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 Case No. 3:15-md-02670-JLS-MDD

RESPONSE OF CLASS PLAINTIFFS TO THE COURT'S ORDER OF APRIL 30, 2021 CONCERNING EN BANC REVIEW

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TABLE OF CONTENTS

INTRODUCTORY STATEMENT **1**

ARGUMENT **2**

THE FACTUAL SETTING OF THE DISTRICT COURT RULING. 2

INCONSISTENCY WITH CIRCUIT AND SUPREME COURT PRECEDENTS. 6

THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE. 13

CONCLUSION **15**

SIGNATURE ATTESTATION **17**

TABLE OF AUTHORITIES

Page(s)

Cases

Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds,
568 U.S. 455 (2013).....7

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018).....13

Daubert v. Merrell Dow Pharmaceuticals Inc.,
509 U.S. 579 (1993).....2

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 8, 9

In re Ethylene Propylene Diene Monomer Antitrust Litig.,
256 F.R.D. 82 (D. Conn. 2009) 5

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009) 7

Kleen Prod. LLC v. Int'l Paper Co.,
831 F.3d 919 (7th Cir. 2016) 6

In re Lamictal Direct Purchaser Antitrust Litig.,
957 F.3d 184 (3d Cir. 2020) 6, 13

Messner v. Northshore University HealthSystem,
669 F.3d 802 (7th Cir. 2012) 12, 13

Officers for Justice v. Civil Service Commission of City & County of San Francisco,
688 F.2d 615 (9th Cir. 1982) 14

Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC,
993 F.3d 774 (9th Cir. 2021) .....*passim*

In re Optical Disk Drive Antitrust Litig.,
No. 3:10-md-2143 RS, 2016 WL 467444 (N.D. Cal. Feb. 8, 2016) 5, 8

In re Packaged Seafood Prods. Antitrust Litig.,
332 F.R.D. 308 (S.D. Cal. 2019) .....*passim*

In re Rail Freight Surcharge Antitrust Litigation,
MDL No. 1869, 934 F.3d 619 (D.C. Cir. 2019).....13

In re Ranbaxy Generic Drug App. Antitrust Litig.,
MDL No. 19-md-02878-NMG, 2021 WL 1947982 (D. Mass. May 14, 2021) 13

Risinger v. SOC LLC,
708 F. App'x 304 (9th Cir. 2017).....12

Ruiz Torres v. Mercer Canyons Inc.,
835 F.3d 1125 (9th Cir. 2016) 1, 10, 11, 12

In re Syncor ERISA Litigation,
516 F.3d 1095 (9th Cir. 2008) 15

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016).....8, 9, 10

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).....8

Other Authorities

Fed. R. App. P. 35(b) 1

Fed. R. Civ. P. 23 .....7, 14

Fed. R. Civ. P. 23(b)(3).....3, 7, 8, 15

INTRODUCTORY STATEMENT

The three Plaintiff classes in this litigation (Direct Purchasers ("DPPs"), Commercial Food Preparers ("CFPs"), and End Payers ("EPPs")) hereby submit this joint brief in response to this Court's order of April 28, 2021 seeking the parties' "positions as to whether this case should be reheard en banc" and asking them to "discuss whether Federal Rule of Civil Procedure 23(b)(3) requires a district court to find that no more than a 'de minimis' number of class members are uninjured before certifying a class."

Rehearing *en banc* of this Panel's ruling in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods, LLC*, 993 F.3d 774 (9th Cir. 2021) ("*Olean*") is appropriate under Fed. R. App. P. 35(b). The majority opinion in *Olean*, which holds that prior to certification, a district court must "resolve the competing expert claims on the reliability of Plaintiffs' statistical model" as to whether more than a "*de minimis* number" of proposed class members are, in fact, uninjured" by the unlawful conduct (993 F.3d at 791), conflicts with *Ruiz Torres v. Mercer Canyons Inc*., 835 F.3d 1125 (9th Cir. 2016) ("*Torres*") (among others), as well as decisions of the Supreme Court and other circuits.

It is appropriate to require a district court to determine if a plaintiff's expert's evidence—including, but not limited to an econometric model—is *capable* of answering the question of whether all or nearly all class members were injured by a

defendant's conduct. But demanding that lower courts quantify the number of uninjured class members at the class certification stage, as the majority in *Olean* does, imposes a requirement that is not mandated by Fed. R. Civ. P. 23(b)(3) and requires the district court to usurp the jury's ultimate obligation to resolve fundamentally disputed facts, such as injury.

ARGUMENT

The Factual Setting Of The District Court Ruling.

This case arises out of a related criminal investigation by the U.S. Department of Justice ("DOJ") into price-fixing of packaged tuna in the United States by the three major producers—Bumble Bee, StarKist, and Chicken of the Sea ("COSI"). The investigation produced three individual and two corporate guilty pleas. Bumble Bee's CEO was then convicted by a jury. Multiple tracks of civil plaintiffs sued the producers and related entities and the three tracks of class Plaintiffs proceeded to a three-day hearing on class certification. That hearing focused on whether common evidence could prove antitrust impact. None of the statistical models the class Plaintiffs' experts put forward was challenged in the district court under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) ("*Daubert*"). *See In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 321 (S.D. Cal. 2019) ("*PSPs*"). The district court certified the classes, and a panel of this Court vacated that order in *Olean*.

The *Olean* majority praised the district court, noting that it "admirably and thoroughly marshal[ed] the evidence in this difficult case." 993 F.3d at 794. It went on to hold that the district court needed to resolve not just whether the Plaintiffs' modeling could show classwide impact, but whether the representative evidence swept in only 5.5% or as much as 28% uninjured DPP Class members, and also to make a "similar" determination for the other putative classes, in order to rule that Plaintiffs had established predominance under Fed. R. Civ. P. 23(b)(3). *Id.*

Dr. Russell Mangum ("Mangum"), the DPPs' class certification expert, testified that "all or nearly all of the proposed DPP Class was injured" under the regression model on which he relied. *PSPs*, 332 F.R.D. at 321, 323. The percentages on which the majority focused only arose in connection with one type of robustness check he performed on his model. *Id*.

Nor did Dr. John Johnson ("Johnson"), Defendants' class expert, opine that 28% of the DPP Class was uninjured. Johnson simply modified Mangum's model by restricting his analysis to each customer's transactional history, rather than the transactions of all members of the DPP Class. *Id.* at 323. This *did not result* in an estimate of uninjured class members. Johnson was *unable to reach any mathematical result* for many customers (because such customers did not purchase in either the benchmark or impact period), or, in many other cases, Johnson's analysis returned

statistically insignificant results (because there were too few transactions in either the benchmark or impact period).

Based on that work, Johnson argued that Mangum's regression model was not capable of demonstrating impact for 28% of the DPP Class. But *Johnson's* decision to modify Mangum's model in ways that return no mathematical results, or that generate statistically insignificant ones, says nothing about *Mangum's* approach. Unsurprisingly, both the district court and the *Olean* panel recognized that Johnson's small sample sizes created reliability issues, because they were "not statistically robust." 993 F.3d at 790; 332 F.R.D. at 324.

Furthermore, two other experts (CFP expert Dr. Michael Williams ("Williams") and EPP expert Dr. David Sunding ("Sunding")) independently determined that wholesale overcharges were universal in the market.[1] Sunding showed that "all, or nearly all, of the Class members" were impacted by the overcharge, through "qualitative, quantitative, and anecdotal and other record evidence." *PSPs*, 332 F.R.D. at 341-42. The district court then considered the criticisms of another defense expert, Dr. Laila Haider ("Haider"), who responded to both Sunding and Williams, and concluded that Sunding's model "is reliable and capable of proving impact" to

[1]The *Olean* majority focused on Mangum, passing over the work of Sunding and Williams, even though, for example, Sunding separately tested the ten largest retailers representing 57% of the commerce and found overcharges in all of their purchases. *See PSPs*, 322 F.R.D. at 342.

the whole EPP Class, so that "common issues predomina[te] in regard to impact." *Id*. at 344. Haider did not offer a model, but merely opined that Sunding's model might not universally show injury. *See id*. at 342-43. Williams made a similar independent finding for the CFPs. *Id*. at 332-33.

Indeed, the district court recognized Defendants' experts' lack of affirmative opinions on questions of common impact, explaining that "[w]hile Defendants' arguments are 'characterized as a dispute over the very feasibility of [P]laintiffs' analysis,' the Court believes that Defendants 'are actually arguing that [P]laintiffs' multiple regression analysis, done a slightly different way (*i.e.*, the 'right' or 'better' way), does not prove what they claim it proves." *Id.* at 328 (citing *In re Ethylene Propylene Diene Monomer Antitrust Litig*., 256 F.R.D. 82, 100 (D. Conn. 2009); *In re Optical Disk Drive Antitrust Litig*., No. 3:10-md-2143 RS, 2016 WL 467444, at *11 (N.D. Cal. Feb. 8, 2016) ("*ODDs*")).

Moreover, as the district court explained, in addition to his regression modeling, Mangum also relied on: (a) an assessment of market structure, performance, and the conduct identified in the guilty pleas; (b) various correlation analyses of important product/pricing characteristics of packaged tuna; (c) various robustness checks based on changes to his regression model's specifications; and (d) various other analyses in response to Johnson's criticisms. *Id*. at 321-25. Mangum's opening Class

Certification Report was 110 pages, and his Reply Report was 97 pages (not counting exhibits). ER 1277-1377; 1907-2020.

The majority opinion's focus on the results of only one of Mangum's robustness checks (which was simply a test of the reliability of his affirmative opinion of marketwide impact) to the exclusion of the remaining analysis of all three of the Plaintiff classes' experts obscures a critical point: statistical analysis by itself is not a panacea and a narrow focus on specific percentages of injured class members generated by a *one version* of a statistical model should not substitute for a holistic analysis of predominance and common impact.[2] The district court recognized this fundamental precept multiple times in its certification order. *See PSPs*, 332 F.R.D. at 328, 341-42 (citing Mangum's and Sunding's other record evidence).

Inconsistency With Circuit And Supreme Court Precedents.

The *Olean* majority opinion purports to require that district courts usurp the role of the trier of fact under the guise of Fed. R. Civ. P. 23 by deciding fact-intensive questions of injury and impact that are fundamentally merits questions. Doing so

[2] *See Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927-28 (7th Cir. 2016) ("several types of evidence" supported the district court's determination that classwide impact was capable of common proof, including market structure and concentration, vertical integration, barriers to entry, lack of substitutes, low demand elasticity, and product homogeneity); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020) ("*Lamictal*") (on class certification, "the court must consider 'all relevant evidence and arguments,' including 'expert testimony'").

raises both due process and Seventh Amendment concerns. The Plaintiff classes have a right to a trial by jury on these issues.

The district court's job for purposes of Fed. R. Civ. P. 23(b)(3) is to determine—from a holistic review of the entire body of evidence—whether class wide injury is *capable* of resolution by common proof. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013) ("requiring that "*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."); *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 311-12 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (plaintiffs must "demonstrate that . . . antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members").

The district court explicitly recognized these principles: "the Court is only concerned with whether the method itself is capable of showing [impact] to all, or nearly all of the Class members—not that it does in fact show that the injury occurred.'" *PSPs*, 332 F.R.D. at 328 (quoting *ODDs*, 2016 WL 467444, at *11).

The *Olean* majority relied, in part, on the Ninth Circuit's opinion in *Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2011) ("*Ellis*") to support its decision. But *Ellis* did not expand a district court's fact-finding mandate, which is limited to resolving factual disputes "necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*." *Id*. at 983

(emphasis in original). The Ninth Circuit explained that this meant that "the district court must determine whether there was significant proof" of the practice alleged. *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011) (internal quotations omitted)).

Ellis does require the district court to resolve "critical factual disputes" in a "battle of the experts" on whether common proof exists to prove plaintiff's case, and in certification under Rule 23(b)(3), whether common questions predominate. *See* 993 F.3d at 793. But there is a fundamental difference between *Ellis* and this case. In *Ellis*,

> Costco offered its own evidence to show that: (1) "women are not underrepresented at Costco and that any gender disparities, if they exist, are confined to two regions of Costco;" and (2) "gender disparities, if they exist, are based upon factors, such as women's lack of interest in jobs requiring early morning hours, which are unrelated to Costco's culture and promotion processes."

970 F.3d at 983. *See also id.* at 984 ("Dr. Saad, Costco's expert, concluded that any gender disparities, if they exist, are confined to two regions.").

None of Defendants' experts engage in a so-called "battle of the experts" by offering up their "own evidence" on the question of impact and injury caused by Defendants' admitted conduct. Johnson, for example, specifically disclaimed doing so when asked at the class certification hearing:

> Q: So just to be clear in terms of your assignment here, you have not come to a conclusion—affirmative conclusion one way or the other whether common impact can be shown in this case or not; is that true?

A: That is correct.

ER 743.

Unlike in *Ellis*, there is *no direct conflict* between the experts to resolve regarding whether some subset of the classes were, in fact, injured by the price-fixing conduct at issue in this litigation. Johnson and Haider did question whether Plaintiffs' regression analyses establish impact to all or virtually all of the respective classes. But that is a question about the ultimate persuasiveness of the evidence in the eyes of the trier of fact, and not a core conflict under Rule 23 that needed to be resolved by the district court prior to certification. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048-49 (2016) ("*Tyson*") ("Reasonable minds may differ as to whether the average time Mericle [plaintiffs' expert] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury.").

Nor did the district court rely solely on regression analyses when deciding whether common issues predominate; it also relied on additional "significant proof" of a price-fixing conspiracy affecting the sale of packaged tuna in the United States in its holistic analysis of the evidence supporting class certification. In fact, the district court explained its rationale as follows: "[t]he evidence put forward by the DPPs, including Dr. Mangum's regression model, supplemented by the correlation tests, the record evidence, and the guilty pleas and admissions entered in this case,

is sufficient to show common questions predominate as to common impact." *PSPs*, 332 F.R.D. at 328.

If a trial demonstrates that some members of the class were not injured at all, certification may yet be appropriate if there is a way to winnow out those that the trier-of-fact finds to be uninjured. *Tyson*, 136 S. Ct. at 1050 (reserving for the district court a post-judgment determination "[w]hether . . . some . . . methodology will be successful in identifying uninjured members of the class" and allowing "a challenge to the proposed method of allocation"); *Torres*, 835 F.3d at 1037 ("the district court is well situated to winnow out those non-injured members . . . or to refine the class definition").

The *Olean* majority opinion's requirement that district courts determine before trial the number of uninjured class members conflicts with the flexibility necessarily afforded to them by the Supreme Court in *Tyson* and by the Ninth Circuit in *Torres*. In *Torres*, the defendant asserted that the class included many uninjured that lacked eligibility for an H-2A job. 835 F.3d at 1136. The Court began by noting:

> Predominance is not, however, a matter of nose-counting. *Jimenez* [*v. Allstate Ins. Co.*,] 765 F.3d [1161] at 1165 [(9th Cir. 2014)]. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class. It is an assessment of "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quotations omitted).

835 F.3d at 1134.

With respect to the defendant's contention that the class included persons exposed to, but not harmed by, its non-disclosure, the *Torres* court explained that "[t]his merely highlights the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members. However, it fails to reveal a flaw that may defeat predominance, such as the existence of large numbers of class members who were never *exposed to* the challenged conduct to begin with." *Id*. at 1136 (emphasis in original). The Court focused on whether plaintiffs "defined [the class] so broadly as to include a great number of members who for some reason *could not have been harmed* by the defendant's allegedly unlawful conduct." *Id*. at 1138 (emphasis added). The Court went on to hold that "fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the District Court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Id*. at 1137. *Accord Risinger v. SOC LLC*, 708 F. App'x 304, 307 (9th Cir. 2017).[3]

[3] The undisputed evidentiary record on which the district court relied supports the contention that all purchasers of packaged tuna were *exposed to* Defendants' price-fixing conduct. *See, e.g.*, SER 3 (Bumble Bee's guilty plea admitted that "the defendant, through its officers and employees, including high-level personnel of the defendant, participated in a conspiracy among major packaged-seafood-producing firms, the primary purpose of which was to fix, raise, and maintain the prices of packaged seafood sold in the United States").

Torres is consistent with the Seventh Circuit's opinion in *Messner v. Northshore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012). There, the circuit court reversed a denial of class certification after the district court deemed the proposed class to have too many uninjured members. It reasoned that "if a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits." *Id*. at 824. Like the Ninth Circuit Panel in *Torres*, it distinguished between class members who were not harmed, as opposed to those that *could not have been harmed* under even the best of circumstances. *Id*. at 825. *See also In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) ("*Asacol*") (brand loyalists were inherently unaffected and could not have been harmed).

Indeed, even after *Asacol*, an opinion on which the *Olean* majority substantially relies, antitrust courts in the First Circuit are not obligated to make findings at class certification concerning the precise number of uninjured class members. *In re Ranbaxy Generic Drug App. Antitrust Litig*., MDL No. 19-md-02878-NMG, 2021 WL 1947982, at *7-8 (D. Mass. May 14, 2021) (refusing to apply rigid *de minimis* test and finding that expert's holistic opinion that "all or virtually all" class members were injured was capable of proving classwide injury).

This Case Presents Questions of Exceptional Importance.

This case presents questions of exceptional importance. As noted by the dissent in *Olean*, "no Ninth Circuit case imposes a cap on the number of uninjured plaintiffs as a prerequisite to class certification." *Olean*, 993 F.3d at 794 (Hurwitz J., dissenting in part). Similarly, no Ninth Circuit decision has required that a district court *must* determine how many uninjured entities are within a proposed class. The Defendants and the majority opinion relied on cases from other circuits that stand for different propositions. Thus, the decisions in *In re Rail Freight Surcharge Antitrust Litigation*, MDL No. 1869, 934 F.3d 619, 624 (D.C. Cir. 2019) and *Asacol*, 907 F.3d at 47, both presented *concessions* by the respective plaintiffs' experts that 12.7% and 10% respectively of the classes were uninjured. In *Lamictal*, 957 F.3d at 193, defendant's expert had created his own model actually finding that the vast majority of a distinct subset of the class was uninjured under the unique factual scenario presented in that case. And even then, the class certification issue did not turn on a precise finding of the number of uninjured class members, but rather on the fact that the district court had not sufficiently considered the defendants' evidence that plaintiffs' expert's model was inadequate under the circumstances. Consistency with these cases does not require that a district court must determine the number of uninjured class members.

The dissent in *Olean* makes the point that "the majority removes from the district court the broad discretion Rule 23 provides and instead replaces it with a '*de miminis*' requirement found nowhere in the Rule or our precedents." 993 F.3d at 797. This has caused notable concern by the district judges in this Circuit that will be tasked with carrying out its mandate. On April 22, 2021, the Honorable Beth Labson Freeman, a judge in the Northern District of California, told a conference that

> [t]he Ninth Circuit's split ruling this month in *Olean Wholesale Cooperative, Inc. v. Bumble Bee Foods* "gives me some degree of alarm," because it requires district judges to resolve class disputes over whether there are injured parties at the certification stage.[4]

The majority's opinion is causing confusion in other ways as well. In this case, the district court very recently declined to proceed with approval of settlement classes between COSI and its parent entity and the classes because the *de minimis* finding required by *Olean* may also apply in the settlement context, something that seems inconsistent with *Officers for Justice v. Civil Service Commission of City & County of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982) and *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("there is a strong judicial policy that favors settlements, particularly where complex class action litigation is

[4] Law 360, *Footnotes, Eye-Popping Fee Bids Among Judges' 'Pet Peeves'* (Apr. 22, 2021), available at https://www.law360.com/articles/1377937.

concerned.") (citations omitted). *See* ECF No. 2593. A rigid rule requiring a *de minimis* finding even when no party subject to the certification order seeks to contest that issue obviously will have wide-ranging ramifications in the district courts.

One component of a district court's analysis under Rule 23(b)(3) is to determine whether common evidence is *capable* of proving classwide impact/injury—not that it does so. The *Olean* majority's requirement that a district court must find no more than a "de minimis" number of uninjured before certifying a class is out of step with Supreme Court precedent and the law in other circuits.

CONCLUSION

For all of the foregoing reasons, it is respectfully suggested that *en banc* review of the decision in *Olean* should be granted. [5]

Dated: May 19, 2021

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[5] Defendants improperly urged the *Olean* Panel to question whether the district court placed the Rule 23 burden on them when it wrote "[u]ltimately, Defendants have not persuaded the Court that Dr. Mangum's model is unreliable or incapable of proving impact on a class-wide basis." 332 F.R.D. at 328. In the context of the district court's explicit rejection of a number of Johnson's critiques in the prior paragraphs of the opinion, such an observation hardly suggests that the district court lost focus on which party bears the burden of proof on whether Rule 23 is satisfied. Indeed, the district court immediately followed up its *finding* that "common questions predominate as to common impact" by noting that "[t]he DPPs have therefore met their burden." *Id*.

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SIGNATURE ATTESTATION

I, Betsy C. Manifold, hereby attest pursuant to Circuit Rule 25-5(e) that all other parties on whose behalf this filing is submitted concur in the filing's content.

Dated: May 19, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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