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

REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

Labor Code section 1102.5 provides broad protection against retaliation for employees who "disclose information" about a violation of law to a government or law enforcement agency or to certain representatives of their employer. To have its intended effect, the provision must assure employees they will not be subject to retaliation for coming forward, even if their information is already known or they are only adding their voice to that of others who have previously complained of the same unlawful conduct. The plain language, statutory context, and legislative history of section 1102.5 all support this commonsense interpretation.

Nonetheless, appointed counsel argues that section 1102.5(b)'s protections are limited to employees whose disclosures about unlawful activity reveal (or are believed by the employees to reveal) something hidden or otherwise unknown. Such a reading would profoundly undermine the purpose of the statute: to encourage employees, who are uniquely positioned to observe unlawful activity, to report violations of law without fear of retaliation. Because an employee may be uncertain about whether all details of a violation are already known, appointed counsel's interpretation would inevitably result in less reporting of unlawful conduct. It would also create a significant deterrent for employees to attempt to resolve concerns informally by complaining to the persons responsible for the unlawful acts, who of course already know about their own conduct.

Section 1102.5 does not require that the recipient of a disclosure be ignorant of the wrongdoing disclosed, and the statute construed as a whole and with reference to California's other whistleblower statutes, along with the statute's legislative history and remedial purpose, support broadly construing section 1102.5(b) to protect the disclosure of wrongdoing

whether or not it is already known. It is indisputably the public policy of California to encourage *more* reporting of unlawful conduct, not *less*.

ARGUMENT

I. "Disclose" Does Not Have a "Settled Meaning" Requiring Something Hidden or Otherwise Unknown to Be Revealed; the Verb Also Encompasses the Act of Exposing or Disseminating Something, Whether or Not It is Already Known

Appointed counsel argues that "disclose" has a "settled meaning" that governs this Court's interpretation of section 1102.5(b), and that "disclose" means to reveal something hidden or otherwise unknown. (ABOM, p. 22.) While this is unquestionably *a* definition of "disclose," that is not the only meaning of the term, which is not defined in the statute. The ordinary meaning of the word also encompasses the *act* of exposing or disseminating a fact, "whether or not the recipient has prior knowledge of it; the term literally means to 'dis-' or 'un-' *close*[.]" (*Pilon v. U.S. Dept. of Justice* (D.C. Cir. 1996) 73 F.3d 1111, 1119 [original emphasis]; Webster's 3d New Internat. Dict. (1981) p. 645; accord Dis. Opn. at p. 15, fn. 5.) Hence the definition cited by the dissent, "to expose to view," as in a "curtain ris[ing] to [disclose] *once again* the lobby." (Webster's 3d New Internat. Dict. (1981) p. 645 [emphasis added]; Dis. Opn. at p. 15, fn. 5.) "This usage neither is uncommon nor does it deviate from 'ordinary meaning.'" (*Pilon, supra,* 73 F.3d at 1119; see also Oxford English Dict., 2d. Ed. (1989) p. 737 [to "open up (that which is closed or shut); to unclose, unfold; to unfasten"].)

Appointed counsel selectively quotes *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1550 for the proposition that "courts interpreting section 1102.5(b) have repeatedly recognized that 'disclosing information' requires that new information be revealed." (ABOM, pp. 22-

23.) But *Hager* undermines rather than supports this point. Although *Hager* accepted "the dictionary definition of 'disclosure'" used by *Mize-Kurzman v. Marin Community College District* (2012) 202 Cal.App.4th 832, it criticized—in the same sentence—that court's failure to account for "the statutory language in the context of the statute as a whole." (*Hager, supra,* 228 Cal.App.4th at 1550.) *Hager* gave "[s]ection 1102.5(b) [] a broad construction commensurate with its broad purpose" in refusing to adopt the dictionary definition used by *Mize-Kurzman*. (*Id.*, at 1552.)

In any case, even appointed counsel's definition of "disclose" can be construed not to require that the recipient of a disclosure be ignorant of the wrongdoing disclosed. This is because the disclosure of a known violation may reveal new information, such as an employee knowing about wrongdoing and intending to challenge it. Contrary to counsel's contention, the statute does not require that a protected disclosure be comprised *only* of information about the underlying conduct. (ABOM, p. 24.) Counsel's interpretation of "disclose" is on the narrow end of narrow. (See *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 597 [refusing "narrow, grudging" constructions of remedial statutes].)

II. Appointed Counsel's Narrow Interpretation of "Disclose" Cannot Be Reconciled with Section 1102.5 as a Whole or with California's Other Whistleblower Statutes

It is fundamental that "[t]he interpretation of a statute may well begin, but should not end, with a dictionary definition of a single word used therein." (*Pearson v. State Social Welfare Bd.* (1960) 54 Cal.2d 184, 194.) Ultimately, the statutory language must be construed "'in context' and with reference to 'provisions relating to the same subject' and 'the whole system of law of which [the statute] is a part.'" (*Skidgel v. California Unemployment Ins. Appeals Bd.* (2021) 12 Cal.5th 1, 20 [citation omitted]).

Moreover, a remedial statute like section 1102.5, with its whistleblower protections for employees, must "be liberally construed with an eye to promoting such protection[s]." (*Indus. Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.) This is particularly true where limiting protected disclosures "would defeat the legislative purpose of protecting workplace whistleblowers" and thereby "discourage whistleblowing" and provide "a disincentive to report unlawful conduct." (*Hager, supra,* 228 Cal.App.4th at 1550.) The Court should decline "to interpret the statute in a manner that would contradict the purpose of the statute." (*Ibid.*)

A. The Narrow Interpretation of "Disclose" Has Absurd Effects When Applied Uniformly Throughout the Statute

Reading "disclose" to require something hidden or otherwise unknown to be revealed cannot be squared with section 1102.5 as a whole. Take for example the context of disclosures to government and law enforcement agencies: the interpretation would have the absurd effect of making an enforcement agency's "state of awareness" of the wrongdoing disclosed "absolutely necessary to establish" a violation of the statute. (Maj. Opn. at p. 11.) This would mean that only the first employee to report a violation to an enforcement agency would be protected from retaliation since the agency would thereafter know about the wrongdoing and a subsequent complaint would reveal nothing new (OBOM, pp. 18-19), directly contradicting *Hager, supra,* 228 Cal.App.4th at 1550 [finding a "first report" rule contrary to the language and intent of section 1102.5(b)].) Employees providing corroborating accounts would be protected only for the new details they reveal; section 1102.5 would not protect them for their corroboration of known information.

Appointed counsel contends this argument overlooks a "safe harbor" in the statute for employees "who reasonably—but incorrectly—believe their communication discloses new information." (ABOM, p. 25.) Specifically, appointed counsel argues that "[t]o benefit from whistleblower protection, the employee need only have 'reasonable cause to believe that the information discloses a violation' of the law." (*Ibid.* [citing Lab. Code § 1102.5(b)].) But the "reasonable belief" provision counsel references protects employees who are mistaken about whether the underlying conduct is *illegal*, not whether their disclosure reveals *new information*. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719.) As the dissent noted, there is no legal basis for reading a "reasonable belief" prong into the meaning of "disclosing information." (Dis. Opn., pp. 18-19.)[1]

[1] Appointed counsel also fails effectively to counter that applying the narrow interpretation of "disclose" uniformly throughout section 1102.5(b) would lead to the absurd result that an employee complaining to a law enforcement agency about their employer stealing from customers would only be protected if the agency did not know (or the employee believed it did not know) that theft was illegal. (OBOM, p. 19.) The point is premised on the statute requiring the employee to reasonably believe the information "discloses" a violation of law. Appointed counsel attempts to dispute this by contending the report would be protected under section 1102.5(b) so long as the agency did not already know about the employer's theft (ABOM, pp. 29-30), but this only addresses whether the disclosure reveals *new information*, not whether the information *itself* discloses a violation of law. Yet appointed counsel contends that the employee's disclosure is protected without regard for whether the agency was aware that stealing was unlawful, apparently applying "a different and less onerous definition of [disclose]" to this part of section 1102.5(b). (Dis. Opn., p. 8.)

B. No Other Provision of Section 1102.5 Supports the Narrow Interpretation of "Disclose"

Appointed counsel tries unsuccessfully to reconcile the Court of Appeal's narrow interpretation of "disclose" with other provisions of section 1102.5. For instance, counsel argues that section 1102.5(e) "highlights why 'disclosing information' under subdivision (b) is limited to the revelation of new information" since "subdivision (e)'s use of different terms—'[a] report' and 'a disclosure'—shows the Legislature understands those terms to convey distinct concepts," which is to say that a public employee's internal complaint need not reveal new information, while the complaint of a private employee, or of a public employee who complains externally, must. (ABOM, pp. 27-28.) But section 1102.5(e) states that a "report . . . *is* a disclosure . . . pursuant to subdivisions (a) and (b)." (Lab. Code § 1102.5, subd. (e) [emphasis added].) Rather than showing these are "distinct concepts," this language demonstrates the term "disclosure" in section 1102.5(b) encompasses the concept of "report," which appointed counsel concedes does not require that new information be revealed.

Counsel's argument additionally misreads the legislative purpose behind section 1102.5(e). The subdivision was one of several legislative changes in 2003 following "a series of high-profile *corporate* scandals and reports of illicit coverups." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 710 [emphasis added].) Because the Legislature was chiefly concerned at that time with the "early detection of *corporate* wrongdoing" (Stats. 2003, ch. 484, § 1 [emphasis added]), it hardly makes sense that section 1102.5(e) would have been enacted to "provide broader protection for public employees" as appointed counsel argues. (ABOM, p. 28.) Rather, the Legislature merely endorsed the commonsense

interpretation of section 1102.5(b) as it existed pre-amendment, when the statute protected only employee complaints to government and law enforcement agencies: that the statute inherently protected public employees who complained internally to their employers. (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 v. Housing Authority* (2000) 85 Cal.App.4th 236, 241-243].)

Appointed counsel next points to section 1102.5(b)'s designation of private persons to whom protected disclosures may be made: "a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (ABOM, p. 30.) Counsel argues these persons "play an analogous role within a private company or firm" to government and law enforcement agencies in that "they are well placed to investigate and correct the problem once it is revealed." (*Id.*, at pp. 30-31.) Theorizing that one who knows about or is responsible for a violation is unlikely to correct it, counsel figures the Legislature "feels a protected 'disclosure' is made to someone in a position to fix the violation – not the person engaged in the wrongdoing." (*Id.*, at p. 31 [quoting Maj. Opn., p. 13, fn. 10].)

As an initial matter, "person[s] with authority" over whistleblowing employees—a term broadly inclusive of an employee's supervisory chain—are not one and the same with outside government and law enforcement agencies. There is no requirement in section 1102.5(b) that a "person with authority" be in a position to *correct* the violation. To the contrary, the statute protects internal complaints made to two distinct categories of employer representatives: (1) those with authority over the employee; and, (2) any other employees who have the authority to "investigate, discover,

or correct" the noncompliance. (Lab. Code § 1102.5, subd. (b) [emphasis added].) Moreover, the Legislature amended section 1102.5(b) to protect complaints to these persons "to better address the realities of workplace retaliation." (See Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended Sept. 4, 2013, p. 8 [arguing that the bill "clarifies, strengthens and expands existing retaliation statutes to better address the realities of workplace retaliation, especially as it affects immigrant workers"].) One such reality is that oftentimes the only person to whom an employee may complain who can act on a violation may well already know about or have been responsible for the violation in the first place.

To serve its broad protective purpose, section 1102.5 must be construed to shield employees who complain to supervisors about the supervisor's own unlawful conduct, in hopes that the supervisor will change course in light of the employee's complaint. Appointed counsel's argument would disincentivize this type of informal dispute resolution, depriving employers of the opportunity to correct unlawful conduct before employees resort to legal action or reporting to enforcement authorities. Stripping employees of protections against retaliation if they disclose concerns within their supervisory chain, as they are often instructed to do, is contrary to the purpose of the statute to give employees the courage and protection to come forward. (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subd. (h) ["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."]; Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended September 4, 2013, p. 8 [describing the 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."].)

Finally, appointed counsel argues that section 1102.5(b)'s protection for "providing information" to, or "testifying" before, any public body conducting an investigation, hearing, or inquiry was meant to encourage employees to "expose" and "shed light on" illegal conduct and thus confirms the statute's purpose to "promote[] [the] disclosure of information that would otherwise be hidden and whose revelation furthers enforcement of the law." (ABOM, pp. 31-32.) Neither term's ordinary meaning requires the revelation of new information, however. In fact, the verification and corroboration of known information are often the core functions of testimony. (See, e.g., *Alpine Mut. Water Co. v. Superior Court* (1968) 259 Cal.App.2d 45, 54 fn. 6 [noting in the civil discovery context that "[i]t is frequently important for an interrogating party to compel his adversary to admit a known fact for the purpose of preventing him from later shifting his ground"]; Pen. Code § 1111 [stating that "a conviction can not (sic) be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"].) The Legislature's use of the term "providing information" is also consistent with the interchangeable usage of "disclose" and synonymous terms in the context of section 1102.5. (Sen. Com. on Industrial Relations, Analysis of Assem. Bill 2452 (1983-1984 Reg. Sess.) as amended April 26, 1984, p. 1 [describing the original legislative purpose of section 1102.5 as "protect[ing] employees . . . for *providing information* to a government or law enforcement agency concerning violations of state or federal laws"] [emphasis added].)

In contrast with the meaning of "disclose" appointed counsel advocates, the Labor Commissioner's interpretation makes sense within the context of section 1102.5 as a whole, including the Legislature's established usage of words and phrases like "report," "provide information," and "contact" interchangeably with "disclose." (OBOM, pp. 20-24.) Appointed counsel dismisses the Legislature's "imprecise language" over the decades as immaterial, but that argument is unavailing. (ABOM, pp. 32-34.) Where words or phrases "appear interchangeably in legislative or judicial usage" the terms are understood to have the same meaning. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 866.) This is true in regard to the statute's enactment in 1984 since it is that Legislature's intent that must be effectuated in construing "disclose." (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1048 ["It is axiomatic that in assessing the import of a statute, we must concern ourselves with the Legislature's purpose at the time of the enactment."].) But this also applies to the amendments in 2003 and 2013 since "the Legislature's expressed views on the prior import of its statutes are entitled to due consideration" in arriving at the true intent when the legislation was enacted. (*Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 389-390 [citation omitted].)

C. The Narrow Interpretation of "Disclose" Is Incongruent With How the Term Is Used in California's Other Whistleblower Statutes

Besides detailing why reading "disclose" to require something hidden or otherwise unknown cannot be squared with section 1102.5 as a whole, the Labor Commissioner showed in the opening brief that the interpretation appointed counsel advocates conflicts with California's other whistleblower statutes, all of which use "disclose" to mean "report" or "communicate." (OBOM, p. 23; Gov. Code § 8547.2(e); Ed. Code §§

44112(e)(1), 87162(e)(1) [defining a "protected disclosure" as "a good faith *communication*"] [emphasis added].) It is true of course, as counsel notes, the other statutes define the phrase "protected disclosure" while section 1102.5 does not, but rather than any difference in underlying purpose the discrepancy simply reflects the reality that "[d]ifferent bills, drafted by different authors, passed at different times, might well use different language to convey the same rule." (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1093.) Indeed, the statutes were enacted more recently than section 1102.5 and it is understood that the Legislature "might well express the same concept with more clarity" in later legislation than before. (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 190.) Based on the plain meaning of "disclose" viewed in the context of section 1102.5 as a whole and with reference to these other statutes, it is evident that a "disclosure" need not reveal new information to whomever it is made to be protected under section 1102.5(b).

III. Far from Acquiescence Through Inaction, the Circumstances Surrounding the Amendment of Section 1102.5(b) Indicate the Legislature Disapproved *Mize-Kurzman*'s Holding that a "Disclosure" Must Reveal Something New to Be Protected

Appointed counsel argues "the Legislature took no action in response to *Mize-Kurzman*'s interpretation of disclosure," finding the Legislature's "apparent acquiescence" in the decision difficult to overlook. (ABOM, pp. 16-17, 37-39.) The inference of acquiescence by inaction is poorly taken.

A. Inaction by the Legislature Is a Poor Basis for Inferring Legislative Approval of a Judicial Decision; the Circumstances Here Do Not Support Acquiescence

As a preliminary matter, as the U.S. Supreme Court has observed, legislative inaction "affords the most dubious foundation for drawing

positive inferences." (*United States v. Price* (1960) 361 U.S. 304, 310-311; see also *Quinn v. State of California* (1975) 15 Cal.3d 162, 175 ["[W]e need only mention the general principle of statutory construction that legislative inaction is indeed a slim read upon which to lean."].) As this Court has explained, "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute," such as "the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors." (*People v. Whitmer* (2014) 59 Cal.4th 733, 741.)

While "[i]n some circumstances[] inaction by the Legislature might indicate legislative approval of a judicial decision," no such circumstances exist here. (*People v. Williams* (2001) 26 Cal.4th 779, 789-790 [finding legislative acquiescence in a California Supreme Court statutory interpretation after 30 years of legislative inaction toward the statute in question contrasted with other legislative enactments exhibiting implicit approval in the interim]; see also *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of California Supreme Court decisions restating that interpretation].)

Mize-Kurzman was decided just one year before the Legislature amended section 1102.5(b). Moreover, the interpretation of "disclose" was hardly settled, as *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 825-826 had rejected the view that disclosing known wrongdoing is not protected under section 1102.5(b), and Congress had expressly abrogated the federal precedents *Mize-Kurzman* relied on as wrongly decided. (S. Rep. No. 112-155 (2012) at p. 5 [stating that the Whistleblower

Protection Enhancement Act of 2012 "overturns several court decisions that narrowed the scope of protected disclosures" including holdings that "disclosures to the alleged wrongdoer are not protected" and "that disclosures of information already known are not protected."].)

The fact this Court has not passed on the matter before now reinforces that instead of acquiescence to *Mize-Kurzman* the Legislature may have "reasonably conclude[d] . . . it should await [the Court's] definitive interpretation" of section 1102.5(b) before proceeding to amend it. (*Quinn, supra,* 15 Cal.3d at 175.)

B. The Legislature's Actions Are a "More Fruitful Inquiry" and Demonstrate Disapproval of *Mize-Kurzman*'s Holding That the Disclosure of Known Wrongdoing Is Unprotected

"An examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry" in determining legislative intent. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156.) On that account the circumstances surrounding the amendment of section 1102.5(b) in 2013 indicate the Legislature disapproved *Mize-Kurzman*'s conclusion that a "disclosure" must reveal something new to be protected under the statute.

The Legislature is not only presumed to have known about *Mize-Kurzman* when it amended section 1102.5(b) (*In re W.B., supra,* 55 Cal.4th at 57), it seems the Legislature *actually* contemplated *Mize-Kurzman* since, as appointed counsel notes, the Legislature codified the court's holding about activity otherwise protected under section 1102.5(b) not losing protection just because it was done as part of an employee's job duties. (ABOM, p. 39; see also *Mize-Kurzman, supra,* 202 Cal.App.4th at 856-858; Stats. 2013, ch. 781, § 4.1 [amending section 1102.5(a) and (b) to state they

apply "regardless of whether disclosing the information is part of the employee's job duties].)

It is telling then that the Legislature amended section 1102.5(b) the legislative session after *Mize-Kurzman* to protect the disclosure of wrongdoing to the *exact* sort of persons who are likely to already know about or have been responsible for the wrongdoing disclosed: namely, "a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (Stats. 2013, ch. 781, § 4.1.) Although the Legislature did not specify its intent to abrogate this aspect of *Mize-Kurzman*, appointed counsel correctly notes that the Legislature is presumed to "have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (ABOM, at p. 38 [quoting *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 236] [internal quotation marks omitted].)

The two bills that amended section 1102.5(b) with Senate Bill 496 in 2013 support that the disclosure of known wrongdoing is protected under the statute. The bills reflect specific concern with protecting low-wage and immigrant workers who speak up about unlawful conduct in the workplace; the bills' purposes would be undermined by reading "disclose" to require something hidden or otherwise unknown to be revealed. (OBOM, pp. 10-12, 23, 29-32.) Appointed counsel's dismissal of Assembly Bill 263 and Senate Bill 666 as largely unrelated to section 1102.5 misses the point. (ABOM, pp. 14-16.) "If the same legislative session enacts two or more acts on the same subject they are presumed to embody the same policy and have been intended to have effect together." (Norman J. Singer, Sutherland Statutes and Statutory Construction § 23:18 (7th ed. 2013).)

Senate Bill 496 did not pass in a vacuum; it was part of a combined effort that legislative session to combat wage theft and other workplace violations, and "to better address the realities of workplace retaliation, especially as it affects immigrant workers." (Stats. 2013, ch. 732 (Assem. Bill 263), § 1, subds. (a), (c), (e)-(h); Sen. Rules Com., Analysis of Sen. Bill 666 (2013-2014 Reg. Sess.) as amended Sept. 4, 2013.) The legislative histories of Assembly Bill 263 and Senate Bill 666 are thus probative of the Legislature's intent to protect internal complaints under section 1102.5(b).

IV. The Fact That Section 98.6 Already Protects a Complaint About Unpaid Wages Does Not Support Appointed Counsel's Narrow Interpretation of Section 1102.5(b); The Legislature Intended the Statutes to Apply Together Against Wage Theft

Appointed counsel argues that section 98.6 "already protects complaints about unpaid wages" and that the Legislature likely did not intend section 1102.5(b) "to do the same work." (ABOM, pp. 41-42.) However, it is common for statutory protections to overlap (see, e.g., *CBOCS West, Inc. v. Humphries* (2008) 553 U.S. 442, 454-455 [discussing the overlap between Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981]), and it is evident from the statutory text in this instance that the Legislature intended sections 98.6 and 1102.5(b) to apply together to protect workers complaining about wage theft (among other workplace violations). Section 98.6 applies because it protects "a written or oral complaint that [an employee] is owed unpaid wages." (Lab. Code § 98.6, subd. (a).) Section 1102.5(b) applies too—even by appointed counsel's account, if the complaint reveals something hidden or otherwise

unknown—because the statute protects a complaint about a violation of law. (*Id.*, at § 1102.5, subd. (b).)[2]

Contrary to appointed counsel's argument that section 98.6 "provides exactly [the] relief" the Labor Commissioner seeks under section 1102.5 (ABOM, p. 42 [quoting Maj. Opn. at p. 18 fn. 13]), only section 1102.5 authorizes a court to award reasonable attorney's fees to a prevailing plaintiff. (Lab. Code § 1102.5, subd. (j).) The statutes also have distinct penalty provisions in that each provides a penalty of up to $10,000 per violation, each expressly in addition to other remedies available, but the section 98.6 penalty is paid to aggrieved employees while the penalty under section 1102.5 is remitted to the State. (Lab. Code §§ 98.6, subd. (b)(3); 1102.5, subd. (f); see also *Hale v. Morgan* (1978) 22 Cal.3d 388, 398 ["The imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy."].) The statutes also have different evidentiary standards. (*Lawson, supra,* 12 Cal.5th at 712 [clarifying that section 1102.6 replaced the *McDonnell Douglas* test as the evidentiary standard for section 1102.5 retaliation claims]; *Garcia-Brower v. Premier Automotive Imports of CA, LLC* (2020) 55 Cal.App.5th 961, 977 [citing *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 for the adoption of *McDonnell Douglas* as the standard for section 98.6 claims].) These differences are by legislative design and reflect a "necessary overlap" between the statutes. (See *CBOCS West, supra,* 553 U.S. at 455.)

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[2] In fact, the statutes overlap quite extensively since section 98.6 expressly incorporates into its protections certain conduct *because* it is protected under section 1102.5(b). (Lab. Code § 98.6, subd. (a) [protecting "conduct delineated in . . . Chapter 5 [of the Labor Code] (commencing with Section 1101) of Part 3 of Division 2"].)

V. The Narrow Interpretation Appointed Counsel Advocates Would Leave a Wide Variety of Whistleblowers to Suffer Irremediable Retaliation

Besides section 98.6 and the wage theft context, appointed counsel cites various federal and California statutes that counsel contends already adequately protect employees from retaliation, even if section 1102.5(b) does not protect the disclosure of known wrongdoing. (ABOM, pp. 46-47.) But the other statutes counsel references are not coextensive with section 1102.5(b), which broadly protects complaints about violations of law, leaving many whistleblowers unprotected when section 1102.5(b) does not apply. An example is illustrative. Suppose that instead of unpaid wages A.C.R. complained to Estrada that he was unlawfully selling alcoholic beverages at the night club afterhours. (Bus. & Prof. Code §§ 25631, 25632 [prohibiting the sale of alcoholic beverages "between the hours of 2 o'clock a.m. and 6 o'clock a.m."].) Unless section 1102.5(b) applied, none of the statutes cited by appointed counsel would protect A.C.R. from retaliation. But by appointed counsel's account section 1102.5(b) would not apply since A.C.R.'s complaint to Estrada about his own wrongdoing would reveal nothing new. (See ABOM, pp. 24-25.)

If appointed counsel's interpretation is adopted, an employee who reports suspected fraud to a supervisor without knowing who committed it would not be protected if it turned out the supervisor did it. Employees who band together to report a manager's theft to the manager's supervisor believing the problem would be taken more seriously if corroborated would not be protected except for the first employee to report it. Likewise for employees who, for the same reason, separately report their employer's illegal dumping of hazardous materials to an enforcement agency. Employees unsure whether wrongdoing is already known might choose to

do nothing. Responsible employers might be deprived of information vital to the lawful operation of their business unless and until an employee deems the problem serious enough to complain to an enforcement agency directly. And so on. Each of these outcomes are contrary to the legislative intent and policy goals behind section 1102.5, to encourage workers to report wrongdoing so it can be curtailed and corrected.[3]

Appointed counsel contends a whistleblower without a statutory claim might still have recourse under the common law for wrongful termination in violation of public policy, known as a *Tameny* claim. (ABOM, pp. 47-48; citing *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 174-175 [recognizing a common law tort action for wrongful discharge].) However, public employees who suffer retaliation for disclosing known wrongdoing to an agency besides their employer do not have the consolation of *Tameny* claims since public entities are only liable for their acts and omissions as provided by statute. (Gov. Code § 815, subd. (a); *Ross v. S.F. Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507, 1514.) Nor might private employees be able to pursue common law claims since not every violation of law is actionable under this doctrine. (*Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66, 75.) And even for

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[3] See, e.g. *Jaramillo, supra,* 200 Cal.App.4th at 829 [noting that a complaint made directly to the wrongdoer serves the public interest in correcting illegal behavior]; *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1123-1124 [explaining that 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]; see also *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…would be to present the problem first to the responsible managers"].)

employees fortunate to have other recourse against their employers, they could not avail themselves of the favorable evidentiary standard, civil penalty, and one-way fee-shift available when bringing section 1102.5(b) statutory claims. (Lab. Code §§ 1102.5, subds. (f) ["In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section."], (j) ["The court is authorized to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of these provisions."], 1102.6; *Lawson, supra,* 12 Cal.5th at 712 ["[S]ection 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims."].)[4] Section 1102.5's protections and remedies are distinct from and additional to those available under the common law.

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[4] Under the *McDonnell Douglas* test, an employee has the initial burden to show by a preponderance of the evidence that the employer took an adverse action against the employee for a prohibited reason. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354.) A prima facie case establishes a presumption of discrimination, which the employer can rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id.*, at 355-356.) If the employer discharges this burden of production, the presumption of discrimination disappears. (*Id.*, at 356.) The employee must then show that the proffered nondiscriminatory reason is a pretext for discrimination, and the employee can offer any other evidence of discriminatory motive. (*Ibid.*) By contrast, section 1102.6 "places the [initial] burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action." (*Lawson, supra,* 12 Cal.5th at 718.) "Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity." (*Ibid.*)

CONCLUSION

In view of the plain language, legislative history, and remedial 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: June 14, 2022

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

/s/ Nicholas Patrick Seitz

Nicholas Patrick Seitz
Attorney for Plaintiff,
Appellant, and Petitioner
LILIA GARCIA-BROWER

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 5,527 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: June 14, 2022

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

/s/ Nicholas Patrick Seitz

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Appellant, and Petitioner
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 June 14, 2022, I served the following document(s):

REPLY 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

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Fourth District Court of Appeal,
Division Three
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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. Executed at County of San Francisco, State of California, on June 14, 2022.

Mary Ann Galapon

Mary Ann Galapon, Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GARCIA-BROWER v. KOLLA'S**
Case Number: **S269456**
Lower Court Case Number: **G057831**

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/s/MaryAnn Galapon
Signature

Seitz, Nicholas (287568)
Last Name, First Name (PNum)

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