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Case No. S266001

IN THE SUPREME COURT OF CALIFORNIA

WALLEN LAWSON,
Plaintiff and Appellant,

v.

PPG ARCHITECTURAL FINISHES, INC.,
Defendant and Respondent.

On a Certified Question from the
United States Court of Appeals for the Ninth Circuit
Case No. 19-55802

APPLICATION TO FILE AMICUS BRIEF; DIVISION OF LABOR STANDARDS ENFORCEMENT AMICUS BRIEF

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Division of Labor Standards Enforcement

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CALIFORNIA LABOR COMMISSIONER

The California Labor Commissioner is the Chief of the Division of Labor Standards Enforcement. (Lab. Code §§ 79, 82.) The Labor Commissioner's enforcement authority includes the investigation and prosecution of whistleblower retaliation under Labor Code section 1102.5. (Lab. Code § 98.7.) Accordingly, the Labor Commissioner has significant interest in the clear, coherent development of pertinent case law, including whether section 1102.6 replaced the *McDonnell Douglas* test as the relevant evidentiary standard for section 1102.5 retaliation claims. The Labor Commissioner submits this amicus brief to show that the plain language of section 1102.6 makes clear that the statute provides the pertinent evidentiary standard, and that the legislative history, this Court's explanation of section 1102.6 in *Harris v. City of Santa Monica* (2012) 56 Cal.4th 203, and analogous federal case law all support that understanding.

Dated: July 1, 2021

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

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AMICUS CURIAE BRIEF

INTRODUCTION

Noting the statute's plain language but observing seemingly inconsistent state appellate decisions, the United States Court of Appeals for the Ninth Circuit certified the following question to this Court:

> Does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the *McDonnell-Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code? (*Lawson v. PPG Architectural Finishes, Inc.* (9th Cir. 2020) 982 F.3d 752, 753.)[1]

The California Labor Commissioner, the state official charged with enforcing section 1102.5, submits this brief in support of an affirmative answer to the certified question.

Section 1102.6 hardly needs interpretation. Its unequivocal language establishes the evidentiary standard for section 1102.5 retaliation claims, which—as the Ninth Circuit correctly recognized and as PPG does not dispute—is materially different from the *McDonnell Douglas* test. Once an employee makes an initial showing that protected activity was a "contributing factor" in an adverse action, section 1102.6 imposes a burden on the employer to prove by clear and convincing evidence that it would have taken the same adverse action for legitimate, independent reasons even without the protected activity. (*Lawson*, *supra*, 982 F.3d at 759.) Any other interpretation contradicts the plain language of the statute and undermines the Legislature's intent to encourage whistleblowing by protecting whistleblowers.

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

This Court has already indicated as much. In *Harris v. City of Santa Monica* (2012) 56 Cal.4th 203, 239, this Court explained that section 1102.6 provides the evidentiary standard for section 1102.5 retaliation claims. Federal courts have also consistently construed the burden-shifting frameworks in the federal whistleblower statutes after which the Legislature modeled section 1102.6 to provide the pertinent evidentiary standard for retaliation claims brought under those statutes, rather than the default *McDonnell Douglas* test.

Based upon the unambiguous language of the statute, the clearly stated legislative intent, this Court's discussion of section 1102.6 in *Harris*, as well as analogous federal case law, the Labor Commissioner respectfully requests that this Court resolve once and for all that section 1102.6 provides the evidentiary standard for section 1102.5 retaliation claims.

LEGAL DISCUSSION

A. Statutory Language Is Generally the Most Reliable Indicator of Legislative Intent, and Section 1102.6 Plainly Provides the Evidentiary Standard for Section 1102.5 Retaliation Claims

Under well-established rules of statutory construction, this Court "must ascertain the intent of the drafters so as to effectuate the purpose of the law." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.) "Because the statutory language is generally the most reliable indicator of legislative intent," the Court must "first examine the words themselves, giving them their usual and ordinary meaning and construing them in context." (*Ibid*.) "If the statutory language contains no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs." (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 802.)

Here, section 1102.6 provides that "[i]n a civil action or administrative proceeding brought pursuant to Section 1102.5," an employee has the initial burden to "demonstrate by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee." (Lab. Code § 1102.6.) Upon such a showing, the statute states that the burden then shifts to the employer to "demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5." (*Ibid.*)

This language contains no ambiguity. As the statutory text's usual and ordinary meaning makes clear, section 1102.6 provides the evidentiary standard for section 1102.5 retaliation claims, whatever the stage of litigation.

B. The Plain Meaning of Section 1102.5 Is Consistent with the Legislative Intent Underlying the Statute, As Demonstrated by Its Legislative History

Although the language of section 1102.6 dictates the result here, the legislative history confirms that the Legislature intended to supplant the *McDonnell Douglas* framework and impose a heightened evidentiary burden on employers for section 1102.5 retaliation claims.

The Legislature enacted section 1102.6 in 2003 with Senate Bill 777. (Stats. 2003, ch. 484, eff. Jan. 1, 2004.) At the time, California courts had adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-356.) Under this 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. (*Id.*, at 354.) A prima facie case establishes a presumption of discrimination. (*Id.*, at 355.) 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 actually a pretext for discrimination, and the employee can offer any other evidence of discriminatory motive. (*Ibid.*) The ultimate burden of persuasion remains with the employee. (*Ibid.*)

Proponents of section 1102.6's burden-shifting standard argued that the *McDonnell Douglas* test "made it almost impossible for whistleblowers to win a challenged whistleblower lawsuit." (Sen. Jud. Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003, p. 8.) This dissuaded employees from "blowing the whistle" despite being "in a unique position to report corporate wrongdoing to an appropriate government or law enforcement agency." (Stats. 2003, ch. 484, § 1; Sen. Jud. Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003, at pp. 3, 8-10.) In view of the Enron, WorldCom, and other massive corporate fraud scandals of the time, the Legislature recognized that a different evidentiary standard was needed to ensure employees could effectively avail themselves of section 1102.5's whistleblower protections and thereby be encouraged to speak out. (Sen. Jud. Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003, pp. 3, 8-10.)

Thus, the Legislature enacted section 1102.6 to replace the *McDonnell Douglas* test as the evidentiary standard for section 1102.5

retaliation claims.[2] In contrast to the *McDonnell Douglas* test, which merely requires that an employer produce evidence of a legitimate, nondiscriminatory reason for taking an adverse action once an employee has made a prima facie case of retaliation (*Guz, supra,* 24 Cal.4th at 354-356), section 1102.6 requires that an employer prove by clear and convincing evidence that it would have taken the same adverse action for legitimate, independent reasons even without the protected activity. (Lab. Code § 1102.6.) And unlike with the *McDonnell Douglas* standard, the burden remains with the employer once the employee has made that initial case; the burden never shifts back to the employee. (*Ibid.*)

The Legislature made clear that this more solicitous standard "establish[es] the evidentiary burdens of the parties participating in a civil action or administrative hearing involving an alleged violation of [section 1102.5]." (Stats. 2003, ch. 484; see *People v. Canty* (2004) 32 Cal.4th 1266, 1280 [preamble statements of intent "properly may be utilized as an aid in construing a statute"].) The legislative history thus confirms that section 1102.6 provides the evidentiary standard for section 1102.5 retaliation claims, with no exceptions for any particular litigation stage.

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[2] (See Sen. Rules Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 3; see also Sen. Jud. Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as introduced Feb. 21, 2003, p. 8 ["By *raising* the standard of proof that the employer must meet, potential whistleblowers, proponents state, would find a safer haven, encourage reporting, and thus foster the early detection of financial fraud by a company."] [emphasis added]; Enrolled Bill Memorandum to Governor for Sen. Bill No. 777 (2003-2004 Reg. Sess.) Oct. 6, 2003 ["This bill extends the current protection of the state whistleblower law by: . . . (4) increasing the burden of proof on the employer to a clear and convincing evidence standard in civil or administrative action . . . under the whistleblower statute, which is similar to the Sarbanes-Oxley Act of 2002."].)

C. This Court Indicated in *Harris* That Section 1102.6 Provides the Evidentiary Standard for Section 1102.5 Retaliation Claims

In *Harris, supra,* 56 Cal.4th 203, the seminal decision about the evidentiary standard for mixed motive discrimination cases under the Fair Employment and Housing Act (FEHA), this Court acknowledged that section 1102.6 provides the evidentiary standard for section 1102.5 retaliation claims:

> Labor Code section 1102.6 . . . requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute (*id.*, § 1102.5) was a 'contributing factor' to the contested employment decision. (*Id.*, at 239.)

D. Federal Courts Have Consistently Construed the Federal Statutes After Which Section 1102.6 Was Modeled to Provide the Relevant Evidentiary Standards for Retaliation Claims, Including at the Summary Judgment Stage

The Legislature modeled section 1102.6 after the burden-shifting frameworks for retaliation claims under the Sarbanes-Oxley Act (SOX) (18 U.S.C. § 1514A), Whistleblower Protection Act (WPA) (5 U.S.C. §§ 1214, 1221), and similar federal whistleblower protection laws. (Assem. Com. on Jud. on Sen. Bill No. 777 (2003-2004 Reg. Sess.) as amended May 29, 2003, p. 4.)[3] Like section 1102.6, these standards provide that an employee has the initial burden to establish a prima facie case of retaliation, and that upon such a showing the burden shifts to the defendant to demonstrate by

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[3] "The sponsor states that this defense is borrowed from federal law, including the Sarbanes-Oxley act (sic) and the federal employee Whistleblower Protection Act." (Assem. Com. on Jud. on Sen. Bill No. 777 (2003-2004 Reg. Sess.) as amended May 29, 2003, p. 4.)

clear and convincing evidence that it would have taken the same adverse action even without the protected activity. (18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(B)(i)-(ii) [for the Sarbanes-Oxley Act]; 5 U.S.C. § 1221(e)(1)-(2), 2302(b)(8) [for the Whistleblower Protection Act].)[4] Because of the similarity between the burden-shifting standards and the Legislature's clear intent to model section 1102.6 after analogous federal statutes, this Court may look to pertinent federal precedent for guidance in construing section 1102.6. (*Id.*, at 354.)

In that regard, federal courts have consistently held that the *McDonnell Douglas* test does not apply when a statute provides a distinct burden-shifting framework. (See, e.g., *Johnson v. Stein Mart, Inc.* (11th Cir. 2011) 440 Fed.Appx. 795, 801 ["We recognize that SOX does not follow the familiar Title VII *McDonnell Douglas* burden-shifting framework."]; *Allen v. Admin. Review Bd.* (5th Cir. 2008) 514 F.3d 468, 475-476 ["This 'independent burden-shifting framework' is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII

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[4] Section 1102.6 notably differs from these federal whistleblower protection laws in that it does not expressly preclude liability if a defendant makes a same-decision showing. (Compare Lab. Code § 1102.6 with 5 U.S.C. §§ 1214(b)(4)(B)(ii), 1221(e)(2) ["[c]orrective action . . . may not be ordered"]; 42 U.S.C. § 5851(b)(3)(D) ["[r]elief may not be ordered"]; 49 U.S.C. § 42121(b)(2)(B)(ii) ["no investigation . . . shall be conducted"].) The availability in mixed-motive retaliation cases of declaratory and injunctive relief, as well as civil penalties and reasonable attorney's fees, serves the important public policy of encouraging whistleblowers to come forward without fear of retaliation, and does so without providing a windfall to employees who would have been subjected the same adverse actions notwithstanding their protected activities. (See *Harris, supra,* 56 Cal.4th at 230-238.)

claims."] [SOX];[5] *Marano v. Dep't of Justice* (Fed. Cir. 1993) 2 F.3d 1137, 1141 [WPA];[6] *Araujo v. New Jersey Transit Rail Operations, Inc.* (3rd Cir. 2013) 708 F.3d 152, 157 ["[W]hen a burden-shifting framework other than *McDonnell Douglas* is presented in a statute, [it is implied that] Congress specifically intended to alter any presumption that *McDonnell Douglas* is applicable."] [Federal Rail Safety Act];[7] *Frobose v. Am. Sav. and Loan Ass'n of Danville* (7th Cir. 1998) 152 F.3d 602, 611-612, 615) [Financial Institutions Reform, Recovery, and Enforcement Act];[8] *Formella v. U.S.*

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[5] For the SOX, see also *Conrad v. CSX Transp., Inc.* (4th Cir. 2016) 824 F.3d 103, 107; *Rhinehimer v. U.S. Bancorp Investments., Inc.* (6th Cir. 2015) 787 F.3d 797, 805; *Wiest v. Tyco Electronics Corp.* (3rd Cir. 2016) 812 F.3d 319, 329; *Lockheed Martin Corp. v. Admin. Review Bd.* (10th Cir. 2013) 717 F.3d 1121, 1129; *Betchel v. Admin. Review Bd.* (2nd Cir. 2013) 710 F.3d 443, 446-448; *Van Asdale v. Int'l Game Tech.* (9th Cir. 2009) 577 F.3d 989, 996; *Harp v. Charter Commc'ns, Inc.* (7th Cir. 2009) 558 F.3d 722, 723; *Day v. Staples* (1st Cir. 2009) 555 F.3d 42, 53; *Livingston v. Wyeth, Inc.* (4th Cir. 2008) 520 F.3d 344, 351.

[6] For the WPA, see also *Baca v. Dep't of the Army* (10th Cir. 2020) 983 F.3d 1131, 1138; *Mount v. U.S. Dep't of Homeland Sec.* (Fed. Cir. 2019) 937 F.3d 37, 42; *Duggan v. Dep't of Defense* (9th Cir. 2018) 883 F.3d 842, 845-846; *King v. Dep't of the Army* (11th Cir. 2014) 570 Fed.Appx. 863, 865-866.

[7] For the Federal Rail Safety Act, see also 49 U.S.C. §§ 20109(d)(2)(A), (A)(i); 42121(b)(2)(B)(i)-(ii); *Lockhart v. MTA Long Island R.R.* (2nd Cir. 2020) 949 F.3d 75, 79; *Epple v. BNSF Ry. Co.* (5th Cir. 2019) 785 Fed.Appx. 219, 222; *Lincoln v. BNSF Ry. Co.* (10th Cir. 2018) 900 F.3d 1166, 1212; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 454; *Armstrong v. BNSF Ry. Co.* (7th Cir. 2018) 880 F.3d 377, 381; *BNSF Ry. Co. v. U.S. Dep't of Labor* (8th Cir. 2017) 867 F.3d 942, 945; *Pan Am Rys., Inc. v. U.S. Dep't of Labor* (1st Cir. 2017) 855 F.3d 29, 36; *Conrad v. CSW Transp., Inc.* (4th Cir. 2016) 824 F.3d 103, 107; *Lee v. Norfolk S. Ry. Co.* (4th Cir. 2015) 802 F.3d 626, 631; *Consol. Rail Corp. v. U.S. Dep't of Labor* (6th Cir. 2014) 567 Fed.Appx. 334, 337.

[8] For the Financial Institutions Reform, Recovery, and Enforcement Act, see also 12 U.S.C. § 1831j(f); 5 U.S.C. § 1221(e)(1)-(2); *Lippert v. Cmty.*

Dep't of Labor (7th Cir. 2010) 628 F.3d 381, 389 [Surface Transportation Assistance Act];[9] *Tamosaitis v. URS Inc.* (9th Cir. 2015) 781 F.3d 468, 481, fn. 12 ["The 1992 amendments to the ERA added a burden-shifting procedure distinct from that established in [*McDonnell Douglas*]."] [Energy Reorganization Act].)[10]

Moreover, federal courts have applied the heightened clear and convincing evidentiary standard to defendants at the summary judgment stage. (See, e.g., *Wiest, supra,* 812 F.3d at 321-322, 329, 333; *Johnson, supra,* 440 Fed.Appx. at 797, 801; *Van Asdale, supra,* 577 F.3d at 1002-1004 [SOX]; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 459-462; *Araujo, supra,* 708 F.3d at 156, 157, 160-162 [Federal Rail Safety Act]; *Lippert, supra,* 438 F.3d at 1278-1279; *Frobose, supra,* 152 F.3d at 611-612, 615 [Financial Institutions Reform, Recovery, and Enforcement

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Bank, Inc. (11th Cir. 2006) 438 F.3d 1275, 1278-1279; *Simas v. First Citizens' Fed. Credit Union* (1st Cir. 1999) 170 F.3d 37, 44.

[9] For the and Surface Transportation Assistance Act, see also 49 U.S.C. §§ 31105(b); 42121(b)(2)(B)(i)-(ii); *Jacobs v. U.S. Dep't of Labor* (11th Cir. 2020) 806 Fed.Appx. 832, 834; *Maverick Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.* (8th Cir. 2014) 739 F.3d 1149, 1155.

[10] For the Energy Reorganization Act, see also 42 U.S.C. § 5851; *Smith v. Dep't of Labor* (4th Cir. 2016) 674 Fed.Appx. 309, 314-315; *Addis v. Dep't of Labor* (7th Cir. 2009) 575 F.3d 688, 690-691 ["In particular, the ERA framework is intended to replace the traditional *McDonnell Douglas* formulation of retaliation."]; *Indiana Michigan Power Co. v. U.S. Dept. of Labor* (6th Cir. 2008) 278 Fed.Appx. 597, 603; *Williams v. Admin. Review Bd.* (5th Cir. 2004) 376 F.3d 471, 476 ["In 1992, Congress inserted into the ERA an independent burden-shifting framework . . . ."]; *Trimmer v. U.S. Dep't of Labor* (10th Cir. 1999) 174 F.3d 1098, 1101; *Stone & Webster Eng'g Corp. v. Herman* (11th Cir. 1997) 115 F.3d 1568, 1572 [noting that the Energy Reorganization Act "is clear and supplies its own free-standing evidentiary framework"].

Act]; *Tamosaitis, supra,* 781 F.3d at 481-483, fn. 7 [Energy Reorganization Act].)

Federal precedent thus reinforces reading section 1102.6 to provide the evidentiary standard for section 1102.5 retaliation claims, including at the summary judgment stage.[11]

E. *Hager, Mokler,* and *Patten* Are Not Authority for the Evidentiary Standard Applicable to Section 1102.5 Retaliation Claims

In its order certifying the question to this Court, the Ninth Circuit identified three published California Court of Appeal decisions that state that the *McDonnell Douglas* evidentiary standard applies to section 1102.5 retaliation claims: *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1540, *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138, and *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378, 1384.) None of these cases actually applies the *McDonnell Douglas* standard, however, because the decisions focus entirely on whether the employee established a prima facie case of retaliation against the employer. (*Hager, supra,* 228 Cal.App.4th at 1548-1552 [whether plaintiff's disclosure was a protected activity]; *Mokler, supra,* 157 Cal.App.4th at 139 [whether plaintiff reasonably believed she disclosed a violation of law]; *Patten, supra,* 134 Cal.App.4th 1386-1390

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[11] The Legislature also modeled section 1102.6 after the District of Columbia's Whistleblower Protection Law. (Assem. Com. on Jud. on Sen. Bill No. 777 (2003-2004 Reg. Sess.) as amended June 17, 2003, p. 6.) Courts there appear to be split about the pertinent evidentiary standard. (See *Coleman v. District of Columbia* (D.C. Cir. 2015) 794 F.3d 49, 54 ["The Act prescribes a distinct burden-shifting framework to govern the proof of whistleblowing claims."]; but cf. *Johnson v. District of Columbia* (D.C. 2007) 935 A.2d 1113, 1118 [using the *McDonnell Douglas* test].)

[whether plaintiff's transfer was an adverse action, and whether a particular disclosure constituted whistleblowing].) Thus, since none addressed the employer's burden of proof, none is authority on the pertinent evidentiary standard. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 284 [a decision is positive authority only on the points actually involved and actually decided]; accord *United Steelworkers of Am. v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 834.) References to the *McDonnell Douglas* test in these cases are therefore properly characterized as dicta. In any case, *Patten*, *Mokler*, and *Hager*'s statements about the *McDonnell Douglas* framework are at odds with this Court's discussion of section 1102.6 in *Harris*, as well as the plain meaning of the statute.

F. The Heightened Evidentiary Standard Applies to All Section 1102.5 Retaliation Claims, and Not Just At Trial

PPG contends that section 1102.6 only applies at trial and only in mixed motive cases, while the *McDonnell Douglas* test applies at all stages of single motive cases and through summary judgment in mixed motive cases. (RB, at pp. 22, 38.) This argument is contrary to principles governing summary judgment established by this Court, has no basis in the statutory text, and would lead to absurd results.

First, PPG's argument about different evidentiary standards at trial and summary judgment overlooks this Court's direction that summary judgment burdens are determined by the applicable burdens of proof at trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) Thus, in the FEHA context for example, it is *Harris*—not *McDonnell Douglas*—that supplies the evidentiary standard for mixed motive discrimination cases at summary judgment. (See *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1185 [holding that the *Harris* mixed motive

analysis "translates readily to the summary judgment context" and citing federal cases in accord].) By the same logic here, section 1102.6 must apply not just at trial but also at summary judgment for mixed motive retaliation cases under section 1102.5. (Lab. Code § 1102.6.) In analogous contexts, federal courts have had no difficulty applying evidentiary standards like section 1102.6 at summary judgment instead of the *McDonnell Douglas* test. (See Section D of the Legal Discussion, *supra*.)

As for PPG's argument that section 1102.6 never applies in single motive cases under section 1102.5, it misreads the term "contributing factor" in section 1102.6 to necessarily mean just "one of many factors." But a "contributing factor" can just as well be *the factor* in an adverse action against an employee if it alone leads to that result. Indeed, this is how courts have construed the phrase in the federal statutes after which section 1102.6 was modeled. (See, e.g., *Frost v. BNSF Ry. Co.* (9th Cir. 2019) 914 F.3d 1189, 1195; *Araujo, supra,* 708 F.3d at 158; *Addis, supra,* 575 F.3d at 691; *Allen, supra,* 514 F.3d at 476, fn.3; *Marano, supra,* 2 F.3d at 1140 [a "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision"].) The argument also overlooks the unqualified language with which the Legislature described the application of section 1102.6 to section 1102.5 retaliation claims (Lab. Code § 1102.6 ["In a civil action . . . brought pursuant to Section 1102.5 . . . ."]; see also Stats. 2003, ch. 484),[12] not to mention the Legislature's stated intention to replace the *McDonnell*

[12] In relevant part, "This bill . . . would establish the evidentiary burdens of the parties participating in a civil action . . . involving an alleged violation of the bill's provisions." (Stats. 2003, ch. 484.)

Douglas test. (Sen. Rules Com. on Sen. Bill 777 (2003-2004 Reg. Sess.) as amended Aug. 18, 2003, p. 3.)

PPG's argument would also produce absurd results. Under PPG's construction, employees subjected to adverse actions for purely retaliatory reasons would have to satisfy a more demanding evidentiary burden than employees subjected to adverse actions for mixes of retaliatory and legitimate reasons. (See *Araujo, supra,* 708 F.3d at 158-159, 162-163 [describing a burden-shifting framework similar to section 1102.6 as "much more protective of plaintiff-employees than the *McDonnell Douglas* framework" and "much easier for a plaintiff to satisfy"].) And even in those mixed motive cases, in order to benefit from section 1102.6's burden-shifting framework at trial, PPG's interpretation would first require employees to satisfy the more rigorous *McDonnell Douglas* test at summary judgment anyway, which would nullify any advantage to employees of section 1102.6's evidentiary standard. Worse, employees could lose at summary judgment under the *McDonnell Douglas* test even though they might have prevailed at trial under section 1102.6's more employee-protective framework. This belies logic, runs counter to fundamental fairness, weakens protections for the most innocent of whistleblowers, and caters to the very worst of employers. As this Court has said, "Interpretations that lead to absurd results . . . are to be avoided." (*Tuoloumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.)

CONCLUSION

This Court need not do more than consider the plain language of section 1102.6 to hold that the statute replaced the *McDonnell Douglas* test as the pertinent evidentiary standard for section 1102.5 retaliation claims.

Moreover, the legislative history, this Court's acknowledgment of section 1102.6 in *Harris*, and analogous federal case law, all support that understanding. The Labor Commissioner respectfully requests that this Court answer the Ninth Circuit's certified question in the affirmative.

Dated: July 1, 2021

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

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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 3,865 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: July 1, 2021

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

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PROOF OF SERVICE

Lawson v. PPG Architectural Finishes, Inc.,
California Supreme Court Case No. S266001

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 July 1, 2021, I served the following document(s):

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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 July 1, 2021.

/s/ Mary Ann Galapon
Mary Ann Galapon, Declarant

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STATE OF CALIFORNIA
Supreme Court of California

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