical facility, or simply performed at an existing facility . (See *Kaanaana, supra*, 29 Cal.App.5th at pp. 795, 797.) In doing so, the court greatly and unnecessarily misapplies the Legislature's intended meaning of "public works." And, the opinion creates a potential ripple effect of enormous uncertainty and grave economic repercussions. The sparse legislative history regarding section 1720 does not justify this radical departure from the original purpose of the prevailing wage law.

The opinion also ignores administrative opinions, including *The Hauling of Biosolids from Orange County* (Apr. 21, 2006, Dept. of Industrial Relations, Pub. Works Case No. 2005-009) <https://www.dir.ca.gov/OPRL/coverage/year2006/2005-009.pdf> [as of Jan. 23, 2019] (*Biosolids*).) While the *Biosolids* opinion is not binding precedent, the statement contained in that opinion that "[f]inding 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) should be accorded some value. As the administrative agency responsible for making determinations regarding coverage under the prevailing wage laws pursuant to Title 8, California Code of Regulations, section 16001, the Director of Industrial Relation's view that the very outcome reached by the Court of Appeal in *Kaanaana* is "illogical" is instructive.

The Court of Appeal's opinion is also incorrect because it stretches beyond recognition the one existing case that states section 1720, subdivision (a)(2) "may apply independently to cover *some* work for an improvement district not otherwise encompassed within [section 1720(a)(1)]'s enumerated categories." (*Kaanaana, supra*, 29 Cal.App.5th at p. 797, italics added, quoting *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 21, italics added.) *Some* work is not *all* work or *any* work. Further, the *Azusa* court carefully tied the expansion of the types of work defined as "public works" to *infrastructure work*, thus staying true to the legislative history that gives the term "public works" its meaning. (*Azusa, supra,* at pp. 20-21.)

The dissenting opinion offers a different interpretation that is consistent with the available legislative history, is supported by the canons of statutory construction that require reading statutes in a way that does not lead to disharmony with the rest of the statute, and is consistent with the legislative intent and the origins of the prevailing wage laws. As the dissent notes, the term "public works" in section 1720, "in every case involved work on 'public works projects' that in some way concerns *infrastructure*—the physical facilities that constitute 'public works projects' or public improvements." (*Kaanaana, supra*, 29 Cal.App.5th at p. 811 (conc. & dis. opn. of Grimes, J.).) This interpretation is in line with the origins of the prevailing wage law, recognizes public work is not necessarily confined to "construction" work, but does not over-extend the law to routine operations that happen to be performed inside a publicly funded facility or improvement. No one, including the Department of Industrial Relations, has ever considered section 1720, subdivision (a)(2) to apply to the many workers districts hire through outside contracts to perform routine operations work.

The *Kaanaana* opinion should be depublished because it incorrectly interprets the long-recognized requirement that prevailing wage laws apply to various kinds of work involving or affecting publicly funded physical facilities or infrastructure, but not to routine operations or other work that happens to be performed for those facilities. The opinion threatens to disrupt the entire prevailing wage law regulatory scheme and creates significant impacts never intended by the statutory scheme.

IV. Depublication Should Be Ordered Because the Opinion's Analysis Is Too Broad and Creates Confusion and Uncertainty.

The work defined as "public work" subject to the prevailing wage law in the *Kaanaana* opinion has never, in the prevailing wage law's more than 80-year history, been applied to routine operations activities to which it will now apply. The court's holding that the public work defined in section 1720, "subdivision (a)(2) applies even when the work does not meet the descriptors in subdivision (a)(1)," vastly expands potential liability for prevailing wage compliance to all "employees contracted to work for irrigation, utility, and similar districts," no matter what kind of work they are performing. (*Kaanaana, supra,* 29 Cal.App.5th at pp. 791, 793.) This could include employees who provide security services, janitorial services, clerical personnel, administrative personnel, and even outside lawyers, engineers and accountants, all of whose minimum rates would have to be specified by the Department of Industrial Relations. None of this work has been deemed "public work" by the Department of Industrial Relations or any published opinion in California to date. Nor should it be as the work does not bear any connection to the origins and purpose of the prevailing wage law as applied to public works involving construction, or work relating to or affecting infrastructure or the physical facility.

The opinion creates a slippery slope when it opens up application of prevailing wage law to employees performing routine operations work at districts described in section 1720, subdivision (a)(2). There is a grave danger of misuse of this case as precedent to extend prevailing wage requirements to employees on a wide range of public projects. Even aside from the potential expansion to other employees, the consequences of the expansion of prevailing wage liability created by *Kaanaana* to all employees working under contract at a district are enormous.

The impact of classifying contracts with third parties as "public works" can be substantial. Frequently, prevailing wages are higher than wages on typical private projects. Thus, predictability about which contracts with third parties are considered "public works" is critical, especially given the costly consequences of an incorrect classification, including fines, penalties, potential criminal prosecution and suspension

from bidding on public works projects. (Lab. Code, §§ 1741, 1775-1777, 1777.1, 1777.7; *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 792.)

Yet, because this was a dispute between private parties the affected public agencies did not learn of the case until after the opinion was published. The opinion should be depublished for the additional reason that public agencies are profoundly affected by the opinion, but did not have the opportunity to advocate for the public's interest and the court did not have the benefit of their views in considering the appropriate resolution of the issues presented in *Kaanaana.*

Further, if required to designate *all* contracts with outside vendors, staffing and management companies, professional service providers, and even temporary management employees as "public works" subject to the prevailing wage laws, labor costs will be substantially increased and the financial feasibility of many projects will be impacted, including those already underway. (*Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th at pp. 981-982.) The impact will affect a large number of districts that fall within the scope of section 1720, subdivision (a)(2). The cost, of course, will be born by the taxpayers.

Applying the designation of "public work" without limitation to all work performed for improvement districts, including routine operations such as belt sorting of recyclables, cannot be a reasoned application of the Labor Code's definition of "public work" or the Legislature's intent. The decision is incorrect and creates confusion and uncertainty. For these reasons, we urge the court to depublish the *Kaanaana* decision.

Very truly yours,

/s/ Lann G. McIntyre

Lann G. McIntyre of
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PROOF OF SERVICE
Kaanaana v. Barrett Business Services, Inc., et al.
Supreme Court Case Number S253458
Second Civil Numbers B276420 and B279838 (Opinion Filed 11/30/18)

I, Theresa Burge, 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 January 29, 2019, I served the following document described as **REQUEST FOR DEPUBLICATION OF OPINION** 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 January 29, 2019, I served the following document described as **REQUEST FOR DEPUBLICATION OF OPINION** 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/or 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 below in the ordinary course of business.

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

Executed on January 29, 2019, at San Diego, California.

/s/ Theresa Burge
Theresa Burge

SERVICE LIST

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Supreme Court Case Number S253458
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