05/10/21
MD

20-1757

Case Number

IN THE UNITED STATES SUPREME COURT

LECIA L. SHORTER

Objector, Class Member and Petitioner

v.

MARY AMADOR, ET AL,

Plaintiffs Individually and as Class Representatives and Respondents

v.

LEROY BACA, COUNTY OF LOS ANGELES AND LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants and Respondents

On Petition for Writ of Certiorari from the Ninth Circuit Court of Appeals and from the United States District Court for the Central District of California, Case No. 2:10-CV-01649-SVW

District Court Judge Stephen V. Wilson

PETITION FOR WRIT OF CERTIORARI

Lecia L. Shorter
287 S. Robertson Blvd., No. 291
Beverly Hills, CA 90211
(310) 869-5838

Petitioner in Pro Per

QUESTIONS PRESENTED

1) What are the collateral attack options of an unnamed class member to challenge the classifications and due process violations in a $53 million civil rights class action settlement involving female inmates and the County of Los Angeles regarding unconstitutional body cavity and strip searches?

2) Whether an unnamed class member, after opting out of a Rule 23(b)(2) class action settlement, has standing to 1) seek collateral review by way of appeal of a class action settlement for *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) due process violations; or, 2) intervene for purposes of appeal on the grounds of due process violations.

3) Whether the District Court *Monelle* liability summary judgment for monetary damages according to a points-based distribution formula with unknown variables for individual class member pay-outs and the inability to challenge the appropriateness of the calculations is sufficient to satisfy the Rule 23 due process requirement of "adequate representation." In other words, did the absent class members have sufficient information about the damages calculations to make an informed decision about whether to be bound by the judgment, or opt out?

4) Whether the class certifications of 94,000 female inmates pursuant to Rule 23(b)(2) and Rule 23(c)(4) adequately protected the interests of the absent class members or were additional sub-classes required for a more appropriate manner of ensuring an equitable distribution of the $53 million settlement fund

5) Whether the arbitrary and capricious denial of an IFP motion to appeal the order approving the class action settlement or intervene, amounts to a denial of access to justice and the equal protection of the laws of the United States in violation of the Fifth Amendment right to Due Process.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASE

Shorter v. Baca, et al. (9th Cir. 2018) 895 F.3d 1176

TABLE OF CONTENTS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Dispositive Orders of the Ninth Circuit Court of Appeals and the District Court for the Central District of California class action orders and judgment below.

I.
OPINIONS BELOW

1. The Dispositive Orders of the United States Ninth Circuit Court of Appeals dated February 12, 2021 appear at Appendix A and B to the petition and are unpublished and reported in the docket of the Ninth Circuit Electronic Court Filings for Case Nos. 20-55965 and 20-562878 at Nos. 496 and 497.
2. The Ninth Circuit Mandates dated March 8, 2021 appear at Appendix C and D to the petition and are unpublished and reported in the docket of the Ninth Circuit Electronic Court filings for Case Nos. 20-55965 and 20-56278 at Nos. 499 and 500.
3. The Ninth Circuit Clerk Order dated December 16, 2020 for Case No. 20-56278 appears at Appendix E to the petition and is unpublished for Case No. 20-56278 at Dkt Entry No. 2.
4. United States District Court for the Central District of California Order Denying Motion to Intervene dated October 29, 2020 appears at Appendix F to the petition and is unpublished and reported in the docket of the Ninth Circuit Electronic Court filings for Case No. 2:10-cv-01649 at No. 486.
5. United States District Court for the Central District of California Order Denying IFP Motion dated September 21, 2020 appears at Appendix G to the petition and is unpublished and reported in the docket of the CACD Electronic Court filings for Case No. 2:10-cv-01649 at No. 473.

6. United States District Court for the Central District of California Order Granting Motion for Final Approval of Class Action Settlement and Granting in Part Motion for Attorney's Fees dated August 11, 2020 appears at Appendix H to the petition and is unpublished and reported in the docket of the CACD Electronic Court filings for Case No. 2:10-cv-01649 at No. 463.
7. United States District Court Order Granting Plaintiff's Motion for Summary Judgment and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment dated June 7, 2017 appears at Appendix I to the petition and is unpublished and reported at 2017 WL 9472901 for Case No. 2:10-cv-01649.

II.

INDEX TO APPENDICES

III.

JURISDICTION

The Ninth Circuit Court of Appeals issued two (2) dispositive orders dismissing Petitioner's appeal from the District Court Orders denying a motion to intervene and a motion to proceed *informa pauperis* for lack of standing on February 12, 2021. No timely motion timely petition for rehearing was filed. Mandates were issued on March 8, 2021. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

IV.

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

FEDERAL RULES

V.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment's Due Process Clause requires the United States government to practice equal protection of the laws, thereby prohibiting arbitrary, capricious, and unjustifiable rulings that are discriminatory and designed to impede access to justice. According to Chief Justice Taft, the Due Process and Equal Protection Clauses are associated and that they overlap, such that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . Due process tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." *Truax v. Corrigan* (1921) 257 U.S. 312, 331. Absent class members in a Rule 23(b)(3) class action have property interests in the monetary damages that require the invocation of principles of due process and equal protection.

Although the Fifth Amendment does not contain an equal protection clause as does the Fourteenth Amendment, the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually

exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. *Bolling v. Sharpe* (1954) 347 U.S. 497 at 499. To live up to its ideals of justice, federal sovereigns must govern impartially.

Rule 23 is the due process vehicle to which class actions are subject. The Ninth Circuit has even acknowledged that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided . . ." *Besinga v. U.S.*, 923 F.2d 133, 137 n.6 (9th Cir. 1989). What the Ninth Circuit has not decided in the context of class actions is when are notice and adequate representation sufficient to satisfy due process concerns in Rule 23(b)(3) class certifications where individual monetary damages are at issue. This is separate and distinct from how to determine when a Rule 23(b)(2) along with 23(c)(4) sub-class certifications to provide adequate representation to absent class members when the damages are vast and varied. Once those issues are clarified, the pressing question which requires clarification in all circuits is whether an absent class member can collaterally attack a class action settlement via an appeal, an independent action or intervention on the grounds of inadequate notice and inadequate representation resulting in due process violations.

VI.

STATEMENT OF THE CASE

On March 5, 2010, two female former inmates who were imprisoned in the Century Regional Detention Facility ("CRDF"), a Los Angeles County Sheriff's Department ("LASD") facility, filed a class action lawsuit in the United States District Court for the Central District of California. Represented by a civil rights law firm, the plaintiffs sued the LASD under 42 U.S.C. §1983. *Amador v. Baca* U.S.D.C. Case No. 2:10-cv-01649). The plaintiffs alleged violations of their Fourth, Eight, and Fourteenth Amendment rights, as well as their equivalents under the California Constitution. Specifically, plaintiffs claimed that CRDF female inmates were routinely subjected to degrading strip and body cavity searches at the CRDF without probable cause or individualized suspicion.

While in the custody of LASD, female inmates were required to publicly identify themselves and remove their tampons or pads in view of other detainees, and before completing the visual-body cavity inspection, which often caused them bleed on themselves or the ground. . . LASD's practice of searching women outside in cold weather conditions. Because the inmates were wearing no clothing, shoes or socks, the air temperature would often have felt as though it were in the 40's or 50's. . . practices used during the first several years of the class, including the requirements that women: (1) face each (other) sic undressed, with bare breasts

and underwear pulled to their knees, while performing various steps in the search process (including inspection of the area under their breasts and stomachs and inspection of their mouths); and (2) that two parallel lines simultaneously complete the visual body cavity inspection by bending over and looking through their legs while deputies inspect their rectum and vagina, one-by-one, during which time they could not avoid seeing similarly positioned women on the opposite wall." There would often be name calling, humiliating body references and other inappropriate behavior by LASD personnel during the search process. [2017 WL 9472901].

According to Class Counsel, "over the class period (2008-2015), more than 94,000 class members were subjected to extremely invasive visual body cavity inspections in large group settings with virtually no privacy protections. See *Amador, et al. v. Baca, et al.,* No. CV 10-01649-SVW-JEM, 2017 WL 9472901 (C.D. Cal. June 7, 2017) (hereinafter "MSJ Order") (granting Plaintiffs' motion for summary judgment), Appendix I; *Amador, et al. v. Baca*, et al., No. 10-CV-1649-SVW, 2016 WL 8904537 (C.D. Cal. Nov. 18, 2016) (hereinafter "Class Cert. Order") (finally certifying several classes and subclasses)." 25,628 of the 40,000 received claims were approved at the time of the final order.

On October 22, 2010, the plaintiffs filed a motion to certify class. On February 28, 2011, the LASD moved to dismiss the case, claiming that the

plaintiffs had failed to exhaust their claims as required by the Prison Litigation Reform Act ("PLRA"). The complaint was amended on January 28, 2011, to add five additional former and current CRDF inmates as named plaintiffs. However, on December 27, 2011, District Judge Stephen V. Wilson moved the case to the inactive calendar, pending the U.S. Supreme Court's decision in *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 U.S. 1510 (2012), another case involving strip searches, which Judge Wilson believed could affect the viability of relevant precedent.

On April 2, 2012, the Supreme Court issued a ruling in *Florence* that if a prisoner was about to be housed in a jail's general population, no individualized suspicion was required for strip searches, no matter how minor the arrest offense. Following this decision, on December 19, 2012, Judge Wilson issued an order moving the case back to the active calendar. In addition, Judge Wilson denied the defendant's motion to dismiss, finding that the LASD did not demonstrate sufficient grievance procedures as required by the PLRA. Judge Wilson also determined that the court would rule on the plaintiffs' motion to certify class after the defendants filed their motion for summary judgment. 2012 WL 12878313, C.D. Cal. However, on January 9, 2013, after the plaintiffs requested the court reconsider its decision to defer ruling on the pending motion to certify class, Judge

Wilson issued a new order allowing the plaintiffs to re-file their motion to certify class given the evidence gathered during discovery.

On June 10, 2013, the plaintiffs re-filed their motion to certify class. On March 12, 2014, Judge Wilson granted plaintiffs request for class certification under Fed. R. Civ. P. 23(b)(2) denying their request for class certification under Rule 23(b)(3) (299 F.R.D. 618). The court also allowed plaintiffs to file a renewed motion to certify a damages class on the issue on liability pursuant to Rule 23(c)(4).

On May 19, 2014, the plaintiffs filed a renewed motion to certify the class, requesting that the court certify a Rule 23(c)(4) liability class. In addition, the plaintiffs requested that the court reconsider its denial of the plaintiffs' request for Rule 23(b)(3) class certification. As an alternative to this Rule 23(b)(3) reconsideration, the plaintiffs requested that the court certify subclasses under Rule 23(c)(4) on the basis of differing conditions of abuse, privacy, sanitation, and weather during the alleged illegal strip searches. On December 18, 2014, Judge Wilson issued an order granting a Rule 23(c)(4) issue class for the purpose of liability, as well as subclass certification. However, the court denied the plaintiffs' request for Rule 23(b)(3) class certification and all other subclass certifications. 2014 WL 10044904.

On November 18, 2016 (2016 WL 8904537, C.D. Cal.), the court certified an additional two classes as (c)(4) issue classes, despite not certifying the (c)(4) classes in a July 26, 2016 order (2016 WL 6804910, C.D.Cal.). These new classes consisted of a class consisting of women who experienced simultaneous searches and a class consisting of women who experienced one-line-at-a-time searches. 2016 WL 8904537, C.D. Cal.

The plaintiffs filed a third amended complaint on December 2, 2016, and a fourth amended complaint on December 19.

On June 7, 2017, the court issued an order regarding summary judgment motions from both parties. The court granted the defendants' motion, dismissing claims of liability against individual defendants acting as individuals due to qualified immunity. The court also granted the plaintiff's motion, finding that because the defendants had not provided evidence establishing why they conducted searches in the humiliating and undignified manner that they did when less intrusive and readily available alternatives existed, the plaintiffs' Fourth Amendment rights were violated. 2017 WL 9472901, C.D. Cal.

The parties then engaged in mediation. The Class Representatives submitted a preliminary settlement agreement for $53 million on July 16, 2019. At that time, Class Counsel was aware of Petitioner's independent action, *Shorter v. Baca, et al.*

2:12-cv-07337 and 695 F.3d 1176 (9th Cir. 2018), against nearly identical defendants claiming nearly identical Constitutional violations particularly as to the body cavity searches. Petitioner was informed by Class Counsel that the Ninth Circuit decision in *Shorter v. Baca* served as the impetus for the County's willingness to settle the class action. Notwithstanding, neither Class Counsel or the Class Administrator 1) notified Petitioner of the class action lawsuit, 2) never related the cases per Local Rule 83-1.3.1-1.3.4, and 3) never notified Petitioner of the class certification or the class settlement, which was finalized on July 15, 2019, the same day the District Court in *Shorter v. Baca* issued a tentative order denying her Motion for Judgment as a Matter of Law or in the alternative, Motion for a New Trial as to the second trial following the Ninth Circuit decision. Petitioner learned of the class action by media pronouncements days after the settlement agreement was reached.

Petitioner independently learned of the class action and interjected objections to the preliminary settlement in March of 2019. Judge Wilson denied approval of the preliminary settlement in a September 23, 2019 hearing. His objection to the settlement centered on the creation of a $3 million fund to finance contracts with Los Angeles-based nonprofit organizations and for-profit groups to "develop a strengthened model of gender-responsive policy and operational practice at all LASD facilities that house female inmates." He said that since there

was a potential for many claimants to come forward demanding compensation in this case, such a fund should not be established unless there is money left over once all members of the class seeking compensation come forward.

Petitioner asked the District Court to appoint independent counsel to clarify ambiguities related to the settlement and apprise Class Members of their legal rights and an auditor to oversee the disbursement process. Dkt. No. 429. Specifically, Petitioner objected to the inadequate representation of Class Counsel and the Class Representatives as well as the settlement itself. Petitioner argued that Class Counsel provided no meaningful vehicle for class members to object to the preliminary settlement in a manner that is procedurally proper. Petitioner also informed the Court that the notice on the Administrator's website was Constitutionally deficient because it did meet the requirement of *Phillips Petroleum v. Shutts* (1985) 472 U.S. 797 because neither the text, email or internet notices provided Class Members an opt out form to execute and return to the court. Petitioner also referenced the confusing nature of the internet notice in that Class Members were told to notify the Administrator of their decision to opt out while simultaneously telling Class Members they were to communicate with the Court. Thereafter, Class Counsel unilaterally requested that all communications to the court be intercepted and given to him despite the Settlement Notice instructing Class Members to independently communicate with the Court their objections and

their desire to opt out. ECF Dkt. No. 429, p. 6. Class members responded with handwritten letters to the court which were either diverted to class counsel with no accountability or held by Judge Wilson. ECF Dkt. No. 450. Class Members were provided no lawful means to opt out.

Substantively, Petitioner claimed due process violations based on the inadequate representation of Class Counsel and the Class Representatives. First, based on the representation of Class Counsel the average payout for individual class members will range from $200 to $1500 compared to the near $13.8 million in attorney fees awarded to Class Counsel. Second, Class Members, Petitioner included, were not provided sufficient information to make an informed decision about accepting the settlement or proceeding with the more arduous choice of litigating their individual claims particularly as to the point calculation and distribution formula which determine the individual pay outs. At the time of the final order approving the settlement, the claims process was closed and there was no reason Class Members could not be informed of the amount they are expected to receive so they could make an informed decision on whether that amount is sufficient to release and waive all claims against Defendants and be bound by the judgment.

After the claims cut-off date passed, neither Class Counsel nor the Claims Administrator disclosed the final formula calculations or the amount of

compensation each Class Member will receive, and Class Members cannot challenge the amount of compensation. The Settlement Administrator informed inquiring Class Members that "[f]or the purposes of the Settlement, the number of points will be based exclusively on the records of the Los Angeles Sheriff's Department. This means that if the Court grants Final Approval to the Settlement, benefits calculations will be based off of the searches identified through the County's records and cannot be challenged. The calculation of points determining your award will not be provided with your payment."

According to Class Counsel, "it would significantly dilute the class fund, and delay class payment, to require a (sic) second round of notice advising class members of the precise amount of their settlement payment (which would still not be known at that point due to yet undetermined administrative and attorney's fee costs)." The District Court agreed and rejected Petitioner's request for independent counsel and an auditor to oversee the distribution of payments. [Final Order, Appendix H].

Third, some Class Members and individuals who did not qualify to be in the class expressed concerns that Constitutional violations beyond the scope of the settlement were not addressed. For instance, if an individual was arrested during the relevant time period, and endured the bus bay body cavity searches, they may also have experienced constitutional violations e.g. rape, physical abuse,

psychological torment, inadequate medical care as well as meal, recreation and sanitation deprivations. There is no meaningful explanation as to why the District Court did not allow additional Rule 23(c)(4) sub-classes for those type of Constitutional violations during the relevant period.

It is well established that the L.A. Sheriffs have consistently abused their authority with an ongoing pattern of violence, sexual assault, and abuses of power against women, amounting to gross and inhumane civil rights abuses. *See Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176. Their actions over the years have been officially renounced by the Department of Justice, the ACLU, the Citizens Commission Against Jail Violence and most recently by the Governor of the State of California in his enactment of AB 1185. The Ninth Circuit should have taken the opportunity to review whether the settlement adequately compensated the violations endured by women who had the unfortunate experience of being in the custody of LASD. This is a question of what constitutes adequate representation by the Class Representatives and Class Counsel according to constitutional due process mandates. A due process analysis that is far overdue.

The plaintiffs submitted an amended settlement agreement for the same amount but appearing to remove the Cy Pres fund. On October 31, 2019. Judge Wilson granted preliminary approval to the settlement on November 7, and set a fairness hearing for July 20, 2020, once class members could reasonably be

notified. Due to COVID restrictions, class members were not allowed to attend the fairness hearing. It was held telephonically and only class counsel and counsel for defendants were allowed to appear.

Finally, Petitioner asked the District Court to consider the feasibility of going to trial particularly where the only issue would be general, special, and punitive damages given that *Monelle* liability was established via summary judgment. Class Counsel had already conceded the difficulties in suing the County of Los Angeles: "the practical reality for both this court and most class members is that there will be substantial barriers and delays to individualized trials." ECF Dkt No. 363, p. 6, lines 4-9. Subsequently, in a self-serving juxtaposition, Class Counsel contended, "[a]lthough a class has been certified here, like the situation where no class has been certified, the settlement here has no "preclusive effect" on Ms. Shorter, and she "retain[s] the ability to file [her] own suit[], and hence, [her] interests are unlikely to even be 'practically' impaired." [ECF Dkt No. 480, p. 9, lines 24-27].[1]

[1] Petitioner was of the opinion that she should not have to file an independent lawsuit considering the summary judgment decision in this matter and requested clarification from the District Court in that regard. In her opinion, it seemed more appropriate for the Court to hold a status conference for all persons who opted out of the settlement, order Defendants to provide any and all necessary information pertaining to their individual claims and set the matter for trial on the issue of general, special and punitive damages. Petitioner has since filed an independent lawsuit and related *Amador v. Baca*. Judge Stephen Wilson denied transfer stating ""Plaintiff's complaint in 2:21-cv-03347 primarily describes a single 2013 arrest that was not at issue in *Solis v. Baca* (2:06-cv-01135) or *Amador v. Baca* (2:10-cv-01649). Plaintiff opted out of the settlement in *Amador v. Baca* (Dkt. 465), which concerned strip searches at CRDF. While Plaintiff alleges she was also subject to strip searches, the new lawsuit is unlikely to raise similar factual or legal questions. Transfer would thus not promote judicial economy." [Dkt No. 6].

On August 17, 2020, Judge Stephen Wilson of the United States District Court for the Central District of California entered a final order approving a $53 million class action settlement between the County of Los Angeles and 9 Class Representatives on behalf of over 94,000 female inmates.

The revised Settlement Agreement requires LASD to pay a total of $53 million dollars into a settlement fund over a period of three years. ECF Dkt. 395-11 ("the Settlement Agreement"). The distribution of funds provided in the Settlement Agreement includes:

□ Incentive awards to nine named plaintiffs of $10,000 each.

□ Third-party class settlement administration costs by the chosen administrator, JND Legal Administration ("JND"), which are currently $672,185.96 based on incurred and estimated fees associated with administration of settlement claims. See ECF Dkt. 451 at 7-8.

□ A provision giving Class Counsel the right to apply for attorney's fees of up to one-third of the Class Fund as well as litigation costs, with final approval over any award of attorney's fees at the Court's discretion.

□ The remainder of the Class Fund to be distributed to class members under a points-based allocation formula

The Class includes a total of 94,857 members, based on the contact information available to the parties and JND from the County's records. 25,548 claims were approved. Claims made by class members are subject to a points-based distribution formula. "The distribution formula developed in the course of mediation by the parties is premised on the changing conditions and level of privacy across the multiyear class period. It allocates increasing point totals for searches endured under worse conditions during earlier periods in the class. Class members receive proportionate recoveries." [Final Order, p. 2, Appendix H]

Even though the District Court disapproved the Cy Pres Fund in the preliminary settlement agreement and the court rejected an assigned auditor, the final Settlement Agreement still allows uncashed funds remaining in the Class Fund to be allocated to nebulous unidentified organizations/programs as opposed to being distributed to the Class Members:

> Any SCM funds not cashed within one year of a check's initial mailing shall be voided, and those funds ("Uncashed Funds") shall be (sic) held for the next round of payments. Where an SCM's check was not cashed within that one-year period, that SCM shall be eliminated as a qualifying Class Member, and that SCM's past and future funds shall become part of the fund for future distribution to Class Members, and allocated to the remaining SCM's during the next

round of payments according to the Class Damages Allocation Formula contained in Section IV. Uncashed funds remaining in the Class Fund one year after the third round of payments shall be given as a donation to the Cy Pres Fund (see ¶ 30), to be allocated equally among the qualifying organizations/programs. [Settlement Agreement, ¶ 54, ¶55].

Because of the inadequate representation of Class Counsel and the Class Representatives, Petitioner chose to opt out and informed the court that she wanted to retain her status as a class member to independently avail herself of the *Monelle* liability summary judgment determination for monetary damages. The District Court therefore deemed Petitioner no longer a class member and determined that she did not have standing to object. The District Court then ruled that he would consider Petitioner's objections *amicus* objections.

All objections by Petitioner and other Class Members were discounted by the District Court. In fact, the District Court stated he did not find Petitioner's objections and requests for full disclosure of individual payout information, independent counsel, and the appointment of an auditor to be compelling. he District Court found that 1) Class Members adequately represented the class; 2) the settlement was negotiated at arm's length; 3) the relief provided for the class is adequate; 4) class members are treated equitably; and 5) settlement approval is

favored because the County is a party to this settlement and supports the proposed settlement. And the reaction of the class supports approval of the settlement—more than 40,000 claims have been submitted, approximately 30,000 will be approved given JND's projections, and only twelve individuals (setting aside standing issues that may further reduce that number) have expressed objections to the settlement agreement. [Final Order, p. 8, Appendix H]. The District Court awarded Class Counsel $13.6 million in attorney fees and costs.

On September 10, 2020, Petitioner filed a notice of appeal of the judgment to the Ninth Circuit. She also filed a motion to proceed *informa pauperis*. On September 21, 2020, acknowledge there exists no Ninth Circuit precedent on the issue, the District Court denied the IFP motion on the grounds that Petitioner lack standing to appeal because she opted out of the settlement. See Order Denying IFP Motion, Appendix G.

On October 1, 2010, Class Counsel filed a motion to dismiss the appeal before the Ninth Circuit contending Petitioner lacked standing to appeal the judgment because she chose to opt out. Class Counsel and the District concede there is no Ninth Circuit precedent or U.S. Supreme Court precedent specifically addressing this issue. The District Court cited these cases (as well as *In re First Capital Holdings Corp. Fin. Prods. Secs. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994)) in concluding that, "[a]lthough the Ninth Circuit has no case standing for this precise

proposition, that Shorter lacks standing to appeal is an obvious and unavoidable application of its [standing] precedents." IFP Order (Ex. 2) at 2, Appendix G.

Petitioner relied upon the Ninth Circuit decision in *Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249 for the premise that she has Article III standing because of the *Monelle* liability summary judgment determination and because she "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." A class member should not be forced to choose between opting out and filing an independent lawsuit where Class Counsel and Class Representatives have not adequately represented the interests of all class members.

On October 29, 2020, the District Court denied Petitioner's Motion to Intervene. The District Court asserted that Petitioner did not have Article III standing to intervene as of right or permissively. [See Order, Appendix F].

On February 12, 2021, the Ninth Circuit summarily granted Class Counsel's motion to dismiss for lack of jurisdiction based on the standing argument. [See, Dispositive Order, Appendix A.]

Also on February 12, 2021, the Ninth Circuit summarily dismissed Petitioner's appeal of the District Court Order Denying Motion to Intervene on the grounds that the appeal is frivolous. [See Dispositive Order, Appendix B].

VII.

REASONS FOR GRANTING THE PETITION

A. THE L.A. COUNTY $53 MILLION CLASS ACTION SETTLEMENT PROVIDES THIS COURT AN OPPORTUNITY TO SETTLE NUMEROUS UNRESOLVED DUE PROCESS CONCERNS REGARDING THE MANAGEMENT AND ADMINISTRATION OF RULE 23(b)(2) AND 23(c)(4) CLASS ACTIONS PARTICULARLY AS TO NOTICE, CLASSIFICATIONS, ADEQUATE REPRESENTATION, CLASS MEMBER RIGHTS, CY PRES FUNDS, AND COLLATERAL ATTACKS

The due process requirements of *Phillips Petroleum v. Shutts (1985) 472 U.S. 797* are not optional, particularly as to notice and adequate representation. The due process requirements were not satisfied in this case. Notice allows class members to monitor the litigation and intervene if necessary. It is therefore a denial of access to justice to prevent an absent class member who was not allowed to monitor the litigation or intervene, the ability to appeal the final order of approval of a $53 million class action settlement or intervene. Article III standing should not be lost where there has not been adequate representation and class members are

forced to choose between being bound by an unjust judgment and independently litigating their individual claims.

The Advisory Committee's Note to Rule 23 makes clear that notice pursuant to subdivision (c)(2) is "not merely discretionary." The Note further explains that this "mandatory notice . . . is designed to fulfill requirements of due procedure to which the class action procedure is of course subject." 28 U.S.C.A. Rules 22 to 23.2, p. 57 (citing *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940)); *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In *Eisen v. Carlisle Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974), the Supreme Court, while sidestepping the question of whether notice is required to comport with due process, made clear that "Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort." The Court also observed that this notice requirement "was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit." *Id.* at 176, 94 S.Ct. at 2152.

In this instance, the District Court made no findings as to the adequacy of the notice itself and whether the class notice met Constitutional due process mandates set forth in Rule 23(c)(2). Petitioner informed the District Court that she never received notice of the class action from class counsel, the class administrator or the

class representatives. This, after class counsel acknowledged that the 2018 Ninth Circuit decision in *Shorter v. Baca, et al.* on the unconstitutionality of humiliating and intrusive body cavity searches without penal justification, and the existence of less intrusive means e.g., body scanners or squat and cough was pivotal in the decision of Los Angeles County to settle the class action. Class Counsel never 1) notified Petitioner of the class action lawsuit, 2) never related the cases per Local Rule 83-1.3.1-1.3.4, and 3) never notified Petitioner of the class certification or the class settlement which was finalized on July 15, 2019, the same day the District Court in *Shorter v. Baca* issued a tentative order denying her Motion for Judgment as a Matter of Law or in the alternative, Motion for a New Trial. This was no coincidence. Petitioner learned of the class action independent of class counsel or the class representatives via media announcement days after the settlement agreement was reached. Petitioner never received any communication whatsoever from the Class Administrator whether by text, email or first-class mail despite this Court's finding that "[o]n January 6, 2020, JND began to send notices alerting class members to the settlement. The Administrator sent notices via text message to 58,272 mobile phone number representing 39,567 class members. ECF Dkt. 451 at 2. The Administrator also sent 54,903 emails to 33,229 class members. Id. Finally, JND sent notices via mail to 71,676 class members." Final Order, p. 3, Appendix H. Petitioner was known to Class Counsel for years given *Shorter v.*

Baca, et al. yet she never received notice of the class action so that she could participate in the litigation or at least monitor the class action. This begs the question of how many other absent class members were intentionally or negligently omitted from the notice process. The District Court refused Petitioner's request for independent counsel and an auditor on the grounds that it would delay payment and impose an unnecessary expense. Final Order, p. 11, Appendix H.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court identified three basic due process elements for use of the class device: 1) The class member "must receive notice plus an opportunity to be heard and participate in the litigation"; 2) the class member must receive "an opportunity to remove himself from the class"; and 3) the named plaintiff must "at all times adequately represent the interests of the absent class members."

In this instance, all three due process elements were collaterally attacked by an absent class member who was forced to opt out of the class settlement because she did not believe the class representatives or class counsel adequately represented her interests or those of other absent class members. After reviewing the proposed settlement, Petitioner objected to the terms, requested independent counsel for uninformed class members, requested to know the final monetary calculations and availed herself of the opt out provisions to protect her interests

when the court refused to adequately address her concerns. She never received an "opt out" form the class administrator or class counsel which begs the question of how many other class members never received notice or an "opt out" form.

Communications between absent class members, class counsel and the court were handled in an ominous manner, leaving room for speculation about whether the voices of the absent class members were heard, muted, or even considered by the trial court. As it stands, there is no way to determine the number of opt outs or the extent of the objections.

The final issue is whether the class members were "adequately" represented by class counsel and the class representatives given 1) the divergent interests of the various class members and their experiences while in the custody of the Los Angeles Sheriff's Department, 2) the formula utilized to provide unspecified money damages with little to no information of individual calculations combined with the inability to challenge the formula constitutes "adequate representation" to satisfy Constitutional due process requirements, and, 3) a potential conflict of interest with class counsel considering the enormous amount of attorneys versus monetary payments to class. In its final order, the District Court stated "The Court also expressly declined to certify a damages class in its prior Orders, and absent a settlement would have required individualized damages determination in order for class members to take these claims to trial." Final Order, p. 11, Appendix H. At a

minimum, after the close of the claims period, class members should have been informed of their individual monetary recovery so they could make an informed decision about whether to opt out or pursue their respective individual claims. Was this adequate representation or another form of a due process violation?

Perhaps this Court should clarify whether the failure to certify a damages class was appropriate as well as whether it is consistent with a Rule 23(b)(2) classifications and Rule 23(c)(4) issue classifications. The Class Representatives initially sought monetary remedies and equitable relief. Defendants cure the wrong with the installation of body scanners. The classification should be according to the stringent due process requirements of Rule 23(b)(3) as well as a certification of a damages class.

When Rule 23(c)(4) classifications are utilized, the classifications should be according to all of the significant issues faced by the affected class members. In this instance, it was differing conditions of abuse, privacy, sanitation, and weather during the alleged illegal strip searches. This begs the question of whether the interests of the class members were adequately protected by the District Court.

The ultimate consideration is whether the District Court adequately considered the interests of all class members. It is no secret that class actions are basically a tool for class counsel to become wealthy at the expense of the injured.

There is little to no accountable for the class administrator and this case is no different particularly where the District Court initially declined the ominous "Cy Pres" fund and then class counsel and defense counsel created a "Cy Pres" fund for uncashed checks. Again, where is the accountability and where will the funds go?

The Circuits are split on what constitutes "adequate representation" and whether an unnamed class member who claims due process violations is able to "opt out" to not be bound by an unfair judgment and then collaterally attack the judgment for due process violations by way of an appeal or intervention.

The Ninth Circuit clearly favors finality of judgments and limits on collateral attacks although there has been no decisive decision deciding the precise issue. Absent class members should always have Article III standing to appeal or intervene in class actions particularly where monetary damages are sought. In this instance, the Ninth Circuit has no precedent on this issue and used the assertion of lack of standing as a reason to pass on the opportunity to clarify this unresolved area of the law.

According to class action expert Megan E. Barriger in her article, *Due Process Limitations on Rule 23(B)(2) Monetary Remedies: Examining the Source of the Limitation in Wal-Mart Stores, Inc. v. Dukes*:

As the class device has evolved, courts have struggled to balance the interests in finality of class judgments with the due process right of every putative class member to their individual day in court. After *Shutts*, courts have disagreed whether challenges based on the basic due process elements may be raised by collateral attack in a subsequent proceeding and, if so, how. Most often arising in the settlement context, many courts have found that a judicial finding of adequate representation during a fairness hearing in the first proceeding precludes a later collateral attack on the class judgment in a second proceeding. This is consistent with the tenet that courts "do not, of course, judge the propriety of a class certification by hindsight." But not all courts agree, with some allowing searching collateral attacks based on Shutts' "at all times" language, unless the challenging class member had been put "on notice" of the alleged "inadequacy" during the class proceeding. These courts assert that the "at all times" phrase from *Shutts* means that the "duty to represent absent class members adequately is a continuing one." This tension in approach culminated in a series of decisions attempting to define adequate representation, the most seminal of which was the Ninth Circuit opinion (albeit divided) in *Epstein v. MCA, Inc.*, 179 F.3d 641

(9th Cir. 1999), limiting the scope of an individual class member's ability to collaterally attack a judgment.

Since *Epstein*, courts have issued diverging opinions on whether finality in class judgments trumps allowing class members broad latitude to collaterally attack judgments. The issue also has attracted considerable academic consideration." The question is whether the collateral court is constrained to a limited review, considering only whether the class action court utilized adequate procedures to assure itself that the *Shutts* due process requirements had been met, or instead, whether it may engage in a broader, merits-based due process review. Although a majority of courts have answered this question by providing for limited collateral review, practitioners should take precautions to protect their clients' class action resolutions from collateral attack in the courts that allow a more probing due process review."

In this instance, the Ninth Circuit used a lack of standing as a reason to prevent Petitioner's collateral attack as an appellant or an intervenor. This in and of itself is a denial of the Fifth Amendment right to due process and equal protection of the laws. A violation that should not be allowed to be imitated by other circuits as a practice.

VIII.

CONCLUSION

Petitioner respectfully requests that this Court consider the profound and unresolved issues before it and grant the petition for a writ of certiorari.

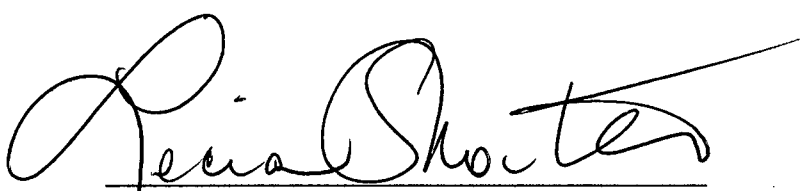
Respectfully submitted on May 10, 2021,

Lecia L. Shorter
Petitioner *In Propia Persona*

CERTIFICATE OF COMPLIANCE

I, Lecia Shorter, do hereby certify that this document has a word count of 6,233 words according to the Microsoft Word program utilized in its preparation.

Dated: May 10, 2021



LECIA SHORTER