

No. D042044

**IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE**

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LOCKHEED MARTIN IMS CORPORATION (now known as ACS State and Local Solutions, Inc.), AFFILIATED COMPUTER SERVICES, INC., U.S. PUBLIC TECHNOLOGIES LLC, and DOES 1-50, *Petitioners*,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
COUNTY OF SAN DIEGO, *Respondent*.

C. L. TRUSTEES, a corporation; PATRICIA YATES, an individual, and CHRISTINE STANKUS, an individual, on behalf of themselves, the general public and all others similarly situated,  
*Real Parties in Interest*.

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From the Superior Court for the County of San Diego  
The Honorable Linda B. Quinn, Judge  
Civil Case No. CV GIC773619

Unfair Competition Case  
(See Bus. & Prof. Code, § 17209 and Cal. Rules of Court, rule 15(e)(2).)

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**APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS**

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**APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS**

To the Honorable Daniel J. Kremer, Presiding Justice:

The Chamber of Commerce of the United States respectfully applies for permission to file the attached amicus curiae brief in support of the petitioners.

The Chamber of Commerce of the United States is the world's largest business federation. It represents an underlying membership of nearly three million businesses and organizations of every size and in every sector and geographic region of the country. The Chamber has thousands of members in California, and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts.

The Chamber routinely advocates the interests of the national business community in courts and before lawmakers across the Nation. As class action litigation has become increasingly common, the Chamber has filed amicus curiae briefs in a wide variety of state and federal appellate courts, including the Supreme Courts of California and the United States. Recent and significant California class certification cases in which the Chamber has participated include *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, and *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906.<sup>1</sup>

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<sup>1</sup> The Chamber also has participated in several recent class certification cases in other jurisdictions. See, e.g., *Szetela v. Discover Bank* (2003) 123 S.Ct. 1258, 154 L.Ed.2d 1087 (cert. denied); *Henriques v. Archstone-Smith Operating Trust (d/b/a Charles E. Smith Residential)*, No. 3D-03 (Fla. Ct. App. 3d Dist.) (pending); *Pitts v. American Security Ins. Co.* (N.C. 2002) 572 N.E.2d 161; *Ysbrand v. DaimlerChrysler Corp.*, No. 97,469 (Okla.) (pending); *Beck v. Boeing Co.* (9th Cir. 2003) 321 F.3d 1021; *Gilchrist v.*

The Chamber seeks to participate as amicus curiae in order to file a brief supporting the petitioners in their effort to obtain relief that would reverse certification of a class. The proposed brief addresses the legal deficiencies of the certified class by contrasting its characteristics with the criteria most recently and most clearly enunciated by the Supreme Court in *Lockheed Martin*, a decision not emphasized in the Petition. In particular, the proposed brief contrasts the superficial commonality of the two issues on which the trial court rested the certification decision with the welter of individual-specific issues that would have to be resolved before a single plaintiff could recover damages or restitution, regardless of the resolution of the supposedly predominant common issues. The brief proceeds to examine the special difficulties arising from class treatment of restitution claims under the Unfair Competition Law, Bus. & Prof. Code § 17200. The proposed brief also explores the likelihood that certification of a massive and disparate class like that approved in the trial court would result either in an unmanageable parade of mini-trials, or in the deprivation of the petitioners' right to defend themselves. Finally, the proposed brief suggests that the unusual characteristics of the class representatives undermine their typicality and adequacy and therefore weigh further against class certification.

This case presents another example of a massive, unmanageable class that threatens to subsume a host of what should be determinative individual issues into an unmanageable class-wide process. Because the leverage afforded by certification of a class this size often becomes the only relevant factor in the fate of litigation, the Chamber wishes to make its

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*State Farm Mutual Automobile Insurance Company*, No. 02-90047(E) (11th Cir.) (pending).

views known at the certification stage.

### CONCLUSION

The application for permission to file amicus curiae brief should be granted and the brief filed.

Dated: May 2, 2003

Respectfully submitted.

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## **INTEREST OF THE AMICUS CURIAE**

The Chamber of Commerce of the United States is the world's largest business federation. It represents an underlying membership of nearly three million businesses and organizations of every size and in every sector and geographic region of the country. The Chamber has thousands of members in California, and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts.

The Chamber routinely advocates the interests of the national business community in courts and before lawmakers across the Nation. As class action litigation has become increasingly common, the Chamber has filed amicus curiae briefs in a wide variety of state and federal appellate courts, including the Supreme Courts of California and the United States. Recent and significant California class certification cases in which the Chamber has participated include *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, and *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906. Because the economic leverage afforded by certification of a class this size often becomes the only relevant factor in the fate of litigation, the Chamber wishes to make its views known at the certification stage.

### **ISSUES ADDRESSED BY THE AMICUS CURIAE**

1. Whether common issues predominate among claims asserted by the purported class of all persons apprehended by automatic traffic enforcement systems in any of 15 jurisdictions.
2. Whether class treatment for those disparate plaintiffs affords substantial benefits to the litigants and court system.

3. Whether the purported class representatives — two of whom paid no fines, and the third of whom is employed by class counsel — satisfy the typicality and adequacy requirements.

### **INTRODUCTION**

Businesses in California and throughout the United States now confront actions brought on behalf of larger and larger classes, with less and less in common between the putative class members, on legal theories that are flimsier and flimsier — at least as applied to the great mass of putative class members. The class action device has jumped its tracks to become, in many cases, a mechanism to extract settlements that are unrelated to the merits of the allegations, but rather are based entirely on the size of the class certified.

This appears to be such a case. The underlying legal theories appear dubious at best, but certification of a class of hundreds of thousands here, as in other cases, can transform a lawsuit of trivial merit into an economic weapon of substantial force. Class certification does not become an instrument to aggregate thinly related complaints, the better to provide a large payoff without any reliable determination of liability — often, indeed, without any determination of liability at all.

The community of interest standards that a class must satisfy, along with the “ultimate[.]” question of overall superiority of class treatment, see *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104-1105, provide the courts with adequate tools to prevent abuses of the class action device. Those standards must be enforced rigorously, however, or businesses in California will face what ACS faces here: thousands, even hundreds of thousands, of lawsuits sharing a common theme but unsusceptible of the “common

proof” of liability required for legitimate class actions. *Id.* at 1109.

The dangers of improperly certified classes are not abstract. Courts supervising such unmanageable classes often are tempted to accede to procedural devices that simply gloss over the dispositive individual issues in the name of efficiency, an efficiency achieved at the expense of principled factfinding and application of law to fact. Of course, that is the point of many of these lawsuits, which are designed to aggregate a massive class under the heading of a common tort despite the widely varying, outcome-determinative circumstances of each individual’s claim.

A defendant subjected to certification of such a class must multiply a slight risk of legitimate liability by a huge number of aggregated plaintiffs, and then factor in the procedural shortcuts that are likely to give plaintiffs “the practical advantage of being able to litigate not on behalf of themselves but on behalf of a ‘perfect plaintiff’ pieced together for litigation.” *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 344. In those circumstances, corporate purse-strings predictably loosen, the putative “clients” get their coupons or other token recovery, and the lawyers who manufactured the lawsuit get their millions.

Because the leverage afforded by certification of a class this size often becomes the only relevant factor in the fate of litigation, it is especially important for this Court to intervene in a timely manner on writ review. The class here seeks to aggregate hundreds of thousands of motorists who ran red lights in any of 15 different jurisdictions — or entrusted their vehicles to someone who did — and were apprehended by an automatic traffic enforcement, or “red-light camera,”

system that the petitioners (collectively “ACS”) provided to any of 15 municipalities. The plaintiffs seek to recover fines and penalties paid for their admitted violations, or attorney fees expended in establishing that a driver besides the owner committed the infraction. The superior court perceived commonality in two issues: (1) whether the 15 different agreements for the 15 different jurisdictions resulted in some form of payment to ACS that was contingent on the number of persons apprehended by automated traffic enforcement systems, and (2) whether in carrying out those 15 different agreements at countless intersections in 15 different jurisdictions, ACS “operate[d]” the automated traffic enforcement systems in a way that supplanted the legally mandated role of the municipalities.

Merely describing those issues shows that they are scarcely common at all. But that is only the starting point. The *rest* of the issues that must be adjudicated before liability to a single plaintiff could be established are still more individualized, and rule out any reasoned conclusion that liability to any individual, much less “to the class as a whole[,] could be determined by facts common to all.” *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 463. For the great bulk of the class members to establish a *right* to money paid in fines for their admitted traffic violations, as would be necessary to establish the kind of wrongful deprivation of property that could support recovery under any of plaintiffs’ theories, would require a highly individualized showing indeed. Those who escaped fines would face only slightly less onerous a burden to show that the expenses of defending against an allegation of a documented violation should be borne by someone other than the vehicle owner. And those who hoped to establish their

innocence after the fact would have to make the most individualized cases of all — except, perhaps, for those plaintiffs seeking intangible damages for the trouble of mounting a defense.

That Plaintiffs seek injunctive relief does not support class certification of the individual claims for monetary relief. See *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 660-661. Class certification is irrelevant to the type of injunction sought here. Any citizen can bring an injunctive action without representing a class. Moreover, injunctions are available under the Unfair Competition Law (UCL), Bus. & Prof. Code § 17200 *et seq.*, on a “representative” basis for public benefit without certifying a class for pecuniary recovery.

Certifying the class here inevitably must produce one of two equally impermissible results. Either the superior court will realize that, after the two purportedly common issues were decided, “numerous and substantial” individual issues would have to be decided before any class member could obtain monetary relief, so that the proceedings will devolve into an endless series of mini-trials. *Lockheed Martin*, 29 Cal.4th at 1111. Or the superior court will accede to procedural shortcuts that allow liability to be imposed before it is properly determined, depriving ACS of its constitutional rights to cross-examination and a jury trial. Class treatment provides no substantial advantages because it does not provide any efficiencies that are both significant and constitutionally acceptable.

Finally, the putative class representatives appear to fail on grounds of both typicality and adequacy. Two of the three are among the minority who escaped liability for the infractions documented for

their vehicles. The third is an employee of class counsel, literally the agent of her lawyer rather than the other way around. Circumstances like these reinforce the artificiality of the class and the lawsuit for which the class was created, and weigh heavily against certification.

This Court should review and vacate this erroneous class certification now, while it makes a difference. The writ should be granted.

### **ARGUMENT**

The central issues on class certification here, as in most cases of broad interest to the business community, are proof of a community of interest and superiority of class treatment. Plaintiffs must prove that (1) common issues of fact and law predominate over individual ones, (2) the class representatives' claims are typical of the class, and the representatives and their counsel can adequately represent the class, and (3) class action treatment is a superior method of adjudication that would substantially benefit both the litigants and the courts. *Lockheed Martin*, 29 Cal.4th at 1104; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 913-14; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. The law is "settled" that plaintiffs bear the burden of *proving* commonality and the other prerequisites for class certification, *Washington Mutual*, 24 Cal.4th at 922-23, which means that equipoise weighs against them. Moreover, plaintiffs must bear their burden with "substantial evidence in the record," not mere allegation and theory. *Lockheed Martin*, 29 Cal.4th at 1108. From all appearances, plaintiffs cannot carry their burden here.

**I. THE MYRIAD INDIVIDUALIZED ISSUES NECESSARY TO PROVE LIABILITY OR GRANT RELIEF PREDOMINATE OVER THE HIGHLY ABSTRACT COMMON ISSUES IDENTIFIED BY THE TRIAL COURT.**

Although the trial court identified two arguably common issues, plaintiffs' "burden on moving for class certification \* \* \* is not merely to show that some common issues exist," but "that common issues *predominate*" over the questions affecting the individual members. *Lockheed Martin*, 29 Cal.4th at 1108; see *Washington Mutual*, 24 Cal.4th at 913. It is not enough to aggregate persons asserting the same general legal theory when each person can recover only by proving an individual claim. To the contrary, a class action "will not be permitted \* \* \* where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Brown v. Regents of Univ. of Calif.* (1984) 151 Cal.App.3d 982, 988-89.

The allegations here do not involve the type of uniform experience typically amenable to class treatment. Plaintiffs did not passively buy the same defective product, or sign the same deceptive form contract. Any claims that putative class members might have did not arise "in the course of the same incident" or "even at the same [location]." *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 813 (quoting *Clausing v. San Francisco Unified Sch. Dist.* (1990) 221 Cal.App.3d 1224, 1234). Regardless of the legal status of ACS's arrangement with each municipality, determining the facts necessary to support what amounts to a refund of a well-earned traffic fine, or of costs expended in avoiding a fine earned by another driver of one's vehicle, would require "extensive examination of the circumstances surrounding each" individual and incident. *City of San Jose*, 12

Cal.3d at 461. See also *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544. Not only individual facts, but individual applications of law to each set of facts, would have to precede any assessment of liability.

**A. The Purportedly Common Issues Are Not Common**

To begin with, the two purportedly common issues — contingent-fee-like contracts, and municipal-versus-private systems operation — are not in fact common to all members of the certified class. “[A]t a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality.” *Sprague v. General Motors Corp.* (6th Cir. 1998) 133 F.3d 388, 397 (en banc). But the class certified in this case lumps together persons who ran (or did not run) red lights in 15 different localities from Sacramento to San Diego, from Imperial Beach to Indian Wells, from Oxnard to Beverly Hills. Both determinations identified by the trial court — whether each public contract amounts to a contingent fee and whether in each jurisdiction the public body or ACS “operate[s]” enforcement systems within the meaning of Vehicle Code § 21455.5(a) (see Pet. Ex. 9, at 2) — require a jurisdiction-by-jurisdiction analysis, at a minimum requiring 15 classes rather than one.

**B. Liability To Any Individual Could Not Be Determined By Class-Wide Proof.**

Even if the two issues relied on by the superior court established some measure of commonality, the presence of *some* common issues is not enough (*Lockheed Martin*, 29 Cal.4th at 1108); rather, common issues must *predominate* so that “liability to the class as a whole c[an] be determined by facts common to all.” *City of San Jose*,

12 Cal.3d at 463. The briefest scrutiny of the claims asserted here makes clear that any purported “class judgment would fail to establish the basic issue of defendant’s liability to the purported class.” *Id.*

To begin with, the purported class encompasses persons whose infractions are of varying status. Some adjudications are pending; some are final. Some were convicted; some were acquitted; some pleaded no contest; some had charges withdrawn. Even among the class representatives, two had their cases dismissed, but one of those is on appeal. The third class representative did not contest her ticket but — after talking to her employer, counsel to the class — apparently had a change of heart.

The circumstances of each infraction (or alleged infraction) would have to be tried or retried for many reasons. Plaintiffs’ allegations of deception and unfairness largely depend on claims that ACS “falsif[ied] evidence,” Pet. Ex. 1, ¶ 35(e), against persons that ACS “knew could not have been guilty,” *id.* ¶ 35(a). See *id.* ¶ 39(f)-(g) (UCL claim). But a factfinder could determine that evidence of a particular infraction was falsified only if presented with proof that the alleged violator was innocent, a highly individual showing.

In addition, for each incident at each intersection, liability under Civil Code § 52.1(j) would require proof that a particular plaintiff “reasonably fear[ed]” violence as a result of the red-light camera systems’ operation. See *In re M.S.* (1995) 10 Cal.4th 698, 715. A plaintiff who “reasonably fears” violence must actually and subjectively fear it, and that fear also must be objectively reasonable under all the circumstances of each incident passing within the field of view of a camera. These issues, too, would need to be explored intersection by

intersection and plaintiff by plaintiff. These highly individual determinations would far outweigh the significance of the preliminary, comparatively common determinations identified by the trial court.

Moreover, three of the four certified causes of action — unjust enrichment, money had & received, and the UCL — are equitable. As a consequence, any grant of relief would require consideration of the “equities on both sides.” *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 180-181. For a proven violator to demonstrate that the equities favored refund by a third party of fines paid to a municipality would require a strong and highly individual equitable showing indeed.

These are not mere issues of proving damages, which itself presents a formidable hurdle. Although “the fact that each member of the class must prove” a “separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether class certification is proper,” *Lockheed Martin*, 29 Cal.4th at 1105 (internal quotation marks omitted), that factor can be significant, even determinative. The need for some individualized showing of damages “does not necessarily preclude the maintenance of a class action,” *Collins v. Rocha* (1972) 7 Cal.3d 232, 238 (emphasis added), but the individualized nature of damages is entirely relevant in determining whether common issues predominate or are overwhelmed by individual issues, e.g., *Osborne v. Subaru, Inc.* (1988) 198 Cal.App.3d 646, 657.

Here, however, the individualized issues do not go merely to the appropriate sum to pay an indisputably injured person, such as when a court must assess how many gallons of gas or cartons of orange juice a class member purchased. See *Linder v. Thrifty Oil Co.*

(2000) 23 Cal.4th 429; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644. Rather, the individualized issues here determine whether a class member is entitled to *any* recompense at all. Because the most fundamental determination of liability requires an individualized inquiry, class certification is inappropriate.

**C. The Unfair Competition Claims Cannot Be Certified For Additional Reasons.**

Plaintiffs' invocation of the UCL does not aid their effort to certify a class. At a minimum, their access to UCL remedies is governed by the equitable principles set forth in *Cortez*. Certainly the UCL does not relieve the putative class members in this case of proving their individual entitlement to monetary relief. After *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, and *Korea Supply v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, there can be no doubt that the only monetary remedy available under the UCL is restitution to direct victims of funds taken from them by the wrongdoer. Cf. Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services* (2002) 90 Cal.L.Rev. 959, 971-72.

Class certification is unavailable for the unfair competition claim for the additional reason that the unique procedural and remedial scheme of that statute is fundamentally incompatible with class action treatment. See *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 680-689 (Haerle, J., dissenting). This Court should find, contrary to the First District, that "the differences between class actions brought under CCP section 382 and representative UCL actions brought under [Business & Professions Code] section 17204 are so substantial that

the two are mutually inconsistent.” *Id.* at 680. For the reasons amply explained by Justice Haerle in his dissent in *Corbett*, UCL actions are intended to “benefit the *public*” through “deterrence and restitution,” while class actions are “basically *private* actions” designed “to provide a procedural mechanism whereby a large number of private plaintiffs may recover damages” if issues of individual proof do not predominate. *Id.* at 682. See *id.* at 682-689 (identifying ten additional “specific differences”).

\* \* \* \* \*

The purportedly common issues fragment upon even cursory analysis. By contrast, the many “questions respecting each individual class member’s right to recover that would remain following any class judgment” on those issues are “so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants.” *Lockheed Martin*, 29 Cal.4th at 1111. The writ should be issued.

**II. CERTIFYING THE UNMANAGEABLE CLASS IN THIS CASE DOES NOT PROVIDE A SUPERIOR MEANS OF ADJUDICATING THESE DISPUTES.**

Because class actions carry with them significant “dangers of injustice,” *City of San Jose*, 12 Cal.3d at 459, a class action should be certified only if class treatment “will provide *substantial* benefits both to the courts and the litigants.” *Washington Mutual*, 24 Cal.4th at 914 (emphasis added); see *Blue Chip Stamps*, 18 Cal.3d at 385. The question whether class action treatment is substantially better than other methods of adjudication incorporates an analysis of “manageability.” *Washington Mutual*, 24 Cal.4th at 922-923. That analysis, in turn, car-

ries with it an inquiry whether the action could be practicably maintained as a class action only at the cost of a litigant's constitutional rights.

As the California Supreme Court has recognized, "class actions may create injustice" by "preclud[ing] a defendant from defending each individual claim to its fullest," which may "deprive a litigant of a constitutional right." *City of San Jose*, 12 Cal.3d at 458. Determination of the individualized factual issues outlined above would depend largely on the testimony of each plaintiff and therefore on each plaintiff's credibility. That would require either patently unmanageable proceedings with thousands of plaintiffs brought in to testify, or some vaguely "representative" procedure that separated the factfinder from the actual, individual facts of each class member's case.

For example either summary testimony by purported experts, or trials in which the circumstances of one plaintiff might determine the fate of a thousand like her, despite their differing individual circumstances, might well allow Plaintiffs to escape the deficiencies in each individual's proof of liability by forcing ACS "to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard*, F.3d at 345. Both "[r]eason and the constitutional mandates of due process compel" the Court "to deny sanction to such a proceeding," and therefore to class certification as well. *City of San Jose*, 12 Cal.3d at 462.

The California and federal constitutions alike regard "undue infringement on the right of cross-examination" as "a denial of due process." *Beverly Hills Multispecialty Group, Inc. v. WCAB* (1994) 26

Cal.App.4th 789, 805. Indeed, “[i]n almost every setting where important questions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly* (1970) 397 U.S. 254, 269, 90 S.Ct. 1011. A trial of the claims of thousands of “class members without discrete focus can be no more than the testimony of experts regarding their claims, as a group.” *In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706, 711. ACS cannot constitutionally face possible liability without the opportunity to probe the underlying events. *Id.* at 711-12. See *Wal-Mart Stores, Inc. v. Lopez* (Tex. App.—Houston [14th Dist.] 2002) 93 S.W.3d 548, 560-561; *Arch v. American Tobacco Co.* (E.D. Pa. 1997) 175 F.R.D. 469, 489 n.21.

Moreover, class procedures are not necessary here. The two, abstract, common issues do not require resolution in a class forum, but could easily be resolved, without invoking an unwieldy class, through the simple expedient of a declaratory judgment litigated to finality, at which point (if adverse to ACS) it would have preclusive effect for the benefit of any plaintiff with a genuine grievance. Then each case could be tried with full and appropriate process.

“[I]t is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen.” *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749. Class treatment could not add meaningful efficiency to the resolution of these disputes without depriving ACS of its right to defend itself. Thus, class treatment would either be unmanageable or unconstitutional, rendering class certification unavailable here.

**III. CLASS TREATMENT SHOULD BE DENIED WHERE THE ATYPICALITY AND INADEQUACY OF THE CLASS REPRESENTATIVES SUGGEST THAT THE CLASS IS A SHAM**

The circumstances of this case reflect another frequent shortcoming of the contemporary, lawyer-driven class action. The class representatives are so facially inadequate to represent the class that they purport to champion that their selection raises questions about the legitimacy of the class itself. A class was certified purportedly to consist of “all persons in the State of California who paid fines, penalties or attorneys’ fees” after being apprehended by an ACS automated enforcement system. Pet. Ex. 9, at 1. Yet the three representatives that counsel recruited for the task are not conceivably adequate to represent that class. All were apprehended in San Diego, only one of the 15 jurisdictions at issue. The only one of the three to pay a fine or penalty is an employee of one of the law firms that manufactured this action (Pet. 9-10); a client who owes her livelihood to her lawyer scarcely has the type of independent judgment usually valued in a class representative. The other two purported class representatives paid no fines or penalties at all; the corporate class representative apparently does not exist in the eyes of the law.

Regrettably it is no longer rare that many or all of the class representatives selected by counsel have not even suffered the principal wrong for which the class claims a right to recover. That one class representative lacks legal existence highlights the artificiality of the class. That the one individual who actually paid the fines that the class seeks to recover is entirely within the economic control of class counsel confirms that the class is a sham constructed to make a weak lawsuit appear stronger by aggregating weak claims. A writ should

issue to require decertification of this factitious “class.”

### CONCLUSION

A writ should issue directing the superior court to vacate the order certifying a class.

Dated: May 2, 2003

Respectfully submitted.

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**CERTIFICATE OF COMPLIANCE  
WITH CALIFORNIA RULE OF COURT 14(C)**

Pursuant to California Rule of Court 14(c), I certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 4,107 words.

Dated: May 2, 2003

MAYER, BROWN, ROWE & MAW

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Donald M. Falk

**CERTIFICATE OF SERVICE**

I, MIMI SAGMIT, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 555 College Avenue, Palo Alto, CA 94306. On May 2, 2003, I served the within documents:

**APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS**

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.
- by placing the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an UPS agent for delivery.
- by causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.

**VIA REGULAR MAIL**

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I am readily familiar with the firm's practice of collection and processing correspondence for personal service and mailing. Under the firm's practice with regard to mailing, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 2, 2003, at Palo Alto, California.

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MIMI SAGMIT