No. 1018771

SUPREME COURT
OF THE STATE OF WASHINGTON

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No. 835963–I

COURT OF APPEALS FOR DIVISION I

D & R EXCAVATING, INC., a Washington corporation; DOUGLAS D. HOFFMAN and SUSAN K. HOFFMAN, and the marital community composed thereof,
Appellants,

v.

KING COUNTY, a political subdivision of the State of Washington; and CPM DEVELOPMENT CORP., dba ICON MATERIALS, a Washington corporation,
Respondents

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# ANSWER TO THE PETITION FOR REVIEW

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## I. IDENTIFY OF RESPONDENTS

Respondents are CPM Development Corp., dba ICON Materials ("ICON"), a general contractor on the Vashon Island Highway Pavement Preservation project for King County (the "Project"), and its surety, Fidelity & Deposit Company of Maryland Payment Bond No. 9283912 ("Fidelity"). Of the issues Petitioners D&R Excavating Inc. and Douglas D. Hoffmann and Susan K. Hoffmann (collectively, "D&R") present for review before the Court, the indemnity issue pertains to the Petitioners' dispute with ICON, and the Bond Claim issue pertains to the Petitioners' dispute with both Fidelity and ICON.

## II. STATEMENT OF THE CASE

### A. Introduction.

The Court of Appeals' decision is (1) entirely consistent with decisions of this Court and published decisions from the Court of Appeals and (2) implicates no interests beyond that of the private parties to the Subcontract involved in this case. Just like in their argument before Division I of the Court of Appeals, with respect to the indemnity issue, the Petitioners again rely primarily on cases that involve implied or common law indemnity, as opposed to contractual indemnity. These cases are inapposite, and contrary to the Petitioners' argument, they do not constrict the bargained-for and unambiguous indemnity provision that establishes

D&R's obligation to defend, indemnify, and hold ICON harmless. The Court of Appeals correctly relied on well-settled legal standards applicable to contractual indemnity—the form of indemnity that governs this case—in holding D&R to the terms of the agreement it willingly entered. With respect to the Petitioner's claim against ICON's payment bond, the Petitioners do not specify which grounds under RAP 13.4(b) entitle them to discretionary review. In arguing that the Court of Appeals erred, the Petitioners not only entirely mischaracterize the Court of Appeals' decision, but they also fail to raise any basis that would justify further review before this Court. Accordingly, as to indemnity and bond claim issues, none of the criteria set forth in RAP 13.4(b) are satisfied, and the Petition for Review should be denied.

### B. ICON Executed a Subcontract with D&R for the Hauling and Disposal of Asphalt Millings Consistent with the Requirements of the Main Contract.

In May, 2018, ICON was awarded a contract for the 2018 Vashon Highway SW Pavement Preservation project for the King County Department of Transportation Roads Services Division. Clerk's Papers ("CP") at 2558; Ex. 2. The Project involved improvement of Vashon Highway SW extending from the North-End Ferry Terminal to the Tehlequah Ferry Terminal. *Id.* Among other things, the work entailed

milling and grinding the existing asphalt prior to repaving the highway with a new surface. *Id.*

ICON subcontracted with D&R to haul and dispose of asphalt millings generated by the paving project. CP at 2559; Ex. 17. D&R is owned by Vashon Island residents Douglas and Susan Hoffmann (the "Hoffmanns"). CP at 16, 185.

The Subcontract between D&R and ICON incorporated the Contract between ICON and the County, and D&R was expressly bound to follow all terms and conditions of the Contract, including the Washington State Department of Transportation's 2018 Standard Specifications for Road, Bridge, and Municipal Construction and Amendments ("WSDOT Specifications"). Ex. 17 at p. 1.

In addition, within Section 1.6 of the Subcontract, D&R agreed that it "shall be solely responsible for all physical and nonphysical conditions affecting the Subcontractor's Work, the Project site, and surrounding conditions, as well as all laws, ordinances, regulations, and governmental requirements applicable to the Work**, including the proper removal and disposal of waste and contaminants encountered on the Project**…" Ex. 17, p. 1 (emphasis added).

D&R and ICON also executed a comprehensive indemnification addendum at Attachment B-3. *Id.* at p. 22. The provision provides in pertinent part:

> Subcontractor shall **defend, indemnify and hold harmless Contractor** and its affiliates and corporate parents, officers, directors, sureties, agents and employees, and any entities to whom Contractor has indemnification obligations under the Contract (the "Indemnitees**"), from and against any and all losses, costs, claims (even though such claims may prove to be false, groundless, or fraudulent), demands, penalties, damages, expenses or liabilities, arising from, resulting in any manner directly or indirectly from or connected with or in the course of the performance of the Subcontractor Work or the Subcontractor obligations**, including without limitation: (a) **damage or destruction of property of any kind**;… and (e) Subcontractor's **noncompliance with any law, rule or regulation, resulting from or connected with services perform**ed or to be performed under this Subcontract by Subcontractor or Subcontractor's agents or employees or for its account, including without limitation, from any **Event of Default as defined in Section 6. 3. I of the Subcontract, which damage, injury, death or other claim arises out of or is connected with the performance of Subcontractor's Work or its failure to comply with the provisions of this Subcontract**, subject to the limitations provided below, but in any event to the fullest extent permitted by law…

Ex. 17, p. 22 (emphasis added).

The Subcontract further sets forth conditions that must be satisfied before D&R is entitled to payment from ICON. *Id*. at p.9-10 (Sections 7.1.3, 7.1.8, 7.1.9). Under these provisions, D&R's right to receive payment is contingent upon ICON first receiving payment from the

County and on D&R satisfying its obligations under the Subcontract, less any amounts to which ICON is entitled due to D&R's breach of its contractual obligations and/or default. *Id*.

### C. D&R Breached the Subcontract by Depositing Millings in Unapproved Locations and Was Subsequently Terminated.

The WSDOT Specifications incorporated in the King County Contract, at Section 2-03.3(7)C, state that the Contractor "must acquire all permits and approvals required for the use of the disposal sites before any waste is hauled off the project." CP at 2558, 2570. Though bound by this requirement as incorporated into the Subcontract, D&R did not obtain the necessary permits prior to hauling and disposing millings from the Project site.

On D&R's behalf, ICON submitted Williams Property Holdings, a property rented by D&R, for the County's approval as a potential stockpiling site for the millings. *Id.* at 2618. The County rejected this proposal, determining that Williams Property Holdings was not an acceptable location. *Id.* ICON informed D&R of this rejection. CP at 2559; 4 Verbatim Report of Proceedings (RP) 386-87. On June 29, 2018, the County notified ICON that despite King County's rejection of Williams Property Holdings as a stockpiling site, it observed millings on the site placed by D&R in violation of the King County Code ("KCC")

and King County's explicit directives. CP at 2618. This notice would be the first of many similar admonishments from King County regarding improper stockpiling.

Although D&R was on notice that it could not store millings at an unapproved site, rather than heed these warnings, D&R's response over the next several weeks was to continue to spread millings at other unapproved locations around Vashon and specifically at D&R's owners' (the Hoffmanns) personal residence. *Id*. at 2634. On August 14, 2018, the County issued yet another notice calling "to immediately stop" stockpiling millings at three properties: (i) Williams Property Holdings, (ii) Development SVCS of America, known colloquially as Misty Isle Farm, and (iii) the Hoffmann Property. CP at 2634; Ex. 73. D&R, however, took no corrective action. CP at 2644-45.

Not only did King County threaten to assess up to $3,000 in civil penalties per day if stockpiling continued, the County also specified that it will "continue withholding" amounts from ICON related to D&R's work "until such time as ICON Materials demonstrates that it is fully in compliance with the Contract's requirements for the proper storage and disposal of all plainings [millings] and other debris from the grinding operation." *Id*. at 2621-23, 2645. In the wake of D&R's continued inaction, ICON sent D&R a letter on November 7, 2018, demanding that

D&R comply with King County's directives and provide a plan for restoration of the properties as was requested by the County. CP at 2648-51.

In a subsequent letter, ICON provided D&R yet another opportunity to cure its default and provide a remediation plan or otherwise resolve the issue directly with King County. *Id.* ICON noted that if D&R does not respond to the request to provide a remediation plan, it will "consider D&R to have failed to cure a breach of the Subcontract," and "will pursue any and all remedies outlined in the Subcontract," and directed D&R to "section 6.3.1. of the Subcontract regarding Default: Takeover." *Id.*

D&R responded to ICON's letter without providing the requested plan and stating only that "D&R cannot take any steps to move or remove the millings unless and until it has worked through these matters with the county." *Id.* at 2658. There was no further equivocation as to what communication D&R was taking with the county (none had occurred), why remediation could not begin, or why the alleged need to address the matter with King County would preclude outlining a plan to begin remediation. CP at 2658; 8 RP at 849-50.

Given D&R's refusal to take any action to remove the millings, despite its ample notice and opportunity to cure that spanned nearly five

months, ICON had no option but to terminate the Subcontract and complete the work itself. CP at 2668-69. D&R did not dispute the termination at that time nor at any time during the litigation. Even after termination, while ICON was performing this remediation work, it continued to provide D&R an opportunity to participate in the remediation to mitigate the costs. *Id.* at 2681-82. Between November 19, 2018, and May 2019, ICON remediated the Melita Pit, Williams Property, and Misty Isle Farms, incurring costs and damages due to D&R's failure to comply with King County's demands, referred to as the "Part 1 costs." *Id.* at 2560; Ex. 17, p.22.

### D. ICON was Unable to Remediate the Private Properties, and King County Subsequently Filed Suit Against ICON.

ICON requested D&R authorize access to the Hoffmann Property (private property owned by D&R's owners) to remediate the Property. CP at 2687-88. However, the Hoffmanns refused to permit ICON access, precluding ICON from completing the remediation work demanded by the County. *Id*. When ICON could no longer comply with the County's directives, the County proceeded with its Notice of Code Violation before the King County Office of the Hearing Examiner against both ICON and D&R. CP at 2470-75. ICON tendered this claim to D&R for defense and indemnity. CP at 2487-89. D&R did not accept the tender.

As the Hearing Examiner determined it lacked jurisdiction to decide contractual matters, King County filed suit seeking specific performance that all millings be removed from the Hoffmann Property. *Id.* at 1-10. King County's Complaint asserted no claim or request to remediate Williams Property Holdings, the Melita Pit, or Misty Isle Farms because ICON already remediated those properties on King County's directives. *See id*. at 1-9.[1]

In turn, ICON named D&R as a third-party defendant. *Id.* at 10-24. In addition to seeking indemnity for the claim brought by King County against ICON in the lawsuit to remediate the Hoffmann Property (Part 2 Costs), ICON also sought damages for D&R's breach of its indemnity obligations, seeking its damages for the Part 1 costs—i.e., the costs incurred remediating the Williams Property Holdings, Melita Pit, or Misty Isle Farms properties. *Id.*

ICON again submitted a tender of defense and demand for indemnity to D&R in connection with the superior court proceedings. *Id.* at 2553-54. The indemnity provision affords ICON a choice to either: (a) select its own attorneys, with D&R to pay the associated costs; or (b)

[1] Months into the litigation, King County amended its Complaint to seek not only remediation of the millings on the Hoffmann Property, but also remediation of the millings placed by D&R on various undisclosed private properties on Vashon Island. *Id.* at 412-23. The costs incurred in so doing are collectively referred to as the "Part 2 costs."

waive the right to select its own attorneys, with D&R to appoint and pay for qualified counsel. Ex. 17, p. 22. D&R again denied the tender. CP at 2217.

**E. ICON'S Summary Judgment Motions.**

ICON moved for partial summary judgment, seeking a ruling that D&R breached the Subcontract by failing to defend, indemnity and hold ICON harmless with respect to D&R's default and failure to correct its work that caused ICON to incur the Part 1 costs in remediating Williams Property Holdings, Misty Isle, and Melita Pit). *Id.* at 188-208, 2425-2692. In addition, because King County's claims in the lawsuit related to properties that had not yet been remediated (the Hoffmann Property and other unspecified private properties on Vashon), ICON sought a ruling that, to the extent ICON was found liable to King County for this future work, D&R would be held equally liable to ICON for these Part 2 costs. *Id.*

The trial court granted ICON's motion, ruling that, as a matter of law, D&R assumed the requirements of the King County Contract and WSDOT Specifications with respect to its work and was obligated to properly dispose of the millings in compliance with the specifications and applicable laws and regulations. CP at 426-33. Moreover, because D&R did not defend, indemnify, and hold ICON harmless as was required under

the Subcontract, the trial court ruled that (a) D&R breached the Subcontract by failing to defend, indemnify and hold ICON harmless with respect to King County's directives for the Part 1 costs, and (b) to the extent King County was successful with respect to the future Part 2 costs, D&R would be equally liable to ICON. *Id.* at 431-32. The amount of damages associated with D&R's breach of the Subcontract and failure to defend, indemnify, and hold ICON harmless, however, for *both* the Part 1 costs and the Part 2 costs, was left to the trier of fact (the Jury). *Id.* at 432.

In a separate motion filed several months later, ICON sought summary dismissal of D&R's claims against its payment bond and its surety, Fidelity, on the basis that no amounts were due to D&R. *Id.*at 583-613. The trial court granted the motion, dismissing the claims against ICON's bond issued by Fidelity. CP at 830-35.

### F. The Trial Court Instructed the Jury Consistent with the Summary Judgment Orders, and the Jury Awarded ICON Damages for the Part 1 Costs

After the trial started, King County and ICON settled, and King County dismissed its claims in the litigation against ICON. *Id.* at 1717. Because King County's claims against ICON in the litigation involved *only* the Part 2 Costs (the Hoffmann Property and the other undisclosed private properties that ICON could not remediate), the indemnity claim

remaining for the jury involved only the Part 1 costs (i.e., the Melita Pit, Misty Isle Farms, and Williams Property Holdings). 11 RP at 1024.

As to ICON's claims for damages against D&R, the trial court instructed the jury in a manner virtually identical to its ruling on summary judgment that, under the terms of the Subcontract, D&R breached its duty to defend, indemnify and hold ICON harmless. CP at 1700, 1715; 9 RP at 890. Finding in favor of ICON, the jury awarded ICON its costs incurred for remediating the Melita Pit, Misty Isle Farms, and Williams Property Holdings. CP at 1727. The jury did not award any costs related to the claims that were resolved—i.e., the Hoffmann Property and the remaining undisclosed private properties. *See id.*

**G. The Court of Appeals Affirmed.**

Division I of the Court of Appeals issued an unpublished opinion affirming the Summary Judgment orders and the judgment. *King County v. CPM Dev. Corp., dba ICON Materials*, No. 83596-3-I (Wash. Ct. App. Feb. 6, 2023) (slip op.). Relying on a plain language interpretation of the Subcontract, the Court rejected the Appellants' argument interposing common law requirements that payment of a claim to a third party and actual liability to that third party are necessary prerequisites to trigger a duty to indemnify in this instance. The Court further rejected the Appellants' argument pertaining to the bond claim that RCW 39.08.030, a

procedural notice statute, provides a private right of action that entitles a bond claimant to maintain a claim even where no amounts are due or will ever become due to the claimant.

## III. ARGUMENT

### A. The Court of Appeals' Decision is Entirely Consistent with Washington Law on Indemnity.

Washington law pertaining to contractual indemnity provisions is extensive and consistent: indemnification provisions are interpreted, like other contract terms, to effectuate the intent of the contracting parties. *See e.g., Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc*., 173 Wn.2d 829, 835, 840, 271 P.3d 850 (2012) (quoting *McDowell v. Austin Co*., 105 Wn.2d 48, 53–54, 710 P.2d 192 (1985) ("[W]e have 'long preferred to enforce indemnity agreements as executed by the parties.'"); *see also Jones v. Strom Constr. C*o., 84 Wn.2d 518, 520, 527 P.2d 1115 (1974) ("[I]n general, indemnity clauses, just as other contractual provisions, are subject to fundamental rules of contractual construction, i.e., the intent of the parties controls."); *Dirk v. Amerco Mktg. Co. of Spokane*, 88 Wn.2d 607, 613, 565 P.2d 90 (1977) ("An often-repeated rule of construction for interpreting indemnity clauses is that they are to be viewed realistically, recognizing the intent of the parties to allocate as between them the cost or expense of the risk of losses or

damages arising out of performance of the contract."); *N. Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 922, 540 P.2d 1387 (1975) ("Indemnity clauses are subject to fundamental rules of contractual construction, and are to be construed reasonably so as to carry out, rather than defeat, their purpose.").

Following the long line of cases pertaining to contractual indemnity, the Court of Appeals correctly based its holding on the plain meaning of the parties' bargained-for indemnity agreement. Slip Op. at 14-16. The Court held that the indemnity provision required D&R to "indemnify and hold ICON harmless for 'any and all losses,' 'costs,' and "expenses' incurred as the result of D&R's work," which "necessarily includes the costs and expenses ICON incurred in removing the asphalt millings that D&R stockpiled…" Slip Op. at 14. There was no requirement within this language that ICON must pay a third party, or that ICON first be found actually liable to that third party, to trigger D&R's duty. *Id.*

This holding is not in conflict with any of the Petitioners' cited authority, which largely consists of inapposite cases pertaining to common law or implied indemnity. In particular, the following cases are implied indemnity cases that do not involve any discussion of contractual indemnity provisions: *Nelson v. Sponberg*, 51 Wn.2d 371, 374, 318 P.2d

951 (1957), *Newcomer v. Masini*, 45 Wn. App. 284, 286-87, 724 P.2d 1122 (1986), *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997), *United Boatbuilders, Inc. v. Tempo Prods. Co*., 1 Wn. App. 177, 179–80, 459 P.2d 958 (1969), and *Fortune View Condo. Ass'n v. Fortune Star Dev. Co*., 151 Wn.2d 534, 90 P.3d 1062 (2004). Because these cases take no position on whether common law or implied indemnity requirements regarding actual liability and payment to a third party supplant the parties' bargain, they do not conflict with the Court of Appeals' decision.

The Petitioners also cite *Stocker v. Shell Oil Co*., 105 Wn.2d 546, 547, 716 P.2d 306 (1986) and *Parkridge Assocs. v. Ledcor Indus*., 113 Wn. App. 592, 605, 54 P.2d 255 (2002), two cases that involve contractual indemnity provisions and that are both entirely consistent with the Court of Appeals' decision.

In *Stocker*, the Court held that contractual indemnity agreements are "consistently enforced" as written, provided they are executed between competent bargainers, are in writing, and meet certain policy objectives, none of which are at issue in this case. 105 Wn.2d at 548. While the Court described indemnity agreements generally as an agreement for contractual contribution, it said nothing about whether payment to a third party and actual liability are required to trigger the duty to indemnify. *Id.*

The fact that the Court specified baseline requirements of an enforceable indemnity provision without ever mentioning payment to a third party or actual liability refutes rather than supports the Petitioners' position. In fact, the Court in *Stocker* confirmed that common law defenses cannot defeat the express language of a contractual indemnification provision, because doing so would "would frustrate the reasonable expectations of the contracting parties and thus interfere with their freedom to contract." *Id.* at 549-50. The Court of Appeals appropriately relied on *Stocker* as to this latter point. Slip Op. at 14-15.

*Parkridge* likewise does not conflict with the Court of Appeals' holding. There, the Court held that, in the context of contractual indemnity, a breach of the covenant of indemnity and the right to recover accrues when "the liability has become fixed and absolute." *Parkridge*, 113 Wn. App. at 605. An indemnitor is liable to the indemnitee at the point "when, under the terms and conditions of the contract, the covenant of indemnity is broken." *Id* (emphasis added). These rules are consistent with the Court of Appeals' holding that the terms of the indemnity provision control when a duty to indemnify is breached.

While the Court in *Parkridge* cited *Barbee* to state the general implied indemnity rule that the duty to indemnify accrues when a "'party seeking indemnity pays or is legally adjudged obligated to pay damages to

a third party,'" it did not do so for the purpose of circumscribing the right to contract for a broader provision. *Id.* (quoting *Barbee*, 133 Wn. 2d at 517). Even beyond the fact that ICON did pay amounts to third parties to remediate the work, the Court said nothing about payment *to a third party* being a universal mandate that limits all indemnity provisions, including where, as here, such a requirement would directly contradict the agreed terms.

In addition, the Court in *Parkridge* evaluated when "losses and liabilities," the operative terms in the indemnity provision at issue, were incurred, to determine at which point the duty to indemnify was fixed under that contract. *Id.* Because the indemnitee did not pay a settlement before the statute of repose expired, meaning the indemnitee did not suffer a "loss or liability" under the provision, the indemnity claim was time-barred. *Id.*

Critically, "liability" in *Parkridge* did not refer to a requirement that the indemnitee had to prove they were actually responsible for the amount paid in the settlement to a third party (as opposed to paying as a volunteer), which is the standard in the common law indemnity cases that the Petitioners rely on. *Compare id. with Nelson*, 51 Wn.2d at 377. Instead, the Court in *Parkridge* focused on when a real pecuniary loss was suffered, and not just potentially suffered, under the applicable indemnity

provision. As the Court of Appeals noted, here, ICON incurred actual costs and expenses arising from D&R's work in removing the milled asphalt, meaning the liability was "fixed and absolute" under the contract, and D&R's indemnity obligations were triggered. Slip Op. at 14.

None of Petitioners' proffered authority supports their contention that payment to a third party and actual liability, principles derived from common law and implied indemnity, prevail over the express terms of the parties' indemnity agreement. To the contrary, as this Court recently recognized, "as a bargained-for allocation of liability between parties," an indemnity agreement "trumps allocation by common law as between those parties." *Wilcox v. Basehore*, 187 Wn.2d 772, 789, 389 P.3d 531 (2017). Because the Court of Appeals' decision is consistent with Washington law, discretionary review under RAP 13.4(b)(1) and (2) is not warranted.

### B. The Construction of An Indemnity Provision in a Subcontract between Two Corporate Entities Does Not Implicate the Public Interest.

The Court of Appeals decision was based on the particular terms of the parties' indemnity agreement as applied to the facts of this case, consistent with the immense body of law that already exists pertaining to interpretation of contractual indemnity provisions. Although indemnity agreements are common, it is unlikely that the phrasing of other provisions will be precisely identical to that used here, or that identical facts will arise

so as to trigger the same contract terms within that indemnity provision. Moreover, the decision is unpublished and therefore has no precedential value. *See* GR 14.1(a). Notwithstanding the Petitioners' bold pronouncement that this case implicates the public interest based on their erroneous understanding of the law, this lawsuit is limited to a private dispute between two contracting parties. Discretionary review under RAP 13.4(b)(4) should likewise not be granted.

### C. There is No Basis for Discretionary Review of the Court of Appeals' Decision on the Petitioners' Bond Claim.

With respect to the claim against ICON's payment bond for which Fidelity is the surety, the Petitioners have not specified which of the exclusive grounds for discretionary review under RAP 13.4(b) entitle them to discretionary review. RAP 13.4(b) provides that discretionary review will only be granted if one of the four categories apply; therefore, Petitioners have failed to show why the Court must review their claim.

In any event, the Petitioners misapprehend the reason their argument on the bond claim was rejected by the Court of Appeals. The Petitioner's claim against ICON's bond was dismissed because they "had no viable claim against ICON for sums owed." Slip Op. at 17. On appeal, the Appellants did not appeal from or assign error to the trial court's dismissal of their affirmative claims against ICON or the jury's verdict

finding ICON did not owe payment to D&R. With no claim against ICON, there can be no claim against its surety. *Tucker v. Brown*, 20 Wn.2d 740, 848, 150 P.2d 604 (1944); *see also McChord Credit Union v. Parrish*, 61 Wn. App. 8, 13-14, 809 P.2d 759 (1991); *Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co.*, 132 Wn. App. 202, 207, 130 P.3d 887 (2006).

Contrary to the Petitioner's argument, their claim was not dismissed on procedural or ripeness grounds, but rather because they lacked any substantive claim for damages against ICON. The Court of Appeals correctly held that RCW 39.08.030, a procedural a notice statute, does not grant claimants a private right of action.[2] Consequently, having identified no basis for discretionary review under RAP 13.4(b), the Court should deny the petition as to the bond claim issue as well.

## IV. CONCLUSION

The Petitioners have failed to identify any conflict with a decision of this Court or of a published Court of Appeals Decision, and the claims pertaining to the dispute with Respondents herein do not implicate a

[2] The Petitioners rely on *United States ex rel. Walton Tech. v. Weststar Eng'g, Inc.*, 290 F.3d 1199 (9th Cir. 2002), which is a case pertaining to the Miller Act, 40 U.S.C.A. § 270a et seq. While the Miller Act creates a *federal* cause of action, this is not a Miller Act case. *See Id.* at 1206.

matter of public interest. Accordingly, the petition for review should be denied.

RESPECTFULLY SUBMITTED this 9th day of June, 2023.

*The undersigned certifies that this brief contains 4,368 words, exclusive of words contained in any appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and any pictorial images. The word count was computed using the word count function in Microsoft Word.*

Dated this 9th day of June, 2023.

Respectfully submitted

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## AHLERS CRESSMAN & SLEIGHT PLLC

## June 09, 2023 - 3:15 PM

## Transmittal Information

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