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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

Deloitte stakes its defense of the decision below on *Wal-Mart Stores v. Dukes*, 130 S. Ct. 2541 (2011), and *Campbell v. PricewaterhouseCoopers,* 642 F.3d 820 (9th Cir. 2011). As for *Dukes*, the Supreme Court has just made clear that class certification is not a referendum on the merits. *See Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). As for *Campbell*, both the district court and the *Campbell* panel itself have declined the opportunity to decertify the class in that very case. Undeterred, Deloitte asks this Court to read *Campbell* (a merits decision predicting California law) to effectively foreclose class actions in overtime cases—even though the California Supreme Court has rejected such a reading as contrary to substantive state policies. And, paradoxically, Deloitte's reading would be burdensome for *employers*, eliminating their ability to exempt categories of workers based on realistic job requirements. Deloitte makes no effort to address any of this.

Instead, Deloitte makes thinly disguised merits arguments. In its zeal to prove its case on the merits, however, Deloitte ends up highlighting the existence of uniform comprehensive policies that bear directly on the common issues in the case—precisely what was missing in *Dukes*. And because the district court will have at its disposal a range of procedural tools (such as subclasses) to manage this case on remand, Deloitte's protests about manageability and efficiency cannot justify the district court's drastic decision to decertify the entire class.

ARGUMENT

I. Like the Decision Below, Deloitte Wrongly Conflates Class Certification with the Merits.

According to Deloitte, "*Dukes* and *Campbell* fundamentally alter how the Court should assess the legal and factual questions bearing on certification." Deloitte Br. 20. But much as Deloitte might wish that *Dukes* effected a sea change in class-certification law, the Supreme Court has now thrown cold water on that view. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Court held that plaintiffs in securities-fraud class actions need not prove the element of materiality to satisfy Rule 23 because "such proof is not a prerequisite to class certification." 133 S. Ct. 1184, 1191 (2013). "Rule 23(b)(3)," the Supreme Court emphasized, "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* To conclude otherwise would "put the cart before the horse." *Id.*

Yet that is exactly what the district court did below. By decertifying the class based solely on *Campbell*—a summary-judgment decision involving an already certified class—the court conflated the standards for class certification and summary judgment. It let Deloitte defeat certification merely by producing declarations from class members emphasizing variations in their work—even from members with the same job titles and job descriptions, who were concededly subject to the same policies and procedures—thereby imposing a requirement,

"essentially, 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).

Deloitte, for its part, reads *Campbell* even *more* broadly than did the district court below. On Deloitte's reading, *Campbell* leaves "no doubt that the exemption determinations at issue here—whether administrative or professional—are individualized inquiries" because "exempt status turns on the intensely factual inquiry of what audit associates actually do," which is "*incapable of common proof*." Deloitte Br. 2, 25, 37 (emphasis added). As Deloitte would have it, then, defendants need not even bother submitting evidence highlighting individual variations in work; they just have to oppose certification and cite *Campbell* because exemption determinations, as a matter of law, cannot be made on a classwide basis.

Campbell does not sweep so broadly. As we discussed in our opening brief (at 35-37), and as the district court in that case explained when it reaffirmed class certification, *Campbell* "did not address class certification," "does not undermine" the arguments for class certification, and neither "says [n]or implies that an examination of the individual work of every single Associate is a 'threshold' requirement for certification of the class." *Campbell v. PricewaterhouseCoopers, LLP*, 287 F.R.D. 615, 623, 627 (E.D. Cal. 2012). And when the defendant in *Campbell* filed a Rule 23(f) petition seeking to appeal the district court's denial of its decertification

motion, this Court denied the petition and noted in its order that "[t]he panel that decided *Campbell* has declined to hear this case as a comeback case," as the defendant had requested. Order, *Campbell v. PricewaterhouseCoopers, LLP*, No. 12-80223, ECF No. 4 (Mar. 1, 2013) (citation omitted).

Deloitte thus asks this Court to read *Campbell* as adopting a rule rejected in *Campbell* itself: that the summary-judgment decision there not only mandates decertification in that case, but effectively prohibits certification in any case where the employer asserts that the employees are exempt under California law. The California Supreme Court has likewise rejected such a rule because it would "shield employers" from liability, *Sav-On Drug Stores*, 96 P.3d at 207, leaving only "'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). Hence, as we explained in our opening brief (at 40-41), Deloitte's reading of *Campbell* is both (a) wrong as a matter of federal procedural law because it conflates class certification and the merits and (b) wrong as a matter of state substantive law, needlessly causing "the character and result of the federal litigation [to] stray from the course it would follow in the state courts." *Hanna v. Plumer*, 380 U.S. 460, 473 (1965). Deloitte offers no meaningful response.

Just as bad, Deloitte's view would be unworkable in practice and undesirable for employers. Because Deloitte believes that "exempt status turns on the intensely

factual inquiry of what audit associates actually do," Deloitte's own rule would require an employer to constantly reassess the exemption determinations of every single audit employee based on what each does "on a day-to-day and audit-to-audit basis," without regard to any objective measure like the company's own realistic expectations, the overall requirements of the job, or the corporate policies and procedures that apply to all audit employees. Deloitte Br. 2, 37. That rule is at odds with any administrable system of wage-and-hour law. It would strip employers of their ability to make categorical exemption determinations of any kind and enlist employers in a burdensome and time-consuming exercise that Deloitte itself does not undertake. Fortunately for employers, that is not the law in California. But Deloitte never denies that it is a necessary consequence of the decision below.

II. Common Questions Predominate Over Individual Issues.

The plaintiffs have "affirmatively demonstrate[d]" that they have satisfied Rule 23 by identifying three common predominant questions. *Comcast Corp. v. Behrend*, 569 U.S. ___, 2013 WL 1222646, at *4 (Mar. 27, 2013) (internal quotation marks omitted). Because each of these questions focuses on issues that are susceptible to common proof—the hiring requirements of the occupation, the realistic requirements of the job, whether external audit work itself is administrative—each has the capacity to generate a common answer that will

resolve the applicability of an exemption asserted by Deloitte without individual issues predominating. Deloitte gives no reason why that is not enough for Rule 23.

A. Learned Profession: Specialized Instruction and Study. The first common predominant question is whether audit employees are required to complete a prolonged course of specialized instruction and study before joining Deloitte. In attempting to pick apart that question, Deloitte offers a smorgasbord of different responses—from why it thinks the question is not common or predominant to why it thinks it will win on the merits. Each rests on a flawed understanding of either Rule 23 or California law.

Deloitte's first response is that the question is not common "because the answer is not capable of resolving any claim or defense in one stroke, *unless Plaintiff prevails*." Deloitte Br. 30 (emphasis altered). "Under *Dukes*," Deloitte submits, "it is insufficient to argue, as Plaintiffs do, that a 'common answer' sufficient to resolve the action in one stroke '*could*' result from the proffered question." *Id.* at 30-31 (some emphasis removed). If that is what Deloitte believes *Dukes* stands for, then it is no wonder that Deloitte puts so much weight on the case. But *Dukes* itself held that commonality means only that a question be "*capable* of classwide resolution"—*i.e.*, that it have "the *capacity* … to generate common answers apt to drive resolution of the litigation." 131 S. Ct. at 2551 (emphasis altered). And *Amgen* drives the point home: It held that plaintiffs seeking certification "need not, at the threshold, prove

that the predominating question will be answered in their favor." 133 S. Ct. at 1196. Deloitte's first response runs afoul of this rule.

Deloitte's second response is that its "minimum hiring requirements satisfy the specialized instruction element of the professional exemption"—or put differently, that Deloitte will prevail on the merits. Deloitte Br. 31. But again, that is not the question at the certification stage. "Merits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1195 (emphasis added). Deloitte asks this Court to go further.

Here, the question on the merits is whether Deloitte requires its audit employees to have completed a prolonged course of specialized instruction that "relate[s] directly to the position." *Solis v. Washington*, 656 F.3d 1079, 1088 (9th Cir. 2011). That is a common question with a common answer. And although the plaintiffs believe that this answer will ultimately favor them—because Deloitte does not require its audit employees to have majored in any particular subject or to have taken even a single class in auditing—whether the answer actually does so is beyond the scope of the Rule 23 inquiry.[1]

[1] Further pressing the merits, Deloitte argues that its "requirements far exceed what other Courts have held to be sufficient to meet this prong." Deloitte Br. 32. But its only precedent for that assertion, *Owsley v. San Antonio Independent School District*, 187 F.3d 521 (5th Cir. 1999), involved a position requiring a (continued…)

Deloitte's third response is that the question is not common "because the educational backgrounds of the putative class members vary widely and would have to be separately examined." Deloitte Br. 34. That misstates the nature of the inquiry under California law. As the district court below acknowledged, "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." ER 9-10. That is because "[t]he learned profession exemption does not ask where or how [individual audit employees] acquired their educations. It asks whether their occupation—[audit employee]—is one which customarily requires a prolonged course of specialized intellectual instruction and study." *Campbell*, 287 F.R.D. at 623. That question is "a simple matter of common proof." *Id.* The defendant "can submit resumes, together with its hiring policy"; the plaintiffs "can submit resumes," plus evidence showing that the defendant "did not require such an education prior to hire." *Id.* As described in our opening brief (at 48-49), that has happened here.

Deloitte's final response is that the question does not predominate because "the *predominant* issue—the touchstone of the exemption—is what actual duties each

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bachelor's degree plus the "completion of 5 3-hour credit college courses" in very specific subjects directly related to the position. *Id.* at 524. Nor does it matter whether audit employees "have the same, or almost the same, educational background as licensed CPAs." Deloitte Br. 32. Licensed CPAs are exempt *by virtue of being licensed*. *See* Cal. Code Regs. tit. 8, § 11040(1)(A)(3)(a). The bottom line is this: If the district court disagreed with the plaintiffs on the merits, then it should have granted summary judgment to Deloitte; it should not have decertified the class.

Plaintiff performed on a day-to-day and audit-to-audit basis, a 'fact-intensive, individualized inquiry' incapable of common proof." Deloitte Br. 37. That argument, if accepted by this Court, would effectively end class actions in California overtime cases. Indeed, it is hard to imagine any class of unlicensed employees in any field being able to be certified because, on Deloitte's view, "the *predominant* issue" is, and always will be, the "actual duties each Plaintiff performed on a day-to-day" basis—an inquiry that Deloitte believes is "incapable of common proof." That cannot be the law. And to the extent that Deloitte interprets California labor law as requiring that result, the California Supreme Court has held otherwise. *See Sav-On Drug Stores*, 96 P.3d at 207.

But even setting this aside, Deloitte's view of predominance is mistaken. To see why, imagine a group of audit employees who were all classified as exempt from California's overtime requirements and who were all paid the same salary by their employer. Imagine further that they claimed that this salary was below the minimum amount needed to qualify for an exemption under California law. *See* Cal. Lab. Code § 515(a). Would these employees be unable to bring a class action against their employer because "the *predominant* issue" is the work they actually do? Of course not. That is because "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). It asks: "Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to

the parties, to decide *some* issues on a class basis or *all* issues in separate trials?" *Id.* (emphasis added). The answer in this hypothetical must be the former because if an employer does not pay an employee a high enough salary, then it cannot exempt that employee from California's overtime laws no matter what the employee does "on a day-to-day and audit-to-audit basis."

The same logic holds true here. If Deloitte does not require its audit employees to have completed a prolonged course of specialized academic instruction that relates directly to the position, then it cannot exempt those employees as learned professionals. Deloitte's argument to the contrary repeats the error made by the district court below, which held that even though this question "can be decided on a class-wide basis"—and thus can resolve the applicability of professional exemption in one stroke—the question does not predominate "because under the Wage Order and *Campbell*, exempt status turns on what employees actually do." ER9-10. To agree with that statement is to read out of the wage order the requirements that do not focus on "what employees actually do."

B. Discretion and Independent Judgment. The second common predominant question identified in our opening brief is whether Deloitte's audit employees are realistically required to customarily and regularly exercise discretion and independent judgment regarding significant matters. The district court below

held that this question was not common because "exempt status turns on what employees actually do," and what some employees actually do varies. ER10.

In defending that decision, Deloitte has staked out two very different positions. The first is that its audit employees *are* realistically required to regularly exercise discretion and independent judgment regarding significant matters, which is consistent with Deloitte's decision to exempt all audit employees from overtime. According to Deloitte, this expectation (which Deloitte says its policies "codify") "is required of everyone on the audit team." Deloitte Br. 44; *see also id.* at 41 (arguing that "relevant laws, professional standard and internal methodologies *require* the use of discretion and independent judgment"). This includes all "individual putative class members," who are "responsible for using their discretion and independent judgment to identify issues deemed sufficiently significant to affect a final decision." *Id.* at 44 n.9. And this exercise of discretion and independent judgment, Deloitte continues, is necessarily significant because "[i]n auditing" the "employee's contribution to the ultimate work product" is "a matter of 'significance' within the meaning of the exemptions." *Id.* at 43.

This argument, however, is no indictment of our position on class certification. Quite the contrary: It is a merits argument strung together by common questions. Crucially, Deloitte *admits* that it has a uniform set of expectations for all of its audit employees. So the question on the merits is whether

those expectations are *realistic*—that is, whether they accurately reflect the requirements of the job in light of the governing state laws and professional standards, Deloitte's corporate policies and job descriptions, and the work that audit employees actually do. That is the analytical approach dictated by the California Supreme Court in *Ramirez v. Yosemite Water Co.*, which instructs lower courts, in making exemption determinations, to "inquir[e] into the *realistic* requirements of the job"—meaning that they must consider not only what employees actually do but also "the employer's realistic expectations" and "the actual overall requirements of the job." 978 P.2d 2, 13 (Cal. 1999). These two latter considerations "are likely to prove susceptible to common proof." *Sav-On Drug Stores*, 96 P.3d at 206. Yet the district court—a diversity court under an obligation to apply state substantive law, *Hanna*, 380 U.S. at 465—did not consider either.

Deloitte cannot rescue the decision below from that error. Deloitte neither cites *Ramirez* nor grapples with the reasoning of *Sav-On Drug Stores*, apparently because it believes that it will win the case on the merits. "But if so that is an argument not for refusing to certify the class but for certifying it and then entering a judgment" in Deloitte's favor—"a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment." *Butler*, 702 F.3d at 362.

The second position staked out by Deloitte resides at the other end of the spectrum, and it tracks the reasoning of the district court. Deloitte argues that "the level of discretion and independent judgment exercised with respect to matters of significance differs among Plaintiffs"—and thus the issue is not capable of common proof—because the work that audit employees actually do on a daily basis varies. Deloitte Br. 45; *see also id.* at 45-46 (arguing that the amount of discretion and independent judgment exercised "is not determined or limited by job title").

But even if the premise of this argument were correct, its conclusion is not. For two reasons: First, just because there is some variation in what employees actually do each day (or in how they characterize what they do) does not mean that "the level of discretion and independent judgment exercised with respect to matters of significance differs," at least in a way that would defeat class certification. If it did, then *no class* of employees—not secretaries, not construction workers, not even janitors—would be able to show common proof on this question. Second, the ultimate inquiry under California law is not whether an employee *actually* exercises discretion and independent judgment regularly and with respect to significant matters; it is whether the employee was *realistically required* to do so. *Ramirez*, 978 P.2d at 13. Deloitte contends that all audit employees were realistically required to do so; the plaintiffs contend the opposite. Regardless of who "win[s] the fray," *Amgen*, 133 S. Ct. at 1191, the question is capable of generating a common answer

and is susceptible to common proof, including Deloitte's policies governing the duties of its audit employees—policies that Deloitte itself admits all are bound by.

Nevertheless, Deloitte argues that "the existence of purportedly 'uniform' policies and procedures does not eliminate the need for individualized inquiries." Deloitte Br. 49. As an initial matter, it is surprising, to say the least, that Deloitte would state that its own company policies are only "purportedly" or "alleged[ly]" common or uniform. *See id.* at 49, 50, & 53. That is particularly so given its earlier statements to the contrary (*see, e.g.*, *id.* at 41 & 44), and the fact that Deloitte does not deny that it has a standardized training program, a comprehensive audit methodology, common computer software and documentation, extensive supervision, a detailed review process, and a company policy requiring that all audit employees comply with all applicable state laws and professional standards, follow the instructions contained in the MAP or audit plan, and bring any potentially "significant matter" that arises during an engagement to the attention of a licensed CPA. *See* Opening Br. 11-22, 53.

Moreover, as this Court has explained (and as we discussed in our opening brief at 44-46), "uniform corporate policies will often bear heavily on questions of predominance and superiority" in overtime cases. *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009). "Indeed, courts have long found that comprehensive uniform policies detailing the job duties and

responsibilities of employees carry great weight for certification purposes" because such policies "suggest a uniformity among employees that is susceptible to common proof." *Id.* at 958-59. In relying on uniform policies, of course, a plaintiff must explain "how they establish predominance as to the particular exemptions." *Marlo v. United Postal Serv., Inc.*, 639 F.3d 942, 948 (9th Cir. 2011); *see also Wang v. Chinese Daily News, Inc.*, --- F.3d ---, 2013 WL 781715 (9th Cir. Mar. 4, 2013). But there is no doubt that where "the duties of the job are largely defined by comprehensive corporate procedures and policies" (as opposed to where the employer "has no control over what [the employees] actually do during the day"), Rule 23 is met—"despite arguments about 'individualized' differences in job responsibilities." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 938, 946 (9th Cir. 2009) (internal quotation marks omitted); *see Campbell*, 287 F.R.D. at 626-627 (finding "common questions and common proof" were "offered in this case," and rejecting a reading of Rule 23 "that would eliminate most class actions in the wage and hour context"). As in *Campbell*, the plaintiffs have presented the necessary common proof here.

One last point: Although Deloitte fully embraces the "what employees actually do" standard in opposing class certification, it acknowledges that this is not the ultimate governing standard under California law. "To the extent Plaintiffs claim they did not perform exempt tasks," Deloitte argues, "such inaction merely reflects the personal decision of those particular Plaintiffs to disregard *Deloitte's*

expectations. Indeed, these claims give rise to the need for additional individualized inquiries, as Deloitte is entitled to adduce evidence about the attitude and performance of any particular putative class member and whether and to what extent he or she met *its expectations*." Deloitte Br. 47 (citations omitted) (emphasis altered); *see also id.* at 50-51 (calling for an inquiry into whether an employee's "work is consistent with *the employer's reasonable expectations*" (emphasis added)).

In other words, were an employee's actual work such that the employee would not be considered exempt, then Deloitte would have the court ask whether that employee met the realistic expectations of the job. But that is not an "additional individualized inquiry." If the employee met expectations, then that employee would be exempt. If the employee did not meet expectations, then that employee would not be exempt. *Ramirez*, 978 P.2d at 13. In both cases, the question comes back to the generally applicable realistic requirements of the job.

In short, Deloitte is trying to have it both ways. It wants to rely on uniform realistic job requirements when the work an employee actually does leads to an unfavorable result for Deloitte on the merits (and when it is making exemption determinations in the first place). But it does not want a court to consider such requirements when its employees rely on them to bring a class action against the company for violating the law. Deloitte must take the bitter with the sweet.

C. Management Policies or General Business Operations. The third common predominant question identified in our opening brief is whether the plaintiffs are primarily engaged in work that is directly related to the management policies or general business operations of Deloitte or its clients. Here, too, Deloitte's arguments come up short.

As Deloitte acknowledges, the work performed by an employee must be both qualitatively and quantitatively administrative to qualify for the administrative exemption. Deloitte Br. 54. "Both prongs," Deloitte claims, "require a fact-intensive inquiry because the determination must be based on a review of the actual job duties performed by an employee." *Id.* at 54-55. But then Deloitte gives its reason for why audit employees perform qualitatively exempt work: because "[w]hen Plaintiffs perform accounting work, they engage in a qualitatively administrative activity," *id.* at 55—that is, because accounting work *itself* (including external auditing) is a qualitatively administrative activity. But if that argument ends up being right, then it will be right across the class. And if it ends up being wrong, then Deloitte will be unable to exempt *any* audit employees as administrative workers. *See Kress v. PricewaterhouseCoopers LLP*, 2013 WL 140102, at *7-*10 (E.D. Cal. Jan. 10, 2013) (whether "California law and AICPA standards" permit audit employees to "advise" clients and "manage" an audit is a common predominant question).

III. This Class Action Would Be Manageable and More Efficient Than Many Individual Suits.

Finally, Deloitte contends that Rule 23 is not met because a class action is not superior to other methods of adjudication. *See* Fed. R. Civ. P. 23(b)(3). But as this Court has noted, "[f]orcing individual [plaintiffs] to litigate their cases, particularly where common issues predominate for the proposed class"—as they do here—"is an inferior method of adjudication." *Wolin v. Jaguar Land Rover N. A., LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010). That is because "filing hundreds of individual lawsuits … could involve duplicating discovery and costs that exceed the extent of proposed class members' individual injuries." *Id.*

Deloitte's argument on superiority is thus simply a repackaging of its argument on predominance: that a class-action trial "would necessarily devolve into an 'unmanageable set of mini-trials'" because each "would require individualized proof." Deloitte Br. 58. This argument fails for the same reason that one did: because nearly all of the key questions in the case can be answered with common proof. *See Wolin*, 617 F.3d at 1176 (holding that a class action was superior because, even if there were some "individualized determinations," "[i]t is far more efficient to litigate" the core of the plaintiffs' theory of liability "on a classwide basis rather than in thousands of individual and overlapping lawsuits").

Consider what would happen if this Court upheld the decision below and the case were to proceed with just the three named plaintiffs. A number of other audit

employees would bring individual actions against Deloitte in district court. In every case—in this one and in those—there would be a dispute about Deloitte's uniform hiring requirements. In every case, there would be a dispute about whether an external audit is a qualitatively administrative activity. And in every case, Deloitte would "adduce evidence" about whether the work that the employee actually did "met its expectations," Deloitte Br. 47, and there would then be a dispute about those expectations and whether they reflected the realistic requirements of the job. Rather than litigate all these common issues in separate suits all across California, it is far more efficient to do so all at once.

Deloitte's assertion that a class action would "entail an impermissible 'Trial By Formula' rejected by *Dukes*" is similarly misplaced. Deloitte Br. 59. In sharp contrast to the class here, the class in *Dukes* sought "to sue about literally millions of employment decisions at once" without any "glue holding the alleged *reasons* for all those decision together." 131 S. Ct. at 2552. The Supreme Court rejected the "novel project" of getting around this shortcoming by using a "sample set of the class members" to determine liability and then extrapolating from that set "to the entire remaining class" (so that if 10% of a sample set of 150 class members were found to have valid claims, then 10% of the 1.5 million total class members would as well, and the total recovery amount would then be divided among the entire

class). *Id.* at 2561. That is nothing like what would happen here, where the questions at the heart of Deloitte's affirmative defenses are common to the class.

Nor is Deloitte correct that the district court will lack the "procedural tool[s]" to effectively manage the class action. Deloitte Br. 59. To the contrary, the court on remand will have a range of "adequate procedural mechanisms" at its disposal to tailor the size and manageability of the class to the record before it. *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003). One of those mechanisms is the use of subclasses. *See* Fed. R. Civ. P. 23(c)(5); *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2009) (noting that potential differences within a class "may counsel the formation of subclasses"). Thus, neither the "sheer number" of class members nor potential differences based on seniority, Deloitte Br. 58, can justify an all-or-nothing approach to class certification. Indeed, this Court "may require the district court to consider on the record the possibility of certifying subclasses." *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 960 (D.C. Cir. 1985); *see Rodriguez*, 591 F.3d at 1123-24; *cf. Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 368 (7th Cir. 2012) (Posner, J.) ("The fact that a class is overbroad and should be divided into subclasses is not in itself a reason for refusing to certify the case as a class action." (alterations omitted)). But what the Court should *not* do is affirm the district court's decision to apply the strong medicine of decertifying the class as a whole.

* * *

By decertifying the class based on a misreading of *Campbell*, the decision below unnecessarily undermines substantive state law, creates a rule that would heavily burden employers in practice, and invites future courts to collapse the certification and merits inquiries into one. It should be reversed.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ Deepak Gupta

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

I hereby certify that my word processing program, Microsoft Word, counted 5,012 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

Deepak Gupta

April 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2013, I filed the forgoing Reply Brief for Appellants via Appellate CM/ECF with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit. I further certify that the following counsel of record will be served via CM/ECF:

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