IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TINA TURRIETA Plaintiff and Respondent, v. LYFT, INC., Defendant and Respondent. _____ BRANDON OLSON, Petitioner and Appellant.	Supreme Court Case No. S271721 Court of Appeal No. B304701 Superior Court No. BC714153

After a Decision by The Court of Appeal,
Second Appellate District, Division Four

Los Angeles County Superior Court
Hon. Dennis J. Landin, Judge

RESPONDENT TINA TURRIETA'S ANSWER TO BRANDON OLSON'S PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Brandon Olson presents a lengthy petition delivering a list of grievances with the rulings below, but fails to present any issue worthy of this Court's limited time.

Olson raises no actual conflict between any of our Courts of Appeal, nor does he raise any novel issue of public policy requiring this Court's attention. Instead, Olson's real complaint lies with the fact that the trial court reviewed his objections, applied exactly the standard that Olson proposed, and approved a settlement based on the specific facts in this case.

Many of the issues Olson raises were waived either because he did not raise them below, or because they turn on factual findings by the Court of Appeal for which Olson did not request rehearing. The remainder are moot because the trial court already considered and rejected all of Olson's arguments, and none of the issues raised by Olson would change that ruling. There is nothing to support review under Rule 8.500(b).

Olson previously filed his own PAGA action against rideshare company Lyft and even filed an unsuccessful petition for coordination that included the instant case. Petition at 19. Despite being aware of the instant case for over a year, Olson made no effort to intervene until after he learned of the settlement. *Id.* at 21. With the hearing on Olson's petition to intervene not set until after the settlement approval hearing, the

trial court vacated the intervention hearing, thereby effectively denying intervention. Court of Appeal Opinion ("Opinion") at 23. Although it did not grant intervention, the trial court allowed Olson to brief and argue regarding the settlement. Opinion at 20 n.13. Having considered and rejected Olson's objections, the trial court approved the settlement as fair, adequate, and reasonable, and consistent with the policy goals of PAGA. Opinion at 10-11.

The Court of Appeal held that Olson had standing to appeal denial of intervention, and that the trial court was within the bounds of its discretion to deny intervention. Opinion at 27. The Court of Appeal also held that Olson, having been denied intervention, lacked standing to move to vacate the trial court's judgment or to appeal the judgment. Opinion at 12, 19.

In his first purported issue, Olson attempts to create the appearance of a conflict with the recent *Uribe v. Crown Building Maintenance Co.*, 70 Cal. App. 5th 986 (2021). But there is no such conflict. The *Uribe* court came to the uncontroversial conclusion that a litigant who had successfully intervened in a case with PAGA and class claims was a party, and had standing to appeal a judgment. *Id.* at 1002. Here, the case was limited to PAGA claims and the trial court denied intervention.

There is no material conflict between *Uribe* and this case. *Uribe* found that an individual who became a party through intervention had standing to challenge ruling in the case where

he was a party. *Id.* at 1001. The court here found that a nonparty who had failed to intervene lacked standing. This is not a conflict; it is a working system in which trial courts determine intervention and those determinations have meaning.

The *Uribe* court was mindful of the opinion in this case and specifically explained that it presented no conflict: "*Turrieta* is distinguishable because the trial court here granted Garibay's motion for leave to file a complaint in intervention." *Id.* at 1002.

In his second issue, Olson contends that the Court of Appeal "swept aside" his contention that there was a problem with the adequacy of an amended notice of claims provided to the LWDA. Petition at 13. This is not true. The Court of Appeal made a factual finding that Olson failed to timely raise this argument to the trial court and thus forfeited the matter "even if appellants had standing to raise it." Opinion at 20-21 n.14. The Court of Appeal also observed that the LWDA never raised any concerns to the trial court and commented on the settlement "only belatedly and in its limited role as amicus on appeal." *Id.* These are findings of fact. But Olson failed to petition the Court of Appeal for rehearing on these issues as required by Cal. Rules Ct. 8500(c)(2). Olson has thus abandoned this issue twice: first by failing to raise it properly before the trial court, and then by failing to seek rehearing in the Court of Appeal.

For his third issue, Olson asks whether a trial court reviewing a PAGA settlement must determine that the proposed settlement is "fair, adequate, and reasonable, and that it advances the public purpose of PAGA." There is no conflict in our Courts of Appeal on this point, and the standard applied by the trial court was not contested at any stage below. The trial court considered Olson's objections, and applied the exact standard that Olson seeks here. Opinion at 11. This illustrates another problem that permeates the petition: it is irrelevant to the resolution of this case. If this Court were to impose the standard advocated by Olson, it would have no impact because the trial court already applied that exact standard. Opinion at 11.

Likewise, the questions that Olson poses regarding standing are hypothetical because the trial court considered and rejected all of Olson's arguments. Opinion at 10-11, 20 n.13. Even if Olson somehow had standing, despite failing at intervention and coordination, it would change nothing. His arguments failed on the fact-specific merits of the case.

The instant objection illustrates how a single objector can delay payment to the State and thousands of employees by the simple expedient of objecting on every possible issue, and pursuing every possible level of appeal. The petition presents a lengthy and diverse laundry list of grievances. It does not, however, show any issue that is worthy of this Court's time.

II. OLSON IDENTIFIES NO ISSUES REGARDING HIS STANDING THAT WARRANT REVIEW

Olson devotes pages 24 through 28 of his petition to arguing that this Court should opine on the standing of PAGA plaintiffs to intervene or appeal a judgment in a separate PAGA action by a different plaintiff against the same defendant. But Olson does not present any issue appropriate for review.

The existing law puts the decision in the hands of trial courts, which may grant or deny coordination or intervention from PAGA plaintiffs in parallel litigation based on the facts of each case. That decision itself is subject to appellate review. There is no reason to change the current state of the law and, even if there were, the instant case would present a poor vehicle.

A. The *Uribe* Holding is Not Inconsistent

Olson argues that there is a conflict between *Uribe* and the instant case. But no such conflict exists. *Uribe* found standing to appeal for a litigant who successfully intervened and was therefore a party below. *Uribe*, 70 Cal. App. 5th at 1002. *Turrieta* finds no standing where the party below was properly denied intervention.

Uribe addresses this issue at length, quoting the *Turrieta* holding that PAGA "does not require a trial court to grant mandatory or permissive intervention." *Id* at 1005. *Uribe* explains that, although PAGA does not mandate intervention,

a successful intervenor would have standing where someone like Olson would not: "*Turrieta* is distinguishable because the trial court here granted Garibay's motion for leave to file a complaint in intervention." *Id*. There is nothing novel here. Only a "party aggrieved" may appeal. Cal. Code of Civ. Proc. §902. As a party, the intervenor in *Uribe* had standing to appeal. As a non-party, Olson does not.

Even Olson's argument, although nominally claiming a conflict in the law, ultimately admits that the two cases are consistent. Olson explains that *Uribe* "adopts (and thus compounds) the same circular reasoning of the Turrieta court. According to the *Uribe* court, the dispositive fact of Garibay's standing was her status as a party in the *Uribe* case having successfully intervened." Petition 27. This is not a conflict. This is, by Olson's own admission, two courts adopting consistent reasoning with which Olson just disagrees.

B. The Existing Law Presents No Policy Issues That Warrant Review

Turrieta and *Uribe* tell us that a litigant in a parallel PAGA action may seek intervention and, if granted, have standing to challenge any subsequent rulings and to appeal. If intervention is not granted, there is no standing to challenge rulings as a nonparty, but the decision on intervention is, itself, subject to appeal. Opinion at 27.

Turrieta and *Uribe* are both consistent with the basic structure of the PAGA. That law provides that an employee acting as a Private Attorney General is deputized to file and pursue a claim for civil penalties. Lab. Code §2699(a). When a settlement is reached, the work of protecting the interests of the State is assigned not to competing PAGA litigants, but to the LWDA and the court overseeing the case. Lab. Code §2699(l)(2).

Olson attempts to create the appearance of complexity by asking the question "how and when did Olson become something other than an agent of the state?" Petition at 25. Of course, this was never the question. The Court of Appeal simply applied the division of responsibilities described in Labor Code §2699(l)(2). The right to review settlements belongs to the LWDA and the trial court. Litigants seeking to contribute to that process are free to seek coordination or petition for intervention.

Olson asks this Court for review to propose an entirely new set of rules for standing that have not been adopted by any court anywhere. Specifically, Olson advocates for a rule under which plaintiffs in parallel PAGA litigation would have standing to object and appeal settlements "as an agent of the . . . State" even when, as here, the court denied intervention. Petition 25.

Olson's proposed rule also cuts deeply into the province of the Legislature in a way that is not suitable for the work of judicial review. Under the existing law, there is no procedure for

notice or objection by PAGA litigants in parallel actions. Labor Code §2699(a) provides only that Labor Code civil penalties may "be recovered through a civil action brought by an aggrieved employee." The job of reviewing settlements is specifically given to the presiding court with notice to the LWDA. "The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." Lab. Code §2699(l)(2).

Although the law specifically addresses the provision of notice when a PAGA case settles, that notice requirement is limited to the LWDA. Lab. Code §2699(l)(2). The Legislature chose not to authorize any procedure for notice to, or objection by, other PAGA litigants. *Arias v. Superior Court*, 46 Cal. 4th 969, 987 (2009) (employees who are not a party to the PAGA action are "not given notice of the action or afforded any opportunity to be heard"); *accord* *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 436 (9th Cir. 2015)("PAGA has no notice requirements for unnamed aggrieved employees"); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014) ("Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed aggrieved employees . . .").

In order to do what Olson asks, this Court would need to rewrite Lab. Code §2699(l)(2) to require that, as in class actions, objections by other PAGA litigants must be considered in addition to any input from the LWDA. The rewritten law would need to provide a right to be heard even absent coordination or intervention. And to give this new rule effect, this Court would need to add a requirement that notice be provided to any other PAGA litigants with claims against the same employer. How else could they make use of the new judicially-created right to object?

This Court has historically shied away from the kind of statutory redrafting that is the core of Olson's petition. "[I]n construing statutory provisions a court may not rewrite the statute to conform to an assumed intention which does not appear from its language." *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal. 4th 627, 650 (1997). "[W]e cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include . . . courts may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 392 (2020). "A court may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used . . . we must assume that the Legislature knew how to create an exception if it

wished to do so." *DiCampli-Mintz v. County of Santa Clara*, 55 Cal. 4th 983, 992 (2012). The aversion to redrafting statutory language has also historically bound our Courts of Appeal. *See, e.g., Pitney-Bowes, Inc. v. State of California*, 108 Cal. App. 3d 307, 320-321 (1980) (rejecting interpretation that requires reading words into the statute; "This, in deference to constitutional concept of separation of powers, we refuse to do. If it is advisable that a statute be changed, the solution lies within the province of the Legislature") (citations omitted).

The statutory rewrite Olson seeks would also require material changes to existing and unchallenged case law. For example, PAGA jurisprudence regarding res judicata is based on the fact that employees like Olson do not have a right to notice or opportunity to be heard. "[N]onparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties." *Arias v. Superior Court*, 46 Cal. 4th 969, 987 (2009). As a result, "unlike class action judgments that preclude all claims the class could have brought under traditional res judicata principles, employees retain all rights to pursue or recover other remedies available under state or federal law." *Canela v. Costco Wholesale Corp.*, 965 F.3d 694, 696 (9th Cir. 2020). Bestowing a right to object even where the court has denied intervention and coordination – would blur the distinction

between PAGA and class action process and upend PAGA authority based on the lack of notice and objection.

The rule that Olson seeks would also promote meritless objections that needlessly delay settlements like this one. In *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 272 (2018) this Court noted "meritless objections 'can disrupt settlements by requiring class counsel to expend resources fighting appeals, and, more importantly, delaying the point at which settlements become final. (Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623, 1634.) These same objectors who appear and object to proceedings in different class actions—also known as "professional objectors"—are thought to harm the class members whose interests they claim to protect." Olson's proposal to import this problem into PAGA cases is not an attractive one.

Perhaps one day a court will adopt the rule that Olson seeks; defining the scope of deputization for a PAGA litigant to include objecting to and appealing orders in parallel cases. But until some Court of Appeal undertakes this endeavor, there is no reason for this Court to jump down so deep the rabbit hole.

The current law allows multiple avenues for the management of multiple PAGA actions. For example, a PAGA litigant action can bring a petition for coordination of different cases involving similar claims. Cal. Code Civ. Proc. §404. In this

case, Olson sought coordination, but the court appointed by the Judicial Council to consider the matter denied Olson's petition. Opinion at 18-19; Petition at 4. Olson could have sought a writ of mandate to challenge that denial, but chose not to. Olson effectively asks this Court to rewrite the procedure set forth in Labor Code §2699(l)(2) because he now finds himself unhappy with his decision not to further pursue coordination. This kind of regret is not a basis for review from this Court.

Uribe also demonstrates that litigants from parallel PAGA actions can express any concerns regarding a potential settlement by seeking intervention. The LWDA is, likewise, free to seek intervention or provide briefing to the trial court (as it has done in prior matters). If the trial court finds an intervenor's concerns compelling, it is free to exercise its discretion to grant intervention, as the *Uribe* court did. Any denial of intervention is subject to appeal as happened here.

A trial court may also consider the objections of a non-party without granting formal intervention. *See also* *Coalition for Fair Rent v. Abdelnour*, 107 Cal. App. 3d 97, 115-116 (1980) (trial courts are authorized to permit participation by would-be intervenors without formally granting intervention). In this case, for example, the trial court effectively denied intervention by refusing to delay the approval proceedings, but considered and rejected every one of Olson's arguments. Opinion at 20 n.13.

Allowing these decisions to be made by judges who are on the front line of litigation and familiar with the facts of each case is strongly consistent with our existing jurisprudence. With regard to settlements generally, "great weight is accorded the trial judge's views. The trial judge is exposed to the litigants, and their strategies, positions and proofs. . . Simply stated, he is on the firing line and can evaluate the action accordingly." *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000). In the case of intervention in particular, "a trial court has broad discretion in determining whether to permit intervention." *City of Malibu v. California Coastal Com.*, 128 Cal. App. 4th 897, 902 (2005).

There is nothing in the existing system that suggests a need for this Court to rewrite the statutory law, upend the published case law, and adopt a position that no Court of Appeal has ever embraced. If so large a change is to come to our law, it should come from the Legislature. Or, at least, it should percolate through the Courts of Appeal until a Court of Appeal proves willing to adopt the rule that Olson seeks here.

C. The Instant Case Presents a Poor Vehicle for Appeal

This case presents a poor vehicle for review because any ruling on standing would be advisory and have no effect on the outcome of the case. Although it did not grant intervention, the trial court permitted Olson to be heard on numerous occasions,

examined every objection that Olson raised to the settlement, and rejected each objection. Opinion at 7, 8, 11, 12.

Finding standing for Olson would not allow the trial court to change its existing findings. In *Coffee-Rich, Inc. v. Fielder*, 48 Cal. App. 3d 990, 997 (1975), for example, a Court of Appeal remanded with instructions to modify specific findings of fact. The trial court made all of the ordered modifications, but also modified a finding of fact in a way not specifically required by the order on remand. *Id.* This was error. "[T]he trial court lacked authority to change old finding 16 as it did." *Id.* at 998. On remand, a trial court may only make the changes specifically instructed. "Where a reviewing court has remanded a matter to the trial court with directions . . . the trial court . . . is bound to specifically carry out the instructions of the reviewing court . . . any material variance from the explicit directions of the reviewing court is unauthorized and void." *Id.* *See also,* *In re Candace P.*, 24 Cal. App. 4th 1128, 1131 (1994) ("[A]ny material variance in the trial court's action from the appellate court's direction is unauthorized and void.").

Nor could any motion after remand change any of the existing findings. Post-judgment, "no facts can be considered except those which are embraced in the findings of the court." *Westervelt v. McCullough* 68 Cal. App. 198, 210 (1924). *See also*, *Simmons v. Dryer*, 216 Cal. App. 2d 733, 739 (1963)

(reversing trial court's order to vacate prior findings of fact and enter new ones); *Simmons v. Dryer*, 216 Cal. App. 2d at 739 (trial court cannot, post-judgment, vacate findings of fact).

Finding standing would not even support intervention. The fact that Olson knew about the instant case and chose not to seek intervention until he learned of a settlement renders his intervention request untimely. In *Hernandez*, 4 Cal. 5th 260 (2018), as in this case, the proposed intervenor was aware of ongoing litigation but "made a strategic choice to wait and see if she agreed with the settlement amount and attorney fees agreement." *Id.* at 272. This was sufficient to deny intervention. *Id.* *See also*, *Noya v. A.W. Coulter Trucking*, 143 Cal. App. 4th 838 (2006); *see also* *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986) (motion to intervene filed after settlement and before approval was properly denied as untimely.)

The controlling law described above means that finding standing for Olson would result in no change to the outcome of the case. This Court generally disfavors advisory rulings that can have no impact on the outcome of the case before it. *See* *Coleman v. Department of Personnel Administration*, 52 Cal. 3d 1102, 1126 (1991) ("The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court"). If the law is going to change as advocated by Olson, that change should happen in a case where the new rule would affect the outcome.

III. OLSON IDENTIFIES NO ISSUES REGARDING LWDA NOTICE THAT WARRANT REVIEW

Olson requests that this Court review the question of whether "a plaintiff lack[s] the authority to prosecute and settle PAGA claims on behalf of the State before satisfying the notice requirements set forth in Labor Code section 2699.3(a)." Petition at 7. Although he describes this as a single issue, Olson also adds to this thicket of issues by also asking this Court to review whether "a trial court lacks jurisdiction to approve a settlement that releases the State's claims for which the plaintiff has not exhausted these notice requirements." *Id.*

Olson has forfeited this claim because he did not properly present these issues to the trial court, choosing to stay silent until his final reply brief. Opinion at 20-21 n.14. He also fails to identify any element of Rule 8.500(b) that might apply here.

A. Olson Failed to Preserve This Issue

The Court of Appeal made a finding that Olson abandoned any argument about inadequate notice of PAGA claims:

> Moreover, regardless of the standing issue, neither appellant timely raised the argument that adding causes of action in the FAC required a new notice to the state – Seifu did not raise it at all and Olson did so only in a single paragraph at the very end of his reply in support of his motion to vacate. This issue is therefore forfeited and we would not consider it, even if appellants had standing to raise it.
> Opinion at 20-21, n. 14.

The Court of Appeal's determination that Olson failed to properly raise the issue in the court below, and that Olson therefore forfeited the argument, is a determination of fact. "[A]s a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged misstatement of an issue or fact in a petition for rehearing." Cal. Rules Ct. 8.500(c)(2). This Court only considers purported errors of fact after a petition for rehearing below. *In re Marriage of Goddard*, 33 Cal. 4th 49, 53 n.2 (2004) (litigant "did not, however, petition for rehearing in the Court of Appeal calling attention to any alleged misstatement of fact in its opinion. We therefore decline to address this argument"); *Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal. 4th 995, 1000 n.2 (2001) (finding that party "did not request correction in a petition for rehearing to the Court of Appeal. Therefore, we will not consider any factual complaints here"); *Jacob B. v. Cty. of Shasta*, 40 Cal. 4th 948, 952 (2007) ("Because neither party petitioned the Court of Appeal for a rehearing, we take our facts largely from that court's opinion").

Olson has thus forfeited this issue twice. First, by keeping his grievance on this point secret until his reply in support of his final motion before the trial court, and, second, by choosing not to petition for rehearing as provided in Cal. Rules Ct. 8.500(c)(2).

B. This Issue Presents No Conflicts or Important Questions That Must Be Settled

Olson has not demonstrated any conflict within the Courts of Appeal with respect to the LWDA notice issue. The Court of Appeal in this case declined to reach the merits of this issue in this case both on grounds of standing, and because it found Olson forfeited the issue. The instant case thus presents no impact on the law in this area. Not only that, Olson has not identified one single case that has raised this issue even as a matter of concern.

Olson has failed to explain why review is necessary to "secure uniformity of decision or to settle an important question of law." Olson devotes just two sentences to contend that this issue is "significant," but provides nothing to substantiate his threadbare conclusion. Olson points to the LWDA's amicus brief below to contend this issue is important to the LWDA, but the Court of Appeal already made a factual finding to the contrary: "This argument should have been addressed [by the LWDA] to the trial court below . . . Instead, it did so only belatedly and in its limited role as amicus on appeal." Opinion at 21 n.14. This is another factual finding for which Olson never sought rehearing with the Court of Appeal. Cal. Rules Ct. 8.500(c)(2).

The heart of Olson's complaint on this issue, therefore, is just that he wishes he had gotten a different outcome. Olson asks this Court to leapfrog over the Court of Appeal's

determination that Olson was not entitled to review, and have this Court itself directly review the trial court's decision.

Setting aside the fact that the trial court determination was amply supported, our rules do not permit this. Purported "trial court error" does not appear on the list of items reviewable by this Court under our Rules. *See* Cal. Rules Ct. 8.500(b). Not only that, our rules provide that a party may petition for this Court's review of "any decision of the Court of Appeal" – not direct review of a trial court ruling. Cal. Rules Ct. 8.500(a)(1). Here, the Court of Appeal did not make any ruling on the merits of Olson' argument concerning LWDA notice; and Olson fails to seek review of the ruling the Court of Appeal *did* make – that he forfeited his right to contest the trial court's ruling on this issue.

C. This Issue is Case-Specific and Any Ruling Would be Advisory

In this case, Plaintiff Turrieta filed a notice of her PAGA claims more than 65 days prior to filing her PAGA lawsuit in 2018. 1 AA 79 ¶¶9-10; 1 AA 92-103. Plaintiff Turrieta and Defendant Lyft reached a settlement in September 2019, following both parties' acceptance of a mediator's proposal. Opinion at 4, 6. On December 9, 2019, Plaintiff Turrieta provided notice to the LWDA of the settlement pursuant to Labor Code §2699(l)(2). Including notice of an amended complaint describing additional statutory violations based on the facts and

theories contained in the original complaint. 1 AA 90 ¶78; 1 AA 251-280.

The LWDA did not object to the settlement in the trial court or seek to participation in the trial proceedings at all. Opinion at 21 n.14. The LWDA did not seek to appeal the judgment entered in the trial court. The LWDA did not, and to this day has not, issued any citation or given any notice of an intent to investigate the claims that are subject to settlement. *See generally* DLSE Amicus Brief. The only action the agency has ever taken on this matter is filing a last-minute amicus brief. Opinion at 21 n.14. The basic timeline looks like this:

The trial court approved the parties' settlement on January 6, 2020 (28 days after the LWDA received notice of the settlement as required by Labor Code §2699(l)(2)). The trial court denied Olson's motion to vacate on February 28, 2020, 81 days after the LWDA received notice. Opinion at 12. Olson filed his notice of appeal on March 12, 2020 (94 days after the LWDA received notice.) 3 AA 711. The LWDA made its first filing in this matter with an amicus brief filed with the Court of Appeal on May 27, 2021. *See* DLSE Amicus Brief. That was 535 days after notice of the settlement and amended complaint.

These facts are both unique to this case and dispositive. At page 29 of his petition, Olson cites to *Williams v. Superior Court*, 3 Cal. 5th 531, 545 (2017) for the proposition that "if the agency

elects not to investigate, or investigate without issuing a citation, the employee may then bring a PAGA action." In this case, the LWDA still has not issued any citation or indicated any intention to investigate the claims being released by the settlement. *See generally* DLSE Amicus Brief. This issue is not resolved by a broad policy question, but by the fact that the agency has not taken any action that would prevent Turrieta moving forward.

For example, the trial court's judgment was not final until February 28, 2020 – the date the court denied Olson's motion to vacate. This was well after the 65-day period passed, still with no response from the LWDA to Turrieta's notice of claims. *See 20th Century Ins. Co. v. Superior Court*, 90 Cal. App. 4th 1247, 1278 (2001) (judgment is not "final" "until all possibility of direct attack thereon," such as a "motion to vacate the judgment has been exhausted"). Opinion at 12. These are fact issues arising from the agency's failure to act in this case, not policy questions that warrant the attention of this Court.

Even if the notice was untimely at the start, the facts in this case would effect a cure and thereby render Olson's question moot. In *Garnett v. ADT, LLC*, 139 F. Supp. 3d 1121 (E.D. Cal. 2015) a plaintiff failed to give notice to the LWDA before filing her PAGA claims. However, the plaintiff gave notice after filing the complaint, and LWDA did not to investigate or issue a citation within 65 days of the notice. This cured the failure to

exhaust prior to filing. *Id*. at 1127. *See also*, *Harris v. Vector Mktg*, 2010 U.S. Dist. LEXIS 5659, *7-8 (N.D. Cal. Jan. 5, 2010) (same). In this case, the LWDA waited 535 days to provide any comment on Turrieta's claims; and even that was just an *amicus* brief. The LWDA still has not issued any citation or given any indication of intent to investigate the claims from the period covered by the settlement.

Another fact-driven issue: the claims for which Olson contends that Turrieta did not provide proper notice are claims for which Olson himself already provided notice to the LWDA before filing his own lawsuit, over three years ago in May of 2018. 2 AA 307 ¶4; 2 AA 311-312 ¶7; *see* DLSE Amicus Brief p. 13. This notice and the LWDA's continuing failure to act described above, constitute waiver by the LWDA that is specific to the facts of this case. *See, e.g.*, *Green v. City of Oceanside*, 194 Cal. App. 3d 212, 222 (1987) (failure to exhaust administrative remedies may be waived, and does not deprive trial court of subject matter jurisdiction); *Keiffer v. Bechtel Corp.*, 65 Cal. App. 4th 893, 896-899 (1998) (same).

There is no policy question here – just a complicated factual record that moots the purported issue for this specific case.

IV. THE STANDARD FOR APPROVAL OF PAGA SETTLEMENTS IS NOT IN DISPUTE

Olson next contends that this Court should take up review in this case "to articulate the standards lower courts must apply in reviewing and approving PAGA settlements." Petition at 34. But Olson fails to identify any reason for this Court to do so. Olson contends there is a "lack of clarity" in our state courts that "has led to inconsistent application of Labor code §2699(l)." *Id*. at 37. But this issue was not in dispute in this case and is not the subject of any division in the case law.

A. There Is No Conflict in the Case Law on This Issue

Olson points to no Court of Appeal cases evidencing any conflict regarding the standard for approval of PAGA settlements; as a result, Olson provides no support for his claim that there exists a problem for this Court to address. Indeed, Olson points to a number of federal trial court cases that all – according to Olson – have reached accord on the standard to apply in approving PAGA settlements. Petition at 36. If the federal trial courts have reached consensus, and there is no conflict among the state courts, what work is there for this Court?

B. Olson Raised No Dispute on This Issue Below

Even in the instant case, there is no dispute over the standard for approval of PAGA claims. Olson argues that settlement of a PAGA action must be found to be "fair, reasonable

and adequate with reference to the public policies underlying the PAGA." Petition at 35. But that is exactly what the trial court did. On January 2, 2020, the trial court found that:

- "The Settlement set forth in the Agreement is in all respects fair, reasonable and adequate, and complies with the policy goals of the PAGA." 2 AA 485 ¶4; Opinion at 11.
- "The Court finds the settlement to be fair, adequate and reasonable in light of the time period that is encompassed by it and the amount that will eventually [be] paid to the State of
- California and to the hundreds of thousands of Lyft drivers." 2 AA 499; Opinion at 10.
- "There was no collusion in Connection with the Settlement." 2 AA 485, 499.
- "The settlement was the product of informed and arms-length negotiations among competent counsel and the record is sufficiently developed to have enabled Plaintiff and Defendant to adequately evaluate and consider their respective positions." 2 AA 2 AA 485; Opinion at 11.

The Court of Appeal did not make any ruling relating to the standard for approval of PAGA settlements. In his briefing to the Court of Appeal, Olson described a standard for reviewing PAGA settlements much like the one he advances here, but he never claimed that the trial court applied the wrong standard. *See* Appellant's Opening Brief ("AOB") at 23-25.

This Court does not generally consider issues that were not raised or decided below. "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Cal. Rules Ct. 8.500(c)(1); *In re Joshua S.*, 41 Cal. 4th 261, 272 (2007) (rejecting argument not made before the Court of Appeal); *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 726 (2007) ("Because 21st Century did not timely raise this issue in the Court of Appeal, however, we declined to address it.").

There has never been a dispute on this point. In his briefing to the Court of Appeal, Olson stated that the trial court applied the "fair, adequate and reasonable" standard that he advances here. AOB at 21, 29. Olson admitted that his grievance was not the standard, but how the trial court exercised its judgment "weighing the amount offered against the strength of the State's case and the risks of further litigation." *Id.* at 33. Instead of arguing that the trial court applied the *wrong standard*, Olson's only argument to the Court of Appeal was that the trial court came up with the *wrong result*. *Id.* at 23-40.

C. Any Ruling on This Issue Would Be Advisory

This issue presents the same problem as Olson's argument on standing. Because the trial court already considered Olson's arguments and applied the exact standard advocated by Olson, any ruling on this point would be a nullity in the instant case.

The trial court has already made factual findings based on the standard Olson proposes. Opinion at 10-11. Absent a change that requires a *different* legal standard, the trial court cannot change its existing findings of fact. *See, e.g. In* *Coffee-Rich, Inc. v. Fielder*, 48 Cal. App. 3d 990, 997-98 (1975). Because adopting the rule that Olson seeks here would change nothing in this case, the opinion Olson seeks would be advisory and therefore disfavored under *Coleman*, 52 Cal. 3d at 1126.

V. OLSON'S COMPLAINTS REGARDING THE FACTUAL FINDINGS ON THE MERITS OF THE SETTLEMENT DO NOT WARRANT REVIEW

At pages 38 through 40 of his petition, Olson presents a laundry list of discontent with various factual and case-specific holdings regarding the underlying merits of the instant settlement. All of these arguments run deep into the fact finding of the trial court and none of them implicate any broader policy issues.

A. Nothing in the Factual Findings Regarding the Value of the Settlement Warrants Review

The record shows that the $15 million recovery in the instant settlement is 15 times higher than the approved PAGA recovery in a similar case regarding California rideshare drivers. *See,* *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1033 (N.D. Cal. 2016); *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 934 (N.D. Cal. 2016). Turrieta presented the trial court and Court of Appeal

with evidence that showed the recovery in this case to be nearly twice as valuable in absolute terms as the next largest PAGA recovery for a rideshare driver case. Opinion at 10; Respondent Turrieta's Brief in the Court of Appeal ("RB") at 35-36. The same evidence shows that the instant settlement was eight times more valuable than the next closest settlement, when allowing for the class size and duration of the release period. RB at 35-36.

Although this case produced a record-setting PAGA recovery, Olson asserts that "a trial court assumes an additional obligation to consider whether there is evidence of a settlement achieved due to a "reverse auction." Petition at 38.

But the trial court in this case performed exactly that analysis and made factual findings including: 1) "The Settlement . . . is in all respects fair, reasonable and adequate, and complies with the policy goals of the PAGA." 2 AA 485; 2) "There was no collusion in Connection with the Settlement." 2 AA 485, 499; and 3) "The Settlement was the product of informed and arm's-length negotiations among competent counsel." 2 AA 485. The trial court also addressed and rejected the "reverse auction" argument at 2 AA 499. Why should this Court devote time to retrying the factual findings of a trial court below? Olson does not tell us.

Olson next complains that "the Court of Appeal adopted without consideration the trial court's conclusions about the fairness of the settlement . . ." Petition at 38. But here again,

Olson chose not to seek rehearing on any factual finding as required by Cal. Rules Ct. 8.500(c)(2). Olson has thereby forfeited this issue. But even if he had not, these case-specific factual judgments cannot be worthy of this Court's limited time.

B. The Trial Court's Valuation of the Claims Does Not Present Any Issue That Warrants Review

Olson's next argument dives even more deeply into the factual weeds of this specific case. The parties attended mediation and accepted the mediator's proposal to settle this case on September 10, 2019. 3 AA 658 ¶4. At the time of the settlement, the law was uncertain as to how this Court's ruling in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 916 (2018) would apply to claims arising under the Wage Order as opposed to the Labor Code. *Dynamex*, 4 Cal. 5th at 916, n.5. *See also, Garcia v. Border Transportation Group, LLC*, 28 Cal. App. 5th 558, 571 (2018) ("We conclude *Borello* furnishes the proper standard as to non-wage-order claims."). AB5 addressed this issue, but that bill that passed the state assembly on September 11, 2019; one day after the *Turrieta* mediation. It only purports to apply prospectively, and did not take effect until January 2020. The instant settlement runs to December 31, 2019, so the law with regard to the settlement period remained uncertain.

There was likewise uncertainty about retroactive application of the *Dynamex* ruling. "A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law." *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 983 (1989).

Olson argues that it was a mistake for the trial court to consider this risk in valuing the claims. Petition at 40. Olson cites *Gonzales v. San Gabriel Transit, Inc.*, 40 Cal. App. 5th 1131 (2019) for the proposition that *Dynamex* was likely to apply retroactively, but *Gonzales* did not come down until October 8, 2019, well after the mediation and settlement. And even then, the issue remained unsettled until this Court's 2021 opinion in *Vazquez v. Jan-Pro Franchising Internat.*, 10 Cal. 5th 944 (2021).

Olson is seeking review of specific rulings that did not go his way, but there is no connection to the larger policies that are the work of this Court. In this argument, for example, Olson points to a disagreement over uncertainty in the law that existed for a period of months between this Court's ruling in *Dynamex* and the legislature's clarification of the law in AB5. That short period of uncertainty is over and it is not going to reoccur. No future court will ask this question again.

Olson asks this Court to invest its time in reviewing the analysis of a single trial court weighing the risks imposed by an uncertainty in the law that has long since been resolved. Such an effort invades the province of the trial court's judgment while offering nothing to guide any future decision anywhere. This is the opposite of the critical work that this Court exists to perform.

C. Nothing in the Distribution of Proceeds from the Settlement Warrants Review

The last argument from the kitchen-sink section of Olson's petition deals with the fact that the settlement provides for the distribution of $5 million in payments to drivers under Labor Code §558(a)(3). On September 10, 2019, when the parties entered into the settlement at issue here, the law was uncertain as to whether or not compensation for unpaid wages described in Labor Code §558(a)(3) could be recovered under PAGA. The parties resolved this uncertainty by negotiating for a payment of $5 million to the drivers at issue in the lawsuit, but limiting the settlement release exclusively to PAGA claims and explicitly excluding any release of wage claims. Opinion at 4-5.

On September 12, 2019, two days after the settlement of the instant matter, the Court of Appeal issued its opinion in *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 188 (2019), holding that "only the Labor Commissioner [can] issue a citation that includes both a civil penalty and the same unpaid wages . . ."

Normally, intervening changes in the law following a settlement will not invalidate the agreement. "Supervening change in the law will not alone suffice as a ground for invalidating a settlement agreement . . . [an agreement] made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty." *Conway v. Takoma Park Volunteer Fire Dep't, Inc.*, 2001 U.S. Dist. LEXIS 2490, *13 (D. Md. Feb. 26, 2001); *see also Dunlap v. Chicago Osteopathic Hosp.*, 1995 U.S. App. LEXIS 4616, *3-4 (7th Cir. Mar. 7, 1995) (change in law strengthening plaintiff's claims following settlement not grounds for plaintiff to avoid the agreement); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991) ("To allow Leroy to challenge the settlement agreement . . . based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements").

Despite the foregoing, Olson argues that this Court should revisit the trial court's approval of the settlement based on the subsequent opinion in *ZB*. Petition at 40. This argument is emblematic of everything that is wrong with Olson's petition. The issue for which Olson seeks review has no wider application. The uncertainty in the law that preceded *ZB*, by definition, will not be repeated. This question cannot re-occur.

Even within this case, the settlement explicitly excludes any release of wage claims (Opinion at 5), so the payment, at worst, represents extra money being paid to aggrieved employees without the State or anyone else giving up anything. The LWDA received notice of this payment and, even in its tardy *amicus* brief below, expressed no disapproval of this additional payment. This is not a policy problem that calls for this Court's efforts.

VI. CONCLUSION

The instant petition is driven by economic interests that are specific to this case. Both class action and PAGA litigation frequently see "professional objectors" who object to any settlement in hopes of obtaining attorney fees. The basic economics of this business model are rent-seeking. A law firm brings an objection and points out that the objector has the ability to appeal any approval of the settlement, thereby delaying payment to employees and attorneys alike. The rent-seeking objector then offers to withdraw the objection in exchange for a portion of the attorney fees from a settlement. Litigants who refuse to pay are subject to years of delay as the objector invokes the appellate process as a means of blockading payment from the settlement.

The instant petition represents the end of that rent-seeking road. It identifies no real conflict in the existing law, and offers no policy questions that meaningfully extend beyond the boundaries of this particular case. It is just a tool for delay.

There might someday be a real conflict in the law with regard to the standing of objectors like Olson when they have been denied coordination and intervention. But there is no such conflict today. The existing case law is consistent and grounded in the ability of trial courts to manage their own cases. There is nothing to be gained from the efforts of this Court at this time.

The law today presents a functioning system wherein PAGA settlements are reviewed by the LWDA and the presiding court, and litigants in parallel PAGA actions may seek to provide input into that process through the mechanisms of coordination and intervention. The fact that Olson is unhappy that he was not successful under the system is not a good enough reason to dismantle it and rewrite the controlling statute.

Ultimately, the instant petition is just a laundry list of individual disappointment. "The assertion of multiple issues suggests mere disgruntlement with the Court of Appeals decision, which itself is not a ground for review." Eisenberg, Civil Appeals and Writs, 13:74, Rutter (2020). Here, the petition identifies three separate issues presented, but those are compounded with the first issue asking three different questions

about intervention, objection, and motions to vacate a judgment. The second purported issue asks two separate questions regarding the authority of PAGA plaintiffs and separately the jurisdiction of trial courts. That is six different questions in three purported issues. Olson then adds three more complaints in Section IV of his petition. And he does not even claim that these qualify as review-worthy issues presented to this Court. That is a total of nine different grievances. Instead of identifying an important policy issue, Olson has just presented a detailed list of why he is unhappy that he lost. There is no basis for review here.

DATED: November 29, 2021

Respectfully submitted,

THE GRAVES FIRM

By: */s/ Allen Graves*

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CERTIFICATE OF WORD COUNT
CALIFORNIA RULES OF COURT,
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DATED: November 29, 2021

Respectfully submitted,
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COUNTY OF LOS)

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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RESPONDENT TINA TURRIETA'S ANSWER TO BRANDON OLSON'S PETITION FOR REVIEW

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
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Lower Court Case Number: **B304701**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/29/2021

Date

/s/Allen Graves

Signature

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