Supreme Court of California
DAN BRIGGS et al., Plaintiffs and Appellants,
v.
EDEN COUNCIL FOR HOPE AND OPPORTUNITY, Defendant and Respondent.
No. S062156.

Jan. 21, 1999.

SUMMARY

Two owners of residential rental properties brought an action for defamation and infliction of emotional distress against a nonprofit provider of tenant counseling services, alleging that defendant engaged in a pattern of harassment by giving false information to plaintiffs' tenants and making defamatory statements about plaintiffs. The trial court entered an order granting defendant's special motion to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), entered a judgment of dismissal, and entered an order awarding attorney fees and costs to defendant. (Superior Court of Alameda County, No. H-180743-5, Bonnie Lewman, Judge.) The Court of Appeal, First Dist., Div. One, Nos. A072446 and A074357, reversed on the ground that defendant failed to make a prima facie showing that plaintiffs' lawsuit arose from a statement or writing in furtherance of defendant's constitutional rights of petition for the redress of grievances or freedom of speech in connection with a public issue.

The Supreme Court reversed the judgment of the Court of Appeal and remanded, holding that the Court of Appeal erred in construing Code Civ. Proc., § 425.16, subd. (e)(1) and (2), as if it contained an "issue of public interest" limitation. The court held that, in accordance with the plain language of the statute, and in consonance with discernible legislative intent, as well as for reasons of sound public policy, a defendant moving to strike a cause of action arising from a statement or writing made in connection with an issue under consideration by, a legally authorized official proceeding need not separately demonstrate that the statement or writing concerned an issue of public significance. In this case, plaintiffs' causes of action against defendant all arose from defendant's statements or writings made in connection with issues under consideration by official bodies or proceedings, specifically, actual and potential civil litigation and a Department of Housing and Urban Development investigation. Thus, to the extent that plaintiffs failed to establish, pursuant to Code Civ. Proc., § 425.16, subd. (b)(1), a probability of prevailing on their claim, their causes of action were subject to defendant's special motion to strike. (Opinion by Werdegar, J., with George, C. J., Mosk, Kennard and Chin, JJ., concurring. Concurring and dissenting opinion by Baxter, J., with Brown, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Pleading § 93--Motion to Strike Pleading as a Whole-- Statutory Remedy Against SLAPP Suits--Required Prima Facie Showing--Need to Demonstrate That Pertinent Statement Concerned Issue of Public Significance.
In an action brought by two owners of residential rental properties against a nonprofit provider of tenant counseling services related to landlord-tenant disputes, alleging that defendant engaged in a pattern of harassment by giving false information to plaintiffs' tenants and making defamatory statements about plaintiffs, the Court of Appeal erred in reversing the trial court's order granting defendant's special motion to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16), on the ground that Code Civ. Proc., § 425.16, subd. (e)(1) and (2), contains an "issue of public interest" limitation. In accordance with the plain language of the statute, and in consonance with discernible legislative intent, as well as for reasons of sound public policy, a defendant moving to strike a cause of action arising from a statement or writing made in connection with an issue under consideration by a legally authorized official proceeding need not separately demonstrate that the statement or writing concerned an issue of public significance. In this case, plaintiffs' causes of action against defendant all arose from defendant's statements or writings made in connection with issues under consideration by

official proceedings-specifically, actual and potential civil litigation and a Department of Housing and Urban Development investigation. Thus, to the extent that, as the trial court impliedly found, plaintiffs failed to establish, pursuant to Code Civ. Proc., § 425.16, subd. (b)(1), a probability of prevailing on their claim, their causes of action were subject to defendant's special motion to strike. (Disapproving, to the extent they hold to the contrary: *Zhao v. Wong* (1996) 48 Cal.App.4th 1114[55 Cal.Rptr.2d 909]; *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* (1996) 50 Cal.App.4th 1633[58 Cal.Rptr.2d 613]; *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591[57 Cal.Rptr.2d 491]; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713[77 Cal.Rptr.2d 1].)
[See 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 962 et seq.]
(2) Statutes § 46--Construction--Presumptions--Legislative Intent--Different Words Used in Same Connection in Different Parts of Statute.
Where different words or phrases are used in the same connection in different parts of a statute, it is presumed that the Legislature intended a different meaning.

(3) Statutes § 38--Construction--Giving Effect to Statute--Construing Every Word.
Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.

(4) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.
Legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives. Furthermore, every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.

(5) Statutes § 42--Construction--Extrinsic Aids--Propriety.
Where legislative intent is expressed in unambiguous terms, the court must treat the statutory language as conclusive; no resort to extrinsic aids is necessary or proper.

COUNSEL

Knox, Anderson & Blake, Anderson & Blake and Kevin Anderson for Plaintiffs and Appellants.

Brancart & Brancart, Christopher Brancart, Elizabeth Brancart; Mark Goldowitz; John C. Barker; and Elizabeth Bader for Defendant and Respondent.

Levy, Ram & Olson and Karl Olson for California Newspaper Publishers Association et al., as Amici Curiae on behalf of Defendant and Respondent.

James D. Smith for Fair Housing Organizations as Amici Curiae on behalf of Defendant and Respondent.
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Catherine I. Hanson and Astrid G. Meghrigian for California Medical Association as Amicus Curiae on behalf of Defendant and Respondent.

Julia Mandeville Damasco for City of Hayward, City of Pleasanton, City of Santa Clara and City and County of San Francisco as Amici Curiae on behalf of Defendant and Respondent.

Hagenbaugh & Murphy, Daniel A. Leipold and Cathy L. Shipe for Cult Awareness Network, Inc., and F.A.C.T.Net, Inc., as Amici Curiae on behalf of Defendant and Respondent.

WERDEGAR, J.

Must a defendant, moving specially under Code of Civil Procedure section 425.16 (hereafter section 425.16 or the anti-SLAPP [FN1] statute) to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding, demonstrate separately that the statement concerned an issue of public significance? In accordance with the plain language of the statute and in consonance with discernible legislative intent, as well as for reasons of sound public policy, we conclude not. Accordingly, we reverse the judgment of the Court of Appeal.

FN1 Strategic lawsuit against public participation. We previously have adopted this acronym for lawsuits affecting speech or petition rights. (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394,

412[58 Cal.Rptr.2d 875, 926 P.2d 1061]; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 713-718[34 Cal.Rptr.2d 898, 882 P.2d 894].) The acronym was coined by Penelope Canan and George W. Pring, professors at the University of Denver. (See generally, Canan & Pring, *Strategic Lawsuits Against Public Participation* (1988) 35 Soc. Probs. 506; Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions* (1990-1991) 27 Cal. Western L.Rev. 399.)

Background [FN2]

Plaintiffs Dan and Judy Briggs own residential rental properties. Defendant Eden Council for Hope and Opportunity (ECHO), a nonprofit corporation partly funded by city and county grants, counsels tenants and mediates landlord-tenant disputes. Seeking damages for defamation and intentional and negligent infliction of emotional distress, plaintiffs allege ECHO harassed and defamed them.

FN2 The factual recitation parallels that of the Court of Appeal. No party petitioned for rehearing to suggest the Court of Appeal omitted or misstated any material fact. (Cal. Rules of Court, rule 29(b)(2).)

Plaintiffs allege: In 1990, ECHO counseled Pamela Ford, an African-American woman who rented an apartment from plaintiffs. After Ford *1110 complained to ECHO that plaintiffs were giving her a less favorable electricity offset than that given to a Caucasian tenant, ECHO assisted Ford in filing a complaint with the federal Department of Housing and Urban Development (HUD) and in prosecuting a small claims court action against plaintiffs. HUD exonerated plaintiffs, but Ford prevailed in small claims court. In an unrelated civil action, plaintiffs sought ECHO's files, ultimately obtaining a court order compelling their production and sanctioning ECHO. Plaintiffs allege that during HUD's investigation of Ford's complaint, ECHO employees referred to Dan Briggs as a "racist," and that other defamatory statements, including that Briggs "is a redneck and doesn't like women," were made to a HUD investigator and other persons.

In 1991, Dan Briggs telephoned ECHO asking for the names and addresses of ECHO's directors so he could complain to them about ECHO's failure to produce the earlier requested documents. Briggs asked to speak with Caroline Peattie, ECHO's assistant executive director. ECHO's receptionist gave Peattie a telephone message slip, and Peattie returned Briggs's call. The subsequently disclosed files revealed that, while talking with Briggs, Peattie wrote and circled on the telephone message slip the letters "KKK." Other ECHO staff members saw the message slip and the "KKK" notation.

The minutes of the ECHO board meetings reveal that at one meeting ECHO's directors discussed whether Dan Briggs was mentally unbalanced. The executive director's notes recorded the view that Briggs was on a "witchhunt." At another meeting, ECHO's executive director stated that Briggs had made racist comments to the city's staff while complaining about city funding of ECHO.

Another of plaintiffs' tenants, Diana Bond, punctured the refrigerator in her apartment while trying to defrost it. The refrigerator was repaired, but malfunctioned a year later. When plaintiffs refused to repair or replace the refrigerator, Bond consulted ECHO. Bond ultimately vacated the apartment, taking the refrigerator with her. Plaintiffs deducted the costs related to the refrigerator from Bond's security deposit, whereupon Bond successfully sued plaintiffs in small claims court. Plaintiffs allege ECHO maliciously gave Bond false advice in connection with this matter.

When plaintiffs' tenants Kirk and Gay-Rita Poates consulted ECHO, a staff member commented, "We know what kind of people you're dealing with." In another incident, involving a dispute between two roommates who also were tenants of plaintiffs, an ECHO staff member told one of the roommates that "this [has] happened [before] with Dan and Judy." The tenant understood the remark to be negative. *1111

After plaintiffs filed this action, ECHO filed a special motion to strike the complaint pursuant to the anti-SLAPP statute. In support, ECHO argued that plaintiffs' claims were based upon statements made in connection with issues pending before or under consideration by executive and judicial bodies (§ 425.16, subd. (e)(1) and (2)), and that plaintiffs had not established a probability they would prevail on their claims (§ 425.16, subd. (b)(1)). In opposition, plain-

tiffs argued that ECHO's alleged activities did not involve matters of "public significance" (§ 425.16, subd. (a)). The trial court granted ECHO's motion, dismissed the complaint, and awarded ECHO attorney fees and costs.

Plaintiffs filed two appeals, one challenging the judgment of dismissal, the other the attorney fees award. The Court of Appeal consolidated the appeals and reversed both the judgment of dismissal and the order awarding attorney fees and costs. The Court of Appeal held that the trial court had erred in striking the complaint under section 425.16, because ECHO had not made a prima facie showing that this lawsuit arose from an act by ECHO in furtherance of its constitutional petition or speech rights in connection with a public issue. Thus, the Court of Appeal impliedly held that a cause of action is not subject to being struck under the anti-SLAPP statute unless it arises from a statement or writing by the defendant which, substantively, addresses an issue of public significance, even if the statement or writing is made before or in connection with an issue under consideration by an official body or proceeding. [FN3]

FN3 All three Court of Appeal justices concluded (erroneously, as will appear) that a defendant qualifies for anti-SLAPP protection only if the challenged suit arises from a petition or speech in connection with a "public issue." Only the two justices constituting the Court of Appeal majority for reversal, however, concluded that ECHO's statements did *not* have public significance within the meaning of the statute.

We granted ECHO's petition for review.

Discussion

Section 425.16[FN4] provides, inter alia, that "A cause of action against a person arising from any act of that person in furtherance of the person's right ***1112** of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement ***1113** or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law ...." (*Id.*, subd. (e).)

FN4 In its entirety, section 425.16 reads:

"(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

"(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

"(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

"(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

"(c) In any action subject to subdivision (b), a

prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to [Code of Civil Procedure] Section 128.5.

"(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

"(e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

"(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

"(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

"(h) For purposes of this section, 'complaint' includes 'cross-complaint' and 'petition,' 'plaintiff' includes 'cross-complainant' and 'petitioner,' and 'defendant' includes 'cross-defendant' and 'respondent.'

"(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section."

(1a) Courts of Appeal applying section 425.16 have divided on the question whether a defendant who moves under the statute to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, an "official proceeding" must separately demonstrate that the statement was made in connection with a "public" issue. (Compare *Zhao v. Wong* (1996) 48 Cal.App.4th 1114[55 Cal.Rptr.2d 909] [section 425.16 applies only to causes of action arising from statements or writings on issues of public significance] with *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036[61 Cal.Rptr.2d 58] (*Braun v. Chronicle*) [section 425.16 applies to any cause of action arising from a statement or writing connected to an issue under consideration by an official proceeding].) The Court of Appeal in this matter followed *Zhao v. Wong*, holding that "a lawsuit qualifies as a SLAPP suit only if it challenges a statement made in connection with a *public* issue made in an official proceeding or a statement made in connection with a *public* issue under review in an official proceeding."

For the following reasons, we conclude the Court of Appeal erred.

1. *Statute's Plain Language*

First, the plain, unambiguous language of section 425.16 encompasses plaintiffs' causes of action against ECHO, without any separate "public issue" requirement. Section 425.16, subdivision (b)(1) expressly makes subject to a special motion to strike "[a]

cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue ...." As noted, for the statute's purposes, an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) *any* written or oral statement or writing made before a legislative, executive or judicial proceeding, or any other official proceeding authorized by law; [and] (2) *any* written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law ...." (§ 425.16, subd. (e), italics added.) Thus, plainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body. ***1114**

Construing clause (2) of section 425.16, subdivision (e), quoted above, the court in *Zhao v. Wong* nevertheless opined that, even though the clause "contains no reference to 'public issue' or an equivalent phrase," it does not "eliminate[] the requirement, expressed in the language subject to definition, that the oral statement or writing must be 'in connection with a public issue.' The operative language in subdivision (b) ... continues to require that the issue in question, i.e. 'an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,' be a public issue." (*Zhao v. Wong, supra*, 48 Cal.App.4th at p. 1127, fn. omitted; accord, *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* (1996) 50 Cal.App.4th 1633, 1639[58 Cal.Rptr.2d 613]; *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591, 1601[57 Cal.Rptr.2d 491].)

Neither *Zhao v. Wong* nor its progeny provides authority, legal or grammatical, for such a strained construction. As explained, the statute plainly reads otherwise. Moreover, for us to adopt the *Zhao* court's novel understanding would contravene a "longstanding rule of statutory construction-the 'last antecedent rule'-[which] provides that 'qualifying words and phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680[183 Cal.Rptr. 520, 646 P.2d 191], quoting *Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389[70 P.2d 918].) And as will appear, the Legislature expressly has rejected *Zhao v. Wong*'s analysis and narrowing approach. (See generally, § 425.16, subd. (a); Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) for July 2, 1997, hg., pp. 3-4.)

The record establishes that plaintiffs' three causes of action against ECHO all "arise from"-i.e., are based upon-statements or writings that ECHO personnel made in official proceedings or in connection with issues under consideration or review by executive or judicial bodies or proceedings.

Specifically, plaintiffs in their complaint base their defamation cause of action on ECHO's alleged assisting of tenant Ford "to institute legal action with ... HUD ... against the plaintiffs," and ECHO's alleged "defamatory statements ... made to a HUD investigator and other unknown persons" in connection with Ford's HUD action, "includ[ing] the term 'KKK' being handwritten and circled next to plaintiff Dan Briggs' name on a ***1115** telephone message note." [FN5] They base their intentional and negligent infliction of emotional distress causes of action on, first, ECHO's alleged provision to tenant Bond of "information with regard to the habitability of [Bond]'s apartment because of a broken refrigerator" about which the Court of Appeal noted Bond had successfully sued plaintiffs in small claims court; second, ECHO's alleged provision of false information and direction to two different tenants involved in a dispute over a security deposit; and, third, ECHO's alleged "failure to comply with a deposition subpoena for production of documents served in an unrelated civil action."

> FN5 Plaintiffs in their complaint also allude vaguely to unspecified (except for "We know what kind of people you're dealing with") and assertedly "defamatory statements concerning plaintiffs' character and qualifications in their business of renting residential apartments," made "in or about June, 1994, [to] another tenant of plaintiffs" and within the hearing of that tenant "and several other persons" on "other occasions."

Thus, plaintiffs' causes of action against ECHO all

arise from ECHO's statements or writings made in connection with issues under consideration or review by official bodies or proceedings-specifically, HUD or the civil courts. Plaintiffs concede that "petitioning activity involves lobbying the government, suing, [and] testifying." As pertinent here, " '[t]he constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative action.' " (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784[54 Cal.Rptr.2d 830], quoting *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19[43 Cal.Rptr.2d 350].) Even ECHO's counseling of tenant Bond, apparently, was in anticipation of litigation, and courts considering the question have concluded that "[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ... such statements are equally entitled to the benefits of section 425.16." (*Dove Audio, Inc., supra*, at p. 784, citing *Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195[17 Cal.Rptr.2d 828, 847 P.2d 1044] and *Ludwig v. Superior Court, supra*, 37 Cal.App.4th at p. 19; see also *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 728[77 Cal.Rptr.2d 1].)

Thus, to the extent that, as the trial court impliedly found, plaintiffs failed to establish a probability of prevailing on their claim (§ 425.16, subd. (b)(1)), [FN6] it follows that their causes of action are, in accordance with section 425.16's plain language, "subject to [ECHO's] special motion to strike" (*ibid.*). ***1116**

> FN6 In issuing its order, the trial court expressly stated, "There is such minuscule ... basis for argument on behalf of plaintiff, I'm going to confirm the tentative ruling and strike the action." Thus, the trial court impliedly found plaintiffs had not established a probability that they would prevail on their claim. (See *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619[284 P.2d 1] [trial court impliedly found "every fact necessary to support its order"].) In the Court of Appeal and in their briefing before this court, plaintiffs have argued that they met their burden under the anti-SLAPP statute of demonstrating a probability that they would prevail on their claims. Reversing on other grounds, we express no opinion on that question.

Plaintiffs, however, citing *Zhao v. Wong*, argue that section 425.16 does not apply to events that transpire between private individuals. The Court of Appeal in *Zhao* opined that "the Legislature contemplated that the statute would apply only to a limited sphere of activities covered by certain protections of the First Amendment, i.e., activities described by the statement of legislative purpose" (*Zhao v. Wong, supra*, 48 Cal.App.4th at p. 1129), which speaks of encouraging "participation in matters of public significance" (§ 425.16, subd. (a)). According to plaintiffs, section 425.16 protects only statements or writings that defend the speaker's or writer's own free speech or petition rights or that are otherwise "vital to allow citizens to make informed decisions within a government office." Plaintiffs insist tenant counseling activities like ECHO's are not protected by section 425.16 because they neither promoted ECHO's own constitutional right of free speech nor informed the public about possible wrongdoing.

Even assuming, for purposes of argument, that plaintiffs accurately have characterized ECHO's activities as constituting neither self-interested nor general political speech, we cannot conclude such activities thereby necessarily fall outside the protection of the anti-SLAPP statute. Contrary to plaintiffs' implied suggestion, the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made *on its own behalf* (rather than, for example, on behalf of its clients or the general public). We agree, moreover, with the court in *Braun v. Chronicle* that "*Zhao* is incorrect in its assertion that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government." (*Braun v. Chronicle, supra*, 52 Cal.App.4th at pp. 1046-1047.)

As the *Braun* court explained: "At least as to acts covered by clauses one and two of section 425.16, subdivision (e), the statute requires simply *any* writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body. Thus these clauses safeguard free speech and petition conduct aimed at advancing self government, as well as conduct aimed at more mundane pursuits. Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amend-

ment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding. [¶] The answer to *Zhao*'s concern over how to harmonize the language of section 425.16, subdivision (e), clause ***1117** two with the statement of legislative intent contained in subdivision (a) is now apparent: The Legislature when crafting the clause two definition clearly and unambiguously resorted to an easily understandable concept of what constitutes a public issue. Specifically, it *equated* a public issue with the authorized official proceeding to which it connects." (*Braun v. Chronicle, supra*, 52 Cal.App.4th at p. 1047, italics in original.)

Thus, contrary to the Court of Appeal's construction, "the statutory language is clear. [Citation.] The statute does *not* limit its application to certain types of petition activity." (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949[52 Cal.Rptr.2d 357], italics added; see also *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 863[44 Cal.Rptr.2d 46] [anti-SLAPP law protects newspaper's statements relating to issue under consideration by county board of supervisors and federal courts]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647-648[49 Cal.Rptr.2d 620] [section 425.16 applies to action to set aside prior personal injury judgment, which resulted from defendant's exercise of his First Amendment litigation rights].)

2. *Principles of Statutory Construction*

Second, the Court of Appeal's analysis contravenes fundamental principles of statutory construction. (2) Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21[201 Cal.Rptr. 207].) Clauses (3) and (4) of section 425.16, subdivision (e), concerning statements made in public fora and "other conduct" implicating speech or petition rights, include an express "issue of public interest" limitation; clauses (1) and (2), concerning statements made before or in connection with issues under review by official proceedings, contain no such limitation. In light of this variation in phraseology, it must be presumed the Legislature intended different "issue" requirements to apply to anti-SLAPP motions brought under clauses (3) and (4) of subdivision (e) than to motions brought under clauses (1) and (2). (*Playboy Enterprises, Inc., supra*, at p. 21.) That the Legislature, when amending section 425.16 in 1997 to add the substance of clause (4), was at pains simultaneously to separate, by parenthetical numbering, subdivision (e)'s resulting four clauses buttresses the point by emphasizing the grammatical and analytical independence of the clauses.

If, as plaintiffs contend, the operative language in section 425.16, subdivision (b), referring to a person's exercise of First Amendment rights "in connection with a public issue," were meant to function as a separate proof ***1118** requirement applicable to motions brought under all four clauses of subdivision (e), no purpose would be served by the Legislature's specification in clauses (3) and (4) that covered issues must be "of public interest." (3) " 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.' " (*Reno v. Baird* (1998) 18 Cal.4th 640, 658[76 Cal.Rptr.2d 499, 957 P.2d 1333], quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22[56 Cal.Rptr.2d 706, 923 P.2d 1].) Accordingly, we reject plaintiffs' contention and adopt, instead, a construction that gives meaning and assigns import to the phrase "of public interest" in subdivision (e)(3) and (4) of section 425.16.

Contrary to plaintiffs' suggestion, that the Legislature, when enacting section 425.16, expressed in the statute's preamble a desire "to encourage continued participation in matters of public significance" (§ 425.16, subd. (a)) does not imply the Legislature intended to impose, in the statute's operative sections, an across-the-board "issue of public interest" pleading requirement. Construing clauses (1) and (2) of section 425.16, subdivision (e) as lacking such a requirement does not diminish their effectiveness in encouraging participation in public affairs. Any matter pending before an official proceeding possesses some measure of "public significance" owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on "public" issues.

As the Court of Appeal in *Braun v. Chronicle* explained: "The term 'significance' supports multiple meanings. It can mean '[t]he meaning or import *of* something' " and "[i]t can also mean '[i]mportance, consequence.' " (*Braun v. Chronicle, supra*, 52 Cal.App.4th at p. 1048, quoting 15 Oxford English Dict. (2d ed. 1989) p. 458.) Thus, a matter may have "public meaning or significance within the language of section 425.16, subdivision (a) because and solely because ... it occurs within the context of the proceedings delineated in clause one ... or ... in connection with an issue under consideration or review by one of the bodies or proceedings delineated in clause two." (*Braun v. Chronicle, supra*, at p. 1048.)

(4) Of course, "legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives." (*Braun v. Chronicle, supra*, 52 Cal.App.4th at p. 1048.) And "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have ***1119** effect." (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805[249 P.2d 241].) In light of these fundamental principles, "the meaning ascribed to the concept of 'public significance' in the preamble must accommodate the singular, clearly defined protected activities set forth in each clause of section 425.16, subdivision (e)." (*Braun v. Chronicle, supra*, at p. 1048.) Construing the term "significance" in the preamble to denote simply "importance" (15 Oxford English Dict., *supra*, at p. 458) harmonizes the term with a plain reading of subdivision (e)(1) and (2) that imports no additional "public issue" requirement, because such a construction accounts for the measure of public significance possessed by "*any* written or oral statement or writing" (§ 425.16, subd. (e)(1) and (2), italics added) that is made before, or in connection with, an official proceeding.

3. *Legislative Intent*

(1b) Third, the Court of Appeal's analysis contravenes the specific legislative intent expressly stated in section 425.16, as well as that implied by the statute's legislative history as revealed by legislative history materials in the record.

In 1997, after the Court of Appeal's decision in this case, the Legislature amended section 425.16, effecting no substantive changes to the anti-SLAPP scheme, but providing that the statute "shall be construed broadly." (§ 425.16, subd. (a), as amended by Stats. 1997, ch. 271, § 1; cf. *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114, fn. 3[57 Cal.Rptr.2d 207] [an appellate court, whenever possible, should interpret the First Amendment and section 425.16 in a manner "favorable to the exercise of freedom of speech, not its curtailment"].) [FN7] The proviso is not surprising, since the "stated purpose of the [anti-SLAPP] statute ... includes protection of not only the constitutional right to 'petition for the redress of grievances,' but the broader constitutional right of freedom of speech." (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176[50 Cal.Rptr.2d 62].) Our construction of section 425.16 to protect not just statements or writings on public issues, but all statements or writings made before, or in connection with issues under consideration by, official bodies and proceedings, is consistent with that purpose, as well as with the statute's plain language.

> FN7 Although the Court of Appeal did not have the benefit of the Legislature's pronouncement that section 425.16 must "be construed broadly" (§ 425.16, subd. (a)), plaintiffs do not contend that this court's decision depends on the wording of the section before the amendment, but, rather, citing *Roberston v. Rodriguez* (1995) 36 Cal.App.4th 347, 356[42 Cal.Rptr.2d 464], acknowledge that section 425.16 is a procedural statute that properly is applied prospectively to an existing cause of action.

(5) Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; "no resort to extrinsic ***1120** aids is necessary or proper." (*People v. Otto* (1992) 2 Cal.4th 1088, 1108[9 Cal.Rptr.2d 596, 831 P.2d 1178], citing *Griffin v. Oceanic Contractors, Inc.* (1982) 458 U.S. 564, 570 [102 S.Ct. 3245, 3249-3250, 73 L.Ed.2d 973]; see also *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804[268 Cal.Rptr. 753, 789 P.2d 934]; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 866[167 Cal.Rptr. 820, 616 P.2d 802].) (1c) Accordingly, we need not refer to extrinsic indicators of legislative intent in concluding that section 425.16 applies to plaintiffs' causes of action based on ECHO's statements in connection with actual and potential civil litigation and a HUD investigation. Nevertheless, we observe that available legislative

history buttresses the conclusion.

Legislative history materials respecting the origins of section 425.16 indicate the statute was intended broadly to protect, inter alia, direct petitioning of the government and petition-related statements and writings-that is, "any written or oral statement or writing made before a legislative, executive, or judicial proceeding" (§ 425.16, subd. (e)(1)) or "in connection with an issue under consideration or review" (*id.*, subd. (e)(2)) by such. The seminal academic research on which the original version of the statute was based used "an operational definition of SLAPP suits as implicating 'behavior protected by the Petition Clause.' " (*Zhao v. Wong, supra*, 48 Cal.App.4th at p. 1124, quoting Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches* (1988) 22 L. & Soc'y Rev. 385, 387.)

The Legislature's 1997 amendment of the statute to mandate that it be broadly construed apparently was prompted by judicial decisions, including that of the Court of Appeal in this case, that had narrowly construed it to include an overall "public issue" limitation. (See Stats. 1997, ch. 271, § 1; *Zhao v. Wong, supra*, 48 Cal.App.4th at p. 1128 [disagreeing "that the statute was meant to have broad application"]; *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra*, 50 Cal.App.4th at p. 1638 [opining that "the statute must be given a narrow interpretation"].) The timing of the amendment alone supports the inference: That the Legislature added its broad construction proviso within a year following issuance of *Zhao*, *Linsco/Private Ledger, Inc.*, and the decision below plainly indicates these decisions were mistaken in their narrow view of the relevant legislative intent.

The Assembly Judiciary Committee's analysis of the amendatory legislation confirms the amendment was intended specifically to overrule *Zhao v. Wong* and the Court of Appeal's decision in this case. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) for July 2, 1997, hg., pp. 3-4 [stating "proponents have provided ample evidence ***1121** that the state's courts of appeal are issuing conflicting opinions about the breadth of Section 425.16," noting that *Averill v. Superior Court, supra*, 42 Cal.App.4th 1170,*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th 628, and *Braun v. Chronicle, supra*, 52 Cal.App.4th 1036, "have construed the statute broadly," while *Zhao v. Wong, supra*, 48 Cal.App.4th 1114, and the Court of Appeal in this case "have construed it very narrowly," and stating Sen. Bill No. 1296 "would clarify the Legislature's intent that the provisions of Section 425.16 be construed broadly"].)

As defendant points out, inferring a separate "public issue" requirement in subdivision (e)(1) and (2) of section 425.16 would result in the anomalous result that much direct petition activity-viz., petition activity connected to litigation that trial courts determine is not focused on an inherently "public" issue-while absolutely privileged under the litigation privilege codified by Civil Code section 47, subdivision (b) and under the federal and state Constitutions, would *not* be entitled to the procedural protections of the anti-SLAPP law, even though section 425.16 expressly states the Legislature's intent thereby "broadly" to protect the right of petition (§ 425.16, subd. (a)). [FN8]

FN8 Plaintiffs, apparently drawing upon the United States Supreme Court's decision in *Connick v. Myers* (1983) 461 U.S. 138 [103 S.Ct. 1684, 75 L.Ed.2d 708], argue at length that whether a statement or writing is protected under section 425.16, subdivision (e)(1) and (2) must be determined by the content, form, and context of the statement or writing, as revealed by the whole record. *Connick* was concerned primarily with protection of speech by public employees and so is not particularly apposite. Moreover, the high court in *Connick* did " 'not deem it either appropriate or feasible to attempt to lay down a general standard against which all ... statements [by employees that are critical of their superiors] may be judged.' " (*Connick, supra*, at p. 154 [103 S.Ct. at p. 1694].) Thus, *Connick*'s suggestion that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" (*id.* at pp. 147-148 [103 S.Ct. at p. 1690], fn. omitted), for the purpose of resolving the issue presented in that case, cannot be taken as authority (either binding or persuasive) for construing section 425.16, our state anti-SLAPP statute.

Thus, the timing of the Legislature's amendment, considered together with relevant legislative history and materials related to both the original statute and the amendment, amply demonstrates the Legislature's intent consistently has been to protect all direct petitioning of governmental bodies (including, as relevant here, courts and administrative agencies) and petition-related statements and writings.

4. *Public Policy*

We also believe that the broad construction expressly called for in subdivision (a) of section 425.16 is desirable from the standpoint of judicial ***1122** efficiency and that our straining to construe the statute as the Court of Appeal did would serve Californians poorly. In effectively deeming statements and writings made before or connected with issues being considered by any official proceeding to have public significance per se, the Legislature afforded trial courts a reasonable, bright-line test applicable to a large class of potential section 425.16 motions. As discussed, the "Legislature when crafting the clause two definition clearly and unambiguously resorted to an easily understandable concept of what constitutes a public issue." (*Braun v. Chronicle, supra*, 52 Cal.App.4th at p. 1047.) For the sake of clarity, as well as under the compulsion of the legal principles earlier discussed, we shall not disturb the bright-line "official proceeding" test the Legislature has embedded in subdivision (e), clauses (1) and (2).

That the Court of Appeal in this case divided on the question whether defendant ECHO's statements about plaintiffs were in fact connected to a "public issue" illustrates that where a bright-line "official proceeding" test is not available, confusion and disagreement about what issues truly possess "public" significance inevitably will arise, thus delaying resolution of section 425.16 motions and wasting precious judicial resources. [FN9] The plain language construction we adopt, on the other hand, retains for California courts, advocates and disputants a relatively clear standard for resolving a large class of section 425.16 disputes quickly, at minimal expense to taxpayers and themselves.

FN9 In a related context, one commentator opines that use of a "public concern" test " 'amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it.' " (Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell* (1990) 103 Harv. L.Rev. 603, 669, quoting Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation* (1987) 21 Val. U. L.Rev. 241, 259.)

Contrary to the suggestion of the concurring and dissenting opinion, we do not believe our construction will unduly jeopardize meritorious lawsuits. The Legislature already has weighed an appropriate concern for the viability of meritorious claims against the concern "to encourage participation in matters of public significance," as is evident in its having declared that the statute is directed against "lawsuits brought primarily to chill the valid exercise of constitutional rights" and "abuse of the judicial process" (§ 425.16, subd. (a)), and in its having provided that lawsuits based on protected statements are nevertheless *not* subject to being stricken when "the court determines that the plaintiff has established a probability that he or she will prevail on the claim" (*id.*, subd. (b)(1)).

The Legislature, moreover, has provided, and California courts have recognized, substantive and procedural limitations that protect plaintiffs ***1123** against overbroad application of the anti-SLAPP mechanism. As we recognized in *Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th at page 412, "This court and the Courts of Appeal, noting the potential deprivation of jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to *prove* the specified claim to the trial court, have instead read the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim. [Citations.]" (Italics in original; see also *College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th at pp. 718-719 [section 425.16 and similar motions operate "like a demurrer or motion for summary judgment in 'reverse' "].)

We have no reason to suppose the Legislature failed to consider the need for reasonable limitations on the use of special motions to strike. As discussed, the Legislature apparently judged the bright-line "official pro-

ceeding" test set out in clauses (1) and (2) of section 425.16, subdivision (e) to be adequate, and thought it unnecessary to add an "issue of public interest" limitation for those two classes of potential cases. For potential cases where an analog to the "official proceeding" bright-line test does not readily appear-viz., "public forum" (§ 425.16, subd. (e)(3)) and "other conduct" (§ 425.16, subd. (e)(4)) cases-the Legislature *did* include an "issue of public interest" limitation. We find no grounds for reweighing these concerns in an effort to second-guess the Legislature's considered policy judgment. If we today mistake the Legislature's intention, the Legislature may easily amend the statute.

Conclusion

For the foregoing reasons, we conclude the Court of Appeal erred in construing section 425.16 as if, contrary to the statute's plain language, clauses (1) and (2) of subdivision (e) contained an "issue of public interest" limitation. Under section 425.16, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance. [FN10] Accordingly, we have neither need nor occasion to consider whether ECHO's statements on which plaintiffs base their causes of action in fact concerned such issues. ***1124**

> FN10 Insofar as they hold to the contrary, *Zhao v. Wong, supra,* 48 Cal.App.4th 1114,*Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th 1633,*Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers, supra,* 49 Cal.App.4th 1591, and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th 713, are disapproved.

Disposition

The judgment of the Court of Appeal is reversed and the cause remanded for further proceedings consistent with this opinion.

George, C. J., Mosk, J., Kennard, J., and Chin, J., concurred.

BAXTER, J.,

Concurring and Dissenting.-I concur in the majority's determination to reverse the judgment of the Court of Appeal below. Eden Council for Hope and Opportunity (ECHO), a nonprofit, publicly funded fair housing counseling organization, was plainly acting in furtherance of its right of petition or free speech *in connection with a public issue or issue of public interest* when it assisted tenants in pursuing legal claims against their landlords, and is thus entitled to seek anti-SLAPP (strategic lawsuit against public participation) protection from a landlord's retaliatory lawsuit aimed at punishing the nonprofit organization for assisting tenants in understanding and defending their legal rights.

I dissent from the majority's conclusion that a defendant moving specially under subdivision (e)(1) or (2) of Code of Civil Procedure section 425.16 (hereafter section 425.16 or the anti-SLAPP legislation) to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law, need never further demonstrate that such proceeding involved a public issue or issue of public interest. The anti-SLAPP legislation is a powerful tool to be broadly construed to promote "... the open expression of ideas, opinions and the disclosure of information." (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 956[52 Cal.Rptr.2d 357].) It is not, however, generally available to the parties to any civil action, but is instead expressly limited to those lawsuits " 'brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances' 'in connection with a public issue.' (§ 425.16, subds. (a), (b).)" (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819[33 Cal.Rptr.2d 446] (*Wilcox*).) The majority's holding in this case belies that carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply.

I

The Legislature has expressly set forth the intent and purpose behind the anti-SLAPP legislation in subdivision (a) of section 425.16: "The Legislature finds and declares that there has been a disturbing increase

in lawsuits ***1125** brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

Accordingly, under the anti-SLAPP statutory scheme, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike ...." (§ 425.16, subd. (b)(1).)

The legislative intent behind the anti-SLAPP legislation could not be clearer. The Legislature enacted the remedial legislation to curtail the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" because such lawsuits discourage persons from "participation in matters of public significance" and thereby constitute an "abuse of the judicial process." (§ 425.16, subd. (a).)

The anti-SLAPP legislation was enacted in response to a growing number of meritless lawsuits, usually alleging tort liability, brought against persons for exercising their constitutional rights of petition and freedom of speech. (Sen. Bill No. 1264 (1991-1992 Reg. Sess.) enacted as Stats. 1992, ch. 726, § 2, pp. 3523-3524.) The term "SLAPP suit," the acronym for "strategic lawsuit against public participation," was coined by two University of Denver professors, George W. Pring and Penelope Canan, who authored the seminal influential studies on this phenomenon.

In *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769[17 Cal.Rptr.2d 457], the court defined a SLAPP suit, plain and simple, as "one brought to intimidate and for purely political purposes:"

In *Wilcox, supra,* 27 Cal.App.4th 809, the court characterized the precise nature of SLAPP suits in the following terms: "The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. [Citations.] ... [¶] The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. (Barker, ***1126***Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 Loyola L.A. L.Rev. 395, 402-403.) Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. (See, e.g., *Protect Our Mountain v. District Court* [(Colo. 1984)] 677 P.2d [1361,] 1364 [developer sought $10 million compensatory and $30 million punitive damages]; Barker, *supra,* 26 Loyola L.A. L.Rev. at p. 403 [estimating damage claims in SLAPP's average $9.1 million].)

"SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. [Citations.] Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. [Citation.] But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. [Citation.] As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished. [Citations.] The SLAPP strategy also works even if the matter is already in litigation because the defendant/cross-complainant hopes to drive up the cost of litigation to the point where the plaintiff/cross-defendant will abandon its case or have less resources available to prosecute its action against the defendant/cross-complainant and to deter future litigation. [Citation.]" (*Wilcox, supra,* 27 Cal.App.4th at pp. 815-816, italics in original.)

To summarize, "while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. (Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* (1989) 7 Pace Envtl. L.Rev. 3, 5-6, 9.) [Fn. omitted.] Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prose-

cution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business. (Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs, supra,* 26 Loyola L.A. L.Rev. at pp. 406-407.) By the time a SLAPP victim can win a 'SLAPP-back' suit years later the SLAPP plaintiff will already have accomplished its underlying objective. Furthermore, retaliation against the SLAPPer may be counter-productive because it ties up the SLAPPee's resources even longer than defending the SLAPP suit itself. (*Id.* at p. 432; Comment, *Strategic Lawsuits Against Public Participtaion: An Analysis of the Solutions* [(1991)] 27 Cal. W. L.Rev. [399,] 403.)" (*Wilcox, supra,* 27 Cal.App.4th at pp. 816-817.) ***1127**

In response to the growing incidence of SLAPP suits, legislatures and courts nationwide have sought to fashion procedural remedies to allow for prompt exposure and dismissal of such abusive lawsuits. California's legislative response to the growing problem was the enactment, in 1992, of the anti-SLAPP legislation embodied in section 425.16. The opening paragraph of California's anti-SLAPP statutory scheme leaves no doubt that the specific intent and purpose behind the remedial legislation was to combat the pernicious problem of SLAPP suits described above, a category of litigation the Legislature deemed an "abuse of the judicial process." (425.16, subd. (a).) [FN1]

> FN1 As the court in *Zhao v. Wong* (1996) 48 Cal.App.4th 1114[55 Cal.Rptr.2d 909] explained: "The legislative history provides further clarity to the statement of legislative purpose. [Fn. omitted.] Without exception, the documents in the chaptered bill file all refer to 'the empirical research of the two University of Denver professors,' in effect incorporating the scholarship of Canan and Pring into the legislative history. [Fn. omitted.] In addition, the report prepared by the Senate Committee on the Judiciary describes five examples of SLAPP suits .... [¶] The Legislature's concerns, as revealed by the legislative history, invariably involved activities violating the right of petition. The research of Canan and Pring is in fact based on an operational definition of SLAPP suits as implicating 'behavior protected by the Petition Clause.' [Fn. omitted.] Pring describes SLAPP suits as 'counter-attack[s] against petition-clause-protected activity. [Fn. omitted.] Three of the five examples of SLAPP suits cited by the Senate Committee on the Judiciary involved expressive activity protected by both the right of petition and the right of freedom of speech. The other two examples cited by the Senate Committee on the Judiciary involve retaliation against lawsuits, i.e., judicial petitions. [Citation.]" (48 Cal.App.4th at pp. 1123-1124.)

Given the purpose and intent behind the anti-SLAPP legislation, I conclude the Legislature could not possibly have intended that *any* litigation arising from *any* written or oral statement made during, or in connection with, *any* legislative, executive, judicial, or other "official" proceeding should automatically qualify as a SLAPP suit within the meaning of section 425.16.

None of the foregoing well-recognized attributes of SLAPP suits-i.e., meritless suits brought primarily to obtain an *economic* advantage over defendants by tying up their resources, driving up their costs of litigation, and ultimately deterring the defendants from exercising their political or legal rights, or punishing them for doing so-are acknowledged by the majority as having any significance in resolving the issue of statutory construction posed in this case. Instead, the majority suggest that "[*a*]*ny matter pending before an official proceeding* possesses some measure of 'public significance' owing solely to the public nature of the proceeding, and free discussion of such matters furthers effective exercise of the petition rights section 425.16 was intended to protect. The Legislature's stated intent is best served, therefore, by a construction of section 425.16 that broadly ***1128** encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." (Maj. opn., *ante,* at p. 1118, italics added.)

I fail to see how the majority's broad and expansive construction of the statute will effectuate the carefully circumscribed purpose and intent behind the anti-SLAPP legislation explicitly set forth in section 425.16, subdivision (a).

Our task in this case is to construe the provisions of subdivision (e)(1) and (2) of section 425.16 in a

manner that best comports with the carefully delineated purpose and intent behind the remedial legislation expressed in subdivision (a). Subdivision (e) provides in its entirety: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: *(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Italics added.)

The majority conclude that under section 425.16, subdivision (e)(1) and (2) there is no separate requirement that the subject inquiry of the legislative, executive, judicial or other "official" proceeding be shown to involve a public issue or issue of public interest. I do not dispute that the language of all four clauses of subdivision (e), taken as a whole, is susceptible of such a literal interpretation. However, such a construction of subdivision (e)(1) and (2) literally reads right out of the statutory scheme the very heart and purpose of this remedial legislation-legislation expressly designed to discourage the filing of a specifically defined category of lawsuits deemed by the Legislature to constitute an "abuse of the judicial process" because they, by statutory definition expressly set forth in subdivision (a), are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."

It would be an exercise in futility to attempt to quantify all possible examples of lawsuits based on actionable oral statements or writings which, under the majority's construction of section 425.16, subdivision (e)(1) and ***1129** (2), will automatically qualify as retaliatory SLAPP suits as a matter of law. *Any* litigation arising from *any* word uttered in a court of law, in a legislative or executive proceeding, or in any "official" proceeding in California, will henceforth, under the majority's rationale, automatically constitute a retaliatory SLAPP suit. *Any* writing made in connection with *any* such proceeding (for example, every pleading or piece of paper prepared in connection with any legal proceeding transpiring in this state), if actionable on some legal basis and sued upon, will likewise, under the majority's rationale, constitute a retaliatory SLAPP suit as a matter of law. It is highly unlikely the Legislature intended or envisioned that such an enormity of legal actions would automatically qualify as retaliatory SLAPP suits under subdivision (e)(1) and (2) when it enacted legislation specifically designed to curb the abusive practice.

The majority's overly broad construction of section 425.16 subdivision (e)(1) and (2) will also likely have a significant impact on pretrial civil litigation in California. The special motion to strike a SLAPP suit is a drastic and extraordinary remedy. It not only allows an early summary dismissal of the plaintiff's complaint, it also cuts off all discovery upon its filing and authorizes an award of attorney fees to the prevailing defendant. (§ 425.16, subds. (b), (c), (g).) The majority's holding expands the definition of a SLAPP suit to include a potentially huge number of cases, thereby making the special motion to strike available in an untold number of legal actions that will bear no resemblance to the paradigm retaliatory SLAPP suit to which the remedial legislation was specifically addressed.

The decision of the Court of Appeal below (including both the majority and dissenting opinions), an earlier published opinion of the same division of that court (*Zhao v. Wong, supra,* 48 Cal.App.4th 1114), and the published decisions of several other Courts of Appeal (see, e.g., *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* (1996) 50 Cal.App.4th 1633[58 Cal.Rptr.2d 613]; *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591[57 Cal.Rptr.2d 491]), have all strived to interpret the overbroad and ambiguous language of section 425.16, subdivisions (b)(1) and (e)(1) and (2), in a manner that preserves the original intent, purpose, and mandate of the anti-SLAPP legislation. In my view those courts have reasonably interpreted subdivision (e)(1) and (2) as requiring that the subject-matter inquiry of the legislative, executive, judicial, or other "offical" proceeding be shown to involve a public issue or issue of public interest so as to preserve and effectuate the

overriding mandate of subdivision (a). The broad construction given subdivision (e)(1) and (2) by the majority, in contrast, effectively abrogates that carefully drafted statement of legislative purpose and intent. ***1130**

In interpreting subdivisions (b)(1) and (e)(1) and (2) of section 425.16 in a manner at odds with the Legislature's carefully circumscribed definition of SLAPP suits set forth in subdivision (a), the majority invoke a " 'longstanding rule of statutory construction-the "last antecedent rule"-[which] provides that "qualifying words and phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." ' (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680[183 Cal.Rptr. 520, 646 P.2d 191], quoting *Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389[70 P.2d 918].)" (Maj. opn., *ante*, at p. 1114.) Rules of statutory construction such as the "last antecedent rule" can oftentimes prove useful in gleaning legislative intent behind complex statutes, but they are not immutable. To my mind, " '[m]ore in point here .... is the principle that such rules shall always " 'be subordinated to the primary rule that the intent shall prevail over the letter.' " ' (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539[147 Cal.Rptr. 157, 580 P.2d 657]; accord, *In re Joseph B.* (1983) 34 Cal.3d 952, 957[196 Cal.Rptr. 348, 671 P.2d 852]; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195[132 Cal.Rptr. 377, 553 P.2d 537].)" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 351[45 Cal.Rptr.2d 279, 902 P.2d 297].)

The heart of this anti-SLAPP legislation is embodied in subdivision (a) of section 425.16. This is a case in which a practical reading of the clearly stated purpose and intent behind this remedial legislation found in subdivisions (a) and (b) should take precedence over a literal reading of the broadly worded subdivision (e)(1) and (2), since the latter, expansively interpreted, is in patent conflict with the former. Unlike the majority, I conclude the Legislature's primary intent is that this remedial statutory scheme be governed by the restricted scope of the statement of legislative purpose found in subdivision (a). As suggested by the court in *Zhao v. Wong, supra,* 48 Cal.App.4th at page 1129, "The very fact that the Legislature included a precisely drafted statement of legislative purpose in the statute manifests an intent that the application of the statute be governed by this statement of purpose."

The statutory construction invoked by the majority does, in a literal sense, appear to harmonize clauses (1) and (2) with clauses (3) and (4) of section 425.16, subdivision (e), since the latter two clauses expressly require a separate showing of involvement of a public issue or issue of public interest where the constitutionally protected written or oral statement was made "in a place open to the public" (subd. (e)(3)) or any other place (subd. (e)(4)). But that same analysis virtually nullifies the precisely drafted statement of legislative intent contained in subdivision (a) when the availability of the ***1131** special motion is being assessed under subdivision (e)(1) or (2), a matter I believe should be of far greater concern to this court in our effort to reasonably construe and effectuate the Legislature's intent and purpose behind the legislation. "[A] court is to construe a statute ' "so as to effectuate the purpose of the law." ' " (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 681[183 Cal.Rptr. 520, 646 P.2d 191].) The purpose of the anti-SLAPP legislation is to make available a drastic pretrial remedy designed to discourage the filing of a specifically defined category of lawsuits deemed by the Legislature to constitute an "abuse of the judicial process" because they are "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The legislation was *not* intended to make such an extraordinary remedy broadly available in every case involving an actionable statement uttered in a court of law, or in a legislative, executive, or other "offical" proceeding.

All three justices comprising the panel that decided petitioner's appeal below, majority and dissenting alike, agreed that the anti-SLAPP statute was not intended to immunize every statement made before or in connection with an official proceeding, but was instead intended to protect statements on a *public issue* made in an official proceeding and statements made in connection with a *public issue* under consideration or review in an official proceeding. (See also *Lins-co/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th at p. 1633;*Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1127.) I would commend what I believe are the key portions of those two separate opinions, which together conclude, contrary to the holding of the majority here, that subdivision (e)(1) and (2) of section 425.16 must be construed

to require a separate showing that the legislative, executive, judicial or other "official" proceeding involved inquiry into a public issue or issue of public interest. The section that follows sets forth the relevant portions of the opinions of the Court of Appeal holding to that effect.

II

In the Court of Appeal below in this case (maj. opn. by Dossee, J.; Stein, J., conc.; dis. opn. by Strankman, P. J.), the majority made the following observations in concluding that a defendant seeking anti-SLAPP protection under section 425.16, subdivision (e)(1) or (2), must separately demonstrate that such statement was made in a legislative, executive, judicial or other "official" proceeding involving a public issue or issue of public interest:

"The remedy authorized by the anti-SLAPP statute is a special motion to strike any cause of action which arises from an 'act of [the defendant] in ***1132** furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue ....' (§ 425.16, subd. (b); see generally, *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809[33 Cal.Rptr.2d 446].)

"The special motion to strike a SLAPP suit is a drastic and extraordinary remedy. It not only allows an early dismissal of the plaintiff's complaint; it also authorizes an award of attorney fees to the prevailing defendant. (§ 425.16, subds. (b), (c).) ....

. . . . . .

"Subdivision (e) of section 425.16 [as in effect and controlling in the instant case] defines an ' "act in furtherance of a person's right of petition or free speech ... in connection with a public issue" ' to include '[1] any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [2] any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or [3] any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.'

"In the present case, respondent ECHO contends that plaintiffs' lawsuit qualifies as a SLAPP suit because it is based upon petitioning activities which fall within phrases [1] and [2] of section 425.16, subdivision (e). [FN2] ECHO asserts that statements made in assisting tenants Ford and Bond to complain to HUD and to file small claims court actions, including ECHO's efforts to resist plaintiffs' subpoenas, qualify as statements within an official proceeding under phrase [1]. Further, ECHO asserts that statements made in response to plaintiffs' efforts to challenge ECHO's public funding were connected to the issues under consideration by HUD or the courts and therefore fall within phrase [2].

> FN2 ECHO does not rely upon phrase [3], which is expressly limited to the use of a public forum in connection with an issue of public interest.

"On two previous occasions, this division has been called upon to examine the scope of the anti-SLAPP statute, and on both occasions we gave the statute a narrow interpretation. First, in *Zhao v. Wong*[, *supra,*] 48 Cal.App.4th [at pp.] 1120-1121, 1129..., we concluded that in light of the legislative history and the declared legislative purpose of the anti-SLAPP statute, the statute applies only to lawsuits which are based upon activities closely tied ***1133** to the right to petition and the freedom of speech. [FN3] We emphasized that the challenged petition or speech must have been 'in connection with a public issue.' (*Zhao, supra,* 48 Cal.App.4th at p. 1127.) Specifically, we held in *Zhao* that within phrase [2] of section 425.16, subdivision (e), the 'issue under consideration or review by a legislative, executive, or judicial body' must be a public issue. (48 Cal.App.4th at p. 1127.) More recently, in *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* [, *supra,*] 50 Cal.App.4th [at pp.] 1638-1639..., we followed the reasoning of *Zhao* to hold that within phrase [1] the statements made before an official proceeding must be on a public issue. In sum, we have concluded that the anti-SLAPP statute was not intended to immunize every statement made before or in connection with an official proceeding, but was instead intended to protect statements on a *public issue* made in an official proceeding and statements made in connection with a *public issue* under consideration or review in an official proceeding. (*Linsco/Private Ledger, Inc. v. Investors Arbi-*

tration Services, Inc., supra, 50 Cal.App.4th at p. 1639;*Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1127.)

> FN3Subdivision (a) of section 425.16 provides: 'The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.'

"Recently, Division Four of this district has disagreed with our interpretation of the anti-SLAPP statute. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1045-1048[61 Cal.Rptr.2d 58]; see also *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650[49 Cal.Rptr.2d 620].) The *Braun* court reasoned that the Legislature *equated* a public issue with the authorized official proceeding to which it connects. Hence, it is the setting itself-an official proceeding-that makes the issue a public issue: 'all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.' (*Braun, supra,* at p. 1047.)

"We cannot accept this construction of the anti-SLAPP statute. Certainly not every issue before the courts and other official bodies is a public issue, and we find it doubtful that the Legislature thought otherwise. (*Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th at p. 1639; see *Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1131.) Furthermore, such a broad reading of the anti-SLAPP statute would have legal consequences beyond the statute's declared purpose, as the anti-SLAPP statute would supplant the statutory privilege for statements made in official proceedings (Civ. Code, § 47, subd. (b)). (***1134***_Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,_ 50 Cal.App.4th at p. 1639; see *Zhao v. Wong, supra,* 48 Cal.App.4th at pp. 1129-1130.) We remain committed to our earlier position that a lawsuit qualifies as a SLAPP suit only if it challenges a statement on a *public* issue made in an official proceeding or a statement made in connection with a *public* issue under review in an official proceeding. (*Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th at p. 1639;*Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1127.)"

Although Presiding Justice Strankman dissented below, he disagreed only with the majority's conclusion that the proceedings at which statements were made that were attributed to ECHO's employees and allegedly slandered plaintiff Briggs did not involve a public issue. Presiding Justice Strankman joined in the majority's threshold conclusion that a public issue showing is separately required under subdivision (e)(1) or (2) of section 425.16 in order for the special anti-SLAPP remedy to apply. The portion of his dissenting opinion relevant here read as follows:

"I agree with the majority that a defendant qualifies for anti-SLAPP protection only if the challenged suit arose from the defendant's petitioning or speech 'in connection with a public issue.' ... [¶] ... [¶] The Legislature expressly declared that its intent in enacting the anti-SLAPP statute was 'to encourage continued participation in matters of public significance' and thus granted a person protection from lawsuits arising from 'any act of that person in furtherance of the person's right of petition or free speech ... in connection with a public issue.' (Code Civ. Proc., § 425.16, subds. (a), (b).) If the statute said no more, there would be no question that a defendant lodging an anti-SLAPP motion must make a prima facie showing that plaintiff's suit arises from an act in furtherance of defendant's right of petition or free speech *in connection with a public issue.* But the statute further provides that an ' "act in furtherance of a person's right of petition or free speech ... in connection with a public issue" ' includes '[1] any ... statement ... made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; [2] any ... statement ... made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or [3] any ... statement ... made in a place open to the public or a public forum in connection with an issue of public interest.' (Code Civ. Proc., § 425.16, subd. (e).)

"The public issue, or public interest, element is expressly included in only the third definitional category of the anti-SLAPP statute, which has led some courts

to conclude that the statute protects any statement made before or in *1135 connection with an official proceeding even if the statement does not concern a public issue. (E.g., *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 650[49 Cal.Rptr.2d 620].) We have rejected this interpretation of the anti-SLAPP statute as contrary to the express declaration of legislative intent and general statutory provision protecting a person's exercise of constitutional rights of petition and free speech *in connection with a public issue.* (Code Civ. Proc., § 425.16, subds. (a), (b); *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* [, *supra,*] 50 Cal.App.4th 1633, 1639 ...; *Zhao v. Wong*[, *supra,*] 48 Cal.App.4th 1114, 1127....) I agree with the majority that 'the anti-SLAPP statute was not intended to immunize every statement made before or in connection with an official proceeding, but was instead intended to protect statements on a *public issue* made in an official proceeding and statements made in connection with a *public issue* under consideration or review in an official proceeding. (*Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th at p. 1639;*Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1127.)' [Citation.]"

III

The majority emphasize that in 1997 the Legislature amended section 425.16, to provide that the statute "shall be broadly construed." (§ 425.16, subd. (a), as amended by Stats. 1997, ch. 271, § 1.) The majority concede the 1997 amendment "effect[ed] no substantive changes to the anti-SLAPP scheme ...." (Maj. opn., *ante*, at p. 1119.) I remain unconvinced the legislative intent behind the statute, as originally enacted *or as amended in 1997*, was to expand the categories of litigation qualifying as SLAPP suits in as broad and open-ended a manner as does the majority's rationale and holding in this case.

The 1997 amendment added a single sentence (italicized below) to the end of subdivision (a) of section 425.16, which currently reads: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly.*" (Italics added.)

Obviously, the opening phrase of the single sentence added by the 1997 amendment-"To this end ..."-reflects the Legislature's intent that the remedial provisions of the anti-SLAPP legislation be "broadly construed" *1136*within the context of the restricted scope of the statement of legislative purpose contained in subdivision (a).* (See also *Zhao v. Wong, supra,* 48 Cal.App.4th at p. 1129.) If the Legislature had instead desired to overrule those decisions of the Courts of Appeal that have construed section 425.16, subdivision (e)(1) and (2), as requiring demonstration of involvement of a public issue, it could have easily done so in precise and explicit terms. To my mind, the majority's analysis and holding serve neither the letter nor spirit of the 1997 amendment. Not only does the rule set down in this case fail to "construe [] broadly" the statute's remedial provisions consistent with the ends described in the carefully drawn statement of legislative purpose found in section 425.16, subdivision (a), it literally reads that statement of legislative purpose right out of the statutory scheme by recognizing sweeping new categories of litigation, bearing no resemblance to the abusive litigation practices described in that subdivision, that will henceforth automatically qualify as SLAPP suits under subdivision (e)(1) and (2).

Finally, the majority's expansive reading of section 425.16, subdivision (e)(1) and (2), may have legal consequences well beyond the statute's declared purpose, as the anti-SLAPP legislation thusly interpreted stands to supplant Civil Code section 47, subdivision (b)'s absolute litigation privilege for communications made in any legislative, judicial, or other official proceeding authorized by law. (See *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc., supra,* 50 Cal.App.4th at p. 1639;*Zhao v. Wong, supra,* 48 Cal.App.4th at pp. 1129-1130.) From a practical standpoint, why, under the majority's rationale, would a defendant move, *at his own expense*, to dismiss an unmeritorious lawsuit based on Civil Code section 47, subdivision (b)'s otherwise applicable litigation privilege for statements made in official proceedings, when, under the majority's expansive interpretation of the anti-SLAPP legislation, he could instead move to specially strike the suit as a retaliatory SLAPP suit and thereby immediately cut off discovery

in the litigation and recover his attorney fees if dismissal is ultimately ordered?

The majority suggest it would be "anomalous" for "direct petition activity" that is "not focused on an inherently 'public' issue" to be absolutely privileged under the litigation privilege of Civil Code section 47, subdivision (b), and yet not be otherwise "entitled to the procedural protections of the anti-SLAPP law." (Maj. opn., *ante*, at p. 1121.) Under the majority's rationale, the scope of the anti-SLAPP legislation is seemingly coextensive with, if not broader than, the litigation privilege embodied in Civil Code section 47, subdivision (b). Could that have been the intent of the Legislature in enacting remedial legislation specifically designed and intended to target the abusive practice of SLAPP suits?

The majority suggest in conclusion that, "If we today mistake the Legislature's intention, the Legislature may easily amend the statute." (Maj. opn., ***1137***ante*, at p. 1123.) Of course the converse is true as well-were we to construe section 425.16, subdivision (e)(1) and (2), as requiring demonstration of the involvement of a public issue in the legislative, executive, judicial or "official" proceedings covered under those clauses of subdivision (e), then if the Legislature disagreed with that construction, it could amend those clauses to more clearly and explicitly convey that no such separate showing is required. I would rather this court risk reversal by the Legislature in construing the provisions of subdivision (e)(1) and (2) *consistently* with the concisely drafted statement of statutory purpose found in subdivision (a), than to interpret those two clauses so broadly as to virtually nullify the very purpose and spirit of the anti-SLAPP legislation by holding that *every* lawsuit based on *any* actionable word uttered or written in connection with *any* legislative, executive, judicial, or other "official" proceeding in the state of California will henceforth, as a matter of law, be deemed a retaliatory SLAPP suit.

I would hold, consistent with the unanimous determination of the Court of Appeal below, that the Legislature intended involvement of a public issue or issue of public interest be demonstrated under subdivision (e)(1) and (2) of section 425.16.

Brown, J., concurred. ***1138**
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Cal. 1999.
Briggs v. Eden Council for Hope & Opportunity
19 Cal.4th 1106, 969 P.2d 564, 81 Cal.Rptr.2d 471, 99 Cal. Daily Op. Serv. 554, 99 Daily Journal D.A.R. 687

END OF DOCUMENT

CALIFORNIA DRIVE-IN RESTAURANT ASSOCIATION, et al., Respondents,
v.
MARGARETE L. CLARK, as Chief of the Division of Industrial Welfare, etc., et al., Appellants.
L. A. No. 18093.

Supreme Court of California
June 16, 1943.

HEADNOTES

(1) Administrative Law--Rules of Administrative Agencies--Interpretation.
Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies.

(2) Statutes § 87, 92--Repeal by Implication--Rule AgainstRepeal by Inconsistent Statute--Necessity for Clear Repugnancy.
The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon; and to overcome the presumption the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation.
See 23 Cal.Jur. 694; 25 R.C.L. 918.
(3) Statutes § 124--Construction--Circumstances Indicating Legislative Intent--Object to Be Accomplished.
The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent.

(4a, 4b) Labor § 17--Regulation of Tipping--Rules and Statutes.
Section 3 of Order 12-A of the Industrial Welfare Commission and Lab. Code, §§ 350-356, are not irreconcilable, but entirely harmonious, since the basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments, the subject of tipping being embraced only incidentally in furtherance of that general purpose, and the statute is concerned exclusively with tipping in respect to its relation to the public, the Legislature having expressly stated that its purpose was to prevent fraud upon the public.

(5) Labor § 17--Regulation of Tipping--Construction of Order.
Conceding that the effect of § 3 of Order 12-A of the Industrial Welfare Commission is to prohibit deduction of tips from employees' wages and that Lab. Code, §§ 350-356, impliedly authorizes their deduction, such prohibition should be strictly limited, and the section will not be violated in instances where the employer retains the entire amount of all tips received above the minimum wage, or deducts the tips from the amount of any wages it has agreed to pay in excess of a specified minimum.

(6) Labor § 17--Regulation of Tipping--Construction of Lab. Code, §§ 350-356.
That Lab. Code, §§ 350-356, authorize tipping is not a necessary conclusion, since the statute does not purport to legalize the retention or deduction of tips received by employees and is nothing more than a comprehensive regulation requiring that the public be informed of an employer's retention of tips.

(7) Labor § 17--Regulation of Tipping--Construction of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission, given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage.

(8) Labor § 17--Regulation of Tipping--Purpose of Lab. Code, §§ 350-356.
If it be assumed that the Legislature in enacting Lab. Code, §§ 350-356, was endeavoring to avoid the difficulty encountered in reference to Stats. 1917, p. 257, still it did not purport to authorize deduction of tips from the minimum wage but merely regulated the retention of tips by employers regardless of whether such retention was or was not a violation of § 3 of Order 12-A of the Industrial Welfare Commission.

(9) Statutes § 180(2)--Aids to Construction--Contemporaneous Construction-- Executive or

Departmental Construction.
While it is a rule of statutory interpretation that the construction given a statute by the administrative agency charged with its enforcement is a significant factor to be considered by the courts in ascertaining the meaning of the statute, where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction.

(10) Trial § 379--Findings--Conclusiveness.
A finding constituting a conclusion of law is not binding upon the appellate court.

(11) Labor § 17--Regulation of Tipping--Validity of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission is not invalid as an unconstitutional interference with freedom of contract as between employer and employee, since in the field of regulation of wages and hours by legislative authority constitutional guarantees relating to freedom of contract must give way to reasonable police regulations, and the Legislature did not act arbitrarily or capriciously, but reasonable grounds appear for the policy established by § 3 of the order.
See 15 **Cal.Jur.** 575; 31 **Am.Jur.** 1080.
(12) Labor § 17--Regulation of Tipping--Validity of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission does not create an improper discrimination in respect to employers or the employees affected. The particular evils at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed.
See 31 **Am.Jur.** 1038.
(13) Labor § 17--Regulation of Tipping--Validity of Order--Finding of Commission.
The fact that no finding by the Industrial Welfare Commission as a basis for Order 12-A appears in the order itself is not of importance, since § 6(a) of the minimum wage law (Stats. 1913, p. 632, as amended by Stats. 1921, p. 378) merely requires that the order shall specify "the minimum wage for women and minors in the occupation in question, maximum hours ... and the standard conditions of labor. ..."

(14a, 14b) Labor § 17--Regulation of Tipping--As Implied Power.
The adoption of § 3 of Order 12-A is within the implied power of the Industrial Welfare Commission, flowing from its power to fix minimum wages delegated to the commission.

(15) Administrative Law--Power of Administrative Agency to Adopt Rules and Regulations.
While an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by statutes, the authority of an administrative board or officer to adopt reasonable rules and regulations deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned, and is implied from the power granted.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Ballard, Judge. Reversed.

Action for injunction and declaratory relief. Judgment for plaintiffs reversed.

COUNSEL

Robert W. Kenny, Attorney General, Earl Warren, Attorney General, Burdette J. Daniels and Alberta Belford, Deputies ***290** Attorney General, Leo L. Schaumer and E. A. Lackmann for Appellants.

Thorpe & Bridges, Gerald Bridges, Frank R. Johnston and E. R. Young for Respondents.

CARTER, J.

Plaintiffs, operators of drive-in restaurants, successfully challenged in the superior court the validity of a regulation of the Industrial Welfare Commission, designated Order 12-A. Defendants, the Chief of the Division of Industrial Welfare of the Department of Industrial Relations and the members of the Industrial Welfare Commission of the Division of Industrial Welfare of the Department of Industrial Relations, appeal from the judgment entered for plaintiffs.

Plaintiffs are independent owners of establishments serving food and beverages. Their patronage consists chiefly of motorists who are served while remaining in their vehicles, however, service may be obtained in the

owner's restaurant buildings. Most of the employees are girls and women commonly referred to as "car hops." The employment arrangement contemplates that the tips received by the employees shall constitute their wages, except that the employers make up the difference if the tips received fall below the minimum wage for minors and adult females fixed by the Industrial Welfare Commission. Plaintiffs posted in their business establishments, the notices required by a statute of 1929, hereinafter set forth. In 1940, plaintiffs were advised by the Chief of the Division of Industrial Welfare that their employment arrangement violated Order 12-A, in that they could not consider the tips received by the minor and female adult employees in computing and paying the minimum wage, and that they would be required to comply with said order.

Order 12-A became effective on June 8, 1923. In section 1 it fixed a minimum wage of $16 per week to be paid to all female adult or minor employees in restaurants or other places where food and drinks were sold. Section 2 fixed the maximum amount the employer could deduct from the minimum wage for meals and lodging furnished the employee. Section 3, here in question, reads: "No employer may include tips or gratuities received by employees designated in section *291 1 hereof as part of the legal minimum wages fixed by said section of this Order." The remaining nine sections deal with hours of labor, working conditions, the employer's duty to keep records, and the like.

In 1929 (Stats. 1929, p. 1971), a statute was passed by the Legislature, now appearing in sections 350-356 of the Labor Code. Section 351 of the Labor Code reads:

"Every employer or agent who collects, takes, or receives any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than 48-point black- face type, to the following effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees."

Section 352 specifies that the notice shall also state the extent to which employees are required to accept gratuities in lieu of wages or permit them to be credited against their wages. The provisions apply to all businesses having one or more persons in service. A gratuity "includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron."

A penalty is imposed for violation of the act, and it is declared that:

"The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement. As a part of the social public policy *292 of this State, this article is binding upon all departments of the State." (Lab. Code, sec. 356.)

Whether the 1929 statute impliedly annulled section 3 of said Order 12-A must be determined in the light of the appropriate rules of statutory construction. (1) Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*Miller v. United States*, 294 U.S. 435 [55 St.Ct. 440, 79 L.Ed. 977].) (2) With reference to implied repeals of statutes this court stated in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 176 [74 P.2d 252]:

"The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two

may stand together. Where a modification will suffice, a repeal will not be presumed." (See 23 Cal.Jur. 694, et seq.) (3) The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent. (*San Francisco v. San Mateo County,* 17 Cal.2d 814 [112 P.2d 595].)

(4a) Applying those rules to the instant case we find no repugnancy. The statute of 1929 and section 3 of Order 12-A rather than being irreconcilable are entirely harmonious. The basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments. The subject of tipping is embraced only incidentally in the furtherance of that general purpose. Broadly, it was designed to deal with the industrial welfare of such employees, and the relation of their welfare to the general public interest. On the other hand the statute is concerned exclusively with tipping in respect to its relation to the public which patronizes not only restaurant establishments but many other businesses. The Legislature expressly stated that its purpose is "to prevent fraud upon the public," a policy underlying no part of the order. Section 3 of the order states that tips received by the designated employees may not be included in the minimum wage therein fixed. (5) If it be conceded that the effect ***293** of said section is to prohibit the deduction of tips from the employees' wages, and that the statute impliedly authorizes such deduction as asserted by plaintiffs, such prohibition should be strictly limited, and said section would not be violated in instances where the employer retained the entire amount of all tips received *above* the minimum wage, or deducted the tips from the amount of any wages he agreed to pay in excess of the specified minimum. It does not apply to male employees or persons employed in businesses other than those mentioned.

(6) Further, it is not necessary to conclude that the statute authorizes tipping. It does not purport to authorize or legalize the retention or deduction of the tips received by the employees. It is nothing more than a comprehensive regulation in respect to advising the public of the retention of tips by the employer whether such retention is legal or not, the essential requirement being that the public be informed of the practice. Fairly interpreted, the posting of the notice is required regardless of whether such retention or deduction is being made from the minimum legal wage fixed by section 3. (7) It may be said that section 3 given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage, because if the employer could retain such tips he would be, in effect, accomplishing indirectly that which he could not do directly, namely, including the tips in the legal wage. It would be a subterfuge for him to receive all the tips and pay the minimum wage. The end result would be counting the tips as a part of the legal wage. That conclusion does not mean that section 3 and the statute are inconsistent to that extent. (4b) The purpose of the statute and section 3 are entirely different. The statute does not purport to cover the special field of tipping in regard to its effect on the minimum wage law. It is aimed at the protection of the public against fraud.

(8) For the same reasons the historical arguments advanced by plaintiffs are not persuasive. True, a statute was enacted in 1917 (Stats. 1917, p. 257) which made it unlawful for an employer to demand tips received by his employee in consideration of the latter's being hired or retained. That act, like the 1929 act, was broad in its scope and did not purport ***294** to affect tipping in relation to minimum wages. It was declared invalid in *In re Farb,* 178 Cal. 592 [174 P. 320, 3 A.L.R. 301], and thereafter the 1929 act was passed. Both of those statutes were aimed at the prevention of a fraud on the public and were not concerned with the effect on the inclusion of tips in minimum wages and the purpose of section 3 of said Order 12-A. If it be assumed that the Legislature in passing the 1929 statute was endeavoring to avoid the difficulty encountered with reference to the 1917 act in *In re Farb, supra,* still it did not purport to authorize the deduction of tips from the minimum wage. It was regulating the retention of tips by employers regardless of whether such retention was or was not a violation of section 3 of Order 12-A. The statute and the order were designed for fundamentally different purposes.

(9) Plaintiffs urge that because the predecessors in office of defendants did not enforce section 3 of Order 12-A, they must have considered it annulled by the 1929 statute, and some of the plaintiffs having been so advised by executive officers of defendants predecessors, the statute should be interpreted to annul said section 3. It is undoubtedly a rule of statutory interpretation that the construction given a statute by the administrative agency charged with the enforcement

of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute. (*Los Angeles County v. Superior Court,* 17 Cal.2d 707 [112 P.2d 10]; 23 Cal.Jur. 776-7.) But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. (*Los Angeles County v. Superior Court, supra;* 23 Cal.Jur. 776.) We have seen that the 1929 statute does not purport to legalize the deduction or retention of tips by an employer, nor does section 3 of Order 12-A prohibit tipping; it merely prohibits the inclusion of tips in the minimum wage for certain employees. The alleged implied nullification which is not favored in the law does not exist.

(10) The trial court found: "... that in adopting section 3 of Order 12A ... defendant ... acted in excess of its jurisdiction." That finding is not, as claimed by plaintiffs, binding upon this court, inasmuch as it is a conclusion of law. In ***295** support of it plaintiffs challenge the constitutionality of section 3, and the validity of the adoption of the order.

(11) Plaintiffs contend that section 3 is invalid because it is an unconstitutional interference with the freedom of contract as between employer and employee. (United States Const., Fourteenth Amendment; Cal.Const., art. I, secs. 1, 13; art. XX, sec. 18.) The main premise relied upon by plaintiffs is that section 3 prohibits an employer and his employee from agreeing that the former shall retain all tips received by the latter, citing *In re Farb, supra,* declaring unconstitutional the 1917 act (*supra.*), and denouncing such practice. It has heretofore been pointed out that the 1917 act was not aimed at and did not involve any restrictions on such contracts directly as a part and in aid of the minimum wage requirements. The 1917 act applied expressly to any and all employees without regard to whether a legal wage was fixed for them. For that reason we do not consider the Farb case as necessarily supporting plaintiffs' position. Furthermore, the reasoning of the Farb case is out of line with the later authorities upholding minimum wage legislation. (See *United States v. Darby,* 312 U.S. 100 [61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430]; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 [57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330]; 31 Am.Jur., Labor, sec. 503; 130 A.L.R. 273; 132 A.L.R. 1443.) There is a distinct difference between a comprehensive prohibition of retention of tips by employers, and the prohibition of such practice as a part of an order fixing minimum wages.

It must be remembered that in the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. The Supreme Court of the United States in discussing the regulation of hours and wages of women employees stated in *West Coast Hotel Co. v. Parrish, supra,* at 392:

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (***296***Holden v. Hardy,* 169 U.S. 366 [18 S.Ct. 383, 42 L.Ed. 780]; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison,* 183 U.S. 13 [22 S.Ct. 1, 46 L.Ed. 55]); in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora,* 190 U.S. 169 [23 S.Ct. 821, 47 L.Ed. 1002]); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas,* 211 U.S. 539 [29 S.Ct. 206, 53 L.Ed. 315]); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co. v. McGuire supra* [219 U.S. 549 (31 S.Ct. 259, 55 L.Ed. 328)]); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon,* 243 U.S. 426 [37 S.Ct. 435, 61 L.Ed. 830]); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White,* 243 U.S. 188 [37 S.Ct. 247, 61 L.Ed. 667]; *Mountain Timber Co. v. Washington,* 243 U.S. 219 [37 S.Ct. 260, 61 L.Ed. 685]). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co. v. McGuire, supra,* p. 570." And at page 399:

"The legislature had the right to consider that its

minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. *Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.* Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (Emphasis added.) Many other illustrations could be given. In the recent case of *Williams* v. [*Jacksonville*] *Terminal Co.*, 315 U.S. 386 [62 S.Ct. 659, 86 L.Ed. 914], the court had before it the question of whether the tips received by red caps could be counted as a part of the minimum wage under the Fair Labor Standards Act (29 U.S.C.A. 201 et seq.) It was held ***297** that they could and that legally speaking such tips were wages under the agreement between the employer and employee. However, the court was careful to point out that the Fair Labor Standards Act did not prohibit the inclusion of tips in the minimum wage, and it recognized that such a prohibition might well be valid. It stated at page 388:

"The Fair Labor Standards Act is not intended to do away with tipping. Nor does it appear that Congress intended by the general minimum wage to give the tipping employments an earnings-preference over the nonservice vocations. The petitioners do not dispute the railroad's contention that, during the entire period, each red cap received as earnings-cash pay plus tips-a sum equal to the required minimum wage. Nor is there denial of increased pay to the red caps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. *The desirability of considering tips in setting a minimum wage, that is whether tips from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision. We deal here only with the petitioners' assertion that the wages Act requires railroads to pay the red caps the minimum wage without regard to their earnings from tips.*" (Emphasis added.)

The presumption is that the Legislature had adequate and reasonable basis for its police regulations and that a statute providing for such regulations is constitutional (5 Cal.Jur. 628, et seq.), and, as expressed in *West Coast Hotel Co. v. Parrish, supra,* the only question to be decided is whether it acted arbitrarily or capriciously. There may be others, but certain reasonable grounds appear for the policy established by section 3 of Order 12-A. As we have seen from the foregoing quotation from *Williams v. Terminal Co., supra,* that possibility is recognized where the court declared that whether the social welfare required that tips be not counted as part of the minimum wage was not for "judicial decision." It cited for that statement, Anderson, *Tips & Legal Minimum Wages,* XXXI American Labor Legislation Review 11, at page 13, where it was aptly said that if the tips received were to be counted as a part of the minimum ***298** wage "... the employee would be required to report to her employer the amount of tips received each week, in order that he in turn could know the amount of wage he must pay to make up the $16.

"If this practice were followed the purpose of the minimum-wage law would soon be defeated. It would not be long before employers discovered which of their employees were costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to the employer a greater amount of tips than actually is received. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation. To prevent just this kind of abuse, most State minimum-wage orders for hotels and restaurants contain a provision that under no circumstances shall tips be counted as a part of the legal minimum wage." In order that the welfare of the employees be advanced and the benefits of the minimum wage law be preserved, it may well be said that section 3 has a reasonable basis. If the employees may be induced, and in effect coerced, by fear of dismissal by an employment contract requiring the tips to be counted as a part of the

minimum wage, to report their tips as equal to the minimum wage even though they are not, the minimum wage requirement is seriously undermined. By indirect method they would be forced into a position of receiving less than the standard fixed. If the employer is permitted to retain the tips in an amount equal to the minimum wage, which as seen would be a violation of section 3, the same condition would exist. The fear of dismissal might well coerce the employees to turn over as tips ***299** a portion of their own funds when the tips received were not equal to the legal wage. The effectiveness of the minimum wage law would be thus impaired. With the employer prevented from retaining tips in the amount of the minimum legal wage, a salutary result would follow. The benefits of the minimum wage law would be preserved, and the dignity of the laborer and his social position would be advanced by relieving him of the necessity of resorting to the undignified conduct encouraged by the tipping practice.

The Legislature clearly sets forth the purpose sought to be obtained by the fixing of minimum wages as that adequate to supply the necessary cost of proper living and to maintain the health and welfare of the employees. (Lab. Code, sec. 1182.) We perceive that that purpose may be thwarted if tips may be included in the minimum wage.

The foregoing discussion does not mean that tips may not be considered wages under certain circumstances such as, computation of compensation under workmen's compensation laws. (*Hartford Acc. & Indem. Co. v. Industrial Acc. Com.*, 41 Cal.App. 543 [183 P. 234]; 29 Cal.L.Rev. 774; 75 A.L.R. 1223, and generally *Williams v. Terminal Co., supra.*) An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation, but section 3 is aimed at the evils above-mentioned in connection with *minimum wages,* and merely because tips may be termed wages under certain circumstances does not mean that they may be counted as part of the minimum wage where to do so would contravene the policy of section 3 and permit the evils there denounced.

(12) In their contention that section 3 is not uniform and is discriminatory (United States Const., Fourteenth Amendment; Cal.Const., art. I, sec. 21; art. IV, sec. 25), plaintiffs suggest that section 3 would not be violated if the employment contract called for all tips to be retained by the employer, citing *Settrie v. Falkner,* Commerce Clearing House Labor Law Service, 3d ed. sec. 60, 779. Apparently that case does not appear in the reporter system nor the Ohio Appellate Reports, but in any event we are not persuaded by its reasoning. Section 3 does present such a situation.

Section 3 creates no improper discrimination in respect to employers or the employees affected. The particular evils ***300** at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed. A reasonable classification has been made. There are many instances where classifications with reference to wages and hours have been upheld. (See *Matter of Application of Martin,* 157 Cal. 51 [106 P. 235, 26 L.R.A. N.S. 242], hours of employment in underground mines; *Matter of Application of Miller,* 162 Cal. 687 [124 P. 427], hours of labor for women but not men.) It is said in 31 Am.Jur., Labor, sec. 414:

"The relation of employer and employee has long been the basis for specific legislation, and statutes applicable only to such relation are not subject to the objection that they constitute class legislation. Moreover, the equal protection of the laws is not denied by the classification of occupations if such classification has a reasonable basis. Such classification may be based upon matters which are personal to the individuals who are acting as employees. For example, statutory regulations with reference to labor of women or children or both may be sustained as against the objection that they constitute an arbitrary discrimination because they do not extend to men. Moreover, the classification may be based not only on the character of the employees but upon the nature of the employer's business, since the character of the work may largely depend upon the nature and the incidents of the business in connection with which the work is done. A statute dealing with employees in a particular line of business does not create an arbitrary discrimination merely because the operation of the statute is not extended to other lines of business having their own circumstances and conditions, or to domestic service."

(13) It is contended that there was no finding by the Industrial Welfare Commission as a basis for its Order 12-A, and that such finding was necessary to the validity of said order; that is, that the wages fixed were adequate to supply the cost of proper living as speci-

fied in the minimum wage law at the time of its adoption. (Stats. 1913, p. 632, as amended.) That contention must necessarily be limited to the claim that such finding must appear in the order itself inasmuch as the appeal is on the judgment roll alone and hence all of the court's findings must be deemed to have been supported by the evidence. Plaintiffs, respondents herein, are bound by those ***301** findings. The trial court found that the order was adopted by the commission pursuant to and under the authority of the minimum wage laws; that on "June 8, 1923, the ... Commission promulgated Order 12-A for the hotel and restaurant industries. That *prior to the formulation and adoption* of said Order 12-A, and in the manner and form prescribed by statute, a conference denominated a wage board of the employers and employees of the said hotel and restaurant industries was called by said commission; that thereafter and prior to the adoption of said Order 12-A, and within the time and in the manner prescribed by law a public hearing was called and held upon said proposed Order 12-A, at which said meeting and wage board conference the employers and employees of said restaurant industry of the State of California were regularly represented.

"That at said public hearing and other meetings witnesses were sworn, testimony taken, and evidence received. It is further true that *every act and thing required by statute to be done by said Commission in the promulgation and adoption of said Order 12-A was done by said Commission within the time and in the manner and form required by statute.*" (Emphasis added.) It was also found that the order was in full force and effect except as otherwise found in the findings referring to its constitutionality and implied repeal by the 1929 statute.

There have been decisions by the United States Supreme Court both ways upon the question of the necessity of findings by an administrative agency as a basis for a rule or regulation issued by it. In *Panama Ref. Co. v. Ryan,* 293 U.S. 388 [55 S.Ct. 241, 79 L.Ed. 446], findings were declared necessary to support a presidential order. The most recent holding by that court in *Pacific States Box & Basket Co. v. White,* 296 U.S. 176 [56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853], is that no findings are necessary where the statute does not require them to support the order of the Department of Agriculture of the State of Oregon fixing the sizes for containers of horticultural products, although a violation of the order is a misdemeanor. That holding is a definite departure from the broad rule announced in *Panama Ref. Co. v. Ryan, supra.* (See 49 Harv.L.Rev. 827.) Other cases have considered the question. (See *American Telephone & Telegraph Co. v. United States,* 14 F.Supp. 121; *Bayley v. Southland Gasoline Co.,* 131 F.2d 412; ***302***Twin City Milk Producers Assn. v. McNutt,* 122 F.2d 564.) We have not been referred to and have been unable to find any case in California on the subject, and while some of the federal court cases indicate that the findings must appear in the order, plaintiffs have suffered no prejudice. The findings of the trial court show that if findings were required by the statute the commission made them. The mere fact that they do not appear on the face of the order is not therefore of importance. The statute did not require that the findings appear on the face of the order. Section 6(c) of the act states merely that the order shall specify "the minimum wage for women and minors in the occupation in question, the maximum hours ... and the standard conditions of labor. ..." (Stats. 1913, p. 632, as amended Stats. 1921, p. 378.)

(14a) The adoption of section 3 of Order 12-A was within the power and authority delegated to the Industrial Welfare Commission by the Legislature. The Constitution authorizes the Legislature to provide a minimum wage for women and minors and for the comfort, health, safety and general welfare of employees, and to confer upon a commission the authority it deems necessary to carry out those purposes. (Cal. Const., art. XX, sec. 17 1/2.) The act under which Order 12-A was promulgated empowers the commission to fix "a minimum wage to be paid to women and minors engaged in any occupation, which shall not be less than a wage adequate to supply such women and minors the necessary cost of proper living and to maintain the health and welfare of such women and minors," and to establish the maximum working hours and the standard conditions of labor. (Stats. 1913, p. 632, sec. 6, as amended Stats. 1921, p. 378.) In our previous discussion of the constitutionality of section 3 we have shown that it had a direct relation to minimum wages and was a natural and important incident thereof. It is an incident of the establishment of minimum wages similar to the provisions in Order 12-A, which specify to what extent board and lodging furnished by the employer may be considered wages. The power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge, is necessarily an implied power flowing from the power to fix a minimum wage delegated to

the commission.

(15) It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute ***303** the source of its power. (*Boone v. Kingsbury,* 206 Cal. 148 [273 P. 797]; *California E. Com. v. Black-Foxe Military Inst.,* 43 Cal.App.2dSupp. 868 [110 P.2d 729]; *Hodge v. McCall,* 185 Cal. 330 [197 P. 86]; *Bank of Italy v. Johnson,* 200 Cal. 1 [251 P. 784].) However, "the authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted." (*Bank of Italy v. Johnson, supra,* 20.) (See, also, *Crawford v. Imperial Irrigation Dist.,* 200 Cal. 318 [253 P. 725]; 21 Cal.Jur. 874.) (14b) In the instant case the power to adopt section 3 may be implied as a power to make effective the order fixing the minimum wage. The power to fix that wage does not confine the agency to that single act. It may adopt rules to make it effective. Plaintiffs cite *Adolph Coors Co. v. Corbett,* (Cal.App.) 123 P.2d 74, decided by the District Court of Appeal. A hearing was granted by this court in that case and thereafter it was dismissed. It is not a controlling authority.

The judgment is reversed.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.
Traynor, J., and Schauer, J., did not participate herein.
Respondents' petition for a rehearing was denied July 15, 1943. Traynor, J., and Schauer, J., did not participate therein. ***304**

Cal.
California Drive-In Restaurant Ass'n v. Clark
22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028, 7 Lab.Cas. P 61,672

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CULLIGAN WATER CONDITIONING OF BELLFLOWER, INC., Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION, Defendant and Appellant
L.A. No. 30464.

Supreme Court of California
June 4, 1976.

SUMMARY

In an action by a water conditioning company against the State Board of Equalization for recovery of use taxes paid under protest, the trial court entered judgment in favor of plaintiff. The court concluded that plaintiff's income from water conditioning contracts under which it furnished its customers with "exchange units" it had acquired without paying sales tax reimbursement thereon was service income and not a receipt from the lease of tangible personal property and thus was not taxable. (Superior Court of Los Angeles County, No. SEC 5658, W. James Turpit, Judge.)

The Supreme Court reversed with directions to enter judgment for defendant. The court held that the transactions in question were leases of "tangible personal property" within the meaning of Rev. & Tax. Code, § 6006, subd. (g), and therefore fell within that statute's definition of "sale," subject to use tax under Rev. & Tax. Code, § 6201, required to be collected by the lessor pursuant to Rev. & Tax. Code, § 6203, at the time rentals are paid. It was pointed out that the transactions contained the requisite elements of a "hiring" under Civ. Code, § 1925, of the "temporary possession and use" of the exchange water conditioning unit for "reward" as well as the requisite elements of a "lease," of the giving up of possession to the hirer so that he uses and controls the rented property. Preliminarily the court had held that the basis of the board's assessment against plaintiff was interpretation of existing regulations and that the proper test on review was whether the board had properly interpreted the relevant sections of the Sales and Use Tax Law and its own relevant regulations adopted pursuant to such law. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Sales and Use Taxes § 30--Collection and Enforcement--Judicial Review of Board of Equalization.
The appropriate test on review of a decision of the State Board of Equalization assessing a use tax delinquency against a water conditioning company based on its receipts from customers for furnishing of "exchange units" under water conditioning contracts was whether the board had properly interpreted the relevant sections of the Sales and Use Tax Law and its own relevant regulations adopted pursuant to such law rather than whether it had employed a classification that was arbitrary, capricious or without rational basis, where the basis of the assessment was not embodied in any formal regulation or even an interpretative ruling covering the water conditioning industry as a whole and directed to the industry's use of exchange units, but was nothing more than the board auditor's interpretation of existing regulations. (Disapproving language to the contrary in *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 Cal.App.3d 576 [118 Cal.Rptr. 818], and *L.A.J., Inc. v. State Bd. of Equalization* (1974) 38 Cal.App.3d 549 [113 Cal.Rptr. 319].)

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
The interpretation of a regulation, like the interpretation of a statute, is a question of law, and while an administrative agency's interpretation of its own regulation obviously deserves great weight, the ultimate resolution of such legal questions rests with the courts.

(3) Sales and Use Taxes § 21--Use Taxes--Transactions Subject to Tax-- Leases of Personal Property--What Constitutes Lease.
The State Board of Equalization properly determined that a water conditioning company's contracts under which it furnished its customers with "exchange units" it had acquired without paying sales tax reimbursement thereon, were leases of "tangible personal property" within the meaning of Rev. & Tax. Code, §

6006, subd. (g), and therefore fell within that statute's definition of "sale," subject to use tax under Rev. & Tax. Code, § 6201, required to be collected by the lessor pursuant to Rev. & Tax. Code, § 6203, at the time rentals were paid. The transaction contained the requisite elements of a "hiring" under Civ. Code, § 1925, of the "temporary possession and use" of the exchange water conditioning unit for "reward" as well as the requisite elements of a "lease," of the giving up of possession to the hirer so that he uses and controls the rented property, and, though "service" is involved in regenerating the units, the "real object" sought by the individual customer, within the meaning of Cal. Admin. Code, tit. 18, § 1501, is to obtain "the property produced by the service."
[See **Cal.Jur.2d, Rev.,** Sales and Use Taxes, § 16; **Am.Jur.2d,** Sales and Use Taxes, §§ 53, 54.]
COUNSEL

Evelle J. Younger, Attorney General, Ernest P. Goodman, Assistant Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Appellant.

J. Kimball Walker for Plaintiff and Respondent.

Brookes, Brookes & Vogl, Valentine Brookes and Lawrence V. Brookes as Amici Curiae on behalf of Plaintiff and Respondent.

SULLIVAN, J.

Defendant State Board of Equalization (Board) appeals from a judgment granting plaintiff Culligan Water Conditioning of Bellflower, Inc. recovery of certain use taxes paid under protest.

The case was tried by the court, sitting without a jury, upon an agreed statement of facts. In substance the pertinent facts are as follows: Plaintiff is in the business of conditioning water at the point of use. Hard water contains calcium and magnesium, and these "hardness" ions cause it to be unsuitable in the home for doing the laundry or for washing and bathing. Plaintiff "softens" the water by removing "hardness" ions. This is accomplished at the point of use, in the home, by passing the water supply through a conditioning unit containing an ion-exchange material *89 which exchanges its more soluble sodium ions for the calcium and magnesium ions. After the ion-exchanger is spent, the unit is regenerated.

Plaintiff's residential business consists of two separate categories: (1) The sale or lease of "home-owned" automatic units; and (2) the furnishing of "exchange units" under a water conditioning contract. The "home-owned unit" is a softener complete within itself which continuously regenerates the ion-exchange material within the unit and regularly provides soft water once inserted in the customer's plumbing system. In connection with the sale or lease of this unit, plaintiff pays a sales tax and secures sales tax reimbursement from its customers. Such taxes are not in issue in the instant case.

It is the furnishing of the "exchange unit" under the water conditioning contract which is at the heart of the present controversy. This unit, once inserted in the customer's plumbing, also regularly provides soft water but unlike the "home-owned unit" cannot itself regenerate the ion-exchange material. Consequently this unit must be replaced periodically by plaintiff in order to provide soft water continuously. The householder contracts with plaintiff for water conditioning and does not purchase the installed equipment. Under its arrangement with the customer, plaintiff agrees to provide the exchange unit, to connect it to the customer's water system and to periodically replace the ion-exchange material in the unit in order to maintain a continuous flow of softened water. The customer pays an initial charge for the necessary alterations to the plumbing system and a monthly or bi-monthly charge for the water conditioning depending upon the quantity of water and the degree of the hardness of the water. Plaintiff regularly removes the exchange material when exhausted, replaces it with new or regenerated material and regenerates the exhausted material at its plant. At all times, plaintiff retains ownership of, and full control over, the unit. [FN1]

> FN1 A specimen of plaintiff's water conditioning contract is attached to, and made a part of, the agreed statement of facts. It is entitled "Culligan Annual Service Subscription" and contains provisions generally reflecting the arrangement described above. Plaintiff also advertises and bills its customers as a water conditioning service.

Prior to 1966 plaintiff operated in a prescribed franchise area in and about the City of Bellflower, California. About May 1, 1966, plaintiff acquired the

assets of a Culligan franchise business known as Culligan of South Gate, Inc. Among the assets purchased were 2,000 portable *90 exchange units. Since plaintiff paid no sales tax reimbursement upon the acquisition of these units, the tax auditor for the Board determined that the 2,000 units were acquired by plaintiff "ex-tax." Accordingly, the tax auditor determined that the service income from the equivalent number of service customers should be included in the measure of taxable sales as "taxable rentals." The Board therefore assessed a tax delinquency of $12,816.17, with accrued interest of $2,347.86, or a total assessment of $15,164.03, for the audit period from April 1, 1966, to December 31, 1968. Plaintiff paid this assessment under protest and filed a timely claim for refund on the ground that the income derived from the lease of these 2,000 units was income from a service business rather than from the rental of property and thus not subject to sales and use tax liability. The Board rejected the claim for refund and plaintiff filed the instant action.

Plaintiff acquired the 2,000 portable exchange units from its transferor (Culligan of South Gate) under a contract of sale whereby such transferor agreed to pay any sales tax due. Plaintiff paid no sales tax reimbursement on this transfer of the 2,000 units, but Culligan of South Gate had paid sales tax reimbursement on them at the time that South Gate had originally acquired the units and prior to the sale to plaintiff by South Gate. Plaintiff had paid sales tax reimbursement on all *other* portable exchange units at the time plaintiff originally acquired them and accordingly was not required to charge sales tax to its customers in connection with the units other than the 2,000.

The Board took the position that section 6006, subdivision (g), of the Revenue and Taxation Code [FN2] applied to the transactions involving the above-mentioned 2,000 exchange units and therefore assessed the tax as being due on a "lease of tangible personal property" in its audit for the period April 1, 1966, through December 31, 1968. [FN3] Attached to the agreed statement of facts and made a part thereof is a declaration of *91 Thomas P. Putnam, assistant chief counsel of the Board, who, the parties agreed, if called as a witness would testify to the statements made in the declaration, it being further agreed, however, that the relevance and probative value of his testimony and the Board's position concerning the lease "are issues in this case."

FN2 Hereafter, unless otherwise indicated, all section references are to the Revenue and Taxation Code.

FN3 Section 6006 as it read at the time of the tax period covered by the assessment, provided in pertinent part as follows:

"'Sale' means and includes:

"

. . . . .

"(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

"

. . . . .

"(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

"(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

"(B) A decedent from whom the lessor acquired the property by will or the laws of succession."

Subdivision (g) was added to section 6006 in 1965. (See Stats. 1965, First Ex. Sess., ch. 2, § 2, p. 5444.)

At the same time section 6010, defining "purchase" was amended by identical language to include "any lease of tangible personal property." (See § 6010, subd. (e),

added by Stats. 1965, First Ex. Sess., ch. 2, § 6, p. 5445; see also Cal. Admin. Code, tit. 18, § 1660.)

Mr. Putnam stated that the Board and its staff considered the type of transaction here involved pertaining to the portable exchange units "to be a 'lease' within the meaning of the Sales and Use Tax Law and, unless the property is leased in substantially the same form as acquired by the lessor and he has previously paid sales tax reimbursement or use tax measured by his purchase price, as a 'sale' and 'purchase' within the meaning of that law, subject to tax measured by the payments made by his customers ...." He explained that this type of transaction was considered to fall within the definition of "hiring" in Civil Code section 1925 and that the periodic payments made by the customer were considered to be the measure of tax by reason of section 6011. He concluded as follows: "By reason of the interworking of Sections 6009, 6201, 6203, 6390, and 6401, the basic tax on leases is considered to be a use tax on the lessee, which the lessor must collect. If the lessee is exempt, then the tax is considered imposed on the lessor as a sales tax and Sections 6051 and 6012 become applicable.

"Regulation 1660 (18 Cal. Admin. Code, § 1660), a copy of which is attached, describes the position of the Board with respect to leases of tangible personal property in general."

The trial court adopted by reference as its findings of fact the agreed statement of facts and concluded that the income upon which the Board's assessment was made "is service income and not a receipt from the lease of tangible personal property and as such is not taxable under *92 the Sales Tax Law," that the Board's position that the transaction in question constituted a lease of tangible personal property "is, on the facts of this case, an arbitrary, unreasonable and unwarranted extension of the interpretation of the words 'lease,' 'rental,' 'sale,' or 'purchase,'" and that plaintiff was entitled to a refund of the tax paid. Judgment was entered accordingly. This appeal followed.

(1, 2) Initially, we must determine the appropriate standard of review applicable to the assessment against plaintiff of use tax liability based on the receipts derived from the lease of the exchange units. The Board contends that the assessment, grounded on what it denominates an administrative classification, may be overturned only if such classification was arbitrary, capricious or without rational basis. However, it is clear from the record that the basis of the assessment was not embodied in any formal regulation or even interpretative ruling covering the water conditioning industry as a whole and directed to the industry's use of exchange units (see § 7051 and Gov. Code, § 11420 et seq.), but rather that the basis of the assessment was nothing more than the Board auditor's interpretation of two existing regulations, that is, the regulation governing the lease of tangible personal property (Cal. Admin. Code, tit. 18, § 1660) and the regulation governing service businesses (Cal. Admin. Code, tit. 18, § 1501).

If the Board had promulgated a formal regulation determining the proper classification of receipts derived from the rental of exchange units to condition water and the regulation had been challenged in the action for refund of the tax paid (§ 6933), the proper scope of reviewing such regulation would be one of limited judicial review as urged by the Board. (*Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 1020-1021 [106 Cal.Rptr. 867]; *Mission Pak Co. v. State Bd. of Equalization* (1972) 23 Cal.App.3d 120, 124-125 [100 Cal.Rptr. 69]; see *Carmona* v. *Division of Industrial Safety* (1975) 13 Cal.3d 303, 309-310 [118 Cal.Rptr. 473, 530 P.2d 161]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-835 [27 Cal.Rptr. 19, 377 P.2d 83].) However, in the instant case the Board adopted no formal regulation of a general nature. Considering the particular facts of the transactions involved in the audit of plaintiff taxpayer and interpreting the statutes and regulations deemed applicable, the Board and its staff arrived at certain conclusions as to plaintiff's tax liability and assessed the tax accordingly. As we have set forth in the details of the record before us, the Board "took the position" that certain sections of the law and the regulations *93 applied and made its assessment in conformity with its view of the law. Thus the "position" taken by the Board with respect to plaintiff's exchange unit transaction was not the equivalent of a regulation or ruling of general application but, as the amicus points out to us and indeed as the very phraseology of the record indicates, was merely its litigating position in this particular matter.

In sum, our present task is to determine whether the Board in making the assessment in controversy has properly interpreted the relevant sections of the Sales

and Use Tax Law and the Board's own relevant regulations adopted pursuant to such law. We recently summarized our proper function thusly: "The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with the courts. [Citations.]" (*Carmona v. Division of Industrial Safety, supra,* 13 Cal.3d 303, 310; see also *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 917 [80 Cal.Rptr. 89, 458 P.2d 33]; *Szabo Food Service, Inc. v. State Bd. of Equalization* (1975) 46 Cal.App.3d 268, 271 [119 Cal.Rptr. 911]; *King v. State Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1012 [99 Cal.Rptr. 802].)[FN4] (3) Therefore, giving the appropriate weight to the Board's interpretation, we must decide whether the receipts from plaintiff's customers using the 2,000 exchange units are taxable rentals for leases of tangible personal property within the meaning of the applicable provisions of the Sales and Use Tax Law and regulations promulgated thereunder.

FN4 In both *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization, supra,* 30 Cal.App.3d 1009, 1020-1021, and *Mission Pak Co. v. State Bd. of Equalization, supra,* 23 Cal.App.3d 120, 124-125, the taxpayer attacked the validity of a formal regulation promulgated by the Board and the Courts of Appeal properly held the applicable standard of review to be whether the regulation was arbitrary, capricious or had no reasonable or rational basis. However, in *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 Cal.App.3d 576, 586-587 [118 Cal.Rptr. 818], and *L.A.J., Inc. v. State Bd. of Equalization* (1974) 38 Cal.App.3d 549, 552 [113 Cal.Rptr. 319], it would appear that the taxpayer attacked the Board's interpretation of existing regulations, rather than the regulations themselves. Accordingly we disapprove any language in those opinions indicating that the proper scope of review of such litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit) is to determine whether the Board's assessment was arbitrary, capricious or had no reasonable or rational basis. The proper scope of review in such cases is that enunciated in the text of this opinion.

It will be helpful to our determination of this question to set forth at this point the respective positions of the parties. It is the position of the *94 Board that plaintiff's installation of the exchange units in its customers' residences under its water conditioning or service contract constitutes a lease of the exchange units. Plaintiff takes the position that such an arrangement does not constitute a lease since although having possession of the unit, the customer has neither use of it, nor dominion or control over it. [FN5] The Board rejoins that it is quite obvious that the customer *uses* the unit and by having control over the use of water in his house, simultaneously has dominion and control over the unit which softens it.

FN5 Plaintiff points to the following portion of the agreed statement of facts: "The exchange unit is under the dominion control, and use of the plaintiff [Culligan] at all times and plaintiff has the full right and power over the unit; the customer is not permitted to tamper with, change, control, or use the exchange unit in any way for his own purposes. At any time at will and as needed, the plaintiff (dealer) exchanges one tank for another .... The customer does not have the right, interest, the desire or the physical or technical ability to alter, control, or make use of the unit in any way other than which is provided for him under his contract by the plaintiff."

We start with the observation that if a lease of tangible personal property is a "sale" (§ 6006) and "purchase" (§ 6010) under the code and regulation (Cal. Admin. Code, tit. 18, § 1660), then the use of the leased property in this state by the lessee is subject to a use tax (§§ 6009, 6201) which the lessor must collect from the lessee at the time rentals are paid (§ 6203) and is measured by the rentals payable (§ 6012). "Any lease of tangible personal property in any manner whatsoever for a consideration is a 'sale' as defined in section 6006, and a 'purchase' as defined in 6010 ..." (Cal. Admin. Code, tit. 18, § 1660) except where sales or use tax is paid upon acquisition of the tangible personal property which is leased in substantially the same form as acquired. (See fn. 3, *ante.*)

Since upon acquiring the 2,000 exchange units here in question, plaintiff neither "paid sales tax reimburse-

ment pursuant to Section 6052 [nor] ... paid use tax measured by the purchase price of the property" (§ 6006, subd. (g)(5); see fn. 3, *ante*) any lease of the units by plaintiff in substantially the form acquired was subject to use tax collectable by plaintiff. Section 6006.3 provides: "'Lease' includes rental, hire and license. ..." Hiring is defined in Civil Code section 1925 as "a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time." As stated in *Entremont v. Whitsell* (1939) 13 Cal.2d 290, 295 [89 P.2d 392], "The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property." (*Id.*, citing Civ. Code, § 1925.) ***95**

Contrary to plaintiff's claim, we are satisfied that on the record before us, plaintiff's customer in a general but very practical sense has the use of the exchange unit which is installed in his plumbing system and has dominion and control over it while it is there. Certainly the customer *uses* the exchange unit by having the water pass along the lead-in pipes, through the conditioning unit, and thereafter throughout the entire water system of his residence. He also has dominion and control over the unit. He may permit it to remain inactive simply by not using the water in his house, as he might do during long absences during the day or over many days while away from home, or during long hours of nonuse during the night. Or he or members of his family may activate the unit and avail themselves of its functioning by the simple act of turning on a faucet. The fact that plaintiff has an *owner's* control of the unit and the exclusive right to replace one unit with another so as to regenerate the exhausted material at its plant, does not derogate in any way from the customer's right to use and control the unit while it is on his premises.

Thus, we conclude that there are present the requisite elements of a "hiring," namely the "temporary possession and use" of the exchange water conditioning unit for "reward" (Civ. Code, § 1925) as well as the requisite elements of a "lease," namely "the giving up of possession to the hirer" so that he "uses and controls the rented property." (*Entremont v. Whitsell, supra*, 13 Cal.2d 290, 295.) We therefore agree with the position of the Board and conclude that on the present record plaintiff's furnishing of the exchange units in controversy under the provisions of its so-called annual service subscription constituted a lease of tangible personal property.

Nevertheless, plaintiff insists that even if the elements of a lease of tangible personal property are present, it is nonetheless unreasonable for the Board to so classify plaintiff's business because it is more properly classified as a service business. [FN6] Plaintiff urges that it provides a water conditioning service consisting of the processing, regeneration and installation of the ion-exchange material which requires the skill and labor of its employees and that the water conditioning exchange unit is merely the vehicle by which such service is provided. Additionally, plaintiff points out that the water conditioning contract is called a service ***96** contract, the bill is labelled a service bill and the water softening industry has always advertised and considered itself as a service industry. Finally, plaintiff claims that its business is more like businesses that have been characterized as service businesses, such as swimming pool cleaners which use chemicals to clean the pool, exterminators which use electronic devices, and linen suppliers who launder the linen, than like businesses commonly thought of as leasing tangible personal property.

> FN6 "Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. Tax, accordingly, applies to the sale of property to them. ..." (Cal. Admin. Code, tit. 18, § 1501.)

The Board has set forth its general standard for classifying transactions involving the transfer of tangible personal property as follows: "The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, *is the real object sought by the buyer the service per se or the property produced by the service.* ..." (Cal. Admin. Code, tit. 18, § 1501, italics added.) Service is defined as "performance of labor for the benefit of another." (Webster's New Internat. Dict. (2d ed., unabridged).) Essentially the crucial point of inquiry is whether the true object of the transaction is the finished article or the performance of labor. (*Albers v. State Board of Equalization* (1965) 237 Cal.App.2d 494, 497 [47 Cal.Rptr. 69].)

We think it quite clear that the true object of the water conditioning contract is the furnishing of the exchange unit which, by itself and without requiring any performance of human labor, softens the water. It is true that human labor or service is involved in regenerating the ion-exchange material, but realistically viewed the customer's purpose in entering into the contract is to obtain, not personal services, but a properly generated and efficiently functioning water conditioning unit. Plaintiff's contention that it is providing primarily a water softening service and that the transfer of the water conditioning unit is merely incidental to the provision of this service simply does not fit the facts - the water softening is done by the water conditioning unit, the service of plaintiff's employees of generating and installing being merely incidental to the function performed by the unit.

Finally plaintiff contends that its business is indistinguishable from various other businesses involving service and the use of tangible personal property which the Board has held not to be lease transactions and that its "water softening service is so analogous to such other cases as to require the same use tax treatment." We shall explain why we consider plaintiff's several arguments unpersuasive. *97

Plaintiff first points out that section 6006, subdivision (g)(2) [FN7] provides that the Sales and Use Tax Law does not apply to a linen supplier and argues that the "furnishing of soft water by [plaintiff] to a customer's home is almost identical in nature to the linen supply service." We do not see how this reference assists plaintiff, since the point plaintiff attempts to make contains its own complete answer, namely that the Legislature has seen fit to provide a statutory exemption for the linen industry. Indeed it would appear that if the exemption indicated in subsection (2) had not been enacted, the lease transactions now covered by the subsection would have fallen within the statutory definition of "sale."

> FN7 Section 6006, subdivision (g)(2) provides: "'Sale' means and includes:
>
> "
>
> . . . . .
>
> "(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:
>
> "
>
> . . . . .
>
> "(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles."

Second, plaintiff argues that the Board "has ruled in a number of other cases that income from similar businesses [is] not subject to sales tax." Plaintiff merely lists, without any development of the point other than a citation to certain sales tax rulings of the Board, the following four types of businesses: (1) swimming pool contractors who service pools with chemicals; (2) exterminators who use electronic devices; (3) security companies who utilize burglar alarms; and (4) community antenna television services. The tax rulings pertaining to the first two types of businesses antedated the 1965 amendments to the Sales and Use Tax Law defining "sale" and "purchase" as including "any lease of tangible personal property." (See fn. 3, *ante*.) These rulings were written at a time when such types of businesses were considered as consumers, rather than retailers, of the chemicals provided with the service; we do not apprehend that they dealt with the factual situation now presented to us, namely the lease of tangible personal property. With respect to the last two types of businesses, plaintiff, as we have already observed, has presented no facts whatsoever as to the methods of conducting the businesses involved, no discussion of the basis of the pertinent tax rulings referred to, and no analyses of plaintiff's position that these last two types of businesses are so indistinguishable from plaintiff's business as to compel a similar tax treatment in the instant case. [FN8] *98

> FN8 Indeed, if it were necessary to analogize, we would think, as the Board itself suggests, that plaintiff's business appears similar to the situation involved in the leasing of automatic data processing equipment, where the taxable rental is deemed to include the incidental services required to be provided as part of the lease, namely the programming of the equipment, the training of operators, and

> the general maintenance of the equipment. (Cal. Admin. Code, tit. 18, § 1502, subd. (k).) In each instance, it would seem that the true object of the transaction is the equipment itself while any services involved are merely incidental to its functioning.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment for defendant.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Richardson, J., concurred. *99

Cal.
Culligan Water Conditioning v. State Bd. of Equalization
17 Cal.3d 86, 550 P.2d 593, 130 Cal.Rptr. 321

END OF DOCUMENT

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.
No. S087881.

Supreme Court of California
June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of "acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.

In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of "acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990)

Wills and Probate, §§ 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only "natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and

"contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory *908 construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

> FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

> FN2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold *909 divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by

section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. *910

As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d

570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge " is "to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, *912 test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent

and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child " and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.)*Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such

> child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
>
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388-389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543), but, as discussed, the word retains virtually the same meaning in general usage today-"to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: " 'Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner

to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the *916 same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. FN6

> FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532,*Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or "shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532,*Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledg[e] it as his own"; (2) that he "receiv[e] it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) *919

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession

of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a "natural brother or sister" within the meaning of such *920 exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

> FN7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby sub-

jecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran, supra,* 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8]*921

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The pa-

> rental rights of the alleged natural father shall be determined as set forth in Section 7664."
>
> FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he ***922** argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516-1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing

thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. ***925BROWN, J.**
I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must af-

firm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

Cal. 2001.
Estate of Griswold
25 Cal.4th 904, 24 P.3d 1191, 108 Cal.Rptr.2d 165, 01 Cal. Daily Op. Serv. 5116, 2001 Daily Journal D.A.R. 6305

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Supreme Court of California
Lesli Ann McCLUNG, Plaintiff and Appellant,
v.
EMPLOYMENT DEVELOPMENT DEPARTMENT et al., Defendants and Respondents.
No. S121568.

Nov. 4, 2004.

Background: A state Employment Development Department (EDD) auditor, who alleged she was sexually harassed by a lead auditor, sued EDD and the lead auditor for hostile work environment and failure to remedy hostile work environment under the California Fair Employment and Housing Act (FEHA). The Superior Court, Sacramento County, No. 98AS00092,Joe S. Gray, J., granted summary judgment for defendants. Plaintiff appealed. The Court of Appeal affirmed as to EDD and reversed as to lead auditor. The Supreme Court granted lead auditor's petition for review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:
(1) amendment to FEHA making nonsupervisory employees liable for sex harassment effectuated a change in the law, rather than merely clarifying it, and
(2) amendment imposing liability on nonsupervisory personnel did not apply retroactively.

Judgment of the Court of Appeal reversed and matter remanded.

Moreno, J., filed a concurring and dissenting opinion.

Opinion, 6 Cal.Rptr.3d 504, superseded.

West Headnotes

[1] Constitutional Law 92 ⚿2450

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and scope in general. Most Cited Cases
(Formerly 92k67)
It is the province and duty of the judicial department, to say what the law is; those who apply the rule to particular cases, must of necessity expound and interpret that rule.

[2] Statutes 361 ⚿278.16

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.16 k. Declaratory, clarifying, and interpretative acts. Most Cited Cases
(Formerly 92k188)
A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment, because the true meaning of the statute remains the same.

[3] Statutes 361 ⚿278.2

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.2 k. Nature and scope. Most Cited Cases
(Formerly 92k188)
A statute has "retrospective effect" when it substantially changes the legal consequences of past events.

[4] Constitutional Law 92 ⚿2450

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and scope in general. Most Cited Cases
(Formerly 92k67)
The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. West's Ann.Cal. Const. Art. 6, § 1.

[5] Constitutional Law 92 ⚷2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50)

Constitutional Law 92 ⚷2457

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2457 k. Interpretation of statutes. Most Cited Cases
(Formerly 92k67)
Subject to constitutional constraints, the Legislature may enact legislation, but the judicial branch interprets that legislation. West's Ann.Cal. Const. Art. 4, § 1; Art. 6, § 1.

[6] Constitutional Law 92 ⚷2457

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2457 k. Interpretation of statutes. Most Cited Cases
(Formerly 92k67)
Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. West's Ann.Cal. Const. Art. 6, § 1.

[7] Statutes 361 ⚷176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial authority and duty. Most Cited Cases
It is the duty of the court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively. West's Ann.Cal. Const. Art. 6, § 1.

[8] Civil Rights 78 ⚷1106

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases
Supreme Court's decision in *Carrisales v. Department of Corrections* interpreted the California Fair Employment and Housing Act (FEHA) finally and conclusively as not imposing personal liability on a nonsupervisory coworker for sex harassment, and thus, for purposes of determining the status of the law when state employee's cause of action against her coworker accrued, Legislature's subsequent amendment imposing personal liability on nonsupervisory personnel had to be interpreted as effectuating a change in the law, rather than as a mere clarification of it. West's Ann.Cal.Gov.Code § 12940(j)(3).

[9] Courts 106 ⚷91(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(1) k. Highest appellate court. Most Cited Cases
The decisions of the California Supreme Court are binding upon and must be followed by all the state courts of California.

[10] Courts 106 ⚷91(.5)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(.5) k. In general. Most Cited Cases
Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction; it is not their function to attempt to overrule decisions of a higher court.

[11] Statutes 361 ⚷220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases
If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration.

[12] Statutes 361 ⚷220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases
A legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute.

[13] Constitutional Law 92 ⚷2351

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2351 k. Construction of statutes in general. Most Cited Cases
(Formerly 92k53)
The Legislature has no authority to interpret a statute; interpretation is a judicial task.

[14] Constitutional Law 92 ⚷2351

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2351 k. Construction of statutes in general. Most Cited Cases
(Formerly 92k53)
Although the Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive, the Legislature has no authority simply to say what the statute meant.

[15] Statutes 361 ⚷220

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases
A declaration that a statutory amendment merely clarified the law cannot be given an obviously absurd effect, and the court cannot accept the legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.

[16] Civil Rights 78 ⚷1006

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions
78k1006 k. Retrospective application. Most Cited Cases

Civil Rights 78 ⚷1106

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases
Because the Supreme Court had already finally and definitively interpreted sex harassment provision in the California Fair Employment and Housing Act (FEHA), the Legislature had no power to decide that a later amendment merely declared existing law. West's Ann.Cal.Gov.Code § 12940.

[17] Statutes 361 ⚷174

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k174 k. In general. Most Cited Cases

A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

[18] Statutes 361 ⚷219(4)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(4) k. Erroneous construction; conflict with statute. Most Cited Cases
It is the courts' duty to construe statutes, even if this requires the overthrow of an earlier erroneous administrative construction.

[19] Statutes 361 ⚷278.5

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 k. In general. Most Cited Cases
(Formerly 361k263)
Generally, statutes operate prospectively only.

[20] Constitutional Law 92 ⚷2488

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2488 k. Policy. Most Cited Cases
(Formerly 92k70.3(3))
A statute's retroactivity is, in the first instance, a policy determination for the legislature and one to which courts defer absent some constitutional objection to retroactivity.

[21] Statutes 361 ⚷278.7

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provisions. Most Cited Cases
(Formerly 361k263, 361k262)
A statute may be applied retroactively only if it contains express language of retroactively or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.

[22] Civil Rights 78 ⚷1106

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases

Statutes 361 ⚷278.36

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.24 Validity of Particular Retroactive Statutes
361k278.36 k. Labor and employment. Most Cited Cases
(Formerly 92k190)
Amendment to California Fair Employment and Housing Act (FEHA) provision, imposing liability on nonsupervisory personnel for sex harassment, did not apply retroactively to alleged sex harassment in the workplace occurring before amendment; any inference that Legislature intended retroactive application was weak, and creating retroactive liability posed constitutional concerns. West's Ann.Cal.Gov.Code § 12940(j)(2, 3).
See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 760C; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2003) ¶ 10:495 et seq. (CAEMPL Ch. 10-E); Cal. Jur. 3d, Labor, § 74 et seq.; Cal. Civil Practice (Thomson/West 2003) Employment Litigation, § 5:47 et seq.

[23] Constitutional Law 92 ⚷994

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k994 k. Avoidance of constitutional questions. Most Cited Cases

(Formerly 92k48(1))
Courts are required to construe statutes to avoid constitutional infirmities.

[24] Constitutional Law 92 ⚿975

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k975 k. In general. Most Cited Cases
(Formerly 92k46(1))
Before a court entertains the question whether retroactive application of a statute implicates constitutional concerns, the court must be confronted with a statute that explicitly authorized the imposition of liability for preenactment conduct.

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Matheny Sears Linkert & Long, Michael A. Bishop and Roger Yang, Sacramento, for Defendant and Respondent Manuel Lopez.

CHIN, J.

**1017[1]*469 "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, *470 must of necessity expound and interpret that rule." (*Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60.)

This basic principle is at issue in this case. In *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083(*Carrisales*), we interpreted Government Code section 12940 (hereafter section 12940), part of the California Fair Employment and Housing Act (FEHA). Later, the Legislature amended that section by adding language to impose personal liability on persons *Carrisales* had concluded had no personal liability. (§ 12940, subd. (j)(3).) Subdivision***431** (j) also contains a statement that its provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).) Based on this statement, plaintiff argues that the amendment**1018 did not *change,* but merely *clarified,* existing law. Accordingly, she argues, the amendment applies to this case to impose personal liability for earlier actions despite our holding in *Carrisales* that no personal liability attached to those actions.

We disagree. Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power. We also conclude this change in the law does not apply retroactively to impose liability for actions not subject to liability when performed.

I. FACTS AND PROCEDURAL BACKGROUND

In January 1998, plaintiff Lesli Ann McClung filed a complaint against the Employment Development Department and Manuel Lopez, alleging claims of hostile work environment and failure to remedy a hostile work environment under the FEHA, as well as another cause of action not relevant here. The superior court granted summary judgment for defendants, and plaintiff appealed.

The Court of Appeal affirmed the judgment in favor of the Employment Development Department, but reversed it as to Lopez. In so doing, it held that Lopez was plaintiff's coworker, not supervisor. It also recognized that we had held in *Carrisales, supra,* 21 Cal.4th at page 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, that the FEHA does not "impose personal liability for harassment on nonsupervisory coworkers." Nevertheless, it found Lopez personally liable for harassment under the FEHA. It applied an amendment to the FEHA that imposes personal liability *471 on coworkers (§ 12940, subd. (j)(3)), even though the amendment postdated the actions underlying this lawsuit. It found that the preexisting statement in section 12940, subdivision (j)(2), that subdivision (j)'s provisions "are declaratory of existing law," "supports

the conclusion that [the amendment] merely clarifies the meaning of the prior statute." Ultimately, it concluded that whether "the amendment merely states the true meaning of the statute or reflects the Legislature's purpose to achieve a retrospective change, the result is the same: we must give effect to the legislative intent that the personal liability amendment apply to all existing cases, including this one." "For Lopez," said the Court of Appeal, "the Supreme Court's interpretation of individual liability under FEHA can be said to have come and gone."

We granted Lopez's petition for review to decide whether section 12940, subdivision (j)(3), applies to this case.

II. DISCUSSION

A. Background

The FEHA "declares certain kinds of discrimination and harassment in the workplace to be 'unlawful employment practice[s].' (§ 12940.)" (*Carrisales, supra,* 21 Cal.4th at p. 1134, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) In *Carrisales,* we interpreted the FEHA as imposing "on the *employer* the duty to take all reasonable steps to prevent this harassment from occurring in the first place and to take immediate***432 and appropriate action when it is or should be aware of the conduct," but as not imposing "personal liability for harassment on nonsupervisory coworkers." (*Carrisales, supra,* at p. 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, citing § 12940, former subd. (h)(1).) Later, effective January 1, 2001, the Legislature amended the subdivision of section 12940 that we interpreted in *Carrisales* (now subdivision (j)). (Stats.2000, ch. 1049, §§ 7.5, 11.) As amended, section 12940, subdivision (j)(3), provides in relevant part: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee...." It seems clear, and no one disputes, that this provision imposes on nonsupervisory coworkers the personal liability that *Carrisales* said the FEHA had not imposed. Subdivision (j) also states that its **1019 provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).)

[2][3] We must decide whether the amendment to section 12940 applies to actions that occurred before its enactment. If the amendment merely clarified existing law, no question of retroactivity is presented. "[A] statute that merely *clarifies,* rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" "because the true meaning of the statute remains the same." *472(*Western Security Bank v. Superior*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1997084961*Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507(*Western Security Bank*).) In that event, personal liability would have existed at the time of the actions, and the amendment would not have changed anything. But if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. "A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Ibid.*) In this case, applying the amendment to impose liability that did not otherwise exist would be a retroactive application because it would "attach[ ] new legal consequences to events completed before its enactment." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229(*Landgraf*).) Specifically, it would "increase a party's liability for past conduct...." (*Id.* at p. 280, 114 S.Ct. 1483; accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839, 123 Cal.Rptr.2d 40, 50 P.3d 751(*Myers*).)

Accordingly, two separate questions are presented here: (1) Did the amendment extending liability in subdivision (j)(3) change or merely clarify the law? (2) If the amendment did change the law, does the change apply retroactively? We consider the former question first. Because we conclude the amendment did, indeed, change the law, we also consider the latter question.

B. Whether the Amendment Changed the Law

[4] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) Thus, "The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326, 109

P.2d 935.)

[5][6][7] The legislative power rests with the Legislature. (Cal. Const., art. IV, § 1.) Subject to constitutional constraints, the Legislature may enact legislation. ***433(*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, 97 Cal.Rptr. 1, 488 P.2d 161.) But the judicial branch *interprets* that legislation. "Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507; see also *People v. Cruz* (1996) 13 Cal.4th 764, 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) Accordingly, "it is the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute finally and conclusively...." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935.)

[8][9][10]*473 In *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, we interpreted the FEHA finally and conclusively as not imposing personal liability on a nonsupervisory coworker. This interpretation was binding on lower state courts, including the Court of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) "The decisions of this court are binding upon and must be followed by all the state courts of California.... Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Ibid.*)

[11][12][13][14][15][16] It is true that if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what **1020 an earlier Legislature intended is entitled to consideration. (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.) But even then, "a legislative declaration of an existing statute's meaning" is but a factor for a court to consider and "is neither binding nor conclusive in construing the statute." (*Ibid.*; see also *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52, 276 Cal.Rptr. 114, 801 P.2d 357;*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8, 185 Cal.Rptr. 582.) This is because the "Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean." (*Del Costello v. State of California, supra,* at p. 893, fn. 8, 185 Cal.Rptr. 582, cited with approval in *People v. Cruz, supra,* 13 Cal.4th at p. 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) A declaration that a statutory amendment merely clarified the law "cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214, 187 P.2d 702.) Because this court had already finally and definitively interpreted section 12940, the Legislature had no power to decide that the later amendment merely declared existing law.

On another occasion, the Legislature similarly enacted legislation overruling a decision of this court-which was within its power-but also purported to state that the new legislation merely declared what the law always was-which was beyond its power. In *People v. Harvey* (1979) 25 Cal.3d 754, 159 Cal.Rptr. 696, 602 P.2d 396, we interpreted Penal Code section 1170.1 as not permitting a certain consecutive sentence enhancement. The Legislature promptly amended the statute to permit the enhancement. (Stats.1980, ch. 132, § 2, p. 306.) It also declared that its ***434** intent was "to clarify and reemphasize what has been the legislative intent since July 1, 1977." (Stats.1980, ch. 132, § 1, subd. (c), p. 305.) The judicial response was swift and emphatic. The courts concluded that, although the Legislature may amend a **474** statute to overrule a judicial decision, doing so *changes* the law; accordingly, they refused to apply the amendment retroactively. (*People v. Savala* (1981) 116 Cal.App.3d 41, 55-61, 171 Cal.Rptr. 882;*People v. Harvey* (1980) 112 Cal.App.3d 132, 138-139, 169 Cal.Rptr. 153;*People v. Cuevas* (1980) 111 Cal.App.3d 189, 198-200, 168 Cal.Rptr. 519;*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 866, 168 Cal.Rptr. 257;*People v. Fulton* (1980) 109 Cal.App.3d 777, 783, 167 Cal.Rptr. 436;*People v. Matthews* (1980) 108 Cal.App.3d 793, 796, 167 Cal.Rptr. 8; see *People v. Wolcott* (1983) 34 Cal.3d 92, 104, fn. 4, 192 Cal.Rptr. 748, 665 P.2d 520.) As one of these decisions explained, this court had "finally and conclusively" interpreted the statute, and a "legislative clarification in the amended statute may not be used to overrule this exercise of the judicial function of sta-

tutory construction and interpretation. The amended statute defines the law for the future, but it cannot define the law for the past." (*People v. Cuevas, supra,* at p. 200, 168 Cal.Rptr. 519.)

[17][18] Plaintiff points out that *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, itself postdated the acts alleged in this case and argues that before that decision, nonsupervisory coworkers had been personally liable under the statute. However, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (*Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274; accord, *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 216, 115 S.Ct. 1447, 131 L.Ed.2d 328.) This is why a judicial decision generally applies retroactively. (*Rivers v. Roadway Express, Inc., supra,* at pp. 311-312, 114 S.Ct. 1510;*People v. Guerra* (1984) 37 Cal.3d 385, 399, 208 Cal.Rptr. 162, 690 P.2d 635.) It is true that two administrative decisions had previously interpreted the statute differently than we did. (See *Carrisales, supra,* at pp. 1138-1139, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) But we merely concluded that those decisions **1021 had misconstrued the statute (*ibid.*); we did not, and could not, amend the statute ourselves. (See *People v. Guerra, supra,* at p. 399, fn. 13, 208 Cal.Rptr. 162, 690 P.2d 635.) It is the courts' duty to construe statutes, " even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935; see also *Rivers v. Roadway Express, Inc., supra,* at pp. 312-313 & fn. 12, 114 S.Ct. 1510 [explaining that a United States Supreme Court decision interpreting a statute stated what the statute had always meant, even if the decision overruled earlier federal appellate court decisions that had interpreted the statute differently].)

Our conclusion that the amendment to section 12940, subdivision (j)(3), changed rather than clarified the law does not itself decide the question whether it applies to this case. It just means that applying the amended section to this case would be a retroactive application. "The fact that application of [the statute] to the instant case would constitute a *475 retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206, 246 Cal.Rptr. 629, 753 P.2d 585.) We turn now to the question ***435 whether the amendment applies retroactively.

C. Whether the Amendment Applies Retroactively

[19] "Generally, statutes operate prospectively only." (*Myers, supra,* 28 Cal.4th at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751; see also *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1206-1208, 246 Cal.Rptr. 629, 753 P.2d 585.) "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " (*Landgraf, supra,* 511 U.S. at p. 265, 114 S.Ct. 1483, fns. omitted; see also *Myers, supra,* at pp. 840-841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." (*Landgraf, supra,* at p. 270, 114 S.Ct. 1483.)

[20][21] This is not to say that a statute may never apply retroactively. "[A] statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity." (*Myers, supra,* 28 Cal.4th at p. 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*United States v. Heth* (1806) 3 Cranch 399, 7 U.S. 399, 413, 2 L.Ed. 479; accord, *Myers, supra,* at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers, supra,* at p. 844, 123 Cal.Rptr.2d 40, 50 P.3d 751.)

[22] We see nothing here to overcome the strong presumption against retroactivity. Plaintiff and Justice Moreno argue that the statement in section 12940,

subdivision (j)(2), that the subdivision's provisions merely declared existing law, shows an intent to apply the amendment retroactively. They cite our statement that "where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection *476 thereto.' " (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507, quoting **1022*California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d at p. 214, 187 P.2d 702.)

Neither *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, nor *California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d 210, 187 P.2d 702, holds that an erroneous statement that an amendment merely declares existing law is sufficient to overcome the strong presumption against retroactively applying a statute that responds to a judicial interpretation. In *California Emp. etc. Com. v. Payne,* the amendment at issue does not appear to have been adopted in response to a judicial decision. In *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, the only judicial action that had interpreted the statute before the Legislature amended it was a ***436 Court of Appeal decision that never became final. After considering all of the circumstances, we specifically held that the amendment at issue "did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, [the amendment] does not act retrospectively; it governs this case." (*Id.* at p. 252, 62 Cal.Rptr.2d 243, 933 P.2d 507.) Here, by contrast, as we have explained, *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, was a final and definitive judicial interpretation of the FEHA. The amendment at issue here *did* change the law.

Moreover, the language of section 12940, subdivision (j)(2), namely, that "The provisions of this subdivision are declaratory of existing law," long predates the Legislature's overruling of *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083. That language was added to the section in reference to a different, earlier, change to the statute. (Stats.1987, ch. 605, § 1, p.1945.) Any inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law.

Plaintiff and the Court of Appeal also cite statements in the legislative history to the effect that the proposed amendment would only "clarify" the law's original meaning. But these references may have been intended only to demonstrate that clarification was necessary, not as positive assertions that the law always provided for coworker liability. We see no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect to the extent the amendment did change the law. Specifically, we see no clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken. "Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf, supra,* 511 U.S. at pp. 272-273, 114 S.Ct. 1483.)

[23][24] Retroactive application would also raise constitutional implications. Both this court and the United States Supreme Court have expressed concerns that *477 retroactively creating liability for past conduct might violate the Constitution, although it appears neither court has so held. (*Landgraf, supra,* 511 U.S. at p. 281, 114 S.Ct. 1483 ["Retroactive imposition of punitive damages would raise a serious constitutional question"]; *Myers, supra,* 28 Cal.4th at pp. 845-847, 123 Cal.Rptr.2d 40, 50 P.3d 751; but see also *Landgraf,* at p. 272, 114 S.Ct. 1483 [describing "the *constitutional* impediments to retroactive civil legislation" as "now modest"].) "An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].' [Citations.] That rule reinforces our construction of the [statute] as prospective only." (*Myers, supra,* at pp. 846-847, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "Before we entertained that [constitutional] question, we would have to be confronted with a statute that explicitly authorized" the imposition of liability "for preenactment conduct." (*Landgraf, supra,* at p. 281, 114 S.Ct. 1483.) The amendment here contains no such explicit authorization.

For all of these reasons, we conclude that section

12940, subdivision (j)(3), does not apply**1023 retroactively to conduct predating its enactment.

***437III. CONCLUSION

We reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR and BROWN, JJ.Concurring and Dissenting Opinion by MORENO, J.

We held in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083 that the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.) does not impose on nonsupervisory coworkers personal liability for harassment. The Legislature later amended Government Code section 12940, subdivision (j), to impose such personal liability. The statute as amended states that its provisions "are declaratory of existing law." (Gov.Code, § 12940, subd. (j)(2).) [FN1]

> FN1. All further statutory references are to the Government Code, unless otherwise specified.

I agree with the majority that the Legislature could not, by amending the statute, clarify its meaning in a manner inconsistent with our decision in *Carrisales.* Thus, the amendment must be deemed to have changed, rather than merely clarified, the law. But unlike the majority, I conclude that by purporting to clarify its original intent, the Legislature clearly intended to apply this statutory change retroactively. We must honor this legislative intent, unless prevented from doing so by constitutional concerns.

The majority correctly recognizes that a statute may apply retroactively. As we stated in *478*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841, 123 Cal.Rptr.2d 40, 50 P.3d 751, "[g]enerally, statutes operate prospectively only"; "unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application' [citation].... Under this formulation a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity. [Citation.]"

The majority, however, "see[s] nothing here to overcome the strong presumption against retroactivity." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 435, 99 P.3d at p. 1021.) I disagree. The statute at issue, subdivision (j)(2) of section 12940, states that its provisions "are declaratory of existing law...." In *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244, 62 Cal.Rptr.2d 243, 933 P.2d 507, we recognized the importance of such legislative language: "[E]ven if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. [Citation.] ... Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment.' "

We made the same point half a century earlier in *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213, 187 P.2d 702, in which the Legislature had amended a statute to add a requirement of an "intent to evade the provisions of this act," further stating that the amendment "is hereby declared to be merely a clarification of the original intention of the legislature rather than a substantive change and ***438** such section shall be construed for all purposes as though it had always read as hereinbefore set forth." Despite the Legislature's statement, it was clear that the amendment changed, rather than merely clarified, the law, as no such intent to evade had previously been required. Accordingly, we held that "the language of the 'clarification' provision in this case cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*Id.* at p. 214, 187 P.2d 702.) We recognized, however, that the Legislature's statement indicated a clear **1024 intent that the amendment apply retroactively: "It does not follow, however, that the 'clarification' provision ... is ineffective for any purpose. It is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (*Ibid.*)

*479 In the present case, as in *Western Security Bank* and *California Emp.*, we cannot give effect to the Legislature's statement that the amendment to section 12940, subdivision (j) was declaratory of existing law, but we can give effect to the Legislature's clear expression of its intent that this amendment be given retroactive effect.

The majority notes that the statutory language stating that the provisions of subdivision (j) of section 12940 are declaratory of existing law was originally added to the statute in reference to a 1987 amendment. The majority concludes from this that "[a]ny inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022.) Again, I do not agree.

A statute that is amended is "re-enacted as amended." (Cal. Const., art. IV, § 9.) "The amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions." (*People v. Scott* (1987) 194 Cal.App.3d 550, 554, 239 Cal.Rptr. 588.) As amended, section 12940, subdivision (j) clearly states that its provisions are declaratory of existing law. The circumstance that the same statement had been made in reference to an earlier amendment of the same statute does not lessen the plain meaning of this statutory language. In general, we take it that the Legislature means what it says. In the present case, it is difficult to imagine how the Legislature could have more clearly expressed its intention that the 2000 amendment to subdivision (j) of section 12940, like the earlier amendment, was declaratory of existing law.

Because the Legislature clearly indicated its intent that the amendment to the statute be applied retroactively, we must honor that intent unless there is a constitutional objection to doing so.

The high court addressed the constitutional concerns posed by retroactive application of statutes at some length in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229. The court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." ***439(*Id.* at p. 265, 114 S.Ct. 1483, fn. omitted.) The court noted that "the antiretroactivity principle finds expression in several provisions of our Constitution," including the ex post facto clause, the provision prohibiting the impairment of obligations of contracts, the Fifth Amendment's takings clause, the prohibition of bills of attainder, and the due process clause. (*Id.* at p. 266, 114 S.Ct. 1483.)

*480 The court was careful to make clear, however, that these concerns do not necessarily prohibit retroactive application of statutes: "The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." **1025(*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 267-268, 114 S.Ct. 1483, fn. omitted.)

Further, courts must defer to a legislative judgment that a statute should be applied retroactively: "In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483.) Accordingly, the high court declared, "the constitutional impediments to retroactive civil legislation are now modest." (*Ibid.*, italics omitted.)

Significantly, defendant Lopez does not cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, he simply asserts that "to impose personal liability ... retroactively should require a 'clear and unavoidable' statement from the Legislature favoring retroactivity...." As explained

above, I conclude that the provision stating that the amendment is declaratory of existing law constitutes such a clear statement of intent to apply the amendment retroactively.

Neither does the majority cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, the majority asserts that retroactive application would "raise constitutional implications," while acknowledging that "[b]oth this court and the United States Supreme Court have expressed concerns that retroactively creating liability for past conduct *might* violate the Constitution, *although it appears neither court has so held.* [Citations.]" (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022, italics added.)

I discern no constitutional impediment to giving effect to the Legislature's clear intent to apply the amendment to section 12940, subdivision (j) retroactively. As noted above, the amendment changed the law by imposing upon nonsupervisory coworkers personal liability under the FEHA for harassment, but this did not subject such nonsupervisory coworkers to liability for ***481** harassment for the first time. As we noted in *Carrisales,* "our conclusion [that nonsupervisory coworkers could not be held personally liable under the FEHA] does not necessarily prevent a harasser from being personally liable to the victim under some other statute or theory of tort. All we hold is that the *****440***FEHA* does not cover harassment short of an unlawful employment practice. The FEHA's noncoverage does not immunize anyone, including a coworker, from the consequences of conduct that is otherwise tortious." (*Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1136, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) And we have recognized "that employment discrimination, including sexual harassment ... can cause emotional distress [and] that such distress is a compensable injury under traditional theories of tort law...." (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 48, 276 Cal.Rptr. 114, 801 P.2d 357, fn. omitted.)

Given the "modest" constitutional impediments to retroactive civil legislation (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483), and the circumstance that harassment by nonsupervisory coworkers was tortious prior to the statutory amendment imposing liability for such conduct under the FEHA, I conclude that there is no constitutional obstacle to the retroactive imposition of personal liability for harassment on nonsupervisory coworkers, as the Legislature intended.

Cal.,2004.
McClung v. Employment Development Dept.
34 Cal.4th 467, 99 P.3d 1015, 20 Cal.Rptr.3d 428, 94 Fair Empl.Prac.Cas. (BNA) 1693, 04 Cal. Daily Op. Serv. 9912, 2004 Daily Journal D.A.R. 13,516

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100 Cal.App.4th 599, 123 Cal.Rptr.2d 157, 02 Cal. Daily Op. Serv. 6707, 2002 Daily Journal D.A.R. 8379
(Cite as: 100 Cal.App.4th 599)

KATHLEEN RILEY et al., Plaintiffs and Appellants,
v.
HILTON HOTELS CORPORATION et al., Defendants and Respondents.
No. B153812.

Court of Appeal, Second District, Division 4, California.
July 25, 2002.

SUMMARY

An individual brought an action against a hotel for violation of a local ordinance governing signage at parking facilities. After plaintiff filed her complaint, the city amended its ordinance in such a way that, if the amended ordinance applied to the hotel, it breached no duty to plaintiff. Unlike the original ordinance, the amended version excluded from the definition of "vehicle parking facility" an off-street parking facility that accommodated, among others, guests and employees of hotels. The trial court found that the ordinance changed the law and that the new law applied retroactively and granted defendant judgment on the pleadings. (Superior Court of Los Angeles County, No. BC236769, Carolyn B. Kuhl, Judge.)

The Court of Appeal reversed and remanded for further proceedings. The court held that the amendment did not apply retroactively. Although the trial court correctly found that the amendment effected a substantive change in the law, there was no basis in the language or the legislative history of the ordinance to apply retroactively the amended ordinance excluding hotels. (Opinion by Epstein, J., with Vogel (C. S.), P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judgments § 8--On the Pleadings--Appellate Review.
An appellate court reviews de novo an order granting a motion for judgment on the pleadings. In determining whether the complaint withstands the motion, the appellate court accepts as true the plaintiff's factual allegations. If the trial court incorporates a summary adjudication ruling and reasoning in its order granting judgment on the pleadings, the appellate court also reviews these legal conclusions de novo.

(2a, 2b, 2c, 2d, 2e) Municipalities § 50--Ordinances--Operation and Effect--Retroactivity--Amendment Changing Law During Pendency of Civil Action.
In an individual's action against a hotel for violation of a local ordinance governing signage at parking facilities, the trial court erred in granting defendant judgment on the pleadings, applying retroactively an amendment to the ordinance, enacted during the pendency of the action, that removed the duty plaintiff claimed defendant breached. First, the trial court correctly found that the amendment effected a substantive change in the law. Unlike the original ordinance, the amended version excluded from the definition of "vehicle parking facility" an off-street parking facility that accommodated, among others, guests and employees of hotels. An uncodified provision stating that the ordinance was merely a qualification of, and not an alteration of, existing law, was incorrect and not binding. The amended version with its new exceptions was not a mere clarification of existing law. However, there was no basis in the language or the legislative history of the ordinance to apply the amended ordinance excluding hotels retroactively. Indeed, the incorrect statement that the law was not changed expressly disclaimed an intent to change the original law.
[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 486; West's Key Number Digest, Automobiles 363.]
(3) Statutes § 5--Operation and Effect--Retroactivity--Clarification.
A clarification of existing law may be applied to transactions predating the enactment of the clarification without being considered retroactive. The clarified law is merely a statement of what the law has always been.

(4) Statutes § 20--Construction--Judicial Function.
A legislative declaration of the meaning of an existing statute is neither binding nor conclusive in construing

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the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts.

(5) Statutes § 42--Construction--Aids--Declaration of Subsequent Legislature.
One Legislature may not speak authoritatively on the intent of an earlier Legislature's enactment when decades separate the two bodies.

(6) Statutes § 5--Operation and Effect--Retroactivity.
Statutes do not operate retrospectively unless the Legislature plainly intended them to do so. Although statutes are generally presumed to operate prospectively and not retroactively, this presumption is rebuttable. When the Legislature clearly intends a statute to operate retrospectively, courts are obliged to carry out that intent unless due process considerations prevent it. Courts may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history.

(7) Municipalities § 59--Ordinances--Enforcement--Private Cause of Action.
An individual was entitled to pursue an action against a hotel for failure to comply with a municipal ordinance governing parking facilities, even though the municipal code did not provide for a private cause of action. Gov. Code, § 36900, subd. (a), expressly permits violations of city ordinances to be redressed by civil action, and both Cal. Const., art. XI, § 7, and Gov. Code, § 37100, prohibit giving effect to city ordinances that conflict with state law. There is no state law that allows a city to abrogate the right of redress created in the Government Code.

COUNSEL

Schreiber & Schreiber, Edwin C. Schreiber and Eric A. Schreiber for Plaintiffs and Appellants.

McNamara, Spira & Smith, Michael P. McNamara and David Campbell Smith for Defendants and Respondents.

EPSTEIN, J.

A local ordinance was amended during the pendency of a lawsuit to recite that it does not impose the duty that the defendants allegedly breached. In this case, we consider whether the amendment is in fact a substantive change in the law, and if so whether the language of the amending ordinance, and the scant legislative history of record, are adequate to give the change retroactive application. The trial court ruled that the law was indeed changed, but that the change was retroactive. We reverse. We agree with the trial court that the law was substantively changed, but we find no basis in the plain language of the ordinance or its legislative history to apply the change to past conduct.

Factual and Procedural Summary

In 1962, the Beverly Hills City Council (Council) adopted an off-street parking ordinance, which included the following definition: "For the purposes of this chapter, the words and phrases set forth in this section are ***602** defined as set forth herein, unless the context clearly indicates a different meaning is intended: [¶] ... [¶] (b) '[p]arking facility' shall mean an off-street facility used for the parking of motor vehicles." (Beverly Hills Ord. No. 1152, § 6-16.01.) The ordinance required any parking facility seeking to charge a fee for parking to display readily visible signs listing the rates and maximum fees. It specified that it was the responsibility of the parking facility's operator and attendants to comply with its terms. This ordinance was codified, starting with section 6-16.01 of the Beverly Hills Municipal Code. [FN1] (*Ibid.*)

> FN1 All undesignated section references are to the Beverly Hills Municipal Code, unless otherwise indicated.

At some point, the ordinance was recodified to its present numbering, beginning at section 4-4.201, and the term "parking facility" was replaced with "vehicle parking facility" throughout the relevant sections. The language prefatory to the definitions was removed, but the definition of "vehicle parking facility," in section 4-4.201(b), remained "an off-street facility used for the parking of motor vehicles." The signage requirement, in section 4-4.202, was expanded to require that the signs be "clearly visible to the motorist from the street prior to entering such facility ...." The responsibility for compliance, in section 4-4.206, remained with attendants and operators.

This was the substance of the ordinance when Kathleen Riley, suing individually and on behalf of a class

of persons similarly situated, filed the present suit. Named as defendants were hotel operators Hilton Hotels Corporation and Hilton Hotels U.S.A., Inc. In the first amended complaint, plaintiffs alleged that defendants operated a vehicle parking facility, charged a fee, but did not provide reasonable notice or the notice required under section 4-4.202.

On May 1, 2001, the Council adopted a new ordinance (the 2001 ordinance) that amended section 4-4.201(b) to read: " 'Vehicle parking facility' shall mean an off-street parking facility, where the primary use of the property is to accommodate the parking of motor vehicles by members of the public. A vehicle parking facility does not include an off-street parking facility that accommodates the parking of motor vehicles by the occupants, customers, clientele and employees of an on-site or adjacent structure where the primary use of that structure is for office, retail or hotel purposes." An uncodified provision, section 2, declared: "This ordinance is declarative of existing law and does not alter the meaning of Section 4-4.201(b) as adopted on March 20, 1962." (Beverly Hills Ord. No. 01-0-2375, § 2.)

Three days later, defendants moved for summary adjudication on the issue of duty. They argued they breached no duty imposed by sections 4.4-202 and ***603** 4.4-206. The trial court agreed, ruling that although the 2001 ordinance did effect a change of law, it was the intent of the Council that it be applied retroactively. The court also ruled that retroactive application neither offended due process nor unconstitutionally impaired any contract between the parties. As construed by the court, the retroactive application meant that defendants never had a duty under section 4.4-202 and 4.4-206, leaving only the common law duty of reasonable notice as a basis for liability.

Plaintiffs amended their complaint again. The second amended complaint alleged in each of the 10 causes of action that liability was incurred as a result only of defendants' violation of sections 4.4-202 and 4.4-206, eliminating the common law theory of lack of notice. Based on the amended ordinance, defendants moved for judgment on the pleadings. The motion was granted, judgment was entered in favor of defendants, and plaintiffs filed this timely appeal.

Discussion

The basis for defendants' motion for judgment on the pleadings was that the second amended complaint does not state facts sufficient to constitute a cause of action against them. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) (1) We review de novo the order granting the motion for judgment on the pleadings. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515[101 Cal.Rptr.2d 470, 12 P.3d 720].) In determining whether the complaint withstands the motion, we accept as true plaintiffs' factual allegations. (*Ibid.*) The trial court incorporated the summary adjudication ruling and reasoning in its order granting judgment on the pleadings. We also review these legal conclusions de novo.

(2a) Defendants argue the trial court erred in rejecting their argument that the 2001 ordinance was declarative of existing law. (3) A finding that the ordinance is merely a clarification of existing law would resolve this appeal because a clarification may be applied to transactions predating its enactment without being considered retroactive. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243[62 Cal.Rptr.2d 243, 933 P.2d 507].) The clarified law is merely a statement of what the law has always been. (*Ibid.*) (2b) We agree with the trial court that this rule has no application to the present case.

As we have discussed, section 2 of the 2001 ordinance stated: "This ordinance is declarative of existing law and does not alter the meaning of Section 4-4.201(b) as adopted on March 20, 1962." This statement is the beginning, but not the end, of our analysis. (4) "[A] legislative declaration of an existing statute's meaning is neither binding nor conclusive in ***604** construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank v. Superior Court, supra*, 15 Cal.4th at p. 244.)

(2c) A similar situation arose in *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210[187 P.2d 702]. A provision was added to the Unemployment Insurance Act in 1939 declaring that there was no limitations bar against the California Employment Stabilization Commission enforcing payment of unemployment insurance contributions against an employer who had not filed a return with the commission. (*Id.* at p. 213.) The provision had been amended in 1943, suspending the statute of limitations only if the employer acted with intent to evade the provisions of the Unem-

ployment Insurance Act. (*Ibid.*) The amending measure "further provided that 'the amendment ... is hereby declared to be merely a clarification of the original intention of the legislature rather than a substantive change and such section shall be construed for all purposes as though it had always read as hereinbefore set forth.' " (*Ibid.*) The court refused to take the Legislature at its word on the issue of statutory construction: "[T]he language of the 'clarification' provision in this case cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*Id.* at p. 214.)

Defendants argue that we should give effect to the Council's statement that the restricted definition of "vehicle parking facility" in the 2001 ordinance is declarative of what the 1962 law provided. They point to a recent statement by the city attorney that the 1962 ordinance was "intended to apply solely to stand-alone parking lots where parking is the primary use of the site" and never "intended to apply to the vehicular entrances to hotels."

(5) "[T]here is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies." (*Western Security Bank v. Superior Court, supra,* 15 Cal.4th at p. 244.) (2d) There is even less logic in the notion that the city attorney in 2001, apparently unaided by any legislative history, may speak authoritatively on the intent of the Council in 1962. We find greater logic and less incongruity in giving effect to the plain terms of the 1962 ordinance.

As we have mentioned, the paragraph prefacing the definition of "parking facility" in the 1962 enactment stated: "For the purposes of this chapter, the words and phrases set forth in this section are defined as set forth herein, unless the context clearly indicates a different meaning is intended [.]" *605 (Beverly Hills Ord. No. 1152, § 6-16.01.) The plain language of the 1962 definition provided for no exclusions. In oral argument before the trial court, defendants contended that the placement of the 1962 ordinance in a chapter of the Municipal Code entitled "Parking Lots and Garages" is "objective support for the idea that hotels and offices and retail uses were excluded from the scope of the definition of vehicle parking facility." They found further objective support in the lack of enforcement of the ordinance against hotels until plaintiffs complained. The construction of an ordinance by those charged with its enforcement is only entitled to deference if the ordinance is ambiguous and "the construction has a reasonable basis in the text of the legislation or the policy which underlies it." (*Department of Health Services v. Civil Service Com.* (1993) 17 Cal.App.4th 487, 501[21 Cal.Rptr.2d 428].) The chapter title is not the clear indication called for in 1962. Lacking such an indication, there is no ambiguity or basis in text or policy from which those charged with enforcement could draw their construction. We also note that, on appeal, defendants do not urge these grounds as support for their interpretation of the Council's intent in 1962.

As in *California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d 210, we cannot agree that the new substantive provision, here a new exception, always was the law. More specifically, we cannot say that when, in 1962, the Council defined "parking facility" as "an off-street parking facility used for the parking of motor vehicles," it actually meant to exclude any parking facility "that accommodates the parking of motor vehicles by the occupants, customers, clientele and employees of an on-site or adjacent structure where the primary use of that structure is for office, retail or hotel purposes." Despite the Council's pronouncement to the contrary nearly four decades later, the 2001 ordinance substantively changed the definition adopted in 1962.

Defendants argue, *California Emp. etc. Com.* notwithstanding, that courts routinely give effect to the expressed legislative intent to clarify existing law rather than change the law. But in each case cited by defendants, the court found the amendment or statute was in fact a clarification of the prior law, and not a substantive change declared to be a clarification by its enactors. (See *City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 771[256 P.2d 305] [construction of original statute to intend meaning made express in amendment "reasonable ... and in accordance with the announced policy underlying the section"]; *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401[276 Cal.Rptr. 524] [prior law was ambiguous; amendment resolved ambiguities]; *Marina Village v. California Coastal Zone Conservation Com.* (1976) 61 Cal.App.3d 388, 393[132 Cal.Rptr. 120] [clarification to regulation resolved

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ambiguity and unintended inconsistency *606 between regulations and enabling statute]; *Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1510[46 Cal.Rptr.2d 822] [concluding after independent analysis of prior law that amendment "did no more than clarify existing law"]; *Western Security Bank v. Superior Court, supra*, 15 Cal.4th at p. 252 [concluding after independent analysis of state of the law before a statute that "the Legislature's action did not effect a change in the law"].)

Because we conclude that the 2001 ordinance changed the law, we must determine whether the language of the enactment demonstrates an intent by the Council that the change be retroactive. (6) "[S]tatutes do not operate retrospectively unless the Legislature plainly intended them to do so." (*Western Security Bank v. Superior Court, supra*, 15 Cal.4th at p. 243.)

"Although statutes 'are generally presumed to operate prospectively and not retroactively,' this presumption is rebuttable. [Citation.] '[W]hen the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us.' [Citation.] We may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history." (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 221-222[105 Cal.Rptr.2d 407, 19 P.3d 1148].)

(2e) In *Preston*, the court based its holding that a statute should be applied retroactively in part on a provision stating: " 'It is the intent of the Legislature in enacting this act to clarify the application [of an existing law].' " (*Preston v. State Bd. of Equalization, supra*, 25 Cal.4th at p. 222.) That statement "strongly suggests" that the statute should apply to causes of action existing on the date of enactment (i.e. retroactively), but the court did not end its analysis there. (*Ibid.*) It also concluded that the Legislature intended a retroactive application, but only when, upon examination of the legislative history, it found the Legislature added the intent provision despite (1) knowledge that "the bill may partially change existing law," and (2) awareness that the provision may result in retroactive application. (*Id.* at p. 223.)

It was necessary for the *Preston* court to resort to extrinsic indicia of intent such as legislative history because the Legislature's intent was not clear from the express terms of the statute. (See *Preston v. State Bd. of Equalization, supra*, 25 Cal.4th at p. 222.) Similarly, we look to the express provisions of the 2001 ordinance, and to extrinsic sources if necessary, to determine the Council's intent. *607

Section 2 of the 2001 ordinance states that the new enactment is "declarative of existing law *and does not alter the meaning of Section 4-4.201(b) as adopted on March 20, 1962.*" (Italics added.) Either the Council is correct and the law is unchanged-a conclusion we have rejected-or it is incorrect. What section 2 does not do is expressly declare the change is retroactive. Nor may we infer an intent to rebut the presumption of prospective application. Even if the Council's intent were unclear, there are no extrinsic indicia that it intended the change to be applied retroactively. [FN2] There is no evidence of awareness that the 2001 ordinance changes the 1962 ordinance, and the only analysis on record is the city attorney's statement that the 2001 ordinance does *not* change existing law. The Council not only failed to express an intent to amend the ordinance retroactively, it expressly disclaimed an intent to change the meaning of the 1962 ordinance. The trial court erred in finding otherwise.

> FN2 Defendants claim that the Council and city attorney "unequivocally indicated an intent that the Amended Ordinance apply to all existing causes of action." The record does not support this assertion.

The trial court granted defendants' motion for judgment on the pleadings based on its previous grant of defendants' motion for summary adjudication, which in turn was based on the finding that the ordinance applies retroactively. Because we find the ordinance changes the law and does not apply retroactively, we reverse the grant of defendants' motion for judgment on the pleadings. We need not address the arguments concerning whether retroactive application offends due process or unconstitutionally impairs any contract between the parties.

(7) Finally, defendants argue that a separate basis for affirmance is the absence of a private right of action under the Municipal Code. The comprehensive regulatory scheme for violations of the Municipal Code, defendants assert, indicates the Council's intent to occupy the enforcement field to the exclusion of private lawsuits. However, Government Code section

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36900, subdivision (a), expressly permits violations of city ordinances to be "redressed by civil action." Both our Constitution and the Government Code prohibit giving effect to city ordinances in conflict with state law. (Cal. Const., art. XI, § 7; Gov. Code, § 37100.) Defendants refer us to no state law that allows a city to abrogate the right of redress created in the Government Code. We decline to read into the Municipal Code an intent to create an impermissible conflict with state law by abrogating the right to a civil action created by the Government Code. *608

Disposition

The judgment is reversed. The cause is remanded to the trial court for further proceedings. Plaintiffs are to have their costs on appeal.

Vogel (C. S.), P. J., and Hastings, J., concurred.
Respondents' petition for review by the Supreme Court was denied October 16, 2002. *609

Cal.App.2.Dist.
Riley v. Hilton Hotels Corp.
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C JOHN A. WALLACE, Appellant,
v.
STATE PERSONNEL BOARD et al., Respondents.
Civ. No. 9447.

District Court of Appeal, Third District, California.
Mar. 9, 1959.

HEADNOTES

(1a, 1b) Civil Service § 8.1--Sick Leave.
Since Gov. Code, § 18100, relating to civil service sick leave, does not limit such sick leave to physical illness, the administrative directive embodied in the Personnel Transactions Manual, § 502, providing that an employee must be physically incapacitated if his request for absence is based on an emotional disturbance, cannot be used to restrict the purpose and intent of Cal. Admin. Code, tit. 2, § 401, defining sick leave to be absence from duty of an employee because of his illness or injury, his exposure to contagious disease, his attendance on a member of his immediate family who is seriously ill, or death in his immediate family, or Gov. Code, § 18100, and the provisions of Cal. Admin. Code, tit. 2, § 401, must be given their obvious meaning that illness may be mental as well as physical.
See **Cal.Jur.2d,** Civil Service, § 11; **Am.Jur.,** Civil Service, § 4 et seq.
(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
Although the construction placed on a statute by an administrative agency is entitled to great weight, neither an administrative officer nor an agency may make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute.

(4) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative directive does not have the force of law and may not be asserted as a standard for the conduct of an agency if the assertion would in any way effect a change in the meaning of an Administrative Code section.

(5) Civil Service § 8.1--Sick Leave.
It was reversible error for the State Personnel Board and the lower court to fail to consider an employee's evidence of inability to perform the services demanded by his employment by reason of emotional disturbance in passing on the validity of his request for sick leave, it being unnecessary under the applicable statutes and rules that an employee suffer such a mental collapse as results in physical incapacity before becoming entitled to sick leave.

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. John Quincy Brown, Judge. Reversed with directions.

Proceeding in mandamus to compel the State Personnel Board to annul its order discharging a permanent civil service employee. Judgment denying writ, reversed with directions.

COUNSEL

Frank G. Finnegan for Appellant.

Edmund G. Brown, Attorney General, Willard A. Shank, Deputy Attorney General, Robert E. Reed and John B. Matheny for Respondents.

PEEK, J.

This is an appeal by petitioner Wallace from a judgment denying his petition for a writ of mandate whereby he sought to annul an order of the State Personnel Board, referred to herein as the Board, and be restored to his former civil service position with the State of California.

From 1949 until he was discharged in 1955, petitioner had been a permanent civil service employee of the Division of Architecture of the Department of Public Works of the State of California, which we shall refer

to as the Department, and since 1951 had been employed in the capacity of senior electrical engineer assigned to the Sacramento office of the Department. While at Sacramento his duties, which required substantial travel of from two to four thousand miles per month, included inspecting electrical installations in state construction projects, interpreting plans and specifications and clarifying misunderstandings relative thereto, inspecting installations with respect to whether or not the work was proceeding according to plan, rendering decisions as to intent ***545** of design, making final inspections and preparing all necessary reports relative thereto.

On August 1, 1955, petitioner was transferred from Sacramento to the Los Angeles office where he was assigned similar work. Approximately two weeks after his assumption of duties in that office he began to feel ill. This he described as extreme depression, severe headaches, fatigue, muscle tension, insomnia, loss of weight, and mental confusion. This condition became progressively worse, and on August 29, after completing an assignment at Bishop, California, he returned to Sacramento to consult his family physician, Dr. James D. Coyle. Following his examination of petitioner, Dr. Coyle determined that he was suffering from a complete physical and emotional collapse. He prescribed medication and complete rest. Petitioner thereupon requested sick leave for the month of October. His request stated he was suffering from "complete physical and emotional collapse." Attached to said request was a certificate from Dr. Coyle stating: "My present diagnosis, well verified, is Myocardial Strain, aggravated by a severe emotional disturbance. I have advised him that he cannot return to work at least until 11-15-55, and probably not at that time." The department referred his request to Dr. Norris Jones, the medical officer for the Board, who in turn ordered an independent medical examination of petitioner by Dr. Herbert W. Jenkins. Dr. Jenkins concluded his report as follows: "On the basis of his statements and my examination, I do not believe there is any physical reason for his not returning to work. He intimated that he might prefer to take a demotion if he could continue to live in this area. He apparently would be incapacitated by symptoms of nervous origin if he were forced to move to the Los Angeles Area." On the basis of Dr. Jenkins' report, the Department, on November 29, 1955, disapproved petitioner's request for sick leave in its entirety and ordered him to return to work in Los Angeles, stating that should he refuse to do so his services would be terminated by reason of the automatic resignation provisions contained in Government Code, section 19503. Thereafter petitioner filed a further request for sick leave for the month of November which likewise was denied as was his request for the month of December. The amount of his accumulated sick leave is not questioned. On December 10 petitioner appealed to the Board from denials of his applications for sick leave and also appealed from the order of the ***546** Department construing his continued absence to be an automatic resignation under the previously mentioned code section.

On March 9 the Board conducted a hearing and thereafter, on June 4, 1956, sustained the action of the Department. Petitioner's request for a rehearing was denied and shortly thereafter he filed the present proceeding in the Superior Court of Sacramento County. The court found in favor of respondents and the present appeal followed.

(1a) Petitioner's first contention relates to the specific finding of the trial court "that petitioner as an employee of the State of California was required, pursuant to section 18100 of the Government Code, to submit satisfactory proof of the necessity for sick leave, *and that pursuant to Section 502 of the Personnel Transactions Manual, adopted by the State Personnel Board, an employee must be physically incapacitated if his request for absence is based upon an emotional disturbance.*"

In accordance with article XXIV, section 4, of the Constitution, the Legislature, by Government Code, section 18100, has provided for sick leave credits for all civil service personnel upon the "submission of satisfactory proof of the necessity" therefor, and the Board, pursuant to the rulemaking power granted by the Constitution, has, by section 401 of article 18 of the Administrative Code, defined sick leave to be "... the absence from duty of an employee because of his illness or injury, his exposure to contagious disease, his attendance upon a member of his immediate family who is seriously ill and requires the care or attendance of the employee, or death in the immediate family of the employee. 'Member of his immediate family' means the mother, father, husband, wife, son, daughter, brother, or sister of the employee, or any person living in the immediate household of the employee."

The Board, in addition, by rule 406, has provided that

"the appointing power shall approve sick leave only after having ascertained that the absence was for an authorized reason. He may require the employee to submit substantiating evidence including, but not limited to, a physician's certificate. If the appointing power does not consider the evidence adequate, he shall disapprove the request for sick leave." The above- mentioned provisions are the only ones pertinent to questions raised by petitioner that are to be found in the Constitution, legislative enactments or administrative rules. Section 502, referred to in the findings of the court, has never ***547** been adopted as a rule by the Personnel Board and hence can be considered as nothing more than an administrative directive for the guidance of department heads to assist them in the maintenance of uniformity in the determination of the availability of sick leave to state employees.

In their brief respondents admit said section 502 "has no formal status in law but is a source of administrative interpretation of the laws and rules for which the State Personnel Board has administrative responsibility." But respondents then contend that by the same token said section is entitled to great weight.

(2) Although the construction placed upon a statute by an administrative agency is entitled to said great weight, nevertheless neither an administrative officer nor an agency may "make a rule or regulation that alters or enlarges the terms of a legislative enactment. [Citations.] (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, ..." (*Whitcomb Hotel, Inc. v. California Emp. Com.*, 24 Cal.2d 753, 757 [151 P.2d 233, 155 A.L.R. 405].) (4) It is well established that an administrative directive such as is embodied in section 502 does not have the force of law and hence may not be asserted as a standard for the conduct of the agency if the assertion would in any way effect a change in the meaning of section 401 of the Administrative Code. (*Conroy v. Wolff*, 34 Cal.2d 745 [214 P.2d 529].) (1b) If, as was held in *Nelson v. Dean*, 27 Cal.2d 873 [168 P.2d 16, 168 A.L.R. 467], section 151 of the 1937 Civil Service Act (now 18100 of the Government Code) does not limit sick leave to physical illness, then it follows that the administrative directive embodied in section 502 of the Transactions Manual cannot be used to so restrict the purpose and intent expressed in section 401 of the Administrative Code or 18100 of the Government Code. If the provisions of the Transactions Manual may not be so used, then it also follows that the provisions of section 401 of the Administrative Code, which are clear and unambiguous, must be given their obvious meaning that illness may be mental as well as physical.

(5) If as we have concluded, it was not necessary under the applicable statutes and rules that an employee suffer such a mental collapse as resulted in physical incapacity before becoming entitled to sick leave, then the court and the Board erred in failing to consider the substantial evidence to this effect which was introduced by petitioner. Certainly this must be true since according to the kind of work to be done ***548** one may be as incapacitated from performing his duties by reason of mental illness as one also may be incapacitated by reason of purely physical illness.

From examination of the transcript it is quite apparent that the conclusion of the court and the Board was predicated upon the necessity of a showing of physical inability to do the job, and that any question of inability to perform the services demanded by the employment by reason of emotional disturbance was wholly outside of the issues.

The record is replete with instances which point up this conclusion. We refer to the comments by the court in its findings relative to the necessity of physical illness; the colloquies between counsel for the Board and the medical witnesses relative to the lack of objective symptoms indicating physical illness; the testimony of the physician appointed by the Board that he was not asked "to evaluate his nervous symptoms in connection with his job. I was asked to evaluate his physical capacity for work"; and the testimony of Mr. Hunter (acting for the Department) that he ignored not only Dr. Coyle's report but also ignored the concluding sentence of Dr. Jenkins' report that the petitioner "would be incapacitated by symptoms of nervous origin if he were forced to move to the Los Angeles Area"; and finally the letter of Dr. Kelley, a psychiatrist, in corroboration of the testimony of Dr. Coyle.

It necessarily follows that an improper standard was applied for the purpose of determining sick leave, and that the court and the Board, in the application of such standard, completely ignored the substantial evidence of mental illness introduced by the petitioner. The result was an unfair hearing.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Van Dyke, P. J., and Schottky, J., concurred. ***549**

Cal.App.3.Dist.
Wallace v. State Personnel Bd.
168 Cal.App.2d 543, 336 P.2d 223

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WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.
S. F. No. 16854.

Supreme Court of California
Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.
See 23 **Cal.Jur.** 776; 15 **Am.Jur.** 309.
(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.
See 11 **Cal.Jur. Ten-year Supp.** (Pocket Part) "Unemployment Reserves and Social Security."
(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act.

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to ***755** that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, ***756** provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem neces-

sary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are ***757** highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club,* 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States,* 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson,* 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie,* 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court,* 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem,* 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths,* 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill,* 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court,* 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners,* 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States,* 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark,* 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.,* 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury,* 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson,* 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall,* 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.,* 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration,* 34 Cal.App.2d 514, 521 [93 P.2d 1046,94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted ***758** without change. (*Biddle v. Commissioner of Internal Revenue,* 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne,* 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States,* 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States,* 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States,* 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson,* 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.,* 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock,* 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System,* 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem,* 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unem-

ployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within ***759** the provisions of the statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), §§ 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust ***760** their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202];*W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.
CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.,* this day filed, *ante,* p. 752 [151 P.2d 233].

Schauer, J., concurred.
Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. ***761**

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Whitcomb Hotel v. California Employment Commission
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