Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA VIRTUAL ACADEMIES

Petitioner

vs.

PUBLIC EMPLOYMENT RELATIONS BOARD

Respondent

CALIFORNIA TEACHERS ASSOCIATION

Real Party in Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

In making a determination as to whether a charging party has established its "prima facie case" of unlawful retaliation due to union activity according to the standard set forth by the National Labor Relations Board in *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 ("*Wright Line*"), may California's Public Employment Relations Board ("PERB" or the "Board"), directly applying the *Wright Line* test to retaliation cases brought under California's Educational Employee Relations Act, postpone its consideration of employer evidence that tends to contradict the charging party's "prima facie case" until after the burden of proof has shifted to the employer to prove, by a preponderance of the evidence, that the employer would have taken the same course of action regardless of the employee's protected activity?

II. LIST OF ALL PARTIES TO THE PROCEEDING

California Virtual Academies ("CAVA"), Respondent in underlying PERB proceeding, Petitioner in California state appeal.

California Teachers Association, Charging Party in underlying PERB proceeding, Real Party in Interest in California state appeal.

Public Employment Relations Board, tribunal in underlying PERB proceeding, Respondent in California state appeal.

III. CORPORATE DISCLOSURE PURSUANT TO SUPREME COURT RULE 29.6

The California Virtual Academies do not have parent companies, and there is no publicly held corporation owning 10% or more of any of the individual California Virtual Academies.

IV. LIST OF ALL PROCEEDINGS DIRECTLY RELATED TO THIS CASE

California Teachers Association v. California Virtual Academies, Public Employment Relations Board Decision No. 2584, Case No. LA-CE-5974-E (September 1, 2018);

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VI. STATEMENT OF BASIS FOR JURISDICTION

The Supreme Court of California's order denying CAVA's Petition for Review was dated June 24, 2020, making the present Petition timely pursuant to Rules of the Supreme Court of the United States, Rule 13.1.

28 U.S.C. 1257(a) grants this Court authority to review the June 24, 2020 order of the California Supreme Court denying CAVA's Petition for Review.

VII. STATUTE INVOLVED IN THIS CASE

29 U.S.C. 158(a)(3), which provides in pertinent part:

It shall be an unfair labor practice for an employer…by

discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…

VIII. STATEMENT OF THE CASE

A. Factual Background

CAVA schools are part of California's constitutional public school system, operating pursuant to authority under California's Charter Schools Act of 1992 (Cal. Ed. Code §§ 47600, *et seq*), and serving as virtual academies wherein teachers educate students from separate physical locations using information technology. As a centerpiece of its education program at all relevant times for this dispute, CAVA utilized an "Individualized Student Plan" ("ILP") as a comprehensive and interactive virtual student record to reflect various critical components of CAVA's educational information including student transcripts, test scores, courses taken, and courses planned for each student. (Administrative Record ["AR"], v.2 pp. 624-627; 629-635.[1])

The ILP process includes as its core component a student/teacher conference addressing the student's educational and life goals. (AR, v. 2 pp. 1423-1424.) Critical to the student/teacher

[1] Pursuant to Rules of the Supreme Court of the United States, Rule 12.7, citation is made to the Administrative Record in this matter prior to its transmittal to the Court.

conference is that a *live* conversation (in person or electronic) takes place allowing a rapport to develop between the student and the teacher to whom the student has been assigned for ILP purposes (referred to as student's "homeroom teacher"). (AR, v.2 pp. 1425-27.) Homeroom teachers are to ensure recording of that conversation and upload it to students' ILP, allowing teachers in later years to review the recording. (*Ibid.*) Instructions developed by CAVA required teachers to categorize a student's ILP as "Complete" or "In Progress" based on whether additional steps or documents were still required for the ILP. (AR, v.2 pp. 990-991; v.4, pp. 1998-2000; 2002-2009; 2011-2013.) An ILP could not be "Complete" if neither the student (nor the student's parent/guardian) participated in a live conference. (AR, v.2 pp. 990-991; 1098-1101; 1102-1103; 1106-110; v.4 pp. 1998-2000; 2002-2009; 2011-2013; 2051; 2144-2145; 2147-2151.)

On August 19, 2014, a CAVA supervisor (Cathy Andrew or "Andrew") was approached at a CAVA in-person training by KK[2], a CAVA parent (who was also a CAVA teacher). (AR, v.2 801; 803-813.) KK told Andrew that the homeroom teacher (Stacey Preach or "Preach") assigned to the parent's child ("SK") in the previous (2013-2014) school year had not conducted a live-ILP conference in the

[2] As it had during the PERB proceeding and at the state appellate level, CAVA will use initials for the parent and student in question, to protect the student's privacy.

Spring of 2014. (AR, v.2 813.) Because if true this failure would represent a violation of the express requirements of the ILP process, Andrew commenced an investigation into KK's allegation later that day, August 19, 2014. (AR, v.2 pp. 813-816; v.3 1514.) The investigation subsequently revealed that Preach had recorded the SK conference on February 24, 2014 and designated the ILP as "Complete" the same day, and that neither SK nor KK had participated in the conference. (*Ibid.*) Consistent with CAVA's standard response where falsification of student records was at issue, CAVA terminated Preach on September 11, 2014. (AR, v.3 pp. 1514-1515.)

Preach had been one of forty teachers who, on April 28, 2014, had emailed CAVA leadership stating their intent to organize a union with the California Teachers Association ("CTA"). (AR, v.3 pp. 1465-1466.) Preach had also worn a pro-union button and distributed union materials at CAVA training sessions on August 11 and 18, 2014. (AR, v.1 p. 459.)

B. Procedural Background and Grounds for Review

CTA filed an unfair practice charge against CAVA with PERB, alleging that CAVA violated California's Educational Employee Relations Act (California Government Code section 3543.5) by unlawfully retaliating against Preach due to Preach's protected pro-union activities. (AR, v.1 pp. 0008-0031.)

PERB issued its decision on September 21, 2018 (the "Decision," attached hereto as **Appendix A**). As PERB stated in the Decision, the burden-shifting framework that PERB applies in retaliation cases (and that would be applied in the Decision) "derives directly" from National Labor Relations Board ("NLRB") precedent interpreting the retaliation statute of the National Labor Relations Act (29 U.S.C. 158(a)(3)), specifically *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 ("*Wright Line*"). (AR, v.1 p. 471, citing *Novato Unified School District* (1982) PERB Decision No. 210, pp. 3, 14 ("*Novato*").) Under the *Wright Line* test, the charging party must first establish a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," and "[o]nce this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." (*Wright Line* at 1089.) Critical for purposes of the present petition, subsequent United States Supreme Court (and federal Court of Appeals) precedent has clearly established that the initial burden that must be carried by the charging party in making this "prima facie showing" of protected activity as motivating factor is a burden of persuasion (not of production) and that in determining whether this "prima facie showing" was made, the reviewing body must consider all relevant evidence presented in the NLRB proceeding,

including any evidence presented by the employer that tends to contradict the charging party's evidence. (See discussion at section IX, *infra*, citing *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001); *NLRB v. CWI of Maryland,* 127 F.3d 319, 331 (4th Cir. 1997); and *Holo-Krome Co. v. NLRB,* 954 F.2d 108, 113 (2d Cir. 1992).)

Applying this *Wright Line* burden-shifting framework, PERB reached the conclusion that CTA had made its "prima facie showing" under the *Wright Line* test by demonstrating that CAVA had terminated Preach because of protected union activity. (AR, v.1 p. 460-470.) PERB based this conclusion in part on its determination that there was "suspiciously close timing" between Preach's protected activity and the commencement of Andrew's investigation. (AR, v.1 p. 461.) This was a critical determination; because it exclusively relied on circumstantial evidence of unlawful motive, CTA was required under PERB precedent to prove such "suspiciously close timing" (along with "some other facts indicating an unlawful motive"). (AR, v.1 p. 460; *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 29-30.)

Yet this conclusion as to "suspiciously close timing" was reached without a consideration of the evidence that CAVA presented with respect to the timing of Andrew's investigation, specifically the uncontroverted fact that on August 19, 2014—earlier in the *same day* on which the Andrew's investigation was initiated-- SK's mother KK had approached Andrew at a CAVA training session and had told her Preach had not conducted a live ILP conference with KK or SK in Spring 2014, and the uncontroverted fact that Andrew only commenced her investigation into Preach after, and as a direct consequence of, this conversation. (AR, v.1 pp. 135-137; 396-397.)

Charging party CTA never denied that Andrew's conversation with KK prompted Andrew's investigation and indeed freely admitted this fact during the PERB proceeding. (See, e.g., AR, v.1 p. 163.)

The Board itself found that the investigation into Preach's conduct was launched by Andrew immediately after she had this conversation with KK, stating in the Decision that:

> On August 19, 2014, KK attended a CAVA training session in her role as a CAVA curriculum specialist. At that session, KK spoke with Andrew about SK's education. KK said she was pleased with SK's new homeroom teacher for the 2014-2015 school year and that SK had had a "wonderful ILP conference" with her recently. KK said that SK's homeroom teacher in the 2013-2014 school year, i.e. Preach, did not conduct a live

> ILP conference in Spring 2014…Andrew testified that following this conversation, she decided to investigate "the concern that the ILP had not been done."

(AR, v.1 pp. 453-454.)

Clearly the fact that Andrew had a "triggering" conversation with KK was in the record at the time the Board made its factual finding with respect to "suspiciously close timing." Yet this universally accepted fact was not considered by the Board in its "suspiciously close timing" analysis.

This was not an oversight by PERB. In its subsequent opposition briefs at the Court of Appeal and California Supreme Court stage, PERB made clear its position that it would not have been appropriate for PERB to consider the "timing" evidence offered by CAVA to rebut CTA's evidence that there was "suspiciously close timing" between Preach's protected activity and Andrew's investigation during the initial, "prima facie showing" stage of the *Wright Line* test. Specific citations to this position are set forth immediately below:

In its July 3, 2019 Opening Brief in support of its Petition for Writ of Extraordinary Relief submitted to the California Court of Appeal, Second District ("Opening Brief"), CAVA argued that *Wright Line* has been specifically adopted by PERB precedent (and applied to the present matter by the present PERB Board) and that under the *Wright Line* test, the NLRB General Counsel "*must prove by a*

preponderance of evidence that union animus was a substantial or motivating factor in the adverse employment action….If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action." (Opening Brief, pgs. 19-20, citing *Consolidated Bus Transit*, 350 NLRB 1064, 1065.) Consequently, argued CAVA, it was error for the PERB Board not to consider this evidence in making its "suspiciously close timing" conclusion during the "prima facie showing" phase of the *Wright Line* test. (Opening Brief, pgs. 21-24.)

In its November 4, 2019 Respondent's Brief at the California Court of Appeal stage, PERB provided the following response to the foregoing argument:

> CAVA also poses a new argument that the Board should have considered Andrew's August 19 conversation with KK as an intervening event that nullified the temporal proximity between the protected activities and the adverse action. (POB 21-22.) This argument erroneously attempts to inject CAVA's affirmative defense (that it investigated and took action solely because of Andrew's conversation with KK) into the timing element of the prima facie case. Thus, this argument conflates the elements of the *Novato* prima facie case with the affirmative defense. (See *Novato*, *supra*, PERB Decision No. 210, pp. 6-8, 14.)

(Respondent's Brief, pg. 47.)

In its Reply Brief at the Court of Appeal stage, CAVA cited to NLRB precedent acknowledging that pursuant to this Court's decision in *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) ("*Greenwich Collieries*"), a charging party's burden of proof under *Wright Line* is a burden of persuasion, not merely of production, and that the charging party must carry the burden of persuasion that the employer's antiunion sentiment was a substantial or motivating factor in the challenged decision *before* the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. (Reply Brief, pgs. 10-12, citing *Manno Electric, Inc.* (1996) 321 NLRB 278, 280, fn. 2 ("*Manno Electric*").) Consequently, argued CAVA, the evidence that Andrew initiated her investigation later in the same day that she had her triggering conversation with KK should have been considered as part of the "prima facie showing" phase of the *Wright Line* test, *before* any conclusion as to "suspiciously close timing" was reached. (*Ibid.*)

On May 4, 2020, the Court of Appeal for the Second District summarily denied CAVA's Petition for Writ of Extraordinary Relief (its order attached hereto as **Appendix B**, and CAVA subsequently filed a Petition for Review of this denial to the Supreme Court of California on May 14, 2020.

The above-quoted exchange between CAVA and PERB at the California Court of Appeal level regarding the requirements of the *Wright Line* test under U.S. Supreme Court precedent was repeated and expanded upon when CAVA petitioned the California Supreme Court for review of the Court of Appeal's decision. In its Petition for Review, CAVA argued as follows:

> As the Board itself stated in the Decision, the burden-shifting framework that PERB applies in retaliation cases derives directly from National Labor Relations Board ("NLRB") precedent, specifically *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 ("*Wright Line*"). (AR, v.1 p. 471, citing *Novato*, *supra*, PERB Decision No. 210 at pp. 3, 14.) Under the *Wright Line* test set forth by NLRB and subsequently adopted by PERB in *Novato*, the weighing of contrary evidence relating to facts circumstantially indicating "unlawful motive" (such as "suspiciously close timing") takes place *before* the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action regardless of the employee's protected activity. (*Consolidated Bus Transit* (2007) 350 NLRB 1064, 1065 ["Under [the *Wright Line* test], the General Counsel *must prove by a preponderance of evidence* that union animus was a substantial or motivating factor in the adverse employment action…[¶]… *If the General Counsel makes the required initial showing*, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity"] (Emphasis added).)

(Petition for Review, pg. 18.)

After citing to the *Manno Electric* board's extended discussion of *Greenwich Collieries* (as previously set forth at the Court of Appeal and as described above) CAVA continued:

> Thus, under the *Wright Line* test, the charging party must make an "initial showing" of causation based upon "a preponderance of the evidence" (*Consolidated Bus Transit*), and in so doing must carry a burden of persuasion, not of mere production. (*Manno Electric*). Under such a test, if a charging party presents evidence that—considered alone, without the benefit of contrary evidence provided by respondent—would suffice to demonstrate the "suspiciously close timing" or any of the other facts indicating an unlawful motive discussed in *Novato*, **but then** respondent does indeed present such contrary evidence, this latter evidence must be considered by the Board before its initial determination of "unlawful motive," i.e. before the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action regardless of the employee's protected activity. Under no reasonable interpretation of the *Wright Line* test could a PERB Board lawfully do what the Board did in the underlying matter—namely refuse to consider all evidence submitted by CAVA during the "initial showing stage" and only consider such evidence during the "affirmative defense" stage of the case (if at all). Were it otherwise, the term "preponderance of the evidence" as used in *Consolidated Bus* would make no sense[ ], and the burden of persuasion would have shifted to CAVA merely upon the production of evidence, in violation of *Manno Electric*.
>
> …

> The Board's dramatic departure from the burden-shifting rules set forth in *Novato* and the NLRB precedent on which that earlier Board relied indicates that the burden-shifting rules for PERB retaliation cases is an unsettled issue under California that is in need of judicial clarification.

(Petition for Review, pg. 19-21 (footnote omitted explaining that the term "preponderance of evidence" is understood to mean a comparison of evidence.)

In its June 4, 2020 Answer to Petition for Review, PERB conceded that the burden-shifting framework applied in PERB matters was drawn from *Wright Line* (as formally adopted in *Novato*), as consistent with PERB's nearly fifty-year practice of drawing from federal law when interpreting California's public sector labor relations statutes. (*Id.*, pg. 33-34.) PERB also provided a revised response to CAVA's argument removing any possible doubt that its position was that evidence tending to contradict the charging party's "prima facie showing" evidence could only be considered during the second, "affirmative defense" stage of the *Wright Line* analysis:

> CAVA's argument that the Board should have considered the conversation between Andrew and KK as part of the timing element of motive erroneously attempts to inject its affirmative defense—that it investigated and acted solely because of Andrew's conversation with KK—into the timing analysis of the prima facie case. (Petition, pp. 15-17.) This argument conflates the elements of the prima facie case with the affirmative defense, where

> such an argument should be considered. (See *Novato*, *supra*, PERB Decision No. 210, pp. 6-8, 14.)

(*Id.*, pg. 24.)

PERB went on to further explain its reasoning in the Answer:

> CAVA improperly argues that CTA's evidence relevant to timing was contradicted by the "triggering" conversation between Andrew and KK, and thus, the Board's not considering all evidence in the record when finding suspiciously close timing and a prima facie case constitutes a "dramatic departure from the burden shifting rules set forth in Novato." (Petition, p. 21.) However, as explained above, the conversation was not relevant to the timing inquiry, and thus, the Board did not depart from its well-established precedent.

(*Id.*, pg. 25.)

On June 24, 2020, the Supreme Court of California summarily denied CAVA's Petition for Review, its decision attached hereto as **Appendix C**.

CAVA submits that the above account satisfies the requirements of Rules of the Supreme Court of the United States, Rule 14.1(g)(i).

IX. REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT

C. The California Supreme Court's Ruling Lets Stand an Interpretation of the *Wright Line* Test that Contradicts United States Supreme Court Precedent

Precedent of this Court has firmly established that under the *Wright Line* test set forth by NLRB (which was subsequently adopted

by PERB in *Novato* and was expressly applied by the PERB Board in the present dispute) the weighing of contrary evidence relating to facts circumstantially indicating "unlawful motive" (such as "suspiciously close timing") takes place *before* the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action regardless of the employee's protected activity.

In *Greenwich Collieries*, this Court held that in an action brought under the federal Administrative Procedure Act the party seeking the rule or order carries a burden of proof that is not merely a burden of going forward, but also a burden of persuasion. (*Id*., pgs. 277-278.) In doing so, the Court reviewed a footnote included in an earlier Supreme Court case (*NLRB v. Transportation Management Corp*. 462 U.S. 393 (1983) ("*Transportation Management*")), a case concerning the proper allocations of evidentiary burdens within the *Wright Line* test for a retaliation action brought under 29 U.S.C. 158(a)(3). (*Transportation Management* at 394-395.) Revisiting the earlier opinion by more closely analyzing the proper allocations of evidentiary burdens for all actions brought pursuant to § 7(c) of the federal Administrative Procedure Act, the *Greenwich Collieries* Court rejected the earlier Court's footnoted statement that § 7(c) imposed a burden of production on the party seeking a rule or order, and instead held that that section imposed a burden of persuasion. (*Id*. at 276-278.)

The *Greenwich Collieries* Court nevertheless held that the *Transportation Management* holding remained intact, for reasons directly relevant to the present dispute:

> The NLRB's approach in *Transportation Management* is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.

(*Id*. at 278; see also *NLRB v. Ky. River Cmty. Care, Inc.* (2001) 532 U.S. 706, 712 [citing to the Administrative Procedure Act and *Greenwich Collieries* for the proposition that in unfair labor practice actions under 29 U.S.C. 158, the charging party "bears the burden of proving the elements of an unfair labor practice, which means it bears the burden of persuasion as well as production."].)

As argued by CAVA in its state court appeal, PERB's positions that (1) evidence tending to contradict CTA's evidence of "suspiciously close timing" was "irrelevant" to PERB's analysis of whether CTA had, in the first instance, carried its "prima facie" burden of proving that CAVA's (alleged) antiunion sentiment had contributed to its decision to terminate Preach and (2) CAVA's evidence may, within the *Wright Line* test, only be considered as part of the CAVA's affirmative defense runs directly contrary to this holding of *Greenwich Collieries*. Subsequent federal Court of Appeals precedent has made the point

even more clear, explicitly rejecting the argument made by PERB. For example, *NLRB v. CWI of Maryland* 127 F.3d 319 (4th Cir. 1997) provided the following analysis:

> Although the ALJ cited to the *Wright Line* standard as the method by which to evaluate [employee]'s discharge, we believe that the ALJ in fact allowed the General Counsel to establish a prima facie case merely by creating an inference that anti-union animus was a substantial or motivating factor in the discharge. Of course, in the original *Wright Line* opinion the Board said that a prima facie case could be made by a "showing sufficient to support the *inference* that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 N.L.R.B. at 1089 (emphasis added). However, the Supreme Court has said that a prima facie case requires the General Counsel to prove *by a preponderance of the evidence* that the employer had a discriminatory intent that was a substantial or motivating factor in the discharge. Thus, a *Wright Line* "prima facie case" cannot be established merely by creating an inference that CWI was motivated by anti-union animus; the General Counsel must prove by a preponderance of the evidence that a discriminatory motive was a substantial or motivating factor in [employee]'s discharge.
>
> The ALJ, however, apparently believed that if an inference of discriminatory intent could be drawn from any of the General Counsel's evidence, a prima facie case was made…[T]he ALJ's analysis shows that he failed to consider the explanation for the termination given by CWI. In determining whether the General Counsel has shown that a discriminatory motive was a substantial or motivating factor in [employee]'s discharge,

> the ALJ clearly should have considered the whole record… **In this case, however, the ALJ did not consider CWI's evidence until after he had found that a prima facie case had been established. Thus, the ALJ improperly concluded that the burden had shifted to CWI without even considering CWI's explanation for the termination**.

(*Id.* at 330-332 (citations omitted) (emphasis added)); see also *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1992) ("Though the language of the [NLRB]'s various pronouncements has created needless confusion, there appears to be a consistent rule in practice. The Board wants the ALJ to make an initial determination as to whether the General Counsel has proved that protected activity was part of the motivation of the employer's conduct. In making that determination, the ALJ may use all of the record evidence. This clearly includes whatever explanation the employer gave to the employees during the episode, and, [sic] it apparently also includes the explanation that the employer presented at the hearing."].)

In failing to grant review of the California Court of Appeal's summary denial of an extraordinary writ to review PERB's Decision, the Supreme Court of California let stand an interpretation of the *Wright Line* test that directly contradicts precedent of this Court and federal Courts of Appeals interpreting such precedent. CAVA submits

that this contradiction provides a compelling reason for this Court to grant the petition for writ of certiorari sought herein.

A. The Due Process Considerations Weigh in Favor of Review of the California Supreme Court's Decision to Let Stand PERB's Re-interpretation of the *Wright Line* Test

California Evidence Code section 500 (applicable to any PERB proceeding applying *Wright Line*) provides that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Since "suspiciously close timing" is circumstantial evidence of *causation* (specifically, whether the employer took adverse action because of employer's exercise of protected rights), the artificially limited timeline of events constructed by PERB (in which the only relevant facts are the date or dates on which the employee engaged in protected conduct and the date or dates of the alleged retaliatory act) converts the "suspiciously close timing" analysis into a meaningless exercise in circular reasoning that virtually guarantees a finding that there was indeed "suspiciously close timing." Specifically, if one *begins* the analysis of what caused a particular act (here, Preach's termination) by creating a timeline in which only one set of potential causative events (here, Preach's protected activity) is included, and all other potential causative events (here, KK's conversation with Andrew) are excluded, one is already

assuming, *a priori,* that one set of events (Preach's protected activity) is most likely to have been the cause of that event while simultaneously assuming that that all other events are less likely to have been the cause of that event. In short, in determining whether it was more likely than not that Preach's protected activity caused her termination, the Board first assumed the truth of that conclusion—i.e, that it was more likely than not that Preach's protected activity caused her termination. This is a textbook example of the logical fallacy of "begging the question" or circular reasoning, an impermissible method of legal reasoning that was clearly unlawful, given CTA's burden as petitioner under Evidence Code section 500. There is no provision under California law that states that PERB may permissibly make an *a priori* assumption –before reviewing the evidence-- that where an employee has engaged in protected activity, and that employee has been terminated, it is more likely than not that the employer who terminated such employee did so *because* of those activities.

Moreover, PERB's interpretation of *Wright Line* sets up a false dichotomy between, on one hand, the type of evidence that may be submitted to counter a charging party's argument that an employer acted with an unlawful motive *at all* and, on the other, the type of evidence that would tend to demonstrate that the employer, despite having a (partially) unlawful motive, would likely have terminated the

employee anyway. However, PERB did not cite (and CAVA is unaware of any) authority stating that if a piece of evidence tends to support a defendant's affirmative defense, that same piece of evidence therefore cannot be submitted to contradict evidence submitted in support of the necessary factual bases of the plaintiff's case in chief. These are different inquiries: (1) whether the employer terminated the employee, at least in part, due to the exercise of employee's protected rights and (2) whether the employer, which terminated the employee due in part to protected activity, would have terminated the employee anyway. It would be a strange and unjust outcome (and one clearly violative of due process) to forbid a defendant from presenting evidence tending to prove that it did not terminate the employee because of protected activity in the first place simply because that evidence might (later) also show that the defendant would have terminated the employee in any event. In practical effect, PERB is misapplying *Wright Line* to create an irrebuttable presumption of partial unlawful motive upon the showing of a one-sided, artificial timeline of "cherry-picked" dates.

For the foregoing reasons, the due process implications of the Board's Decision weigh in favor of this Court's review of the Supreme Court of California's failure to grant review of the California Court of Appeal's summary denial of an extraordinary writ to review PERB's re-interpretation of the burden-shifting rules of *Wright Line*.

X. CONCLUSION

For the foregoing reasons, CAVA respectfully requests that this Court grant the petition for writ of certiorari sought herein.

October 30, 2020

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