

No. 18-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER,

Plaintiff-Appellant,

v.

DANNY BURLS, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Civil Action No. 5:17-CV-79 JLH-BD
The Honorable James Leon Holmes, *United States District Judge*

**MOTION FOR LEAVE TO FILE BRIEF OF FORMER CORRECTIONS
DIRECTORS AND EXPERTS AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR
REHEARING EN BANC**

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October 23, 2019

Pursuant to Federal Rule of Appellate Procedure 29(b), Martin F. Horn, Steve J. Martin, Richard Morgan, Dan Pacholke, Phil Stanley, and Eldon Vail. (collectively, “*amici*”) move respectfully for leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellant Charles Hamner and his request for rehearing *en banc*. Appellees oppose this motion.

IDENTITY OF *AMICI CURIAE*

Amici curiae are former corrections directors and experts with experience reducing the use of solitary confinement. *Amici* are concerned the use of long-term solitary confinement has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security. *Amici* assert prison security can be maintained without the use of isolation and emphasize prisoners with mental illnesses who are placed in solitary confinement are often more disruptive and less manageable because of their isolation. *Amici* present data showing that eliminating prolonged solitary confinement in favor of alternative prison management methods leads to safer and more efficient prisons.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Correction and Probation for seven years. Horn has also served as Executive Director of the New York State Sentencing Commission.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has received gubernatorial appointments in Texas to both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas Prisons, The Walls Came Tumbling Down* and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections. During his thirty-three-year career as a Correctional Officer, he worked in one of the first intensive management units (IMUs) in Washington. Twenty-five years later, he led the effort to limit the use of IMUs, reducing system-wide violence by over thirty percent. That work is described in *More than Emptying Beds: A Systems Approach to Segregation Reform*.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. His forty-two-year career in corrections includes terms as Director of Correctional Institutions, Regional Administrator, Probation Officer, and Youth Correctional Officer. He is currently a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary confinement.

**INTEREST OF *AMICI CURIAE* AND RELEVANCE OF
MATTERS ASSERTED TO DISPOSITION OF CASE**

Among the issues presented to this Court in Mr. Hamner’s petition for rehearing *en banc* is whether holding Mr. Hamner—an individual suffering from severe mental illnesses—in solitary confinement for 203 days in conditions of extreme isolation violated his clearly established constitutional rights. *Amici* request leave to file the accompanying Brief of *Amici Curiae*, which outlines multiple well-known alternatives to solitary confinement available to Defendants at the time of Mr. Hamner’s confinement. *Amici* assert that these alternatives produce safe, effective outcomes for both prison staff and prisoners. This brief will assist the Court in its consideration of the qualified immunity issue by providing the perspective of reasonable former corrections directors and experts who recognize the harm caused by prolonged solitary confinement of mentally ill individuals.

Litigation has long highlighted the risks of harm to prisoners in isolation, particularly those with mental illnesses. *See, e.g., Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1124 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 906 (S.D. Tex.

1999); *Madrid v. Gomez*, 899 F. Supp. 1146, 1257-58 (N.D. Cal. 1995). Organizations such as the American Psychiatric Association and American Bar Association have publicly spoken out against solitary confinement for prisoners with mental illnesses. See, e.g., *American Psychiatric Association Position Statement on Segregation of Prisoners with Mental Illness* (2012, retained 2017), available at <https://bit.ly/2QhVsF9>; *ABA Standards for Criminal Justice: Treatment of Prisoners*, 32, 56 (3d ed. 2011), available at <https://bit.ly/2VWwHnJ>. The American Bar Association’s Standards on Treatment of Prisoners expressly forbid housing prisoners with serious mental illnesses in segregation because “segregation of prisoners with mental illness can be so damaging, and because isolation itself can incubate mental illness.” *ABA Standards* at 56. *Amici*—all of whom are corrections experts and/or former directors of state corrections systems—approach the inhumane conditions of long-term isolation at issue in this case from the perspective of professionals who have taken responsibility for reducing the systemic violence and lasting harms created by solitary confinement. *Amici* have seen first-hand the dramatic reduction in prison violence and positive development of prisoners who are prepared and permitted to succeed that result from eliminating reliance on prolonged solitary confinement.

Amici are concerned the use of long-term solitary confinement, including for people with serious mental illnesses, has been perpetuated under a misguided belief

that prisons have no viable alternative for ensuring security. Partly in reaction to frequent litigation challenging the constitutionality of prolonged solitary confinement and a growing awareness of its harmful effects, many state correctional systems have implemented substantial reforms. *Amici* aim to assist the Court by showing how prison systems have executed these reforms, thereby reducing the use of prolonged isolation while maintaining prison security and reducing operational costs. The success of the reforms highlighted by *amici* demonstrate that eliminating prolonged solitary confinement is possible through three interrelated reforms: reducing the number of prisoners sent to solitary confinement, providing rehabilitation that instills prosocial behaviors benefitting the prison as a whole, and reducing the length of time prisoners spend in solitary. *Amici* submit that these three strategies, implemented together, have proven to result in safer prisoners and safer communities.

CONCLUSION

In light of the availability and success of these reforms, along with the substantial volume of litigation challenging long-term solitary confinement, prison administrators are on notice that it is a constitutional violation to place mentally-ill individuals like Mr. Hamner in prolonged solitary confinement. As Justice Sotomayor stated, “[c]ourts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in near-total

isolation from the living world, in what comes perilously close to a penal tomb.”
Apodaca v. Raemisch, 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation and citation omitted).

For the above stated reasons, *amici* request respectfully that the Court grant their motion for leave and accept for filing the accompanying *amicus* brief in support of Mr. Hamner’s petition for rehearing *en banc*.

Dated: October 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,144 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f). This document complies also with the typeface requirements of Federal Rule of Appellate Procedure 27(d)(E) because this document has been prepared in a proportionally spaced typeface using Times New Roman in font size 14.

Additionally, pursuant to Local Rule 27B(h)(2), I certify this motion has been scanned for viruses and is virus-free.

Dated: October 23, 2019

s/ Danielle C. Jefferis
Danielle C. Jefferis

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 23, 2019

s/ Danielle C. Jefferis
Danielle C. Jefferis

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INTERESTS OF *AMICI CURIAE*

Amici curiae are former corrections directors and experts with experience reducing the use of solitary confinement. *Amici* are concerned the use of long-term solitary confinement has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security. *Amici* assert prison security can be maintained without the use of isolation and stress prisoners with mental illnesses who are placed in solitary confinement are often more disruptive and less manageable because of their isolation. *Amici* present data showing that eliminating prolonged solitary confinement in favor of alternative prison management methods leads to safer and more efficient prisons.

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RULE 29(a)(4)(E) STATEMENT

Amici certify no party's counsel authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the brief's preparation and submission.

SUMMARY OF ARGUMENT

Aware of isolation's harmful effects, many correctional systems have demonstrated that eliminating prolonged solitary confinement—while simultaneously improving prison security—is possible through three interrelated reforms: reducing the number of prisoners sent to solitary confinement, providing rehabilitation that instills prosocial behaviors benefitting the prison as a whole, and reducing the length of time prisoners spend in solitary. These three strategies, implemented together, result in safer prisons and safer communities. In light of the availability and success of these reforms, prison administrators can no longer assert a compelling interest in keeping prisoners in long-term solitary confinement.

ARGUMENT

I. Solitary Confinement Did Not Reduce Violence Within Prison Systems But Did Raise Concerns About Harm To Prisoners.

Over a century ago, America abandoned solitary confinement as a failed experiment begetting mental illness.¹ But in the 1980s, solitary confinement returned

¹ Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 746-47 (2015).

to America’s prisons, partly in reaction to the violence and disorder created by exploding prison populations.² Correctional officials believed they could pinpoint the “troublemakers” and the “worst of the worst” who most frequently engaged in violence and put them in isolation to restore order.³ They were wrong.

Increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”⁴ Nonetheless, isolation became an overused part of the correctional toolkit.⁵ Punitive isolation became common for even minor offenses.⁶ As the practice proliferated, studies showed “[p]risons with higher rates of restrictive housing had higher levels of facility disorder.”⁷ Psychologists demonstrated that the pathology underlying the increase in disorder was caused by isolation, which led prisoners to “occupy this idle time by committing themselves to fighting against the system.”⁸

² *Id.* at 747-50.

³ Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

⁴ B. Steiner & C.M. Cain, U.S. Dep’t of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* 165, 179 (2016).

⁵ Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. Times, March 11, 2012, at A1.

⁶ Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* 15 (2018).

⁷ Allen Beck, U.S. Dep’t of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

⁸ Craig Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003).

Attitudes about solitary confinement have shifted. Research confirms prolonged solitary confinement causes extensive harm to people's mental health.⁹ Litigation has highlighted the risks to prisoners in isolation, particularly those with mental illnesses.¹⁰ Mindful that solitary confinement harms prisoners and does not improve safety, the United States Senate and many states have commissioned studies on the impacts of isolation and have undertaken broad reforms to restrict its use.¹¹ Seven states passed legislation prohibiting placement of mentally ill prisoners in solitary confinement.¹² Sixteen states passed legislation limiting the use of isolation, and many more reformed correctional policies to reduce solitary confinement.¹³ The American Correctional Association (ACA), the largest corrections accrediting body

⁹ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 286 (2018).

¹⁰ See, e.g., *Jones'El v. Berge*, No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002); *Joslyn v. Armstrong*, No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

¹¹ Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014) <https://bit.ly/1Bk0AJz>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://bit.ly/2YKCC5R>; Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell 87-88* (2018) (*ASCA-Liman 2018*).

¹² Those states are Colorado, Massachusetts, Nebraska, Nevada, New Mexico, New York, and Texas. National Conference of State Legislatures, *Administrative Segregation: State Enactments: January 2018* (2018), <https://bit.ly/2YJabvK> (*State Enactments*); Andrew Oxford, *Gov. Lujan Grisham signs criminal justice legislation*, Santa Fe New Mexican, Apr. 3, 2019, <https://bit.ly/2JyTAqL>.

¹³ *State Enactments*, *supra* note 12.

in the United States, recommended limiting the use of isolation and prohibiting the placement of people with “serious mental illness in long-term solitary confinement.”¹⁴ In 2016, a report published by the Association of State Correctional Administrators and the Arthur Liman Center for Public Interest Law at Yale Law School captured the growing tendency toward reform: “Instead of being cast as the solution to a problem, restricted housing has come to be understood by many as a problem in need of a solution.”¹⁵

II. Limiting The Use Of Solitary Confinement Has Reduced Violence Within Prisons And Improved Safety For Corrections Officers.

As of 2019, many states have restricted the use of solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report system-wide reforms that have dramatically reduced the population of prisoners in isolation.¹⁶ Prisoners in these states now reportedly stay in isolation for days, not years, in compliance with ACA-recommended standards.¹⁷ These states transformed their prisons by reducing the

¹⁴ American Correctional Association, *Restrictive Housing Performance Based Standards*, 4-RH-0031, 4-RH-0025 (Aug. 2016), <https://www.asca.net/pdfdocs/8.pdf> (*ACA Standards*).

¹⁵ Association of State Correctional Administrators & Liman Center for Public Interest Law at Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* 15 (2016) (*ASCA-Liman 2016*).

¹⁶ *ASCA-Liman 2018*, *supra* note 11, at 5, 7.

¹⁷ *ACA Standards*, *supra* note 14, at 13-14.

number of prisoners sent to solitary confinement, initiating prosocial training for prisoners in temporary isolation, and reducing the length of time prisoners spend isolated.

These reforms have resulted in a dramatic decrease in prison violence.¹⁸ In Mississippi, “the number of incidents requiring use of force plummeted. . . Monthly statistics showed an almost seventy percent drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”¹⁹ Similar metrics in Colorado showed a decrease in violence of approximately eighty percent post-reforms.²⁰ In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three or more times every week in solitary; after reforms, they now occur only a few times each year.²¹ Barely a year after implementing solitary confinement reforms, Maine

¹⁸ See, e.g., Marc A. Levin, Esq., *Testimony Before the U.S Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (February 25, 2014), <https://bit.ly/2Mdmgbg>; Rick Raemisch, remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What’s Worked in Colorado?* (Sept. 17, 2018), <https://bit.ly/2VXdPh> (*Raemisch Remarks*); *Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author) (*Deterrence*).

¹⁹ Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1043 (2009).

²⁰ *Raemisch Remarks*, *supra* note 18.

²¹ Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 a.m.), <https://n.pr/2vLYbTL>.

prisons reported “substantial reductions in violence.”²² Similarly, Washington officials observed a fifty percent drop in assaults against staff, the use of weapons, and fights within a year of implementing various reforms, including a group violence deterrence strategy.²³ Between 2014 and 2017, violent incidents in two high-security Washington prisons decreased by nearly sixty percent and prisoner-on-staff assaults plummeted by nearly ninety percent.²⁴

III. States Reduced Their Use of Solitary Confinement by Limiting the Reasons and Managing the Behaviors that Result in Prisoners Being Sent to Solitary.

Recognizing that solitary confinement does not reduce prison violence, prison officials developed strategies to reduce the influx of prisoners into isolation. These strategies included deterring violent acts that resulted in isolation, eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who need mental health treatment or protective custody.²⁵

Prison officials began reforms by evaluating who was put in solitary confinement and why. They discovered that rather than housing “the worst of the worst,” isolation cells often were filled with people who were simply disruptive,

²² Levin, *supra* note 18, at 3.

²³ Dan Pacholke & Sandy Felkey Mullins, U.S. Dep’t of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 1, 5 (2016), <https://bit.ly/2MdmuiC>; *see generally*, Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017).

²⁴ *Deterrence*, *supra* note 18.

²⁵ Digard, *supra* note 6, at 28-29.

mentally ill, or sought protective custody.²⁶ Self-reports from correctional departments indicated “[l]ow-level nonviolent offenses were among the most common infractions to result in disciplinary segregation sanctions,” and in some states, eighty percent of prisoners in solitary confinement had been diagnosed with a mental illness.²⁷ Heeding policy expectations outlined by the National Commission on Correctional Health Care prohibiting the placement of people with mental illness in solitary confinement,²⁸ reforming states determined that assignment to solitary was inappropriate for these prisoners in the first place, and continued isolation was likely to cause long-term harm.²⁹ Now, reforming states withhold privileges to punish less serious infractions instead of using punitive isolation,³⁰ reserving solitary confinement only for prisoners who “pose a serious threat to the safety of others,” and “only when a less-restrictive setting is not sufficient.”³¹

States also reduced the influx of prisoners into isolation by creating alternative housing for prisoners who need mental health treatment and/or protective custody. Several states—including Colorado, Massachusetts, Nebraska, New Mexico, New

²⁶ Hans Toch & Terry Kupers, *Violence in Prisons, Revisited* 45.3 J. of Offender Rehabilitation 1, 18 (2007); Digard, *supra* note 6, at 15.

²⁷ Digard, *supra* note 6, at 16; *ASCA-Liman 2016*, *supra* note 15, at 50.

²⁸ National Commission on Correctional Health Care, Position Statement: Solitary Confinement (Isolation) 4 (April 2016), <https://www.ncchc.org/filebin/Positions/Solitary-Confinement-Isolation.pdf>.

²⁹ *Beyond Supermax*, *supra* note 19.

³⁰ Digard, *supra* note 6, at 31-32.

³¹ *Id.* at 32.

York, and Texas—passed legislation preventing the isolation of prisoners with serious mental illness, with New Mexico also excluding any prisoner who exhibits self-injurious or suicidal behaviors.³² These states, along with Arizona, Mississippi, North Carolina, North Dakota, Pennsylvania, Virginia, Washington, and the federal government, created policies for housing prisoners with mental illness in ways that do not exacerbate their illnesses.³³ Reforming states implemented individualized screening procedures to identify vulnerable prisoners with specific housing and/or treatment needs.³⁴ Once those states have identified vulnerable prisoners, officials make case-by-case decisions as to whether to place these individuals in “mission-specific” housing, where programming, schedules, and security are tailored to the needs of that population.³⁵ By implementing these strategies and diligently re-screening potentially vulnerable prisoners, innovating jurisdictions have shown “that agencies can safely reduce their use of segregation. . . by removing vulnerable, nonviolent individuals from segregation and considering alternative strategies.”³⁶

³² *State Enactments*, *supra* note 12; Oxford, *supra* note 12.

³³ *Hager & Rich*, *supra* note 11; U.S. Dep’t of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 48-49 (2016), <https://www.justice.gov/archives/dag/file/815551/download>.

³⁴ Allison Hastings et al., National PREA Resource Center, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails* 7-8 (2015).

³⁵ *Id.* at 10-11.

³⁶ *Id.* at 18-19.

CONCLUSION

“Clearly, viable alternatives to supermax do exist.”³⁷ Reforming states have demonstrated less harmful and more effective alternatives can prevail over long-term isolation in prison. The alternatives to solitary confinement employed by a large and growing number of states have enhanced prison security, prisoner welfare, and societal safety, demonstrating there is no longer a penological interest in maintaining prisoners in prolonged isolation. Minimizing solitary confinement’s harm is not only a moral imperative, but also a practical necessity.

Dated: October 23, 2019

Respectfully submitted,

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s/ Danielle C. Jefferis

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³⁷ Briggs, *supra* note 3, at 1371.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,432 words excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f). This document complies also with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because this document has been prepared in a proportionally spaced typeface using Times New Roman in font size 14.

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Dated: October 23, 2019

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Danielle C. Jefferis

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I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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