Case No. S271721

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

TINA TURRIETA
Plaintiff and Respondent,

v.

LYFT, INC.,
Defendant and Respondent.

BRANDON OLSON,
Petitioner.

After a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B304701
Superior Court Case No. BC714153

RESPONDENT TINA TURRIETA'S RESPONSE TO AMICUS CURIAE BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT

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I. INTRODUCTION

The amicus brief provided by the Labor Commissioner on behalf of the LWDA and DLSE ("LWDA") is notable for what it does not say. The LWDA argues that it has "the ability to challenge deficient or improper settlements of PAGA claims," but never explains what language in Labor Code §2699(a) would bestow such power on private litigants with competing PAGA claims against the same employer. The LWDA has many powers that are not bestowed upon PAGA litigants, including the ability to issue citations and conduct administrative proceedings. There is no textual basis for the rule urged by the LWDA.

Lacking any authority in the statute, the LWDA makes a policy argument contending that "the interests of the state and the purposes of PAGA" would be best served by this Court providing PAGA litigants with a power to review settlements in competing litigation. But the agency's argument ignores half of the public policy analysis. In *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 272 (2018), this Court described the peril imposed by rent-seeking objectors who demand attorney fees in exchange for withdrawing an objection or appeal. The agency's failure to discuss the cost imposed by rent-seeking or ill-conceived objections renders its analysis unhelpful.

Besides ignoring half of the problem, the LWDA brief also ignores the existing solutions. The agency admits that the

"notice requirements and court oversight of PAGA settlements are safeguards to protect the public interest." But the remainder of the agency's brief pretends that both the courts and the agency itself are somehow too feeble to perform their statutory duties.

The LWDA complains that it lacks sufficient resources for statewide law enforcement, but presents no evidence of its separate claim that it also lacks the much more modest resources necessary to review the PAGA settlements of which it is provided notice. The record shows that LWDA receives specific funding to review settlement notices at the exact level prescribed by the Legislature. It was also the Legislature who drafted Labor Code §2699(l)(2), assigning the review of settlements to the courts and the LWDA. Any argument that the agency needs more should be directed to the Legislature.

Even if this Court were a legislative body, the LWDA proposal would be unsound. The existing law provides for both judicial and agency review. It also allows litigants in overlapping PAGA actions to file objections, and allows courts the discretion to consider them (as the court in this case did). Unhappy litigants in overlapping cases are also free to petition the LWDA to the extent they believe further agency action is required. In light of the existing protections, incentivizing competing litigants to profit by objecting and appealing every settlement is neither fair, nor effective, nor wise.

II. THE PAGA ASSIGNS REVIEW OF SETTLEMENTS TO THE COURTS AND THE LWDA

The LWDA begins with the premise that the agency's "resources are inadequate" to review the notices of settlements that it is provided pursuant to Labor Code §2699(l)(2). LWDA Amicus Brief ("Brief") p. 18. From this premise, the agency concludes that "the LWDA must also be able to rely on aggrieved workers to protect workers from deficient settlements." *Id.* This argument fails for multiple reasons.

A. The LWDA Has Resources to Review Settlements

The most obvious problem with the LWDA's position is a lack of factual support. The agency describes itself as being "without the resources to identify each deficient PAGA settlement." Brief p. 23. But the LWDA does not provide any evidence regarding its resources. There is no declaration from any person in authority at the agency. There is no data regarding the budget or the number of attorneys employed by the agency. There is absolutely nothing that would allow this Court to take judicial notice of the LWDA's funding, staffing, or ability to perform its legally assigned function of reviewing settlements. Parties cannot get facts before this Court by mere argument, they must offer actual evidence through a request for judicial notice or citation to the record. *See* *Cox v. Griffin*, 34 Cal. App. 5th 440, 451 (2019) ("it is axiomatic that argument is not evidence").

Because the LWDA has done no such thing in this case, any argument regarding the agency's purported shortfall of resources must be disregarded.

The LWDA cites to cases from the early days of PAGA for the proposition that the Legislature's motive in establishing PAGA in 2004 was a perceived lack of agency resources to perform statewide Labor Code enforcement. For example, at page 22 of its brief, the LWDA cites *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 390 (2014) for the "lack of government resources to enforce the labor code" that precipitated the enactment of PAGA in 2004. But these cases are inapposite because the LWDA's argument here is not premised on its inability to spend thousands of attorney hours litigating hundreds of cases across California. In this case, the LWDA argues that it lacks the resources to even review the notices of settlement received from attorneys who did the work of litigating the cases. Brief at p. 23. The agency offers no facts and no law to support that conclusion.

The job of reviewing settlement notices is very different from the job of conducting enforcement litigation. With regard to its obligation to review settlement notices, the LWDA has enjoyed a specific appropriation of $1.5 million per year directed exclusively to the PAGA function of reviewing settlements since 2016. Respondent's Motion for Judicial Notice ("MJN") Exh. 3 at p 5.

The legislative history and case law predating the 2016 amendment are irrelevant, both because they predate the 2016 appropriation and because they deal with a different topic: enforcement duties as opposed to the administrative function of reviewing settlements. There is absolutely nothing in the law, or legislative history to suggest that the LWDA lacks the resources to review settlements.

Besides being unsupported by evidence, the LWDA's argument regarding its capacity is also contradictory. At page 18 of its brief, the LWDA argues that "its resources are inadequate to fully review the large volume of PAGA cases filed." But at page 25 of its brief, the LWDA says "the notice and review process in section 2699.3 is an integral component of PAGA's statutory scheme, as the LWDA depends on proper notice to decide whether to allocate scarce resources to an investigation." It is impossible for both of the LWDA's representations to be true. How can the LWDA depend on prefiling notices when the agency admits that it does not review those notices?

The LWDA's own argument actually shows that it has adequate resources for the job of reviewing settlements. The agency provides argument (but no evidence) that it receives "about 245" notices of proposed settlement each month. Brief p. 18. If this is true, a single full-time attorney, working a normal schedule of 166 hours per month would have more than half an

hour to review of every single notice of settlement and identify any requiring further examination. (245/166=.677551). That is more than enough time to at least identify settlements that warrant further, more detailed review. Does the LWDA contend the $1.5 million budget provided exclusively for a dedicated PAGA unit cannot employ a single attorney to perform an initial review?[1]

Even if there were a need for more money, the LWDA's position that it is under-resourced is untenable given the facts of this case. The instant settlement would provide more than $3 million to the LWDA. 1 AA 049. For 2021, LWDA public records show that the agency employs at least four attorneys with compensation ranging from $112,000 to $204,000 annually. SMJN Exh 1. Assuming an average cost of $150,000 a year for additional counsel, the payment from just the instant settlement could pay for 20 additional attorneys for a full year. Or it could

[1] The LWDA's failure to establish that it lacks the resources required to review notices of settlement also refutes the agency's argument at footnote 4 of page 18 of its brief, that "the LWDA silence with respect to any given settlement is often the result of limited resources and should not be viewed as a tacit approval of that settlement." Because the agency has offered no evidence at all to suggest that it lacks the resources to review settlement notices (a job that could be performed by a single attorney), there is every reason for a court to conclude that the agency's failure to respond to a settlement notice represents a tacit approval. To hold otherwise would allow the agency to abrogate a basic statutory responsibility for which it has both a statutory mandate and specific funding.

be used over five years to pay for four full-time attorneys; enough to devote more than two hours to review each of the 245 notices of settlement that the LWDA claims it receives each month.

To the extent there is any shortage of funding for the agency, the problem is not a lack of resources. The problem is rent-seeking objections that obstruct massive payments to the agency like the one offered by the settlement in this case. A ruling that allows every attorney representing a PAGA litigant to delay payment for years by simply filing an objection and appeal will only reduce the flow of payments to the LWDA, and thereby exacerbate any shortage.

More fundamentally, the LWDA has failed to establish that there is any shortage of resources to review settlements. This failure is terminal for the LWDA's position because the agency's entire argument is premised on the idea that the agency lacks the resources to perform its statutory function. Having failed to establish that premise, the agency's conclusion cannot prevail.

B. The LWDA Position is Inconsistent With the Language and Purpose of the Statue

The second problem with the LWDA's argument is that it is inconsistent with the law. As Respondent explains in her Opposition, Labor Code §2699(l)(2) provides that settlements will

be reviewed by the trial court and submitted to the LWDA. The Legislature could have, but did not, provide any mechanism for notice to or review by competing PAGA litigants.

The LWDA asks us to infer the authority to review settlements from the fact that private attorneys general have been deputized to litigate claims for civil penalties, but these are two different jobs. In its own brief, the LWDA cites this Court's ruling in *Arias v. Superior Court* to explain that the PAGA exists to "allow aggrieved employees, acting as private attorneys general, to recover civil penalties for labor code violations, with the understanding that **labor law enforcement agencies were to retain primacy over private enforcement efforts**." Brief at pp. 11-12 citing *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009) (emphasis supplied).

The job of reviewing settlements is a necessary part of the LWDA's "primacy" as described in *Arias*. The subsequent legislative history confirms this. In 2016, the Legislature passed SB 836, which added the requirement that PAGA settlements be submitted to the LWDA. Confirming that the LWDA was responsible for reviewing the settlements, SB 836 also authorized a budget of $1.5 million for the LWDA to establish a dedicated PAGA unit specifically to perform the work of reviewing settlements as required by the amended PAGA statute. MJN Exh. 3 at p. 5. There is no mention in the 2016 amendment of

expanding the work done by individual PAGA litigants. The only goal of the amendment was to increase "agency and court oversight." MJN Exh. 3 at p. 1.

The LWDA's argument misunderstands the difference between enforcement and supervision. The basic enforcement function assigned to a private attorney general is both narrow and simple: "to recover civil penalties for labor code violations." *Arias*, 46 Cal. 4th at 980. The LWDA's contention that private attorneys general might also perform a supervisory role by reviewing each other's settlements and using objections and appeals to enforce power on each other exists nowhere in the statute.

The agency suggests that "a PAGA litigant's substantial role in enforcing our labor laws on behalf of the state law enforcement agencies" should inform this Court's analysis of a PAGA plaintiff's ability to contest a proposed settlement of overlapping claims. Brief at p. 19. That argument misses the point. It is true that PAGA litigants have a substantial role in advancing litigation to enforce labor laws, but no statute has ever indicated PAGA litigants have a substantial role in supervising or reviewing settlements in overlapping litigation. The original 2004 legislation had no requirement for review of settlements whatsoever, and the 2016 amendment explicitly assigns the work of reviewing settlements to the court and the LWDA.

For its part, the agency argues that the State's authority to review settlements should somehow be inferred as part of the deputization of a private attorney general. But that argument is inconsistent with the entire PAGA statutory scheme. The LWDA possesses extensive authority that is not provided to a private attorney general. The LWDA has authority to issue citations and conduct administrative proceedings, but no court has ever held that such authority is somehow bestowed by implication upon an individual private attorney general. Why should Labor Code §2699(a) be read as providing authority for a private attorney general to perform the agency's job of reviewing settlements, but not also be read to perform the agency's job of issuing citations and holding administrative hearings? If we accept the LWDA's invitation to go beyond the actual language of the statute, how do we draw the line? And how can we conclude that the Legislature intended for litigants in overlapping PAGA actions to review settlements when Labor Code §2699(l)(2) provides a list of everyone who needs to receive notice of the PAGA settlement, and other PAGA litigants are not on the list? The LWDA is not silent on these points because it overlooked them. The agency is silent because there are no good answers to these questions.

III. THE LWDA IGNORES COUNTERVAILING POLICY CONCERNS

The LWDA fails to address or even discuss the problem of rent-seeking objectors that exists whenever an individual litigant or attorney has the power to hold up settlement through objection and appeal. *Hernandez*, 4 Cal. 5th 2 at 272. But the problem of rent-seeking objectors is central to the position taken by the LWDA. The LWDA quotes *Iskanian* for the proposition that "the lack of government resources to enforce the labor code led to a legislative choice to deputize **and incentivize** employees uniquely positioned to detect and prosecute such violations through the PAGA." Brief p. 22, *citing to* *Iskanian*, 59 Cal. 4th at 390 (emphasis supplied). But incentivizing litigants to pursue civil penalties is very different from incentivizing them to make a balanced assessment regarding the merits of an overlapping settlement.

The LWDA brief fails because it ignores this critical issue of incentives. As this Court noted in *Iskanian*, the PAGA is not just a set of procedural rules, it provides a system of incentives that induce attorneys to act. *Iskanian*, 59 Cal. 4th at 390. Attorneys who litigate PAGA claims and prevail are rewarded with attorney fees. Labor Code §2699(g)(1). But how do those incentives work if we add to the private attorney general's

portfolio the job of reviewing settlements in overlapping actions, and making a decision as to whether to object or appeal?

The existing incentives provided by the PAGA are completely wrong for the job of reviewing settlements. An attorney who chooses not to object to a settlement receives no money. An attorney who chooses to object and appeal can then bargain for a share of the attorney fees in exchange for withdrawing her objection. Why is it useful to have competing private attorneys general review settlements when each individual is incentivized to object every time?

In situations like the instant case, where the objector and settling plaintiff cannot reach agreement on the amount of attorney fees in exchange for withdrawing an objection (MJN Exh. 5), the rule proposed by the LWDA incentivizes appeal and the longest possible delay so that the fee-seeking attorney will present a credible threat the next time he demands fees in exchange for withdrawing an appeal.

The instant case presents a clear example of the incentive problem. Negotiated in 2019, the *Turrieta* settlement recovered $15 million for a liability period of just 32 months. The value of the instant settlement is 15 times higher than the approved PAGA recovery in a similar case regarding California rideshare drivers. *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930 (N.D. Cal. 2016), These record-setting results were possible because, at the time

that the settlement was negotiated, this Court's ruling in *Iskanian*, 59 Cal. 4th at 388-389, provided that the Defendant could not use arbitration agreements to avoid PAGA liability.

Now that law has changed. In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924 (2022), the United States Supreme Court reversed a portion of this Court's *Iskanian* ruling and held that a properly-worded arbitration agreement can prevent an individual from maintaining a representative PAGA action. The change in the law is germane to the instant case, as Defendant previously brought motions to compel arbitration with regard to both Respondent Turrieta and Objector Olson. SMJN Exhs. 2-3. To understand the prevalence of arbitration agreements for the employees at issue in this case, consider that the instant settlement is based on 565,000 drivers. 1 AA 107. A recent settlement in *Laborde v. Lyft* (Los Angeles Superior Court Case No. BC707667), which was limited to drivers who had opted out of Defendant's arbitration program, identified just 1,459 drivers who submitted a request to opt out of the arbitration provision of Lyft's terms of service. SMJN Exh. 4.

The overwhelming prevalence of arbitration agreements is important. If Objector were successful in derailing the instant settlement, he would leave the litigation in a far worse position, with Defendant moving to compel arbitration under *Viking River*, and no chance of bargaining for anything like the $15 million

that *Turrieta* recovered when she negotiated the instant settlement back in 2019.

So why is there still an appeal? If the law has changed such that derailing the current settlement would obviously produce an adverse outcome, why is there any party still willing to attack settlement? The problem, again, comes down to economic incentives. PAGA provides no system to pay an attorney who chooses not to object or chooses to abandon an appeal without first extracting an agreement for payment of fees. The fact that an objector can be economically incentivized to a course of action so obviously destructive to the interests of the litigation illustrates why the legislature was wise to appoint courts and agencies rather than profit-driven litigants to review settlements.

The incentive problem also illustrates a larger difficulty with the position advanced by the LWDA. Expanding the role of a private attorney general to include objecting to and appealing settlements requires other statutory infrastructure that does not exist. As Respondent explained in her brief on the merits, a rule allowing private attorneys general to object in overlapping cases would mandate a requirement that notice be provided to any other PAGA litigants with claims against the same employer. But Labor Code §2699(l)(2) provides a list of everyone who needs to receive notice of the PAGA settlement, and competing PAGA litigants are not on the list.

Likewise, a supervisory role for PAGA litigants would also require a new incentive system. The PAGA properly incentivizes attorneys to vigorously perform the basic function of recovering civil penalties by awarding attorney fees under Labor Code §2699(g)(1). But there is no system to incentivize an attorney representing a private attorney general to perform a neutral or judicious job of reviewing a settlement in an overlapping case. How is an attorney compensated when she finds a settlement in an overlapping case to be adequate, and makes the ethical decision not to object? What plan exists to incentivize a neutral and dispassionate evaluation of whether a settlement in an overlapping PAGA action is in the best interests of the State? The agency offers no answer.

IV. THE LWDA FAILS TO ACCOUNT FOR EXISTING SAFEGUARDS

The LWDA begins by admitting that the legislature drafted the PAGA to require notice of settlement to be provided to the LWDA, and to require that all settlements to be reviewed by the trial court. "These notice requirements, and court oversight of PAGA settlements, are safeguards to protect the public interest." Brief p. 13, citing *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, 88 (2020).

The LWDA also admits that it has authority to act on the settlement notices that it receives. The agency argues at length

that it has authority to both intervene and seek to set aside a judgment in any settlement for which it receives notice and of which it does not approve. Brief pp. 15-17 ("both of these procedures are available to the LWDA with respect to deficient PAGA settlements").

In her brief on the merits, Respondent questioned whether the agency had any standing to act on a claim after the end of the 60-day notice period provided by Labor Code §2699.3(a)(2)(A). Respondent noted that PAGA lacks language found in other *qui tam* statutes like Cal. Gov. Code §12652(f)(2)(A), which specifically authorized the government to intervene even after declining its opportunity to investigate a claim. The agency strongly rejects this position, citing to *California Business & Industrial Alliance v. Becerra*, 80 Cal. App. 5th 734 (2022) for the proposition that the agency has full power to object or intervene whenever it does not approve the settlement. Brief pp. 15-17.

Having admitted that the operative statute includes safeguards to avoid unfair or collusive settlements, including the ability for the agency itself to object or intervene, the LWDA goes on to argue that this Court should nonetheless extend the job of reviewing settlements to PAGA litigants in overlapping actions. The agency speculates that such a move could further "the fairness of a PAGA settlement to the LWDA and the public." But the LWDA never explains why its own admitted ability to

object, move to set aside judgments and presumably appeal if it is unsuccessful is not sufficient.

As described above, the LWDA makes reference to its purportedly limited resources, but the work required of the agency is extremely narrow. Litigants in overlapping cases are already free to submit objections and courts are free to exercise discretion to consider those objections. In fact, the trial court in this case did exactly that. 2 AA 282; Reporter's Transcript ("RT") at 13:7-17:15; 303:6-28; *Turrieta v. Lyft, Inc.*, 69 Cal. App. 5th 955, 973 n.13 (2021).

The only activity for which the LWDA is indispensable is the decision to formally object, or, if a timely objection is unsuccessful, appeal. There is no reason to think that the agency lacks the resources to make its own decision about whether to file a timely appeal or instead enjoy the payments from a settlement.

Nor is there any lack of recourse for litigants in overlapping PAGA actions who believe that the LWDA should take action. Besides filing objections with a trial court, an unhappy litigant is free to petition the LWDA to make a timely filing. The LWDA is a public agency. The contact information for its attorneys is freely available and the agency routinely corresponds with plaintiffs' attorneys. *See* California Employment Lawyer's Association Amicus Brief Appendix B. The agency offers no

reason why it should not be responsible for making a timely decision in response to such a request.

The LWDA also ignores the existing procedural mechanisms for managing multiple PAGA actions against the same employer. For example, the agency points to the use of intervention under California Code of Civil Procedure §387 "to obviate delay and multiplicity of actions." But the LWDA ignores Code of Civil Procedure section 404, which provides for coordination of multiple related actions. The agency likewise ignores the fact that the Objector in this case has twice brought a petition seeking coordination with the instant case, and twice been denied. 1 RA 015; SMJN Exh. 5. There is no lack of safeguards or tools for dealing with multiple PAGA actions.

Some of the concerns described by the LWDA are counterfactual. For example, the agency contends that the rule adopted by the Court of Appeal "deprives the [trial] court of relevant knowledge and informed analysis gain during litigation." Brief at p. 24. That is simply untrue. The trial court in this case, for example, exercised discretion to hear and consider every argument raised by the Objector. 2 AA 282, 485, 499; 1 RT 13:2-17:23; 2 RT 316;27-317:4. Ultimately, the only substantial "benefit" from the LWDA's position would be the ability of overlapping PAGA litigants to file an appeal without any input from the agency. But what is the benefit of that?

V. THERE IS NO BASIS FOR INTERVENTION BY COMPETING PAGA LITIGANTS

The critical weapon for a rent-seeking objector is the ability to appeal. Gaining the ability to file an appeal allows the objector to delay settlement by years and to leverage that power to demand a share of attorney fees from any settlement. The LWDA argues that every overlapping PAGA litigant should have the leverage of appeal available both through intervention under Code of Civil Procedure section 387 and vacatur under Code of Civil Procedure section 663. Brief p. 16.

The LWDA's brief says nothing further with regard to vacatur, so there is no substantive argument to address on that point. With regard to intervention, it appears that that the LWDA means to suggest that a PAGA litigant in an overlapping action might possess the pecuniary interest that is a necessary (but not sufficient) requirement for both mandatory and permissive intervention.[2] The agency proposes that an individual's status as a private attorney general could itself constitute a pecuniary interest, and alternatively suggests that a private attorney general even lacking any interest might be able to somehow borrow the interest of the state and seek intervention as acting as the State. Neither of these arguments are viable.

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[2] The issue of intervention is moot in this particular case because Petitioner fails other independent requirements for intervention, including timeliness. *See* Answer to Opening Brief at p. 66.

A. There Is No Property Interest in Status as A Private Attorney General

The LWDA's position appears to be driven by a misunderstanding of *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1003 (2009). In *Amalgamated*, a union sought to litigate as a private attorney general on the theory that employee union members had assigned their rights under PAGA to the union. *Id.* at 998-999. This Court held that the union could not sue, because PAGA claims belong exclusively to the State. *Id.* at 1003.

Amalgamated began by explaining that, if employees had any pecuniary interest in a PAGA action, that interest could be transferred. "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner." *Id.* at 1001. The Court concluded there could be no transfer because employees have no interest at all. PAGA "does not create property rights or any other substantive rights. Nor does it impose any legal obligations." *Id.* at 1003. "The private plaintiff has no claim to [PAGA] penalties; they are property of the state. . . Since the state is the party with the property interest in a PAGA claim, it is the party that has the right to payment." *Medina v. Poel*, 523 B.R. 820, 827 (E.D. Cal. 2015).

The LWDA reads *Amalgamated* as simply holding that "a PAGA claim is not transferable." Brief at p. 21. The agency goes on to argue that the fact "that the aggrieved employees cannot assign their ability to act as agents for the state does not mean they have no 'qualifying interest' for purposes of intervention." But that is not what this Court said in *Amalgamated*. This Court actually said that, if there was any quantum of interest at all possessed by a private attorney general, that interest "may be transferred by the owner." *Amalgamated*, 46 Cal. 4th at 1003. This Court did not hold that a private attorney general possessed a nontransferable interest; it found that there was no interest whatsoever to be transferred. *Id.* at 1003.

B. A PAGA Litigant Cannot Borrow The Pecuniary Interest of the LWDA

Besides arguing (incorrectly) that an individual serving as a private attorney general might have a pecuniary interest in his role, the agency makes a separate argument to the effect that every private attorney general has the same ability to involve themself in an overlapping PAGA action as the agency itself. In its strongest form, this argument suggests that the private attorney general has this ability not because he possesses his own interest, but because standing as a private attorney general somehow allows the PAGA litigant to act as if she were the State. Brief p. 17-25. This argument fails for multiple reasons:

First, the agency's argument ignores the language of the statute. The scope of action afforded to a private attorney general is an entirely statutory construction. Prior to the promulgation of PAGA, private litigants had no ability at all to act on behalf of the LWDA with regard to civil penalty claims. A private attorney general thus only possesses the State's interest or authority to the extent that the statute says that she does. There is no external authority that would bestow a pecuniary interest upon a PAGA litigant. There is only one relevant question: what does the language of the PAGA authorize a private attorney general to do?

Looking at the language of the statute, the answer to the intervention question is easy. The legislature specifically listed all of the entities that should be given notice of the settlement so that they can participate in the process, and overlapping PAGA litigants are not on that list. Labor Code §2699(l)(2). If the legislature wanted to bestow the power of intervention upon overlapping PAGA litigants who opposed the settlement, it would also have given them the right to receive notice.

The LWDA's argument amounts to a backdoor effort to use Code of Civil Procedure section 387 to expand the scope of action for a PAGA litigant beyond anything described in the statute. That cannot work. If the legislature had intended for competing PAGA litigants to intervene in each other's actions it could have

provided for that in the statutory language. This Court consistently has held that it must assume that the legislature meant exactly what it said in the language of a statute. *Siry Investment, L.P. v. Farkhondehpour*, 2022 Cal. LEXIS 4052, 28-29 (2022) (court would "not speculate that the Legislature meant something other than what it said" or "rewrite a statute to posit an unexpressed intent").

The second problem with the agency's argument is that it misunderstands the nature of the relationship between the LWDA and a PAGA action. Neither the agency nor a competing PAGA litigant can intervene, because intervention is a procedure applicable to nonparties. The LWDA is already the real party in interest for every PAGA action. *Kim*, 9 Cal. 5th at 81. A request for "intervention" by a competing PAGA litigant is not a request to add a party to the litigation, it is a request to have competing counsel appear so that they can represent the same party. No statute has ever provided for such an arrangement.

The third problem with the LWDA's argument is that, like the rest of its brief, it fails to take account of the countervailing policy concerns. The LWDA states that "intervention exists to avoid delay." Brief p. 24. But allowing intervention means allowing objection and appeal. The instant case illustrates the problem with that. The parties agreed to settle the instant case in 2019. Because Objector's counsel could not obtain an

agreement to be paid fees to his satisfaction, almost three years have gone by since the settlement without the case being resolved. Holding that every litigant in an overlapping PAGA action has the right to do what Objector has done here will incentivize the same delay in every settlement.

VI. THE LWDA IGNORES RECENT FEDERAL AUTHORITY

Although the LWDA waited until the end of the statutory period to file its amicus brief, it failed to address important recent authority that bears directly on the issues in this appeal. On June 29, 2022, the Ninth Circuit issued its opinion in *Callahan v. Brookdale Senior Living Cmtys., Inc.*, 38 F.4th 813 (9th Cir. 2022). The *Callahan* court considered a PAGA objector who raised the same kinds of objections brought by Petitioner here: "Neverson's primary contention is that her interests are not adequately represented because the PAGA settlement amount is too small. She claims that Callahan miscalculated the maximum PAGA penalties and unreasonably discounted them in agreeing to the settlement." *Id.* at 821. "Neverson further argues that Callahan was not properly deputized to pursue certain claims that were a part of the settlement." *Id.*

The objector in *Callahan* sought the same basic relief on appeal as the Objector here, claiming that she should have been allowed intervention and that the underlying settlement was

defective. "Neverson raises three arguments on appeal: (1) that she is entitled to intervene in Callahan's PAGA action as a matter of right; (2) that the district court abused its discretion in denying her permissive intervention; and (3) that the district court abused its discretion in finding that the PAGA settlement is fundamentally fair, adequate, and reasonable." *Callahan*, 38 F.4th at 819. The *Callahan* court reached the exact same conclusion as the Court of Appeal below in this case "as a non-party to this action, she [appellant] has no right to appeal the district court's approval of the PAGA settlement." *Id.* at 823.

In reaching its conclusion, the *Callahan* court looked specifically at an issue raised by Appellant here. Appellant has argued that the *Uribe* case is inconsistent with the ruling of the Court of Appeal below. But the Ninth Circuit found the opposite in *Callahan*: that the Court of Appeal's opinion in the instant case was completely consistent with *Uribe*. Both opinions hold that a PAGA litigant in overlapping action who has been denied intervention has no standing to appeal.

> Neverson argues that she has a right to appeal the settlement because "the weight of California authority supports non-parties having a substantive right to intervene in overlapping PAGA suits." As an initial matter, we note that two of the three California state cases Neverson cites are consistent with this opinion. *See* *Turrieta v. Lyft, Inc.*, 69 Cal. App. 5th 955, 284 Cal. Rptr. 3d 767, 778 (Ct. App. 2021) (affirming the trial court's denial of intervention and finding that

> the proposed intervenors had no right to appeal the approval of the PAGA settlement); *Uribe v. Crown Bldg. Maint.*, 70 Cal. App. 5th 986, 285 Cal. Rptr. 3d 759, 770-72 (Ct. App. 2021), *as amended* (Oct. 26, 2021) (allowing an intervenor to challenge a PAGA settlement on appeal where the trial court granted intervention and that decision to allow intervention was not challenged on appeal). *Callahan*, 38 F. 4th at 823.

Callahan also provided important insight into the nature of intervention in a PAGA case. The LWDA argues that intervention should be allowed because "each PAGA plaintiff has the equal duty to ensure that any settlement advances the public's interest . . ." Brief p. 20. This position is problematic because all PAGA cases have just one real party in interest: the State. *Kim*, 9 Cal. 5th at 81. Allowing intervention therefore creates a situation where two sets of lawyers, adverse to each other, are purporting to advocate for the same client. This was an issue in *Callahan*. "The district court first noted that because both Callahan and Neverson are deputized agents of the LWDA who assert the interests of the LWDA, they represent the same legal right and interest in the PAGA action." *Callahan*, 38 F.4th at 822.

The *Callahan* court explained that, as in California law, intervention requires a finding that the existing representation is inadequate, and such a finding is disfavored where the would-be intervenor represents the same interest as an existing party.

"When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. And, if the proposed intervenor's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Callahan*, 38 F.4th at 821.

Had the LWDA chosen to comment on this recent authority, the agency might point out that federal and state law standards for intervention are different. But the policy problem addressed by *Callahan* is the same as the one facing this Court. The LWDA and the Objector would create a situation where the trial court has before it multiple attorneys adverse to each other purportedly advocating for the same principle. Federal courts are right to disfavor such a situation. In the instant case, the trial court addressed the problem by denying intervention but still considering (and ultimately rejecting) every one of the Objector's arguments. 2 AA 282; RT at 13:7-17:15; 303:6-28; *Turrieta*, 69 Cal. App. 5th at 973 n.13.

The decisions made by the trial court in this case illustrate the wisdom of the *Callahan* rule and the opinion of the Court of Appeal below. Holding that litigants in overlapping PAGA actions lack standing to derail a settlement through lengthy appeals does not prevent trial courts from considering objections (as the trial court here did). Instead, the rule described by the

Court of Appeals below allows trial courts the freedom to exercise their discretion to consider relevant arguments while maintaining the power to review settlements where it is placed by Labor Code §2699(l)(2): the trial court, and the LWDA. In this case, the trial court carefully considered and rejected every argument raised by Petitioner through multiple motions. The LWDA, having had 81 days in which to act before the trial court denied the final motion to set aside judgment, chose to do nothing. Nothing further should be required.

Callahan, along with *Saucillo v. Peck*, 25 F. 4th 1118 (9th Cir. Feb. 11, 2022), *Feltzs v. Cox Communs. Cal.*, 2022 U.S. Dist. LEXIS 25626 (Jan. 21, 2022), and *Chalian v. CVS Pharmacy, Inc.*, 2020 U.S. Dist. LEXIS 163427, at *3 (C.D. Cal. July 30, 2020), also illustrate a uniform rule across the federal courts and an overwhelming weight of authority among all courts. Of course, this Court is not bound to follow the weight of authority and could create a different rule for PAGA cases in state courts than is observed by federal courts. But neither the LWDA nor Appellant has provided any reason to create such a fracture.

VII. THE LWDA'S ATTACKS ON THE MERITS OF THE SETTLEMENT ARE INAPPOSITE

Eighty-one days passed from the time that Respondent provided the LWDA notice of the instant settlement to the date of the ruling being appealed here. In all that time, the LWDA chose

not to make any comment on the settlement. Nor did the LWDA make any move to appeal. The agency remained silent for more than a year, only filing an amicus brief in the Court of Appeal on the last statutory day to do so. The Court of Appeal noted that the LWDA could have asserted objections before the trial court "or at minimum requested more time to consider the proposal." Instead, the Court noted, the LWDA chose to act "only belatedly." *Turrieta*, 69 Cal. App. 5th at 973 n.14.

Having given up any opportunity to make its own arguments on the merits, the LWDA, as amicus, is limited to arguments that have been properly placed at issue by the parties to this appeal. "It is a general rule that an amicus curiae accepts a case as he or she finds it." *California Assn. for Safety Education v. Brown*, 30 Cal. App. 4th 1264, 1274 (1994) ("*Brown*"); *accord* *Neilson v. City of California City*, 133 Cal. App. 4th 1296, 1310 n.5 (2005). "Amicus curiae may not launch out upon a juridical expedition of its own unrelated to the actual appellate record." *Brown*, 30 Cal. App. 4th at 1274. Despite all of this, and despite the fact that the instant appeal does not concern any of the merits of the settlement, the agency has raised multiple arguments with regard to the merits.

One of the LWDA's arguments appears to be an error. At page 10 of its brief, and again on page 23, the DLSE represents to the Court that "the parties failed to account for *Dynamex* in

valuing the claims." This statement is false. The record shows that Respondent's initial motion seeking approval of the settlement included a discussion of *Dynamex* and how it impacted the case. 1 AA 066. Subsequent pleadings in the trial court provided even more detailed information about how the parties weighed the impact of *Dynamex,* including careful considerations regarding retroactive application, and the application of the ABC standard to claims outside of the wage order. 3 AA 652. Indeed, the record shows that the settlement was specifically designed to cover the time period beginning before this Court ruled in *Dynamex,* and continuing through December 31, 2019, the last day prior to the effective date of AB 5.

The entire point of the limited time period covered by the settlement is to limit the agreement to those months during which there was uncertainty regarding application of the ABC test. For example, the *Dynamex* court refused to say whether the ABC standard would apply to Labor Code claims. "We express no view on that question." *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 916 n.5 (2018). The Court of Appeal noted that "*Dynamex* did not reach the question of whether the ABC test applies to nonwage order related Labor Code claims." *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131, 1157 (2019). AB5 addressed this issue, but that bill passed the state assembly on September 11, 2019, one day after the

mediation and agreement in *Turrieta*. AB5 only purports to apply prospectively, and did not take effect until January 2020. The instant settlement only runs to December 31, 2019.

The agency's failure to recognize the important role that *Dynamex* played in the valuation of the settlement is inexplicable. The pleadings filed with the Court of Appeal show that although Appellant and Respondent disagreed as to how various elements of uncertainty with regard to *Dynamex* should affect the value of the case, there was no claim that anyone had failed to consider the issue. Indeed, Respondent's brief with the Court of Appeal spent five pages addressing these issues in detail. Respondent's Brief in Opposition to Appeal pp. 48-52. Regardless of how the error occurred, the LWDA's statement that "the parties failed to account for *Dynamex*" is contravened by even a cursory review of the pleadings in the record.

The agency's next argument on the merits (which it admits are beyond the scope of the instant appeal), is to claim that Respondent "attributed zero value" to rest break and minimum wage claims released by the settlement. Brief pp. 23, 25, 27. This is also incorrect. The record shows that Respondent's counsel examined the data and provided an exact dollar value for each cause of action. 1 AA 82-83. That careful analysis identified two claims (meal break and minimum wage violations) that did not meaningfully occur in the data. *Id*. at 83 ¶36. Turrieta

researched and valued every single claim, collected $15 million for all released claims, and accurately reported to the trial court the maximum potential value of each claim. 1 AA 82-83.

The LWDA's last complaint, described on page 25 of its brief, is to argue that Respondent was not "authorized" to bring claims for meal break and minimum wages that were included in the settlement. The Court of Appeal rejected this argument because it was not timely. Appellant did not mention the issue until his final reply brief, and the LWDA waited more than a year before providing any comment regarding the settlement. *Turrieta*, 69 Cal. App. 5th at 973, n.14, *citing to St. Mary v. Superior Court*, 223 Cal. App. 4th 762, 783 (2014) "points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before;" *Balboa Ins. Co. v. Aguirre*, 149 Cal. App. 3d 1002, 1010 (1983).

The LWDA's argument also fails on the merits. The amended complaint was part of a settlement, and notice of settlement is governed by Section 2699(l)(2): "the proposed settlement shall be submitted to the agency at the same time that is submitted to the court." That is exactly what happened here. Neither Olson nor the LWDA has identified any law that would cause the general notice period for a new lawsuit to trump the specific notice period for settlements. Section 2699.3 provides notice requirements for commencing suit. The PAGA provides

separate notice requirements on settlement. Cal. Lab. Code §2699(l)(2). Turrieta complied with both of these requirements. Before filing her action, Turrieta gave notice to the LWDA and waited 65 days. 1 AA 79 ¶9, 1 AA 92-103. Turrieta gave notice of her settlement when she filed her motion for approval. 1 AA 81 ¶29, 1 AA 121-123, 3 AA 658 ¶5. That is all the law requires.

Even if a 65-day notice requirement does apply, that requirement has been met here. The only order at issue in this appeal is the trial court's denial of Olson's motion to set aside the judgment approving the settlement. 3 AA 711, 2 CT 483. That ruling came on February 28, 2020 - 81 days after Turrieta provided notice of the settlement, including the amendments to the complaint associated with the settlement. 1 AA 81 ¶29, 1 AA 121-123, 1 AA 90 ¶78, 1 AA 251-266.

Even if there were some defect in the original notice (there was not), it has long since been cured. At page 25 of its brief, the LWDA explains that the purpose of Section 2699.3 is to allow the agency "to decide whether to allocate scarce resources to an investigation." It has been more than two years since the LWDA received notice of settlement, and it still has made no move to investigate the claims from the period covered by the settlement. The window for the agency to act closed long ago.

The law is clear that the passage of time, without the LWDA initiating an investigation, cures any shortcoming in the original notice. In *Donnelly v. Sky Chefs, Inc.*, 2016 U.S. Dist. LEXIS 147825, 4 (N.D.Cal. Oct. 25, 2016), for example, a plaintiff initiated a PAGA action just one day after giving notice to the LWDA. The failure to exhaust the notice period did not require dismissal or affect the jurisdiction of the court. *Id*. The cases confirming this rule are legion. *See,* Turrieta RB (re Olson) at 46-47; *Garnett v. ADT, LLC*, 139 F. Supp. 3d 1121, 1126-1128 (E.D. Cal. 2015); *Magadia v. Wal-Mart Assocs.*, 319 F. Supp. 3d 1180, 1188-1189 (N.D. Cal. 2018); *Harris v. Vector Mktg*, 2010 U.S. Dist. LEXIS 5659, 7 (N.D. Cal. Jan. 5, 2010); *Hoang v. Vinh Phat Supermarket*, 2013 U.S. Dist. LEXIS 114475, 18-19 (E.D. Cal. Aug. 13, 2013). These cases establish that even where the LWDA receives notice even *after* filing of a lawsuit, any failure of notice is cured by the passage of time.

All of the agency's attacks on the merits of the settlement are outside the scope of this appeal. Some, like the agency's contention that the parties did not consider *Dynamex*, represent some error or failure to review the record in this case. The remaining arguments are untimely, irrelevant to this appeal, and fail on the merits.

VIII. CONCLUSION

The LWDA's brief fails because of three basic misunderstandings.

First, the agency improperly conflates the work required to prosecute litigation with the much less burdensome work required to review settlements at the end of the litigation process. The legislature enacted PAGA because it believed the LWDA lacked the resources to directly conduct the hundreds of lawsuits necessary to enforce state labor laws. But the legislative history shows the opposite with regard to the review of settlements. As of 2016, the Legislature specifically instructed the LWDA to review settlements and provided a $1.5 million annual budget to ensure that the agency had the resources to perform that function.

The LWDA has provided no evidence whatsoever that the resources that it has are inadequate to perform the basic function of reviewing settlements. This is fatal to the LWDA's position, because the agency's entire argument is that PAGA litigants must be allowed to take over the agency function of reviewing settlements due to a lack of resources. There is no evidence of a lack of resources, and therefore there is no need for this Court to expand the role of PAGA litigants as the LWDA suggests.

The agency's second misunderstanding has to do with the incentives that drive the conduct of attorneys representing

private attorneys general. The LWDA position is based on the premise that extending the role of PAGA litigants by permitting them to review and appeal overlapping settlements would supplement the agency's job of providing fair and neutral reviews of PAGA settlements. But that is not what the law would do. PAGA is structured to incentivize litigants by rewarding them with attorney fees when they recover penalties. There is no incentive for PAGA litigants to conduct a fair or neutral review of overlapping settlements. Indeed, because the structure of PAGA was not designed for review by competing PAGA litigants, the resulting incentives would be perverse.

Attorneys representing PAGA litigants in overlapping cases must always object if they would like any chance of being paid. An attorney who reviewed a settlement and found it to be adequate would have no means to make any money at all. But were objections permitted, an attorney representing an objector would almost always recover attorney fees by simply offering to withdraw an objection or appeal in exchange for a share of fees. The agency's position ignores the basic economic incentives that make it impossible for any attorney representing a PAGA litigant to do the same kind of supervisory review that the statute requires of the LWDA.

The LWDA's third misunderstanding goes to the mechanics of the issues now before this Court. The instant case illustrates

that trial courts can and do exercise their discretion to consider objections from any litigant in an overlapping PAGA case. Indeed, the trial court here did exactly that. The key issue in this case is whether those overlapping PAGA litigants will each be empowered to derail a settlement for years by filing an appeal without any input from the LWDA or any neutral agency.

The questions of intervention and vacatur are all proxies for this underlying issue: Will litigants in overlapping PAGA actions have both the incentive and the power to file appeals as a means of extracting payment of attorney fees? There is no reason to allow this outcome. Litigants are free to petition the LWDA if they would like to see the agency take action, but allowing unilateral action by attorneys who stand to profit from every objection simply makes no sense.

All three of the LWDA's errors stem from a failure to come to grips with the actual language of the PAGA. That statute provides that settlements will be reviewed by two distinct entities: a judicial review by the trial court and an administrative review by the LWDA. The statute does not make any provision for review by competing PAGA litigants and, as a result, it lacks the basic infrastructure that would be necessary to support such a system. There is no provision to give notice to competing PAGA litigants and there is no alternate system of compensation that could incentivize a neutral review by competing PAGA litigants.

It may well be that the PAGA could be improved with refinements to the current law. The problem with the LWDA's brief is that it asks this Court to do work that is allotted to the Legislature. The agency's desire for more resources is understandable, but it is not for this Court to answer that call.

DATED: August 17, 2022

Respectfully submitted,

THE GRAVES FIRM

By: */s/ Allen Graves*

ALLEN GRAVES
Attorney for Plaintiff and
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CERTIFICATE OF WORD COUNT
CALIFORNIA RULES OF COURT,
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The text of Respondent's brief consists of 8,730 words as counted by the Microsoft Word 2021word processing program used to generate the brief, exclusive of the tables, verification, supporting documents, and certificates.

DATED: August 17, 2022

Respectfully submitted,
THE GRAVES FIRM

By: */s/ Allen Graves*
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Attorney for Plaintiff and
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PROOF OF SERVICE

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COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 122 N. Baldwin Ave., Main Floor, Sierra Madre, CA 91024.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and was executed on August 17, 2022, at Sierra Madre, California.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S271721**
Lower Court Case Number: **B304701**

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ADDITIONAL DOCUMENTS	[Proposed] Order Granting Motion for Judicial Notice

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8/17/2022

Date

/s/Allen Graves

Signature

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