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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.***
Amici Curiae Letter in Support of Petition for Review (Cal. Rules of Court, rule 8.500(g))
Supreme Court Case No. S253458
Second Civil No.: B276420, B279838 - Opinion Filed November 30, 2018
Presently Reported at: *Kaanaana v. Barrett Business Services, Inc., et al.* (2018) 29 Cal.App.5th 778
Petition for Review filed January 9, 2019

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

This letter is submitted on behalf of the County Sanitation District No. 2 of Los Angeles County, California Association of Sanitation Agencies, League of California Cities, the California State Association of Counties and the California Special Districts Association in support of Barrett Business Services, Inc.'s petition for review of *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778 (*Kaanaana*), pursuant to California Rules of Court, rule 8.500, subdivision (g).[1]

[1] No party has participated in the preparation of this letter and no party has provided any funding for it.

INTERESTS OF AMICI

County Sanitation District No. 2 of Los Angles 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 contract 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 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.

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 has identified this case as having statewide significance for special districts.

The District, CASA, the League of California Cities, CSAC and CSDA request that the Court grant review of the Court of Appeal's above-referenced opinion. As explained more fully below, the issue is one of first impression and profoundly impacts a wide range of publicly funded districts.

WHY REVIEW SHOULD BE GRANTED

Public works projects have been subject to wage regulation since 1931 when prevailing wage laws were first enacted to protect construction workers on government projects from unscrupulous practices due to the oversupply of labor during the Great Depression. (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 294.) While initially applicable to construction work, the definition of public works has expanded over the years. Yet, in every case expanding the definition of public works, the "work" has always been limited to work on or affecting public works *infrastructure*, but not the routine operation of existing facilities. The *Kaanaana* opinion substantially expands the categories of work for which contract workers at local public agencies must be paid prevailing wages by expanding the definition of "public works" to include all workers, which may include such workers as contract janitors, security officers, food service workers, temporary clerical workers and other workers supplied to public agencies by contract employers.

Thousands of publicly funded districts in California regularly use contract workers for their routine operations and for professional services such as legal advice, engineering consulting and accounting services. This work is done under contract because the work load varies and the service providers can increase or decrease the number of workers as necessary. Until now, these workers at utilities and other districts have not been treated as subject to the prevailing wage laws for public works because they are not engaged in work that is considered "public works," but rather,

work related to the routine operations of the district. Now, for the first time, they are potentially subject to prevailing wage laws.

The *Kaanaana* opinion is the first published opinion to address the issue of whether contract workers performing routine work at a public facility that does not involve "construction, alteration, demolition, installation, or repair work," or other work involving infrastructure or the physical facility, is considered "public works" and thus subject to the prevailing wage laws. The issue decided in *Kaanaana* is: "whether plaintiffs' work, consisting of the belt sorting of recyclables at recycling facilities owned by Los Angeles County Sanitation Districts, constitutes 'public work.'" (*Kaanaana,* 29 Cal.App.5th at p. 789.)

Kaanaana holds that "the 'construction language' limiting the definition of 'public works' in subdivision (a)(1) of section 1720 does not also limit the definition of 'public works' in subdivision (a)(2)," which addresses "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type." (*Id.* at pp. 791, 798.) Thus, the court concluded, "the recycling work done for the sanitation districts in this case constitutes 'public work.'" (*Id.* at p. 797.)

The opinion is seriously flawed and creates profound economic and administrative impacts for a large number of publicly funded districts and contract workers. The Court of Appeal's expansive construction of section 1720, subdivision (a)(2) conflicts with all other definitions of public works in section 1720 by considering *all* work performed on public projects for districts, regardless of its nature, as public works. Every other subdivision of section 1720 describing "public works" involves work on a physical facility or infrastructure. Thus, districts are singled out for a more expansive application of the prevailing wage law to their operations than any other public works project. This conclusion is unnecessarily broad and is untethered to the statutory scheme and legislative intent.

Further, the opinion creates uncertainty and confusion about the types of workers subject to prevailing wage laws and blurs the line between "public works" and routine work that happens to take place at a publicly funded entity. Predictability about prevailing wage law application is critical to the numerous districts impacted by this decision, which must manage budgets and public funds in providing critical public services. Amici urge the Court to grant review of this important case.

I. The Decision Involves an Issue of Statewide, Public Importance.

The *Kaanaana* decision affects numerous districts statewide that provide a broad range of important public services, including sanitation, water, sewage collection and treatment, and other critical utilities. These local public agencies, funded by public money, negotiate multi-million contracts with contract-service providers. The District, alone, has over $50 million in contracts for contract workers and professional services, none of whom have been classified by the DIR as workers subject to prevailing wage laws.

The Department of Industrial Relations ("DIR") determines the prevailing wage for public works. Contractors and others who work on public works projects are required to register with the DIR and are subject to certified payroll requirements on most public works. The DIR defines "public works" in general as: "Construction, alteration, demolition, installation, or repair work done under contract and paid in whole or in part out of public funds." https://www.dir.da.gov/Public-Works/PublicWorks.html [as of January 23, 2019]. The DIR website states public works "can include preconstruction and post-construction activities related to public works projects." (*Ibid.*) The DIR website directs: "For a full definition of public works refer to Labor Code section 1720." (*Ibid.*)

As a result of the *Kaanaana* decision, Labor Code section 1720 now applies broadly to include all contract workers at the District and other routine operations workers at "irrigation, utility, reclamation, and improvement districts, and other districts of this type." The DIR will be required to make prevailing wage determinations for each of these workers. (section 1770.) The 2018 general prevailing wage determinations published by the DIR have been made for numerous crafts, but none are even remotely applicable to belt sorters, or security guards, janitors, outside attorneys, accountants, or consulting engineers, all of whom have not been covered by prevailing wage laws. (See https://www.dir.ga.gov/OPRL/2018-2/PWD/index.htm.)

Consequently, the DIR will be required to conduct wage surveys for all kinds of employees not currently included in its existing classifications and to determine a prevailing wage for them. This Court should grant review to settle the important questions presented in this case before such a vast and ambiguously defined undertaking is required.

II. Review Is Necessary To Provide Clear Guidance On An Important Question of Law.

The *Kaanaana* opinion creates uncertainty and confusion where predictability about what constitutes "public works" is critical to the many affected districts, the Department of Industrial Relations, the contract workers themselves and the public, who, as taxpayers, face the prospect of an increased tax burden.

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 reviewed for the additional reason that public agencies are profoundly affected by the opinion, but have not had the opportunity to advocate for the public's interest. The Court of Appeal did not have the benefit of their views in considering the appropriate resolution of the issues presented in *Kaanaana.* Thus, the Court is urged to grant review because of the need for clear guidance on this important question of law after consideration of all interests, both public and private.

The term "public works" has, until now, uniformly been interpreted as work on infrastructure or the facility itself, consistent with its origins…. 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 works" is not necessarily limited to construction work, on its face, each category of work defined as public works in section 1720 involves work performed on a physical facility or infrastructure.

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, expect as used in Section 1778 relating to retaining wages.

The court in *Kaanaana* viewed the omission of the word "construction" at the beginning of subdivision (a)(2)'s definition of public works as meaning there was *no* limitation on the type of work done for districts that could be considered "public works." The court did not consider the alternative interpretation presented by the dissenting opinion that reached a middle-ground by interpreting the work qualifying as public works in subdivision (a)(2) to work performed for districts relating to or affecting infrastructure, even if not construction work.

The opinion creates uncertainty by over-extending the definition of "public works" to cover 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), to apply to the many workers districts hire through outside contracts. This could include employees who provide security services, janitorial services, clerical personnel, administrative personnel, and even outside lawyers, engineers and accountants. None of this work has been deemed "public works" by the Department of Industrial Relations or any published opinion in California to date. The *Kaanaana* opinion threatens to upend the entire prevailing wage law regulatory scheme and creates significant impacts never intended by the public works law.

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, 786.)

III. Alternatively, This Court Should Order That The Opinion in *Kaanaana* Be Depublished.

In the event this court determines that the issues the petition for review and this letter present are not ripe for review, this amici alternatively request that the court order that the opinion in *Kaanaana* be depublished on the grounds that it incorrectly interprets Labor Code section 1720, and will cause confusion and

uncertainty for workers, public agencies, staffing companies, trial courts and reviewing courts alike.[2]

As explained in detail above, applying the designation of "public works," without limitation, to all work performed for districts, including routine operations such as belt sorting of recyclables, cannot be a reasoned application of the Labor Code's definition of "public works" or representative of the Legislature's intent.

CONCLUSION

This is an issue of great public importance and a case of first impression that should be decided by this State's highest court. For all of these reasons, the Court is urged to grant review of the *Kaanaana* decision.

Alternatively, if this court determines that review is not yet appropriate, it should depublish the opinion in *Kaanaana*.

Very truly yours,

/s/ Lann G. McIntyre

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[2] Amici are also contemporaneously filing a separate letter requesting depublication. (See Cal. Rules of Court, rule 8.1125, subd. (a)(2).)

PROOF OF SERVICE

Kaanaana v. Barrett Business Services, Inc., et al.
Supreme Court Case Number S253458 (Petition for Review Filed 1/9/19)
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 **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** 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 **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** 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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