Case No. S269456

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor Commissioner, etc.,
Plaintiff and Appellant

v.

KOLLA'S, INC. et al.,
Defendant and Respondent.

Fourth Appellate District, Division Three, Case No. G057831

Orange County Superior Court, Dept. C34
Case No. 30-2017-00950004-CU-WT-CJC
The Honorable Martha K. Gooding, Judge

OPENING BRIEF ON THE MERITS

State of California, Department of Industrial Relations,
Division of Labor Standards Enforcement

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Legislation

ISSUE PRESENTED

Whether Labor Code section 1102.5(b) protects an employee from retaliation for disclosing unlawful activity to a person or agency that already knows about the unlawful activity.[1]

INTRODUCTION

This case involves the scope of whistleblower protections for employees who complain about violations of law to their employers. When A.C.R.,[2] a bartender at Kolla's night club, told the club's owner she was owed unpaid wages, she was immediately terminated and threatened with immigration consequences. (1 CT 35-36.) The Labor Commissioner determined that the retaliation violated section 1102.5(b) and brought this enforcement action. (*Id.*, at 31, 35-36, 147-148, 153, 158-161.)

Section 1102.5(b) prohibits an employer from retaliating against an employee for "disclosing information" about a violation of law "to a government or law enforcement agency, [or] to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct" the violation. (Lab. Code § 1102.5, subd. (b) as amended by Stats. 2013, ch. 577 (Sen. Bill 666), § 5; Stats. 2013, ch. 732 (Assem. Bill 263), § 6; Stats. 2013, ch. 781 (Sen. Bill 496), § 4.1 [eff. Jan. 1, 2014].) Although A.C.R. was fired and threatened because she complained about a violation of law (i.e., unpaid wages) to a person with authority over her, a divided Court of Appeal nonetheless held that the Labor Commissioner did not state a valid cause of action. According to the majority, A.C.R. was not protected under section 1102.5(b) because there

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[1] All undesignated statutory references are to the Labor Code.

[2] The complainant's initials are utilized in the underlying complaint and appeal because of the sensitivity of the allegations involved.

was no evidence her complaint revealed anything new to Kolla's owner. (Maj. Opn., at pp. 5-6, 9-11.)

The majority's narrow reading of section 1102.5(b) has no basis in the statutory framework. The dictionary definitions of "disclose" the majority utilized contain no requirement that a "disclosure" reveal something new (or be believed by the employee to reveal something new) to the person or agency to whom the disclosure is made. Indeed, the majority overlooked the dictionary definition that a disclosure could reveal something "again." The plain language of section 1102.5(b) requires only that a reasonably based suspicion of unlawful activity be reported (i.e., communicated) by an employee to a person or agency to be protected. (Lab. Code § 1102.5, subd. (b).) The statutory framework and section 1102.5(b)'s legislative history all confirm this broader interpretation, showing that the Legislature, when legislating whistleblower protections, intends "disclose" to mean simply a report or communication. Nothing in the legislative history suggests an employee must prove a complaint reveals a violation of law previously unknown to the person or agency to whom it is made.

Indeed, contrary to legislative intent, the majority's view of section 1102.5(b) leaves only narrow whistleblower protections for internal complaints about violations of law, with profound implications for the enforcement of California's minimum labor standards and the protection of low-wage and immigrant workers. The Legislature has repeatedly strengthened section 1102.5 and other whistleblower protections to encourage workers to speak up when their rights are violated. This includes an amendment to section 1102.5(b) to explicitly protect "internal complaints" about violations of law so workers could "report concerns to their employers without fear of retaliation or discrimination." (Sen. Rules

Com. on Sen. Bill 496 (2013-2014 Reg. Sess.) as amended Sept. 6, 2013, pp. 4-5; Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h) [eff. Jan. 1, 2014].) The majority largely negates this protection for many workers, including those who report wrongdoing directly to the wrongdoer and those who are not the first to complain. In fact, the majority's decision leaves workers "with only one truly safe course: *do nothing at all*." (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1124 [emphasis added]; accord *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243; see also *Mitchell v. Robert DeMario Jewelry, Inc.* (1960) 361 U.S. 288, 293 ["For it needs no argument to show that fear of . . . retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."].)

In view of the plain language, legislative history, and legislative purposes of section 1102.5(b), the Court of Appeal's decision should be reversed. A protected "disclosure" under section 1102.5(b) happens even if the person or agency to whom a report is made already knows about the unlawful activity.

BACKGROUND

I. A.C.R.'s Complaint and the Retaliation

A.C.R. worked as a bartender at Kolla's, Inc. ("Respondent Kolla's"). (1 CT 35.) On April 5, 2014, A.C.R. complained to Gonzalo Sanalla Estrada, Respondent Kolla's owner, that she was owed unpaid wages.[3] (*Ibid.*) Upset that A.C.R. complained to him about the unpaid

[3] Failure to pay wages violates numerous provisions of the Labor Code. (See Lab. Code §§ 200 et seq., 1197, 1197.1, 1199). Thus, A.C.R. had reasonable cause to believe that her complaint disclosed a violation of a state statute or a violation of or noncompliance with a state rule or regulation. (1 CT 35; Lab. Code § 1102.5, subd. (b).)

wages, Estrada immediately threatened to report A.C.R. to the "immigration authorities," then terminated her employment and warned her never to return to the nightclub. (*Id.*, at 35-36.)

II. Labor Code Section 1102.5(b)

The Legislature enacted section 1102.5 in 1984. (Stats. 1984, ch. 1083 (Assem. Bill 2452), § 1 [eff. Jan. 1, 1985].) At the time, no law broadly prohibited retaliation against employees for reporting unlawful activity in the workplace. (Assem. Com. on Labor and Employment on Assem. Bill 2452 (1983-1984 Reg. Sess.) as introduced, p. 1.) Section 1102.5(b) was thus enacted "[t]o protect employees . . . for providing information to a government or law enforcement agency concerning violations of state or federal laws." (Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984, p. 1.)

Since its enactment, the Legislature has repeatedly broadened section 1102.5 to encourage employees to "blow the whistle" on illegal practices at work. As the Legislature has recognized, whistleblower protections are "the bedrock upon which all other workplace rights rest," and "[a]s a practical matter, employees have no real right to minimum wage, overtime, rest breaks, worksite safety, or to be free from harassment if, upon attempting to exercise those rights, they can be fired immediately." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill 1947 (2019-2020 Reg. Sess.) as introduced, at p. 2.)

The first enhancements to section 1102.5 came in 2003. In the wake of the Enron, WorldCom, and other massive corporate fraud scandals of the early 2000s, and with a focus on employees' "unique position to report corporate wrongdoing to an appropriate government or law enforcement

agency" (Stats. 2003, ch. 484 (Sen. Bill 777), § 1 [eff. Jan. 1, 2004]), the Legislature expanded the statute's whistleblower protections to "encourage earlier and more frequent reporting of wrongdoing by employees . . . ." (Assem. Com. on Judiciary on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended May 29, 2003, p. 1.) Among these changes, the Legislature broadened section 1102.5(b) to protect "employees who report a violation of a state or federal rule," where previously only reports about violations of state or federal statutes or regulations were protected. (Legis. Counsel's Dig., Sen. Bill 777 (2003-2004 Reg. Sess.), Stats. 2003, ch. 484.) The Legislature also added section 1102.5(e), which clarified that a public employee need not report a violation of law to an outside agency to be protected under section 1102.5(b). (Sen. Com. on Judiciary, Analysis of Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced, pp. 2, 7.) [codifying the interpretation of section 1102.5(b) in *Gardenhire, supra,* 85 Cal.App.4th at 241-243]; Stats. 2003, ch. 484, § 2.)[4]

The version of section 1102.5(b) at issue here became effective in 2014. On this occasion, the Legislature broadened section 1102.5(b) to prohibit retaliation against employees for "disclosing information" about a violation of law "to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct" the violation. (Lab. Code § 1102.5, subd. (b) as amended by Stats. 2013, ch. 577 (Sen. Bill 666), § 5; Stats. 2013, ch. 732 (Assem. Bill 263), § 6; Stats. 2013, ch. 781 (Sen. Bill 496), § 4.1 [eff. Jan. 1, 2014].) The Legislature

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[4] Other changes included the addition of section 1102.5(f) to provide a civil penalty for violations of the statute (Stats. 2003, ch. 484, § 2), and the enactment of section 1102.6 to establish the evidentiary standard for section 1102.5(b) retaliation claims. (Lab. Code § 1102.6 as added by Stats. 2003, ch. 484, § 3.)

described this as a "prudent" change to protect "internal complaints" about unlawful activity. (Sen. Rules Com. on Sen. Bill 496 (2013-2014 Reg. Sess.) as amended Sept. 6, 2013, pp. 4-5.) The Legislature explained: "It is in the public interest of the State of California that workers be able to report concerns to their employers without fear of retaliation or discrimination." (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h).)

Notably, the 2014 amendment reflects the Legislature's specific concern about protecting low-wage and immigrant workers who speak up about unlawful conduct in the workplace. As the author of one bill incorporating the amendment argued, existing law at the time did little to deter unscrupulous employers from using workers' immigration statuses "to prevent workers from demanding their rights in the workplace," or to retaliate against workers for "demand[ing] that . . . employer[s] comply with California's labor laws." (Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4.) The Legislature found this to be particularly problematic in the wage theft context, which it described as "a serious and widespread problem that causes severe hardship" for low-income workers, many of whom are immigrants. (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subds. (a), (c).) It declared:

> Far too often, when workers come forward to expose unfair, unsafe, or illegal conditions, they face retaliation from the employer. [¶] . . . No employee should have to fear adverse action . . . simply for engaging in rights the State of California has deemed so important that they are protected by law. [¶] It is in the public policy interest of the State of California that workers be able to report concerns to their employers without fear of retaliation or discrimination. (*Id.*, at subds. (e)-(h).)

The author of one bill incorporating the amendment thus described the version of section 1102.5(b) at issue here and related legislative changes as "needed to empower workers to exercise their rights under California without fear," stating that the changes would "lift the veil of silence in the workplace." (Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4.) An amendment sponsor explained: "[These changes] will prohibit employers from engaging in immigration-related retaliation against workers who have spoken up about unpaid wages, unsafe working conditions, or unfair treatment." (Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013, p. 8.) "The State has both a right and an obligation to protect workers and to ensure that basic labor laws can be enforced. Employers who engage in these forms of retaliation must be held accountable." (*Id*., at pp. 8-9.)[5]

III. The Labor Commissioner's Case

A.C.R. filed a complaint with the Labor Commissioner about the immigration-based threat and the termination of her employment. (1 CT at 35-36, 147.) The Labor Commissioner determined that both violated California law. (*Id.*, at 147-148, 158-161.) The Labor Commissioner then sued Respondent Kolla's and Estrada for unlawful retaliation. (*Id.*, at 31, 35-36, 153; see former Lab. Code § 98.7, subd. (c) as amended by Stats.

[5] The related changes included the amendment of section 98.6 to protect internal complaints about unpaid wages, and the enactment of sections 244 and 1019 to prohibit immigration-based threats and unfair immigration-related practices as means of unlawful employment retaliation. (Stats. 2013, ch. 732 (Assem. Bill 263), §§ 2, 4; Stats. 2013, ch. 577 (Sen. Bill 666), §§ 3, 4 [eff. Jan. 1, 2014].)

2013, ch. 732, § 3 [eff. Jan. 1, 2014] [authorizing suit to enforce a Labor Commissioner determination that retaliation occurred].)

IV. Trial Court Proceedings

As relevant here, the Labor Commissioner alleged a cause of action against Respondent Kolla's and Estrada for violation of section 1102.5. (1 CT 31.) The elements of a prima facie case are: (1) that an employee engaged in a protected activity; (2) that the employer subjected the employee to an adverse action; and (3) that a causal link exists between the protected activity and the adverse action. (*Patten v. Grant Joint Union High Sch. Dist.* (2005) 134 Cal.App.4th 1378, 1384.) Respondent Kolla's and Estrada did not defend against the action. (1 CT 60-65.) Nonetheless, the trial court entered judgment against the Labor Commissioner on the section 1102.5(b) claim, holding that the Labor Commissioner did not state a valid cause of action because A.C.R. reported her suspicions of unlawful activity to her employer instead of a public agency. (*Id.*, 186-194.) The Labor Commissioner appealed. (*Id.*, at 193-197.)[6]

V. Appellate Court Decision

The Labor Commissioner asserted on appeal that the trial court relied on a superseded version of section 1102.5(b) in concluding that the statute did not protect A.C.R.'s internal complaint about a violation of law. (Maj. Opn., at pp. 5-6.) Although the Court of Appeal agreed about the trial court utilizing an incorrect version of the statute, the majority *sua sponte* affirmed the trial court's judgment on another ground, holding that the Labor Commissioner did not allege what the majority believed was an essential factual element of a section 1102.5(b) claim: that A.C.R.'s

[6] The appeal was subsequently dismissed as to Estrada only.

complaint revealed something new (or was believed by A.C.R. to reveal something new) to Respondent Kolla's and Estrada. (*Id.*, at pp. 5-6, 9-11.)

In reaching its holding, the majority resorted to dictionary definitions of "disclose" for section 1102.5(b). (Maj. Opn., at pp. 9-11.) The definitions provided that "[t]he word 'disclose' means 'to make known' or 'open up to general knowledge,' especially 'to reveal in words (something that is secret or not generally known).' " (*Id.*, at p. 10 [citing Webster's 3d New Int'l Dict. (1981) p. 645, col. 2].) The majority thus concluded that "[f]oundational . . . to a disclosure" under section 1102.5(b) "is the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." (Maj. Opn., at p. 10.) The majority believed "[t]he Legislature's choice of [the] word ['disclose'], rather than words like 'report' or 'tell,'" was "significant." (*Ibid.*) The majority also agreed with *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, 859 that "criticism delivered directly to the wrongdoers does not further the purpose of" section 1102.5(b) "to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it." (Maj. Opn., at 11.) Consequently, the majority held that the Labor Commissioner failed to state a valid cause of action for violation of section 1102.5(b). (*Id.*, at pp. 5-6, 9-11.)

Noting that the majority cited no legislative history supporting its conclusion, Justice Fybel dissented, criticizing the majority's interpretation of section 1102.5(b) as "incorrect," "unduly restrictive," and "thoroughly inconsistent" with the Legislature's clear intent to broadly protect employees from retaliation. (Dis. Opn., at pp. 2-3, 14.) In the dissent's view, the term "disclose" as used in section 1102.5(b) means "to make a

report or to communicate information" about unlawful activity, "regardless of whether the recipient of the disclosure is already aware of that information." (*Id.*, at p. 14.) The dissent also criticized the majority for relying on *Mize-Kurzman, supra,* 202 Cal.App.4th at 858-859, whose earlier use of a dictionary definition to construe the statute was flawed and based on Federal Circuit precedent that Congress since repudiated for misinterpreting a similar provision under the federal Whistleblower Protection Act (WPA). (Dis. Opn., at pp. 3-4, 9-14.) The dissent also noted that the majority opinion conflicted with *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1549-1552, which it said holds that "a [d]isclosure within the meaning of section 1102.5(b) occurs even if the recipient is already aware of the information reported to it." (Dis. Opn., at pp. 4, 14-19.) The dissent would therefore have reversed the trial court and remanded with instructions for judgment to be entered for the Labor Commissioner. (*Id.*, at pp. 1, 21.)

STANDARD OF REVIEW

Matters presenting pure questions of law, not involving the resolution of disputed facts, are reviewed de novo. (*Aryeh v. Canon Bus. Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) This includes the proper interpretation of a statute (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432) and the application of the interpreted statute to undisputed facts. (*Int'l Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.)

ARGUMENT

I. Section 1102.5(b) Protects an Employee from Retaliation, Regardless of Whether the Complaint Reveals a Violation of Law Previously Unknown to the Person or Agency to Whom It Is Made

In determining the scope of section 1102.5(b)'s whistleblower protections, the Court's "fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616.) It begins with the text, giving "it a plain and commonsense meaning." (*Ibid.*) Of course, the text must not be considered "in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose." (*Ibid.*) "[C]ourts must generally follow [the text's] plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Ibid.*)

With respect to the Labor Code specifically, this Court adopts a "construction that best gives effect to the purpose of the Legislature," which the Court has defined "as the protection of employees — particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code." (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 866 [citation omitted].) Where a statute has "more than one reasonable interpretation," the Court "consider[s] the ostensible objectives to be achieved by the statute, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction and the statutory scheme of which the statute is a part." (*Ibid.*)

A. The Statutory Text Does Not Require That the Recipient of a Disclosure Be Ignorant of the Wrongdoing Disclosed

Citing no legislative history, the majority below construed section 1102.5(b) to require that a disclosure under the statute reveal "something

new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." (Maj. Opn. at 10.) As the dissent recognized, however, the majority's dictionary definitions of "disclose" do not compel this reading, which creates absurd results when applied to the use of the word "discloses" later in section 1102.5(b). Rather, there are other more reasonable interpretations of term that make sense in the context of the statute as a whole and, as explained later, follow the legislative intent underlying the statute.

Neither dictionary definition of "disclose" cited by the majority necessarily requires that the recipient of a complaint be unaware of the violation alleged. As noted above, "disclose" has at least two meanings. One definition is "to expose to view," much like a "curtain rises to [disclose] once again the lobby." (Maj. Opn. at p. 10, fn. 9.) To disclose in this sense is to bring something within the immediate perception of the observer, which may not have been within view at that moment. But while that disclosure may reveal something new, it just as well may reveal something about which the observer already knew (i.e., "to [disclose] once *again*"). As the dissent observed, there is no requirement that "whatever is exposed to view ha[ve] been previously unknown to the viewer." (Dis. Opn. at p. 15, fn. 5.)

The other definition of "disclose" on which the majority relied is "to make known" or "open up to general knowledge, especially to reveal in words (something that is secret or generally not known)." (Maj. Opn. at 10.) Even applying the majority's reading, this definition can be reasonably interpreted to afford whistleblower protection to an employee complaining about a violation of law directly to the violator. This is because the complaint may reveal to the violator not just that the employee knows about

the violation, but also that the employee intends to challenge it. The majority did not recognize these inherent revelations for the violator, focusing narrowly instead on the violator's knowledge of the violation.[7]

Indeed, the majority's reading of "disclose" cannot be squared with the use of the word (or variations thereof) in other parts of the statute.[8] (See *People v. Dillon* (1983) 34 Cal.3d 441, 468 ["[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute."].) In particular, the flaws in the majority's reasoning appear in the context of disclosures to government and law enforcement agencies. In such instances, the majority's reading would have the absurd effect of making a law enforcement agency's "state of awareness . . . absolutely necessary to establishing a violation of the statute." (Maj. Opn. at 11.)

First, based on the majority's interpretation, only the first employee who complains to a law enforcement agency will be protected from

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[7] At a minimum, the majority's construction contravenes the Legislature's intent to protect workers who challenge illegal practices in the workplace, and to encourage employers to correct violations promptly, as both of these goals are served by protecting complaints made directly to the wrongdoer.

[8] In full: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for ***disclosing*** information, or because the employer believes that the employee ***disclosed*** or may ***disclose*** information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information ***discloses*** a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether ***disclosing*** the information is part of the employee's job duties." (Lab. Code § 1102.5, subd. (b) [emphasis added].)

retaliation; any who follow will not be protected because the agency will by then already know about the wrongdoing, so a subsequent disclosure will not be "something new." As *Hager, supra,* 228 Cal.App.4th at 1549-1552 thoroughly explained, however, nothing in the statute or legislative history suggests the Legislature intended that an employee be the "first reporter" to benefit from section 1102.5(b)'s protections.[9]

Second, as the dissent observed, applying the majority's construction to the statute's "reasonable belief" requirement would make that requirement nonsensical. Section 1102.5(b) requires that an employee have "reasonable cause to believe that the information *discloses* a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." (Lab. Code § 1102.5, subd. (b) [emphasis added].) Under the majority's definition of "disclose," an employee who reported to a law enforcement agency that their employer was stealing from customers would only be protected from retaliation under section 1102.5(b) if the agency did not know (or the employee believed it did not know) that such theft violated local, state, or federal law. (Dis. Opn., at pp. 3, 6-8.) Rather than address this absurdity, the majority expressly avoided it. (See Maj. Opn. at p. 10, fn. 9.)

The relevant jury instruction, CACI No. 4603, is in accord. As the dissent noted, "[t]here is nothing in the standard jury instruction that asks

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[9] Had the Legislature intended section 1102.5(b) to have such a restriction, it knew how to create one. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 [citation omitted].) California's False Claims Act, for instance, contains an "original source" requirement meant to exclude from the statute's coverage "those that do not sound the alarm, but echo it." (*State of Cal. v. Pac. Bell Tel. Co.* (2006) 142 Cal.App.4th 741, 755.)

the jury to consider the recipient of a report's awareness, or perceived awareness, of the underlying information of the report at the time the employee complained." (Dis. Opn., at p. 4.) Indeed, "[n]othing in this jury instruction or the statute suggests the term disclose means anything other than communicating information that shows a violation of law." (*Id.*, at p. 20.)

B. The Legislature Uses "Disclose" to Mean a Report or Communication When Legislating Whistleblower Protections

Section 1102.5(b)'s legislative history supports reading "disclose" not to require that the recipient of a disclosure have learned something new. Indeed, although the majority based its decision in part on the Legislature using "disclose" instead of "words like 'report' or 'tell' " in section 1102.5(b) (Maj Opn. at p. 10), legislative history spanning over 30 years shows that the Legislature repeatedly used words and phrases like "report," "provide information," and "contact" interchangeably with "disclose" in the context of the statute. That the Legislature alternated between these terms indicates the Legislature viewed the words and phrases as synonymous, thus eliminating the significant distinction on which the majority based its decision. (See *Ferra, supra,* 11 Cal.5th at 866 [noting that where synonymous words or phrases "appear interchangeably in legislative or judicial usage" those words or phrases should be understood to have the same meaning].)

Using the word "disclose" and its variations throughout, section 1102.5(b) was enacted in 1984 "[t]o protect employees . . . for *providing information* to a government or law enforcement agency concerning violations of state or federal laws." (Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26,

1984, p. 1 [emphasis added].) In different analyses and reports, the Legislature described the protected activity variously as "*reporting*" a violation of law and "*contacting*" a public agency. (Assem. Com. on Labor and Employment on Assem. Bill 2452 (1983-1984 Reg. Sess.) as introduced, pp. 1-2 [emphasis added]; Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984, p. 2; see also Div. of Labor Standards Enforcement, Enrolled Bill Rep. on Assem. Bill 2452 (1983-1984 Reg. Sess.) Aug. 22, 1984, p. 1 [emphasis added].) Indeed, in advocating that the then-Governor sign Assembly Bill 2452 into law, the bill's author noted that it "prohibits an employer from firing an employee for *reporting* a violation of state or federal law to a government or law enforcement agency . . . ." (Assemblywoman Waters, author of Assem. Bill 2452 (1983-1984 Reg. Sess.), letter to Governor Deukmejian, Aug. 23, 1984.)

In 2003, the Legislature noted employees' "unique position to *report* corporate wrongdoing to an appropriate government or law enforcement agency" (Stats. 2003, ch. 484 (Sen. Bill 777), § 1 [eff. Jan. 1, 2004] [emphasis added]) and expanded the statute's protections to "encourage earlier and more frequent *reporting* of wrongdoing by employees . . . ." (Assem. Com. on Judiciary on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended May 29, 2003, p. 1 [emphasis added].) These changes included broadening section 1102.5(b) to protect "employees who *report* a violation of a state or federal rule," where previously only reports about violations of state or federal statutes or regulations were protected. (Legis. Counsel's Dig., Sen. Bill 777 (2003-2004 Reg. Sess.), Stats. 2003, ch. 484 [emphasis

added]; Lab. Code § 1102.5, subd. (b) as amended by Stats. 2003, ch. 484, § 2.)[10]

The Legislature also added section 1102.5(e) in 2003, which clarified that a public employee need not *report* a violation of law to an outside agency to be protected under section 1102.5(b). (Sen. Com. on Judiciary, Analysis of Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced, pp. 2, 7; Stats. 2003, ch. 484, § 2.) The Legislature intended this amendment to codify the decision in *Gardenhire, supra,* 85 Cal.App.4th at 241-243, where the court held that a public employee's internal complaint was protected based on the plain language of the statute. Importantly, the version of section 1102.5(b) in effect at that time was more limited than the current one, as it only protected employees for "disclosing information" about unlawful activity to government and law enforcement agencies. (Former Lab. Code § 1102.5, subd. (b) as enacted by Stats. 1984, ch. 1083 (Assem. Bill 2542), § 1 [eff. Jan. 1, 1985]; *Gardenhire, supra,* 85 Cal.App.4th at 241.)[11] Thus, as the dissent explained, rather than create a distinction between public and private employees, the history of section 1102.5(e) reflects that the Legislature intended "disclose" and "report" to be used interchangeably. (Dis. Opn., at pp. 14-17.)

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[10] "It is reasonable to presume that the Legislature [acted] with the intent and meaning expressed in the Legislative Counsel's digest." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1170.)

[11] In full: "No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." (Former Lab. Code § 1102.5, subd. (b) as enacted by Stats. 1984, ch. 1083 (Assem. Bill 2542), § 1 [eff. Jan. 1, 1985].)

And again when expanding section 1102.5 in 2013, the Legislature explained: "It is in the public interest of the State of California that workers be able to *report* concerns to their employers without fear of retaliation or discrimination." (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h) [emphasis added]; see also Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4 [discussing the importance of protecting workers who "*demand[]* that . . . employer[s] comply with California's labor laws"] [emphasis added]; Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013, p. 8 [same for workers who "have *spoken up* about unpaid wages, unsafe working conditions, or unfair treatment"] [emphasis added].)

The plain language of California's other whistleblower protection statutes confirm that the Legislature often uses "disclose" to mean a report or communication when legislating whistleblower protections. (See Gov. Code § 8547.2, subd. (e); Ed. Code §§ 44112, subd. (e)(1), 87162, subd. (e)(1) [defining a "protected disclosure" as "a good faith *communication*"] [emphasis added]; see also *Mize-Kurzman, supra,* 202 Cal.App.4th at 848 [holding that "nothing in the legislative history of the pertinent statutes or the case authorities indicates that the terms 'disclosing information' and 'a disclosure of information' in Labor Code section 1102.5 and 'protected disclosure' in Education Code section 87162 were intended to have significantly different meanings."].)

The terms "disclose" and "report" have also been used interchangeably in case law. (See *Green v. Ralee Eng'g, Co.* (1998) 19 Cal.4th 66, 76-77; *Hager, supra,* 228 Cal.App.4th at 1549-1550; *Mize-Kurzman, supra,* 202 Cal.App.4th at 857; *Jaramillo v. County of Orange*

(2011) 200 Cal.App.4th 811, 827; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1312-1313; *Gardenhire, supra,* 85 Cal.App.4th at 242; *Collier, supra,* 228 Cal.App.3d at 1123-1124.) In light of this usage, it is only reasonable to conclude that the Legislature intended "disclose" as used in section 1102.5(b) to have the same meaning as "report." (See *Ferra, supra,* 11 Cal.5th at 866.)

II. Courts Reading the Statutory Language in Context Have Found Complaints About Violations of Law Protected Even Where the Wrongdoing Complained About Was Already Known

The majority followed *Mize-Kurzman, supra,* 202 Cal.App.4th at 858-859 to narrowly construe section 1102.5(b). In doing so, the majority disregarded contrary precedent holding that the report of facts already known to a person or agency—even the complaint about wrongdoing directly to the wrongdoer—is a protected "disclosure" under section 1102.5. (*Hager, supra,* 228 Cal.App.4th at 1549-1550; *Jaramillo, supra,* 200 Cal.App.4th at 825-826.) These cases correctly recognized that a "disclosure" in the context of 1102.5(b) is simply a complaint about a violation of law. *Mize-Kurzman*, to the contrary, failed to read the statutory language in the context of the statute as a whole. Moreover, the Federal Circuit precedent that *Mize-Kurzman* relied upon was later abrogated for misinterpreting a similar provision under the federal WPA. (Dis. Opn., at pp. 3-4, 9-14.) The majority therefore erred in following *Mize-Kurzman*.

A. *Jaramillo* and *Hager* Hold That Complaints About Known Wrongdoing Are Protected "Disclosures" Under Section 1102.5(b)

Contrary to *Mize-Kurzman* and the majority, the Courts of Appeal in *Jaramillo* and *Hager* rejected the view that the disclosure of known wrongdoing to a person or agency is not protected under section 1102.5(b). Both opinions determined that this conclusion was compelled by the plain

language of the statute, and that to hold otherwise would undermine the purposes of section 1102.5.

In *Jaramillo, supra,* 200 Cal.App.4th at 825-826, the court held that "there is no question" that an employee's complaint to his supervisor about the supervisor's own unlawful conduct "fits within the literal definition of whistleblowing under [] section 1102.5." The plaintiff was an assistant sheriff who had been terminated after warning the sheriff about his unlawful use of a county helicopter for private purposes and illegal "sale" of badges and concealed weapons permits to campaign contributors. (*Id.*, at 815-816.) Although the defendant argued there was no protection for whistleblowing "where only the wrongdoer himself could hear the whistle," the court found this argument "to the direct contrary" of *Gardenhire* (*id.*, at 826), which found that requiring a public employee to complain externally would contravene the purpose of section 1102.5 and "encourag[e] public employees who suspect[] wrongdoing to do nothing at all." (*Gardenhire, supra,* 85 Cal.App.4th at 243.) The *Jaramillo* court also recognized that protecting the employee's complaint to the sheriff served the public interest in curtailing illegal practices. (*Jaramillo, supra,* 200 Cal.App.4th at 829 [noting that if Jaramillo had been protected from retaliation the sheriff "might have been willing to heed Jaramillo's counsel and curtail his wayward ways"].)[12]

[12] The majority attempts to distinguish *Jaramillo* because that decision involved a public employee protected by section 1102.5(e). (Maj. Opn., at p. 16, fn. 11.) This is irrelevant, however, because *Jaramillo* addressed only 1102.5(b), and held that the complaint to the sheriff about the sheriff's own wrongdoing was a protected "disclosure." (*Jaramillo, supra,* 200 Cal.App.4th at 825-826.)

Similarly, *Hager, supra,* 288 Cal.App.4th at 1549 held that "[t]he plain language of former section 1102.5(b) [] does not limit whistleblower protection only to an employee who discloses unlawful conduct that had not been previously disclosed by another employee." The plaintiff was a deputy sheriff who had been terminated after reporting another deputy's alleged misconduct to supervising officers at the Los Angeles County Sheriff's Department. (*Id.*, at 1546-1547.) The defendant cited *Mize-Kurzman* in arguing that others had previously disclosed the same violations of law that the plaintiff reported and that the plaintiff therefore did not "disclose information" under section 1102.5(b) because the information was already known to the defendant. (*Id.*, at 1548.) The court rejected *Mize-Kurzman*'s dictionary definition of "disclosure," noting that it failed to account for "the statutory language in the context of the statute as a whole," citing the interchangeable usage of "report" and "disclosure" in section 1102.5(e) and reasoning that "[a] report does not necessarily reveal something hidden or unknown." (*Id.*, at 1550.)[13] *Hager* also noted that the narrow definition "would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so." (*Ibid.*)

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[13] In *Hager, supra,* 228 Cal.App.4th at 1550, the court noted: "To the extent *Mize-Kurzman* has highlighted an inconsistency in the statute, that is, a public employee must merely 'report' unlawful conduct, and other employees must 'disclose,' unlawful conduct, it is up to the Legislature to resolve this issue, not this court." As the dissent explained, however, this observation merely "points to the lack of uniformity in terminology and does not hold that such a dichotomy between public and private employees exists in the statute." (Dis. Opn., at p. 18.) Moreover, as discussed, the history of section 1102.5(e) reflects that the Legislature intended "disclose" and "report" to be used interchangeably.

Hager concluded that section 1102.5(b) "should be given a broad construction commensurate with its broad purpose." (*Id.*, at 1552.)

B. *Mize-Kurzman* Was Wrongly Decided and the Majority Erred in Relying on It

In concluding that a report of publicly known information is not a protected "disclosure," *Mize-Kurzman* conflicts with *Jaramillo* and *Hager* and is the outlier among the courts to consider this issue. The decision was also wrongly decided. As discussed above, the dictionary definitions utilized by *Mize-Kurzman* and the majority are inconsistent with the meaning of "disclose" as it is used in the context of the statute as a whole. *Mize-Kurzman* failed to consider that context.

Mize-Kurzman also relied on Federal Circuit precedent interpreting the federal WPA that has since been shown to have been incorrect. A few months after *Mize-Kurzman* was decided, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), which amended the federal WPA "to *clarify* the disclosures of information protected from prohibited personnel practices." (Pub. L. No. 112-199 (Nov. 27, 2012) 126 Stat. 1465 [emphasis added].) In doing so, Congress criticized the Federal Circuit precedent *Mize-Kurzman* followed for ignoring earlier amendments to the federal WPA in 1994 that "were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure," and for "continu[ing] to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA" "[d]espite the clear legislative history and the plain meaning of the 1994 amendments." (S. Rep. No. 112-155 (2012) at pp. 4-5 [original emphasis].)

Finally, both *Mize-Kurzman* and the majority mistakenly concluded that protecting complaints like A.C.R.'s does not further the goals of section 1102.5(b). (*Mize-Kurzman, supra,* 202 Cal.App.4th at 859 [holding that "criticism delivered directly to the wrongdoers does not further the purpose of" section 1102.5(b) "to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it."]; accord Maj. Opn., at p. 11.) Not only is there no basis in the statutory text for excluding these complaints from protection, but protecting these complaints actually furthers the purpose of section 1102.5 to encourage employees to speak up about unlawful conduct in the workplace. As *Jaramillo, supra,* 200 Cal.App.4th at 829 noted, a complaint made directly to the wrongdoer serves the public interest in correcting illegal behavior. And as the court in *Collier, supra,* 228 Cal.App.3d at 1123-1124 explained, a complaint made directly to the employer serves the public interest in curbing illegal conduct by providing the employer an opportunity to deal with the problem internally before a government agency becomes involved.[14] Moreover, the

[14] Other courts have identified similar rationale for protecting internal complaints. (See, e.g. *Hashimoto v. Bank of Hawaii* (9th Cir. 1993) 999 F.2d 408, 411 [finding internal complaints protected under ERISA's whistleblower provision because "[t]he normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers," and "[i]f one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown."]; *U.S. ex rel. Yesudian v. Howard Univ.* (D.C. Cir. 1998) 153 F.3d 731, 742 [finding internal complaints protected under the whistleblower provision of the federal False Claims Act because it would not "be in the interest of law-abiding employers for the statute to force employees to

legislative history shows that the Legislature intended to protect workers who directly challenge their employers' illegal practices. (See Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4; Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013, p. 8.) Protecting workers like A.C.R. who complain to supervisors responsible for the nonpayment of their wages furthers the goals of section 1102.5(b), and the majority's assumption to the contrary was wrong and does not support its narrow reading of the statute.

III. The Majority's Decision Curtails Whistleblower Protections and Undermines Enforcement of the Labor Code

The Legislature has declared it the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Lab. Code § 90.5, subd. (a).) Fundamental to that public policy is the ability of employees to make internal complaints about violations of law, among other whistleblowing, without fear of retaliation or discrimination. (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h).) Indeed, as the Legislature has recognized, whistleblower protections are "the bedrock upon which all other workplace rights rest," and "[a]s a practical matter, employees have no real right to minimum wage, overtime, rest breaks, worksite safety, or to

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report their concerns outside the corporation in order to gain whistleblower protection."].)

be free from harassment if, upon attempting to exercise those rights, they can be fired immediately." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill 1947 (2019-2020 Reg. Sess.) as introduced, at p. 2.) Like the Legislature, courts also recognize the importance of robust whistleblower protections. (See *Mitchell, supra,* 361 U.S. at 293 ["For it needs no argument to show that fear of . . . retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."]; *Collier, supra,* 228 Cal.App.3d at 1125 [the attainment of a lawful workplace "requires that an employee be free to call his or her employer's attention to illegal practices"].)

Toward this end, as noted above, the Legislature has continually strengthened 1102.5(b), including to protect "internal complaints" about violations of law and to encourage low-wage and immigrant workers to speak up when they experience wage theft. The majority's reading of 1102.5(b) would undermine all of these goals.

Under the majority's reading of section 1102.5(b), many workers will be forced to risk irremediable retaliation if they complain to their employers about unpaid wages. This is particularly true in the small business context where the only person to whom an employee may complain who can remedy a violation may well have caused the violation (innocently or not) in the first place. More broadly, in the wage theft context, it is likely that the "person with authority over the employee or another employee who has the authority to investigate, discover, or correct" the violation was aware of—if not responsible for—the nonpayment of wages. Leaving these workers unprotected when they complain to their employers about unpaid wages and other violations contravenes the legislative intent to protect low-wage and immigrant workers who speak up

about unlawful employment practices. (See Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4; Assem. Com. on Labor and Employment, Analysis of Assem. Bill 263 (2013-2014 Reg. Sess.) as amended April 11, 2013, p. 8.)

Leaving internal complaints unprotected will also discourage workers from reporting wrongdoing at all. As *Collier, supra,* 228 Cal.App.3d at 1124 and *Gardenhire, supra,* 85 Cal.App.4th at 243 recognized years ago, an employment relationship can suffer after an employee reports a violation of law to a public agency, even though the employee may be protected from retaliation. If complaining internally would risk irremediable retaliation, these "discouraging options" would leave an employee "with only one truly safe course: *do nothing at all*." (*Collier, supra,* 228 Cal.App.3d at 1124 [emphasis added]; see also *Gardenhire, supra,* 85 Cal.App.4th at 243 [seeing "no reason to interpret the statute to create such anomalous results"]; accord *Mitchell, supra,* 361 U.S. at 293 [rejecting a statutory interpretation that would leave employees "with what is little more than a Hobson's choice"].) *Collier, supra,* 228 Cal.App.3d at 1124 also saw that the situation would be no better for the responsible employer "who would be deprived of information which may be vital to the lawful operation of the workplace unless and until the employee deems the problem serious enough to warrant a report directly to a [public] agency." Construing the statute to broadly protect internal complaints thus benefits not just employees but responsible employers too.

The problem with the majority's view of section 1102.5(b) is particularly acute for immigrant workers who may be reluctant to complain to government or law enforcement agencies. Thus, broad protection for internal complaints advances the legislative intent "to better address the

realities of workplace retaliation, especially as it affects immigrant workers." (Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended Sept. 4, 2013, p. 8.) As the Legislature recognized, wage theft is "a serious and widespread problem that causes severe hardship" for low-income workers, many of whom are immigrants. (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subds. (a), (c).) To encourage compliance with the Labor Code, the Legislature declared that "[i]t is in the public policy interest of the State of California that workers be able to report concerns to their employers without fear of retaliation or discrimination." (*Id.*, at subds. (e)-(h).) An interpretation of section 1102.5(b) that broadly protects internal complaints would "empower workers to exercise their rights under California law without fear" and "lift the veil of silence in the workplace." (Assem. Com. on Judiciary, Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended May 7, 2013, p. 4.) The majority's opinion, in contrast, would leave many of the most vulnerable workers "quietly to accept substandard conditions." (*Mitchell, supra,* 361 U.S. at 293.)

CONCLUSION

In view of the plain language, legislative history, and legislative purposes of section 1102.5(b), the Labor Commissioner requests that the Court hold that a protected "disclosure" under the statute happens even if the person or agency to whom a report is made already knows about the unlawful activity.

Dated: November 12, 2021

STATE OF CALIFORNIA,
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT

/s/ Nicholas Patrick Seitz

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that the enclosed brief is produced using 13-point Times New Roman type, including in footnotes, and contains approximately 7,760 words, which is less than the total words permitted by the California Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 12, 2021

STATE OF CALIFORNIA,
DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT

/s/ Nicholas Patrick Seitz

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LILIA GARCIA-BROWER

PROOF OF SERVICE

Garcia-Brower v. Kolla's, Inc.
California Supreme Court, Case No. S269456
Fourth District Court of Appeal, Division Three, Case No. G057831
Orange County Superior Court, Case No. 30-2017-00950004-CU-WT-CJC

I, Mary Ann Galapon, declare as follows:

I am employed in the County of San Francisco, I am over 18 years of age and not a party to this action, and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On November 12, 2021, I served the following document(s):

OPENING BRIEF ON THE MERITS

✓ **By overnight delivery.** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) below. I placed the sealed envelope or package for collection and overnight delivery with all fees fully prepaid.

Kolla's, Inc.
c/o Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Gonzalo Sanalla Estrada
23716 Marlin CV
Laguna Niguel, CA 92677

Hon. Martha K. Gooding
Orange County Superior Court,
Dept. C34
Clerk of the Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

✓ **By TrueFiling.** I electronically filed the document, which constituted service under California Rules of Court, rule 8.500(f).

Fourth District Court of Appeal,
Division Three
Clerk/Executive Officer of the
Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at County of San Francisco, State of California, on November 12, 2021.

Mary Ann Galapon

Mary Ann Galapon, Declarant