No. 20-2710

IN THE

United States Court of Appeals

for the

Eighth Circuit

DEVIN G. NUNES,

Plaintiff – Appellant

v.

RYAN LIZZA AND HEARST MAGAZINE MEDIA, INC.,

Defendants – Appellees

HEARST MAGAZINES, INC.

Defendant.

On Appeal from the United States District Court for
the Northern District of Iowa
Civil Action No. 5:19-cv-04064-CJW
The Honorable C.J. Williams, Judge Presiding

APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35(b)(1) AND 40(a)(2) STATEMENT

The Panel erred by (i) announcing a rule of constitutional law in direct conflict with another recent decision from this Court, *Nelson Auto Center, Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952 (8th Cir. 2020) (Loken, J.), and (ii) exceeding the scope of a federal court's authority sitting in diversity by making a prediction of Iowa state law that is without support, and applying Iowa law without first conducting a necessary conflict of laws analysis, pursuant to which California law applies.

The Panel incorrectly held that the mere filing of a lawsuit sufficed to plausibly create actual malice supporting a public official defamation case. It broke from all authority, including authority from this Court and the Supreme Court. The novel holding would allow public officials to silence critical press coverage by using blanket, implicit denials devoid of any factual content that draws into question the truth of the speech they denied.

The Panel also exceeded its authority under *Erie* when it predicted that the Iowa Supreme Court would hold that a hyperlink to an article that does not include its original text constitutes republication of the article. Every court to consider the question has held otherwise, and the Iowa Supreme Court holds that republication requires publishing "a copy" of the material at issue. This issue is exceptionally important, and there is no basis for the Panel's

prediction of state law. Moreover, the Panel improperly applied Iowa law on this point, as it overlooked a live conflict of laws issue, and the Court cannot apply Iowa law consistent with *Erie* without first determining which state's law applies. On this issue, California law should apply.

STATEMENT OF THE CASE

This defamation case involves a sitting Congressman who sued *Esquire* magazine and its former freelance reporter, Ryan Lizza. The Panel held that the Article contained a defamatory implication—found by "connecting the dots," even though the relevant facts were not "juxtaposed" in "consecutive sentences"—that the Congressman conspired with others to hide the illegal use of undocumented workers at his family's Iowa farm. Opinion at 7-8. The Panel affirmed the district court's ruling that the operative complaint failed to allege facts that could support a finding of actual malice, rendering the publication of the Article unactionable. Opinion at 11-12.

But the Panel found that Lizza's hyperlinking of the Article in a tweet posted after the Congressman filed suit was actionable, ruling that (i) the mere referral was a "republication" of the underlying article, and (ii) the original complaint put Lizza on notice that the charged implication was not true. Opinion at 13-15.

ARGUMENT

I. THE PANEL'S UNPRECEDENTED ACTUAL MALICE RULING CONFLICTS WITH A DECISION OF THIS COURT AND RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE

According to the Panel, the mere fact that Lizza hyperlinked to the Article after "Nunes filed this lawsuit and denied the [A]rticle's implication," Opinion at 15, could support a finding that Lizza recklessly disregarded the truth of the implication when making his web posting.

This decision should be reheard for two reasons. First, it directly conflicts with the holding of this Court in *Nelson Auto*, 951 F.3d at 959 (allegation that defendant hyperlinked to article after plaintiff put defendant on notice that article was false insufficient to support actual malice).

Second, it raises a question of exceptional importance: Does an allegation that the plaintiff denied a statement prior to a hyperlinking to the original publication show actual malice? By answering that question "yes" contrary to all prior precedent, the Panel's opinion incentivizes strike lawsuits and self-censorship by the press when reporting on a public official who disputes a report.

A. The Panel's Ruling Directly Conflicts with *Nelson Auto*.

Nelson Auto concerned an auto repair shop claiming it was defamed by a July 24, 2017 report that it had been "charged criminally." 951 F.3d at 955.

On July 28, 2017, the owners of the auto repair shop "complained" to the news station that its report was false. *Id.* In November 2017, the news station published a "reference and hyperlink" to the same allegedly false article, "despite being on notice from plaintiff that it was false and defamatory." *Id.*

For the panel, Judge Loken wrote that the previous denial, followed by a new publication of the hyperlink to the defamatory statements, as a matter of law was insufficient to allege actual malice. *See id.* Rather, the unanimous order by Judges Loken, Stras, and Shepherd looked to the text of the new posting itself for "allegations from which it can reasonably be inferred that the false statement was republished with reckless disregard for the truth." *Id.* at 959. Finding no such allegations, the Court affirmed dismissal. *See id.*

In direct conflict with *Nelson Auto*, the Panel held that publishing a link to the complained-of article "after Nunes filed this lawsuit and denied the article's implication" *was*, standing alone, "suggestive enough to render it plausible that Lizza, at that point, engaged in 'the purposeful avoidance of the truth'" and thus had "actual malice" at the time of the hyperlink. Opinion at 15. The Panel did not find, nor could it, that the text of Lizza's tweet itself would support an inference of actual malice.

Because this "panel['s] decision conflicts with" *Nelson Auto*, a prior "decision of" this Court, "consideration by the full [C]ourt is therefore

necessary to secure and maintain uniformity of the [C]ourt's decisions." Fed. R. App. P. 35(b)(1)(A).

B. The Panel's Decision Defies Settled Law.

The Court should resolve the conflict between *Nelson Auto* and this case by agreeing with all other courts, including the Supreme Court: A denial by the plaintiff prior to publication is not evidence of actual malice. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 691 n.37 (1989) ("Of course, the press need not accept 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.'") (quoting *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977)); *see also, e.g.*, *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1043 (10th Cir. 2013); *Harris v. City of Seattle*, 152 F. App'x 565, 569 (9th Cir. 2005); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1285 (D.C. Cir. 2003); *Bertrand v. Mullin*, 846 N.W.2d 884, 900 (Iowa 2014).

At the Rule 12(b)(6) stage, where a plaintiff must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), a denial prior to (re)publication does not render the allegation of actual malice "plausible." *See Tah v. Glob. Witness*

Publ'g, Inc., 991 F.3d 231, 242 (D.C. Cir. 2021) (affirming Rule 12(b)(6) dismissal; finding "no support in our First Amendment case law" for proposition that publisher must "credit" a defamation plaintiff's "denials"), *petition for cert. filed* (U.S. July 26, 2021) (No. 21-121).

Rather, a denial "only 'serves to buttress a case for actual malice when there is something in the content of the denial or supporting evidence produced in conjunction with the denial that carries a doubt-inducing quality.'" *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 281-82 (S.D.N.Y. 2013) (citation omitted) (granting Rule 12(b)(6) motion), *aff'd*, 807 F.3d 541 (2d Cir. 2015), and *aff'd*, 622 F. App'x 67 (2d Cir. 2015); *cf. Tah*, 991 F.3d at 248-49 (Silberman, J., in dissent, acknowledging that the "probative value" of a denial depends on its "substance and context").

The Panel made no finding that Appellant's original complaint had any "doubt inducing" qualities, nor could it have done so. As the Panel recognized, the charged implication, much less its denial, was not even expressly alleged.

According to the Panel, Appellant's "denial" of the charged implication materialized from two separate paragraphs of his original complaint: Paragraphs 24 and 25. Paragraph 24 alleges that the "strong defamatory gist and false implication" was an awareness of and/or conspiracy to conceal

"criminal wrongdoing"—but it does not identify what the "criminal wrongdoing" was. No. 19-cv-04064 (N.D. Iowa), ECF No. 1 ¶ 24. Paragraph 25 recites tweets "by third-parties," some of whom reference "undocumented labor" and the "family farm"—but it does not allege that any text in these tweets (i) is false or (ii) relates to the charged implication. *Id.* ¶ 25.[1]

The original complaint sets forth no factual allegations suggesting that Lizza would doubt the accuracy of a supposed implication that Appellant did not even directly challenge in his original complaint, and which would not be challenged until Appellant's *amended* complaint, filed more than two months *after* Lizza's November 20, 2019 tweet. JA19 ¶ 13.

Moreover, the charged defamatory implication did not arise from either a juxtaposition or omission of material facts. Rather—according to the Panel—it arose from the "insinuat[ion]" of "[t]wo statements" (relating to the family and former President Trump) that were neither "juxtaposed" nor "consecutive," and were linked only by "connecting the dots." Opinion at 3, 7-8.

In sum, the Panel found that the "denial" in the original complaint was (i) implied, (ii) conclusory, and (iii) of an unwritten "insinuat[ion]" that Lizza

[1] Appellant's challenges to the eight express statements in the Article did not reference or explain the "criminal wrongdoing." *Id.* ¶ 23.

would be tasked with reading into his Article. Such a "denial" is miles away from placing any serious doubt toward the accuracy of the statements, or inferences, actually published.

Even if Appellant had expressly denied the charged implication in his original complaint, that would not be enough under settled law.[2] Appellant has not alleged factual matter to "place[]" the post-denial hyperlink "in a context that raises a suggestion" that Lizza no longer believed the Article, as opposed to "merely" pointing to "conduct that could just as well be" explained by Lizza's continued belief in the Article's accuracy. *Twombly*, 550 U.S. at 557; *see also Bertrand*, 846 N.W.2d at 901 ("[R]epeat[ing] a defamatory statement after being informed of the statement's *unambiguous* falsity" could "generat[e] an inference of actual malice" (emphasis added)).[3] That Lizza shared a hyperlink to the Article after Appellant filed his lawsuit only reinforces that he did not have doubts as to its veracity.

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[2] The comment from the Restatement (Second) of Torts (Am. L. Inst. 1977) that the Panel relied upon, Opinion at 14-15 (quoting § 580A cmt. d), (i) predates contrary precedent applying the actual malice rule, including *Connaughton*, *see supra* pp. 5-6, and (ii) has not, to Appellees' knowledge, been applied or followed by any other federal court.

[3] The Panel quotes this sentence but omits the word "unambiguous." *See* Opinion at 12-13.

C. The Panel's Decision Empowers Censorship by Public Officials.

If the Panel's decision stands, then once a public official denies reported facts or surmised implications (even obliquely or implicitly), a publisher must never again reference the challenged article, on pain of substantial cost and legal burden. *See Schuster v. U. S. News & World Report, Inc.*, 602 F.2d 850, 855 (8th Cir. 1979) ("[T]he Supreme Court has recognized that the cost of defending a protracted lawsuit can chill first amendment rights.").

Moreover, the Panel's decision incentivizes reporters to *not* seek comment from public officials prior to original publication, a "desirable and responsible practice." *Davis v. Costa-Gavras*, 654 F. Supp. 653, 657 (S.D.N.Y. 1987). After all, failure to seek comment is *not* probative of actual malice, *see id.*; *Hurley v. Nw. Publ'ns, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968), whereas—if the Panel's ruling stands—if the reporter sought comment and got a denial, then that *would* be "suggestive" of actual malice.

Worse, the Panel's opinion gives public officials veto power over unflattering coverage. They can discourage a report (or later promotion of it) by simply issuing a blanket denial. Indeed, it encourages public officials to issue denials to *all* unflattering reporting, regardless of accuracy.

This turns *New York Times Co. v. Sullivan* on its head. Animating the

Supreme Court's "actual malice" rule is our Constitution's rejection of the British form in favor of placing "the censorial power . . . in the people over the Government, and not in the Government over the people," 376 U.S. 254, 274-75 (1964) (quoting James Madison during debate in House of Representatives, reported at 4 Annals of Congress 934 (1794)). The Panel's decision cedes the "censorial power" back to the government, whose officials, by merely denying allegations, can discourage and punish the press through costly, invasive, and protracted lawsuits.

II. THE PANEL'S RULING DOES NOT COMPORT WITH *ERIE*

A. The Panel Created an Unsupported Rule of Iowa Law, as Iowa Precedent Compels a Finding that Hyperlinking to an Article Does Not Constitute Its "Republication."

This federal Court plays no role in developing state law. *See Williamson v. Hartford Life & Accident Ins. Co.*, 716 F.3d 1151, 1154 (8th Cir. 2013). The Court must "decide the case as the Iowa Supreme Court would decide it." *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 407 (8th Cir. 2004).

Where state law is unclear, this Court makes an "*Erie*-educated guess" about how the state's supreme court would decide a question of state law, *see Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 856 (8th Cir. 2010); *see also Doe*, 380 F.3d. at 407. To avoid exceeding its Constitutional limitations, *see Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it must faithfully apply the state supreme

court's precedent without substituting its judgment for that of the state's highest court. *J-McDaniel Constr. Co. v. Mid-Continent Cas. Co.*, 761 F.3d 916, 919 (8th Cir. 2014), *as corrected* (Aug. 4, 2014).

1. Iowa Precedent Disallows a Rule that a Hyperlink to an Article Is a Republication of the Article. The Iowa Supreme Court has defined "republication" as the "copying and republishing [of] a defamatory writing." *Morse v. Times-Republican Printing Co.*, 100 N.W. 867, 871 (Iowa 1904). A hyperlink does not copy the content accessed by the link, and thus is not a republication under Iowa law. Declaring a writing a republication is significant because "[e]very repetition or republication of a libel is a new libel" and a new "adoption of the original calumny." *Id.* It must be an affirmative "act"—of "*copying* . . . a defamatory writing"—that triggers such weighty consequences. *Id.* (emphasis added).

The act of copying the characters in a hyperlink, or a direction to access a writing, is not the act of copying or repeating the writing itself. Here, there is no allegation that any of the text within Lizza's November 20, 2019 tweet copies or republishes the defamatory implication at issue.

Were the question considered unsettled, the Iowa Supreme Court would "look to relevant holdings in other jurisdictions." *Stuart v. State ex rel. Jannings*, 253 N.W.2d 910, 913 (Iowa 1977). Where all other jurisdictions to have

considered a question have reached the same conclusion, the Iowa Supreme Court likely would join the chorus. *E.g.*, *Gray v. Oliver*, 943 N.W.2d 617, 628 (Iowa 2020); *State v. Rimmer*, 877 N.W.2d 652, 672 (Iowa 2016).

"Courts agree" that hyperlinking is *not* an act of republication of the content behind the link. *See Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 504 (6th Cir. 2015) (applying Tennessee law).[4]

The reasoning of this uniform precedent is unassailable. Hyperlinks are reference tools. They "direct[]" readers to that "previous" publication. *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021) (applying Virginia law). Accordingly, there is "no principled reason for holding a hyperlink distinct from a traditional reference, such as a footnote, for purposes of republication." *Id.* (collecting cases); *see also Clark*, 617 F. App'x at 505; *In re Phila. Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012), *as corrected* (Oct. 25, 2012) (applying

[4] *See also, e.g.*, *Penrose Hill, Ltd. v. Mabray*, 479 F. Supp. 3d 840, 851-53 (N.D. Cal. 2020) (California law); *In re Min. Res. Int'l, Inc.*, 565 B.R. 684, 698 (Bankr. D. Utah 2017) (Utah law); *Allstate Ins. Co. v. Shah*, No. 15-CV-01786, 2017 WL 1228406, at *4 n.33 (D. Nev. Mar. 31, 2017) (Nevada law); *Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016) (Illinois law); *Klayman v. City Pages*, No. 13-CV-143, 2015 WL 1546173, at *12 (M.D. Fla. Apr. 3, 2015) (Florida law), *aff'd*, 650 F. App'x 744 (11th Cir. 2016); *U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) (Washington law); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258, 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007) (California law); *Biro v. Conde Nast*, 171 A.D.3d 463 (N.Y. App. Div. 2019) (New York law).

Pennsylvania law, and collecting cases).

That the hyperlink may "call the *existence* of the article to the attention of a new audience" is of no consequence. *Salyer v. S. Poverty L. Ctr., Inc.*, 701 F. Supp. 2d 912, 916, 916 (W.D. Ky. 2009) (applying Kentucky law). The fact remains that a hyperlink "does not present the *defamatory contents* of the article to that audience." *Id.* It is no different than recommending or referring someone to a published article or book, and "[m]aking access to the referenced article easier does not appear to warrant a different conclusion from the analysis of a basic reference." *Id.* at 917; *see also Slozer v. Slattery*, No. 2566 EDA 2014, 2015 WL 7282971, at *7 (Pa. Super. Ct. Nov. 18, 2015) (hyperlinker's "motivations and her designation of the link with a 'like'" not "a reiteration of the defamatory content").

The Panel's statement that case law "do[es] not hold *categorically* that hyperlinking to an original publication never constitutes republication," Opinion at 14 (emphasis added), strains to create law where it does not exist. Every case to consider the question has held that hyperlinking merely points readers to the *original* publication, where it is hosted. It does not create a copy of, or alter, the cited publication. Neither Appellant nor the Panel cite any

contrary cases.[5]

2. The Panel's Rule Breaks with Iowa's Tradition of Protecting Speech. The Iowa Supreme Court is not required to follow precedent from other jurisdictions if doing so would be inconsistent with the public policy of the state of Iowa. *See Acuff v. Schmit*, 78 N.W.2d 480, 484 (Iowa 1956). But here, the Iowa Supreme Court would not reject a national consensus in favor of the novel speech-restrictive rule reached by the Panel. The Iowa Supreme Court has a 140-year-plus tradition of protecting comment on, or criticism of, persons who place themselves in the political arena or public eye. *See Mott v. Dawson*, 46 Iowa 533, 537 (1877); *Cherry v. Des Moines Leader*, 86 N.W. 323 (Iowa 1901); *Bertrand*, 846 N.W.2d at 901-02.

Were the Iowa Supreme Court to hold that a hyperlink constitutes republication of the linked content, it would cast a chilling effect on internet communications, including those in furtherance of such commentary. For

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[5] If text accompanying a hyperlink *is itself* defamatory, then a court may reach a different conclusion. *E.g.*, *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 278 (S.D.N.Y. 2016) (did not "merely" hyperlink where text in new article was defamatory). For example, this Court in *Nelson Auto*—considering whether a hyperlink was a "republication" of a prior article—examined the words that were newly published in the *later* article, including the surrounding text and words within the hyperlink itself. *Nelson Auto*, 951 F.3d at 960-61 (Minnesota law). Here, there is no allegation that the text in Lizza's tweet was defamatory.

one—as demonstrated by the Panel's ruling—the mere sharing of a hyperlink may re-set the time at which the speaker's fault is analyzed for speech that preceded the sharing. Further, it would "implicate an even greater potential for endless retriggering of the statute of limitations." *See Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002). This rejection of what is known as the "single publication rule" would result in a "multiplicity of suits and harassment of defendants" who did nothing more than refer to a prior publication. *Id.*

B. Alternatively, the Court Should Certify the Question to the Iowa Supreme Court.

If the Court believes the question of whether the Iowa Supreme Court would treat hyperlinks as republications of linked content to be "in doubt," then it should certify the question to the Iowa Supreme Court. *See Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266, 1267-69 (8th Cir. 1983) (certification appropriate where "public policy aims" of the state are implicated, the answer from the state's highest court would be dispositive and render it unnecessary for this Court to reach constitutional questions [*see supra* Point I], and there is a "likelihood of the recurrence of the particular legal issue" (citation omitted)); *see also McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (supporting certification on "novel" question of tort law "laden with value judgments and fraught with implications for First Amendment rights").

C. Panel Rehearing Is Warranted Because There Is a Live Conflict of Laws Issue that Must be Resolved Before Any State's Law May Be Applied.

The Panel overlooked a critical point of law, Fed. R. App. P. 40(a)(2): Its creation of Iowa law conflicts with the law of California, which must apply here. Appellees have always asserted that, in the event of a conflict, California law would apply, and the issue has never been decided or conceded. *See* Appellees' Br. at 26 n.9 ("To the extent this Court finds that there is a true conflict of laws between Iowa and California, California law should apply."). The issue was not resolved by the district court because the parties and court agreed that there was no material difference on dispositive issues.

California fully embraces the single publication rule, *Traditional Cat Assn., Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 404 (2004) (single publication rule for internet publications), and applying its reasoning, hyperlinks are not republications of underlying content, *see Penrose Hill*, 479 F. Supp. 3d at 851-53; *Sundance Image Tech.*, 2007 WL 935703, at *7. Because, on the Panel's holding, Iowa and California laws conflict, the Panel should have engaged in a choice of law analysis.

Applying Iowa choice of law rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), Iowa would "follow the Restatement's 'most significant relationship' methodology for choice of law issues," *Veasley v. CRST*

Int'l, Inc., 553 N.W.2d 896, 897 (Iowa 1996). For claims of defamation arising from content published in multiple states, "the state of most significant relationship will usually be the state where the person was domiciled at the time." Restatement (Second) of Conflict of Laws § 150(2).

Iowa's choice of law rules dictate that California law supplies the rule of decision in this case as to republication. *Esquire* is available in California. Congressman Nunes pleads that he is "a citizen of California," JA15 ¶ 4, and any purported harm to his reputation would most severely be felt in his California congressional district. *See Condit v. Dunne*, 317 F. Supp. 2d 344, 354 (S.D.N.Y. 2004) (applying California law to defamation case by California congressman).

CONCLUSION

Appellees respectfully request that either the Panel vacate its September 15, 2021 opinion and grant rehearing or, in the alternative, that the full Court vacate the opinion and grant rehearing *en banc*.

Dated: October 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,894 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f). This count is from the word-count function of Microsoft Word.

2. This motion 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 this motion has been prepared in a proportionally spaced typeface using Microsoft Word Version 16.0.13801.20928 (part of Microsoft Word for Office 365 MSO) in 14 point Calisto MT font.

3. Pursuant to Local Rule 28A(h)(2), this petition has been scanned for viruses and the motion is virus-free.

Dated: October 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2021, I filed a copy of the foregoing document using the Court's electronic filing system, which will send notification of such filing to all counsel of record.

/s/ Jonathan R. Donnellan