Press Release

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

FOR IMMEDIATE RELEASE February 16, 2017

Media Contact: Mark Chenoweth | mchenoweth@wlf.org | 202-588-0302

WLF Advocates Additional Class-Action Reforms in Response to Proposed Rule 23 Changes

(In re: Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure)

> **"Now is an opportune time for class-action reform. Burdensome class actions constitute an unnecessary drain on the American economy. Without any sacrifice to the pursuit of justice, thoughtful revisions to Rule 23 will go a long way toward improving federal class-action litigation practice in a way that benefits the civil justice system as a whole."**
> **—Cory Andrews, WLF Senior Litigation Counsel**

WASHINGTON, DC—Washington Legal Foundation yesterday evening submitted comments to the Advisory Committee on Civil Rules in response to the Committee's Preliminary Draft of Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure. WLF's comments offer suggestions for improving the Committee's Proposed Amendments to address three particular problems with federal class actions today: *cy pres* awards, unascertainable classes, and inequitable treatment of parties seeking interlocutory review of class-certification decisions.

Controversially, but with increasing frequency, federal judges have used *cy pres* in class-action settlements to award unclaimed funds to one or more charities. The proposed rule amendments would endorse that practice implicitly, but WLF's comments explain why *cy pres* is rife with problems. Among other things, federal law does not authorize giving relief to entities that were not injured by the defendant's wrongful conduct, and the Rules Enabling Act does not permit federal procedural rules to alter the substantive rights of parties in litigation.

WLF's comments also encourage the Committee to include an explicit ascertainability requirement in Rule 23. WLF believes that absent the fundamental threshold requirement that members of a putative class be ascertainable, class-action plaintiffs are too often excused from satisfying even the most basic prerequisite for class-wide relief: class membership.

Finally, WLF asked the Committee to prevent class-action plaintiffs from getting a second bite at the class-certification apple that defendants cannot get. If named plaintiffs dismiss a case with prejudice, they should not be able to appeal a class-certification denial when they were already refused an interlocutory appeal on the class-certification issue. That question is currently pending before the Supreme Court, but the Committee could also fix it via a clarification of Rule 23.

Upon filing its comments, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: "Now is an opportune time for class-action reform. Burdensome class actions constitute an unnecessary drain on the American economy. Without any sacrifice to the pursuit of justice, thoughtful revisions to Rule 23 will go a long way toward improving federal class-action litigation practice in a way that benefits the civil justice system as a whole."

Celebrating its 40th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

###