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COURT OF APPEALS

STATE OF NEW YORK

ROBERTO RAMOS, ET AL.,

Appellants,

-against-

No. 160

SIMPLEXGRINNELL LP,

Respondent.

20 Eagle Street
Albany, New York 12207
September 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 160, People (sic) v.
2 Semplex (sic) - - - Simplex.

3 Counselor, do you want any rebuttal - - -

4 MR. FAY: Two minutes - - -

5 CHIEF JUDGE LIPPMAN: - - - time?

6 MR. FAY: - - - Your Honor.

7 CHIEF JUDGE LIPPMAN: How much?

8 MR. FAY: Two minute, please. Two minutes.

9 CHIEF JUDGE LIPPMAN: Two, sure. Go ahead.

10 MR. FAY: May it please the court. There
11 are two certified questions here, and the first
12 question is - - - concerns the deference that a - - -
13 a court should give to enforcement discretion by the
14 New York Department of Labor, in determining whether
15 it will, for administrative purposes, enforce its own
16 action. And we believe that the Department of Labor,
17 in its own - - - in its amicus brief here, has
18 answered the question directly, stating that its
19 intention to limit its enforcement discretion has no
20 direct application or reference to this private cause
21 of action.

22 JUDGE SMITH: How can the Department of
23 Labor position work, though? I mean, they say that
24 it - - - it affects only their administrative
25 enforcement and not - - - not how we interpret the

1 contract.

2 MR. FAY: That's correct.

3 JUDGE SMITH: But their administrative
4 enforcement is subject to review in Article 78, isn't
5 it?

6 MR. FAY: Well, not in this case.

7 JUDGE SMITH: No, but - - - but if they - -
8 - if they continue, as the brief seems to imply, if
9 they continue to apply it administratively, in a way
10 that's nonretroactive, can't - - - so if your - - -
11 if one of your clients, instead of bringing a
12 lawsuit, goes to the - - - goes to the Commissioner
13 and says get me my money, and she says, no, you're
14 not entitled to your money, this is not retroactive,
15 he can bring an Article 78, right?

16 MR. FAY: He can, and it would be a totally
17 different review question.

18 JUDGE SMITH: Well, it - - - really?

19 MR. FAY: Yes.

20 JUDGE SMITH: In other words, the same
21 person and the same facts could lose in Article 78
22 and win in this case?

23 MR. FAY: Possibly. That's the - - - that
24 goes - - -

25 JUDGE SMITH: Isn't - - - is that really -

1 - -

2 MR. FAY: Well, there may - - -

3 JUDGE SMITH: Does that make any sense, to
4 - - - to create that situation?

5 MR. FAY: In the larger scheme of things it
6 makes sense, because there are many differences
7 between the administrative enforcement action and a
8 private cause of action, including the length of
9 time, statute of limitations, the remedies available.

10 JUDGE SMITH: Okay. But the - - - let's
11 talk about the same person doing the same work for
12 the same employer on the same day, you're saying that
13 whether he gets paid prevailing wage or not depends
14 entirely on whether he - - - he's trying to enforce
15 the same statute, and if the Commissioner of Labor is
16 enforcing it, he doesn't get the money, but if he
17 enforces it in court, he does?

18 MR. FAY: That could happen. And it - - -
19 just as - - - just as someone who sues on a timely
20 basis, and reaches back six years under the statute
21 of limitation, can get his remedy going all the way
22 back to six years; if that same person decided to go
23 to the Department of Labor, he'd be out of luck for
24 the first four years of his - - - of his damages
25 period.

1 JUDGE GRAFFEO: Well, we've said in several
2 cases that we do give deference to the Department of
3 Labor. To what extent? How are you parceling out
4 what we give deference to and what we don't give
5 deference to?

6 MR. FAY: The short answer is in areas of
7 the Department's expertise, where it is interpreting
8 the statute based on its - - -

9 JUDGE GRAFFEO: Right, which is what, with
10 respect to 220? Is that the categories of employees
11 that are entitled to - - -

12 MR. FAY: That's one thing.

13 JUDGE GRAFFEO: - - - prevailing wages?

14 MR. FAY: And that came in - - - this was a
15 coverage determination that the Department made in
16 its opinion letter, and what Your Honor just
17 mentioned came into play that one of the - - - one of
18 the issues is, is this - - - are these the class of
19 workers who are covered under the prevailing wage
20 law.

21 JUDGE GRAFFEO: So you'd like - - - you
22 would - - - you're asking us to give deference for
23 that determination?

24 MR. FAY: Well, already the court - - -
25 actually, the appellants in this case thought that

1 the district judge ducked that issue, and we filed an
2 appeal based on the idea that he didn't rule on
3 whether testing and inspection was covered.

4 JUDGE GRAFFEO: Well, I guess I'm asking
5 what do you want us to do on that issue?

6 MR. FAY: On this issue, to follow the view
7 of the Department of Labor, which says that on the
8 substantive law it deserves some deference, but on
9 the timetable for its own enforcement, it does not
10 interfere with the private right of action.

11 JUDGE SMITH: Isn't - - -

12 MR. FAY: And - - -

13 JUDGE SMITH: Isn't the - - - doesn't the
14 decision whether to make a - - - a ruling retroactive
15 or nonretroactive depend, to some extent, on the
16 extent to which the - - - the community has relied on
17 the previous state of the law, or even on what the
18 previous state of the law is?

19 MR. FAY: It depends on the context. In
20 the - - - in the administ - - -

21 JUDGE SMITH: Well, in this context, by New
22 York's - - -

23 MR. FAY: In the administrative arena, it
24 could.

25 JUDGE SMITH: In this - - - in this - - -

1 in this context, doesn't the - - - I mean, isn't it
2 true that the - - - the Commissioner does have
3 expertise in what her rulings, prior to December of
4 2009, meant and were understood to mean in the
5 community and were relied on?

6 MR. FAY: There - - - there was no
7 precedent in this area, except that the major thing
8 is that the substantive law was the same throughout
9 the entire period of this contract.

10 JUDGE READ: Yeah, but she said there was a
11 lot of confusion.

12 MR. FAY: She said there was confusion, and
13 I think the record speaks clearly that the confusion
14 was that brought about by the respondent in this case
15 who went and - - - and during the middle of the court
16 case or the beginning of the court - - -

17 JUDGE READ: Well, what about the testimony
18 - - - was it Mr. [Ay'-lood], or whatever his name
19 was?

20 MR. FAY: Mr. Alund?

21 JUDGE READ: Alund.

22 MR. FAY: Yes, Mr. Alund was the person at
23 the Department of Labor who was the recipient of the
24 presentations by Simplex, saying we think this is not
25 covered. And they presented this chart and - - -

1 part by the Department; you say from listening to
2 Simplex.

3 MR. FAY: I agree. But - - - and - - - and
4 she did take into account. That's why she made - - -
5 partly, I assume, why she made the decision - - -

6 JUDGE SMITH: And didn't her expertise, in
7 - - - in how the regulated community - - - how - - -
8 how confusing her rulings were and what the regulated
9 community thought, didn't her expertise inform that
10 decision?

11 MR. FAY: Yes, but it doesn't go to the
12 legal question as to whether the - - -

13 JUDGE SMITH: Well, I - - -

14 MR. FAY: - - - as to whether - - -

15 JUDGE SMITH: - - - I suggest it does.

16 MR. FAY: - - - the prevailing wage law - - -
17 -

18 JUDGE SMITH: I'm suggesting it does, that
19 if she uses her expertise to say, look, this is the
20 degree of confusion we've created, this is how much
21 people have been mixed up by it, therefore,
22 nonretroactivity is the right course, why isn't that
23 something we should defer to?

24 MR. FAY: You should defer to it, in terms
25 of enforcing Department of Labor actions that follow

1 that internal guidance. The question is totally
2 different in a contract action.

3 JUDGE SMITH: Well, again - - -

4 MR. FAY: The question here is what is - -
5 -

6 JUDGE SMITH: - - - let me come back - - -
7 I mean, you - - - you gave - - - you gave me an
8 answer that I - - - I - - - threw me for a while, but
9 let me come back to it, on that question, the two
10 identical cases that come out differently.

11 MR. FAY: Right.

12 JUDGE SMITH: You say, well, it could come
13 out differently because there were different statutes
14 of limitations. But here, these are both - - - in
15 both cases you're interpreting exactly the same
16 words. You're saying this work is or is not
17 construction, maintenance - - -

18 MR. FAY: No.

19 JUDGE SMITH: - - - or repair.

20 MR. FAY: Your - - -

21 JUDGE SMITH: You say it is in an
22 administrative proceeding and not in a lawsuit?

23 MR. FAY: The court - - - that's correct,
24 because in the lawsuit, that issue is not even before
25 the court. The court is to decide what the law

1 meant. There was no substantive change in the law.

2 JUDGE SMITH: Well, the issue - - -

3 MR. FAY: So it was not - - -

4 JUDGE SMITH: Well, the issue that is
5 before the federal court in this lawsuit is whether
6 your guys are doing construction, maintenance and
7 repair.

8 MR. FAY: That's one of the issues, but
9 that's - - -

10 JUDGE SMITH: And they - - - and they say
11 yes, because they're deferring to the conser - - - to
12 the Commissioner's interpretation of the law.

13 MR. FAY: No, the main issue is whether
14 testing and inspection is covered and always has been
15 covered. That's the court's job. And the fact that
16 the - - -

17 JUDGE SMITH: Covered because it is
18 construction - - -

19 MR. FAY: And - - -

20 JUDGE SMITH: - - - maintenance and repair.

21 MR. FAY: And the court will give deference
22 to the Department of Labor's decision that it was and
23 always has been.

24 JUDGE GRAFFEO: Why - - -

25 MR. FAY: The Court - - -

1 JUDGE GRAFFEO: Why do we have to give
2 deference to whether it's prospective or retroactive?

3 MR. FAY: I don't think it comes into the
4 case at all, because it's not part of the judicial -
5 - - judicial function. And I'll - - -

6 CHIEF JUDGE LIPPMAN: Okay. Thanks,
7 counselor.

8 MR. HUGHES: Thank you, Your Honor. Peter
9 Hughes for the appellee.

10 This ruling by the Commissioner, in
11 December of 2009, was a new administrative rule. And
12 the standard - - -

13 JUDGE RIVERA: Did it go through a rule-
14 making process?

15 MR. HUGHES: It did not, but - - -

16 JUDGE RIVERA: So how is it a rule?

17 MR. HUGHES: Because the opinion letters of
18 the Commissioner of Labor are entitled to the same
19 defe - - -

20 CHIEF JUDGE LIPPMAN: Why isn't that just a
21 change in the law that the - - -

22 MR. HUGHES: I'm sorry, Your Honor.

23 CHIEF JUDGE LIPPMAN: Why isn't it just a
24 change in the law?

25 MR. HUGHES: Because that which was not

1 covered - - -

2 CHIEF JUDGE LIPPMAN: Now they have an - -

3 -

4 MR. HUGHES: - - - is to - - -

5 CHIEF JUDGE LIPPMAN: Now they've clarified
6 what their view of the law is.

7 MR. HUGHES: They have not merely
8 clarified; they have made - - -

9 CHIEF JUDGE LIPPMAN: No, why couldn't it
10 be viewed as a clarification?

11 MR. HUGHES: Because their view was
12 different before, as the - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but maybe their
14 view wasn't final, like we were talking about before,
15 that they were being lobbied, they looked at it, they
16 put something out, and then they said, no, no, it's
17 not quite right, and they're clarifying it. Why - -
18 - why wouldn't you view it as that?

19 MR. HUGHES: Becau - - - well, for - - -
20 two things. One, there was an opinion letter issued
21 by the Department of Labor, on this precise issue,
22 saying that this very type of work was not covered,
23 in addition to the matrices - - - leaving those aside
24 - - - issued by the - - - the Department of Labor's
25 legal Department.

1 CHIEF JUDGE LIPPMAN: So they pull that
2 back and they say, no, no, that's not right - - -

3 MR. HUGHES: I understand.

4 CHIEF JUDGE LIPPMAN: - - - now we're
5 clarifying it.

6 MR. HUGHES: But the other thing is that
7 the Commissioner of Labor, herself, here recognized
8 that the change was so significant that it could not
9 be applied to past contracts. And we are here under
10 a theory of a third-party beneficiary of the - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but why isn't
12 that just using their discretionary powers that
13 aren't entitled to deference?

14 MR. HUGHES: That - - - that's precisely
15 what's entitled to deference because the - - - the
16 nature of this - - -

17 CHIEF JUDGE LIPPMAN: Their discretionary
18 view is entitled to - - - to deference?

19 MR. HUGHES: Well, again, Your Honor, I'm
20 not - - - if you're talking about - - -

21 CHIEF JUDGE LIPPMAN: What is it - - - what
22 is entitled to deference in terms of what the - - -

23 MR. HUGHES: What - - -

24 CHIEF JUDGE LIPPMAN: - - - the DOL does?

25 MR. HUGHES: What is entitled to deference

1 is the Commissioner of Labor's determination as to
2 whether work is covered or not by the law at all, and
3 then once it is covered, what the classifications
4 are. And the Commissioner of Labor, when issuing the
5 opinion letter in question here, specifically stated
6 that the law - - - the opinion would apply only to
7 future contracts, contracts put out for bid after
8 this opinion was issued. I mean, I - - - again, I
9 understand I'm up against it because the Attorney
10 General submitted the amicus brief - - -

11 JUDGE RIVERA: But - - -

12 MR. HUGHES: - - - but the Attorney General
13 - - -

14 JUDGE RIVERA: But counsel, what - - -

15 MR. HUGHES: - - - can't create facts.

16 JUDGE RIVERA: - - - what's the basis for
17 the confusion, other than a letter a few months
18 before the Commissioner Smith's final letter?

19 MR. HUGHES: I believe - - -

20 JUDGE RIVERA: What's the basis for the
21 confusion?

22 MR. HUGHES: I believe the confusion is
23 also, if you look in detail at the deposition
24 testimony - - -

25 JUDGE RIVERA: Yes.

1 MR. HUGHES: - - - of Director Alund, who's
2 been with the Department for twenty-five years, who
3 was defended at his deposition that was taken by the
4 plaintiffs in this case, and who testified that
5 historically the Department of Labor had not
6 considered the inspections - - -

7 JUDGE RIVERA: So his testimony, in and of
8 itself, resolves the entire legal question.

9 MR. HUGHES: What - - -

10 JUDGE RIVERA: Is that what you're arguing?

11 MR. HUGHES: Well, I would say it goes a
12 significant way to it, but that demonstrates what, in
13 fact - - -

14 JUDGE RIVERA: Well - - -

15 MR. HUGHES: - - - the Department of Labor
16 had been doing for the past - - -

17 JUDGE RIVERA: Well, he was wrong - - -

18 MR. HUGHES: - - - decade plus.

19 JUDGE RIVERA: - - - at one point, wasn't
20 he?

21 MR. HUGHES: I'm - - -

22 JUDGE RIVERA: He was wrong at one point
23 because - - - right? His letter had to be removed,
24 and they had to remove the matrices that he had used.
25 So obviously, he's not correct all the time.

1 MR. HUGHES: Well, I wouldn't say that he
2 was wrong; I would say the Commissioner of Labor came
3 to a different conclusion later on and changed the
4 law. So - - -

5 JUDGE RIVERA: Is it possible to interpret
6 it as I have suggested?

7 MR. HUGHES: I - - - I guess that is a - -
8 - a possibility, Your Honor, but again, the
9 Commissioner - - -

10 JUDGE RIVERA: And if that is the case, why
11 don't we rely, then, on the DOL?

12 MR. HUGHES: Because - - - well, again,
13 Your Honor - - -

14 JUDGE RIVERA: I mean, the DO - - -

15 MR. HUGHES: - - - we're not saying you do
16 not rely on the - - - the DOL. I mean, I - - - the
17 DOL - - - we - - - we agree, you must give deference
18 to the DOL. But you have to give deference to
19 everything the DOL says.

20 CHIEF JUDGE LIPPMAN: Counsel, if it's a
21 clarification, you lose?

22 MR. HUGHES: I don't - - - well, again,
23 Your Honor, no, I - - - I don't think it's a clari -

24 CHIEF JUDGE LIPPMAN: No, if it's - - -

25 MR. HUGHES: - - I don't think merely if it

1 - - -

2 CHIEF JUDGE LIPPMAN: - - - a
3 clarification, you lose?

4 MR. HUGHES: I don't think merely if it's a
5 clarification you lose because - - -

6 CHIEF JUDGE LIPPMAN: Why not? Why not?

7 MR. HUGHES: - - - because the fact is that
8 the Department of Labor was advising that this work
9 was not covered, in an opinion letter, in matrices,
10 and in - - - and in the matrices that it published,
11 not just to us, but to the community at large. And
12 in addition, that was, in fact, their enforcement.

13 CHIEF JUDGE LIPPMAN: Yeah, yeah, but if
14 it's just - - - but if that, in the end, just amounts
15 to a clarification, can you prevail?

16 MR. HUGHES: Yes, Your Honor, because,
17 again, when my client is bidding contracts in 2007 or
18 8, then it is relying, for its financial bidding, on
19 what it understands the law to be.

20 JUDGE SMITH: Yeah, but the law is what the
21 law is, not what you understand it to be, isn't it?

22 MR. HUGHES: Again, Your Honor, I - - - I
23 think that - - -

24 CHIEF JUDGE LIPPMAN: In the end, can it be
25 what you understand it to be, or is it what it is?

1 JUDGE SMITH: Or is it - - -

2 MR. HUGHES: I don't - - -

3 JUDGE SMITH: Or is it what the Department
4 of Labor says it is?

5 MR. HUGHES: Right, that's - - - I think
6 that's the point, it is what the Department of Labor
7 said it was at the time. And to reach back - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but now - - -
9 now the Department of Labor's saying this is what it
10 is.

11 MR. HUGHES: This is what it is - - -

12 CHIEF JUDGE LIPPMAN: And assume that's the
13 law, that that's what it is.

14 MR. HUGHES: This is what it is going
15 forward.

16 JUDGE PIGOTT: Now, you mentioned a fifty-
17 million-dollar contract with somebody.

18 MR. HUGHES: I didn't, but - - -

19 JUDGE PIGOTT: So if I understand your
20 argument, you're saying in 2008 or 2009 you had to
21 bid on a contract and there are others bidding on it,
22 too. And one of the factors that goes into that is
23 the cost of labor. And you, relying on the DOL, said
24 that prevailing wage does not apply with respect to
25 this contract with - - - on - - - on these workers,

1 and therefore we're bidding X. Anybody who - - - who
2 disagreed with you would be bidding X-plus, because
3 you were bidding low. You were not bidding the
4 prevailing wage. If somebody bid the prevailing
5 wage, they would not get the contract, I assume,
6 assuming all other things being equal. You would
7 have underbid it. Right?

8 MR. HUGHES: I don't think so, Your Honor,
9 because this information was available to everybody.

10 JUDGE SMITH: I know - - -

11 MR. HUGHES: This wasn't a secret - - -

12 JUDGE SMITH: I'm not - - -

13 MR. HUGHES: - - - communication.

14 JUDGE SMITH: I'm giving you a softball.

15 MR. HUGHES: Right.

16 JUDGE SMITH: What I'm saying is, in your
17 reliance on the DOL, you made a bid and were
18 successful in it. Anybody who had not listened to
19 the DOL, who said, well, the DOL may say that the
20 prevailing wage doesn't apply, but I think it does,
21 more than likely would not have won the contract
22 because it would have been higher, because the
23 prevailing wage is higher than what you bid. Right?

24 MR. HUGHES: Presumably.

25 JUDGE PIGOTT: And now you're being told

1 that even though you won the bid, based upon what the
2 DOL said, you now have to go back and pay this people
3 the prevailing wage because they have changed their
4 mind. And you think that's unfair.

5 MR. HUGHES: Yes, Your Honor, plus all the
6 interest that's been accumulating - - -

7 JUDGE RIVERA: But - - -

8 MR. HUGHES: - - - since they didn't get
9 paid on time.

10 JUDGE RIVERA: Counsel, the claims are
11 going back to 2001, as I recall, so let - - - let me
12 ask you this. Is there something in the record that
13 indicates that either - - - either the Department
14 made very clear at that time that - - - that this was
15 or was not covered, and/or did you, in the bid, make
16 very clear whether or not you were or were not
17 applying prevailing wages to this particular category
18 - - -

19 MR. HUGHES: And I'm sorry, Your Honor - -
20 -

21 JUDGE RIVERA: - - - of work?

22 MR. HUGHES: - - - you're talking about an
23 earlier time period?

24 JUDGE RIVERA: Well, the claim is going
25 back to 2001. It's not my time period; it's the

1 plaintiffs' time period.

2 MR. HUGHES: That's right.

3 JUDGE RIVERA: Right?

4 MR. HUGHES: Your Honor, I would say that
5 there was - - - there's nothing specifically
6 published that goes to say that testing and
7 inspection of fire alarms is or is not covered.
8 However, if you look at the history of the statute,
9 which is the way the - - - the director of Public
10 Work looked at it - - -

11 JUDGE RIVERA: Um-hum.

12 MR. HUGHES: - - - and the determination of
13 whether what these employees are doing falls within
14 the category of laborers or workmen, and the
15 determination was that it was not. And we cited to
16 cases, you know, some very old, but that,
17 traditionally, inspection-type work was not
18 considered to be the work of laborers and workmen,
19 and therefore not have been covered.

20 JUDGE RIVERA: But if - - - I still - - - I
21 don't understand; what they're arguing is if there is
22 not - - - going back to 2001; hold off one moment on
23 the letter from the DOL's Commissioner in 2009. If
24 there's not that kind of firm statement, going back
25 to 2001, and you sign an agreement and your bid is I

1 will comply with the law and I will provide
2 prevailing wages to anyone who is subject to
3 coverage, aren't you stuck? If there's no statement
4 from the Department telling you, wouldn't the burden
5 have been on you to confirm this?

6 MR. HUGHES: Well, again, they - - - they
7 did go to confirm it and we did go to - - -

8 JUDGE RIVERA: No, no, but that's in 2009;
9 I'm talking about claims that are going back to 2001.

10 MR. HUGHES: I - - - I understand, Your
11 Honor, but by the same token, we - - - how can we
12 assume that had they gone to the indivi - - - to the
13 Department that is in charge - - -

14 JUDGE RIVERA: Um-hum.

15 MR. HUGHES: - - - of enforcing this to ask
16 whether this is covered, that they would have found -
17 - -

18 CHIEF JUDGE LIPPMAN: Counsel, but that's
19 what I was asking you before, that it can't be what
20 you think it is. You know, during that whole period,
21 so you thought it was X and it was Y. Aren't you
22 bound by Y?

23 MR. HUGHES: Again, Your Honor, I - - - I
24 would just say - - - and - - - and this is where I -
25 - - I think you have to go to the language of what

1 the Commissioner of Labor said in the Decemb - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but what about
3 - - - but I think Judge - - - Judge Rivera's asking
4 what about all those years before that.

5 MR. HUGHES: And that's - - - I think the
6 answer is in the Commissioner's letter that she is
7 saying this applies only to contracts - - -

8 CHIEF JUDGE LIPPMAN: So once she said - -
9 -

10 MR. HUGHES: - - - after this date.

11 CHIEF JUDGE LIPPMAN: Once she says that,
12 even if a short while later she pulls that, and
13 again, it's a conclusion, clarifies it, for all that
14 period back, it's what you thought it was?

15 MR. HUGHES: Again, Your Honor, I - - - I'm
16 - - - I'm talking about the Commissioner's letter in
17 December of 2009 where she says - - -

18 CHIEF JUDGE LIPPMAN: I know - - -

19 MR. HUGHES: - - - this interpretation only
20 - - -

21 CHIEF JUDGE LIPPMAN: - - - I'm talking
22 about 2001 till then.

23 MR. HUGHES: That - - - correct, Your
24 Honor. And again, based - - -

25 CHIEF JUDGE LIPPMAN: What about that

1 period?

2 MR. HUGHES: That - - - then there would -
3 - - the prevailing wage would not have to be paid and
4 that's why - - -

5 JUDGE PIGOTT: That's where she's saying I
6 understand if people didn't get it or didn't
7 understand with the prevailing wage, it was
8 confusing, and so that's water under the bridge, and
9 I'm saying that from today on, prevailing wage.

10 MR. HUGHES: I don't think the Commissioner
11 of Labor could have been clearer.

12 JUDGE RIVERA: Let me ask you this, though.
13 So the Commissioner decides to only apply prospective
14 enforcement because she determines there's some
15 confusion. That - - - that letter, in and of itself,
16 is not specific to you, correct?

17 MR. HUGHES: Actually, it was addressed to
18 us.

19 JUDGE RIVERA: Okay. But - - - well, I
20 know it's addressed to you, because you raised it - -
21 - the question, but I'm saying in terms of the
22 confusion and understanding, that's a general
23 statement, correct?

24 MR. HUGHES: That is correct, Your Honor.

25 JUDGE RIVERA: So - - -

1 MR. HUGHES: And - - -

2 JUDGE RIVERA: - - - why would that
3 foreclose the plaintiffs from trying to establish
4 that you were not confused?

5 MR. HUGHES: I don't - - - I don't think
6 they've ever claimed that we weren't confused, Your
7 Honor. They - - - they were trying to claim that
8 there's a - - - a new ruling, that because it was
9 issued today, it applies back to forever. And again
10 - - -

11 JUDGE RIVERA: Well, I thought their
12 position was the workers have been covered from the
13 day you entered this contract - - - these contracts
14 in 2 - - - going all the way back to 2001. Thank - -
15 - I'm sure they're very pleased that the Commissioner
16 has got - - - seen the light and agreed with them.
17 But their argument, it strikes me, is that, going all
18 the way back to 2001, the law covered this particular
19 type of work and these employees. So I gue - - - so
20 my question was why - - - why - - - why does the
21 letter foreclose them from trying to present evidence
22 that - - - that was also your understanding, if this
23 is going to be based on your understanding?

24 MR. HUGHES: Well, again, Your Honor, where
25 we are in the litigation, they have never tried to

1 prove that our understanding was anything
2 differently. They have - - - their entire argument
3 has been that it doesn't matter what our
4 understanding was; the Commissioner of Labor has
5 said, in 2009, that this is covered, and therefore,
6 back to the beginning of time - - -

7 JUDGE RIVERA: No, no, I understand - - -

8 MR. HUGHES: - - - it covered - - -

9 JUDGE RIVERA: I'm sorry; perhaps I was not
10 clear. I understand that argument from their side.
11 I'm simply saying if - - - if, however, we were to
12 find that - - - that your subject of understanding is
13 important and consequential, all I'm saying is then
14 why is it that the DOL's letter would foreclose them
15 from establishing your subjective understanding? I
16 understood the other argument; I'm not asking about
17 that argument.

18 MR. HUGHES: I - - - I - - - I don't think
19 that the Commissioner's letter forecloses that our
20 subjective understanding was different, if I - - - if
21 I'm understanding Your Honor's question. I'm sorry.

22 JUDGE RIVERA: Okay.

23 CHIEF JUDGE LIPPMAN: Okay, counselor,
24 thanks.

25 MR. HUGHES: Thank you.

1 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

2 MR. FAY: Very briefly, Your Honor. The
3 period of time in which the so-called confusion arose
4 was only the time in which Simplex was lobbying the
5 Department of Labor, including going to Mr. Alund and
6 having him - - -

7 JUDGE SMITH: Does the - - - can the case
8 turn on that?

9 MR. FAY: No.

10 JUDGE SMITH: I mean, is a decision - - -

11 MR. FAY: No, I'm just - - -

12 JUDGE SMITH: - - - made in response to a
13 lobbyist on a different footing from one made without
14 a lobby?

15 MR. FAY: No, Your Honor. I'm pointing out
16 the timetable. In relation to our controversy, which
17 began in 2001, and up to the time and beyond the
18 opinion letter, it was a blip on the screen in terms
19 of - - -

20 CHIEF JUDGE LIPPMAN: How long - - - how
21 long was the period exactly?

22 MR. FAY: From the end of 2008 till the - -
23 - till the time the matrices were removed in June of
24 2009.

25 JUDGE SMITH: You're saying the law is

1 perfectly clear until then?

2 MR. FAY: No, there was no - - - the law
3 was clear to us. The obligation was clear. For
4 example, I'll give you the - - - the - - - in our - -
5 - on page 10 of our reply brief, we quote from that
6 fifty-million-dollar OMH contract that started in
7 2002. Not only did it have the standard clause
8 saying you must comply with the prevailing wage law,
9 it specifically said that the work to be done was
10 including, but not limited to, all inspections and
11 tests necessary to comply with all government
12 requirements. So that was in the contract from 2002.

13 JUDGE SMITH: Let me ask you a different
14 question. The dialogue that the - - - that the Chief
15 was having with your adversary about whether this was
16 a - - - whether the law changed or whether it was
17 just clarified. Assume that it was a change - - - I
18 realize you say it wasn't - - -

19 MR. FAY: Okay.

20 JUDGE SMITH: - - - but assume that the law
21 did change, we would - - - we would owe deference - -
22 - the courts would owe deference, wouldn't they, to
23 the former decision as well as to the present one?

24 MR. FAY: Yes. But again, it's - - - when
25 - - - when the private cause of action's coming up,

1 it's deference, not decision. The Court still has to
2 do its job. It has to decide what the law was during
3 the entire period of the controversy.

4 JUDGE SMITH: Okay. But it's at least
5 theoretically possible that the - - - that the
6 Commissioner could, at different times, reach two
7 different views of the law, and we'd have to - - -
8 we'd defer to both.

9 MR. FAY: Typically. Yes, but that didn't
10 happen here.

11 JUDGE SMITH: Who is the expert in whether
12 it happened?

13 MR. FAY: Well, the court, because, again,
14 the exercise is to what degree do I owe deference to
15 the administrative agency.

16 JUDGE SMITH: Doesn't the Commissioner know
17 more than we do about exactly what the state of the
18 law was and the understanding of the law in the
19 community?

20 MR. FAY: Not necessarily. I think that's
21 the court's function, but as - - - as far as the - -
22 - when the Commission - - - when the Commissioner has
23 come before this court and said, when I gave them a
24 pass on retroactive administrative enforcement, I was
25 not intending to interfere with any private cause of

1 action, I think that ought to be viewed and taken
2 into account.

3 JUDGE RIVERA: So you're - - - also I take
4 your statement a few moments ago, in response to
5 Judge Smith, I think you're also saying that if there
6 are different views that the Department has
7 communicated, that that is a factor for the court to
8 take into consideration as to the degree of deference
9 to give to - - - to the Department.

10 MR. FAY: That's correct.

11 JUDGE SMITH: Why should you defer - - - I
12 guess I'm still having trouble understanding the
13 distinction the Department of Labor makes, which you
14 apparently embrace. It's one ques - - - there's a
15 question of law - - - or a question of law or a law
16 applied to the facts or something, of whether this
17 particular work is repair, maintenance - - -
18 maintenance, repair and whatever. The Commissioner
19 has given an answer to that question. Why don't we
20 owe exactly as much or as little deference to that -
21 - - to that determination in a contract case as in an
22 - - - as in an Article 78?

23 MR. FAY: Because in a contract case, the
24 ultimate determination is what did the law require -
25 - -

1 JUDGE SMITH: Yes, but - - -

2 MR. FAY: - - - nothing else.

3 JUDGE SMITH: - - - but that is a question
4 on which, indeed, you're telling us that we should
5 defer to the Commissioner's present view.

6 MR. FAY: Well, you - - - you could ignore
7 the Commissioner and start from scratch and come up
8 with your own conclusion.

9 JUDGE SMITH: Well, that's not what the
10 Second Circuit is doing, and it's not - - - that's
11 not what the magistrate did. They're def - - - and
12 everyone seems to agree that the courts will defer to
13 what the Commissioner now says the law is.

14 MR. FAY: What the law is. But that's also
15 because the - - -

16 JUDGE SMITH: Why shouldn't we do that
17 exactly the same in a contract case and an
18 administrative case?

19 MR. FAY: Two different - - - two totally
20 different functions. One is - - -

21 JUDGE SMITH: But it's - - - but you're
22 answering the same question on which the - - -

23 MR. FAY: No, you're not, Your Honor.

24 JUDGE SMITH: - - - on which the - - - on
25 which the - - -

1 MR. FAY: The court does not have before it
2 - - - that is, the district court has no question
3 before it concerning the fairness or confusion or
4 anything like that. The question it has before it
5 is, on the facts of the case, was the prevailing wage
6 law violated when Simplex did not pay for testing and
7 inspection.

8 JUDGE SMITH: But if - - -

9 MR. FAY: That's it.

10 JUDGE SMITH: But you're telling me that if
11 that exact question comes up in an Article 78, in
12 which the Commissioner had said no, it was not
13 violated, we would not overrule the Commissioner?

14 MR. FAY: In Article 78, it depends on
15 whether it was a rational decision. That's not the
16 standard in this case.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. FAY: Thank you, Your Honor.

19 CHIEF JUDGE LIPPMAN: Thank you all.
20 Appreciate it.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Roberto Ramos, et al. v. SimplexGrinnell LP, No. 160, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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