IN THE SUPREME COURT
OF THE STATE OF CONNECTICUT

No. S.C. 17735

ELLEN PALMER, et al.,
on behalf of themselves and
all others similarly situated,
Plaintiffs-Appellants,

vs.

FRIENDLY ICE CREAM CORPORATION,
Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS WITH APPENDIX

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STATEMENT

This is a putative class action brought under the state's minimum wage law. When the Superior Court denied class certification, it ended the claims of approximately 2,000 absentees. Because the trial court's order terminated a separate and distinct class action proceeding and because the order threatens the preservation of the plaintiffs' rights, plaintiffs seek an immediate appeal of the order.

1. The Plaintiffs' Complaint. In September 2004, Ellen Palmer, Cindy Brown, and Vicky Wilks—three waitresses employed by the Friendly Ice Cream Corporation (Friendly's)—filed a complaint in the Tolland County Superior Court on behalf of themselves and all Friendly's waiters and waitresses in Connecticut, alleging that the company has a policy of failing to compensate them properly under Connecticut law. A-16-17. Specifically, the plaintiffs alleged that, by deducting "tip credits" from the servers' wages, Friendly's does not pay them the minimum wage for time they spend performing non-service side duties (such as food preparation) and has thereby denied them compensation they have earned, in violation of the Connecticut Minimum Wage Act, Conn. Gen. Stat. § 31-60. A-23-28. In September 2005, the court permitted the plaintiffs to join thirty-four additional Friendly's employees as named plaintiffs.

2. The Superior Court's Order. In January 2006, the Superior Court (Sferazza, J.) issued a decision denying the plaintiffs' motion for class certification. A-1-10. Although the court found that all the prerequisites for class certification in Practice Book Section 9-7—numerosity, commonality, typicality, and adequacy of

representation—had been met, the court concluded that class certification should be denied under Section 9-8's predominance requirement. A-7-9.

In so finding, the court relied on this Court's recent decision in *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 320-21 (2005) ("*Collins II*"). The trial court read *Collins II* to stand for the proposition that "it is insufficient for the named plaintiffs merely to establish that the common issues will predominate for most or even a high percentage of the members of the proposed class." A-7. Instead, the plaintiffs "must demonstrate [predominance] for each and every one of the 2,000 prospective members of the putative class." A-7-8.

Under this standard, the court declared, *even if* the plaintiffs could successfully prove that "the defendant had a corporate policy of requiring *all its servers* to perform [certain side tasks], that these side tasks are non-service duties under [the applicable regulations], and that the defendant failed to segregate the work hours devoted to such side duties from service duty time," such proof would be insufficient to establish liability "with respect to each particular employee." A-8 (emphasis added). The court reasoned that, despite class-wide proof of liability, at trial, the defendant would have "the right to require the plaintiffs to meet the normal burden of proof as to each member of the proposed class and prove that each particular member performed non-service duties for a specific time period." A-9. In other words, the court held, the plaintiffs would have "the evidentiary responsibility to prove" their case "for each member of the putative class *as if that member were the sole plaintiff*." A-9 (emphasis added).

3. Proceedings on Appeal. Believing that the Superior Court's decision misread this Court's class action precedents and the class predominance requirement, plaintiffs sought further review. In May 2006, after the Superior Court summarily denied their motion for reconsideration, the plaintiffs appealed the denial of class certification to the Appellate Court. In July 2006, the Appellate Court summarily granted the defendant's motion to dismiss the appeal. A-13. Plaintiffs then filed a petition for certification in this Court. This Court granted that petition in September 2006, limited to the following question: "Is an order denying a motion for class certification a final judgment for purposes of appeal?" A-14.

SUMMARY OF ARGUMENT

Orders denying class certification may be immediately appealed. All the relevant considerations—this Court's precedents concerning appealability, the separate and distinct nature of the class action proceeding, the experience with interlocutory class certification appeals in state and federal courts, the practical effect of class certification denials, the need for development of the law, and the risk that plaintiffs' rights will be irretrievably lost—favor permitting such appeals.

1. In *Rivera v. Veterans Mem. Med. Ctr.*, 262 Conn. 730 (2003), this Court held that an order *decertifying* a class action may be immediately appealed. In reaching that conclusion, the Court stressed the relevance to the appealability analysis of the special policies underlying class action litigation—promoting efficiency, protecting the rights of absentees, and providing access to judicial relief for small claimaints. The same policies also support appeals from orders *denying*

class certification in the first instance. Here, as in *Rivera*, immediate appeal is warranted because it may be prohibitively expensive for the named plaintiffs to pursue their claims on an individual basis, it is appropriate for the named plaintiffs to attempt to vindicate the interests of the class as a whole, and the efficiency rationales underlying both the class action device and the final judgment rule are served by permitting immediate appeal.

2. Under the first prong of the test set forth in *State v. Curcio*, 191 Conn. 27 (1983), an immediate appeal may be taken from an order that terminates a separate and distinct proceeding. The order below is such an order: It terminates the class action proceeding in its entirety, an appeal from the order can proceed separately from the litigation on the merits, the order comes at the conclusion of a proceeding governed by a particular rule, and it is a procedural order that has the effect of ending the proceeding with respect to certain parties. Under this Court's precedents, immediate appeal is appropriate in these circumstances.

Both the state and federal courts have permitted immediate appeals from class certification denials for reasons that fall within the ambit of the first *Curcio* prong. A significant number of state courts have embraced a "death knell" doctrine, under which appeals are warranted because the denial of certification will often sound the "death knell" of the litigation when it is not economically feasible for the individual plaintiffs to go forward. And although the U.S. Supreme Court once rejected that doctrine, the federal judiciary has recently changed course and permitted appeals from class certification orders in part based on a death knell

rationale. Because wage and hour class actions are likely to fall into the death knell category, that rationale is particularly compelling in this case. And additional factors identified by other jurisdictions—such as the need for the development of the law of class actions—also strongly militate in favor of immediate appeal.

3. Under the second prong of *Curcio*, an immediate appeal lies where the order concludes the rights of the parties such that further proceedings cannot affect them. This factor, too, counsels in favor of appealability. When class certification is denied, the plaintiffs lose rights they possess until that point. Not least among these rights is the right to toll the statute of limitations, which begins when a class actions commences and ends when class certification is denied. The consequences of the loss of that right can be devastating and may even preclude absent class members from bringing successive class actions—even though they had neither notice nor an opportunity to participate in the earlier proceedings and even though the new class complaint may correct purely procedural deficiencies found in the first one. Even worse, because other courts may accord preclusive effect to the denial of certification, the inability to appeal immediately can subject the plaintiffs to wholesale preclusion, barring even timely class claims from going forward. And finally, when the trial court denies certification, the putative class members lose their lawyer, a lawyer who otherwise owes them a fiduciary duty to protect their interests. The trial court's order, in short, strips the case of its class action status and all the rights accompanying that status.

STANDARD OF REVIEW

The question whether an order is considered a final judgment for purposes of appeal "implicates the subject matter jurisdiction of an appellate court to hear an appeal" and is thus "'a question of law'" over which this Court's "'review is plenary.'" *Sweeney v. Sweeney*, 271 Conn. 193, 208 (2004) (quoting *Tappin v. Homecomings Financial Network, Inc.*, 265 Conn. 741, 750 (2003)).

ARGUMENT

Connecticut's "law relating to final judgments and interlocutory orders is well established." *Hartford Accident and Indemnity Co. v. Ace Am. Reins. Co.*, 279 Conn. 220, 224 (2006) (quoting *Rivera v. Veterans Mem. Med. Ctr.*, 262 Conn. 730, 733 (2003)). Although the rule is that appeals are limited to final judgments, in both criminal and civil cases, this Court has "determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal." *Rivera*, 262 Conn. at 734-35; *see* Practice Book § 61-1; Conn. Gen. Stat. § 52-263.

"It is apparent that there are certain judgments which are undoubtedly final and others that are clearly interlocutory and not appealable. The problem, of course, arises in the gray area between these obvious certainties." *Madigan v. Madigan*, 224 Conn. 749, 753 (1993). "To evaluate those orders that lie in the 'gray area,'" this Court has relied on the familiar two-part *Curcio* test. *Id.* Under that test, "[a]n otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order

or action so concludes the rights of the parties that further proceedings cannot affect them." *Rivera*, 262 Conn. at 735 (quoting *State v. Curcio*, 191 Conn. 27 (1983)).

The order in this case meets both criteria. Taken together, this Court's appealability precedents, the experience of other state and federal courts, the efficiency rationales of class action litigation, the risk that the order will constitute the "death knell" of the litigation, and the need to protect the rights of absent plaintiffs all point in one direction: toward permitting immediate appeals from orders denying class certification.

I. The Unique Functions of Class Actions—and the Protection of Absentees in Particular—Counsel in Favor of Immediate Appeals From Class Certification Denials.

Just three years ago, in *Rivera*, this Court held that an order decertifying a class is a final judgment for purposes of appeal. Before *Rivera*, the Court had, "in the past, considered class certification orders on appeal," but had not "been presented expressly with the issue of whether [the Court] has jurisdiction to hear such appeals." *Rivera*, 262 Conn. 730, 734 n.5.

Rivera was a lawsuit challenging a hospital's allegedly unlawful debt collection activities on various common-law grounds, as well as under the Connecticut Unfair Trade Practices Act (CUTPA). Because there was no question that the plaintiffs had a statutory right to appeal with respect to the CUTPA claims, the Court considered only "whether the trial court's order, as it affect[ed] the remaining counts, constitute[d] a final judgment." *Id.* at 734 n.6; *see* Conn. Gen. Stat. § 42-110h

(providing that "[a]n order issued under this section shall be immediately appealable by either party"). In concluding that the order was a final judgment under *Curcio*, the Court stressed the relevance of the special policies underlying class action litigation to the appealability analysis:

> Our determination is predicated on the fact that class actions serve a unique function in vindicating plaintiffs' rights. Class action procedures . . . increase efficiencies in civil litigation by encouraging multiple plaintiffs to join in one lawsuit.

Id. at 735. In particular, the Court explained that Connecticut's class action procedures are "designed to prevent the proliferation of lawsuits and duplicative efforts and expenses" and that class actions serve "four essential and distinct functions"—(1) promoting judicial economy and efficiency, (2) protecting defendants from inconsistent obligations, (3) protecting the interests of absentees, and (4) providing access to judicial relief for small claimants. *Id.* at 735 (citing *Grimes v. Housing Auth.*, 242 Conn. 236, 244, 247 (1997)).

While *Rivera* involved a decertification order rather than an initial denial of certification, *Rivera*'s analysis extends to appeals from denials of class certification as well.

First, although, as here, the Superior Court's decision in *Rivera* could have been appealed after the case had proceeded to final judgment on the named plaintiffs' claims, the Court held that an immediate appeal was warranted under the second *Curcio* prong because it might be prohibitively expensive for the plaintiffs to pursue their claims on an individual basis. The trial court's order, in this Court's

words, threatened to deprive the plaintiffs of "an economically efficient means to proceed in an action that they otherwise might be unable to pursue." *Id.* That same logic underscores the need for an immediate appeal here.

Second, although, as here, the appeal was brought by the named plaintiffs, *Rivera* recognized the special role of the named plaintiffs and the courts in "[p]rotect[ing] the rights of absentee parties," *id.* at 735, and, in particular, the role of the named plaintiffs in protecting those rights through an immediate appeal. Thus, although the named plaintiffs could have pursued their own claims in the court below (assuming, charitably, that it would have been economically feasible to do so), it was appropriate for the named plaintiffs to appeal immediately and attempt to vindicate the rights of the class as a whole. Again, the logic of *Rivera* supports allowing immediate appeals from both orders of decertification and initial denials of class certification because both orders deprive the absent class members of rights that only the named plaintiffs can protect.

Third, *Rivera* reflects a recognition that the special efficiency rationales of class action litigation should be given considerable weight in any appealability analysis. And although it is not made explicit in *Rivera*, it is also significant that the principles underlying both the class action device *and* the final judgment rule are animated by strong efficiency concerns. "The final judgment rule is grounded in considerations of judicial economy, specifically, a policy discouraging piecemeal litigation that wastes valuable judicial time and resources." *Gorelick v. Montanaro*, 94 Conn. App. 14, 24 (2005). Rarely is an appeal more economical than in the

class certification context—it decides the fate of hundreds if not thousands of people's claims at once. On the other hand, denying an avenue for immediate appeal threatens the loss of the absentees' rights and encourages the proliferation of individual lawsuits, as explained below. Where the efficiency benefits of permitting immediate appeals are actually *greater* than those of foreclosing them, the jurisdictional calculus is easy; the Court does not confront the typical and more difficult question whether the reasons for permitting appeal are "more persuasive than the traditional reasons of judicial economy generally offered as a justification to adhere to a rule of nonappealability." *Madigan v. Madigan*, 224 Conn. 749, 757 n.9 (1993).

Finally, although Connecticut's class action jurisprudence remains relatively "sparse," *Rivera*, 262 Conn. at 737, this Court has recently begun to develop its own class action law and has issued several landmark rulings discussing the requirements for class certification. Notably, each of these decisions arose out of immediate appeals from trial court orders with respect to class certification. *See Collins v. Anthem Health Plans, Inc. (Collins I)*, 266 Conn. 12 (2003) (denying motion to dismiss appeal because "the CUTPA and nonCUTPA claims are inextricably intertwined"); *Collins v. Anthem Health Plans, Inc. (Collins II)*, 275 Conn. 309 (2005) (permitting interlocutory appeal without discussing appellate jurisdiction); *Macomber v. Travelers Prop. and Cas. Corp.*, 277 Conn. 617 (2006) (permitting interlocutory appeal on same grounds as in *Collins I*); *Marr v. WMX Technologies, Inc.*, 244 Conn. 676 (1998) (permitting immediate appeal from class certification

decision in CUTPA action without discussing appealability). Although these decisions do not discuss the *Curcio* appealability factors, they stress the same class action policy rationales on which *Rivera* premised its finding of appealability: the interest in efficiency, the role of class actions in allowing plaintiffs to pursue claims they otherwise might not be able to pursue, and the concern for the rights of absent class members.

II. The Superior Court's Order Is Appealable Under *Curcio*'s "Separate and Distinct Proceeding" Prong.

Under the first *Curcio* prong, an immediate appeal may be taken from an order that "terminates a separate and distinct proceeding." *Curcio*, 191 Conn. at 31. This standard "requires that the order being appealed from be severable" from the rest of the action, so that the appeal and the rest of the underlying action can "proceed independent[ly]" of one another. *Hartford Accident & Indem. Co. v. Ace Am. Reins. Co.*, 279 Conn. 220, 225-26 (2006); *see State v. Parker*, 194 Conn. 650, 654 (1984) ("The 'separate and distinct' requirement of *Curcio* demands that proceeding which spawned the appeal be independent of the main action."). "If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy the first prong of *Curcio*." *Hartford Accident & Indem.*, 279 Conn. at 226. An order denying class certification satisfies these standards. Because the order terminates the class action proceeding in its entirety and leaves only the named plaintiffs' individual actions, and because appeals from class certification decisions

can proceed independently of litigation on the merits, the order is subject to immediate appeal.

"Class certification is a procedural mechanism enabling representative parties to litigate on behalf of a class of unnamed persons, who are not joined in the action." *Collins I*, 266 Conn. at 16 n.3. Although class certification determinations are sometimes enmeshed in the factual and legal circumstances of the plaintiffs' causes of action, this Court, following federal practice, has repeatedly emphasized that the certification determination must be made independently of the merits. *See Marr v. WMX Technologies, Inc.*, 244 Conn. 676, 680 (1998) ("[W]hether a class action is proper does not depend on the merits of the litigation. There will almost invariably be disputed questions of fact or law on the merits."). The trial court "is bound to take the substantive allegations of the complaint as true" and "'the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of the [class action rules] are met . . .'" *Rivera*, 262 Conn. at 743 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). The class certification determination, in other words, does not "implicate the merits of the principal issue at trial"—namely, whether the defendant is liable. *Parker*, 194 Conn. at 653. This Court, moreover, has had no trouble entertaining appeals from class certification decisions prior to judgment on the merits in the trial court. *See Rivera*, 262 Conn. 730; *Collins I*, 266 Conn. 12; *Collins II*, 275 Conn. 309; *Macomber*, 277 Conn. 617; *Marr*, 244 Conn. 676.

When class certification is denied, the class action proceeding ends and the named plaintiff may proceed independently with his or her case on the merits (although, as explained below, there will often be significant practical and economic obstacles to doing so). Conversely, even if there is subsequently a judgment on the merits against the named plaintiff in an individual capacity, the putative class as a whole retains a stake in the litigation and can pursue the question whether a denial of class certification was proper. *See Robichaud v. Hewlett Packard Co.*, 82 Conn. App. 848, 851-52 (2004) (citing *Deposit Guaranty Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326 (1980); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). The class proceeding is thus a "separate and distinct" proceeding within the meaning of *Curcio*.

"Orders made at the conclusion of a procedure governed by a single rule or statute"—such as the end of a class certification procedure governed by Practice Book §§ 9-7 and 9-8—are particularly strong candidates for immediate appeal under the first *Curcio* factor. Tait and Prescott, *Connecticut Appellate Practice & Procedure* § 3.2(b) (3d ed. 2000); *see State v. Roberson*, 165 Conn. 73, 82 (1973) (interlocutory appeal is warranted where "the decision of the court marks the final disposition of a [type of] judicial proceeding authorized by statute").

More specifically, this Court has long held that important procedural motions that have the effect of ending the proceedings with respect to certain parties (in this case, approximately 2,000 absent class members) are immediately appealable. For

instance, in *Harris v. First Nat'l Bank & Trust Co.*, 139 Conn. 749, 753 (1953), the Court held that an otherwise interlocutory order granting a motion to drop a party constitutes a final judgment for purposes of appeal. Similarly, it is well-established that the denial of a motion to intervene as of right constitutes a final judgment, *see Horton v. Meskill*, 187 Conn. 187, 191-98 (1980); *see also Kerrigan v. Commissioner of Public Health*, 279 Conn. 447, 449 n.3 (2006); *King v. Sultar*, 253 Conn. 429, 435 (2000) (motions to intervene are appealable when the proposed intervenor has a "colorable" claim to intervention as of right), as are denials of permissive intervention. *See* Tait and Prescott, *Connecticut Appellate Practice, supra,* § 3.6(c) (collecting cases and concluding that, as a practical matter, all denials of intervention are immediately appealable in Connecticut). Interlocutory orders with respect to motions to interplead or implead are similarly appealable. *See id.* § 3.6(d), (e). What each of these situations has in common is that the trial court's rulings, as in this case, had the effect of throwing certain parties out of court on purely procedural grounds—procedural grounds that easily could be reviewed immediately on appeal and whose practical significance might be lost without immediate review.

B. Both state and federal courts have permitted immediate appeals from orders denying class certification for reasons similar to or the same as those within

the ambit of the first *Curcio* prong. The experience of these other courts is therefore instructive here.[1]

1. *State Courts.* A substantial number of state court systems, including those of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Indiana, Iowa, Louisiana, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, and West Virginia, permit immediate appeals of class certification orders.[2] Although these states naturally have different rules and doctrines governing appellate jurisdiction, the decisions permitting immediate appeals have generally focused on the unique function of class actions, the importance and practical effect of the certification decision (particularly the financial disincentive for the named plaintiff to

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[1] *See Madigan v. Madigan*, 224 Conn. 749, 757 n. 9, 620 A.2d 1276 (1993) (noting that "[a]n inquiry into the law of other jurisdictions supports our conclusion that temporary custody orders are immediately appealable. On balance, we find that the rationale for allowing immediate appeals adopted in the latter jurisdictions, in conjunction with the practice in other jurisdictions that allow these appeals by special interlocutory appeals rules, to be more persuasive than the traditional reasons of judicial economy generally offered as a justification to adhere to a rule of nonappealability.").

[2] *See, e.g., Butler v. Audio/Video Affiliates, Inc.,* 611 So.2d 330 (Ala. 1992); *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1038 (Alaska 1981); *Reader v. Magma-Superior Copper Co.*, 494 P.2d 708, 709 (Ariz. 1972); *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 769 S.W.2d 419, 419 (Ark. 1989); *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 28 (Cal. 1981); *Levine v. Empire Sav. and Loan Ass'n*, 557 P.2d 386, 387 (Colo. 1976); *Aetna Cas. & Sur. Co. v. Cantrell*, 399 S.E.2d 237, 238 (Ga. 1990); *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385-86 (Ind. 1998); *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 366 (Iowa 1989); *Carr v. GAF, Inc.*, 702 So.2d 1384, 1385 (La. 1997); *Faulkenbury v. Teachers' and State Employees' Ret. Sys. of N. Carolina*, 424 S.E.2d 420, 429 (N.C. 1993); *Rogelstad v. Farmers Union Grain Terminal Ass'n, Inc.*, 224 N.W.2d 544, 548 (N.D. 1974); *Klocke v. A & D Ltd. Partnership*, 629 N.E.2d 49 (Ohio Ct. App. 1993); *Miles v. N. J. Motors*, 291 N.E.2d 758 (Ohio 1972); *Bell v. Beneficial Consumer Discount Co.*, 348 A.2d 734, 736 (Pa. 1975); *Hanson v. Fed. Signal Corp.*, 679 A.2d 785, 787 (Pa. 1996); *McAllen Med. Ctr. v. Cortez*, 17 S.W.3d 305, 308 (Tex. App. 2000), *aff'd in relevant part*, *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227 (Tex. 2001); *McFoy v. Amerigas, Inc.*, 295 S.E.2d 16 (W.Va. 1982); *Mitchem v. Melton*, 277 S.E.2d 895 (W.Va. 1981).

continue with the litigation), the feasibility of interlocutory review, and the impact on absent class members.

California, whose courts entertain more class actions than any other state, has enjoyed perhaps the longest experience with immediate appeals from class certification denials under its so-called "death knell" doctrine. The definitive expression of that doctrine is found in *Daar v. Yellow Cab Co.*, which explains that an order denying class certification

> determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In its legal effect the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed.

433 P.2d 732 (Cal. 1967) (internal citations and quotation marks omitted); *see also Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 28 (Cal. 1981) (reaffirming *Yellow Cab* and holding that "[a] decision by a trial court denying certification to an entire class is an appealable order"); *accord Butler v. Audio/Video Affiliates, Inc.*, 611 So.2d 330, 331 (Ala. 1992) ("[A] denial of class certification effectively terminates the litigation as to all members of the class other than the original plaintiff; this is because it has a 'death knell' effect of making further proceedings in the action impractical and because it finally determines a claim of right separate from and collateral to the rights asserted in the cause of action."); *Reader v. Magma-Superior Copper Co.*, 494 P.2d 708, 709 (Ariz. 1972) (holding that an "order determining that the action could not be maintained as a class action, . . . in effect, determines the action, since

as a practical reality it forecloses the appellants from pursuing their action further [and it is] obviously impossible or improvident for them to absorb the enormous expenses of the suit. The trial court's order, in effect, terminates the litigation.").

The "death knell" rationale is particularly apt in this case—a class action brought under the state's minimum wage laws. In *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1038 (Alaska 1981), the Alaska Supreme Court permitted an immediate appeal from an order denying certification in an action under the state's wage and hour law because "the trial court's decision effectively terminated the action with respect to the unnamed class members" and because "the delay caused by a separate trial and resulting appeal would hamper any later effort to send notice to the unnamed class members." Similarly, state appellate courts have recognized that class treatment "is plainly the superior means for resolving the litigation" in "wage and hour disputes (and others in the same general class)" because they provide "a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Aguiar v. Cintas Corp. No. 2*, 50 Cal. Rptr. 3d 135, 148 (Cal. Ct. App. 2006).

State courts have also stressed that "the effect which the dismissal will have on the plaintiffs' financial ability to proceed with the litigation is not the only consideration which must be carefully weighed." *Rogelstad v. Farmers Union Grain Terminal Ass'n, Inc.*, 224 N.W.2d 544 (N.D. 1974). Among the other factors that "militate in favor of a decision to review the order of the trial court"—both discussed below in the context of the second *Curcio* factor—are that "the members of the

alleged class represented by the named plaintiffs in the case at bar will be without legal counsel as a result of the trial court's decision" and that "the statute of limitations will continue to run on their claims." *Id.* Both of these factors are further discussed below in the context of the second *Curcio* prong.

Another factor—one that is particularly relevant under the first *Curcio* prong—is that the order denying certification "does not affect, nor will it be affected by, the subsequent final judgment on the merits." *Id.* Hence, if the named plaintiff finds it economically feasible to proceed and "prevail[s] on the merits in the trial court, the case could end at that point. It is conceivable [and even likely] that, being satisfied with his judgment, [the named plaintiff] might decline to appeal the class action order. In that event, the trial court's determination that a class action was inappropriate would not be reviewed" and the named plaintiff "would not, in this situation, afford the type of representation for the class that is intended by" the class action rules. *Id.* On the other hand, if the named plaintiff "appeal[s] a favorable judgment, equally serious problems would arise. If the judgment were affirmed and the order denying class action status reversed, [the appellate court] would be faced with the problem of fairly disposing of the case" and "a new trial maintained as a class action might be required." *Id.* Immediate appeal of class certification denials avoids these undesirable consequences.

2. *Federal Courts.* In the federal courts, the appealability status of orders denying class certification has recently undergone a transformation. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court cast aside the "death knell"

doctrine, which had been developed by the Second Circuit and had, up until then, been accepted by virtually all of the other circuits. *See generally Moore's Federal Practice* § 23.97 (3d ed. 1999); *e.g.*, *Eisen v. Carlisle & Jacqueline* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966) (permitting interlocutory appeal because the trial court's "dismissal of the class action" would "irreparably harm Eisen and all others similarly situated" and "will for all practical purposes terminate the litigation" and thus sound "the death knell of the action."). *Coopers & Lybrand* did not, however, entirely preclude immediate appeals from class certification decisions. *See Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 336 n.8 (1980) ("[O]ur ruling in [*Coopers & Lybrand*] was not intended to preclude motions under 28 U.S.C. § 1292(b) seeking discretionary interlocutory appeal for review of the certification ruling."). To the contrary, the Court acknowledged just two years after *Coopers & Lybrand* that "[i]n some cases such an appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably." *Id.*; *see*, *e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). Nor did *Coopers & Lybrand* preclude immediate appeal by writ of mandamus. *See*, *e.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996).

The continuing practical need for immediate review of class certification decisions eventually led the federal judiciary to more formally recognize these appeals. Thus, as this Court has recognized, the federal courts of appeals now

permit immediate appeals from orders denying class certification. In *Rivera*, "the defendant cite[d] *Coopers & Lybrand* . . . for the proposition that certification orders are not immediately appealable." *Rivera*, 262 Conn. at 736 n.8. This Court rejected "[t]he defendant's reliance [as] misplaced because that case was superseded in 1998 by the addition of subsection (f) to rule 23 of the Federal Rules of Civil Procedure, which provides for interlocutory appeals" of certification orders on a discretionary basis. *Id.* Because this Court often looks to the federal courts for guidance in class action matters, *Collins I*, 266 Conn. at 32, it is worth exploring both the purposes animating Rule 23(f) and what the federal courts have had to say about appeals from denials of class certification under the new rule.

The Federal Rules Committee, echoing the spirit of the "death knell" doctrine, explained the basis for this expanded federal appellate jurisdiction over orders denying class certification as follows:

> [S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.

Federal Rule of Civil Procedure 23(f), 1998 Committee Notes; *see also Blair v. Equifax Check Services, Inc.*,181 F.3d 832 (7th Cir. 1999) (discussing "the reasons Rule 23(f) came into being"). The Federal Judicial Center study on which the Committee relied explained that the provision "is intended to afford an opportunity for prompt correction of error before the parties incur significant litigation or settlement costs. The underlying theory is that class certification rulings very often

have make-or-break significance for the litigation." Thomas Willging, et al, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 80 (1996).[3]

In applying Rule 23(f), the federal courts have stressed the importance of immediate appeals in cases in which "the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation." *Blair,* 181 F.3d at 834; *accord Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164, 165 (3d Cir. 2001) (immediate appeal from denial of class certification warranted because the "claims pressed by the putative class members may be too small to survive as individual claims"); *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001) (immediate appeal is warranted in "'death knell' cases," in which "the class certification order effectively terminates the litigation . . . because the denial of certification makes the pursuit of

[3] In concluding that the avenues for immediate appeal of certification decisions should be expanded, the federal judges on the committee had before them an unusually rich record. In addition to the Federal Judicial Center's extensive empirical study, the record included voluminous public comments; a RAND Institute for Civil Justice study, Deborah Hensler, et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000), which analyzed the results of detailed case studies and surveys of lawyers engaged in class-action litigation in both state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts, including their *Report on Mass Tort Litigation*. In addition to these sources, the committee obtained practical insight by consulting with a number of experienced class-action practitioners who represented all major points of view. Taken as a whole, the 1998 amendments constituted a balanced attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device — efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results. *See Report of the U.S. Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice* (September 2002) (detailing record supporting 1996 amendments).

individual claims prohibitively expensive."); *see also Hevesi v. Citigroup, Inc.*, 366 F.3d 70 (2d Cir. 2004).

These decisions all recognize "a basic truth about class action litigation"—that "the fight over class certification is often the whole ball game." *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294-95 (11th Cir. 2006). "Indeed, the centrality of certification to the outcome of litigation prompted enactment of Federal Rule of Civil Procedure 23(f)." *Id.*; *see also Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) ("[E]ven ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties."); *In re Diet Drugs Prod. Liab. Litig.*, 93 Fed.Appx. 345, 350 (3d Cir. 2004) ("[O]rders denying certification may effectively eviscerate the plaintiffs' ability to recover."). Even *Coopers & Lybrand* itself recognized that the denial of class certification may "induce a plaintiff to abandon his individual claim." 437 U.S. at 470. As discussed above, that risk is certainly present here—and is likely present in virtually all wage-and-hour class actions.

The federal cases also stress another important reason to allow immediate appeals from class certification denials: "[A]n appeal may facilitate the development of the law. Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed." *Blair*, 181 F.3d at 835. As the Second Circuit has explained, precluding interlocutory review of denials of class certification would deprive the appellate courts of the ability to decide questions "of fundamental

importance to the development of the law of class actions." *Sumitomo*, 262 F.3d at 140.

This factor, too, is implicated here. Although, as noted above, this Court has begun to develop its own class action jurisprudence in recent years, virtually all of that development has been in the form of decisions arising out of interlocutory appeals and has thus far been limited to cases involving CUTPA claims. *See Collins II*, 275 Conn. at 322-23 (noting that "our jurisprudence governing class actions" remains "relatively undeveloped"); *Collins I*, 266 Conn. 12; *Macomber*, 277 Conn. 617; *Marr*, 244 Conn. 676. Restricting the development of the law to that one area only—as opposed to, say, civil rights or employment class actions, or consumer class actions more generally—would threaten to skew this state's class action jurisprudence because the obstacles to certification in a given case may depend on the types of claims at issue.

There is strong evidence, moreover, that the trial courts in this state have had an exaggerated response to the predominance analysis of the two *Collins* decisions. A recent article surveying class action developments found that "[o]f all the significant class certification decisions since the Supreme Court's 2005 decision in *Collins*, all but one declined to certify the class." Shaun Sullivan, et al, *A New Era for Class Actions in Connecticut: Collins and its Aftermath*, Connecticut Lawyer 10 (Nov. 2006). In addition to this case, there are several other minimum wage class actions in which trial courts have recently denied class certification based on questionable applications of the *Collins* decisions. *See Orozco v. Darden*

Restaurants, Inc., 2006 WL 2411520 (Conn. Super. Ct. Aug. 3, 2006), *cert. granted*, Nov. 7, 2006 (No. S.C. 17771); *Bucchere v. Brinker Int'l, Inc.*, No. X01-CV-04-4000238S (Conn. Super. Ct. June 6, 2006), *cert. granted*, Nov. 7, 2006 (No. S.C. 17770); *Galbreth v. Briad Restaurant Group, LLC*, 2005 WL 3509777 (Conn. Super. Ct. Nov. 29, 2005). Absent some appellate review of these and other recent decisions denying class certification, "putative class action plaintiffs may find Connecticut state courts an inhospitable forum." Sullivan, et al., *A New Era for Class Actions in Connecticut*, *supra*, at 13.

Finally, the prospect of appellate review of orders denying class certification serves another, closely related function: It causes trial court judges to be fully attentive to the all-important class certification determination and the purposes animating class action litigation. A principal value of the appeals process is that it "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal. Stud. 379, 408-11, 425-26 (1995). Appeals correct errors. Decisions such as *Rivera*, *Collins I*, *Collins II*, and *Macomber*, all demonstrate that there is a crucial role for this Court and the Appellate Court to play in policing what is often the central issue in a class action. A grudging, overly formalistic view of the final judgment rule, however, would effectively stunt the development of this Court's nascent class action jurisprudence.

III. The Superior Court's Order is Appealable Under *Curcio*'s "Rights" Prong.

Under the second prong of the *Curcio* test, an immediate appeal lies "where the order or action so concludes the rights of the parties that further proceedings cannot affect them." *Rivera*, 262 Conn. at 735. The Court has also stated the standard as encompassing "a claimed right the legal and practical value of which would be destroyed if it were not vindicated before trial." *State v. Malcolm*, 257 Conn. 653 (2001); *see also State v. Parker*, 194 Conn. 650, 656 (Conn. 1984) (standard considers whether the rights at issue "would be irreparably lost unless interlocutory review is permitted."). The parties seeking to appeal under this prong must "establish that the trial court's order threatens the preservation of a right already secured them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal." *Rivera*, 262 Conn. at 735.

When class certification is denied, the plaintiffs lose a bundle of rights. *Rivera* held that "the right to proceed as a class" was a cognizable right under the second *Curcio* factor. 262 Conn. at 735. To be sure, an initial denial of certification is different from the decertification order at issue in *Rivera* in that decertification follows a prior determination that the plaintiffs may proceed with their class action. Nevertheless, the plaintiffs here are left in the same position as were the plaintiffs in *Rivera* after the class was decertified: Both sets of plaintiffs had lost their rights to proceed as a class. Put the other way around, an initial denial of certification, like a decertification, deprives the plaintiffs of significant rights in their possession at the

time the certification motion is decided and should similarly be subject to immediate appeal.

A. *Tolling.* Perhaps the most important of these rights for absentees is the tolling of the statute of limitations. *See* Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 Fla. L. Rev. 803, 803 (2006). ("Timing is everything. Even the most meritorious lawsuit will be dismissed if the statute of limitations has run on the plaintiff's claim. In class action litigation, this hurdle is particularly daunting."). In *Grimes v. Housing Authority of the City of New Haven*, 242 Conn. 236 (1997), this Court adopted the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), under which "the *commencement* of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Grimes*, 242 Conn. at 243 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).

Without the right to tolling under *American Pipe* and *Grimes*, absent class members would be encouraged to file individual suits or intervene to protect their rights while the class action is pending, and the efficiency goals of class action litigation would be greatly undermined. Prior to a decision with respect to certification, "potential class members are mere passive beneficiaries of the action brought in their behalf." *American Pipe*, 414 U.S. at 538. Accordingly, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely

on the named plaintiffs to press their claims." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983).

Under the *American Pipe* rule, the plaintiffs' right to tolling accrues at the time the putative class action is filed and is lost when class certification is denied. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1011 (3d Cir. 1995) (The "commencement of a class action tolls the running of the statute for all purported members of the class, but upon denial of class certification, the tolling period ends."). Thus, "the trial court's order threatens the preservation of a right already secured" to the plaintiffs. *Rivera*, 262 Conn. at 735.

The loss of the right to tolling at the time class certification is denied, when combined with the lack of any opportunity for immediate appeal, would create serious practical problems and encourage the filing of hundreds or even thousands of similar individual lawsuits—exactly the type of burden on judicial resources that the class action device is designed to prevent. Even assuming that the named plaintiffs were to pursue their individual actions and appeal the denial of certification from the ultimate judgment, many putative class members' claims would be put at risk. The plaintiffs, "if required to await a dismissal of this appeal, a trial, and a subsequent appeal from final judgment, may find that their actions have been barred before the ultimate resolution by this court of the class action issue. A dismissal of this appeal could have the effect of proliferating 'preventive' lawsuits commenced by plaintiffs concerned that their cases would otherwise become outlawed by the statute of limitations before this case was determined." *Rogelstad*, 224 N.W.2d at

547 (holding that loss of plaintiffs' tolling rights counsels in favor of immediate review of denials of class certification); *Miles*, 291 N.E.2d at 762.

On the other hand, if, following a denial of class certification, absent plaintiffs—who may correctly believe they have a more compelling basis on which to seek certification—seek to press their claims in the context of a successive class action, they may well be barred from doing so. Although the tolling of an initial putative class action preserves an absent class member's right to file an *individual* claim upon denial of class certification, the federal courts of appeals have held that, except in limited circumstances, the statute of limitations is not tolled for absentees in an earlier action who seek to bring a successive *class action* upon the denial of class certification in the earlier action (or upon the certification of a narrow class, followed by the filing of a successive class action on behalf of a broader class that was denied certification in the earlier action).[4] Although we do not agree with many of those decisions and the Connecticut courts have not previously decided this question—and need not do so here—the decisions of the federal appellate courts are instructive because they demonstrate the potential danger that denial of

[4] *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 10-11 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 149-50 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874, 876-79 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *see also Robbin v. Fluor Corp.*, 835 F.2d 213, 213-14 (9th Cir. 1987); *Catholic Soc. Servs., Inc. v INS (CSS VI)*, 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc) (stating that, following a denial of certification in an earlier case, "we would not permit plaintiffs to bring a class action"). *See generally* 7B Wright et al., *Federal Practice and Procedure* § 1795, at 51-52 (3d ed. 2005); 5 *Moore's Federal Practice* § 23.65[1][b] (3d ed. 2002); 5 Conte and Newberg, *Newberg on Class Actions* § 16:11 at 186 (4th ed. 2002).

certification poses to the absentees' rights. The second *Curcio* factor does not require the plaintiffs to prove that their rights will be lost with 100% certainty, but only "that the trial court's order *threatens* the preservation of a right already secured them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal." *Id.* at 735 (emphasis added). That much is certain.

B. *Preclusion.* Apart from the loss of tolling rights, without immediate appeals of class certification denials, absent class members' rights can be seriously and irreparably harmed even where no statute of limitations problem exists. A denial of certification in one case may bar absent class members from filing a class action as a matter of preclusion doctrine. In *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation,* for example, the Seventh Circuit held that where a court deems representation of the putative class to be adequate but denies class certification for other reasons, the absent class members are bound by the ruling and precluded from bringing a successive class action. 333 F.3d 763 (7th Cir. 2003). Thus, any member of the would-be plaintiff class would be barred from filing a similar class action in any court, even a state court, *see id.* at 768-69, even though he or she would otherwise have had the right to bring the action and even though he or she did not participate in the earlier litigation. Although we do not suggest that this view of preclusion in the class certification context is necessarily correct—a question this Court need not answer at this time—it underscores why an immediate appeal is necessary to protect class members' rights: Other courts may accord

preclusive effect to denials of class certification by the Connecticut courts. Indeed, denying plaintiffs an avenue for immediate appeal from an order that may be accorded preclusive effect—and thus extinguish their right to seek class-wide redress in *any* court—implicates fundamental constitutional due process concerns and, in particular "our deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996); *see Hansberry v. Lee*, 311 U.S. 32 (1940) ("[T]here has been a failure of due process . . . where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.").

Both preclusion rules and the rules barring successive class actions on statute of limitations grounds, we emphasize, may apply even though the absent class members have *not* been given any notice of the pendency of the action or an opportunity to opt out. *See In re Bridgestone/Firestone,* 333 F.3d at 769 ("[N]o statute or rule requires notice, and an opportunity to opt out, before the certification decision is made; it is a post-certification step."). This lack of notice, combined with the very real threat to the absent class members' rights, makes it imperative that the named plaintiffs—and class counsel—be permitted to protect their rights, and those of the absent class members, through an immediate appeal. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (characterizing notice and opt-out rights as "minimal procedural due process protection").

C. ***Legal Representation.*** Finally, as already noted, a compelling fact that "militates in favor" of permitting immediate appeal is that, once the trial court denies

certification, "the members of the alleged class represented by the named plaintiffs in the case at bar will be without legal counsel as a result of the trial court's decision." *Rogelstad*, 224 N.W.2d at 547; *Miles*, 291 N.E.2d at 762 (same). This, too, strips the class members of a protection they already possess because, "[b]eyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 801 (3d Cir. 1995); *see also Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973). Once certification is denied, however, the named plaintiffs no longer represent the absent class members in the trial court. Indeed, as the Eleventh Circuit has noted, "[w]hen the district court denies class certification, the named plaintiffs no longer have a duty to advance the interests of the excluded putative class members." *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998); *see also United Airlines, Inc.*, 342 U.S. at 394. The trial court's order, in short, "strip[s] [the suit] of its character as a class action," Fed. R. Civ. P. 23(c)(1), 1966 Committee Note, and thereby deprives the plaintiffs of both the ability to pursue their claims through an efficient aggregated procedure and the protection of the former class counsel, who up until that point was duty-bound to protect the plaintiffs' interests.

CONCLUSION & STATEMENT OF RELIEF REQUESTED

This Court should reverse the decision of the Appellate Court dismissing the appeal, hold that the Superior Court's order denying class certification is final for purposes of appeal, and retain jurisdiction to consider the merits of the appeal or, in the alternative, remand to the Appellate Court so that it may review the Superior Court's order denying class certification in the first instance.

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CERTIFICATION OF COMPLIANCE WITH RULE 66-3 AND RULE 67-2

The undersigned hereby certifies that this Brief of Plaintiff-Appellants complies with all the provisions of Connecticut Rules of Appellate Procedure §§ 66-3 and 67-2.

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CERTIFICATION OF SERVICE

I hereby certify that on this ____ day of December 2006, the original and 25 copies of the Brief of Plaintiffs-Appellants and the attached Appendix were filed with the Connecticut Supreme Court and service copies were mailed postage prepaid to:

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