No. 00-152

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR S. LUJAN
Petitioner

v.

G & G FIRE SPRINKLERS, INC
Respondents.

RESPONDENT'S BRIEF

Filed January 16th, 2001

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTIONS PRESENTED

1. Is a statutory seizure of money due under a contract, by State Enforcement officials, for payment of civil penalties and third-party wage claims, which have been assessed for alleged violations of the Labor Code, to advance the regulatory policy of the State, a deprivation of property?

2. If the money seized must be held until the completion of a civil lawsuit, including exhaustion of appellate rights, does the Due Process Clause require a pre- or prompt post-deprivation hearing?

3. If the seizure becomes permanent, with no hearing being held, by the failure of the contractor to file a lawsuit within ninety days of completion of the project, must there be a pre- or prompt post-deprivation hearing?

4. Is a targeted subcontractor, who is alleged to be the violator of the Labor Code, and who bears the economic burden of the seizure, entitled to a hearing at any time, and if so, is the subcontractor entitled to a pre- or prompt post-deprivation hearing?

5. Does the California Procedure deprive a contractor and/or a subcontractor of a property interest in a claim to payment?

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I. INTRODUCTION

Consider a procedure that allows enforcement officials to seize money, without notice or hearing, based on secret one-sided determinations. Consider further a contractor who pays the prevailing wage being choked to death because of its non-union status. You have just considered a procedure that was declared to be unconstitutional by the District Court and Court of Appeals.

Petitioner's brief revealed, for the first time to G&G, that in response to this lawsuit, the State has adopted legislative changes scheduled to become effective July, 2001. Notwithstanding the legislative changes, the judgment in this case remains vital, and should not be vacated.

II. DESIGNATION OF THE PARTIES

The respondent is G & G Fire Sprinklers, Inc. ("G&G") a contractor.

Petitioners are referred to as "DLSE." DLSE is the state agency mandated to enforce the California Labor Code. *Labor Code* §90.5.[1] The Labor Commissioner is chief of DLSE. *Labor Code* §21. The office of the Labor Commissioner, and DLSE, are the same entity. Jt. App. 230.[2]

III. STATEMENT OF FACTS

A. Application Of The Notice To Withhold Procedure To G&G

G&G is a fire sprinkler contractor whose business includes performing work on public works projects in California. Jt. App. 189-190. G&G became a target of DLSE enforcement officials. Jt. App. 189-222. G&G

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[1] All references to the "Labor Code" refer to California Labor Code.

[2] "Jt. App." refers to the Joint Appendix.

believed that it was being targeted by DLSE, because of its non-union status. Jt. App. 151. G&G believed that DLSE was participating in an effort to force G&G out of business. *Id.*

G&G has performed work as a prime contractor, and as a subcontractor, on public works projects. Jt. App. 189-190. DLSE issued Notices to Withhold against G&G on numerous projects. Jt. App. 190-191. G&G disputed and denied the allegations of DLSE, and contended there was no proper basis for the Notices to Withhold. Jt. App. 191, 193. G&G asserted that the Notices to Withhold were "wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably." Jt. App. 69.

Prior to the seizures which were pending when this action was filed, DLSE seized money on a number of G&G's projects, including projects known as Anaheim City Public Utilities Project; Moore Hall Seismic Renovation, at University of California, Los Angeles; University Center Expansion, at University of California, Santa Barbara; Rec-Center, University of California, Santa Barbara; and the Pyramid at California State University, Long Beach. Jt. App. 190-191. G&G acted as both a prime contractor, and subcontractor, depending on the project. Jt. App. 190-191. The aforesaid Notices to Withhold seized approximately $300,000 of money due. Jt. App. 159, 190-191. G&G contended that the penalties and wage claims asserted by DLSE were arbitrary, unreasonable and without merit. Jt. App. 69, 191. The exclusive remedy, upon seizure of the money, is to file a lawsuit, and all money must be held pending completion of the lawsuit, including appeal. In the meantime, the seizure of the money was cutting off G&G's cash flow, putting G&G at imminent threat of going out of business. Jt. App. at 193-194. G&G filed an action in the United States District

Court, alleging that the seizure procedure was unconstitutional. Jt. App. 152-153, 174-175. Meanwhile, a state court ordered G&G and DLSE to mediation. A settlement was reached. DLSE released all of the Notices to Withhold (Southern California only) in exchange for approximately ten percent of the money seized. Jt. App. 174-175; Notice of Settlement filed in District Court is lodged by G&G.

Not long after the events described above, DLSE issued a Notice of Penalty Assessment against G&G on a project known as CSU, San Bernardino. Jt. App. at 195-196. The Notice of Penalty Assessment was dated July 12, 1995. The Notice of Penalty Assessment ordered the University (project owner) to withhold $750 per day, commencing July 1, 1995, "from any and all progress payments which now or thereafter may become due to the contractor." Jt. App. 195-196. The notice stated that "the withholding shall continue until you are notified to the contrary by this office." *Id.* The Notice to Withhold identified G&G as the targeted subcontractor. The Notice was issued just as G&G was to receive the final payment on the project. Jt. App. at 193. The Notice of Penalty Assessment was open-ended, increasing on a daily basis. The University was unable to release any money to the prime contractor on the project. Jt. App. 259, 260. As a result, over $500,000 due to the prime contractor was being held by the seizure. Jt. App. at 259, 260.

The notice asserted that penalties had been assessed pursuant to §1778(f) of the Labor Code. Jt. App. 195. There is no such statute. A subsequent notice stated that the penalties were assessed under *Labor Code* §1776(g). Jt. App. 208-209. The statute provides for civil penalties, to be assessed by DLSE, when a contractor fails to comply with a request for payroll records within ten days. Neither G&G nor the prime contractor received any request

for payroll records, prior to receipt of the Notice to Withhold. Jt. App. 192, 259-260. The deputy labor commissioner, who issued the notice, contended that such a request had been sent to G&G (albeit at an out-dated address). Jt. App. at 192. G&G promptly provided the payroll records, and requested that the penalty assessment be rescinded. Jt. App. 192-193. DLSE refused to rescind the penalty assessment. Jt. App. at 192-193.

Upon G&G's receipt of the Notice of Penalty Assessment for CSU, and DLSE's refusal to rescind the penalty assessment, it was apparent to G&G that DLSE would issue a Notice to Withhold against G&G, on any project, irrespective of whether there was any basis to do so. The District Court lawsuit was re-filed.

A month later, the open-ended penalty assessment remained in effect, and no money could be released by the owner of the project. As a result, G&G's agreed-upon payment was not received. Jt. App. 193. G&G's attorney sent a letter to DLSE demanding that the Notice of Penalty Assessment be rescinded immediately. Jt. App. at 253-256. G&G's attorney further stated that, in the event DLSE was unwilling to rescind the Notice of Penalty Assessment, a specific amount thereof should be specified.

On September 13, 1995, DLSE's counsel transmitted a Notice to Withhold to the University (the awarding body), superceding the previous penalty assessment. Jt. App. at 197-209. The letter from DLSE's counsel to the University stated: "Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G & G Fire Sprinklers, Inc. This Notice to Withhold supercedes the previous Notice of Penalty Assessment." Jt. App. 198. The Notice to Withhold was in the amount of $23,121.28. Jt. App. 199. The notice alleged wage underpayments of $1,771.28, and penalties of $21,350. Jt. App.

208-209. The penalties included $20,000 for failure to provide payroll records under *Labor Code* §1776(g). *Id.* The penalties were assessed at the rate of $750 per day. The statute provides for a penalty of $25 per day, per worker. Basic arithmetic reveals that penalties were based on thirty workers per day. There were four workers. Jt. App. 199-205. The Notice to Withhold stated that the University was "directed to withhold and retain from any payment due the general contractor the total amount of $23,121.28." Jt. App. at 199. DLSE also included a standard memorandum explaining that the contractor was not allowed to post a bond in lieu of the seizure of funds. Jt. App. at 201-202. The memorandum explained that the purpose of the seizure is to create a fund that may be transmitted as payment to DLSE, and therefore a bond was not allowed. *Id.* The seizure of the prime contractor's money was passed through, by the prime contractor, to G&G. As a result, G&G's agreed-upon money due for the project was not paid. Jt. App. at 193.

On September 22, 1995, DLSE issued a Notice to Withhold on a project known as City Hall-Culver City. Jt. App. 210-218. The Notice to Withhold asserted alleged violations of the Labor Code by G&G. The notice stated that the city was "directed to withhold and retain from any payments due the general contractor the total amount of $48,314.64, which is the sum of all wages and penalties forfeited pursuant to the provisions of *Labor Code* §1727 as evidenced by the attached Notice of Wages Owed and Notice of Penalty Assessment." Jt. App. at 210-211. The attached Notice of Wages Owed stated: "Please take notice that the persons named on Exhibit A, attached hereto and made a part hereof, have performed labor as stated on Exhibit A." The Exhibit A identified G&G as the alleged violator, but merely referenced "unknown employees." Jt. App. at 216. DLSE gave no

prior notice that the Notice to Withhold and Penalty Assessment would be issued. Jt. App. at 193. G&G requested information as to the basis of the notice, but none was provided. *Id.* G&G disputed that there was any basis for the Notice to Withhold. *Id.*

A Notice to Withhold was also pending on a project known as San Joaquin General Hospital. Jt. App. 192. DLSE told G&G that it disputed the job classification used by G&G for certain workers on the project. Jt. App. 192.

Each of the aforesaid Notices to Withhold was issued on account of alleged violations of the California Prevailing Wage Law by G&G. Jt. App. 190-191. Pursuant to the mandate of the Notices to Withhold, the awarding bodies for each of the projects withheld payments they had determined to be due to the prime contractors, and the prime contractors, in turn, withheld money earned by G&G. Jt. App. 191. As a result of the Notices to Withhold that were pending, more than $120,000 was being withheld from G&G. Jt. App. 193. This was the status when the motion for summary judgment in this case was heard, and granted.

B. The Notice To Withhold Procedure

The prevailing wage laws apply to public projects, and private projects funded, in whole or in part, by public money. *Labor Code* §1720. The prevailing wage laws impose, upon contractors and subcontractors, obligations with regard to payment of wages, work hours, and record keeping relating thereto. *Labor Code* §§1774, 1776, 1813. The prevailing wage obligations are imposed as a matter of law, irrespective of the terms of any contract. *Lusardi v. Aubry*, 1 Cal.4th 976; 4 Cal.Rptr.2d 837 (1992).

The Labor Code provides various enforcement mechanisms for violations of the prevailing wage laws. A

violation of the prevailing wage laws may give rise to criminal penalties (§§1777, 1778), administrative debarment (§1777.1), civil penalties (§§1775, 1776(g), 1813), and liability for wage underpayments (§1775). The Labor Code provides for the payment of civil penalties, and wage claims, from money that becomes due under the public works contract. *Labor Code* §§1727, 1730-1731, 1775.

The Notice to Withhold is a procedure used by DLSE to enforce the prevailing wage provisions of the Labor Code.[3] The Notice to Withhold is a statutory seizure order issued by DLSE to an awarding body. *Labor Code* §1727, *Id.* The seizure is made without notice or hearing. *Id.* The Notice to Withhold seizes payments as they become due under the contract. *Id.* The Notice to Withhold sets forth civil penalties assessed by DLSE, and alleged wage claims asserted by DLSE. *Id.* The Notice to Withhold identifies the subcontractor, if any, alleged to have violated the Labor Code. *Id.* The awarding body is ordered to remit the money seized to DLSE, unless the contractor files a lawsuit, pursuant to *Labor Code* §§1730-1731. *Id.* If a lawsuit is filed, the money is held by the awarding body, as a stakeholder, pending completion of the lawsuit, including exhaustion of all appellate rights. *Id.* The lawsuit is the exclusive remedy, and no other issue may be included in the action. *Id.* The money must be held pending conclusion of the lawsuit, including exhaustion of all appellate rights. *Labor Code* §1731; *Krueger v. San Francisco*, 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); Jt. App. 182, 332-335 [undisputed fact on summary judgment]; *See also, Purdy v. State of California*, 71 Cal.2d 566 (1969) [action pursuant to *Labor Code*

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[3] *Krueger v. San Francisco*, 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); *Labor Code* §§1727, 1730-1733, 1775, 1813; Jt. App. 195-222; Jt. App. 241, 250; Jt. App. 333-335.

§§1730-1731 is the exclusive remedy to recover money seized]. The awarding body has a mandatory duty under the Labor Code to comply with the Notice to Withhold. *Id.* A refusal to comply with the Notice to Withhold can be a crime. *Labor Code* §1777.

The Labor Code provides that the contract should give notice of the obligation to pay prevailing wage, and the potential for civil penalties. *Labor Code* §§1773.2, 1773.8, 1775, 1813. The authority for the Notice to Withhold is *Labor Code* §1727. *See also,* Jt. App. 195-222 [Notices to Withhold and DLSE memorandum]. The Labor Code does not provide that the withholding requirement be included in the contract. *See, Labor Code* §1727.

IV. THE PROCEEDINGS BELOW

G&G filed this action in District Court alleging that the Notice to Withhold Procedure, and statutes on which it was based, were unconstitutional. Jt. App. 151-152.

G&G obtained summary judgment. The only fact disputed by DLSE was G&G's contention as to the amount of time necessary to litigate the State Court lawsuit. Jt. App. 332-335. DLSE stated that a State Court lawsuit could be brought to trial nine to fifteen months after filing. DLSE did not dispute that the money must be held pending trial, and appeal. *Id.*, 181-182, 332-335. G&G argued that the procedure was unconstitutional, even accepting DLSE's contention regarding the time required to bring a case to trial. Jt. App. 352. G&G contended that due process required a hearing, with regard to the "temporary" seizure, pending the completion of the lawsuit provided for by the Labor Code.

The District Court found in favor of G&G.

The Court of Appeals affirmed the District Court's judgment, with a modification. *G & G Fire Sprinklers, Inc.*

v. Bradshaw, 156 F.3d 893 (9th Cir. 1998). The Court of Appeals held that the Notice to Withhold Procedure was unconstitutional, but that the statutes need not be declared unconstitutional on their face. *Id.* at 905. The Court held that the statutes were unconstitutional as applied. *Id.* The Court of Appeals stated that the constitutional defect could be remedied by adoption of regulations providing for a pre-deprivation or prompt post-deprivation hearing. *Id.* The Court of Appeals held that the right to a lawsuit under *Labor Code* §§1730-1733 did not satisfy the due process violation asserted by G&G. *Id.* at 904, n.9.

Upon a Petition for Rehearing by DLSE, the Court of Appeals modified the opinion to state that a post-deprivation hearing would be sufficient (as opposed to requiring a pre-deprivation hearing). Pet. App. A-18.

The case was remanded to the District Court. In response to the Ninth Circuit's opinion, DLSE adopted regulations providing that a prime contractor, or subcontractor, could obtain a hearing, within thirty days. The hearing would determine whether there was "reasonable cause" for the Notice to Withhold. The regulations provided that the hearing would have no *res judicata* effect with regard to an underlying State Court lawsuit, filed pursuant to *Labor Code* §§1730-1733. *See, Title 8 of California Code of Regulation* §§16410-16414. DLSE argued to the District Court that the regulations remedied the constitutional violation in accordance with the Ninth Circuit opinion.

Subsequently, this Court granted a Petition for Writ of Certiorari, and vacated the Ninth Circuit opinion for reconsideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999). The Ninth Circuit issued an order

reinstating its prior opinion, without modification. *G & G Fire Sprinklers v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000).

V. THE COURT OF APPEALS OPINION

The Court of Appeals held that the Notice to Withhold Procedure is a "seizure" which requires the State "provide the contractor with a reasonably prompt hearing of some sort." *G&G, supra*, 156 F.3d at 897, 904. The Court relied on *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), in holding there was a deprivation of property, comparing the procedure to a garnishment. *Id.* at 901. The Court explained that the Labor Code authorized seizure of "*money owed* to contractors or subcontractors for alleged violations of the state prevailing wage law." *Id.* at 902. [Emphasis Added.] If a lawsuit is filed to recover the money seized, "the money is held in escrow until its resolution. §1731." *Id.* at 898.

The Court held that a prompt post-deprivation was due, relying on *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) [temporary suspension of pay required "prompt post suspension hearing."]. The Court held that a right to a lawsuit under *Labor Code* §§1730-1733 was not sufficient due process, rejecting DLSE's reliance on *Parrat v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The Court held that the injury to G&G, as a subcontractor, was a direct injury; but even if it was indirect, the result would be the same – G&G had standing to assert "a direct constitutional challenge" to DLSE's conduct. *Id.* at 899-901, 902. "The state's action is targeted at G&G; the prime contractors' only role in the dispute is that of a conduit." *Id.* at 900.

The Court rejected DLSE's argument that this case involved contractual disputes. *Id.* at 902. The Court explained that the case posed no risk of "federalization"

of state contract law. *Id.* at 902. The case involved the "regulatory power" of the State. *Id.* at 902.

The Court rejected DLSE's contention that G&G's lack of a direct right of action against the awarding body was a basis for denying relief. *Id.* at 901. In response, the Court stated that the inability of a subcontractor to sue for recovery of the money seized "only bolsters" their conclusion in the case. *Id.* at 901. The Court noted the self-executing nature of the procedure. *Id.* at 904. [If a lawsuit is not filed within ninety days, the seizure is permanent, without any hearing having been held].

The Court held the statutes were unconstitutional as applied. The constitutional defect could be remedied by adopting a hearing procedure for "G&G and others." *Id.* at 905-906. The Court did not specify a particular procedure, but left the State "to manage its own affairs in a manner consistent with the Constitution." *Id.* at 905.

In connection with holding that the case does not involve breach of contract claims, the Court stated that "G&G concedes that the express terms of the contract grant the state authority to withhold funds for wage violations; the withholding is not a breach of contract." *Id.* at 902. A review of G&G's briefs will reveal that no such statement was made. G&G has consistently argued that DLSE's action is not pursuant to contract. The Court explains, in a footnote, that it is referring to G&G's point that usual breach of contract remedies do not exist for the statutory seizure. *Id.* at 902, n.6. G&G's point was that the awarding body is under a statutory mandate to withhold the payment due, hence there is no breach of contract; and the exclusive remedy is the lawsuit under *Labor Code* §§1731-1733. *See*, Appellee's Brief filed in Ninth Circuit, March 25, 1996, p. 13.

Upon remand from this Court, to reconsider the opinion in light of *Sullivan*, the Court of Appeals reinstated its opinion, without modification. *G&G v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000). The Court of Appeals held that this case involved state action, and the Court distinguished *Sullivan* with regard to the property interest. The Court stated that there was a property interest in the right to a claim for payment. G&G believes that additional grounds for distinguishing *Sullivan* exist. In addition to relying on the reasoning of the Court of Appeals opinion, G&G sets forth in this brief the additional reasons that *Sullivan* is distinguishable from this case.

VI. SUMMARY OF ARGUMENT

This is a case about the deprivation of property. The property seized, while it goes by various names, is what we have called in this litigation, the right to money due for work performed. The right to money due means the right to *money due*. The money seized by DLSE is money due. There are certain sequences of events which must occur in a particular order, to occur at all. Among these is that payment under a contract must be due before payment is made. In a California public works project, money is determined to be due when the awarding body, in the exercise of its *proprietary* judgment, determines that money is due and payable under the public works contract.

An awarding body, exercising it's *proprietary* judgment, may determine that money requested, is not due. A dispute can arise. The dispute may be submitted to a dispute resolution procedure. While there are particular procedures of this sort in California, for public works contract disputes, they are of no specific concern here. The significant point is that upon resolution of the dispute, whether by agreement, arbitration award, judgment

or otherwise, if the resolution calls for payment to the contractor, money is due for work performed.

If every payment for work performed was disputed, little work would be done. The usual state of affairs is that money becomes due, when the awarding body, acting under the terms of its contract, and within the broad confines of the California Public Contracts Code, makes the proprietary determination that money is due. The consequence of a determination that money is due, is that money is paid; all of which occurs, before any effective action is taken by DLSE.

DLSE enters as a stranger to the contract. DLSE, at times, refers vaguely in its brief to itself, and the awarding body, interchangeably, as the "State." The two are not the same, in substance or form. DLSE attempts to clothe itself in the sheep's wool of the awarding body's proprietary conduct. DLSE itself has declared, in another case, that it "is the enforcing entity of the prevailing wage statutes and . . . is not a participant in the various public works projects."[4] The California Supreme Court has declared that DLSE's enforcement actions creates a "direct and palpable conflict of interest" with the proprietary concerns of the awarding body. The conclusion that DLSE is engaged in enforcement activity, pursuant to the regulatory power of the State, and not proprietary marketplace activity, is not even a close call. In a similar vein, the conclusion that DLSE's actions are not contractual, but wholly regulatory, is not a close call either. Once again, the California Supreme Court has spoken on the issue. The Court stated that the prevailing wage obligations are statutory obligations, imposed by law, even if the contract says in big, bold, red, underlined letters that

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[4] *Department of Industrial Relations v. Fidelity Roof*, 60 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465 (1997).

"Thou shall not pay the prevailing wage." The California Supreme Court held that DLSE is not in privity with the awarding body. The California Public Contracts Code provides that each public agency in California has its own right to act as an independent marketplace participant, with regard to public works. Labor Code § 1727, which provides DLSE with the authority to issue the so-called Notices to Withhold (which would be better termed notices of SEIZURE), does not require, or even suggest, that a public works contract set forth, or even provide notice of, the withholding procedure. All that the Labor Code directs be put in a public works contract, is notice of the contractor's legal obligation to comply with the prevailing wage laws, and possibly also (though the statutes are vague on this) notice of the potential for civil penalties and liability if the law is violated. The statute expressly states that the *"money due"* is *"forfeited"* by violations of the Labor Code. It is difficult to forfeit something one does not own. Admittedly, the mere use of isolated words in the statute is not dispositive, since substance controls over form. The substance here is a statutory forfeiture, implemented by a statutory seizure, pursuant to the order of government enforcement agents. The character of the action is confirmed by the fact that DLSE officials assert *prosectutorial* immunity for the issuance of Notices to Withhold. (A copy of such a ruling from *G&G v. Dept.* BC220974 is lodged herewith).

Having established that DLSE is a stranger to the contract, and more importantly, a stranger to the proprietary concerns of the contract, we still have yet to see DLSE enter the picture in an effective way. Enter the Notice to Withhold. The Notice to Withhold, despite its quaint nomenclature, is a statutory seizure order. The Notice to Withhold directs the awarding body, pursuant to its mandatory obligations under the Labor Code, to

withhold *"from money due or which becomes due to the contractor"* monies for transmittal to DLSE (non-compliance by the awarding body may be a crime). The money is to be paid to DLSE for civil penalties assessed under the Labor Code, and for alleged wage claims asserted by DLSE. In the event the workers cannot be found (including "unknown" workers alleged to be owed wages, *see*, Part III), the wage claim money goes into a trust fund, from where it goes into the State's general fund, whenever the trust fund exceeds $200,000.[5]

The Notice to Withhold seizes money due, not merely in words but in action. There can be no monies available for transmittal to the DLSE, as payment of civil penalties, or wage claims, unless money has been determined to be due under the public works contract by the awarding body. The Notice to Withhold does not terminate the awarding body's contractual obligation to pay the money due; it seizes the money as it becomes due.

DLSE continues to insist, in this case, that the right to money due under a contract, for work performed, is not property, because it doesn't rise to the level of entitlements such as a horse trainer's license or a college teacher's tenure rights. DLSE contends that G&G, by asserting that the right to receive money due is a property right, is trying to create some new form of property, that will cause western civilization to collapse. According to DLSE, all contract law will become federal law, if regulatory enforcement officials are not granted the unfettered right to seize money due under a contract,

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[5] While not particularly relevant to this case, it may be worthy of note that there is a seldom-used provision of the Labor Code, which allows an awarding body to establish a Labor Compliance Program (LCP), which if approved by DLSE, allows the awarding body to keep the civil penalties it collects pursuant to the LCP, as an incentive to enforce the Labor Code.

without concern for the Due Process Clause. Yet due process rights for seizures under state law are well-established in other contexts, and those subjected to such established procedures are not inundating the federal courts. This case does not establish a right to sue in federal court for project specific disputes, but merely the obligation of the State of California to establish a procedure.

Contrary to the views expressed by, and in support of, DLSE, the right to money due under a contract is not a new-found property right, just created by the Ninth Circuit. Before John Hancock put his John Hancock on the Declaration of Independence, the right to money due for work performed was property. When the founding fathers wrote the Fifth Amendment, and later the Fourteenth Amendment, they may not have been thinking of statutory penalties for violations of not-yet-created prevailing wage laws, but they were definitely thinking of the right to money due for work performed. This particular stick, in the bundle of sticks we call property, is so old, that DLSE, and its supporters, seem to have forgotten about it, or worse yet, inadvertently thrown it on a holiday fire. Speaking of the holidays, the inevitable chorus of reply will be that workers too have rights, as they surely do. One Court noted that bankrupting a contractor with unproven and untested seizures of money, pursuant to the government's regulatory power, may well put those very workers out of work. But more to the point, workers are deserving of protection and concern, including the protection of vigorous law enforcement by DLSE, which is, after all, the reason for its existence. However, when DLSE, acting as an enforcement arm of the State, enforces the law in ways that involve the seizure of property, process is due, and in this case, long overdue.

Since this summary of argument has undoubtably droned on far too long, we will not belabor the difference between a request for payment, and a seizure of a payment that is due, although this is the central distinction between this case and the *Sullivan* case. This case asks the question of what happens *after* the insurer in *Sullivan* determines that payment *is* due. Is the money freely available for seizure by regulatory enforcement officials without due process? Does such a seizure of the money due, on the purported basis of alleged violations of the law, invoke the Due Process Clause?

If DLSE issued a Notice to Withhold for labor law violations on a private job, due process would be required. The Due Process Clause does not evaporate because the owner of the project may be a public entity, or a private entity receiving public funds.

The Notice to Withhold attaches only after it has been determined that money is due. While the Notice to Withhold intends that money be paid to the DLSE, the money must first remain suspended in a state of limbo, for an indeterminate amount of time. From the contractor's point of view, the time is measured in years. DLSE may receive the money much sooner, for if the contractor does not file and serve notice of a lawsuit within ninety days of completion of the work, the seizure becomes permanent, and the money is transferred from limbo to DLSE. If the contractor does file the lawsuit, the money remains suspended in limbo until completion of the lawsuit, including exhaustion of DLSE's appellate rights. You may be wondering whether this procedure allows enforcement officials to gain unfair leverage from excessive Notices to Withhold. But rather than ponder such a question, let us return to the point, which is process due. The point of this case is that process is due for the seizure, while the money seized remains in regulatory purgatory, awaiting

the completion of the litigation. A further question is whether any process is due before the seizure becomes permanent, by the self-executing nature of the procedure. A third question is whether the targeted subcontractor, who bears the loss, is entitled to a hearing. The Court of Appeals held that a hearing "of some sort" is required to determine if a basis for the seizure exists, pending the marathon of litigation, or for those whose legs can't last the twenty-six miles.

The state action argument, raised for the first time four years into the litigation, invokes the age-old duck test. If it looks like a duck, walks like a duck, and quacks like a duck, it's a duck. This case is a challenge to the conduct of DLSE, a state actor.

To G&G's surprise (believe it or not, G&G is not a major player in the halls of power in Sacramento), DLSE revealed in its brief that new legislative changes are pending, in response to this lawsuit. The new legislation includes three familiar elements – the Notice to Withhold procedure, large-scale statutory ambiguities, and DLSE's plenary power to implement and enforce the statutes by adoption of regulations, and otherwise. Needless to say, DLSE continues to assert that its seizures of money are beyond the reach of the Due Process Clause, despite the fact that the new statutes, make even more clear than it already was, that the procedure is a regulatory enforcement mechanism.

DLSE asserts a split among the Circuit Courts. G&G has found only two Circuits who have considered whether a seizure, of money due, under prevailing wage laws, invokes the Due Process Clause. The Second Circuit and the Ninth Circuit (in this case) have both answered in the affirmative. In both Circuits, a breach of contract claim does not invoke the Due Process Clause. There is no split among the Circuits. The Circuits are unanimous. Due process is required for regulatory seizures. Such seizures are not a mere breach of contract.

Of course, a person is free not to undertake public works projects. All businesses may evade all regulatory enforcement action, by not engaging in business. The Notice to Withhold Procedure gives DLSE the power of *de facto* debarment of contractors from public works. The Notice to Withhold Procedure can, and does, put contractors out of business. Electing to go out of business is not an adequate remedy. Under such a theory, there are no constitutional limits on the seizure of property, in a commercial context, since a person may always choose not to do business. Business risk should not be defined as including a governmental right to seize property without due process.

The property right to money due for services rendered is of ancient origin, and derives in this case from the awarding body's contractual activity as a marketplace participant. Regulatory labor laws are not an essential ingredient to the creation of the property right. The right to payment due under a contract would exist in the absence of the statutory scheme for seizing money due, to pay civil penalties and purported wage claims.

Property may not be defined, by statute, as incorporating a governmental right of seizure. Enforcement mechanisms which seize money to pay civil penalties and forfeitures do not define property; they seize property. Characterizing such enforcement mechanisms as a definition of property logically implies that all property can be defined as subject to government seizure. The promise of property in America means much more. "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Seven decades ago, when the prevailing wage laws were adopted in California, the power of government to regulate business activity may have been debatable.

Today, the power to regulate is well-established. Acceptance of the position urged by DLSE, and the *amicus curiae*, would constitute a quantum leap in the expansion of such power. The DLSE's contention is that States may enforce regulatory laws by seizing money without notice or hearing. Acceptance of such a position by this Court could lead to the adoption of a myriad of laws, mandating seizure of money due, without notice or hearing. Adherence to constitutional restrictions in the enforcement of regulatory laws is a requirement at the core of the Due Process Clause. Constitutional constraint on enforcement officials is no less important when the owner of property happens to be a public entity, acting as a marketplace participant, or a private party receiving public funds. The power of State officials is not limited merely by their good intentions, which may be disregarded or misapplied at their whim. Constitutional limitations have been established to prevent the abuse of such power. Thomas Jefferson said, "let us hear no more of faith in men, but bind them to the Constitution."

VII. DLSE'S CONTENTION THAT THIS CASE DOES NOT INVOLVE STATE ACTION IS INCORRECT

G&G has asserted throughout the five plus years of this litigation that it has standing to challenge the constitutionality of the DLSE seizure procedure as both a subcontractor, *and as a prime contractor*. The Court of Appeals apparently concluded that it did not need to reach the issue. G&G has standing as both a prime contractor and subcontractor, to challenge the DLSE procedure for seizing a prime contractor's money. G&G also has standing to challenge the seizure of a subcontractor's money. Unlike *Sullivan*, in which a judgment was sought against a private party, G&G sought and obtained a judgment only against a state actor.

The first and most critical right that needed to be vindicated in this case was the right to a hearing, for someone, anyone. Under existing law there is no right to a hearing for anyone. The Court of Appeals said that there should be a right to a hearing for everyone whose money was seized. The Court described those who shall have the right to a hearing as "contractor," "subcontractor," "G&G and others." DLSE, quite appropriately, has interpreted the requirement as a hearing for the prime contractor and targeted subcontractor (in its regulations, and its anticipated statutes, which were adopted to respond to the judgment in this case). DLSE contends that the seizure of the subcontractor's money is not state action. The judgment is sustainable without having to reach this issue (*i.e.*, G&G has standing to challenge seizure of the prime contractor's money). Nevertheless, we examine the issue in light of *Sullivan*.

A. The Pass-Through Of The Seizure From The Prime Contractor To The Subcontractor Is State Action

In *Sullivan*, the Court explained that a private party's resort to the machinery of the State, to effect an ex parte seizure of property is state action. *Sullivan*, 119 S.Ct. at 989. In this case, state action is even more severe. Here, the machinery of the State is thrust upon a private party to effect an ex parte seizure, purportedly to advance the regulatory purpose of the State. *See, Labor Code* §1774 [statutory duty imposed on subcontractor to pay prevailing wages.] DLSE speaks of the prime contractor's discretion to pay the subcontractor. DLSE grants the prime contractor discretion to absorb the loss from DLSE's targeting of the subcontractor as alleged violator of the Labor Code, or alternatively, the prime contractor may

accept the role of DLSE's enforcement agent. Significantly, *Labor Code* §1729 grants a safe harbor to the compliant prime contractor. The net effect is that the subcontractor bears the burden of the civil penalties and alleged wage claims, by becoming the transferee of the seizure. The prime contractor is enlisted by DLSE in the transfer as a mere conduit, or at most joint participant, by the hammer of economic compulsion. The prime contractor is drafted into the fray, only after DLSE interjects itself into the contractual relations of the project participants, by seizing money due, and which will become due, to the prime contractor. DLSE identifies the subcontractor as the alleged violator of the Labor Code, thereby rendering the prime contractor's pass-through inevitable. For example, on the CSU job, DLSE stated that it sent G&G, as subcontractor, a request for payroll reports (albeit to a wrong address), and transmitted its Notice to Withhold with a letter specifically targeting G&G; on Culver City Hall, DLSE asserted that G&G had failed to pay "unknown workers"; and on the San Joaquin project, DLSE asserted that G&G had mis-classified workers. *See*, Part III.A, *supra*.

The injured subcontractor, who is looking for his money, is confronted with a prime contractor who says "I don't have it," and the DLSE who says "I didn't take it." The money is held by an awarding body, who says "I don't want it." All the while, no hearing rights accrue. DLSE concedes the subcontractor's right of equitable subrogation, and the potential of an assignment, from a prime contractor, who himself has no right to a due process hearing. The subcontractor's predicament is not the result of "judgments made by private parties without standards established by the state" or "state inaction, or . . . a legislative decision not to intervene in a dispute," but rather the subcontractor is directly in the cross-hairs

of a pro-active State enforcement agency. *Sullivan*, 119 S.Ct. at 987. State action is manifest.

B. G&G Has Standing As A Subcontractor To Challenge The Constitutionality Of The Seizure Of The Prime Contractor's Money Due

G&G suffered a direct injury from the seizure of the prime contractor's money due and, therefore, has standing to challenge the constitutionality of that seizure. The injury to G&G, as a subcontractor, from the seizure of the prime contractor's money due, was a direct injury caused by the DLSE. *See*, *G&G*, 156 F.3d at 900. (Pet. App. A-26). No other result makes sense. The prime contractor suffers no injury, to the extent the seizure is passed through to the subcontractor. Obviously, the seizure causes an injury. If the prime contractor is not injured, the injury must be suffered by the subcontractor. In *J&K Painting v. Bradshaw*, 45 Cal.App.4th 1394, 1399; 53 Cal.Rptr.2d 496, 499 (1996) the Court held that a subcontractor suffers direct injury from DLSE's Notice to Withhold:

> "According to the Commissioner [DLSE], PaintCo [subcontractor] was not aggrieved by the assertedly illegal withholding order because the withholding of funds was directed against Amoroso, the general contractor. The Commissioner does not dispute, however, that Amoroso in turn withheld funds from PaintCo, as section 1729 expressly empowered it to do. PaintCo was therefore directly aggrieved by the withholding, and possesses a direct interest in the determination of its lawfulness." *Id.* at 1399.

DLSE asserts that a subcontractor has a direct right of action against the awarding body to recover monies withheld. "DLSE has continued to take the position in this litigation that equitable subrogation permits the *subcontractor to stand in the shoes of the prime contractor* . . . As

an agency empowered to administer the prevailing wage law in California, its determinations in this respect have been accorded great weight in the California courts."[Emphasis added]. (Petitioner's Brief, p. 36).

A subcontractor on a public works project may not be terminated by a prime contractor, except on statutory grounds after a hearing before the awarding body. *Cal. Pub. Cont. Code* §4107. California law imposes a statutory duty on a prime contractor to pay a subcontractor out of monies paid by the awarding body. *Cal. Pub. Cont. Code* §§7107, 10262, 10262.5.

The DLSE seizure of the prime contractor's money due causes direct injury to the targeted subcontractor. G&G, as a targeted subcontractor, has standing to challenge the constitutionality of the DLSE seizure. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 505 (1975). This case concerns the conduct of DLSE, as state actor.

C. Even If G&G, As A Subcontractor, Suffers An Indirect Injury, G&G Has Standing To Seek Declaratory And Injunctive Relief With Regard To DLSE's Conduct

Even if the injury to G&G is indirect, G&G has standing to challenge DLSE's actions. *Lujan, supra, Warth, supra*. DLSE asserts that a targeted subcontractor "stands in the shoes of the prime contractor" with regard to an action to recover the money held by the awarding body. If release of the prime contractor's money did not redress the subcontractor's injury, why would the subcontractor "stand in the shoes of the prime contractor?" DLSE seems to contend that this is the case of the phantom seizure. The prime contractor's money is taken, but he suffers no injury because it is transferred to the subcontractor, and so the prime contractor has no injury to redress, while the

subcontractor, who suffers the injury, has no redress against the one who caused it, DLSE.

D. G&G Has Standing As A Prime Contractor

G&G has standing to challenge the Notice to Withhold Procedure as a prime contractor. Standing requires an injury that is concrete and particularized, and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The pleadings, and facts, show that G&G was being targeted, on an ongoing basis, by DLSE. *See*, Part III.A, *supra*. G&G's complaint alleged that "Plaintiff has performed work as both a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and as a prime contractor." Jt. App. 67. G&G's motion for summary judgment established, as an undisputed fact, that "Plaintiff has performed and intends to continue to perform work, on a number of public works projects in the State of California. Plaintiff has performed such work, and intends to perform such work in the future, as both a subcontractor, and prime contractor." Jt. App. 182, 190. The motion further established that "DLSE has issued Notices to Withhold on account of alleged violations of the prevailing wage law by Plaintiff where Plaintiff has acted as a subcontractor, and a prime contractor. . . . For example, G&G was a prime contractor for the Anaheim City Public Utilities Project for which a Notice to Withhold was issued." Jt. App. 183, 190, 191. The facts show that G&G suffered an actual injury from an ongoing series of DLSE actions. The injury occurred to G&G as both a subcontractor, and as a prime contractor. The injury was concrete and particularized. The injury was both actual and imminent. G&G

had actually suffered the injury as a prime contractor. Given G&G's intention to continue to do business as a prime contractor, further injury was imminent. G&G had standing to challenge the Notice to Withhold Procedure as a prime contractor.

VIII. THE NOTICE TO WITHHOLD PROCEDURE CAUSES A DEPRIVATION OF A PROPERTY INTEREST

DLSE argues that the prevailing wage requirement is a condition precedent to payment under the public works contract. Unfortunately, no one told the awarding body, who, unlike DLSE, is a party to the contract. *See, Lusardi, supra.* So while DLSE contends that the condition precedent to payment under the contract has not yet occurred, it issues orders to the awarding body, requiring that payment be made, but not to the contractor, who has been determined by the awarding body to have earned the money due for work performed, but instead to DLSE, who need not prove anything, to anyone. Jt. App. 195-222 [Notices to Withhold]; *Labor Code* §§1727, 1728, 1776(g) [withholding is from "money due contractor" and "progress payments then due"]; *Cal. Pub. Cont. Code* §§9203, 10621 [awarding body makes proprietary determination of when money is due].

This Court has held that a deprivation of property occurs when an entitlement grounded in state law is removed for cause. *See, Logan v. Zimmerman,* 455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982). This Court has held that the right to money due is property. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969) [wages due]; *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) [rent due]. California law provides that decisions about payment under a public works contract are to be made by

a party to the contract, based on its discretion to exercise proprietary judgment. *Cal. Pub. Cont. Code* §§9203, 10261. DLSE seizes the payment, to pay the secretly assessed civil penalties and wage claims derived from the unproven and untested allegations of Labor Law violations. Thus an awarding body, upon having made the determination that payment is due under the public works contract, but having been served with a Notice to Withhold by DLSE, makes the payment, but not to the prime contractor. The payment is made to DLSE, or held as an escrow fund, until all litigation rights have been exhausted, including the DLSE's rights of appeal. *Labor Code* §1730-1733. (Technically, the awarding body is the nominal defendant in the lawsuit, but DLSE defends the case as real party interest.) This brings us to the new math: work performed + work accepted + payment approved + payment made + payment diverted for penalties and third party claims = no deprivation of property, or so says DLSE. Consider the facts of *James Daniel Good, supra,* where the property included the right to money due for rent. If the tenant had been a public entity, the seizure would, nevertheless, have been a deprivation of the landlord's property. It is true, that in this case the contractor is regulated, but if DLSE issued a Notice to Withhold for labor law violations on a private project, due process would be required. The result does not change because the owner is a public entity, acting as a marketplace participant, or a private entity receiving public funds. How can it be that the right of a college professor to teach English is property, but the right to payment due for services rendered is not?

DLSE relies on cases holding that a breach of contract does not constitute a deprivation of property. A contractual dispute over payment does not remove an established entitlement, for cause. The hallmark of property

does not exist. Also, when a public entity acts as a marketplace participant, concerned only with its proprietary interests, constitutional constraint is of less concern. *See, Wisconsin v. Gould,* 475 U.S. 282, 290 (1986); *Building Trades Council v. Associated Builders,* 507 U.S. 218, 229; 122 L.Ed.2d 565; 113 S.Ct. 1190, 1197 (1993). When money due under a contract is seized for civil penalties and third party claims, which are imposed for alleged violations of State law, there is a deprivation of property.

G&G is aware of only two circuits who have addressed the issue in this case, and both found there to be a deprivation of property. *See, General Electric v. Department of Labor,* 936 F.2d 1448 (2nd Cir. 1991); (the other is this case). These cases are not contrary to the well-established rule that the mere breach of a construction contract is not a deprivation of property, which is the rule in both the Ninth and Second Circuits.

DLSE relies on *O.G. Sansone v. Department of Transportation,* 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (1976) for the proposition that the withholding is merely a contract dispute. The California Supreme Court held otherwise sixteen years later. *Lusardi, supra.* Furthermore, *Sansone* is poorly reasoned. *Sansone* misapplied due process law, and is inconsistent with other cases. *See, General Electric v. Department of Labor,* 936 F.2d 1448 (2nd Cir. 1991). *Sansone* is inconsistent with *Merco v. Los Angeles,* 274 Cal.App.2d 154 (1969), which provided that deduction of civil penalties from a prime contractor by the awarding body, for violation of the fair subcontracting act, is a deprivation of property. *Sansone* is even inconsistent with itself, to the extent that it held that the procedure is contractual. *Sansone* said:

> " 'There is no inhibition upon the state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations.' "

Sansone distinguished *Merco* on the grounds that under the Labor Code, there was no discretion with regard to the amount of civil penalties to be imposed. As recognized in *Merco,* a hearing is required to ascertain the fact of the violation. *Merco, supra,* at 166, n.6. The distinction relied on by *Sansone,* no longer exists. In 1989, *Labor Code* §1775 was amended to provide discretion in the determination of the amount of penalties. *Sansone* is no longer good law.

DLSE relies on *Atkin v. State of Kansas,* 191 U.S. 207 (1908). *Atkin* merely held that the State may regulate commercial activity involving public entities as marketplace participants. *See, Metropolitan Water Dist. v. Whitsett,* 215 Cal. 400 (1932). *Atkin* does not hold that regulatory enforcement actions do not require due process. *See, General Electric v. New York,* 936 F.2d 1448, 1455 (2nd Cir. 1991).

A. The Notice To Withhold States That It Seizes Money Due Under The Contract

The Notice to Withhold is issued on standard forms, by enforcement officials of DLSE. The Notice to Withhold is issued to an awarding body. Among the examples included in the joint appendix is a Notice to Withhold alleging a wage underpayment of $1,739.33, and civil penalties of $21,350. Jt. App. 197-207. The Notice to Withhold states:

> "You are directed to withhold and retain from *any payments due* the general contractor the total amount of $23,121.28 which is the sum of all wages and penalties *forfeited pursuant to the provisions of Labor Code §1727* . . . if no notice of suit is received within ninety days . . . *the amount withheld shall be remitted to this office."* [Emphasis added] Jt. App. 199-200.

The Notice to Withhold further states: "This notice is given *pursuant to the provisions of section 1727 of the Labor*

Code. You are hereby required pursuant to said section to withhold *any and all payments which are or hereafter may become due* to the contractor hereinabove named to the extent of the total claim." [Emphasis added]. Jt. App. 213-214. A standard memorandum by DLSE to awarding bodies is included in the record at Jt. App. 201-202. The memorandum states, in part, as follows:

> "There is a statutory scheme within the Labor Code which sets such a high priority of payment of wages to workers that certain Labor Code provisions enable the *DLSE to enforce proper payment of wages and penalties* by mandating that the awarding body withhold funds set out in the notice to withhold (Labor Code §1727) . . . *Labor Code §1730 clearly mandates that the awarding body shall forward funds* withheld pursuant to a notice to withhold *directly to DLSE*." [Emphasis Added] Jt. App. 201-202.

B. The Labor Code States That The Seizure Is Of Money Due

The statutes which provide DLSE with the authority to issue the Notice to Withhold expressly state that the withholding is a seizure of "money due." The statutes require penalties to be withheld from "progress payments then due." *Labor Code* §1727 provides that "before making payments to the contractor of *money due* under a contract for public work, the awarding body shall *withhold and retain therefrom*" the civil penalties and wages allegedly due. *Labor Code* §1728 provides that where full payment is made in the form of a single warrant, or other evidence of full payment, the awarding body shall accept from the contractor cash in an amount equal to, and in lieu of, the amount required to be withheld, and then shall release the final warrant or *payment in full*. *Labor Code* §1775 provides for the imposition of civil penalties by the Labor

Commissioner for violations of the prevailing wage laws. The statute states that "to the extent there is insufficient *money due a contractor* to cover all penalties and amounts due in accordance with this section, or in accordance with section 1813" the DLSE may maintain a lawsuit to recover the penalties and amounts due. *Labor Code* §1776(g), which provides for civil penalties for failure to keep and provide certain payroll records, states that "upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld *from progress payments then due.*"

C. The California Courts Have Stated That The Seizure By The Notice To Withhold Is Of Money Due

The California Supreme Court explained the statutory provisions for withholding as follows: "Deficiencies and penalties are to be withheld by the awarding body *from sums due* under the contract. (§1727)." *Lusardi v. Aubrey*, 1 Cal.4th 976, 986; 4 Cal.Rptr.2d 837, 842 (1992). The California Court of Appeals stated that "the contracting public entity (the 'awarding body') is required to withhold from any *payments due* the contractor all wages and penalties which have been forfeited by virtue of those violations. (§1727)." *J&K Painting v. Bradshaw*, 45 Cal.App.4th 1394, 1397; 53 Cal.Rptr.2d 496, 498 (1996).

D. The Notice To Withhold Seizes Money For Third-Party Claims

The civil penalties are not contract damages retained by the awarding body. The penalties must be transmitted to the DLSE for payment into the general fund of the State. *Labor Code* §1731.

The amounts seized for wage claims are not contract damages to be retained by the awarding body. The

monies are to be transmitted to the DLSE for disbursement to workers, or deposit into a trust fund for workers maintained by the Department of Industrial Relations. *Labor Code* §1731, 1775.[6] The Notices to Withhold issued by the DLSE expressly states that "the amount withheld shall be remitted to this office." Jt. App. 200.

DLSE is a statutory assignee of all workers in California with regard to claims for wages. *Labor Code* §96.7. The Notice to Withhold includes the following statement: "I am an authorized representative acting for the State Labor Commissioner. I execute this declaration *on behalf of the workers* whose names are set forth on the attached notices."

E. The Seizure Of The Prime Contractor's Right To Money Due Is Sufficient To Support The Judgment

It has been established that the Notice to Withhold seizes the prime contractor's right to receive money due under the contract. The money is paid, instead, into a fund to be used for payment of civil penalties and wage claims. The seizure of the prime contractor's right to receive money due under the contract is a deprivation of property. *Sniadach, supra, James Daniel Good, supra, General Electric, supra.* At this point, process is due. Vindicating a prime contractor's right to a hearing establishes that the procedure is unconstitutional, and provides most of the relief sought by G&G. Establishing the right to a hearing for a prime contractor remedies G&G's problem as a prime contractor, and mostly as a subcontractor, since

[6] When the trust fund exceeds $200,000 monies are transferred to the State's general fund, not to the awarding body. *Labor Code* §96.7.

DLSE concedes an equitable right of subrogation for participation by a subcontractor, and a subcontractor may well be able to participate, in any event, as an assignee, witness, or joint participant. Establishing the prime contractor's right to a hearing establishes even more, because it follows that a targeted subcontractor has a due process right to participate. *See,* Part VII, *supra.* The injury to the targeted subcontractor is an injury, entitled to redress under due process principles. *See,* Part VII, *supra.* Although vindicating the right to a hearing with regard to the seizure of the prime contractor's money due is sufficient to decide the case, it is noteworthy that the Notice to Withhold invades two other property interests.

F. The Subcontractor's Property Interest In Money Due

The subcontractor's property interest in money due, actually includes two property interests; a statutory right to receive payment from the prime contractor's payment, and the old-fashioned money due for work performed.

A subcontractor has a statutory entitlement to the contract, *Cal. Pub. Cont. Code* §4107 [termination of subcontract allowed only on statutory grounds after a hearing]; and a statutory entitlement to payment from money paid to the prime contractor. *Cal. Pub. Cont. Code* §§7107, 10262, 10262.5; *Cal. Bus. & Prof. Code* §7108.5. The Notice to Withhold terminates these statutory entitlements. The targeted subcontractor who is owed money would be paid, but for the seizure of the prime contractor's payment due. The seizure is distinct from a contractual dispute with the awarding body, because the prime contractor, in acting as a mere conduit, or joint participant, for DLSE, passes through the seizure by DLSE. *See,* Part VII.

Similarly, the seizure terminates the targeted subcontractor's right to receive money due under the contract, even without regard to any statutory entitlements. *See, Labor Code* §1729.

In order for the prime contractor to pass through the loss it has suffered, there must be money due to the subcontractor. If there is no money due to the subcontractor, the prime contractor cannot pass through his loss. Thus, the constitutionality of the procedure must be determined in the context of when money is due to the subcontractor. (This was the situation G&G was in on the projects described in the statement of facts). The money due, is not paid, because of the seizure by DLSE. Where the subcontractor is the alleged violator of the law, who is suffering the economic burden, the subcontractor has the right to a hearing. *See, O'Bannon v. Town Court,* 447 U.S. 773, 789, n.22; 100 S.Ct. 2467, 2477; 65 L.Ed.2d 506 (1980).

G. This Case Involves Regulatory, Not Proprietary, Conduct, And Does Not Involve A Breach Of Contract Claim

Proprietory provisions of a contract are negotiable. The awarding body can make choices to accomodate the market. The Labor Code is non-negotiable.

In *Lusardi v. Aubrey,* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992) the California Supreme Court expressly held that the prevailing wage law creates statutory obligations, which exist without regard to the terms of any contract. The California Supreme Court analogized the function of the DLSE, in enforcing the prevailing wage laws, to that of a criminal prosecutor. *Lusardi, supra,* at 992.

Contractual remedies must be compensatory. An awarding body has no liability for civil penalties imposed under the Labor Code. *Aubry v. Tri-City Hospital District,* 2 Cal.4th 962, 969; 9 Cal.Rptr.2d 92 (1992). Similarly, an

awarding body has no liability for underpayment of wages to workers. *Id.* The money seized does not compensate the awarding body for damages. Damages claimed by the awarding body would be offset from the contract price, before the awarding body determines if there is "money due," which can be seized to pay penalties and wage claims.

The imposition of civil penalties for violations of State law are never a matter of contract. Penalty provisions in a contract are void. *See e.g.,* 1 Witkin, Summary of Cal. Law, Contracts §503 (9th ed. 1987). Civil penalties can be imposed only as an act of regulatory power.

The Court has explained that a governmental entity acts as a marketplace participant when, as an owner of property, it conducts business as would any private owner of property, with no interest in setting policy. *See, Building Trades v. Associates Builders and Contractors,* 507 U.S. 218 (1993); *Wisconsin v. Gould, supra,* [invalidated a statute which provided that three-time violators of the National Labor Relations Act could not bid on public works projects as being regulatory, not proprietary].

Dillingham v. County of Sonoma, 190 F.3d 1034, 1037-1038 (9th Cir. 1999) held that DLSE actions pursuant to the prevailing wage law are regulatory, not proprietary. In this case, DLSE stated in the District Court, as an undisputed fact, that "the Division of Labor Standards Enforcement, the agency mandated to enforce the prevailing wage requirements of the California public works law (California *Labor Code* §§1730-1850) has interpreted the purposes of the act to benefit workers and prevent unfair competition in the industry."

The California Supreme Court explained that there is a direct conflict of interest between the proprietary interests of the awarding body, and the regulatory interests of DLSE. *Lusardi, supra,* at 995.

DLSE "is the enforcing entity of the prevailing wage statute and . . . is not a participant in the various public works projects." *Department of Industrial Relations v. Fidelity Roof,* 60 Cal.App.4th 411, 420; 70 Cal.Rptr.2d 465 (1997). "When DLSE pursues only unpaid wages and not section 1775 penalties, it acts solely on behalf of the aggrieved workers." *Id.* at 427.

When an awarding body contracts, as an owner of property, for the construction of a building or other improvement, it acts as a marketplace participant. Disputes over performance, such as the quality or timeliness of work, etc., are proprietary in nature. However, the statutory mandate that an awarding body hold money, to secure payment of civil penalties and third-party claims for wages, does not involve marketplace activity. The awarding body is subjected to a statutory mandate to enforce the Labor Code, so as to promote the public policy of the State. The action of the awarding body pursuant to such mandate is regulatory, and not proprietary. In essence, the Labor Code mandates that the awarding body remove its marketplace participant hat, put on its governmental enforcement hat, and enforce the Labor Code. In so doing, the awarding body does not act as would any private owner of property. The awarding body acts as an enforcer of State law. *See, Aubry v. Tri-City,* 2 Cal.4th 962, 969; 9 Cal.Rptr.2d 92 (1992) [awarding body not liable for non-compliance with prevailing wage laws because "this is an injury that could not exist in an action between private persons."]

Regulatory conduct by states is subject to limitations not imposed on private parties because "Government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints." *Wisconsin, supra,* at 290. See, also, *Building Trades, supra,* at 229. An awarding body, pursuing its

proprietary interests, is constrained by the marketplace. DLSE officials, pursuing enforcement actions, are not constrained by market forces. DLSE does not manage a construction budget, or contemplate a need for bidders on the next project.

The seizure of money by enforcement officials pending extended litigation can have devastating effects. The constraint imposed by marketplace activity does not exist when enforcement officials act pursuant to the regulatory power of the State. The Brief of Amicus Curiae, Port of Oakland, quotes a law review article as stating: "The Due Process Clause's function of discouraging arbitrary government action is of limited importance when external constraints have the same effect. The most important external constraint for our purposes is the general effect that marketplace competition has on government behavior and individual choice." *Id.* at p. 7, n.4. DLSE is not subject to any such constraint, as it is not a marketplace participant engaged in proprietary conduct. As a law enforcement agency, DLSE can, and does, target contractors without regard to the proprietary concerns of the awarding bodies. An owner's risk from breaching a contract does not exist for DLSE. An owner who breaches a contract by arbitrarily refusing payment may suffer substantial damages, termination of work by the contractor, and/or rescission of the contract. An awarding body, acting as proprietor, is concerned with its desire to complete the work at the least possible cost. The awarding body must be concerned with not discouraging bidders on future contracts. DLSE has no such proprietary concerns. The cutting off of a contractor's cash flow can, and often does, put the contractor out of business. Excessive Notices to Withhold are inherently attractive, due to the leverage available to enforcement officials from such an

action. The right to sue, and obtain recovery of the money seized years later, is too little too late.

Judge Kozinski, dissenting in this case, stated that "[w]hen the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands." *G&G*, 156 F.3d at 910, n.2 (Pet. App. A-51). Judge Kozinski misses the point. This case is about releasing all the ferociousness of State enforcement officials, completely untethered to the mast of the Constitution.

H. The Holding Of The Court Of Appeals Is Consistent With *American Manufacturers v. Sullivan*

This case was previously remanded to the Court of Appeals, to be reconsidered in light of the recent decision in *American Manufacturers v. Sullivan*, 52 U.S. 40; 119 S.Ct. 977; 143 L.Ed.2d 130 (1999). The Court's prior order regarding *Sullivan* was issued in response to a Petition for Writ of Certiorari, by DLSE, that presented the question in this action is as follows:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the Due Process Clause of the Fourteenth Amendment to anything more than an opportunity to pursue its contract claims through an ordinary State Court lawsuit?"

As explained in the discussion above, no such issue is presented by this case.

Sullivan involved the denial of a claim by a public insurance company. The Court held that the mere submission of a payment request did not establish an entitlement to payment. This case addresses the situation where the payment request has been approved, and the obligation to pay established. The question here is whether a

seizure of the right to receive the payment is a deprivation of property.

In *Sullivan*, enforcement officials did not seize money due under the insurance policy, for payment of civil penalties and third-party claims arising from an alleged violation of law. *Sullivan* did not involve money due, civil penalties, third-party claims, or regulatory enforcement action. *Sullivan* did not involve termination of an entitlement for cause. *Sullivan* involved classic proprietary conduct by a public entity. An employer could purchase insurance from the private insurer, or the public insurer.

This case is the flip side of the *Sullivan* coin. *Sullivan* involved denial of a claim by an insurance company. A due process violation did not arise, merely because the insurer was a public company. In this case, DLSE's enforcement action would require due process, if a private project were involved. The mere fact that the project owner may be public company, does not eliminate the need for due process.

Sullivan is similar to the cases which hold that a mere contractual dispute is not a deprivation of property. The breach of contract cases are inapplicable here for the same reason that *Sullivan* does not control. *See, G&G, supra,* 156 F.3d at 901-902 (Pet. App. A-31-32) [contract cases distinguished].

I. DLSE's Reliance On O'Bannon Is Misplaced

DLSE's reliance on *O'Bannon v. Town Court, supra* is misplaced. In *O'Bannon*, a nursing home received due process for termination of its medicare/medicaid certification. The patients claimed a right to additional process. *O'Bannon* does not apply to the facts of this case. In this case, neither a subcontractor, nor a prime contractor, receives due process. In this case, there is no hearing at which anyone can attend. G&G has standing, as a prime

contractor, and as a subcontractor, to establish the right to such a hearing. *See,* Part VII, *supra.* In *O'Bannon,* due process rights already existed for the nursing home, who had the financial incentive to exercise those rights.

Additionally, *O'Bannon* concerned an indirect injury. Even as a subcontractor, G&G asserts a direct injury. *See,* Part VII.B, *supra; G&G, supra,* 156 F.3d at 903 (Pet. App. A-26-27). Furthermore, *O'Bannon* expressly states that it does not apply to indirect injuries to targeted third parties. *O'Bannon, supra,* at 789, n.22; *G&G, supra,* 156 F.3d at 903 (Pet. App. A-26-27).

IX. THE DLSE'S CONTENTION THAT ADEQUATE REMEDIES EXIST IS INCORRECT

DLSE argues that the right to sue under *Labor Code* §§1730-1733, or under various other theories, is adequate remedy. The right of a contractor to sue does not address the deprivation in issue. The issue here is the seizure of money pending the final determination of such a lawsuit. The "temporary" seizure can be devastating in its effect. The release of the money seized, years later, does not remedy the injury suffered from cutting-off a contractors cash flow. This Court has held that notice and hearing for such a "temporary seizure" is required. *Sniadach, supra; James Daniel Good, supra; Fuentes v. Shevin,* 407 U.S. 67, 85; 32 L.Ed.2d 556, 572; 92 S.Ct 1983 (1972).

Contractual disputes over payment arise in a fundamentally different context, and are fundamentally dissimilar to regulatory enforcement action. *See,* Part VIII. G.

In a lawsuit to recover monies seized by a Notice to Withhold, the contractor has the burden of proof. DLSE is not required, at any time, to establish that adequate grounds existed for the issuance of the Notice to Withhold. A contractor's money may be held for years, even if DLSE did not have legitimate grounds to issue the Notice

to Withhold. The procedure provides tremendous leverage for enforcement officials, which case be misused. Excessive and improper seizures can be used to compel a contractor to accept demands not justified by the facts or law. The power of enforcement officials must be constrained by due process.

When a deprivation causes an ongoing injury, pending a full litigation of the issue, this Court has held that a hearing is required for the temporary seizure. *James Daniel Good, supra,* [ex parte proceeding to establish "probable cause" for seizure pending litigation inadequate], *Fuentes, supra,* at 99 ["probable validity" must be established], *Sniadach, supra,* at 343 ["probable validity" must be established]; *Bell v. Burson,* 402 U.S. 536, 540; 91 S.Ct. 1586 (1971) ["reasonable possibility of judgment" must be established]; *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 545-546; 105 S.Ct. 1487 (1985) ["reasonable grounds" must be established]. The type of hearing required varies, depending on the circumstances. In this case, no hearing of any type is provided. The Court of Appeals only specified that the hearing must be either a pre or prompt post-deprivation hearing. The Court of Appeals stated that the State should manage its own affairs in a manner consistent with the Constitution. *G&G,* 156 F.3d at 905. (Pet. App. A-40).

Generally, the Court balances several factors when considering what process is due: (1) The private interests, (2) the governmental interest, (3) administrative burden, and (4) risk of an erroneous decision. *See, Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *Cleveland, supra,* at 543. Consideration of the aforesaid factors in this case, establishes that the right to a lawsuit is not adequate process for the seizure, pending completion of the lawsuit to recover.

A. The Private Interest Is Substantial

The private interest at stake was aptly stated in *Bailey v. Secretary of the United States Department of Labor*, 810 F.Supp. 261 (D. Alaska 1993) as follows:

> "It is undisputed that plaintiff received no due process hearing by a neutral decision maker prior to suspension of the payments due her for contract work performed for the government. While the Department of Labor has commenced an administrative proceeding against plaintiff, it is undisputed that these proceedings will take from six months to a year to reach a conclusion as to whether or not plaintiff was in fact underpaying her employees and, if so, in what amount.
>
> It is undisputed that without the cash flow from the contracts, plaintiff will not be able to continue to perform the contracts. She will in substance be put out of business; and the ten employees who are employed under the two contracts in question will be out of work.
>
> In order to recover immediately (and hold for six months to a year) the sums of money arguably due plaintiff's employees, defendant has come perilously close to destroying plaintiff's business and, in the process, terminating the jobs of the ten employees who defendant would theoretically benefit – six months to a year from now."
>
> *Id.* at 262-263.

The California procedure creates the same risk to the business of the targeted contractor. Jt. App. 193-194 [G&G's business threatened], Jt. App. 341 [contractors often go out of business after prevailing wage claims].

The failure to provide a prompt hearing causes substantial harm to an important private interest. Cutting off

the cash flow to a contractor causes substantial injury, and can even force the contractor out of business. *Cf. Labor Code* §1777.1 [debarment from public works based on prevailing wage violations requires a pre-deprivation hearing]. *See, Berlanti v. Bodeman*, 780 F.2d 296, 300 (3rd Cir. 1985) [the right to bid on public works projects is a property right]; *Cal. Pub. Cont. Code* §4107 [public works subcontract can be terminated only on statutory grounds, after a hearing].

B. The Governmental Interest Is Not Affected By A Hearing

The governmental interest is in enforcing the Labor Code. A hearing to determine probable validity does not conflict with the governmental interest. The State has no legitimate interest in the baseless seizure of money. See, *Bell, supra*, at 540.

DLSE claims an interest in seizing the money before it is dissipated. Wage claims are protected by a surety bond (*Cal. Civ. Code* §§3247, 3248). Civil penalties are deposited in the State general fund. *Labor Code* §1731. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. See, *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S.Ct. 2680, 2693, n.9, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.) ('[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit')." *James Daniel Good, supra*, at 55-56. Contract payments on a construction project are made progressively over a substantial period of time. The risk that DLSE will not be able to recover civil penalties is minimal. A pre-deprivation

hearing is appropriate. When extraordinary circumstances justify foregoing a pre-deprivation hearing, the statute must be "narrowly drawn to meet any such unusual condition." *Sniadach, supra,* at 339. DLSE's interest in avoiding dissipation of funds cannot be impaired by the Court of Appeals requirement of a prompt post-deprivation hearing.

C. A Right To Hearing Would Impose No Administrative Burden

The procedure that had been provided by the State was a lawsuit. The law provides that the money must be held until the lawsuit is complete, pending appeal. Providing a hearing for probable validity could not be a burden. The hearing would only serve to weed out claims without merit.

D. The Risk Of Error Is Substantial With A Notice To Withhold

The risk of erroneous deprivation is high where the underlying determination involves factual disputes. *Cleveland,* at 543; *Chalkboard v. Brandt,* 902 F.2d 1375, 1381 (9th Cir. 1989). The risk of error is less "where the factual issue to be determined was susceptible of reasonably precise measurement by external standards." *Chalkboard, supra,* at 1381. For example, chemical testing of a horse for drugs, *Barry v. Barachi,* 443 U.S. 55, 65; 99 S.Ct. 2642, 2649; 61 L.Ed.2d 365 (1979); suspension of a driver's license for prior convictions, *Dixon v. Love,* 431 U.S. 105, 113; 97 S.Ct. 1723, 1727; 52 L.Ed.2d 321 (1979); prior issuance of a criminal indictment, *Federal Deposit Insurance Corporation v. Mallen,* 486 U.S. 230, 242; 11 L.Ed.2d 265; 108 S.Ct. 1780 (1988).

The determination of purported prevailing wage violations generally involves hotly contested factual disputes. *See,* Part III.A.

The balancing test weighs heavily in favor of a hearing to determine whether the Notice to Withhold has probable validity. The private interest is of critical importance. The public interest is completely satisfied by a prompt post-deprivation hearing, and not seriously effected by a pre-deprivation hearing. A hearing imposes no burden on the State at all. There is great risk of an erroneous deprivation.

The cases relied on by DLSE are not applicable to this case. DLSE cites *Parrat v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), but DLSE acknowledges that these cases are distinguishable. DLSE concedes that in *Parrat* and *Hudson,* "the alleged destruction of the property did not stem from the proper implementation of an established State procedure, but rather, from the unauthorized and unanticipated acts of State employees." (DLSE's brief, p. 39). *Parrat* and *Hudson* involved claims for damages for torts of State officials. In fact, *Parrat* was overruled on the grounds that mere negligence does not constitute a deprivation of property. *Daniels v. Williams,* 474 U.S. 327, 330-331; 106 S.Ct. 662; 88 L.Ed.2d 662 (1986).

Unlike *Parrat* and *Hudson,* this case involves a continuing injury from a temporary, non-final seizure. In *Parrat* and *Hudson* a pre-deprivation hearing was not possible, and a prompt post-deprivation hearing unnecessary, as there was no ongoing injury. A State Court lawsuit was all that was possible, and all that was necessary to redress the injury. In this case, the State Court lawsuit does not address the injury from a wrongful seizure pending trial and appeal.

DLSE cites *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 771 (1977). *Ingraham* held that a pre-deprivation hearing was not required before administering corporal punishment in a public school. *Ingraham* is distinguishable for several reasons.

In *Ingraham*, the court held that a pre-deprivation hearing was impractical because of the enormous burden which it would place on the schools. A prompt-post-deprivation hearing was unnecessary because there was no ongoing injury. The problems of excessive burden and impracticability faced in *Ingraham* do not exist in this case.

In *Ingraham* the Court noted that excessive corporal punishment can result in civil and criminal liability. Hence, there was a substantial deterrent to erroneous acts. DLSE officials are immune from civil lawsuits for damages, and are not criminally liable for wrongful Notices to Withhold. No substantial deterrent exists.

Ingraham distinguished property right cases.

Ingraham involved the unique circumstances of school discipline.

The right to a civil lawsuit is not adequate process. In fact, it is no process at all with regard to the seizure pending the litigation. It is the substantial injury for this "temporary" seizure which the Court of Appeals remedied. A hearing is required to determine if grounds exist for the seizure, pending the State Court lawsuit.

X. THE LEGISLATIVE CHANGES REFERRED TO IN THE PETITIONERS' BRIEF SHOULD NOT AFFECT THE JUDGMENT

The DLSE's brief revealed, for the first time, legislative changes scheduled to take effect in July 2001. G&G was not previously aware that legislative changes had been proposed. The judgment in this case remains as vital

as ever, even if the legislative changes take effect. The case is not moot. If the Writ is dismissed because of legislative changes, the judgment should remain in effect.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). Where a case is moot because of the Petitioner's action, the judgment should not be vacated. *U.S. Bank Corp. v. Bonner*, 513 U.S. 18 (1994).

The anticipated legislation does not necessarily eliminate the challenged practice. Moreover, if the judgment were vacated, the legislation could be repealed. *Mesquite, supra*, at 289 [City could reenact the provision if judgment vacated]. Also, a case and controversy exists as to G&G's award of attorney fees, and as to pending proceedings under the existing law. Whether moot or not, the judgment should not be vacated.

The "new" legislation is not in effect. The legislative history establishes that it was a response to the judgment in this case (legislative history lodged with the Court). The expected legislative changes do not eliminate the need of prospective relief. The Notice to Withhold Procedure remains under the new statutes. The statutes are vague in numerous respects with regard to the right to a hearing. DLSE continues to assert that the Notice to Withhold does not implicate the Due Process Clause. The statutes provide that DLSE shall adopt regulations to implement the statutes. It is important that DLSE do so in the context of a judgment declaring that due process concerns must be honored.

The statutes provide for a new hearing procedure. The statutes are silent as to whether the time frames therein are mandatory or directory, whether money seized must be released if a hearing is not timely granted,

what is meant by "commencing a hearing", and when a hearing must be concluded. If the time frames in the new statutes are applied strictly, money seized can be held more than six months. A loose interpretation could allow a much longer seizure, without any hearing. These issues are not before the Court, and are not specifically a part of this action. They are relevant only in explaining why the judgment, determining that due process applies, is necessary and important. The judgment will guide DLSE's conduct, which is the purpose of declaratory relief. Furthermore, the statutes are not in effect, and can be repealed or modified.

This case has been pending for more than five years, even with a relatively quick summary judgment. If the judgment were vacated, DLSE could ignore the Constitution, and it could take another five years to address the issue. DLSE could then change the law again, and evade the judgment again.

G&G obtained a judgment for attorney fees. Although the amount of attorney fees was set by stipulation, DLSE appealed. The appeal is stayed, pending this Writ. DLSE has stated that if DLSE prevails, they will argue the attorney fee award should be vacated. In addition to the prospective relief discussed above, a case and controversy remains as to G&G's recovery of attorney fees. DLSE states in its brief that many cases under the existing law remain. Pet. Brief at 11. G&G has cases pending in state court with regard to Notices to Withhold issued under current law. The case is not moot as to G&G.

If the Court considers the case moot, it is respectfully submitted that the Writ should be dismissed as improvidently granted, but the judgment should not be vacated. To the extent the case is moot, it is because of the State's action, taken in response to the judgment in this case. DLSE participated in the legislative changes. A judgment

should not be vacated as a result of the Petitioner rendering it moot. *U.S. Bank Corp., supra.*

XI. THE JUDGMENT DOES NOT DEPEND ON ANY UNCERTAINTIES IN STATE LAW

The brief of Amicus Curiae United States suggests that the judgment in this case rests on forecasts of uncertain state law. The argument is incorrect.

The interpretation of state law was set forth as an uncontroverted fact in the motion for summary judgment, and not disputed by DLSE. Jt. App. 182, 332-335. A different interpretation of state law may not be urged in this Court, as a basis to reverse the judgment. *Bishop v. Wood,* 426 U.S. 341 (1941). The state law issues raised could not be determinative in any event.

The doctrine of abstention was never raised in the five years this case has been pending, except for a mention in the brief by the United States. The doctrine does not apply, and reliance thereon by DLSE has been waived.

XII. DLSE'S CONTENTION THAT G&G DID NOT PLEAD AND PROVE AN ENTITLEMENT IS INCORRECT

The factual pleadings regarding specific projects were relevant only to bolster G&G's standing to challenge the DLSE procedure. The arguments not raised in the District Court, in either DLSE's motion to dismiss, or opposition to motion for summary judgment, regarding the pleadings or evidence, were waived, and cannot be raised on appeal in this Court. *Singleton v. Wulf,* 428 U.S. 106, 49 L.Ed.2d 826 (1976).

The withholding of money from G&G was adequately plead, and proved, for purposes of this action.

With regard to the pleading – *See*, Jt. App. 68 [money presently withheld due to notices to withhold]; Jt. App. 69 [G&G deprived of earned progress payments]; Jt. App. 69-70 [G&G deprived of money by pass through withholding]. With regard to proof – *See*, Jt. App. 174-185, 332-335 [G&G's statement of uncontroverted facts, and response by DLSE]; Jt. App. 191 [money withheld from prime contractor and G&G by pending Notices to Withhold]; Jt. App. 193 [G&G's negotiated payment not received as had been agreed because of Notice to Withhold, not less that $120,000 being held, effect of notices to withhold is to cut off payments for work performed]; Jt. App. 195-222 [notices to withhold issued as to G&G and DLSE memorandum to awarding body state money due, or which becomes due must be held for transmittal to DLSE, letter from DLSE to awarding body and prime contractor states "Transmitted herewith is a copy of DLSE's Notice to Withhold with respect to subcontractor G&G Fire Sprinklers, Inc."].

G&G did plead, and prove that it disputed the assertion that it violated the prevailing wage law. *See*, Jt. App. 69 [complaint alleges Notices to Withhold were wrongful, incorrect, excessive]; Jt. App. 191 [declaration supporting summary judgment states G&G disputes and denies the alleged violations of prevailing wage laws]. The District Court did not litigate specific disputes regarding alleged prevailing wage violations, and had no reason to do so.

Respectfully submitted,

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