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.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

The Superior Court's denial of class certification in this case was not an isolated event. As Friendly's correctly points out (at 2), "[s]ince the issuance of the trial court's memorandum of decision in this matter, several other courts have denied class certification in cases that raised similar claims under the Connecticut Minimum Wage Act."[1] These decisions all turn on a common legal issue—the extent to which the predominance analysis articulated by this Court in *Collins v. Anthem Health Plans, Inc*., 275 Conn. 309 (2005), dooms class certification even when the plaintiffs can prove a uniform corporate practice of wage-and-hour violations. Taken together, these unreviewed trial court decisions mark the death knell of claims brought by thousands upon thousands of Connecticut workers—all based on what plaintiffs view as an incorrect interpretation of *Collins*. Absent a change of course, one set of commentators have predicted, future "class action plaintiffs may find Connecticut state courts an inhospitable forum." *See* Sullivan, et al., *A New Era for Class Actions in Connecticut: Collins and Its Aftermath,* Connecticut Lawyer 13 (Nov. 2006).

This case thus provides a good example of why the efficiency benefits to be gained from immediate appeals of class-certification denials outweigh "the traditional reasons of judicial economy generally offered as a justification to adhere to a rule of nonappealability." *Madigan v. Madigan*, 224 Conn. 749, 759 n.9 (1993). If immediate appeal is permitted, the fate of thousands of workers' claims can be decided in a single round of appellate briefing

[1] *See Orozco v. Darden Restaurants*, 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. 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); *Bates v. C&L Diners, LLC*, No. CV-05-4022111S (Conn. Super. Ct. Dec. 12, 2006).

and argument. Connecticut's experience with immediate appeals in CUTPA class actions demonstrates the efficiency and feasibility of such appeals. Denying immediate appeal, on the other hand, would encourage a proliferation of individual lawsuits, threaten the rights of thousands of claimants, and inhibit the development of class action law in Connecticut.

A. ALLOWING IMMEDIATE APPEAL WOULD FURTHER THE EFFICIENCY RATIONALES OF BOTH CLASS-ACTION AND APPEALABILITY JURISPRUDENCE.

1. Friendly's (at 7-10) attempts to minimize the importance of considerations of judicial economy, even though *Rivera v. Veterans Memorial Medical Center*, which permitted immediate appeals from class-decertification decisions, was explicitly "predicated on the fact that class actions serve a unique function in vindicating plaintiffs' rights" and, in particular, that they "increase efficiencies in civil litigation." 262 Conn. 730, 735 (2003). Indeed, Friendly's (at 8) goes so far as to assert that "*[n]othing* in the Court's decision in *Rivera*" supports immediate appeals from class certification denials.

But Friendly's offers no response to our discussion (at 7-11) of the four aspects of *Rivera* that are especially instructive here. Specifically, Friendly's does not deny (1) that *Rivera* rested on a recognition that the lack of an appeal threatened to deprive the plaintiffs of "an economically efficient means to proceed in an action they might otherwise be unable to pursue," *id.* at 735, (2) that the courts have a special duty to "protect the rights of absentee parties," *id.*, (3) that the special efficiency rationales of class-action litigation should be given considerable weight in any appealability analysis; and (4) that *Rivera*, and other cases arising out of immediate appeals from class-certification decisions, represent the principal avenue by which this Court has developed its otherwise sparse class-action jurisprudence.

2. Friendly's particularly fails to appreciate the significance of this last point—that Connecticut's nascent class action jurisprudence is almost entirely the fruit of immediate appeals and that the Court's experience with these cases is pertinent to any appealability assessment under *State v. Curcio*, 191 Conn. 27 (1983). Friendly's (at 9-10) dismisses these cases out of hand because they involved "claims brought, in whole or in part, under [CUTPA]," a statute that expressly allows such appeals. But the Legislature is assumed to be aware of this Court's final judgment jurisprudence; there is no basis to read the Legislature's decision to permit appeals in one context as a decision to foreclose appeals in all others. *See Hartford Accident & Indem. Co. v. Ace Am. Reins. Co*., 279 Conn. 220, 238 (2006) ("Although the legislature is free to make it clear in the language of a statute that an immediate appeal may be taken from an order of the court, the absence of such language is not determinative of whether such a right exists.").

The CUTPA appeals are significant because they function as a laboratory for evaluating the appropriateness and feasibility of immediate appeals in non-CUTPA cases. Friendly's arguments—particularly its arguments that judicial economy is not served by immediate appeals of certification denials and that such orders do not terminate a sufficiently separate and distinct proceeding under *Curcio*'s first prong—are belied by the CUTPA cases. When it permitted immediate appeals from class certification decisions in CUTPA cases, the Legislature struck a balance between precisely the same competing concerns that are at issue here. Experience has proved that policy judgment correct. Friendly's points to no evidence that appeals in CUTPA class actions have flooded the courts, that they have unduly impeded litigation in the trial courts, or that they have had anything other than a salutary effect on class action litigation in Connecticut.

Building on CUTPA's statutory authorization, this Court has already expanded the avenues for immediate appeal from class certification decisions. The Court has, for example, permitted appeals in cases raising both CUTPA and non-CUTPA claims under the doctrine of pendent appellate jurisdiction, *Collins v. Anthem Health Plans*, Inc., 266 Conn. 12, 28-30 (2003)—a doctrine that, like *Curcio*, is based on an overriding concern for judicial economy. *See Taff v. Bettcher*, 243 Conn. 380, 384 (1997). In *Rivera*, the Court held that immediate appeals from *all* decertification orders, regardless of the subject matter of the case, are appropriate under *Curcio*. And in *Walsh v. National Safety Associates, Inc*., 241 Conn. 278 (1997), the Court demonstrated that appeals from some certification decisions can be resolved summarily—a procedure that can be used to diminish any burdens on judicial resources. The sky has not fallen as a result of these incremental steps in favor of immediate appeals of certification decisions.

3. If Friendly's position were to prevail, the result would be an unprincipled patchwork of appealability law. An order denying certification in a case raising only CUTPA claims would be immediately appealable. But an otherwise identical order in a case raising both CUTPA and non-CUTPA claims would only be immediately appealable if the claims were deemed to be inextricably intertwined. Orders denying certification in all other cases involving both CUTPA and non-CUTPA claims, or in cases not raising CUTPA claims at all, would never be immediately appealable (unless they are decertification orders), even if they are of broad significance and even if denying the appeal would result in gross inefficiencies and irreparable harm.

This Court has explained that, when it comes to appealability, "[c]onsistency among functionally equivalent motions is desirable to avoid illogical distinction and complexity."

State v. Morrissette, 265 Conn. 658, 668 n.16 (2003) (quoting C. Tait & E. Prescott, *Connecticut Appellate Practice and Procedure* § 3.11 at 98 (3d ed. 2000)). To prevail, Friendly's must persuade the Court that the opposite is true here—that the *Curcio* doctrine compels inconsistent treatment of orders denying functionally equivalent motions for class certification.

B. THE DENIAL OF CLASS CERTIFICATION MARKS THE END OF A SEPARATE AND DISTINCT PROCEEDING.

1. Our opening brief demonstrated that denials of class certification satisfy the first prong of the *Curcio* test—they are orders that "terminate[] a separate and distinct proceeding." *Curcio*, 191 Conn. at 31. Ignoring most of this argument, Friendly's only response (at 11-12) is to point out that certification decisions, and thus appeals from certification decisions, often involve considerations that are enmeshed in the merits.

Although it quotes and cites the proper case law, Friendly's response gets the first *Curcio* prong backwards. The question is not whether the merits may be relevant to the appeal, but whether the appeal will interfere with the action on the merits as it proceeds in the trial court. *See Hartford Accident & Indem.*, 279 Conn. at 225-26. The focus, in other words, is on the appeal's effect on the merits, not the merits' effect on the appeal.

As the Court explained in *State v. Parker*, "the 'separate and distinct proceeding,' though related to the central cause, must be severable therefrom. The question to be asked is *whether the main action could proceed independent of the ancillary proceeding*." 194 Conn. 650, 654 (1984) (emphasis added). In *Parker*, that test was not met because it was "clear that a criminal prosecution could not progress while the issues surrounding accelerated rehabilitation were pending on appeal." *Id.* The same thing cannot be said here. Once class certification is denied, the action may proceed in the trial court as an

individual lawsuit, as if a class action had never been brought. The class action determination cannot sensibly be described as "merely a step along the road" to a decision on the merits of the individual lawsuit. *State v. Coleman*, 202 Conn. 86, 90 (1987).[2]

Friendly's cites no authority to the contrary. In fact, the only case involving class certification appeals that Friendly's cites, *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), undermines rather than supports its argument. Although "interlocutory appeals by certification under 28 U.S.C. § 1292(b)" in the federal courts are disfavored because they can result in delay, *Blair* explains, that argument has "less weight" when it comes to Federal Rule of Civil Procedure 23(f)—the new rule that permits discretionary appeals from class certification decisions—"because Rule 23(f) is drafted to avoid delay." *Id.* at 835. Specifically, as with appeals in Connecticut under the *Curcio* doctrine, an appeal under Rule 23(f) "does not stop the litigation unless the district court or the court of appeals issues a stay—and a stay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting." *Id.* Indeed, in *Blair* itself, the court did not stay the two cases on appeal: "[B]oth continued in the district court and," by the time of the appeal, "one already ha[d] been decided on the merits. Because stays will be infrequent, interlocutory appeals under Rule 23(f) should not unduly retard the pace of litigation." *Id.*

Closer to home, it is beyond doubt that immediate appeals from class certification orders in Connecticut do *not* impede an individual action from proceeding on the merits

[2] In any event, this Court has stressed that the trial court has a duty to keep the merits of the case separate from the class determination to the extent possible. *See Rivera*, 262 Conn. at 746 (concluding that trial court had improperly "considered the merits of the plaintiffs' action when deciding the issue of decertification.") (citing *Marr v. WMX Technologies*, 244 Conn. 676, 681 (1998)).

while the issue of certification is on appeal. *See, e.g., Robichaud v. Hewlett Packard Co.*, 82 Conn. App. 848 (2004) (Superior Court proceeded to summary judgment while certification question was on appeal). Friendly's does not suggest otherwise. Once again, the courts' experience with CUTPA cases leads the way forward.

2. Friendly's spends several pages of its brief (at 13-17) taking issue with plaintiffs' discussion of the reasons that other courts have permitted immediate appeals from class certification denials. But instead of confronting the reasoning of these decisions head-on, Friendly's first engages in a counting exercise, disregarding some cases because they are "based upon court rules or statutory authorization" or because they "fall under the second or 'rights' prong of *Curcio*," and characterizing its position as "the majority rule." Def's Br. 14. That mechanical approach is not how this Court evaluates other courts' decisions in the appealability context. Rather, this Court considers the practice in jurisdictions allowing appealability on the basis of *both* judicial doctrine and court rules, and for reasons that fall within *both* of the *Curcio* prongs. In *Madigan v. Madigan*, for example, this Court concluded that "[a]n inquiry into the law of other jurisdictions support[ed]" the "conclusion that temporary custody orders are immediately appealable." 224 Conn. at 759 n.9. Even though only "a limited number of jurisdictions recognize temporary custody orders as final for the purpose of immediate appeal," the Court found that the *reasoning* "adopted in the [those] jurisdictions, in conjunction with the practice in other jurisdictions that allow these appeals by special interlocutory appeals rules," was "more persuasive than the traditional reasons of judicial economy generally offered as a justification to adhere to a rule of nonappealability." *Id.*

3. Turning to other courts' reasons for granting appealability, Friendly's (at 15-17) argues that plaintiffs have mistakenly relied on the so-called "death knell" rationale, under which state and federal courts permit immediate appeals on the ground that certification denials will often sound the death knell of the plaintiffs' claims for all practical purposes.

Friendly's primary objection is that plaintiffs "erroneously view the 'death knell' from the position of the *unnamed* plaintiffs, rather than from the standpoint of the *named* plaintiffs." Def's Br.15. But Friendly's never explains why it would be inappropriate for this Court to consider the consequences of the denial of certification for absent class members. Indeed, this Court has consistently emphasized the courts' function, in class action litigation, to "protect the interest of absentee parties" and "provide access to judicial relief for small claimants." *Rivera*, 262 Conn. at 735 (quoting *Grimes v. Housing Auth*., 242 Conn. 236 (1997)); *see also Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 52 (2d Cir. 2000) ("[T]he court is to act as a fiduciary who must serve as a guardian of the rights of absent class members.") (internal quotation marks omitted).

In any event, Friendly's argument fails on its own terms. The "death knell" rationale takes account of the interests of *both* the absentees and the named plaintiffs; the point is that the "claims pressed by the putative class members may be *too small to survive as individual claims*." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 165 (3d Cir. 2001) (emphasis added); *see also In re Sumitomo Copper Litig*., 262 F.3d 134 (2d Cir. 2001) ("death knell" rationale accounts for cases in which "the denial of certification makes the pursuit of individual claims prohibitively expensive"); *Eisen & Carlisle v. Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966) ("We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr.

Eisen."). "For the named plaintiff, who typically has a very small claim and is using the class mechanism as a means of bringing suit, denial of class certification can be disastrous. As a practical matter, without the possibility of class recovery, it would often be economically infeasible for the plaintiff to bring an individual action." Jordon Kruse, *Appealability of Class Certification Orders*, 91 Nw. U. L. Rev. 704, 704-05 (1997).

The only authority that Friendly's cites to suggest that the death knell concern does not support immediate appeals is a passing remark by Judge Easterbook, who opined that "class suits are prosecuted by law firms with portfolios of litigation, and these attorneys act as champions for the class even if the representative plaintiff would find it uneconomical to carry on with the case." *Blair*, 181 F.3d at 834. That could be true in some cases—such as certain suits brought by public interest organizations—but such cases are surely the exception. Indeed, even Judge Easterbook acknowledges that immediate appeals may be warranted because "a denial of class status can doom the plaintiff." *Id.* His speculation, in any event, is an outlier. *See* Glynn, *Discontent and Indescretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 248, 257 (2001) (quoting Judge Easterbrook's statement as an anomalous expression of "skepticism toward class claims of irreparable harm").

C. THE DENIAL OF CLASS CERTIFICATION THREATENS TO DEPRIVE THE PLAINTIFFS OF RIGHTS THAT THEY POSSESS AT THE TIME CERTIFICATION IS DENIED.

The death knell rationale is also relevant to the question of whether appealability is appropriate under *Curcio*'s second prong, under which 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. This so because the second prong considers whether

the rights of the party seeking appeal "would be irreparably lost unless interlocutory review is permitted." *Parker*, 194 Conn. at 656. Irreparable harm is a necessary, but not a sufficient, condition of appealability under the second prong. The order at issue must also threaten rights that are already secured to the plaintiffs. *Hartford Accident & Indem.*, 279 Conn. at 231. In our opening brief (at 25-29), we explained that plaintiffs lose a bundle of rights upon the denial of class certification—rights that they possess at the time the certification motion is decided.

1. In discussing this prong, Friendly's first spends several pages (17-20) responding to an argument that plaintiffs did *not* make. Plaintiffs did not argue in their opening brief, and do not argue here, that the only right at stake is the "right to proceed as a class." Thus, the trial court's discretion to decide whether to certify a class, which Friendly's discusses at length, is irrelevant here.

2. Our opening brief pointed out that perhaps the most important of the rights at stake is the right to the tolling of the statute of limitations. Under this Court's decision in *Grimes*, 242 Conn. 236, and the U.S. Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the commencement of a class action suspends the applicable statute of limitations as to all putative members of the class. Without this right, absent class members would be encouraged to file individual suits or to intervene to protect their rights. We further explained that the federal courts of appeal have held that the statute of limitations generally is not tolled for absentees who seek to bring a successive class action after certification in an earlier action has been denied.

Friendly's does not quarrel with any of this. Instead, its only response is to point to a single 1977 decision of the U.S. Court of Appeals for the Third Circuit, *Gelman v.*

Westinghouse Electric Corp., 556 F.2d 699, which "has neither been adopted nor disfavored by the Second Circuit." Def's Br. at 20-21. Friendly's argues that all of the federal circuit decisions cited in our opening brief have "overlook[ed] *Gelman*." Defs. Br. 21. But *Gelman* does not address the question whether tolling extends to successive class actions and—as we explained in our opening brief (at 28 n.4)—both the Second and Third Circuits, and many other courts, have held that it ordinarily does not. *Gelman* addressed a different question: What happens *if* the individual action is litigated to final judgment and *if* the denial of class certification is appealed and *if* the decision denying certification is reversed? *Gelman*'s answer was that, when all these conditions are met, "the status of the class members is to be determined by relation back to the date of the initiation of the suit." *Id.* at 701. If, however, the case is settled or for some other reason is not litigated to final judgment, or the denial of class certification is not challenged on appeal, or is challenged on appeal but affirmed, the absent class members will lose their right to tolling.

The relevant question for purposes of the second *Curcio* prong is what the members of the putative class must do to protect their rights following the denial of certification. Friendly's does not deny that the putative class members possess the right to tolling under *Grimes* and *American Pipe* from the commencement of the suit up until the point at which certification is denied, at which point that right ends and may be lost forever. This is sufficient to show that the decision denying certification "threatens to abrogate a right" that the plaintiffs possessed at the time certification is denied. *Hartford Accident & Indem*., 279 Conn. at 226.

3. Apart from the tolling problem, the opening brief demonstrated (at 29-30) that the denial of class certification threatens absentees' rights by subjecting them to the possibility

that they will be barred from filing a class action as a matter of preclusion doctrine. As with the question of tolling, Friendly's response does not quarrel with most of plaintiffs' argument. Instead, Friendly's seeks to distinguish or minimize the preclusion principles announced by the Seventh Circuit's decision in *In re Bridgeston/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), pointing to yet another Seventh Circuit decision, *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656 (7th Cir. 2004). To be sure, *Carnegie* found *In re Bridgestone/Firestone* to be inapplicable on the facts of that case, but for reasons that have nothing to do with the issues presented here. *Carnegie* rejected the defendant's preclusion argument because (1) the same defendant had argued that the previous denial of class certification was wrong and was therefore "estopped to argue now that it was right," and (2) that the defendants had not raised their collateral estoppel defense in a timely manner and had therefore forfeited it. *Id.* at 663. Neither of those distinctions is relevant. Friendly's, in short, can offer no assurances that 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—threatens to deprive them of an important right they possess up until the point that certification is denied, namely their due process right to a "day in court." *See Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996).

4. Finally, our opening brief explained (at 30-31) that class attorneys have a duty to represent the interests of the class as a whole from the time the class complaint is filed until the point at which certification is denied; that duty creates a corresponding right of the class members to demand that the lawyers meet their fiduciary obligations—a right they lose

upon the denial of certification. Tellingly, Friendly's offers no response at all to this argument.

D. IMMEDIATE APPEAL UNDER THE *CURCIO* DOCTRINE IS PREFERABLE TO DISCRETIONARY REVIEW.

In the final segment of its brief (23-28), Friendly's offers a catalogue of the standards the federal courts have employed in deciding whether to grant discretionary review from class certification orders under Federal Rule of Civil Procedure 23(f). Connecticut has no equivalent of Rule 23(f). Thus, to the extent that federal case law is relevant, it is relevant for the same reason that other states' case law is relevant: To evaluate the reasons that have led courts or policymakers to permit immediate appellate review of denials of class certification in the first place, and to see whether those reasons fall within the ambit of the two *Curcio* prongs.

Friendly's, however, addresses neither the policy reasons that led to the adoption of Rule 23(f) nor the reasons that prompt federal courts to permit appeals under that rule. Rather, Friendly's point is simply that the federal courts have been stingy in exercising their discretion under the rule. True enough. *See* Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Rule 23(f): A Proposal for a New Guideline*, 2004 Colum. Bus. L. Rev. 231 (2004) (surveying case law). But the choice presented here is not between *some* immediate appeals versus *many* immediate appeals; it is between immediate appeal under the *Curcio* doctrine or no immediate appeal at all. As explained in our opening brief (at 18-24), the standards adopted by the federal circuits—all of which recognize the need to permit some appeals based on the death knell effect and the need for development of the law—do not suggest that the solution is to entirely foreclose immediate appeals from class certification denials. But that is what Friendly's suggests.

In any event, the approach taken by the federal courts, while better than nothing, is far from perfect. *See* Glynn, *Discontent and Indescretion*, 77 Notre Dame L. Rev. at 229-256 (criticizing the many problems that attend discretionary review of class certification orders in the federal courts). Discretionary review neither adequately corrects errors that threaten to inflict irreparable harm nor significantly enhances the development of the law. *Id.* at 179. And it creates additional burdens on the courts and litigants in the form of wasteful collateral litigation over the standards for discretionary review, *id.*—as demonstrated by the very cases cited in Friendly's brief. Where the purpose of limiting appeals is the savings of judicial resources, this is surely an undesirable result. If discretionary review of class certification denials were the only avenue for appeal, it would be worth these risks. The defects in the discretionary procedures, in other words, would "be worth overlooking to ensure that some errors get addressed. Yet, this simply means discretionary review ought to be considered in the absence of other viable options." *Id.* at 249.

But as we demonstrate here and in our opening brief, in Connecticut, the *Curcio* doctrine provides just such a "viable option." Appeals from orders denying class certification should be permitted not only because they satisfy the requirements of this Court's two-prong *Curcio* test, but because they would actually achieve efficiency while preserving the unique benefits of the class action device.

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 March 2007, 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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