S246490

IN THE

SUPREME COURT OF CALIFORNIA

JAMES A. NOEL
PLAINTIFF, APPELLANT, AND PETITIONER

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. CIV 1304712

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICI CURIAE IMPACT FUND, CALIFORNIA EMPLOYMENT LAWYERS ASSN., CENTRO LEGAL DE LA RAZA, LEGAL AID AT WORK, AND WORKSAFE IN SUPPORT OF PLAINTIFF, APPELLANT, AND PETITIONER JAMES A. NOEL

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), proposed amici curiae Impact Fund, California Employment Lawyers Association ("CELA"), Centro Legal de la Raza, Legal Aid at Work, and Worksafe (collectively, "Amici") respectfully request permission to file the attached amicus brief in support of the appeal of plaintiff, appellant, and petitioner James A. Noel.

Amici represent workers in cases challenging wage theft and discrimination and rely on the class action mechanism to effectively vindicate our clients' rights. Amici can provide focused assistance to this Court in understanding the implications of the ascertainability standard applied below in the context of workers' rights class actions.

In accordance with California Rules of Court, Rule 8.250(f)(4), no party or counsel for the party, other than counsel for Amici, have authored the proposed brief in whole or in part or funded the preparation of the brief.

INTEREST OF PROPOSED AMICI

Amicus **Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund is a California State Bar Legal Services Trust Fund Support Center that assists legal services projects throughout the State of California. The organization has served as class counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. The organization has submitted amicus briefs in numerous cases before this Court.

Amicus **CELA** is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before this Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522.

Amicus **Centro Legal de la Raza (Centro Legal)** was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually with support ranging from advice and referrals to full representation in court, in the areas of housing law, employment law, family law, consumer protection, immigration law and support to survivors of domestic violence. Centro Legal participates in and its clients rely on class action litigation to protect the rights of low-income communities. Accordingly, the outcome of this matter is of considerable interest to our organization and to the clients we assist.

Amicus **Legal Aid at Work** is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented low-wage clients in cases involving a broad range of issues, including wage theft and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid at Work has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an *amicus curiae* capacity. Legal Aid at Work has a strong interest in ensuring that California workers can continue to enforce their rights through class actions.

Amicus **Worksafe** advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Millions of low-wage and immigrant workers often toil long hours in harsh and hazardous work environments in California. These same workers often face employment and labor violations. Worksafe has an interest in ensuring workplace justice for all workers.

BRIEF OF AMICI CURIAE

INTRODUCTION AND SUMMARY OF ARGUMENT

What must the plaintiff demonstrate at class certification in order for the trial court to conclude that a proposed class is "ascertainable"? Petitioner Noel has ably demonstrated that the standard applied below, adopted from the earlier Court of Appeal decision in *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, is inconsistent with this Court's precedent and likely to inhibit the use of class actions to redress corporate misconduct. Although this appeal involves a consumer class action, this heightened standard for an "ascertainable" class is equally detrimental to class actions in the employment context as *Sotelo* itself demonstrates.

Amici write separately to address the implications of this erroneous standard for class actions to enforce worker rights, including protections against discrimination and wage theft. *Sotelo* not only requires that plaintiffs demonstrate that class members are individually identifiable at class certification but also mandates that the identification be based on "official records." As explained below, this formulation is wrong on both counts.

First, under longstanding precedent, a class is "ascertainable" when its definition "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description." (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 14.) It is

not an "identifiability" standard. (*See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 ["an ascertainable class" does not require "identifying the individual members of such class as a prerequisite to a class suit"].) This distinction is critical for ensuring that workers may avail themselves of the class action mechanism.

Just as important, a finding of ascertainability – and, ultimately, the ability of workers to seek redress as a group – is not and should not be dependent on whether their employer has maintained "official records." Such a limitation creates an incentive for employers to destroy records or avoid maintaining records in the first instance. In most cases, employers do keep records but, when they have not, California law ensures that workers attempting to prove violations of their legal rights are not unfairly penalized by their employers' recordkeeping failures. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189; *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134-35.) Workers should similarly not be deprived of the ability to demonstrate an "ascertainable class" because the employer has kept no records. This is particularly so because class members can often be identified through other means for purposes of notice and remedies, when the need arises within a specific case. The absence of "official records" should not be an arbitrary barrier to class treatment in such cases.

Sotelo's "more demanding" legal standard creates needless evidentiary hurdles for class certification and is, thus, at odds with this State's strong public policy favoring the use of class

actions, particularly to vindicate worker rights. The class mechanism avoids repetitious litigation and provides redress for claimants for whom individual lawsuits would prove too costly to pursue. For workers, class actions are vital for ensuring the full enforcement of labor and anti-discrimination laws and to allay reasonable fears of workplace retaliation.

Amici respectfully urge this Court to reverse the Court of Appeal and clarify that a class, whether comprised of consumers or workers, is "ascertainable" based upon an objective class definition, and that class certification is not dependent on the presence of "official records."

ARGUMENT

The text of California Code of Civil Procedure Section 382, which authorizes the use of the class action mechanism in civil cases, does not expressly require an "ascertainable" class.[1] Instead, this Court has interpreted Section 382 to impose two requirements: (1) "an ascertainable class" and (2) "a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." (*Daar, supra,* 67 Cal.2d at p. 704 [citations omitted].) In *Daar,* this Court explained that, to satisfy the ascertainability requirement, the class proponent need not "identify[] the individual members of [the] class as a prerequisite to a class suit." (*Id.* at p. 706.) The Court observed: "Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a requisite to a class suit." (*Ibid.*)

Relying on *Sotelo*, the courts below made precisely the same mistake as the defendant in *Daar.*

A. *Sotelo* Erroneously Required the Identification of Class Members at Class Certification, a Standard that Has and Will Prevent the Certification of Meritorious Employment Class Actions

Prior to *Sotelo,* the Courts of Appeal had little difficulty finding that a variety of proposed classes in employment cases

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[1] The section provides in relevant part: "when the question is one of common or general interest, of many persons or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (CCP § 382.)

were "ascertainable." (See, e.g. *Ghazaryan v. Diva Limousine Ltd.* (2009) 169 Cal.App.4th 1524 [on-call wage policy for limousine drivers]; *Bufil v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.App.4th 1193 [meal and rest break claims for check-cashing employees]; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325 [wage and hour violations for parcel delivery drivers]; *Estrada, supra,* 154 Cal.App.4th 1 [misclassification of delivery drivers]; *Aguiar, supra,* 144 Cal.App.4th 121 [wage violations for uniform and laundry workers]; *Stephens v. Montgomery Ward & Co., Inc.* (1987) 193 Cal.App.3d 411 [gender discrimination in promotions].)

Consistent with *Daar,* these workers' rights cases reaffirmed that, for purposes of class certification, "a plaintiff is not required, at this stage of the proceedings, to prove the existence and identity of class members." (*Stephens, supra,* 193 Cal.App.3d at p. 419.) Instead, courts have observed that an "ascertainable class" is "better achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." (*Lee, supra,* 166 Cal.App.4th at p. 248, citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.) A class is "ascertainable" when its definition permits self-identification. (*Estrada, supra,* 154 Cal.App.4th at p. 338 [class definition should describe "a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description"].) Moreover, projected administrative costs for identifying class members at the remedial stage do not defeat a

finding at certification that the class is ascertainable. (See *Reyes v. San Diego Country Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1276; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266.)

Sotelo altered the landscape, and its outcome aptly illustrates the kinds of important employment class actions that will be improperly shut down at the threshold certification stage on ascertainability grounds if this Court adopts *Sotelo*'s approach. In *Sotelo,* plaintiffs brought a claim that newspaper carriers and distributors were misclassified as independent contractors. (*Sotelo, supra*, 207 Cal.App.4th at p. 644.) The class included at least 5,000 members with a "recorded relationship" with the defendant as well as others who did not have such a recorded relationship. (*Id.* at p. 649.) Rather than determining on whether the class was properly defined such that affected class members could self-identify, the trial court focused on whether there were means to ensure individual notice for those unrecorded class members. (*Id.* at pp. 647-50.) Responding to the court's inquiry, plaintiffs proposed alternatives including obtaining records from class members who hired other carriers, which the court rejected. (*Id.* at p. 649.) The Court of Appeal ultimately chose to prioritize the need for individual notice to every class member, although such notice is not legally required. As a result, the Court of Appeal ensured that *none* of the class members – both those with recorded relationships and those without – would receive any redress. Where practical alternatives exist for notifying workers, pursuit of ideal notice should not be

allowed to blunt the effective enforcement of California's wage and hour laws.

Following *Sotelo,* another class action to address wage theft on behalf of a large group of agricultural workers was similarly derailed by heightened ascertainability requirements. In *Cruz v. Sun World International, LLC* (2015) 243 Cal.App.4th 367, 381, the proposed class included over 1,300 direct employees and several thousand others whose labor was procured by farm labor contractors. The Court of Appeal affirmed the trial court determination that the latter group was not ascertainable, focusing on the difficulty and expense of identifying those workers and rejecting suggested means to facilitate self-identification. (*Id.* at p. 382.) The decision effectively immunized agricultural employers, who rely on these contractors to enlist vulnerable farm workers, from their failure to meet state labor standards.

Other types of employment cases that will be thwarted by this Court's adoption of *Sotelo*'s ascertainability standard are discussed below.

B. *Sotelo*'s Requirement that Class Members Be Identified with "Official Records" Will Prevent the Certification of Meritorious Employment Class Actions

The decision below, citing *Sotelo,* held that class members are ascertainable "where they may be readily identified without unreasonable expense or time by reference to *official records.*"

(Appellate Opinion at 9 [emphasis added].)[2] If a class may only be "ascertainable" based on the identification of class members through "official records," employers will be incentivized to skirt employment record-keeping requirements and employees will be needlessly prevented from using the class mechanism. Alternatives exist for identifying workers that are reliable and consistent with a defendant's due process rights.

Most employers keep records of their employees' identities and other employee-related data for their own business purposes. Employers are also required by statute and regulation to maintain many categories of employment-related records. (See, e.g., Cal. Labor Code § 1174 (c) & (d); Cal. Unemployment Ins. Code § 1085; 22 CCR § 1085-2.) In many potential employment class actions, sufficient records will be available at whatever stage in the litigation they are needed.

Where an employer *fails* to maintain such records, both federal and California law have long recognized that employees should not be deprived of the ability to protect their rights in a class action. The U.S. Supreme Court held in *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680 that the consequences of a failure to maintain records should fall on the employer, not on the employee. To do otherwise would be "a perversion of fundamental principles of justice" and would "allow the employer

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[2] The "official records" language first appeared in *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932, and has been parroted, without analysis, by numerous courts since. (See, e.g., *Ghazaryan, supra*, 169 Cal.App.4th at p. 1532; *Lee, supra*, 166 Cal.App.4th at p. 1334.)

to keep the benefits of an employee's labors without paying due compensation." (*Id.* at pp. 686, 688.) The Court in *Mt. Clemens* allowed the employee to prove the amount and extent of work with "just and reasonable inference." (*Id.* at p. 687.) The burden then shifted to the employer to rebut that inference with more precise data. (*Id.* at pp. 687-88.)

California adopted the *Mt. Clemens* burden-shifting framework in *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, and has interpreted it more broadly. California does *not* limit this burden-shifting to records that the employer is under a duty to maintain. (*Amaral, supra*, 163 Cal.App.4th at p. 1190 ["the absence of an express duty of record-keeping is not dispositive"].) To protect workers, the courts have instead focused on "fundamental fairness" and whether "essential facts necessary to proof lie within the exclusive knowledge or control of one party." (*Ibid.*)

While these cases have tended to focus on the need to calculate employee *damages* in the absence of complete records, the Court of Appeal in *Aguiar* relied on the same principle in making the *ascertainability* determination. There, the employer had failed to track which laundry employees performed work on items covered by public works contracts to which a living wage ordinance applied. (*Aguiar, supra*, 144 Cal.App.4th at p. 136.) The Court of Appeal rejected the claim that the absence of records, which were contractually required, precluded the finding of an "ascertainable class":

> [The employer] cannot defeat class treatment because it failed to keep track of the employees who worked on the

> [public works] contracts, as it certified it would do, and commingled [public works] items with those of other customers. If it is determined later in the litigation that certain employees did not work on [the public works] contracts, those employees can be eliminated from the class at that time.

(*Ibid.*) Because the employer made a business decision to commingle the records, the Court found that it was appropriate to shift the burden of proof to the employer on issues regarding employee time spent on the contracts, citing *Hernandez.* (*Id.* at pp. 135-36.) *Sotelo*'s requirement that a plaintiff identify potential class members with official records before a class may even be certified is at odds with this line of case authority protecting the ability of employees to prove their claims when records do not exist.

Misclassification cases, like *Sotelo* and *Cruz,* underscore the problem with the ascertainability standard used by the courts below. For an unscrupulous employer, one of the benefits of misclassifying workers as independent contractors (rather than as employees) is to avoid state record-keeping requirements. It would be a perverse result if an employer would be rewarded with the denial of class certification where the challenged conduct is that the employer sought to avoid all employment obligations, including record-keeping.

An "official records" requirement also poses additional threats to workers' rights class actions. There are cases where official records will not exist but the claims may nonetheless be manageable, as well as important and appropriate subjects for class litigation. For example, if an employer maintains a policy

that discriminates against employees who are pregnant or who have been pregnant, the employer may or may not have "official records" of class members who meet those definitions. The same would be true for employment practices that adversely affect LGBTQ employees; employers typically do not maintain records of the sexual orientation or gender identity of employees.

The solution in scenarios like these is simple and manageable. A notice to the workforce with the class definition, stated in objective terms, would allow class members to easily self-identify. If necessary, self-identifying class members could provide a declaration or other proof of class membership at the remedial stage.

Similarly, deterred applicants – those who have been deterred from submitting a job application because of a "long-entrenched policy of discrimination" – may state class claims of a pattern and practice of discrimination under the Fair Employment and Housing Act. (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 368, 378; see also *Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 742 [summary judgment reversed where worker alleged employer deterred her from applying for a position because she was pregnant].) By definition, an employer will not have any records, official or otherwise, of deterred applications. An "official records" requirement to satisfy ascertainability would needlessly frustrate the ability of those prospective employees to enforce their legally recognized civil rights in a class action.

Employment records for undocumented workers are sometimes inaccurate or incomplete yet this, too, should present no insurmountable barrier to redress. Under California law, workers are entitled to the full protection of the state's labor, employment and civil rights laws *regardless* of their immigration status. (Cal. Gov. Code § 7285; *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407). An "official records" requirement "would effectively immunize *employers* that, in violation of fundamental state policy, discriminate against their workers . . . or fail to pay the wages that state law requires." (*Salas,* at p. 426 [emphasis in original].) If plaintiffs must identify class members through "official records" to obtain class certification, it could undermine statutory protections for these workers.

The identification of class members based on "official records" is also an unnecessary hurdle for employment or civil rights class actions that seek only prospective declaratory and injunctive relief. (See, e.g., *Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal.App.4th 676.) In such cases, the relief is necessarily provided to the class as a whole; individual class members do not have a due process interest in personal notice or the right to opt out of the class. (*Bell v. American Title Ins. Co* (1991) 226 Cal.App.3d 1589, 1609-10; *Reyes, supra,* 196 Cal.App.3d at p. 1274 ["prejudgment notice is not required in welfare class actions where declaratory and injunctive relief are the primary objectives"]; cf. *Shelton v. Bledsoe* (3d Cir. 2015) 775 F.3d 554, 563 [under federal law, "ascertainability is not a requirement for certification of a . . .

class seeking only injunctive and declaratory relief").][3] A requirement to identify class members at the certification stage of equitable relief class actions – and to do so through "official records" – would serve no useful function, nor is it necessary to satisfy due process.

Even without "official records," class members may nonetheless be identified in a variety of other ways when the need arises. For example, notices can be distributed through paycheck envelopes, company intranets, union newsletters, workplace bulletin boards, or employee social media websites. Class members may then self-identify through declarations. (*Bowerman v. Field Asset Servs., Inc.* (N.D.Cal. 2017) 242 F.Supp.3d 910, 935 [noting that "self-identification through declarations is an accepted practice"].) Defendants' due process rights are protected because they retain the right to individually challenge any claims. (See *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1131, citing *Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 667.) These alternatives are consistent with this Court's admonition that trial courts "be 'procedurally innovative' in managing class actions" and will protect worker class actions (*Sav-On v. Superior Ct.* (2004) 34

[3] The U.S. Supreme Court has held that due process requires notice and the right to opt out in class actions for *money damages* but has not reached the same conclusion for equitable relief cases. (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811 n.3 [noting that its holding was limited to claims for money damages, "[w]e intimate no view concerning other types of class actions, such as those seeking equitable relief."]

Cal.4th 319, 339, quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453).

Because it is an unnecessary restriction that could prevent certain class actions from satisfying the "ascertainable class" requirement, the Court should clarify that "official records" are not required where other alternatives exist for the identification of class members.

C. *Sotelo*'s "More Demanding" Standard for Establishing an Ascertainable Class Will Frustrate this State's Public Policy Favoring the Use of Class Actions to Protect Worker Rights

The standard for ascertainability applied below is at odds with California's public policy. This Court has repeatedly affirmed that California "has a public policy which encourages the use of the class action device." (*Sav-On*, *supra*, 34 Cal.4th at p. 340, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.) The class mechanism has the salutary effects of avoiding "repetitious litigation" and providing "small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Sav-On*, at p. 340, quoting *Richmond*, at p. 469.)

This State's strong endorsement of class actions works in tandem with its public policy favoring vigorous enforcement of minimum labor standards and prohibitions on employment discrimination. (See, e.g., Cal. Labor Code § 90.5(a); Cal. Gov. Code § 12940; see also *Sav-On*, *supra*, 34 Cal.4th at p. 340; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1429-30.) The Fair Employment and Housing Act expressly incorporates