Docket No. 09-16370

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON CAMPBELL and SARAH SOBEK, *et al.*, Plaintiffs-Appellees,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District Of California
The Honorable Lawrence Karlton
No. 06 CV-02376-LKK-GGH

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INTRODUCTION

Plaintiffs' brief rarely acknowledges or embraces the legal rationales articulated by the District Court in its summary adjudication Order, and largely relies upon arguments newly-fashioned on appeal to defend that Order.

The Professional Exemption: Plaintiffs seek to uphold the result below on the basis of the text and structure of the Professional Exemption, but they are not faithful to either. Put simply, nothing in the Wage Order precludes unlicensed accountants from being shown to be exempt under subsection (b) of the Professional Exemption. Plaintiffs' argument that the "drafting history" of the wage order at issue shows an intention on the part of the IWC to prohibit unlicensed accountants from being professionally exempt should be rejected, because the language and structure of the Professional Exemption are not ambiguous, and contain no such prohibition.

Even the District Court did not accept Plaintiffs' tortured reading of the text of the Professional Exemption, or claim to find unambiguous intent on the part of the IWC to exclude from eligibility for the Professional Exemption ***all*** unlicensed members of the accounting profession -- and inevitably by extension, ***all*** unlicensed lawyers, doctors, dentists, optometrists, architects, engineers, and teachers. Doing so is flatly contrary to the overriding principle governing

application of exemptions from overtime provisions, which is to consider individual employees' work duties.

The Administrative Exemption: In defense of the District Court's summary adjudication as to the Administrative Exemption, Plaintiffs try to focus this Court's attention on their disputed version of the facts, and on provisions of the Business and Professions Code ("B&P Code") that concern the working relationship of CPAs and the unlicensed accountants they employ. The ruling at issue, however, cannot be sustained upon Plaintiffs' contention that the particular unlicensed professionals in this case primarily perform routine work. That argument is one for the jury, following remand. Nor is Plaintiffs' argument that unlicensed accountants are required by the B&P Code to be supervised dispositive as to the Administrative Exemption. All exempt employees may be supervised, and almost all certainly are. But that is not the issue -- the Administrative Exemption only becomes inapplicable when the level of supervision is determined to be ***more*** than "only general supervision." That determination requires trial.

Plaintiffs' failure of proof and waiver arguments betray a misunderstanding of the respective burdens at issue on summary adjudication. Plaintiffs argue that PwC failed to prove a host of elements of the exemptions at issue, and that such supposed failures of proof defeat, or constitute a waiver of, PwC's exemption defenses. That is entirely incorrect. Plaintiffs' motion for summary adjudication

did not raise all elements of the exemptions; thus, Plaintiffs did not carry their initial burden of production on multiple elements of the relevant exemptions. Accordingly, PwC had no burden to come forward with admissible evidence on those elements, and its "failure" to do so is not a waiver of any sort.

Finally, although PwC has raised the affirmative defense of exemption as to all class members, it does not assert that all unlicensed accountants working in California are exempt. Each employer seeking exemption bears a burden to prove that its employees perform work satisfying the requirements for exemption. Here, the District Court made threshold errors of law in the construction of the Wage Order and denied PwC the opportunity to meet its burden. Unless reversed on appeal, the District Court's unprecedented ruling will similarly, and wrongfully, affect employers of thousands of lawyers, doctors, dentists, optometrists, architects, engineers, teachers, and accountants practicing in California.

ARGUMENT

I. PLAINTIFFS' ARGUMENT THAT ACCOUNTANTS CAN ONLY QUALIFY FOR THE PROFESSIONAL EXEMPTION UNDER SUBSECTION (a) IS UNSUPPORTABLE.

A. Unlicensed Accountants Are Eligible For The Professional Exemption Under Subsection (b).

Plaintiffs have elected to defend the District Court's categorical construction of the Professional Exemption by arguing that the "text and structure" of the exemption establish three "mutually exclusive" professional classifications

("enumerated," "learned," and "artistic" professions), and that employees in the professions recognized in subsection (a) can only be shown to be professionally exempt under that subsection. *See* Brief of Plaintiffs-Appellees ("BA") at 23 ("The text and structure of the three professional classifications demonstrate that they are mutually exclusive -- that is, no profession can be categorized in more than one [subsection]…."). To reach that conclusion requires reading subsection (a) contrary to its plain language, so as to apply to all employees working in the enumerated professions, instead of only those who are licensed or certified by the State of California. Given the actual words of the Wage Order, it is not surprising that there is no case law authority accepting such a construction.

In fact, the only two courts other than the court below to have considered the issue both found that unlicensed employees in the professions identified in subsection (a) may be qualified as professionally exempt under subsection (b). The first decision, *Nguyen v. BDO Seidman, LLP*, No. SACV 07-01352-JVS (C.D. Cal. July 6, 2009), is cited in PwC's initial brief ("PwC Br." at 26), but was not addressed in Plaintiffs' brief. The second decision was rendered by Judge Fischer subsequent to PwC's initial brief. *See Mekhitarian v. Deloitte & Touche (ICS), LLC*, No. CV 07-412 DSF (MANx), 2009 WL 6057248, at *2-4 (C.D. Cal. Nov. 3, 2009). The *Mekhitarian* court found that the license requirement of subsection (a) "can be viewed as a shorter method" for determining exemption, and that

"[i]ndividuals without a license can also be exempt if they meet the requirements of …[subsection (b)], but this requires an examination of the duties of the individuals who are allegedly exempt." *Id*. at *3. Indeed, the court found "no legal or logical reason to believe that the practice of 'public accountancy' -- for which a CPA license is required -- and the scope of the learned professional exemption are the same," noting that "[i]f an employee meets the requirements of learned professionals [sic] exemption, yet is not engaged in work requiring a CPA license, there is no basis in the Wage Order for declaring the employee non-exempt." *Id*.

In addition to the complete absence of supporting California case law, Plaintiffs' argument suffers from three fundamental flaws. ***First***, although the crux of Plaintiffs' textual argument is that subsections (a) and (b) of the Professional Exemption must be read "as a complete sentence" (BA at 24), Plaintiffs' brief never mentions the first words of the sentence at issue: "***A person*** employed in a professional capacity ***means any employee*** who meets all of the following requirements...." Cal. Code Regs. tit. 8, § 11040(1)(A)(3) (emphasis added). Those words make absolutely clear that what follows in subsections (a) and (b) are requirements pertaining to individual employees, not professions as a whole. Thus, subsection (a) does not cover all persons employed in the professions of "law, medicine, ... or accounting," but applies instead to any individual lawyer,

doctor, dentist, optometrist, architect, engineer, teacher, or accountant "[w]ho is licensed or certified by the State of California," and is primarily engaged in the practice of her licensed profession. *Id*., § 11040(1)(A)(3)(a). Nothing in subsection (a) or elsewhere in the Wage Order bars accountants from qualifying under subsection (b) ***if*** they meet the standards of subsections (b)(i) and (b)(iii), covering exempt employees in learned professions.[1] The entire sentence, which makes clear that the exemption is available to "any employee" who meets the requirements for exemption, undercuts Plaintiffs' "holistic" argument.[2]

Second, even if one were to read subsections (a) and (b) together (and apart from the preceding words of the sentence), there is nothing in the language of those subsections stating that "the professions specifically enumerated in the former cannot also fall within the latter," as Plaintiffs allege. BA at 24. According to

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[1] Plaintiffs' assertion that subsection (b)(iii) is not an element of the showing necessary to exempt "learned" professionals, but pertains only to employees in "artistic" professions, is incorrect. *See Medipalli v. Maximus, Inc.*, No. CIV. S-06-2774 FCD EFB, 2008 WL 958045, at *5 (E.D. Cal. Apr. 8, 2008); *see also* 2002 DLSE Manual at § 54.10.5, Request for Judicial Notice in Support of Reply Brief for Defendant-Appellant ("Defendant's RJN II"), Ex. 4.

[2] Plaintiffs' alternative argument that, even if PwC were entitled to prove its Attest Associates qualify as exempt under subsection (b), PwC failed to do so (*see* BA at 36-38), misapprehends the parties' burdens on summary adjudication. *See infra* at Section II.A. Plaintiffs' motion argued exclusively that subsection ***(a)*** is the only means by which Attest Associates can be professionally exempt, and that Attest Associates by definition cannot satisfy that subsection. *See* Defendant-Appellant's Excerpts of Record ("ER") at 261-90. Having made only that argument, Plaintiffs cannot now argue PwC's proof under subsection ***(b)*** was insufficient.

Plaintiffs, subsection (a) is a "specific" provision that controls over the "general" provision of subsection (b). *Id*. But Plaintiffs are only able to apply their rule of construction by erroneously viewing subsection (a) as directed to the entirety of specific professions, when it in fact only applies to a subset of their members, *i.e.* those licensed or certified by the State of California.[3]

The only reasonable reading of subsections (a) and (b) together is that, to be exempt, an employee must be shown to be primarily engaged in an occupation that is properly classified as a "profession," and to be working in a professional capacity. Subsection (a) is comprised of the administratively predetermined cases -- those employees who are ***both*** employed in the most widely agreed-upon professions (as identified in the Wage Order), and are already recognized by the State of California, through licensure or certification, to be engaged in the practice of their profession. Subsection (b) is open to all employees whose employers

[3] Plaintiffs' suggestion that the Supreme Court's *per curiam* decision in *HCSC-Laundry v. United States*, 450 U.S. 1 (1981), requires this Court to read into the Wage Order a prohibition on unlicensed accountants coming within subsection (b) of the Professional Exemption is fanciful. *HCSC-Laundry* is a federal tax case bearing no resemblance to this state wage-and-hour action. There, the Court held that a tax code section specific to the taxpayer, not a more general section, governed the tax dispute at hand. This case is not analogous, because subsection (a) of the exemption is not directed specifically to all employees in enumerated professions, but rather to certain "licensed" professionals not involved in this case. Neither the text nor the structure of the exemption suggests that unlicensed accountants are excluded from the broader "learned profession" requirement, and *HCSC-Laundry* certainly does not compel such a conclusion.

make the requisite factual showings that the field in which they work is a profession, and that the duties they perform within that field rise to the level of exempt work.[4] *See Mekhitarian*, 2009 WL 6057248, at *2-3.

Plaintiffs' argument that subsections (a) and (b) are mutually exclusive ***by profession*** would lead to the anomalous result that unlicensed professionals in the recognized professions are barred from exemption, but unlicensed professionals in all other professions can be exempt. The State of California offers licenses and certifications in numerous occupations covered by Wage Order 4-2001, including such diverse occupations as private investigators, talent agents, and laboratory technicians. *See* Cal. Code Regs. tit. 8, § 11040(2)(O).[5] The licensure status of employees in those professions, however, is irrelevant, as subsection (b), in contrast to subsection (a), has no licensure requirement. It defies common sense to suggest that employers of talent agents or private investigators are allowed to pursue the Professional Exemption for their unlicensed employees; but law firms cannot do so for first-year associates, hospitals cannot do so for first-year residents,

[4] Plaintiffs' additional argument that the "learned" and "artistic" professions of subsection (b) "are mutually exclusive of one another" (BA at 26), even if accurate, is entirely irrelevant to the question of whether unlicensed employees in the eight "enumerated" professions of subsection (a) may be professionally exempt under subsection (b).

[5] *See, e.g.*, Cal. Bus. & Prof. Code §§ 7522-23 (private investigators), §§ 1241, 1260-1261.5 (clinical laboratory technicians and scientists); Cal. Labor Code §§ 1700.4-1700.22 (talent agents).

and accounting firms cannot do so for accountants who are not CPAs. Whether an unlicensed talent agent or private investigator can be shown to be professionally exempt depends on the nature of that individual's job duties -- the same test must apply to unlicensed lawyers, doctors and accountants.[6]

Third, Plaintiffs' argument that subsections (a) and (b) are "mutually exclusive by profession" cannot be squared with language in the Wage Order indicating that some unlicensed teachers -- those teaching in accredited colleges and universities -- can qualify for exemption. Teaching is one of the eight professions enumerated in subsection (a). The 2001 Wage Order defines teaching for the purpose of the Professional Exemption[7] to be "the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing ["CTPL"] ***or teaching in an accredited college or university***." *See* Cal. Code Regs. tit. 8, § 11040(2)(R) (emphasis added). Importantly, the CTPL only certifies

[6] Plaintiffs' reading of the statute would create significant anomalies within the recognized professions as well, by disadvantaging employers in those professions (particularly accounting and medicine) where licensure takes longest. Such employers would employ a relatively larger group of professionals deemed ineligible for exemption. Nothing in the language or structure of the Wage Order suggests that the IWC intended such disparate impacts, either among the eight enumerated professions, or as between those eight professions and all other professions for which licensure or certification is available.

[7] Section (2)(R) states that "teaching" is defined "for the purpose of Section 1 of this order." *See* Cal. Code Regs. tit. 8, § 11040(2)(R). The only use of the word "teaching" in Section 1 is in the list of eight enumerated professions in subsection (a) of the Professional Exemption. *Id*., § 11040(1)(A).

teachers for grades K-12 (Cal. Educ. Code § 44202) -- it does not certify college and university teachers.

The effect of this definition of "teaching" on the exemption status of teachers is two-fold. First, teachers of grades K-12 are eligible for the Professional Exemption ***only*** if they are certified by the CTPL. A K-12 teacher who is not licensed by the CTPL, by definition, is not within the profession of teaching for purposes of the Professional Exemption, and thus such individuals cannot be qualified for the Professional Exemption under either subsection (a) or (b). Second, and more important, unless the reference to teachers at "an accredited college or university" is mere surplusage, the fact that the Wage Order expressly includes these teachers as members of the profession of "teaching" indicates that they may be exempted under the Professional Exemption. However, because college and university teachers are not certified by the CTPL, they are ***not*** eligible to qualify for exemption under subsection (a), and thus may ***only*** qualify for the Professional Exemption pursuant to subsection (b).

Because CTPL-certified K-12 teachers qualify for the Professional Exemption through subsection (a) and college and university teachers qualify through subsection (b), Plaintiffs' "mutually exclusive" argument cannot apply to teachers. That argument, which Plaintiffs frame in absolutist terms ("the professions specifically enumerated in [subsection (a)] cannot also fall within

[subsection (b)]") (BA at 24), is equally invalid for employees in the other enumerated professions.

B. The Wage Order's "Drafting History" Cannot And Does Not Alter The Professional Exemption's Clear Language and Structure.

1. The Plain Words Of The Professional Exemption Preclude Resort To Drafting History.

Citing a miscellany of strategically excerpted documents -- many of which do not even pertain to the wage order at issue -- Plaintiffs argue that the IWC clearly intended to exclude unlicensed accountants from eligibility for exemption as learned professionals. BA at 29-36. In so arguing, Plaintiffs do not attempt to establish the necessary predicate for resort to extrinsic materials, *i.e.*, ambiguity in the text being construed. *See, e.g.*, *BedRoc Ltd. v. United States*, 541 U.S. 176, 186 (2004) ("Because we have held that the text of the statutory reservation [is clear]…we have no occasion to resort to legislative history.") (citations omitted). Instead, they simply jump to the drafting history in an attempt to support a position that is unsupported by the words of the Wage Order, or to set up an argument that the Wage Order is ambiguous and must be resolved in Plaintiffs' favor. *See, e.g.*, BA at 38, 54. As the Supreme Court has long recognized, it is wholly improper to ***create*** ambiguity in an otherwise unambiguous statute by elevating extrinsic materials above the plain text. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994), *superseded by statute*, 31 U.S.C. §§ 5322, 5324 ("[W]e do not

resort to legislative history to cloud a statutory text that is clear."); *see also United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 85 Cal. App. 4th 86, 92 (2000). Having not claimed that the Wage Order is ambiguous, Plaintiffs are poorly positioned to ask this Court to examine drafting history -- particularly history never presented to the District Court.

2. Plaintiffs' Rendition Of The Drafting History Of Wage Order 4-2001 Is Inaccurate.

Compounding the problem of using legislative history to interpret an unambiguous Wage Order is the fact that Plaintiffs' analysis of the "drafting history" does not focus on the 2001 Wage Order at issue, but largely purports to describe the original adoption of an exemption for "learned" professionals in the 1989 Wage Order. As a consequence, Plaintiffs' analysis is inherently misleading: Although the 1989 Wage Order was the first to expressly recognize the exemption of employees in "a learned or artistic profession," that wage order differs markedly from the 2001 Wage Order at issue herein.[8]

Even if the Professional Exemption in the 1989 Wage Order was unclear in any respect, that is irrelevant to this appeal because the text and structure of the 2001 Wage Order are different and the Professional Exemption is unambiguous. Specifically, the 2001 Wage Order split into two separate subsections the

[8] Wage Order 4-2001 became effective January 1, 2001, and the relevant language of the Professional Exemption appears in PwC's initial brief. *See* PwC Br. at 10-11.

exemption for licensed or certified professionals in certain recognized professions (subsection (a)) and the exemption for employees in "learned" and "artistic" professions (subsection (b)). The two subsections are joined by the disjunctive word "***or***" and are both available to "any employee who meets all of the … requirements [of either subsection]." Cal. Code Regs. tit. 8, § 11040(1)(A)(3).

By separating licensed or certified employees in certain professions from all other professional employees, the Wage Order reasonably provides an expedited path to exemption for the former group. Although there are different and additional showings required for employees who are not eligible for exemption under subsection (a), the 2001 Wage Order unambiguously allows all such employees to be exempt from overtime provisions ***if*** they are shown to meet the requirements of subsections (b)(i) and (b)(iii). No legislative history -- certainly not the legislative history of a wage order not at issue -- can change that fact.

Even were it appropriate to look to the Wage Order's "drafting history," two overarching problems mar Plaintiffs' argument. First, Plaintiffs cite to documents that they claim interpret the 1989 Wage Order, but which in fact pertain to the earlier, more limited 1980 order. Second, in addressing documents that pertain to the drafting history of the 1989 and 2001 Wage Orders, Plaintiffs employ selective quotation and unwarranted inference to argue that the drafting history "confirms that the professional classifications are mutually exclusive." BA at 29.

a. Plaintiffs Improperly Rely On Pre-1989 Documents That Have No Relevance To The Professional Exemption.

Plaintiffs highlight a document (Exhibit C to Plaintiffs-Appellees' Request for Judicial Notice ("Plaintiffs' RJN")) that they describe as "interpretive guidelines for the 1989 Wage Order," and claim that it confirms the fundamental proposition they seek to advance to this Court, *i.e.*, "that the 'learned' and 'artistic' provisions were *not* intended to exempt unlicensed accountants in particular…." BA at 32. PwC denies that characterization of the IWC's intention for the most fundamental reason -- Plaintiffs' Exhibit C is an interpretive guideline for the ***1980, not the 1989***, Wage Order.

Text unmentioned by Plaintiffs reflects that Exhibit C interprets the 1980 Wage Order. First, the exhibit recites that exempt employees must regularly receive a remuneration of at least ***$900*** per month. *See* Plaintiffs' RJN, Ex. C, pp. 5, 24-25. This was the remuneration requirement in the 1980 Wage Order. Defendant's RJN II, Ex. 1 (Cal. Code Regs. tit. 8, § 11040(1)(A)(1) (effective January 1, 1980)). The remuneration requirement in the 1989 Wage Order was ***$1150*** per month. Defendant's RJN II, Ex. 2 (Cal. Code Regs. tit. 8, § 11040(1)(A)(1) (effective July 1, 1989)). Second, Exhibit C states that the "DLSE is ***precluded*** from following federal criteria in exempting professionals" in determining whether individuals working in "learned profession[s]" could be

exempt under "Section 1" of the Wage Order. *See* Plaintiffs' RJN, Exhibit C, at 22 (emphasis added). In contrast, the 1989 Wage Order's Statement As To The Basis directs that the learned professional exemption "would ***permit***…use of the federal guidelines for purposes of interpretation." *Compare id*., *with* Plaintiffs' RJN, Ex. B, at 3 (emphasis added). Exhibit C thus interprets an inapplicable Wage Order, shedding no light on the present dispute.

Equally egregious is Plaintiffs' assertion that the DLSE "has confirmed that an accountant is exempt from California's overtime protections only if the person is a licensed CPA." BA at 32 n.21. As support for that proposition, Plaintiffs cite a ***1986*** document that predates by three years the adoption of the wage order on which Plaintiffs focus, and predates by 15 years the wage order at issue. *See* Defendant's RJN II, Ex. 1 (Cal. Code Regs. tit. 8, § 11040(1)(A)(2) (effective January 1, 1980)). To suggest that the DLSE has confirmed that an accountant "***is exempt***," without disclosing that the source material long predates the broadening amendment of the pertinent subsection of the Wage Order, is wholly inappropriate.[9] BA at 32 n.21 (emphasis added).

Through a similarly flawed analysis, Plaintiffs' Amici cite a DLSE policy manual for the proposition that in the 1989 Wage Order, "the IWC explicitly

[9] In February 1989, the DLSE concluded to the contrary, opining that unlicensed accountants may be exempt if they meet the requirements of the learned professional exemption. Defendant's RJN II, Ex. 3, at 1.

extended the protections of its standards to…uncertified accountants." *See* Brief *Amicus Curiae* of Former Commissioner of the IWC and Former Chief Counsels of the DLSE in Support of Plaintiffs-Appellees ("Locker *et. al.* Amicus") at 12 (citing Lloyd W. Aubry, Jr. & Timothy J. Long, *Aubry's California Wage and Hour Guide* 33, 45.1 (Employer's Group 1995)). The policy manual, however, was referring to an earlier wage order, as evidenced by the statement in the manual that "in Order[]…4… ***after July 1, 1989*** the Professional Exemption ***will be broadened***…." *Id*. (emphasis added).

b. The Drafting History On Which Plaintiffs Rely Does Not Support Plaintiffs' Inferences.

Compounding Plaintiffs' chronological mischaracterizations of the "drafting history," Plaintiffs rely heavily on wholly unsupportable inferences from that history. For example, Plaintiffs point to a 1988 letter to the IWC from the California Society of Certified Public Accountants ("CalCPA") suggesting that the IWC amend the Wage Order to state that learned professions "include, but are not limited to" the professions enumerated in the licensure prong. BA at 30-31 (citing Plaintiffs' RJN, Ex. A). Based on that letter and the fact that the IWC did not adopt the suggestion, Plaintiffs contend that the IWC "considered -- *and specifically rejected* -- proposals that would extend the 'learned' professions exemption to cover unlicensed accountants." BA at 29-30 (emphasis in original).

The problem with Plaintiffs' leap from the fact of this letter to the conclusion they propose is that there is no evidence establishing why the IWC did not adopt CalCPA's proposal. As the Supreme Court has cautioned, "[legislative] inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citations omitted). That is precisely why no inference is appropriately drawn here.[10]

Equally erroneous are inferences Plaintiffs seek to draw from federal regulations that were ***not referenced*** by the Wage Order. Plaintiffs argue that the IWC "evinced an intent to make unlicensed accountants ineligible for the 'learned' professional exemption" because the IWC did ***not*** reference in the Wage Order two sections of the Code of Federal Regulations that would have confirmed PwC's position, had they been cited. *See* BA at 33-35. As a matter of logic, however, it does not follow that any federal regulation the IWC did not incorporate was

[10] The amicus submission from former IWC Commissioner Barry Broad and former DLSE Chief Counsels Miles Locker and Thomas Cadell admits that the matter was never brought to a vote, directly undercutting Plaintiffs' assertion that it was "rejected." Locker *et. al.* Amicus at 10. Amici attempt the same improper inference from the non-adoption of a proposed change to the Wage Order in 2000: they fail to cite any evidence establishing why the change was not made. *See* Locker *et. al.* Amicus at 13. In any event, their submission is nothing more than uncrossed testimony that was not presented to the District Court, and should be disregarded for that reason alone.

expressly rejected, as Plaintiffs assume. Contrary to Plaintiffs' assumption, courts are clear that the failure to adopt a statutory amendment -- to say nothing of the failure to incorporate extrinsic regulations into an altogether separate statute -- does not support the same inference that affirmative deletion of draft language may support. *See, e.g.*, *United States v. Meek*, 366 F.3d 705, 719-20 (9th Cir. 2004) (refusing to infer that by not adopting amendment, Congress specifically considered and rejected liability it would have imposed). Plaintiffs' cited authority is wholly inapposite. In both *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 (1983), and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441-43 (1987), Congress chose certain proposed statutory language over other proposed language. Here, in contrast, the IWC's failure to reference any particular federal regulation does nothing to alter the meaning of the words it chose to define the Professional Exemption. Plaintiffs' reliance on "drafting history" does not make permissible a reading of the Wage Order directly at odds with the language of that order.

Finally, Plaintiffs mischaracterize documents on which they rely. For example, Plaintiffs rely on the 1989 Wage Order's Statement As To The Basis to conclude that the order's "'learned' and 'artistic' professions do not overlap with the 'enumerated' professions." *See* BA at 31-32. Read in its entirety, however, that document does not support Plaintiffs' conclusion. As Plaintiffs note, the

Statement indicates that the learned and artistic professional prong would recognize "'new groups as professionals' -- specifically, those in 'emerging occupations, such as those in the fields of science and high technology.'" BA 32. But the addition of subsection (b) was not limited to that single purpose -- the IWC's use of "broad language" was also intended to provide the flexibility to consider "individual professional exemptions based on actual duties and responsibilities," whereas the prior Wage Order "relied too much on credentialism." *See* Plaintiffs' RJN, Ex. B, at 3. Thus, far from declaring an intent to limit employees categorically, the Statement indicates that the IWC meant what it said in the text of the Wage Order: Exemption determinations ***must*** be employee- and fact-specific, considering individual duties and responsibilities.

C. Rules of Statutory Construction Cannot Alter The Professional Exemption's Clear Language And Structure.

Just as the Wage Order's drafting history cannot be employed to alter plain text, canons for construing ambiguities cannot be used to override the clear language of the Professional Exemption. While Plaintiffs do not even argue that the Wage Order is ambiguous, Plaintiffs state that ***should*** the Court find any ambiguity, the Court must construe the Wage Order in Attest Associates' favor. BA at 19, 38-40, 54. In support of this contention, Plaintiffs cite "two controlling principles of California law": The Wage Order's overtime protections should be

construed broadly, and the Wage Order's exemptions should be construed narrowly. *Id*. at 38-39.

Plaintiffs' propositions are two sides of the same coin, and both are inapplicable here. Like other presumptions, the "pro-employee" rule of construction is applicable only when the text itself is unclear.[11] If there is no ambiguous language to construe -- as Plaintiffs and PwC both contend -- there is no language to "presume" favorable to one party or the other. It is true that at trial "PwC has the burden to prove that Attest Associates are 'plainly and unmistakably exempt' from overtime under the Wage Order" (BA at 39-40), but this is a ***factual*** burden, not a ***legal*** burden to convince the District Court that the Wage Order means what it says. PwC's burden to prove its affirmative defense of exemption does not relieve the District Court of its initial obligation to define the legal parameters of that exemption. By improperly limiting the Professional Exemption for employees in the enumerated professions to those who have been licensed or certified, the District Court foreclosed PwC's ability to prove its case.

[11] *See, e.g., United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008) (resort to rule of lenity is appropriate "only when a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute") (internal quotation marks omitted); *accord People v. DeSimone*, 62 Cal. App. 4th 693, 700 (1998).

II. PWC IS ENTITLED TO SHOW THAT ITS ATTEST ASSOCIATES SATISFY THE "GENERAL SUPERVISION" REQUIREMENT OF THE ADMINISTRATIVE EXEMPTION.

In arguing that the District Court's Administrative Exemption determination should be upheld, Plaintiffs conspicuously fail to defend the very foundation of that determination: the District Court's unwarranted definition of the "general supervision" requirement of subsection (d) of the exemption. Having abandoned the District Court's approach, Plaintiffs resort to three alternative arguments on appeal, all seeking to deny PwC its right to make a factual showing under subsection (d). Plaintiffs argue that PwC failed to set forth any evidence in the District Court to carry its burden of proof under subsection (d), thereby waiving its arguments. Plaintiffs also argue that "under California law," Attest Associates *cannot* -- regardless of their particular employment circumstances -- work under "only general supervision" and "along specialized lines," as subsection (d) requires. Finally, Plaintiffs assert that PwC's arguments "are surprising given recent [financial] scandals." BA at 50. None of these arguments is well taken.

A. Plaintiffs Did Not Place Subsection (d) Of The Administrative Exemption At Issue In Their Motion For Summary Adjudication.

Plaintiffs' claim that PwC waived its arguments regarding subsection (d) of the Administrative Exemption in the court below reflects a fundamental distortion of the proceedings in the District Court and the issues before this Court. Specifically, Plaintiffs assert that in the District Court PwC: (1) failed to analyze

that section's "general supervision" requirement as a distinct element of the exemption and failed to set forth "proof separate from the other elements of [its] claim"; and (2) failed to submit any evidence that Attest Associates "work along specialized or technical lines requiring special training, experience or knowledge." *See* BA at 51-53.

Plaintiffs ignore the fact that PwC's appeal derives from the granting of ***Plaintiffs'*** motion for summary adjudication. Plaintiffs -- not PwC -- had the initial burden of production to show an "absence of evidence" to support essential elements of PwC's affirmative defense of exemption. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). However, Plaintiffs made no such showing, failing to raise either element of subsection (d) in their motion, and instead focusing exclusively on the flawed claim that Attest Associates do not perform exempt duties under subsection (a)(i). ER 275-79. Because Plaintiffs did not contest the "general supervision" or "work along specialized or technical lines" requirements, PwC was under no obligation to proffer its evidence on those elements.[12] *See*

[12] In any event, PwC submitted evidence establishing that Attest Associates work under "only general supervision," even under the District Court's flawed definition of that term. *See, e.g.*, ER 220 (¶39); ER 189-90 (¶¶13-14); ER 243 (¶10); ER 224 (¶6). PwC also submitted evidence establishing that Attest Associates perform work "along specialized or technical lines requiring special training, experience, or knowledge" under subsection (d). *See, e.g.*, ER 157-60 (AMFs 14-23); *see also* ER 106-14.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000) (citing additional authorities).

Contrary to Plaintiffs' assertion, PwC did not waive its arguments in the District Court regarding the "general supervision" requirement of the Administrative Exemption. *See* BA at 51. Indeed, Plaintiffs did not raise that requirement in their motion for summary adjudication. The District Court's *sua sponte* reformulation of the "general supervision" requirement, and its entry of summary adjudication against PwC on that ground, thus was not prompted by Plaintiffs' motion. Because PwC was not provided notice that its evidence on that issue was required, the District Court's Order cannot be sustained on the basis of either a failure of proof or waiver.[13] *See Nissan Fire*, 210 F.3d at 1102-03.

Finally, Plaintiffs' reliance on *Hourani v. United States*, 239 F. App'x 195 (6th Cir. 2007), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), is misguided. Both *Hourani* and *Wainwright* involved the waiver of arguments that the appellant had the burden of raising in the district court but instead raised ***for the first time on appeal***. *See Hourani*, 239 F. App'x at 197-98; *Wainwright*, 433 U.S. at 89-91. PwC had no such burden under subsection (d) in opposing Plaintiffs' motion.

[13] Plaintiffs' reliance on *Herrera v. F.H. Paschen/S.N. Nielsen, Inc.*, No. D051369, 2008 WL 5207359 (Cal. Ct. App. Dec. 15, 2008), to suggest by comparison that Attest Associates do not perform "'specialized or technical work'" (*see* BA at 44-45) is of no consequence; PwC had no burden to prove such facts because Plaintiffs did not move for summary adjudication on that ground.

Plaintiffs' reliance on *United States v. Beckstead*, 500 F.3d 1154 (10th Cir. 2007), and *People ex. rel. Dep't of Alcoholic Beverage Control v. Miller Brewing Co.*, 104 Cal. App. 4th 1189 (2002), is similarly misguided. Both of these cases involved the appellant's failure to properly raise an issue on appeal. *See Beckstead*, 500 F.3d at 1163; *Miller Brewing Co.*, 104 Cal. App. 4th at 1200. That is not the case here.

B. Plaintiffs' Evidence And Arguments Are Insufficient To Support The District Court's Summary Adjudication Regarding The "General Supervision" Requirement Of Subsection (d).

1. Rules Governing The Field Of Accounting Do Not Require Unlicensed Accountants To Work Under More Than "Only General Supervision."

Plaintiffs' reliance on the B&P Code -- like the District Court's -- is misplaced.[14] Plaintiffs argue that B&P Code section 5053 mandates a high degree of supervision over unlicensed accountants through its requirement that such accountants be under the "control and supervision" of licensed CPAs because, by "coupl[ing]" the terms "control" and "supervision" together, the legislature "inten[ded] to require CPAs to exercise pervasive authority over the actions of their unlicensed employees." BA at 47 (citing authorities). Yet, as explained in

[14] Plaintiffs citation to *Erlenbaugh v. United States*, 409 U.S. 239 (1972), to justify their reliance on the B&P Code under the doctrine of *in pari materia* is unavailing. *See* BA at 47. As *Erlenbaugh* notes, the doctrine of *in pari materia* may be invoked where the statutes at issue ***address the same subject matter***. *See* 409 U.S. at 243. The B&P Code and the Wage Order do not address the same subject matter.

PwC's opening brief, these terms do not mandate any particular ***level*** of supervision.[15] *See* PwC Br. at 41-44.

2. Plaintiffs' Self-Serving Declarations And Proffered Exhibits Do Not Establish That There Are No Genuine Issues Of Material Fact.

Plaintiffs also argue that PwC's auditing software and internal policies require more than "only general supervision" of Attest Associates. In support of this argument, Plaintiffs primarily rely on the self-serving declaration testimony of class member Joseph Soave, a former Attest Associate who worked in one PwC office for one year. *See* BA at 49 (citing Plaintiffs' Supplemental Excerpts of Record ("SER") at 102-03). Nothing in Mr. Soave's testimony explains -- or even suggests -- how closely he or any other Attest Associate was supervised. *See* SER at 102-03. Instead, he describes his own work as involving little more than mindlessly following audit steps set forth in proprietary audit software, which, if true, reflects only that he failed to perform up to PwC's expectations. *See, e.g.*, *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 802 (1999) (holding an employee who is not primarily engaged in exempt work due to his own substandard performance may not thereby "evade a valid exemption").

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[15] *See, e.g., Mekhitarian*, 2009 WL 6057248, at *4 ("There is no support for Plaintiffs' overly broad claim that mere review and approval of the class members' work is sufficient to take them outside of the administrative exemption…It is the ***degree*** of supervision that is key….") (emphasis added).

Plaintiffs' reliance on a document entitled "Documenting Your Work In the Client File" also does not support their supervision claims -- indeed, it merely conflates subsection (b)'s "discretion and independent judgment" requirement with the "general supervision" requirement of subsection (d). *See* BA at 49-50. As explained by the District Court, these standards are distinct. *See* ER at 39:24-25. Thus, Plaintiffs point to no PwC policy or procedure mandating supervision incompatible with the Administrative Exemption's requirement.

3. The Exemption Status Of Attest Associates Is Unrelated To PwC's Response To Financial Scandals.

Plaintiffs suggest that PwC, in effect, be estopped from arguing that Attest Associates work "under only general supervision" because PwC has rightfully emphasized its commitment to performing audit procedures intended to increase its ability to detect fraud. *See* BA at 50-51. The exemption status of Attest Associates simply cannot be ascertained by reference to congressional testimony regarding investor protection. There is no inconsistency between (1) PwC's emphasis, in the face of recent financial scandals, on adding and enforcing various fraud-detection procedures and policies; and (2) PwC's claim that Attest Associates work under "only general supervision" for purposes of the Wage Order.

III. THE IMPACT OF THE DISTRICT COURT'S ORDER IS NOT LIMITED TO THE PROFESSION OF ACCOUNTING.

As set forth in PwC's initial brief and its supporting amici briefs, the District Court's Order, if affirmed, would mean that the employers of thousands of lawyers, doctors, dentists, optometrists, architects, engineers, teachers, and accountants practicing in California have been misclassifying their employees as exempt from overtime for more than 20 years. Plaintiffs spend the final pages of their brief attempting to convince this Court that the District Court's Professional Exemption determination, if upheld, will have no impact on the exemption status of individuals engaged in the other professions listed in subsection (a) of the Professional Exemption. *See* BA at 54-57. In fact, there is no way to limit the Professional Exemption ruling that Plaintiffs seek to the profession of accounting.

Specifically, Plaintiffs claim that the District Court's Order will not impact the exemption status of licensed, out-of-state attorneys practicing in California. Plaintiffs argue that such attorneys "may satisfy the Professional Exemption through their out-of-state licenses" by registering with the state through the "Multijurisdictional Practice Program," or by moving before California courts to appear *pro hac vice* in individual cases. BA at 56-57. Plaintiffs claim that such professionals can therefore practice "*as if* they were 'licensed or certified' by the State of California," thus allowing them to qualify as professionally exempt under subsection (a) of the exemption. BA at 57 (emphasis in original).

To state this argument is to refute it. None of the procedures allowing attorneys licensed in other states to practice law under limited conditions in California makes such attorneys "licensed… by the State of California" -- the *sine qua non* of exemption under subsection (a). Under the District Court's Order, all such attorneys, as well as all attorneys in private practice in California who are not admitted to the California bar, would be ineligible for the Professional Exemption. Similarly, the District Court's Order could render non-exempt thousands of doctors, architects, engineers, and others who work in California who either have not yet been licensed, or who are licensed in another state, regardless of the nature of their individual job duties. Nothing in the Wage Order suggests that it was intended to have such far-reaching effects.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's Order of summary adjudication and remand for further proceedings under the correct legal standards.

Dated: March 23, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,788 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 23, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Re: *Campbell, et al. v. PricewaterhouseCoopers LLP*
Docket No. 09-16730
Pending Motion for Extension of Time to File Reply Brief

To Whom It May Concern:

Pursuant to the Advisory Committee Note to Circuit Rule 31-2.2, Defendant-Appellant PricewaterhouseCoopers LLP ("PwC") hereby states that its unopposed motion for an extension of time to file the accompanying reply brief is pending. PwC's motion, filed on February 3, 2010, requested an extension of time until March 23, 2010 for PwC to file the accompanying reply brief. Accordingly, PwC has filed its reply brief within the time requested in its motion.

Sincerely,

s/Daniel J. Thomasch

Daniel J. Thomasch

DJT/SFZ:lr