No. 19-56514

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,
Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
(No. 3:15-md-02670)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Corbin K. Barthold
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

May 21, 2020

CORPORATE DISCLOSURE STATEMENT

Washington Legal Foundation has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

AVERAGED CLASS DAMAGES ARE INCOMPATIBLE WITH THE CONSTITUTION, THE LAW, AND THE RULES OF PROCEDURE 6

A. Article III 6

B. The Due Process Clause 9

C. The Rules Enabling Act 12

D. Rule 23(b)(3) 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 1, 7, 12

Am. Exp. Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 1, 12

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 17

Bridge v. Phx. Bond & Indem. Co.,
553 U.S. 639 (2008) 9

Broussard v. Meineke Discount Muffler Shops, Inc.,
155 F.3d 331 (4th Cir. 1998) 16

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013) 10, 11

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 16

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 12

Gen. Tel. Co. of the S.W. v. Falcon,
457 U.S. 147 (1982) 18

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 1, 14

Honda Motor Co., Ltd. v. Oberg,
512 U.S. 415 (1994) 9

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018) 16

In re Rail Freight Fuel Surcharge Antitrust Litig.,
725 F.3d 244 (D.C. Cir. 2013) 16

Page(s)

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 10

Lindsey v. Normet,
405 U.S. 56 (1972) 9

Londoner v. Denver,
210 U.S. 373 (1908) 9

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 6

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 9, 10, 16

Mullane v. C. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950) 9

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 2, 12

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 7, 12

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 6

Tyson Foods, Inc. v. Bouaphako,
136 S. Ct. 1036 (2016) 1, 7, 8

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... *passim*

Washington v. Glucksberg,
521 U.S. 702 (1997) 10

Waters v. Merchants' Louisville Ins. Co.,
11 Pet. 213 (1837) 10

CONSTITUTION, STATUTES, AND RULES:

Const. art. III, § 2, cl. 1 6

28 U.S.C. § 2072(b) 12

Page(s)

Fed. R. Civ. P. 23(a)(2) 13

Fed. R. Civ. P. 23(b)(3) 4, 5, 13, 14

Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment 14

Fed. R. Civ. P. 82 6

MISCELLANEOUS:

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2002) 11

Oliver Wendell Holmes, Jr., *The Common Law* (1881) 10

3 William Rubenstein, *Newberg on Class Actions* (5th ed. 2013) 11

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. For decades WLF has appeared as an *amicus curiae*, in important class actions, to combat attempts to abuse Rule 23 and the class mechanism. See, e.g., *Tyson Foods, Inc. v. Bouaphako*, 136 S. Ct. 1036 (2016); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

At the root of much class litigation is the plaintiffs' bar's resistance to a basic truth: some claims *simply aren't amenable* to class treatment. Rule 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). That is no tragedy. To the contrary, it is a feature of our legal system we can be proud of. The "stringent

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

requirements" for class certification are a salutary product of society's commitment to due process and the rights of the defendant.

There is an "inherent tension" between "representative suits" and "our deep-rooted historic tradition that everyone should have his own day in court." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). When that tension runs too high, it is the privilege of bringing a class action that gives way, and the right to a fair legal process that stands firm. A plaintiff may combine only those claims that are truly "capable of class-wide resolution"—claims that can be resolved "in one stroke." *Wal-Mart*, 564 U.S. at 350.

This case, WLF submits, is emphatically not one where such a resolution can be achieved.

SUMMARY OF ARGUMENT

There are many well-known examples of the "wisdom of the crowd" effect. Ask people at the fair to guess the weight of a cow, for instance, and the average of their guesses will often be astonishingly close to the cow's true weight. The technique works by negating underlying idiosyncrasies. Many people will overestimate the cow's

weight. Many will undershoot it. Averaging the various wrong answers tends to produce a single number near the right answer.

As with the weight of cows, so with damages in litigation? Of course not. If Bill takes $100 from Frank and nothing from Jack, no reasonable person will say that Frank and Jack each have lost $50. If, citing the $100 taken from Frank, Jack sues Bill for $50, he'll be laughed out of court. And nothing changes if a lawyer tries to get the $50 for Jack by stamping "CLASS ACTION" at the top of a complaint. In a lawsuit—certainly one in federal court—*each* plaintiff must have suffered an injury. A plaintiff without an injury has no suit, and slipping her into a class cannot *create* a suit for her. Class actions don't proceed by the wisdom of the crowd. Whereas averaging estimates of a cow's weight removes unwanted noise, averaging the harm suffered by class members conceals crucial facts. A crowd of plaintiffs clamoring to average their injuries calls to mind the man with his head in an oven and his feet in a freezer who says that, overall, he's pretty warm.

The named plaintiffs here seek to press antitrust claims on behalf of three classes of purchasers of packaged tuna. To do so, they must establish that each class meets the Rule 23(b)(3) "predominance"

requirement. The trial court allowed the plaintiffs to manufacture the required predominance by simply assuming away the very distinctions that make it impossible to meld the various purchasers into three uniform classes. The plaintiffs' three experts each took it as read that all direct purchasers of the defendants' packaged tuna paid the same average anticompetitive overcharge. Two of those experts then accepted without question that this assumed harm trickled down the supply chain, into two classes of indirect purchasers. Overlooked at all points was the fact that direct purchasers took negotiated prices. Because the direct purchasers differed greatly in size, in buying power, and in negotiating skill, to assume that each of them paid the same overcharge was untenable. Not surprisingly, the plaintiffs could not, even in their own modeling, show that all direct purchasers did so. Yet the trial court certified all three classes.

The plaintiffs' use of an averaging technique runs into an array of obstacles. *First*, to have standing to sue under Article III, a plaintiff must have suffered an injury in fact. Averaging a class's damages may improperly hide the fact that many class members have no injury. *Second*, the Due Process Clause protects basic procedural rights,

including the right to put on a defense and the right to be held liable only for harms one has caused. Averaging violates due process by depriving the defendant of the chance to raise individual defenses against each party the defendant has not harmed. *Third*, the Rules Enabling Act ensures that the Federal Rules of Civil Procedure do not "enlarge or modify any substantive right." Yet the trial court's class-certification order relieves class members of the need to show that they *each* suffered an injury under the antitrust laws. *Finally*, Rule 23(b)(3) demands a showing that "the questions of law or fact common to class members predominate over any questions affecting only individual members." To retreat to an averaging method that obscures individual class members' lack of injury is, in effect, to admit an *absence* of predominance.

The appellate process, with its three-judge panels, has an element of the wisdom of the crowd to it. The averaging of class damages surely does not. The class-certification order stands on a fallacy, and this Court, in its collective wisdom, should vacate it.

ARGUMENT

AVERAGED CLASS DAMAGES ARE INCOMPATIBLE WITH THE CONSTITUTION, THE LAW, AND THE RULES OF PROCEDURE.

"If Tom [Hanks] wins tonight, it means that between us we will have three best actor awards."

- Steve Martin, who to this day has zero best actor Oscars, while hosting the 2001 Academy Awards

A. Article III.

Article III "extend[s]" the federal "judicial Power" only to "Cases" and "Controversies." Const. art. III, § 2, cl. 1. The case-or-controversy clause limits the federal courts to resolving lawsuits in which the plaintiff has suffered an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Grounded in the Constitution, the case-or-controversy requirement is, of course, not subject to congressional or judicial repeal or amendment. "The requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute" or rule. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). And the Federal Rules of Civil Procedure, Rule 82 confirms, "do not extend . . . the jurisdiction of the district courts." Fed. R. Civ. P. 82.

"Rule 23's requirements must," in short, "be interpreted in keeping with Article III constraints." *Amchem Prods.*, 521 U.S. at 612-13. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality). "And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.*

Just like a named plaintiff, an absent class member who lacks an injury in fact cannot proceed with (or get carried along in) a lawsuit in federal court. Yet *averaging* injuries allows uninjured class members to do just that—to partake in a federal suit, by appropriating injuries they did not suffer. This "borrowing" of others' injuries as a source of standing is no less ridiculous than Steve Martin's "borrowing" of another's Oscars as a brag, the difference being that in the latter case, the jesting "borrower" understands the absurdity.

It would put the matter too tepidly to say that nothing in *Tyson Foods, Inc. v. Bouaphako*, 136 S. Ct. 1036 (2016), changes (or could change) any of this. The decision supports the defendants. Although it

affirmed the certification of a class of workers owed overtime wages for time spent donning and doffing gear, *Tyson Foods* confirmed that class certification cannot stand on "representative evidence that is statistically inadequate or based on implausible assumptions." *Id.* at 1048. If "no reasonable juror" could believe, based on the representative evidence, that each class member was injured, class certification is improper. *Id.* at 1049. That is this case. The trial court certified the classes based on implausible assumptions about the reliability and accuracy of an average applied at a granular level. It granted certification based on evidence that no reasonable juror could believe established *each* purchaser's injury.

In a concurring opinion, moreover, Chief Justice Roberts, joined by Justice Alito, made *Tyson Foods*'s consistency with Article III explicit. "Article III," the Chief Justice wrote, "does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 1053. If on remand the trial court could find "no way to ensure that the jury's damages award [went] only to injured class members," Article III would require that the award "not stand." *Id.*

B. The Due Process Clause.

"Well-established common-law protection[s] against arbitrary deprivations of property" are "presumpti[vely]" part of "the Due Process Clause." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Using an averaging process to bring uninjured persons into a class deprives the defendant of at least two such well-established protections.

First, the right to defend oneself. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. C. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). "A hearing, in its very essence, demands that he who is entitled to it shall have the right to support [himself] by argument." *Londoner v. Denver*, 210 U.S. 373, 386 (1908). In the context of civil litigation, this means that a defendant must be allowed "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

When averaging is used to "mask the prevalence" of class members' "individual issues," the defendant is deprived of the ability "to challenge the allegations of individual plaintiffs." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008), abrogated on other grounds, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). That is

"an impermissible affront" to the defendant's "due process rights." *Id.*; see also *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Yet it is precisely what the district court allowed here.

Second, there is the right to be held accountable only for a harm one has caused. "For centuries, it has been a well-established principle of the common law, that in all cases of loss, we are to attribute it to the proximate case, and not to any remote cause." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (quoting *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 223 (1837)). It is hard to imagine a liberty more "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), than an innocent defendant's right to exoneration. That liability attach to the source of the injury is even more fundamental to our law than that it attach to a human. See Oliver Wendell Holmes, Jr., *The Common Law* 7-12, 17-19 (1881) (discussing Greek, Roman, and Anglo-Saxon law's imposition of liability on animals and inanimate objects that cause an injury).

Averaging damages enables a plaintiff to smuggle into a class people who suffered no injury at all, much less an injury *caused* by the

defendant. That is what happened here: the direct-purchaser plaintiffs were allowed to include, in their class, entities that negotiated prices equal to or below the plaintiffs' predicted competitive prices. Those entities suffered no injury caused by the defendants. The indirect-purchaser plaintiffs were then allowed to build two further classes on this same warped foundation.

It is no answer that the injured might be separated from the uninjured at the lawsuit's tail end. Promises that any such process will fix the problem are illusory. Precisely because a certified class is assumed to be uniform, discovery directed at absent class members is rare. See 3 William Rubenstein, *Newberg on Class Actions* § 9:16 (5th ed. 2013). And in any event, most certified class actions promptly end. "Empirical studies . . . confirm what most class action lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002). A trial court must, therefore, "determin[e] . . . at *the class certification stage*" whether "class members can be identified without extensive and individualized fact-finding or 'mini-trials.'" *Carrera*, 727 F.3d at 307-08.

C. The Rules Enabling Act.

The Rules Enabling Act declares that the Federal Rules of Civil Procedure "shall not . . . enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Congress has required, in other words, that the Rules "really regulate procedure—the judicial process for enforcing rights and duties recognized by substantive law." *Shady Grove*, 559 U.S. at 407 (plurality). They may not alter "the rules of decision by which the court will adjudicate those rights" and duties. *Id.*

The Supreme Court has found it increasingly necessary to remind the federal courts that when they apply Rule 23, they must comply with the Act. See *Amchem Prods.*, 521 U.S. at 612-13, 628-29; *Ortiz*, 527 U.S. at 845; *Wal-Mart*, 564 U.S. at 367; *Italian Colors*, 570 U.S. at 234. The Act ensures that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The Act thus *mandates* that a class "not be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 564 U.S. at 367.

A plaintiff proceeding under the state or federal antitrust laws, the court below acknowledged, must establish that it "suffered damage as a result of [the] Defendants' alleged anti-competitive conduct." (ER10.) Yet averaging the class's harm relieves many plaintiffs of the need to do precisely that. Using Rule 23 as a vehicle to slip uninjured plaintiffs into an antitrust lawsuit is a blatant violation of the Rules Enabling Act.

D. Rule 23(b)(3).

Last but not least, there is Rule 23 itself. Given the Article III, due-process, and statutory problems that an averaging method creates, one would expect to find that such a method does not cohere with a humble procedural rule. On that score, Rule 23 does not disappoint.

If a class would, if successful, be entitled to "individualized" money awards, the plaintiff seeking class certification must satisfy Rule 23(b)(3)'s "predominance" requirement. *Wal-Mart*, 564 U.S. at 362. To meet that requirement, the plaintiff must show not only that the class "suffered the same injury," *id.* at 349-50—a separate prerequisite imposed by Rule 23(a)(2)—but also that "the questions of law or fact

common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3).

Predominance is usually absent when there are "material variations" in "the kinds or degrees of reliance" that putative class members placed on a defendant's alleged misconduct. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment. That is exactly the problem here. Direct purchasers conducted discrete purchasing negotiations with the defendants. (ER319-21.) The prices the defendants charged thus varied according to each direct purchaser's buying power and negotiating skill. (*Id.*) So there is no way to show that the class members "suffer[ed] the same injury," 564 U.S. at 350, let alone a way to show that "the questions of law or fact common to class members *predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added). This is not a case where a defendant "might attempt to pick off the occasional class member." *Halliburton Co.*, 573 U.S. at 276. A substantial issue exists as to how *each* direct purchaser fared in its negotiations with the defendants. The defendants would at trial seek to show, transaction by transaction, that *many* direct purchasers negotiated a competitive price

(or lower) for themselves, and thus neither suffered an injury nor passed one through to others.

This case strongly resembles *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), in which a group of Title VII plaintiffs sought to certify a class of employees subjected to Wal-Mart's policy of delegating pay and promotion decisions to site managers. *Wal-Mart* held that no class could be certified, because individualized issues would exist as to whether, how, and why any given manager wielded his delegated discretion in a discriminatory manner. 564 U.S. at 355-56. *Wal-Mart* further said that the plaintiffs could not overcome this problem with anecdotal evidence, because such a "trial by formula" could not create an inference that "*all* the individual, discretionary personnel decisions [we]re discriminatory." *Id.* at 358 (emphasis added); see also *id.* at 367. Here, likewise, individualized issues exist as to each direct purchaser's ability to negotiate a competitive price. And like a "trial by formula" based on representative evidence, a "trial by formula" based on an averaging method would create only the illusion of predominance, by sweeping individual differences under the rug of a single statistical figure.

Wal-Mart confirms, in short, that class certification under Rule 23 may not stand on a device that masks some class members' lack of injury. *Id.* at 367. And it—and much other authority—shows that an averaging method is just such a masking device. See *id.*; *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) ("for purposes of Rule 23(b)(3)," a model must "establish that damages are susceptible of measurement across the entire class"); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) ("The need to identify those [uninjured] individuals will predominate and render [a class] adjudication unmanageable[.]"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013) ("common evidence" must show that "all class members were in fact injured"); *McLaughlin*, 522 F.3d at 231 ("We reject plaintiffs' propos[al] . . . [to base class certification on an] estimate of the average loss for each plaintiff[.]"); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be.").

Were yet more evidence needed that Rule 23 does not bless the use of averaging methods in this case, it could be found in the various ways that those methods distort the class-action process. To begin with, by welcoming uninjured parties into the lawsuit, averaging creates conflicts of interest within the class. After all, any award to the class members that suffered no injury will likely be given at the expense of the class members that suffered a greater-than-average injury. What's more, averaging falsely inflates the size of the class, thereby increasing the plaintiffs' leverage over the defendant. "Courts have noted the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Averaging makes that problem even worse than it otherwise would be. Finally, averaging is often, at bottom, no more than an attempt to pull the wool over people's eyes. It is generally for the judge to evaluate the opaque mathematics involved. Yet if he can gin up complexity, get the busy trial judge to (incorrectly) abandon recondite issues to the vagaries of trial, and arrive before a jury, a plaintiff's lawyer has in large measure succeeded in transforming the case from a dispute over law, data, and competing analyses into a dispute over optics, emotions, and competing narratives.

From there the case turns less on the merits than on the defendant's willingness to gamble.

"Actual, not presumed, conformance" with Rule 23 is "indispensable." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 160 (1982). Yet averaging methods that sneak uninjured entities into a class cannot even be "presumed" to conform with Rule 23. Not even close.

CONCLUSION

The district court's class-certification order should be reversed.

May 21, 2020

Respectfully submitted,

/s/ Corbin K. Barthold

Corbin K. Barthold
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org
Counsel for Amicus Curiae Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,456 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Office Word 2010 and is set in 14-point Century Schoolbook font.

May 21, 2020

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2020, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Corbin K. Barthold