No. 12-16384

In the United States Court of Appeals for the Ninth Circuit

JAMES BRADY, et al.,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

DELOITTE & TOUCHE LLP,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANTS (UNDER SEAL)

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INTRODUCTION

This case concerns whether an employer who denies overtime and other benefits to an entire category of employees—and who has comprehensive uniform policies governing the job duties and responsibilities of those employees—can block the employees' ability to bring a class action under California wage law simply by contending that they are exempt from mandatory overtime—that is, by contending that they are wrong on the merits.

The court below decertified a class of Deloitte & Touche employees on the ground that this Court's decision in *Campbell v. PricewaterhouseCoopers, LLP*, mandates that result. 642 F.3d 820 (9th Cir. 2011). *Campbell* does no such thing. It held that a certified class of employees bringing similar claims against a different employer was not entitled to summary judgment on the merits. The decision, in other words, predicts how the California Supreme Court would interpret the State's substantive law. It does not mention class certification. And in fact, the California Supreme Court has emphasized that the State's substantive law would be undermined if "a certification proponent in an overtime class action [were required to] prove the entire class was nonexempt whenever a defendant raise[d] the affirmative defense of exemption." *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 207 (Cal. 2004).

The district court's overreaction to *Campbell* warrants reversal. The plaintiffs here have satisfied their burden under Rule 23 by showing that common questions

predominate over individual ones—including the legal questions whether the class members are exempt learned professionals and whether they regularly exercise discretion and independent judgment with respect to significant matters. That showing—not proof that the plaintiffs will prevail on the merits—is what Rule 23 requires.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction in this case under 28 U.S.C. § 1332(d)(2) because this is a class action consisting of at least 100 members, the matter in controversy exceeds $5 million (exclusive of interests and costs), and the plaintiffs and defendant are citizens of different States. ER25 (Complaint). The plaintiffs' petition for interlocutory review of the district court's March 27, 2012 decertification order was timely filed under Federal Rule of Appellate Procedure 5(a)(2) and Federal Rule of Civil Procedure 23(f) on April 10, 2012. This Court granted the petition on June 14, 2012, and has jurisdiction under Rule 23(f) and 28 U.S.C. § 1292(e).

STATEMENT OF THE ISSUES

Deloitte & Touche denies overtime and other benefits to an entire category of unlicensed California audit employees whose job duties and responsibilities are largely defined by comprehensive uniform policies. In *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820 (9th Cir. 2011), this Court held that a

certified class of employees bringing similar state-law overtime claims against a different employer was not entitled to summary judgment on the merits. The issues presented are:

1. Did the district court err in decertifying the class in this case based on *Campbell*?

2. Given Deloitte's comprehensive uniform policies governing both its hiring process and the job duties and responsibilities of its unlicensed audit employees, did the district court err in holding that none of the following were common predominant questions:

- Whether unlicensed audit employees are required to complete a prolonged course of specialized intellectual instruction and study before joining Deloitte;
- Whether unlicensed audit employees are expected to customarily and regularly exercise discretion and independent judgment with respect to matters of significance; and
- Whether unlicensed audit employees are primarily engaged in work that is directly related to the management policies or general business operations of Deloitte's clients?

STATEMENT OF THE FACTS AND OF THE CASE

The district court in this case certified a class of unlicensed California accounting employees who worked in Deloitte's audit line of service and were denied, among other things, overtime pay under California law. *See* Cal. Lab. Code § 510(a). Two years later, the court decertified the class in response to this Court's decision in *Campbell*, 642 F.3d 820. The plaintiffs successfully petitioned this Court to appeal the decertification order under Rule 23(f), arguing that the district court's response to *Campbell* was manifestly erroneous.

I. Statutory and Regulatory Background

A. California's Overtime Requirement

California requires employers generally to pay overtime to any employee who works more than eight hours a day or 40 hours a week. Cal. Lab. Code § 510(a). This requirement is broader than the one contained in the Fair Labor Standards Act (FLSA), *see* 29 U.S.C. § 207(a)(1)—the federal counterpart to the State's overtime laws—and has been described by the California Legislature as a "fundamental protection for working people." 1999 Cal. Stat. 134, § 2(g). For this reason, the California Supreme Court has instructed courts to construe the requirement "liberally," "with an eye to promoting such protection." *IWC v. Superior Court*, 613 P.2d 579, 585 (Cal. 1980).

California courts have emphasized the importance of the class-action device to this remedial scheme. The courts have explained that class actions are necessary to prevent "'random and fragmentary enforcement' of the employer's legal obligation to pay overtime," *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 745 (Cal. Ct. App. 2004) (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971)), under which "the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime," *Gentry v. Superior Court*, 165 P.3d 556, 567 (Cal. 2007). "[C]lass actions," the California Supreme Court has stressed, prevent this "failure of justice in [the State's] judicial system." *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 30 (Cal. 2000).

B. Exemptions from Mandatory Overtime

The California Labor Code delegates to the State's Industrial Welfare Commission (IWC) the authority to promulgate exemptions from mandatory overtime "for executive, administrative, and professional employees." Cal. Lab. Code § 515(a). The IWC may set its own standards for these exemptions "provided that the employee"—at the very minimum—"is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." *Id.* § 515(a). Further, California courts have made clear that

"exemptions from statutory mandatory overtime provisions are narrowly construed," *Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 8 (Cal. 1999), so that "their application is limited to those employees plainly and unmistakably within their terms." *Nordquist v. McGraw-Hill Broad. Co.*, 38 Cal. Rptr. 2d 221, 226 (Cal. Ct. App. 1995). And the burden of proving that an employee is plainly and unmistakably within an exemption's terms falls on the employer because "the assertion of an exemption from the overtime laws is considered to be an affirmative defense." *Ramirez*, 978 P.2d at 8.

The IWC exercises its statutory authority by issuing regulations known as "wage orders." At issue in this case is Wage Order No. 4-2001, which is codified at California Code of Regulations title 8, section 11040. That regulation defines the scope of the three exemptions listed in the California Labor Code, two of which are relevant here: the professional exemption and the administrative exemption.

The Professional Exemption. California's professional exemption is "narrower than that in the FLSA." *Nordquist*, 38 Cal. Rptr. 2d at 225. To designate an employee under this exemption, the employer must establish three elements. *First*, the employer must show either (1) that the employee "is licensed or certified by the State of California and is primarily engaged in the practice of" one of eight professions, including accounting; or (2) that the employee "is primarily engaged in an occupation commonly recognized as a learned or artistic profession." Cal. Code

Regs. tit. 8, § 11040(1)(A)(3)(a) & (b). A "learned" occupation is one that "requir[es] knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes." *Id.* § 11040(1)(A)(3)(b)(i). The work performed in such an occupation must also be "predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work)." *Id.* § 11040(1)(A)(3)(b)(iii).

Second, the employer must establish that the employee "customarily and regularly exercises discretion and independent judgment" with respect to significant matters in performing the work described in the first element. *Id.* § 11040(1)(A)(3)(c).

Third, the employer has to show that the employee meets the minimum-salary requirement. *Id.* § 11040(1)(A)(3)(d). Only if the employer proves that each of these three elements is satisfied may it classify an employee as exempt under the professional exemption.

The Administrative Exemption. The administrative exemption applies only if an employer can establish that the employee (1) has duties and responsibilities that are "directly related to management policies or general business operations" of either the employer or the employer's clients; (2)

"customarily and regularly exercises discretion and independent judgment"; (3) works "under only general supervision" while either executing "special assignments and tasks" or performing "along specialized or technical lines requiring special training, experience or knowledge"; (4) "is primarily engaged in duties" that meet the first three requirements; and (5) satisfies the minimum-salary requirement. *Id.* § 11040(1)(A)(2). As with the professional exemption, the failure to prove even one of these elements precludes application of the administrative exemption.

Deloitte asserts that all of its audit employees are administrative or professional employees, and it exempts them all from overtime compensation on those grounds.

C. Rules Governing the Practice of Public Accountancy

In addition to establishing these overtime rules, California regulates the practice of public accountancy within the State. The State requires any person engaged in this practice to have obtained a certified public accountant (CPA) license. Cal. Bus. & Prof. Code § 5050. A person without a CPA license is prohibited from doing any of the following activities:

- Holding oneself "out to the public in any manner as one skilled in the knowledge, science, and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation";

- Performing or offering to perform for compensation "professional services that involve or require an audit, examination, … or review of financial transactions and accounting records";
- Preparing or certifying audit reports for clients.

Id. § 5051(a), (c), & (d).

Although unlicensed employees may not perform any of these functions, they are permitted to assist CPAs in the practice of public accountancy, provided that "the employee or assistant works under the control and supervision of a certified public accountant." *Id.* § 5053. Federal law also mandates the supervision of unlicensed employees and authorizes the Public Company Accounting Oversight Board (PCAOB) to discipline audit firms that fail to exercise the requisite level of supervision. Sarbanes-Oxley Act, 15 U.S.C. § 7215(c)(6). The PCAOB has, for example, brought a disciplinary proceeding and imposed sanctions against an audit firm that had "failed to appropriately supervise the work of audit assistants" because the firm, among other things, allowed its audit assistants "to decide for themselves what audit procedures should be performed in an audit." *In the Matter of Chisholm*, PCAOB Release No. 105-2011-003, ¶¶ 4, 11, 54 (Apr. 8, 2011), *available at* http://pcaobus.org/Enforcement/Decisions/Documents/Chisholm.pdf.

In addition, because auditor independence can be compromised if the auditor is "acting as management … of the audit client," federal regulations

preclude accountants and unlicensed employees working under their control and supervision from performing "[m]anagement functions" for clients "at any point during the audit," including "performing any decision-making, supervisory, or ongoing monitoring function for the audit client." 17 C.F.R. § 210.2-01, Preliminary Note 2 & (c)(4)(vi).

II. Factual Background

Deloitte provides auditing services, known within the company as "Audit and Risk Enterprise Services" (AERS), to businesses in the United States. ER189 (Smith Dep.). The core of these services is the audit—a detailed review of a company's financial documents to ensure that the recorded information is accurate in all material respects. ER196. The personnel who perform this procedure are organized into a hierarchy comprising (in ascending order of seniority) staff, seniors, managers, senior managers, directors, and partners. Employees in the top four tiers—managers and up—are required to hold CPA licenses. ER192. Employees in the bottom two tiers—staff and seniors (or collectively, "audit employees")—are not.[1]

[1] The staff position consists of both first-year and second-year staff (sometimes called "audit assistants" and "audit senior assistants," respectively). ER236. Deloitte's job descriptions and training manuals do not distinguish between these positions, instead referring to them simply as "staff." ER313 (Audit Approach Manual) Similarly, the senior position includes both "audit in-charges" and "audit seniors." ER236. These positions have the same job expectations and

This case concerns only those bottom-tier employees, all of whom Deloitte classifies as exempt from mandatory overtime compensation. Indeed, it is Deloitte's policy that *none* of its audit employees—not even the first-day worker with no background in auditing—primarily takes orders from supervisors; according to Deloitte, they *all* regularly exercise discretion and independent judgment with respect to significant matters and meet the exemptions' other requirements.

A. Deloitte's Hiring, Training, and Promotion Processes

Deloitte typically hires new staff directly out of college. ER195 (Smith Dep.) (describing university-recruiting programs as the "primary feeder" and "primary source of new hires"). Staff are required only to have taken the necessary courses to be eligible to sit for the CPA exam, which in California means that they have a bachelor's degree in any subject and have accumulated either (a) 10 units in accounting classes and 35 units in business-related classes, or (b) 24 units in accounting classes and 24 units in business-related classes. Deloitte imposes no other academic requirements on its new hires. Thus, audit employees need not have majored in accounting or have taken even a single course in auditing. Nor are they required to have any "real world accounting experience" at the time they are hired. ER193-94 (Smith Dep.); ER458 (Baker Decl.); ER584 (Cavanagh Decl.).

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perform the same functions. ER312 (Audit Approach Manual); ER578 (Hernstad Decl.).

In part because of this lack of experience, Deloitte uses what "[Managing Director of Human Resources Jim] Wall calls an apprentice model." *Talent Management: Accounting for Good People*, The Economist, July 19, 2007, *available at* http://www.economist.com/node/9507322/. Deloitte requires new hires to attend its "AERS New Hire Training" program, a weeklong course given to new Deloitte employees nationwide. ER577 (Hernstad Decl.); ER592 (Brady Decl.). The course is standardized to provide consistency across offices and serves primarily to introduce new employees to the computer software and audit methodology that will direct what they do as audit employees. ER340 (Seminar Overview); ER577 (Hernstad Decl.); ER599 (Chiu Decl.).

After this initial training, audit employees are required to attend additional training sessions annually. These sessions are "geared more towards the level of experience that they have," with experience corresponding to the number of "busy seasons" the employee has completed. ER205 (Smith Dep.). A "busy season" refers to the period between early January and late March or early April. ER522 (Kuo Decl.); ER600 (Chiu Decl.). During this period, all audit employees are expected to work a minimum of 55 hours per week—work for which they do not receive overtime pay. ER239. Staff who have completed two busy seasons are generally promoted, as a matter of course, to seniors. ER578 (Hernstad Decl.). They remain in that position until they become licensed CPAs or leave the company.

B. Deloitte's Audit Process

Deloitte refers to each audit that it performs as an "engagement," and to those who perform the audit as an "engagement team." ER289 (Audit Approach Manual); ER595 (Brady Decl.). Each engagement team is led by a partner and includes both licensed and unlicensed employees.

All engagements are governed by Deloitte's standardized audit approach, which "[c]learly set[s] out the manner in which Audit Engagements are [to be] performed," thereby ensuring that "all audits"—regardless of the composition of the engagement team or the industry in which the client operates—are completed "in a consistent manner on a worldwide basis." ER290 (Audit Approach Manual). This prescribed approach allows Deloitte to "[t]ransfer professional staff between offices … with minimal retraining" and to "[h]ave a common basis for sharing technology and training materials." *Id.*

Deloitte's audit approach consists of a comprehensive methodology, common computer software, and common documentation. ER342 (Phases of the Audit Approach). The computer software, which is called Audit Systems 2 (AS/2), "supports all phases of the audit process" and includes "audit packs" that are organized by industry, "so there is no guesswork in selecting them." ER295 (Audit Approach Manual); ER124 (Cavanagh Decl.). These packs contain standardized

forms, checklists, and worksheets for the employees to fill out on the computer screen. ER124 (Cavanagh Decl.); ER203-04 (Smith Dep.); ER383-84.

AS/2 is used to generate the audit plan that will govern the engagement, as well as what are known as Model Audit Programs, or MAPs. A MAP functions like it sounds—as a comprehensive road map of detailed instructions for completing each step of the audit. ER203-04 (Smith Dep.); ER579-81 (Hernstad Decl.); ER594-96 (Brady Decl.). MAPs are created for each engagement based on the answers to a series of "yes, no type" questions. ER197-98 (Smith Dep.). Audit employees are not permitted to deviate in any way from the precise course charted in the MAP without approval from a licensed accountant. ER581 (Hernstad Decl.); ER596 (Brady Decl.). They must follow each of its preprogrammed steps. ER124 (Cavanagh Decl.) (audit employees do "not have the authority to change or ignore or otherwise not follow the audit Methodology"). Even where a MAP is not used for a particular procedure, the audit employee's work is controlled by "checklists, instructions from management, and reference to [the prior] year's work." ER128 (Cavanagh Decl.).

Each engagement consists of five phases: (1) preliminary engagement activities, (2) audit planning, (3) performing the audit plan (or audit testing), (4) concluding and reporting, and (5) post-engagement activities. ER342-75 (Phases of

the Audit Approach). Audit employees participate primarily in the middle three phases—planning, testing, and reporting.

Planning Phase. The planning phase is when the MAP and other instructions for carrying the audit plan are created. "Planning is generally not a difficult process, but rather is methodical," requiring the employees working on the process "to answer a number of yes/no type questions"—for example, does the client own real estate?—on forms that "include a number of checklists" and are "detailed, precise, and dictate what and how steps must be completed." ER167 (Peralta Decl.); *see also* ER158 (Drabble Decl.). As this information is entered into the computer, the specific steps comprising the audit plan and MAP "are automatically created or eliminated by the software," much like a decision tree will create or eliminate paths based on the answers provided. ER158 (Drabble Decl.); ER126 (Cavanagh Decl.). Further, because "most clients are repeat clients, the planning process can often be substantially completed by following the prior year's steps as an example and inserting updated data." ER158 (Drabble Decl.); *see also* ER126 (Cavanagh Decl.).

The audit plan and MAPs created during the planning phase "set[] forth the course and scope of the audit," and "include all thresholds and baselines," such as what constitutes a material misstatement (any deviation above $100, for instance). ER159 (Drabble Decl.); ER127 (Cavanagh Decl.). Partners and managers are

responsible for the activities in this phase and make all "key decisions considered necessary to plan the audit," but seniors assist in filling out the checklists and answering the yes-or-no questions. ER119 (Strategic Audit Planning); ER158 (Drabble Decl.); ER167 (Peralta Decl.); ER126 (Cavanagh Decl.). Like all audit employees, their work is closely supervised and reviewed for accuracy.

Testing Phase. The next phase (testing) is when the specific instructions contained in the audit plan and MAP—or those directly issued by a partner or manager—are carried out and the audit is actually performed. The activities completed during testing are "directed and controlled by … the applicable MAPs and/or other AS/2 documents," including worksheets from prior years' audits. ER167 (Peralta Decl.); *see also* ER159 (Drabble Decl.).

Because of the routinized nature of this work, audit employees perform most of the activities in this phase. ER362 (Phases of the Audit Approach). Indeed, staff "spend the overwhelming majority of their time"—estimated at "80 to 85 percent" by one senior manager—working on the testing phase of the audit. ER269 (Young Dep.); ER579 (Hernstad Decl.); ER586 (Cavanagh Decl.). Seniors, too, "spend the majority of their time in this phase," although they also participate in the planning and reporting phases. ER586 (Cavanagh Decl.); ER594 (Brady Decl.); *see also* ER159 (Drabble Decl.); ER368 (Phases of the Audit Approach). Whether staff or senior, the "primary function" of an audit employee "is to perform the audit by

verifying statements and inputting information into AS/2." ER124 (Cavanagh Decl.).

The work performed during the testing phase falls into one of three categories: controls testing, substantive testing, and analytics. Controls testing involves checking the internal controls that the company has in place for ensuring that its financial statements are accurate. For example, if the company requires that every check that it issues above $5,000 contain at least two signatures, the MAP might direct audit employees to review a certain number of checks written over that amount to confirm that the rule is being followed. ER128-29 (Cavanagh Decl.). This exercise, called "benchmarking," might sometimes occur outside of a MAP, but in that case the instructions would instead be provided in another AS/2 document or by the engagement's management. *Id.*

Substantive testing verifies the accuracy of the account information and balances provided in the company's financial statements. As with controls testing, this work entails the comparison of one piece of information with another—here, the amounts listed in the financial statements with the amounts contained in the underlying documents—to see if they match. This procedure is sometimes referred to as "ticking and tying." ER595 (Brady Decl.); ER169 (Peralta Decl.).

A common example of ticking and tying is reviewing the company's cash accounts. In this scenario, the MAP or audit plan will provide directives for how to

confirm that the company in fact had the amount of cash on hand that it listed on its balance sheet. ER595 (Brady Decl.); ER552-53 (Steinheimer Decl.); ER399 (Using the Model Audit Program) ("For example, if you are working on the cash section, find the relevant cash amounts on the balance sheet and agree it to the amount on the leadsheet."). Or, to take another example, if "a legal expense [were] recorded in the [company's] trial balance," the MAP would instruct the employee how to "verify the accuracy of the amount and the validity of the amount and the completeness of the amount," usually by simply matching the number recorded in the balance line to the number contained in the relevant third-party invoice. ER263 (Young Dep.).

Another example involves "agree[ing] the client's sub-ledger to its general ledger." ER129 (Cavanagh Decl.). Because a "client's general ledger is a compilation of the client's sub-ledgers," this task entails "making sure that they actually match." *Id.* Thus, "if the accounts receivable sub-ledger has a balancer of $100K made of three receivables of $40K, $40K, and $20K, the general ledger should have this same information." *Id.*

The audit plan or MAP tells the employee which accounts to test and "provides acceptable ways to perform this task." *Id.* This might mean giving the employee a choice among several "pre-established acceptable tests" because any of

them "lead to the same objective being achieved": verification of the accuracy of the reported information. ER128 (Cavanagh Decl.); ER160 (Drabble Decl.).

If an audit employee discovers "any material errors" at any point in this process—using the numerical definition of materiality set by the partner in advance of the testing phase—the employee is required, without exception, to report that error up the chain of command. ER168 (Peralta Decl.); ER124, 127 (Cavanagh Decl.). In fact, audit employees are required to bring *any* potentially "significant matter" discovered during the audit to the attention of the engagement's management so that a licensed accountant may assess the issue's significance and decide how to proceed. ER282 (Young Dep.) ("Any significant finding [an audit employee] would have observed or witnessed during their testing, that [in] their judgment would be a significant matter would be communicated to engagement management."); ER303 (Audit Approach Manual).

The other type of testing—analytics—is a comparison of the company's current-year financial statement with the company's statements from past years to see whether there have been any significant changes necessitating further inquiry. ER586-87 (Cavanagh Decl.). The determination of what constitutes a significant change is made by a licensed CPA, as is the determination of what to do in the event that such a change exists. ER126 (Cavanagh Decl.).

Reporting Phase. The final phase of the engagement that audit employees participate in is the reporting phase, which comes after the audit has been completed. The principal activity conducted during this phase consists of preparing a report for the client that summarizes the audit's findings. Although seniors play a role in the preparation of this report, their work is closely supervised by a licensed accountant, and the final report is signed by the engagement partner. ER581 (Hernstad Decl.); ER596 (Brady Decl.).

C. Deloitte's Review Process

In addition to providing its audit employees with specific instructions about how to carry out their duties, Deloitte has adopted an extensive audit-review process consisting of at least three levels of review. Opp. to Certification 18, n.12. This extensive review process is in part dictated by the state laws and professional standards governing public accounting firms, which require that audit employees work under the control and supervision of licensed CPAs. Cal. Bus. & Prof. Code § 5053. As PCAOB's Acting Chairman has explained:

> Public company auditing, especially in the large firm context, is heavily dependent on proper supervision. Engagement teams are not sent out on their own to conduct audits as they see fit. On the contrary, firms have detailed audit manuals and elaborate systems of quality control, designed to ensure that engagements are conducted in accordance with firm practice and with the applicable auditing standards.

Daniel L. Goelzer, Acting Chairman, *Application of the "Failure to Supervise" Provision of the Sarbanes-Oxley Act of 2002 and Solicitation of Comment on Rulemaking Concepts*, Address at PCAOB Open Board Meeting (Aug. 5, 2010), *available at* http://pcaobus.org/News/Speech/Pages/08052010_GoelzerFailureToSupervise.aspx.

Deloitte is no exception. Its corporate policy mandates that all audits be completed in accordance with all applicable laws and professional standards. ER402-32. Deloitte requires "[a]ny audit procedure" conducted by an audit employee to be checked and rechecked during the audit by supervisors. ER262 (Young Dep.). This "detailed review is extremely thorough and ensures that all steps in the audit are strictly done in compliance with Deloitte Methodology. If any step is not done pursuant to the Deloitte Methodology," then it must be redone. ER167 (Peralta Decl.); *see also* Opp. to Certification 18, n.12. Comprehensive review notes spell out how the steps must be redone. ER133 (Cavanagh Decl.).

Throughout the audit process, staff are expected to "raise questions with more experienced team members and to communicate constantly." ER313 (Audit Approach Manual). These questions are often directed first to seniors, who assist the staff in working through their assigned sections of the audit. ER581 (Hernstad Decl.). Seniors review the staff's work product—that is, their completed checklists, standardized forms, and other documents—by going back through the same

process to make sure that the staff have adhered to every step of the MAP and audit plan, as well as any instructions from superiors. And managers, in turn, review the work product of seniors. ER261-62 (Young Dep.).

III. Proceedings and Decisions Below

The named plaintiffs in this case—James Brady, Sarah Cavanagh, and Iva Chiu—filed a class action against Deloitte in January 2008, claiming that they had been misclassified as exempt employees while working as audit employees in one of Deloitte's California offices. ER25 (Complaint). Whether the plaintiffs are entitled to overtime pay (and thus will prevail on their claims) depends on whether Deloitte can prove that their positions qualify for either the professional or administrative exemption.[2]

A. The Certification Order

The plaintiffs moved to certify a class of all Deloitte audit employees who were denied overtime pay and worked in California in the four years prior to the complaint's filing date. Federal Rule of Civil Procedure 23 entitles a plaintiff to bring a class action if all of subsection (a)'s requirements and at least one of subsection (b)'s requirements are met. The plaintiffs here sought certification under

[2] Brady was employed as staff in the San Diego office from August 2003 to April 2005. ER592 (Brady Decl.). Cavanagh was employed as staff in the Los Angeles office in September 2004 and was promoted to senior in late summer 2006. ER584 (Cavanagh Decl.). Chiu was employed as staff in the Los Angeles office in July 2003 and promoted to senior in July 2005. ER599 (Chiu Decl.). None of the three still worked for Deloitte when the lawsuit was filed.

(b)(3), which provides for certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[3]

In opposing certification, Deloitte argued that the plaintiffs could not "establish that common issues predominate because determining the applicability of the professional and administrative exemptions will require an inquiry into the individual experiences of the proposed class members." ER22 (Certification Order). Deloitte attempted to highlight differences among these experiences by producing declarations from audit employees stating that they had not simply "consulted with their supervisor whenever a discrepancy arose" but had "challenged audit methodology and/or participate[d] in the preparation of an audit plan." ER15-16. Deloitte also provided declarations from employees who claimed to have "performed work outside of their level, completing tasks that would normally be reserved for a person in a higher position"—for example, a staff member who had assumed the duties of a senior for an engagement. ER16. "[B]ecause each proposed class member had a different experience during the course of their

[3] Rule 23(a)'s requirements are that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."

employment," Deloitte contended, it would "be impossible for the Court to determine the applicability of the exemptions on a class-wide basis." ER22. Deloitte did not explain how *it* had been able to determine the applicability of the exemptions across the class when it classified all audit employees, in one stroke, as exempt workers.

The district court rejected Deloitte's attempt to have it both ways. The court concluded that common questions of law and fact predominated over whatever individual differences might exist among class members. ER23. "Most of defendant's evidence regarding class members' job duties and purported levels of discretion," the court explained, "goes to the merits of plaintiffs' claims, rather than whether certification is proper." *Id.* The court noted that these are distinct standards: "In determining the propriety of a class action, the question is not whether the plaintiffs … will prevail on the merits, but, rather, whether the requirements of Rule 23 are met." ER16. And as to the latter question, the court determined that the common inquiry whether the plaintiffs had "exercised discretion and independent judgment with respect to matters of significance"—a necessary component of both the professional and administrative exemptions—was capable of classwide resolution. ER23.

The district court also accepted the plaintiffs' additional argument for why Rule 23(b)(3)'s predominance requirement was met. The plaintiffs maintained that

the applicability of the professional exemption could be decided across the class because unlicensed accountancy could not qualify as a "learned profession" under California law and was therefore categorically ineligible for the exemption. In addition, the plaintiffs had argued that the applicability of the administrative exemption could be decided on a classwide basis because the question whether audit employees worked "under only general supervision" could be resolved by reference to California's public-accountancy rules, professional standards, and Deloitte's corporate policies—all of which applied equally to every audit employee working in Deloitte's California offices. The district court determined that these questions too were common to the class and predominated over individual ones. ER20-23.

The court did not address the other common predominant questions identified by the plaintiffs, including whether their occupation required a prolonged course of specialized academic instruction (as opposed to relying on training), and whether they were primarily engaged in work that directly related to the management policies of Deloitte's clients.

B. *Campbell v. PricewaterhouseCoopers, LLP*

One year later, after the plaintiffs had moved for partial summary judgment on the merits, this Court decided *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820 (9th Cir. 2011). The district court in *Campbell* had certified a class of unlicensed

employees at another "big four" accounting firm (PricewaterhouseCoopers) because the employees' job duties and responsibilities there were "sufficiently similar to warrant class treatment," even if there was "some evidence of variation" regarding those duties and responsibilities. *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 605 (E.D. Cal. 2008). This Court denied a Rule 23(f) petition to appeal the certification decision. The district court later granted summary judgment to the plaintiffs, concluding that no unlicensed accounting employee may qualify for the professional exemption as a matter of California law and that the class members were not exempt under the administrative exemption because their work was "necessarily subject to more than general supervision" by virtue of the laws and professional standards governing audit employees. *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp. 2d 1163, 1171-84 (E.D. Cal. 2009).

This Court reversed the district court's grant of summary judgment. With respect to the professional exemption, the Court's holding was twofold. The Court first held that audit employees "are not categorically ineligible for the professional exemption as a matter of law." *Campbell*, 642 F.3d at 830. Whether they qualify for the professional exemption depends on whether they fit within the "learned profession" prong of the exemption—that is, on whether they are "primarily engaged in an occupation commonly recognized as a learned or artistic profession" and customarily and regularly exercise discretion and independent judgment. *Id.* at

826, 830. The Court determined that the "crucial touchstone" for this question of California law "is the employee's actual job duties and responsibilities." *Id.* at 830.

Turning to that inquiry, the Court held that there was "voluminous conflicting evidence" concerning what unlicensed accounting employees "actually do during audit engagements" and whether their employer could "reasonably expect" them "to perform anything more than menial, routinized work." *Id.* This evidence—which included numerous depositions from class members and other employees, company "manuals explaining job roles and procedures for audit engagements," and "detailed training documents"—could be evaluated only by a factfinder. *Id.*

With respect to the administrative exemption, the Court held that neither the statutory nor regulatory framework precludes application of the exemption as a matter of California law. The Court acknowledged that audit employees must be supervised by licensed CPAs, but the extent of that supervision—*i.e.*, whether it is "only general supervision" or something greater—is ambiguous. "Without better guidance on the legal definition of 'general supervision,'" the Court concluded that "this highly contested fact issue [could] be resolved only after trial." *Id.* at 832. Further, "the numerous factual disputes" concerning what unlicensed employees "actually do (and what [their employer] reasonably expects them to do) during audit engagements" precluded summary judgment. *Id.* The Court nowhere

suggested, much less held, that the case should not go forward on a classwide basis, nor did it indicate that the jury could not resolve the merits issues for the class as a whole.[4]

C. The Decertification Order

With the plaintiffs' motion for summary judgment still pending in the district court, Deloitte moved to decertify the class based on *Campbell*, as well as on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The district court granted the motion, holding that "common issues do not predominate because under the Wage Order and *Campbell*, exempt status turns on what employees actually do"—a question that the court reasoned must be answered individually. ER10 (Decertification Order). The court acknowledged that some questions, such as "whether Deloitte's hiring requirements satisfy the specialized instruction prong of the learned professions test" (which they must if the professional exemption is to apply to audit employees), could be resolved on a classwide basis. ER9-10. But in the court's view, only one question mattered: What

[4] Indeed, the district court in *Campbell* recently denied a motion to decertify the class in that case based on this Court's reversal of summary judgment. *Campbell v. PricewaterhouseCoopers LLP*, No. S-06-2376, 2012 WL 5989377 (E.D. Cal. Nov. 29, 2012). The court explained that "the Ninth Circuit decision in *Campbell* did not address class certification. Rather, it was a decision that: (1) on the law, plaintiffs were not categorically excluded from the 'learned profession' exemption solely by virtue of their lack of a professional license; and (2) material issues existed with respect to the 'learned profession' exemption which precluded a summary adjudication on the merits." *Id.* at *12.

did the employees actually do? The court did not discuss whether the realistic job requirements for Deloitte's audit employees, which are critical to exemption status under California law, *see Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 13 (Cal. 1999), were susceptible to common proof.

In response to the plaintiffs' argument that "Deloitte's audit methodology and review process preclude[d] class members from exercising discretion and independent judgment"—an issue that the district court had previously held was suitable for classwide resolution—the court concluded that "a review of that methodology …, as well as the class members' declarations discussing their use of MAPs, shows that the methodology does not preclude the exercise of discretion and independent judgment." ER11 (Decertification Order). The court reached this conclusion because "a number of class member[s] describe, with specificity, using MAPs and exercising discretion and independent judgment because MAPs can contain open-ended questions and steps." *Id.* The court did not elaborate on this rationale or address whether any audit employees were *primarily engaged* in exercising discretion and independent judgment with respect to *significant matters*. Nor did the court explain why it answered a question that this Court in *Campbell* held must go to the jury.

The plaintiffs petitioned this Court to appeal the decertification order under Rule 23(f), arguing that the district court's reaction to *Campbell* to decertify the class

in this case "conflat[ed] the distinction between class certification and the ultimate burden of proof" and was thus manifestly erroneous. Rule 23(f) Pet. 2. The Court granted the petition on June 14, 2012. ER1 (Order).

SUMMARY OF THE ARGUMENT

In decertifying the class, the district court relied on *Campbell*—a merits decision predicting how the California Supreme Court would decide an issue of California substantive law—to reach an outcome that the California Supreme Court has expressly rejected. The decertification order should be reversed.

I. The district court erred in applying *Campbell* to decertify the class. *Campbell* concerned whether a *certified* class of unlicensed audit employees was entitled to summary judgment on the merits of their overtime claims. That decision did not so much as mention (let alone apply) the standards for class certification, and it provides no authority for decertifying the class here. If anything, *Campbell* reaffirms the district court's earlier recognition that the "evidence regarding class members' job duties and purported levels of discretion goes to the merits of plaintiffs' claims, rather than whether certification is proper." ER23.

The district court's reliance on *Campbell* to decertify the class conflates these two separate inquiries. By allowing Deloitte to defeat class certification simply by producing declarations from class members emphasizing variations in their work—even from members with the same job titles and job descriptions, who were subject

to the same uniform policies and procedures—the court essentially imposed a requirement "that a certification proponent in an overtime class action prove the entire class was nonexempt whenever a defendant raises the affirmative defense of exemption." *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d 194, 207 (Cal. 2004).

The California Supreme Court has expressly rejected such a requirement. This Court should do so as well. Affirming the decision below would effectively eliminate class actions for a broad swath of claims arising under California's overtime laws—an outcome that would thwart the policies underlying those laws and "shield employers" from liability. *Id.*

Affirming the decision below would also create an unworkable regime in which, to comply with state and federal wage laws, employers would be required to make a wide variety of exemption determinations on a week-by-week, employee-by-employee basis, carefully monitoring what each employee actually does without regard to job titles, uniform corporate policies, or realistic job requirements. California law does not require that result. Instead, employers may rely on their own uniform, realistic expectations in determining the exemption status of a group of employees. And those same uniform, realistic expectations must be considered in determining whether class certification is warranted.

II. Rule 23 does not require a class proponent to prove that a class action is guaranteed to generate common answers apt to drive the resolution of the litigation,

only that it has the "capacity" to do so. *Dukes*, 131 S. Ct. at 2551. The plaintiffs in this case have met that requirement. Deloitte itself treats all of its audit employees the same for overtime purposes. And the company heavily regulates their job duties and responsibilities through standardized policies, procedures, hierarchies, and training programs. Those policies and "centralized rules … suggest a uniformity among employees that is susceptible to common proof." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958-59 (9th Cir. 2009).

In ignoring these comprehensive uniform policies, the district court improperly rejected at least three common predominant questions: (1) whether Deloitte's audit employees are engaged in an occupation commonly recognized as a learned profession, (2) whether they customarily and regularly exercise discretion and independent judgment with respect to significant matters, and (3) whether they are primarily engaged in work that is directly related to the management policies or general business operations of Deloitte's clients.

A. With respect to the first question, the district court acknowledged that "whether Deloitte's hiring requirements satisfy the specialized instruction prong of the learned professions test" is a question that "can be decided on a class-wide basis." ER9-10. But the court concluded that this question does not predominate "because under the Wage Order and *Campbell*, exempt status turns on what employees actually do." ER10. That is wrong as a matter of California law.

The specialized-instruction prong must be met to exempt an unlicensed employee under the professional exemption, regardless of the work that the employee actually performs. Thus, whether Deloitte's hiring requirements for audit employees satisfy the specialized-instruction prong is not only a common question, as the district court recognized, but a predominant one. Its answer has the capacity to decide the applicability of the professional exemption for every class member without having to consider the particulars of their day-to-day work.

B. With respect to the second question, the district court reasoned that Deloitte's standardized audit methodology and extensive review process do "not preclude the exercise of discretion and independent judgment" because some class members discussed in declarations how "MAPs can contain open-ended questions and steps" and thus "exercis[ed] discretion and independent judgment." ER11. The court determined that this question was not common to the class.

That reasoning is flawed for two reasons. First, by determining that some audit employees exercised discretion and independent judgment in using MAPs, the district court answered a question that this Court in *Campbell* held is for the jury. Second, the district court did not even fully answer that question. The relevant question under California law is not simply whether the audit employees actually exercised discretion and independent judgment; it is whether they were *realistically expected* to *regularly* and *customarily* exercise discretion and independent judgment

with respect to *significant matters*. That question, which the district court did not address, has the capacity to generate a common answer across the class.

C. Finally, with respect to the third question, the district court held that "whether work qualifies as 'administrative' depends on the particular facts of the case." ER11. But the question for class certification is whether those facts are susceptible to common proof. They are here. Whether Deloitte's comprehensive uniform corporate policies prevent its audit employees from primarily engaging in giving managerial advice to clients is one that can be answered in the same way for all class members.

STANDARD OF REVIEW

This court "review[s] a district court's class-certification decision for an abuse of discretion." *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 946 (9th Cir. 2011). A district court necessarily abuses its discretion if its decision is "premised on a legal error." *Id.* (internal quotation marks omitted); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[W]e accord the decisions of district courts no deference when reviewing their determinations of questions of law."). A district court also abuses its discretion if it relies on an improper factor, omits a substantial factor, or commits a "clear error of judgment in weighing the correct mix of factors." *In re Wells Fargo*, 571 F.3d at 957.

ARGUMENT

The district court in this case decertified the class solely because of this Court's decision in *Campbell*. But *Campbell* neither discussed nor applied Rule 23's class-certification requirements. Instead, that case considered a very different issue: whether a certified class of unlicensed accounting employees was entitled to summary judgment on their overtime claims under California law. This Court's answer to that question—that summary judgment was improper because the applicability of the exemptions turned on contested factual issues in that case—is no ground to decertify the class here. Rule 23 does not require the plaintiffs to prove at the certification stage that *every* audit employee was *in fact* misclassified as exempt from mandatory overtime; it requires only that a common question predominate. As in *Campbell*, that standard has been met here, and the district court's conclusion to the contrary is reversible error.

I. The Decision Below Improperly Conflates Class Certification with the Merits and In Doing So Undermines Substantive State Law.

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (internal quotation marks omitted). The principal error in the decision below is that it effectively does away

with this critical distinction. As the district court itself recognized earlier in the case, "[m]ost of [Deloitte's] evidence regarding class members' job duties and purported levels of discretion"—submitted in the form of employee declarations—"goes to the merits of plaintiffs' claims, rather than whether certification is proper." ER23 (Certification Order). That was a correct statement of law when the class was certified, and it remains correct today. No decision by this Court, nor any by the California Supreme Court, has held otherwise.[5]

Indeed, the district court in *Campbell* recently reaffirmed its class-certification decision after the defendant moved to decertify the class following this Court's decision on summary judgment. *See Campbell v. PricewaterhouseCoopers LLP*, No. S-06-2376, 2012 WL 5989377 (E.D. Cal. Nov. 29, 2012). The court's reasoning was simple: "the Ninth Circuit decision in *Campbell* did not address class certification," "does not undermine this court's language relating to class certification," and neither "says [n]or implies that an examination of the individual work of every

[5] Although the class-certification inquiry will often "entail some overlap with the merits," *Dukes*, 131 S. Ct. at 2551, the district court "may not go so far as to judge the validity of [the underlying] claims," *United Steel Workers*, 593 F.3d at 808 (ellipsis and internal quotation marks omitted); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) (Rule 23 does not require proof that the proponents of class certification will "actually prevail on the merits of their claims"); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 417 (6th Cir. 2012) ("Whether the class members will ultimately be successful in their claims is not a proper basis for reviewing a certification of a class action." (brackets and internal quotation marks omitted)); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) ("[T]he court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.").

single Associate is a 'threshold' requirement for certification of the class." *Id.* at *7, *12.

Yet the district court in this case determined that *Campbell* requires decertification here. The court concluded that "common issues do not predominate because under the Wage Order and *Campbell*, exempt status turns on what employees actually do," without regard to uniform company policies or the realistic requirements for the job. ER10 (Decertification Order). And because declarations submitted by the parties in this case contain varying accounts of what audit employees actually do, the court held that the exemption determinations must be made individually. *Id.*

The consequences of that flawed holding are profound. If affirmed by this Court, the decision below would allow defendants in overtime class actions brought under California law to defeat certification simply by producing declarations from a few class members purporting to highlight variations in their work experiences, just as Deloitte did here. And because some variation in what employees actually do (or in how they characterize what they do) is inevitable in every case—even among employees with the same job titles and responsibilities, working under the same policies and procedures—employees seeking certification would have to "prove [that] the entire class was nonexempt whenever a defendant raises the affirmative defense of exemption." *Sav-On Drug Stores, Inc. v. Superior Court*, 96 P.3d

194, 207 (Cal. 2004). That requirement would impose an impossible burden on class-certification proponents in overtime cases and would run afoul of this Court's holding that the existence of an affirmative defense does not "compel a finding that individual issues predominate over common ones." *Williams v. Sinclair*, 529 F.2d 1383,1388 (9th Cir. 1975). Affirming the decision below would effectively "foreclose use of the class action device for a broad subset of claims, a rule inconsistent with the efficiency aims of rule 23." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004) (reversing the denial of class certification and holding that the existence of an affirmative defense did not defeat predominance).

For these reasons, the California Supreme Court has expressly rejected an interpretation of California law that would permit such an outcome. That Court in *Sav-On Drug Stores, Inc. v. Superior Court* considered essentially the same argument that Deloitte made to the district court below: that an employee's exemption status depends solely on how the "employee actually spends his or her time," which is inherently an individualized inquiry that precludes class certification whenever the defendant can show that some class members, unlike others, might spend the majority of their time doing exempt work. 96 P.3d at 204-207.[6] The defendant in

[6] *See also id.* at 198 & 200 ("In opposing certification, defendant argued that whether any individual member of the class is exempt or nonexempt from the overtime requirements depends on which tasks that person actually performed" and "requires making individual computations of how much time each class member actually spent working on specific tasks," and that those tasks "varied

that case, like Deloitte here, argued that the "plaintiffs' evidence of policy uniformity and operational standardization is irrelevant and cannot amount to substantial evidence that common issues of law and fact will predominate in the action." *Id.* at 200.

The California Supreme Court rejected those arguments for two reasons. First, it "decline[d] the invitation" to interpret the State's substantive law as "creat[ing] or imply[ing] a requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action." *Id.* at 207. Such an interpretation of state law would force "a certification proponent in an overtime class action [to] prove the entire class was nonexempt whenever a defendant raises the affirmative defense of exemption." *Id.* That would "reverse the burden" demanded by California law (that the employer show that its employees are exempt from the statutory entitlement to overtime pay), impose a summary judgment standard at the class-certification stage, and thus "shield employers" from liability under California law. *Id.*[7]

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significantly from store to store and individual to individual, based on multiple factors").

[7] *See also Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 490 (E.D. Cal. 2006) ("Under California law, the employer bears the burden of showing that an employee is exempt from overtime laws. Requiring a plaintiff to demonstrate that class members are not exempt would effectively reverse that burden." (citing *Ramirez*, 978 P.2d 2)) (certifying class under Rule 23).

Second, and equally important, *Sav-On Drug Stores* reaffirmed that an employee's exemption status under California law does not turn exclusively on what the employee actually does, but also on "the employer's realistic expectations" and "the actual overall requirements of the job"—determinations that "are likely to prove susceptible to common proof." *Id.* at 206. Were these latter considerations irrelevant (as the decision below considered them to be), employees could become entitled to overtime pay by failing to live up to their employer's reasonable expectations and the actual responsibilities of their job. And employers would be obligated constantly to reassess their exemption determinations with respect to a wide swath of unlicensed employees based on what each employee actually does. California law requires nothing of the sort. Rather, it permits employers to do exactly what Deloitte did here: adopt a uniform classification policy for a group of employees based on the employer's own realistic expectations concerning those employees.

In short, the district court erroneously relied on a federal decision making a prediction about California's *substantive* labor laws to reach an outcome that the California Supreme Court has rejected as undermining those very laws. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), of course, federal courts sitting in diversity must "apply state substantive law and federal procedural law," *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). In doing so, the U.S. Supreme Court has

emphasized, diversity courts should interpret federal procedural law "with sensitivity to important state interests and regulatory policies," *Gasperini v. Ctr. For Humanities*, 518 U.S. 415, 427 n.7 (1996), and consider whether an interpretation of federal procedural law will cause "the character and result of the federal litigation [to] stray from the course it would follow in state courts." *Hanna*, 380 U.S. at 473. The district court here got things doubly wrong. It was wrong to conflate class certification and the merits, and it was wrong to do so in a way that unnecessarily undermines state substantive law.

Because Rule 23 does not authorize district courts to transform the class-certification inquiry into a referendum on the merits—particularly when doing so would undermine substantive state law—the district court's decertification order should be reversed.

II. Because Comprehensive Uniform Corporate Policies Govern the Employees' Job Duties and Responsibilities, Common Questions Predominate Over Individual Issues.

"Rule 23 permits *all* class actions that meet its requirements." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010) (emphasis added). This means that "the suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation)," and "fit into one of the three categories described in subdivision (b)." *Id.* at 1437. If the plaintiffs can show that these two conditions are met, then they are entitled to bring

their claims as a class action. *Id.*; *Ellis*, 657 F.3d at 979-80. The plaintiffs have cleared that bar here.

The Supreme Court has explained that "[w]hat matters to class certification" is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551 (emphasis removed and internal quotation marks omitted). That capacity exists in this case because Deloitte itself treats all of its audit employees the same for overtime purposes and has in place "comprehensive uniform policies governing [their] job duties and responsibilities." *In re Wells Fargo*, 571 F.3d at 958. As this Court has recognized, federal "courts have long found" that such policies and "centralized rules" "carry great weight for certification purposes" because they "suggest a uniformity among employees that is susceptible to common proof." *Id.* at 958-59. And so, "[w]here there is evidence that the duties of the job are largely defined by comprehensive corporate procedures and policies"—as there is here—"district courts have routinely certified classes of employees challenging their classification as exempt, despite arguments about 'individualized' differences in job responsibilities." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) (ellipsis and internal quotation marks omitted).

The decision below marks a sharp departure from this line of cases, as the Seventh Circuit's recent decision in *Ross v. RBS Citizens, N.A.*, illustrates. 667 F.3d

900 (7th Cir. 2012). There, a group of assistant branch managers working in various Charter One Illinois branches brought a class action under the FLSA and Illinois labor law alleging that they had been misclassified as exempt from overtime pay. Charter One opposed certification, arguing that "a factfinder would be required to individually determine whether each [class member] performed non-exempt duties" and that, as a result, the claims would require "significant and time-consuming individualized liability inquiries." *Id.* at 908. Charter One further contended that certification was inappropriate in light of *Dukes*, in which the Supreme Court reversed certification of a class of over one million Wal-Mart employees from all 50 states who sought to challenge "literally millions of [allegedly discriminatory] employment decisions all at once," even though Wal-Mart had no companywide discriminatory policy but instead "allow[ed] discretion by local supervisors over employment matters." *Id.* at 2552-54.

The Seventh Circuit rejected Charter One's argument and held that the class was "properly certified." *Ross*, 667 F.3d at 908. The court noted that "the majority of the [class members] assert that they primarily performed non-exempt work." *Id.* at 909. This was enough for class-certification purposes because although there "might be slight variations in the exact duties that each [class member] performs from branch to branch, the [members] maintain a common claim that unofficial company policy compelled them to perform duties for which

they should have been entitled to collect overtime." *Id.* at 909-10. Thus, "[c]ontrary to Charter One's assertion, an individualized assessment of each [class member's] job duties" was not necessary. *Id.* at 910. The "glue holding together" the class was the defendant's uniform company policy. *Id.*; *see also Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176, 2011 WL 4597555, at *4 (S.D.N.Y. Oct. 4, 2011) (distinguishing *Dukes* on the ground that New York's version of the FLSA does not "require an examination of the subjective intent behind millions of individual employment decisions" but instead looks at "whether the company-wide policies, as implemented, violated Plaintiffs' statutory rights").

This Court has recently stressed the importance of comprehensive uniform corporate policies in determining whether the class has the requisite cohesiveness to be certified. In a pair of decisions issued on the same day, the Court considered whether home mortgage consultants, employed by the defendant banks to sell loans on their behalf, could bring overtime class actions under California law. *Vinole*, 571 F.3d 935; *In re Wells Fargo*, 571 F.3d 953. The defendants in both cases had "no control over what the [consultants] actually [did] during the day" and did "not monitor how [they] perform[ed] their work activities." *Vinole*, 571 F.3d at 938. On the contrary, each consultant "was granted almost unfettered autonomy to do his or her job"; the defendants "only track[ed] the number and value of loans that [the consultants] close[d] each month." *Id.* at 938, 947. Without a uniform corporate

policy, the only thread tying the class members' claims together was each defendant's decision to treat them all as exempt from overtime.

This Court held that a blanket exemption policy, on its own, is insufficient to establish predominance. *Id.* at 946. Instead, other factors—namely, whether "the employer exercised some level of centralized control in the form of [a] standardized hierarchy, standardized corporate policies and procedures governing employees, uniform training programs, and other factors susceptible to common proof"—must also be considered. *Id.* at 946.

At the same time, the Court acknowledged that "uniform exemption policies are relevant to the Rule 23(b)(3) analysis." *In re Wells Fargo*, 571 F.3d at 955. "An internal policy that treats all employees alike for exemption purposes suggests that the employer believes some degree of homogeneity exists among the employees," which "undercuts later arguments that the employees are too diverse for uniform treatment." *Id.* at 957. But without more, an exemption policy cannot predominate. Not so with "uniform corporate policies," which "bear heavily on questions of predominance and superiority." *Id.* at 958 (emphasis added).

The class members in this case are governed by *both* uniform corporate policies *and* a uniform exemption policy. Unlike the defendants in *Vinole* and *Wells Fargo*, Deloitte "exercises some level of centralized control"—indeed, a high level of control—over its audit employees. *Vinole*, 571 F.3d at 946. It has a "standardized

hierarchy," has implemented "standardized corporate policies and procedures governing employees," and institutes "uniform training programs"—each of which is, in this Court's words, "susceptible to common proof" and "carr[ies] great weight for certification purposes." *Id.*; *In re Wells Fargo*, 571 F.3d at 958. Under such circumstances, courts "routinely" grant certification, "despite arguments about 'individualized' differences in job responsibilities." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) (internal quotation marks omitted).

The decision below is at odds with these cases. In addition, it ignores at least three common predominant issues: (1) whether Deloitte's audit employees are engaged in an occupation commonly recognized as a learned profession, (2) whether they customarily and regularly exercise discretion and independent judgment with respect to significant matters, and (3) whether they are primarily engaged in work that is directly related to the management policies or general business operations of Deloitte's clients.

A. Whether Deloitte's audit employees are engaged in an occupation commonly recognized as a learned profession is a common predominant question.

Deloitte asserts that *all* of its audit employees are exempt professionals. To prevail on this defense, Deloitte must establish each of the exemption's three elements, including (because audit employees are unlicensed) that they are learned professionals—*i.e.*, that they are "primarily engaged in an occupation" that

"requir[es] knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes." Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(b)(i).

As the district court acknowledged below, "whether Deloitte's hiring requirements satisfy the specialized instruction prong of the learned professions test" is an issue that "can be decided on a class-wide basis." ER9-10 (Decertification Order). Because the issue focuses on the *hiring* requirements of the *occupation*, as opposed to the particular qualifications of the employee against which the exemption defense is asserted, the question is susceptible to common proof. Nevertheless, the court concluded that this common question does not predominate over individual ones "because under the Wage Order and *Campbell*, exempt status turns on what employees actually do." ER10. That is a misreading of *Campbell* and an incorrect statement of California law.

As this Court has held in interpreting a federal regulation incorporated by the California wage order at issue here, the "learned profession" exemption is "restrict[ed] … to professions where specialized academic training is a *standard prerequisite*." *Solis v. Washington*, 656 F.3d 1079, 1084 (9th Cir. 2011) (quoting 29 C.F.R. § 541.301(d)) (emphasis added). "[T]he exemption does not apply to

'occupations in which most employees have acquired their skill by experience.'" *Id.* at 1088 (quoting 29 C.F.R. § 541.301(d)). Thus, if Deloitte cannot prove that it requires its audit employees to have completed a prolonged course of specialized academic instruction that "relate[s] directly to the position," *id.* at 1088, then it cannot exempt those employees as learned professionals. And if audit employees are not learned professionals, then the professional exemption does not apply to them—regardless of what they "actually do." ER10.

Campbell does not (and could not) contradict this principle of California law. Instead, as the district court in that case recently noted, "the prolonged study requirement is a *threshold* requirement that must be established before the court can find that an employee is exempt under the learned profession exemption." *Campbell*, 2012 WL 5989377, at *7; *see also id.* ("The learned profession exemption does not ask where or how Attest Associates acquired their educations. It asks whether their *occupation*—Attest Associate—is one which customarily *requires* a prolonged course of specialized intellectual instruction and study." (emphasis added)). That requirement is "a simple matter of common proof": the defendant "can submit resumes, together with its hiring policy," while the plaintiffs "can submit resumes," plus evidence showing that the defendant "did not require such an education prior to hire." *Id.*

The plaintiffs here have done just that. Deloitte requires its audit employees to

have taken the college courses necessary to sit for the CPA exam; it does not require a degree in any particular field. Audit employees working in California must therefore have a bachelor's degree in any subject and have taken either (a) 10 units in accounting classes and 35 units in business-related classes, or (b) 24 units in accounting classes and 24 units in business-related classes. Deloitte's audit employees need not have taken a single course in auditing, and no further academic requirements are necessary. Moreover, once employed, audit employees must attend numerous training sessions and receive extensive on-the-job training to enable them to perform their job duties.

Thus, a common question in this case—as recognized by the district court—is whether the academic requirements described above are "sufficiently specialized and relate directly to the position," or whether they are instead "general academic training," with Deloitte "relying upon apprenticeship and experience to develop the advanced skills necessary for effective performance." *Solis*, 656 F.3d at 1088. Where the district court went astray is in determining that this common question cannot predominate because exemption status turns exclusively on what audit employees actually do. It does not.

This is not to say, of course, that the class members are guaranteed to prevail on this particular question. But whether they win or lose, they will do so together. Rule 23 requires no more. As Judge Easterbrook has put it, "Rule 23 allows

certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010); *see also Butler v. Sears, Roebuck & Co.*, --- F.3d ---, 2012 WL 5476831, at *2 (7th Cir. Nov. 13, 2012) (Posner, J.) (defendant's merits argument "is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate [the defendant]—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment").

B. Whether audit employees customarily and regularly exercise discretion and independent judgment with respect to significant matters is a common predominant question.

The second common predominant question is whether audit employees customarily and regularly exercise discretion and independent judgment with respect to significant matters in the performance of their job duties. Because this requirement is common to every exemption in the wage order, it is "arguably the single most important issue" for determining whether an employee is entitled to overtime. *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 596-97 (E.D. Cal. 2008) (certification order); *see also* Cal. Lab. Code § 515(a). If the employer cannot prove that an employee "*customarily* and *regularly*" exercises discretion and independent judgment with respect to significant matters, Cal. Lab. Code § 515(a) (emphasis added), "then that employee is not exempt from overtime, regardless of

whether other exemption requirements may be satisfied." *Campbell*, 253 F.R.D. at 597.

The exercise of discretion and independent judgment implies that an employee "has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." 29 C.F.R. § 541.207 (incorporated by California wage order applicable here). It is distinct from "the use of skill in applying techniques, procedures, or specific standards." *Id.* "An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories … is not exercising discretion and independent judgment." *Id.*

Here, the district court held that the exercise-of-discretion determination cannot be made on a classwide basis because (1) the determination hinges on what employees actually do, (2) the work that some audit employees actually do varies in this case, and (3) the "plaintiffs have not shown that this inquiry is amenable to common proof." ER9. But in determining whether an employee exercises discretion and independent judgment, California law requires courts to consider not just what the employee actually does but also "the employer's realistic expectations" and "the actual overall requirements of the job." *Sav-On Drug Stores*,

96 P.3d at 206. These latter issues "are likely to prove susceptible to common proof," *id.*, particularly where (as here) the employees' duties are constrained by strict uniform company policies, professional standards, and state laws, and the employer itself treats the employees alike for exemption purposes. *See Vinole*, 571 F.3d at 946; *In re Wells Fargo*, 571 F.3d at 958.

1. "There are two potential components to whether (and how often) an employee exercises independent judgment and discretion: one based on the employee's actual duties and one based on the employer's expectations." *Campbell*, 253 F.R.D. at 600. The reason for both components is that neither standing alone "would be wholly satisfactory":

> On the one hand, if hours worked on [an exempt activity] were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in [an exempt activity] during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption.

Ramirez, 978 P.2d at 13. The California Supreme Court has therefore instructed courts to "steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job." *Id.* This objective inquiry encompasses both the employer's expectations and what the employee actually does.

Although this latter question "has the potential to generate individual issues," looking to an employer's *realistic* expectations is an objective inquiry that is "likely

to prove susceptible to common proof." *Sav-On Drug Stores*, 96 P.3d at 206. That is especially true here, where there is a standardized employee training program, a comprehensive audit methodology, common computer software and documentation, extensive supervision, a detailed step-by-step review process, a classwide exemption policy, state laws and professional standards limiting the duties of all audit employees, and a strict uniform corporate policy requiring all audit employees to follow the instructions contained in the MAP and audit plan and to bring *any* potentially "significant matter" that arises during an engagement to the attention of a licensed CPA so that the CPA may assess the issue's significance and decide how to proceed. ER282 (Young Dep.). These "uniform corporate policies" and "centralized rules, to the extent they reflect the realities of the workplace, suggest a uniformity among employees that is susceptible to common proof." *Wells Fargo*, 571 F.3d at 957-58.

Indeed, as one district court recently commented in an analogous FLSA action: "It would, rather, be shocking to learn that Audit Associates everywhere were not 'similarly situated' in that they are constrained by uniform, explicit, and unvarying rules, whether imposed by [the company], the profession, or the Government. That uniformity does not mean Audit Associates are entitled to overtime; they may well be similarly situated professionals or similarly situated administrative employees." *Pippins v. KPMG, LLP*, No. 11-0377 (S.D.N.Y. Jan. 3,

2012). But it does mean that their claims are similar enough to proceed as a class. *Id.*

2. In holding to the contrary, the district court did not analyze whether Deloitte might realistically expect its audit employees to not exercise discretion and independent judgment with respect to matters of significance. Nor did the court consider whether that question might be capable of generating a common answer across the class.

Instead, the district court concluded that a review of Deloitte's audit methodology, "as well as the class members' declarations discussing their use of MAPs, shows that the methodology does not preclude the exercise of discretion and independent judgment." ER11. The district court reached this conclusion because "a number of class members describe, with specificity, using MAPs and exercising discretion and independent judgment because MAPs can contain open-ended questions and steps." *Id.* The court similarly held that neither Deloitte's multi-layered review process nor its policy requiring audit employees to bring "significant accounting and auditing questions" to the attention of the engagement's management "precludes class members from exercising discretion or independent judgment." *Id.* (internal quotation marks omitted).

This reasoning is wrong for two reasons. First, by determining that some audit employees "exercis[e] discretion and independent judgment," the district

court answered a question that this Court in *Campbell* held is for the class-action jury. *See* 642 F.3d at 830 ("[o]nly a factfinder can weigh [the] evidence," "determine the credibility of a witness," and "determine whether Plaintiffs meet the standards of the professional exemption" (internal quotation marks omitted)). And second, even if answering the jury question were proper, the court never concluded that some audit employees were *primarily engaged* in exercising discretion and independent judgment with respect to *significant matters*. The court did not reach this conclusion because it could not. Its assertion that Deloitte's uniform corporate policies cannot possibly preclude the regular exercise of discretion and independent judgment with respect to significant matters thus is left unsupported.

C. Whether audit employees are primarily engaged in work that is directly related to the management policies or general business operations of Deloitte's clients is a common predominant question.

Yet another common predominant question is whether Deloitte can prove that its audit employees are primarily engaged in work that is "directly related to management policies or general business operations" of Deloitte's clients, as required for those employees to qualify for the administrative exemption. Cal. Code Regs. tit. 8, § 11040(1)(A)(2)(a)(i). The district court disposed of this question in a single sentence, determining that "whether work qualifies as 'administrative' depends on the particular facts of the case." ER11. That may be so, but the question for class certification is not whether "the particular facts of the case"

matter; it is whether those facts vary materially from class member to class member so that the question is not capable of being resolved on a classwide basis. They do not here.

The California Supreme Court has held that, under California labor law, "[w]ork qualifies as 'directly related' if it satisfies two components. First it must be *qualitatively* administrative. Second, *quantitatively*, it must be of substantial importance to the management or operations of the business. Both components must be satisfied before work can be considered 'directly related' to management policies or general business operations in order to meet the test of the exemption." *Harris v. Superior Court*, 53 Cal. 4th 170, 181-82 (Cal. 2011).

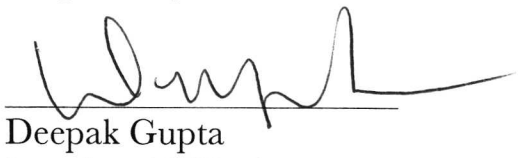
Whether both of those components are satisfied in this case—or put differently, whether Deloitte's comprehensive uniform corporate policies prevent its audit employees from being able to be *primarily engaged* in giving *substantially important* management advice to clients—is a common predominant question. Indeed, the commonality of that question is illustrated by an argument made by Deloitte below. At the summary judgment stage, one of Deloitte's main arguments for why its audit employees qualify for the administrative exemption was that the "audit service itself" is directly related to the management policies and general business operations of Deloitte's clients. Opp. to Partial Summ. J. 24. That defense to liability, regardless of whether it were accepted by a court, would either apply or

not apply to *all* class members. The district court's failure to even grapple with these questions is further error warranting reversal by this Court.

CONCLUSION

The judgment of the district court should be reversed, with instructions that the class be certified as defined in the district court's March 23, 2010 certification decision, and the case should be remanded for further proceedings on the merits.

Respectfully submitted,



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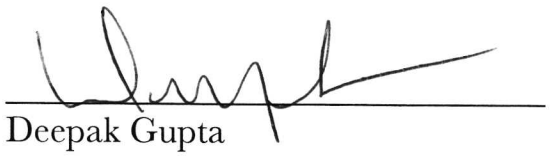
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 12,924 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).



Deepak Gupta

December 17, 2012

STATEMENT OF RELATED CASES

As required by Circuit Rule 26-2.6, Plaintiffs-Appellants state that they are aware of one case pending before this Court that presents related legal issues, albeit on a different record and with different parties. A petition for permission to appeal the district court's order denying decertification in *Campbell v. PricewaterhouseCoopers, LLC*, No. S-06-2376, 2012 WL 5989377 (E.D. Cal. Nov. 29, 2012), was filed on December 7, 2012, and docketed as Case No. 12-80223. As of the filing of this brief, no response to the petition has been filed and this Court has taken no action on the petition.

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2012, I filed under seal the forgoing Brief of Appellants by sending one original and 7 copies by overnight mail to the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit.

I further certify that, on this date, a copy of the foregoing Brief of Appellants was served on the counsel below by overnight mail:

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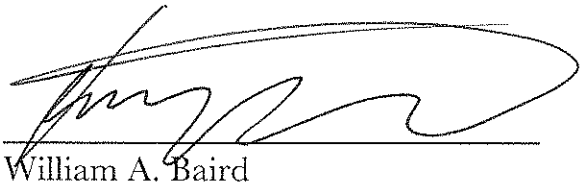
Dated: December 17, 2012



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