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 SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The basic problem with objection and intervention in a PAGA case is that the only real party in interest is already a party. The United States Supreme Court recently followed this Court's precedent when it explained that PAGA presents "a single principle, the LWDA, that has a multitude of claims" for violations experienced by different employees. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1920 (2022).

This structure is important because our law only permits intervention by someone who is not currently a party to litigation. "An intervention takes place when a nonparty, deemed an intervenor, becomes a party to an action or proceeding between other persons." Cal. Civ. Proc. Code §387(b). "A nonparty shall petition the court for leave to intervene by noticed motion or ex parte application." *Id.* at §387(c).

So how can the State, acting through a deputized Private Attorney General, intervene in a case where the State is already the plaintiff through another Private Attorney General? Appellant argues that the scope of deputization bestowed by Section 2699(a) somehow creates an interest distinct from that held by the State that can support multiple representatives of the same government fighting each other across multiple lawsuits. But recent events and case law show why this can never work.

II. NEW AUTHORITY

A. *Accurso*

Accurso v. In-N-Out Burgers, 94 Cal. App. 5th 1128 (2023), review granted, S282173 (Nov. 29, 2023) recently disagreed with the Court of Appeal here to find that, in certain circumstances, competing PAGA litigants might have access to permissive intervention under Section 387(b). *Accurso* begins by asserting that "[w]hether an appellant has standing as a 'party aggrieved' under section 902 . . . is not the same as whether a nonparty must or may be allowed to intervene under section 387." *Id.* at 1143.

Having drawn this distinction, the *Accurso* court then looks to Rule 24 of the Federal Rules of Civil Procedure to develop a new standard for intervention under Section 387(d)(2), holding that that "nonparty PAGA claimants who seek to intervene in overlapping PAGA cases must have a 'significantly protectable interest,'" and "[a] personal interest is not required." *Id.* at 1145.

At this point, the *Accurso* analysis develops some gaps. Having invented the "significantly protectable interest" standard, *Accurso* fails to describe how a PAGA litigant could meet even this modified standard. The omission is important because this Court has been clear that PAGA litigants have no interest of any kind in the State's claims. *See e.g.* *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993 (2009).

The idea that a Private Attorney General holds no interest in the action is a warp thread in the tapestry of PAGA jurisprudence. The *Viking River* court specifically relied on this Court's opinion in *Amalgamated Transit* when it explained "[e]mployees have no assignable interest in a PAGA claim. . . . For purposes of this opinion, we assume that PAGA plaintiffs are agents." *Viking River*, 142 S. Ct. at 1914 fn.2. After *Viking River*, this Court reiterated that PAGA presents "fundamentally a law enforcement action" in which the State "deputize[s] the aggrieved employee to pursue sanctions on the state's behalf." *Adolph v. Uber Technologies, Inc.*, 14 Cal. 5th 1104, 1117 (2023). Law enforcement actions do not generally involve competing prosecutors appealing each other's plea bargains.

Our courts of appeal have relied extensively on this principle. Recent examples of this include: *Estrada Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582, 599 (2024). (PAGA actions seek to recover solely "on the state's behalf" rather than "to redress employees' injuries."); *Gregg v. Uber Technologies, Inc.*, 89 Cal. App. 5th 786 (2023) ("Every PAGA claim is a dispute between an employer and the state.")

Accurso does not address this issue. Within a few paragraphs of proposing the "significantly protectable interest" standard, *Accurso* abandons that articulation and describes a standard that ignores Section 387 in favor of allowing

intervention whenever a litigant's pleadings might be helpful to the court:

> [D]o nonparty PAGA claimants with overlapping claims have something significant to add to the settlement approval process? We think they may, and we are of the view that permissive intervention supplies a means to make sure the perspective of potentially affected nonparty PAGA claimants is included in the settlement approval process. *Accurso*, 94 Cal. App. 5th at 1153.

This second standard conflicts with multiple important elements of our current jurisprudence:

The controlling statute. The PAGA assigns the job of reviewing settlements to the trial court with notice to the LWDA. Labor Code §2699(l)(2). The statute does not allow for litigants in other overlapping PAGA cases to join the statutorily-defined process even if they have "something significant to add."

The legislature's balancing of interest. When it drafted Section 2699(l)(2), the legislature navigated between twin perils of unscrutinized settlements and rent-seeking objectors. It may be that a competing PAGA litigant could have useful pleadings to offer, but such litigants also have a strong incentive to use the ability to object and appeal to derail any settlement unless the attorneys are given a substantial fee. *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 272 (2018). *Accurso* offers no explanation of how its new rule would balance this competing

policy concern. Nor does the opinion address the critical fact that the legislature has already set this balance in Section 2699(l)(2).

Existing qui tam law. *Accurso* acknowledges that PAGA actions are a qui tam action. *Accurso*, 94 Cal. App. 5th at 1147-1148. But it ignores the fact that other qui tam statutes contain express provisions allowing intervention and the legislature chose not to include any such provision in the PAGA. Consider, for example, the California False Claims Act ("CFCA") Gov. Code, §12652(a)(3). If Section 387 authorized intervention in overlapping qui tam lawsuits generally, the provisions authorizing intervention specifically in other types of qui tam lawsuits would be superfluous. Our law forbids this conclusion: "[S]tatutes must be harmonized. . . . They will not be construed in such a way as to render related provisions nugatory." *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 408 (2003). *Accurso* also ignores the fact that the CFCA and other statutes like it predate PAGA so the legislature clearly knew how to provide for intervention in a qui tam action if that was the intent.

A trial court's ability to consider argument without intervention. *Accurso* is animated by a policy desire to have trial courts apprised by dissenting litigants in overlapping cases. But this goal does not require intervention. If the reason for allowing intervention is so competing PAGA litigants can have "a seat at the table" (*Accurso*, 94 Cal. App. 5th 1154), this can be

accomplished by the trial court considering objections on an amicus curiae basis. Trial courts have "broad discretion over the conduct of pending litigation," including the authority to accept amici curiae briefs. *In re Marriage Cases*, 43 Cal. 4th 757, 791 fn.10 (2008).

The nonparty requirement for intervention. *Accurso* also fails to address the question of how the State can intervene through a second Private Attorney General where it is already a party. Cal. Civ. Proc. Code §387(b). *Accurso* describes the objectors as "nonparty PAGA claimants" but never explains how that designation could apply. *Accurso*, 94 Cal. App. 5th at 1153.

Even if this Court were to adopt the standard from *Accurso*, it would not provide any basis for reversal in this case. The standard described by *Accurso* requires that "a trial court . . . must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state's interests." *Accurso*, 94 Cal. App. 5th at 1153 (internal citation omitted). In this case, the trial court did exactly that: considering each of the objections raised by Appellant and concluding that both the representation and the result here were more than adequate. 2 AA 485. There is no need for reversal where the trial court has already completed the analysis *Accurso* suggests.

Accurso is instructive because it shows just how far one has to go to build a framework that would allow permissive intervention by a competing PAGA litigant. The fact that *Accurso* ultimately had to endorse giving "a seat at the table" to litigants who could just as easily provide whatever information they wish as amicus curiae shows that the existing legal framework cannot support intervention.

B. *Viking River*

In *Viking River*, 142 S. Ct. at 1916, the United States Supreme Court examined this Court's holding in *Iskanian* and the protections that case provided against waiver and mandatory arbitration of PAGA claims. Accepting Appellant's arguments here would invalidate parts of *Iskanian* that survived *Viking River*.

As the *Viking River* court saw it, *Iskanian* "prohibits waivers of 'representative' PAGA claims" in the sense that "it prevents parties waiving *representative standing* to bring PAGA claims in a judicial or arbitral forum." The defendant in *Viking River* argued that the FAA preempted *Iskanian* because the FAA specifically protects bilateral arbitration and representative PAGA claims are, the defendant argued, inherently not bilateral. *Id.* at 1912. On this basis, defendant claimed the entirety of *Iskanian* must be preempted. *Id.*

Viking River rejected the employer's position, holding that *Iskanian's* prohibitions did not all violate the FAA because, under this Court's precedent, a PAGA action is strictly bilateral: "Unlike procedures distinctive to multiparty litigation, single-principal, single-agent representative actions are "bilateral" in two registers: They involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant." *Id.*

Viking River cited specifically to *Turrieta* for the very holding that is at the heart of the issues before this Court: "[t]he employee's 'ability to file PAGA claims on behalf of the state does not convert the state's interest into their own or render them real parties in interest.'" *Id.* at 1914 fn.2.

The Supreme Court's reliance on the ruling below is important. If this Court accepts Appellant's argument that PAGA litigants have some quantum of interest distinct from the State, PAGA proceedings would no longer be bilateral and *Iskanian* would be completely preempted by the FAA for the exact reasons advanced by the defendant in *Viking River*.

Appellant may argue that he is not advancing a personal interest for PAGA litigants. He concedes as much before this Court, disclaiming any "'personal' interest in this action." OBOM 31. Instead, Olsons argues that the scope of deputization afforded under PAGA somehow creates a nonpersonal property

interest in acting on behalf of the State that extends to adverse proceedings against other deputized Private Attorneys General.

Besides the obvious problem with the theory that the State is deputizing multiple agents to fight amongst themselves, Appellant's theory is still incompatible with the preservation of *Iskanian*. Any interest that could support intervention under Cal. Civ. Proc. Code §387 must necessarily render the ensuing proceeding non-bilateral under the reasoning described in *Viking River*. *Viking River*, 142 S. Ct. at 1912. We cannot have it both ways. Either PAGA presents a bilateral dispute between the State and the employer, or it presents some other constellation of interests that falls outside the binary scheme that survived FAA preemption in *Viking River*.

Since *Viking River*, some litigants have run aground on the term "individual PAGA claim" viewing the word "individual" as antithetical to "representative." A careful reading dispels this. The Court explained: "PAGA actions are "representative" in that they are brought by employees acting as representatives – that is, as agents or proxies – of the State. But PAGA claims are also called "representative" when they are predicated on code violations sustained by other employees." *Viking River*, 142 S. Ct. at 1916. The Court went on to explain that its terminology distinguished between the State's claims for violations experienced by the PAGA litigant and the State's claims for violations experienced

by other employees. *Id*. *Viking River* was explicit that "[t]here is no individual component to a PAGA action." *Id*.

C. Other Federal Authorities

Accurso points to federal law for a potential standard regarding intervention, but federal authorities have widely embraced the Court of Appeal ruling below. "The Court agrees that a plaintiff in a parallel PAGA action lacks a protectable interest to support intervention in the settlement of a separate PAGA action with overlapping claims." *Vallejo v. Sterigenics U.S. LLC*, 2023 U.S. Dist. LEXIS 65825 at *14. (S.D. Cal. Apr. 12, 2023) (citing *Turrieta*). *Callahan v. Brookdale Senior Living Cmtys., Inc.*, 42 F. 4th 1013, 1023 (9th Cir. 2022) (citing *Turrieta* in upholding lower court ruling denying intervention and finding lack of standing for overlapping PAGA litigant).

III. APPELLANT HAS ACCEPTED A SETTLEMENT OF PAGA CLAIMS

One other relevant matter has arisen since Respondent filed her principal brief: Appellant has entered into a settlement of the State's PAGA claims for violations that involved Appellant. Olson and his attorney have received an undisclosed sum in exchange for a release of the "individual PAGA claim" related to Olson's employment by Lyft. *See* Motion for Judicial Notice ("MJN") Exh. 1, 3:9-24. In a tactical bid to preserve the instant appeal, the deal "does not release plaintiff's representative PAGA

claim . . . And does not include any claim for attorney's fees and costs based on the pending representative PAGA claim." *Id.*

This raises the question of whether Olson's tactic has worked. Does he still have standing to appeal given that there are no surviving claims that relate to Olson? In arguing before the Court of Appeal, Olson claimed that he had an individual interest in the PAGA claim relating to the violations that he personally experienced and that interest gave him standing. If that were the basis for Appellant's argument here, he now lacks standing as he has sold the State's claim for those violations.

Even if it does not eliminate standing, Olson's decision to reap personal financial windfall by settling some of the State's claims while continuing to oppose the instant settlement illustrates a basic problem with his argument regarding the scope of deputization. The rule advocated by Olson allows exactly what he has done here: delaying a $15 million settlement by years while simultaneously profiting by entering into a separate settlement agreement under which the State's claims are compromised with the amount being paid to Olson and his counsel never even being disclosed. MJN Exhs. 1, 3.

Olson's conduct dramatically highlights the risk of strategic, rent-seeking objections that this Court identified in *Hernandez*, 4 Cal. 5th at 272. Appellant himself has successfully delayed a $15 million settlement for nearly five years while

enriching himself and his counsel by selling off some of the very claims he has successfully kept in limbo for so long. All of this is the necessary economic consequence of a system that would give each competing litigant the ability to effectively veto any settlement for years as it grinds through the appellate process.

Giving every employee the ability to delay resolution of PAGA cases by years at a time is contrary to the basic law-enforcement objective of PAGA. In this case alone, the years of delay and the diminishing value of the fixed settlement amount imposed by inflation (which peaked at 8% in 2022) means that the real value of the State's recovery has been reduced by more than $1 million while Olson has delayed payment.

And Olson's conduct shows why the risk of self-serving incentives is exponentially higher in a PAGA case. For class-action cases like the one at issue in *Hernandez*, objections are at least limited by the objector's individual interest in the subject of litigation. In a PAGA case, Appellant would let the objector derail a settlement until he receives attorney fees while simultaneously profiting by selling off the State's claims for an undisclosed personal profit.

IV. CONCLUSION

Accurso shows that there is no viable way to bypass the plain language of the law that requires a direct pecuniary interest to intervene, object, or move to vacate a PAGA settlement. *Viking River* shows how adopting the rule Appellant seeks could yield unintended consequences as it changes critical attributes of the law.

Olson himself has demonstrated the policy problem with the rule he advocates – showing how profit-driven litigants are incentivized to delay settlements for years while simultaneously profiting by settling portions of the State's claims.

Taken together, these elements support the existing structure in Section 2699(l)(2). Individual litigants are deputized to represent the State within a PAGA action, and settlements are reviewed by the trial court with notice and the power to object or appeal going to LWDA.

The legislature's solution allows trial courts the freedom to consider the input of overlapping PAGA litigants as amici curiae while protecting from perverse incentives that would inspire rent-seeking appeals if standing were conferred as Appellant has advocated. There is no good reason for this Court to undo the legislature's work.

DATED: April 26, 2024

Respectfully submitted,

THE GRAVES FIRM

By: */s/ Allen Graves*

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CERTIFICATE OF WORD COUNT
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The text of Respondent's brief consists of 2,799 words as counted by the Microsoft Word 2021 word processing program used to generate the brief, exclusive of the tables, verification, supporting documents, and certificates.

DATED: April 26, 2024

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RESPONDENT TINA TURRIETA'S SUPPLEMENTAL BRIEF

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Supreme Court of California

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