No. S246490

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DIANA NIEVES NOEL, as Personal Representative, etc.,
Plaintiff and Appellant,
v.

THRIFTY PAYLESS, INC.,
Defendant and Respondent.

Review of a Decision by the Court of Appeal,
First Appellate District, Division Four
Case No.: A143026

Marin County Superior Court Case No. CV 1304712

BRIEF OF WASHINGTON LEGAL FOUNDATION AND CALIFORNIA RETAILERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND CALIFORNIA RETAILERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public-interest law and policy center based in Washington, D.C., with supporters nationwide, including many in California.[1] WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently in this Court as well as other state and federal courts to oppose the certification of inappropriate and unwieldy class actions. (*See, e.g., Briseno v. ConAgra Foods, Inc.* (9th Cir.) 844 F.3d 1121, *cert. denied* (2017) 138 S. Ct. 313; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429.) In addition, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies and analyses on issues related to class-action litigation. (*See, e.g.*, James M. Beck and Rachel B. Weil, "Cy Pres" *Awards: Is the End Near for a Legal Remedy with No Basis in Law?*, (Oct. 2014) WLF Working Paper No. 188; David E. Sellinger and Aaron Van Nostrand, *With Ninth Circuit Exacerbating Legal*

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Discord on "Ascertainability," Time for SCOTUS to Resolve Split (Jan. 26, 2017) WLF Legal Pulse.)

The California Retailers Association (CRA) is a trade association representing all segments of the retail industry: general merchandise, department stores, mass merchandisers, fast food restaurants, supermarkets and grocery stores, chain drug, and speciality retail such as auto, vision, jewelry, hardware, and home stores. CRA works on behalf of California's retail industry, which currently operates over 418,840 retail establishments with a gross domestic product of $330 billion annually and employs 3,211,805 people—one fourth of California's total employment.

A class that cannot be ascertained, *amici* believe, is not legitimate. If a class-action plaintiff need not demonstrate a means for identifying the people who populate the class, a class action becomes a means of bypassing those people's due process rights. Such a shortcut might benefit representative plaintiffs and their lawyers, but it will harm California's producers, retailers, and consumers.

STATEMENT OF THE CASE

Plaintiff James A. Noel purchased an inflatable swimming pool at a drugstore operated by Defendant/Respondent Thrifty Payless, Inc. for $59.99. The packaging accurately stated the pool's dimensions ("8 FT X 25 IN"), but Noel contends that the pool he purchased was smaller than the one

depicted on the packaging. Noel filed suit, claiming that Thrifty's allegedly inaccurate packaging violated California law and caused him injury.

Six months later, after engaging in discovery, Noel moved for class certification. He sought to represent a class consisting of as many as 20,000 people who purchased a Ready Set Pool from Thrifty in California during the class period. The motion provided no evidence that there existed a means by which the purchasers could be identified and contacted—to inform them that (1) they were plaintiffs in a class action and (2) they were entitled to opt out of the class. Noel acknowledged that he had not sought to discern through discovery whether such evidence existed but insisted that he was not obliged to provide any such information at the certification stage.

After a hearing, the trial court denied class certification for Noel's claims arising under the Unfair Competition Law (Bus. & Prof. Code, § 17200 *et seq.*) (UCL) and the False Advertising Law (Bus. & Prof. Code § 17500) (FAL). The court determined that Noel had failed to satisfy the ascertainability requirement for class certification under Code of Civil Procedure section 382. That is, he had failed to provide any evidence regarding a method by which class members could be identified, such as

that there existed records containing the names of purchasers.[2]

Following James Noel's death, his wife Diana succeeded to his claims. She appealed the denial of certification, and the court of appeal affirmed. The court stated that "[b]ringing forth evidence to show the proposed class was ascertainable was Noel's burden." (Typed op. 7.) It held that the trial court did not abuse its discretion in concluding that "the class cannot be ascertained on the evidentiary showing Noel made, which lacked any level of assurance that there is an available means to notify class members of the pendency of the action." (*Id.* at 17.)

The appeals court explained that under Code of Civil Procedure section 382, "a certification motion may be granted where there is 'an ascertainable class, and a well-defined community of interest among class members.'" (*Id.* at 5-6 [quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326].) The court stated that an important factor in determining whether the class is ascertainable is whether there exists a "means of identifying class members." (*Id.* at 6 [citing *Sotelo v. Media News Group, Inc.* (2012) 207 Cal.App.4th 639, 648].) The court concluded

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[2] The trial court also denied class certification for Noel's claim under the Consumers Legal Remedies Act (Civ. Code § 1750 *et seq.*) (CLRA), based both on an absence of ascertainability and a failure to establish commonality of interest among class members. The court of appeal affirmed the CLRA ruling based on lack of commonality and did not address ascertainability. Noel has not sought review of that holding.

that Noel failed to satisfy the ascertainability requirement despite having ample time to undertake discovery designed to demonstrate a means of identifying pool purchasers:

> [Noel] pointed to Rite Aid's interrogatory responses relating the number of pools sold (20,752), the number of pools returned (2,479), and Rite Aid's gross revenue from sale of the pools ($949,279.34), but submitted nothing offering a glimpse of insight into who purchased the pools or how one might find that out. He neither described nor produced Rite Aid's records from which these numbers were derived, nor did he indicate how much other information those records might reveal. ... While Noel was not required to actually identify the 20,000-plus individuals who bought pools, his failure to come up with any *means* of identifying them was a legitimate basis for denying class certification.

(*Id.* at 10-11.)

The court of appeal stated that "the purpose of the ascertainability requirement is the due process concern of facilitating notice to the class." (*Id.* at 16.) That is, absent class members are constitutionally entitled to notice *reasonably calculated* to apprise them of the class action prior to its adjudication on the merits, to provide them an opportunity to opt out or else be bound by any judgment. The court rejected Noel's assertion that it is sufficient if some class members will be ascertainable at the remedial stage based on self-identification, stating that "[t]o ignore the issue of identifying class members for notice purposes gives short shrift to the due process considerations in play at the certification stage" and that "[t]he theoretical

ability to self-identify as a member of the class is useless if one never receives notice of the action." (*Id.* at 16, 18 [citation omitted].)

The appeals court also affirmed the trial court's alternative basis for denying class certification of the UCL and FAL claims: that Noel failed to demonstrate that a class action would be "superior" to individual litigation of the claims he asserted. (*Id.* at 20.)

SUMMARY OF ARGUMENT

To represent a class, a plaintiff must offer a realistic means of identifying the class's members. Noel presented no realistic way of identifying the class of pool purchasers she seeks to represent. In the absence of such evidence, the trial court did not abuse its discretion when it denied Noel's certification motion on that basis.

Unlike federal courts when applying Fed.R.Civ.P. 23, this Court has long required parties seeking class certification under section 382 to demonstrate the ascertainability of the proposed class. (*See, e.g., Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021; *Weaver v. Pasadena Tournament of Roses Ass'n* (1948) 32 Cal.2d 833, 842-43.) In applying the ascertainability requirement, the Court has focused on the likelihood that absent members can be located—both so that they can be notified about the lawsuit and so that they can benefit from any judgment. The requirement stands on the assumption that a class is valid only if its

members can be found. But if, as here, there is no discernable means of identifying absent class members, then the likelihood that they will ever learn about the lawsuit is negligible, and thus they will be afforded neither an opportunity to opt out of the suit nor a realistic means of sharing in funds awarded to the class.

Although class actions can facilitate efficient resolution of claims, they also impose significant burdens and "may impose injustice." (*San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 [stating that "the class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right"].) For that reason, the Court requires trial courts, when considering class certification motions, to weigh both benefits and burdens of certification and to "allow the maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*Id.* at 459.) The burdens of a class action will almost always outweigh its benefits when, as here, the plaintiff has provided no evidence that a method exists for identifying (and providing notice to) absent class members because those individuals cannot possibly benefit from litigation of which they are unaware.

Noel's response: even though there is no evidence that we will ever be able to notify any absent class members directly (either by U.S. Mail or

email), we can provide sufficient notifice by publishing advertisements about the lawsuit. All available evidence refutes that contention. Studies have concluded that when publication is the only form of notification provided to absent class members in consumer class actions about the availability of monetary compensation, less than one plaintiff in 4,300 submits a claim. Notice-by-publication has a role to play in class actions, particularly as a supplement to direct notification or in cases in which there is a means of identifying many but not all absent class members. But where there is no evidence that *any* absent class members can ever be identified, the likelihood is vanishingly small that absent class members will benefit from the class action. In those instances, one cannot realistically conclude that "substantial benefits accrue both to litigants and the courts" if the class is certified.

Noel asserts that some federal appeals courts, applying Fed.R.Civ.P. 23, have rejected the ascertainability standard adopted by the courts below. But they decline for a straightforward reason: federal law, unlike California law, does not require separate consideration of ascertainability. In any case, several parts of Rule 23—for example, Rule 23(a)(4)'s adequate representation requirement and Rule 23(b)(3)'s superiority requirement—address ascertainability by other routes.

The only individuals who stand to benefit from certification in such

cases are the lawyers. Because both parties to a class action have strong incentives not to proceed to trial, a certified class almost always results in settlement—and a hefty fee for the plaintiffs' lawyers. When, as here, absent class members are unlikely to share in the settlement proceeds because they cannot be identified, attorneys invariably resort to *cy pres* distributions to justify their fee awards. But legal commentators are increasingly questioning the propriety of *cy pres* distributions because they so rarely provide any sort of benefit (whether direct or indirect) to absent class members. Indeed, the U.S. Supreme Court has agreed to hear a case in its upcoming term that calls into question the constitutionality of *cy pres* awards.

While *cy pres* awards may be appropriate as a means of disposing of residual funds following the distribution of the bulk of settlement funds to identified class members, this Court has never sanctioned *cy pres*-only class certifications. That is, where all absent class members get nothing (because they cannot be identified), a class action cannot plausibly be deemed to confer on them the requisite "substantial benefits" simply because class counsel propose that settlement funds be distributed to a charity that absent class members might like.

The decision below should be affirmed for the additional reason that class certification would violate the U.S. Constitution. The Court has

authorized class-wide litigation on the assumption that all class members will be bound by the judgment. (*Weaver*, supra, 32 Cal. 2d at 842.) The U.S. Supreme Court has imposed strict due-process requirements that limit the power of state courts to bind absent class plaintiffs, including a requirement to provide notice "reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." (*Phillips Petroleum v. Shutts* (1985) 472 U.S. 797, 812.) Yet Noel has identified no method by which *any* absent class members can be identified (for purposes of direct notification of these proceedings) and instead proposes that notification be published in a newspaper in hopes that some pool purchasers might serendipitously learn of the lawsuit by reading the notification. Such notification cannot plausibly be described as one "reasonably calculated" to apprise pool purchasers of the pending lawsuit, their right to opt out of the class, and the possibility of a recovery if they do not opt out. Under these circumstances, *Shutts* prohibits California from attempting to bind absent class members to any judgment in this case.

Equally important is the potential infringement of Thrifty's due-process rights. Due process entitles a class defendant to assurances that absent class members will be bound by a judgment in its favor. (*Id.* at 805.) Yet because Noel has presented no evidence that *any* absent class members

can be identified, there is little likelihood that they will learn of the lawsuit—and thus they would not be bound by any judgment entered in Thrifty's favor. The Due Process Clause protects a defendant from such no-win litigation.

ARGUMENT

I. A PLAINTIFF HAS FAILED TO DEMONSTRATE THAT A CLASS ACTION IS FEASIBLE WHEN, AS HERE, SHE FAILS TO DEMONSTRATE ANY MEANS FOR ASCERTAINING WHO IS A MEMBER OF THE CLASS

The parties agree that a class should not be certified under Code of Civil Procedure section 382 unless the class is "ascertainable"; their disagreement focuses on what constitutes an ascertainable class. Noel contends that the ascertainability requirement demands no more than that the class be sufficiently well defined that individuals reading the class definition know if they are included—that knowledge enables them to contact the court and self-identify as class members. The courts below correctly rejected that very narrow understanding of the ascertainability requirement. It also requires evidence that there is a means by which the court can identify absent class members for notification purposes. As the court of appeal concluded, "The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action." (Typed op. 8-9 [quoting *Sotelo*, supra, 207 Cal.App.4th at 649].)

Noel bore the burden of demonstrating that the requirements for

class certification were satisfied. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.) Because Noel failed to demonstrate that there exists a means by which absent class members can be identified, the trial court properly denied certification.

A. The Court Has Long Recognized that Class Certification Requires an Ascertainability Showing

This Court has sanctioned class certification in consumer cases at least since 1971. (*See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808-10.) The Court has explained that class actions serve two essential purposes: (1) to "eliminate the possibility of repetitious litigation"; and (2) to "provide small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Richmond*, supra, 29 Cal.3d at 469 [citations omitted].)

The Court has "uniformly" held that "two requirements must be met in order to sustain a class action: (1) there must be an ascertainable class; and (2) there must be a well defined community of interest in the questions of law and fact involved affecting the parties to be represented." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 [citations omitted].) Thus, for example, in *Weaver* the Court held that class certification was unwarranted in a case involving individuals denied the opportunity to purchase Rose Bowl tickets because the plaintiffs failed to demonstrate the existence of an

ascertainable class of would-be purchasers. (*Weaver*, supra, 32 Cal.2d at 842-43.)

The Court's case law contradicts Noel's assertion that the existence of a means of identifying absent class members (thereby providing trial courts with the ability to directly notify absent class members about the pending lawsuit) is irrelevant to whether the class is ascertainable. For example, the Court has repeatedly emphasized that one factor relevant to the class-certification determination is "the probability each member [of the proposed class] will come forward ultimately, identify himself, and prove his separate claim to a portion of the total recovery." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386 [citing *Daar*, supra, 67 Cal.2d at 706 & 713]; *see Linder*, supra, 23 Cal.4th at 435.) If a trial court lacks a means of identifying absent class members and thus cannot directly notify them that they are parties to a lawsuit, the probability that they ultimately will come forward and submit a claim is exceedingly small. It is highly unlikely that absent class members who are not directly notified of their party status will learn about it through other means. Those lacking such knowledge will never come forward.

In several cases the Court has cited the ready identifiability of absent class members as evidence that a class is ascertainable. For example, *Vasquez* held that the ascertainability requirement presented "no serious

obstacle" to certification because "the names and addresses of the [200] class members may be ascertained from defendants' books." (*Vasquez*, supra, 4 Cal.3d at 810-11.) Similarly, the Court held in *Richmond* that "[t]he issue of ascertainability of the class" was "a relatively simple matter" because the absent class members "are easily identified and located." (*Richmond*, supra, 29 Cal.3d at 478.) The Court would have had no reason to examine the ready identifiability of absent class members in connection with its ascertainability analysis if, as Noel contends, the ascertainability requirement did not concern itself with whether there exists a means of identifying absent class members, and if a plaintiff could satisfy the requirement merely by demonstrating that the proposed class encompasses a group with clearly defined characteristics.

B. Class Certification Promotes Judicial Efficiency Only if Absent Class Members Can Be Identified, and Noel Has Not Demonstrated She Can Do So

In determining whether a proposed class should be certified, the Court recognizes the need to carefully examine both the benefits and burdens of proceeding on a class-wide basis. While class actions can provide significant benefits—both by permitting efficient resolution of claims and by providing small claimants an opportunity to redress injuries that could not be pursued cost-effectively on an individual basis—the Court "has not been unmindful of the accompanying dangers of injustice or the

limited scope within which these suits serve beneficial purposes." (*San Jose*, supra, 12 Cal.3d at 459.) For that reason, the Court "has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action only when substantial benefits accrue to both litigants and the courts." (*Id.; see Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530; *Brinker*, supra, 53 Cal.4th at 523 [stating that the party advocating class treatment must demonstrate "substantial benefits from certification"]; *Blue Chip Stamps*, supra, 18 Cal.3d at 396 [citing *San Jose*].)

The trial court appropriately denied class certification here given that the burdens imposed by class certification vastly exceed any benefits. Because Noel has not identified a reasonable way to contact them, no more than a handful of the thousands of absent class members can benefit from this action. They cannot benefit because they will never be notified about the lawsuit and thus will not know to submit a claim (or to opt out). A class action cannot be deemed an "efficient" means of resolving multiple claims (*Richmond*, supra, 29 Cal.3d at 474) when so few of the class members have any actual stake in the outcome. The lawsuit cannot even be justified as a means of stopping ongoing violations of the UCL or the FAL; Noel does not allege that Thrifty Payless continues to sell the Ready Set Pool (it does not). The burden of the action is immense—as is true of any certified

class action. And as *amici* discuss below, the potential for the "injustices" cited by *San Jose* (13 Cal.3d at 458) and later Court decisions (including depriving absent class members of the opportunity to press their own claims, precluding a defendant from defending each individual claim to the fullest, and depriving a litigant of a constitutional right) is significant.

Noel's principal response is to complain that denying class certification under these circumstances would sound the death knell for consumer class actions. That concern is overblown. As Thrifty Payless has pointed out, courts applying the ascertainability standards adopted by *Sotelo* and the courts below routinely certify classes in consumer cases. (*See, e.g., Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193.) But they certified those classes because, in contrast to Noel, the plaintiffs introduced evidence at the certification stage that there existed a method of ascertaining the identity of at least some absent class members. There will often be records that identify the purchasers of consumer products; but when (as here) the plaintiff has introduced no evidence that such records exist or that there is some other means of identifying absent members, class certification is unwarranted. Under those circumstances, the benefits of class certification will virtually never outweigh the burdens.

Indeed, the real danger is that class certification here would equate to class certification in every putative consumer class action. Enterprising

attorneys can go into any store, find a product that they subjectively believe is labeled in a misleading manner, and then file class claims against the store on behalf of all other purchasers of the same product. Even if there exist no means of identifying other purchasers, Noel's proposed ascertainability standard—that the class is ascertainable so long as it is clearly defined—would require class certification no matter how insubstantial the named plaintiff's claims may be and without regard to whether any absent class members will ever benefit from the litigation.

C. The Class Cannot Be Ascertained Solely Through Notice-by-Publication, a Method that Will Elicit Almost No Responses

Noel concedes that she has not demonstrated that there exists a means of identifying anyone else who purchased a Ready Set Pool from Thrifty Payless. She insists, however, that such information is unnecessary for purposes of adequately notifying class members—they can be notified by means of placing advertisements in unspecified publications. She contends that direct notification (whether by U.S. Mail or email) is unnecessary.

Noel invokes rule 3.766(f), California Rules of Court, for the proposition that notice-by-publication is an acceptable form of notification in cases in cases in which "all members of the class cannot be notified personally." (Noel Br. 46.) *Amici* recognizes that notice-by-publication

may on occasion be appropriate in class actions in which there is a means of directly contacting some but not all absent class members. But rule 3.766(f) explicitly limits notice-by-publication to cases in which the notice is "reasonably calculated to apprise the class members of the pendency of the action."[3] Noel offers nothing like this. She proposes no method of notice "reasonably calculated" to notify absent class members of the action.

Ascertainability hinges on "the probability [that] each member [of the proposed class] will come forward ultimately, identify himself and prove his separate claim to a portion of the total recovery." *Blue Chip Stamps*, supra, 18 Cal.3d at 386.) But when notice is provided solely through general advertisements, the "probability" that "each member will come forward" is minuscule.

Indeed, all available evidence suggests that any notice published by Noel would come to the attention of no more than a handful of the thousands of swimming-pool purchasers. *See, e.g., Pearson v. NBTY, Inc.* (7th Cir. 2014) 772 F.3d 778, 782 [citing authorities]; *In re Carrier IQ, Inc., Consumer Privacy Litig.* (N.D. Cal. Aug. 25, 2016) No. 12-md-02330, 2016

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[3] For example, class counsel may know the names of potential claimants to a common fund but not their addresses. A notice that lists the names of potential claimants is reasonably calculated to come to their attention. Even if a potential claimant does not run across the notice on her own, any acquaintances who read it are likely to bring the notice to her attention.

WL 4474366, at *4 [citing analysis by well-respected claims administrator that found a median claims rate of .023% in publication notice cases]; Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* (Feb. 1, 2016) Emory Legal Studies Research Paper No. 16-402; Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?* (May 9, 2014) Reuters [reporting that median claims rate in consumer cases with publication notice is "1 claim per 4,350 class members"]; Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush* (May 8, 2014) Forbes.)

If one assumes a similar one-in-4,350 response rate to any notice-by-publication in this case, only *five* of the as many as 20,000 absent class members would receive financial compensation from any settlement entered into by the parties. That plainly does not satisfy the Court's minimum standard for class certification: a showing that certification will confer "substantial benefits" on both "litigants and the courts." (*San Jose*, supra, 12 Cal.3d at 459.)

D. Federal Rule 23 Case Law Is Consistent with the Lower Court's Decision

"The lower court's approach," Noel contends, "is contrary to the weight of federal authority on ascertainability." (AOB 32.) That assertion is inaccurate; by invoking federal law to shape California law, Noel

compares apples to oranges.

At issue in the federal cases cited by Noel was whether Fed.R.Civ.P. 23 contains an implicit provision requiring separate consideration of ascertainability. The Third Circuit has repeatedly held that a party seeking class certification must demonstrate ascertainability. (*See, e.g., Carrera v. Bayer Corp.* (3d Cir. 2013) 727 F.3d 300.) Other federal appeals courts disagree. (*See, e.g., Mullins v. Direct Digital LLC* (7th Cir. 2015) 795 F.3d 654.) But that dispute is irrelevant here because California case law has consistently understood Code of Civil Procedure section 382 to contain an ascertainability requirement. (*See, e.g., Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 28.) The only issue here is whether that well-established understanding requires a party to demonstrate a plausible means of identifying absent class members in order to establish ascertainability.

Moreover, federal-court decisions that reject a discrete ascertainability requirement nonetheless recognize that the ability to identify absent class members (for purposes of notifying class members of the existence of the suit and distributing settlement proceeds) is relevant to the class-certification determination. They simply have concluded that consideration of that issue is more properly considered in conjunction with other Rule 23 requirements. The Seventh Circuit concluded in *Mullins*, for

example, that the issue of whether there exists "a reliable and administratively feasible way to identify all who fall within the class definition" is:

> [B]etter addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

(*Mullins*, 795 F.3d at 658 [quoting Fed.R.Civ.P. 23(b)(3)].) Almost all of the federal-court decisions cited by Noel include no suggestion that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy" even when (as here) there is no evidence that there exists a means of identifying *any* of the absent class members.[4]

Indeed, both the Seventh Circuit and other federal appeals courts have explicitly held that Rule 23 class certification is inappropriate when there is little or no prospect that absent class members will benefit thereby—which is the state of affairs whenever (as here) there is no means of identifying them. (*See, e.g., In re Aqua Dots Prod. Liab. Litig.* (7th Cir.

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[4] In addition to finding that Noel did not demonstrate the existence of an ascertainable class, the trial court held that Noel failed to establish superiority and denied class certification on that basis as well. (Typed op. 20.) That holding, which is in full accord with *Mullins*, provides an alternative basis for affirming the decision below.

2011) 654 F.3d 748, 751-52; *In re Subway Footlong Sandwich Mktg. Litig.* (7th Cir. 2017) 869 F.3d 551, 557; *Gallego v. Northland Group* (2d Cir. 2016) 814 F.3d 123, 129-30.)

E. A Disposition that Benefits No One Other than the Lawyers Does Not Serve the Purposes of Section 382

Although Noel has failed to demonstrate that the litigants would derive a substantial benefit from class certification, one group that would undoubtedly benefit are the lawyers. A certified class action is time-consuming and highly complex and thus in most instances generates substantial billable hours for counsel for the parties.

As the Court has observed, the "vast majority of cases settle after a class action is certified." (*Duran*, supra, 59 Cal. 4th at 27 n.27.) The economic forces that usually compel defendants to settle any certified class action, even when they possess meritorious defenses, are well documented. (*See, e.g., Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476.) Class counsel usually extract a substantial fee award as a part of any settlement.

But hefty fees for the parties' attorneys are hardly the sorts of "substantial benefits" that the Court had in mind when extolling the value of certified class actions. In the absence of any evidence that class certification would benefit either the litigants or the courts, the trial court properly denied Noel's motion to certify the class.

Even if the class gains little, some of these well-remunerated lawyers will respond, the court could confer an indirect benefit on absent class members by approving *cy pres* distributions to charities whose interests are in some way aligned with theirs.[5] But while this Court has approved of *cy pres* awards in some limited contexts, it has never upheld such awards when they constitute all or nearly all of the settlement proceeds. Nor has it endorsed class certification where (as here) the only possible "benefit" that class members might derive from certification is the indirect benefit of knowing that funds are being paid to a charity of which (in the view of class counsel) they might approve.

Moreover, both the propriety and constitutionality of *cy pres* awards have been questioned with increased frequency in recent years. (*See, e.g., Pearson*, supra, 772 F.3d at 784.) A *cy pres* award often provides no more than "the illusion of compensation." (Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and*

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[5] *Cy pres* originated in trust law. Short for the French "*cy pres comme possible*," or "as near as possible," it referred to a court's power, typically under statute, "to save testamentary charitable gifts that would otherwise fail." (*Klier v. Elf Atochem N. Am., Inc.*(5th Cir. 2011) 658 F.3d 468, 473-74.) The application of the *cy pres* doctrine to class-action settlements is a much more recent development, dating from the 1980s. Some courts have approved *cy pres* settlement agreements that expressly provide for awards to charities or foundations in addition to funds earmarked for distribution to class members.

Empirical Analysis (2010) 62 Fla. L.Rev. 617, 641.) Indeed, the U.S. Supreme Court has agreed to hear a case in its upcoming term in which the petitioner challenges the constitutionality of *cy pres* awards. (*Frank v. Gaos*, No. 17-961, *cert. granted* (2018) 138 S. Ct. 1697.)

Cy pres awards may be appropriate as a means of disposing of residual funds following the distribution of the bulk of settlement funds to identified class members. But where absent class members get nothing (because they cannot be identified), a class action does not confer on them the requisite "substantial benefits" simply because class counsel can propose that settlement funds be distributed to a charity that absent class members might like. In other words, the possible availability of *cy pres* awards cannot compensate for Noel's failure to demonstrate the existence of an ascertainable class.

Nor can a *cy pres*-only class action be justified as a means of disgorging a culpable defendant's ill-gotten gains. California has authorized class actions to promote judicial efficiency and to provide "small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Richmond*, supra, 29 Cal.3d at 469.) One possible side effect of a certified class action may be to deprive a culpable defendant of ill-gotten gains when he otherwise

would have gone unpunished.[6] But the State did not adopt class-action procedures in order to place its thumb on the scale or to increase the potential liability of alleged wrongdoers. This Court has rejected efforts to use class-action procedures as a means of altering substantive law:

> Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means for the ends—to sacrifice the goal for the going. [Fn.] The federal law on class actions is in accord. Rule 23 was not intended to make a change in the substantive law, ... and the federal courts have been criticized when they have made such changes.

(*San Jose*, supra, 12 Cal.3d at 462 & n.9.)[7] If class certification is unwarranted in light of the movant's failure to demonstrate an ascertainable class, certification cannot be justified by pointing to the potential availability of *cy pres* distributions (and fee awards) as a means of disgorging ill-gotten gains from allegedly culpable defendants.

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[6] Of course, another possible side effect is that a non-culpable defendant, acting in response to class certification, will feel forced to pay money to settle insubstantial claims.

[7] *San Jose* anticipated several recent U.S. Supreme Court decisions that have reaffirmed that Rule 23 is a procedural rule that is not intended to further any substantive policy objectives. (*See, e.g., Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 367 [stating that the Rules Enabling Act, 28 U.S.C. § 2972(b), "forbids interpreting Rule 23 'to abridge, enlarge, or modify any substantive rights'"].)

II. CLASS CERTIFICATION WOULD VIOLATE THE DUE-PROCESS RIGHTS OF NOT ONLY ABSENT CLASS MEMBERS BUT ALSO RESPONDENT THRIFTY PAYLESS

The decision below should be affirmed for the additional reason that the class-certification regime endorsed by Noel would violate the due-process rights of both absent class members and defendants.

The Rights of Absent Class Members. *Phillips Petroleum v. Shutts* holds that the U.S. Constitution imposes significant restrictions on a state court's exercise of personal jurisdiction over absent class members in a suit seeking monetary relief. The Fourteenth Amendment's Due Process Clause entitles them to: (1) adequate notice of the class action; (2) an opportunity to be heard and participate in the litigation; (3) an opportunity to opt out and pursue their claims separately; and (4) adequate representation at all times by the named plaintiffs. (*Shutts*, supra, 472 U.S. at 812.) The notice must be "reasonable calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." (*Ibid.*)

When, as here, there is no evident means of ascertaining the identity of class members, it is not possible to provide them with the requisite due-process notice and the requisite opportunity to participate in the litigation

(by, for example, submitting a claim for a share of any judgment).[8] Under these circumstances, the Due Process Clause prohibits a court from binding absent class members to its judgment. When there is no means of providing constitutionally adequate notice, *Shutts* bars certification of a class. (*Id.*)[9]

In her discussion of due-process rights, Noel mentions *Shutts* only in passing and urges the Court to avoid an "insistence upon perfection in actual notice to class-members" and not to worry about "the specter of an occasional successful collateral attack" lest "the whole concept of a large class-action" be "stultified." (AOB 50 [citations omitted].) In other words, Noel urges the Court to ignore due-process rights in search of some greater good. But the only "greater good" that class actions are intended to accomplish is providing class members with an opportunity to obtain redress for injuries. It makes little sense to sacrifice absent class members' due-process rights in pursuit of that goal if the end result is that they will never learn of the litigation and thus can derive no benefit from it.

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[8] Notice-by-publication cannot plausibly be deemed notice "reasonably calculated ... to apprise interested parties of the action," in light of its abysmal track record. *See* supra at 19 (noting studies showing a median claims rate of .023% in publication notice cases).

[9] The U.S. Supreme Court stated that "class action notice sufficient under the Constitution and Rule 23" may simply be impossible in cases in which the proposed class is too "unselfconscious" or "amorphous." (*Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 628.)

The Rights of Defendants. Class certification of an unidentifiable class places a class defendant in an untenable position. If the defendant loses, all class members will be entitled to share in the judgment. But the defendant cannot "win"—absent class members, because they did not receive constitutionally adequate notice, will not be bound by the judgment.

If a judgment issues, the U.S. Constitution entitles the class defendant to assurance that the entire plaintiff class is bound by res judicata—just as the defendant is bound:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court had jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

(*Shutts*, supra, 472 U.S. at 805.)

As *amici* explain above, absent class members will have a strong argument that they are not bound by any judgment in Thrifty Payless's favor. Because there is no way to identify members of the class, the vast majority of absent class members will not receive constitutionally adequate notice of the lawsuit—and absent class members who have not received notice and an opportunity to submit a claim (or to opt out) have a constitutional right not to be bound by any judgment.

Shutts concluded that the Due Process Clause does not permit defendants to be confronted by no-win litigation of that sort. Due process requires that if Thrifty Payless must face the possibility of a class-wide loss, it should also be assured the possibility of a class-wide victory.[10] Because there can be no such assurance when the class aligned against Thrifty Payless is unascertainable, certification of the class violates its due-process rights.

The no-win dilemma faced by Thrifty Payless resembles the problem created by one-way intervention in class actions. The Court has recognized that one-way intervention raises serious constitutional concerns because it permits absent class members to delay deciding whether to participate in the class action until after they learn whether the class has won or lost. (*Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069; *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16 .)[11] Because of those

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[10] Indeed, putative class actions filed *seriatum* are a growing problem for the business community. For example, *China Agritech, Inc. v. Resh* (2018) 138 S. Ct. 1800, involved the third of three putative class actions raising identical claims and filed by a single law firm. After its first two suits were unsuccessful, the law firm simply filed a new lawsuit on behalf of new named plaintiffs.

[11] "One-way intervention" describes a situation that arises when a trial court rules on the merits before ruling on a motion for class certification. The Court has recognized that a premature merits-based ruling in a putative class action provides a significant advantage to potential plaintiffs:

constitutional concerns, the Court has severely restricted the authority of trial courts to issue merits-based rulings until after deciding whether to certify a class. (*Fireside Bank*, supra, 40 Cal.4th at 1083.) And the requisite pre-merits determination of the suitability of the case as a class action must include determinations regarding "the composition of the class and the form of notice to the members." (*Pacific Land*, supra, 20 Cal.3d at 16.)

The due-process concerns raised by one-way intervention are equally applicable here. Thrifty Payless should not be required to defend a certified class action that it cannot possibly win on a class-wide basis—that is, any defense judgment would not be binding on absent class members, none of whom will be receiving notice "reasonably calculated" to inform them of the action.

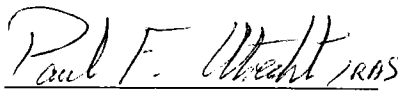
> One party could style the case a "class action," but the missing parties would not be bound. A victory by the plaintiff would be followed by an opportunity for other members of the class to intervene and claim the spoils; a loss by the plaintiff would not bind other members of the class. (It would not be in their interest to intervene in a lost cause, and they could not be bound by a judgment to which they were not parties.) So the defendant could win only against the named plaintiff and might face additional suits by other members of the class, but it could lose against all members of the class.

(*Fireside Bank*, supra, 40 Cal.4th at 1078 (citations omitted).)

CONCLUSION

Amici curiae WLF and the California Retailers Association respectfully request that the judgment of the Court of Appeal be affirmed.

Respectfully submitted,



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Dated: September 27, 2018

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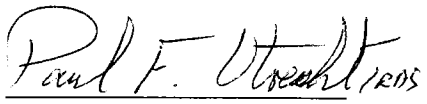
CERTIFICATE OF COMPLIANCE

I, Paul Utrecht, hereby certify that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Brief of the Washington Legal Foundation, *et al.,* as *amici curiae* in support of Defendants and Respondents is produced using 13-point Times New Roman type including footnotes, and contains approximately 7,077 words. I rely on the word count of the computer program (WordPerfect X5) used to prepare this brief.



Paul F. Utrecht

Dated: September 27, 2018

PROOF OF SERVICE

I am employed in Washington, D.C. I am over the age of 18 and not a party to the within action. My business address is Washington Legal Foundation, 2009 Massachusetts Avenue, N.W., Washington, DC 20036.

On September 27, 2018, I served this document, described as

Brief of Washington Legal Foundation, *et al.*, as *amici curiae*

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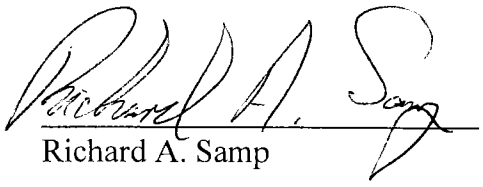

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