Case No. 20-3493

United States Court of Appeals
For the Eighth Circuit

301, 712, 2103 AND 3151 LLC, et al.,

Plaintiffs-Appellants,

v.

CITY OF MINNEAPOLIS,

*Defendant-Appellee.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (No. 20-cv-01904)

PLAINTIFFS/APPELLANTS' PETITION FOR REHEARING BY PANEL OR REHEARING *EN BANC*

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12 TWENTY-SECOND AND 1827 LASALLE LLC; 137 EAST SEVENTEENTH STREET LLC; 1522 LASALLE AVENUE LLC; 1728 SECOND AVENUE AND 1801 THIRD AVENUE LLC; 1806 AND 1810 THIRD AVENUE LLC; 1816, 1820 AND 1830 STEVENS AVENUE LLC; 1817 SECOND AVENUE LLC; 1900 AND 1906 CLINTON AVENUE LLC; 1924 STEVENS AVENUE LLC; 2020 NICOLLET AVENUE LLC; 2101 THIRD AVENUE LLC; 2323 AND 2401 CLINTON AVENUE LLC; 2417, 2423 AND 2439 BLAISDELL AVENUE LLC; 2427 BLAISDELL AND 2432 FIRST AVENUE LLC; 25 TWENTY-FIFTH STREET LLC; 2535 CLINTON AVENUE LLC; 2545 BLAISDELL AVENUE LLC; 2609 HENNEPIN AVENUE LLC; 2633 PLEASANT AVENUE LLC; 2720 PILLSBURY AVENUE LLC; 2738 AND 2750 PILLSBURY AVENUE LLC; 2809 PLEASANT AVENUE LLC; 600 FRANKLIN AVENUE LLC; AMY SMITH; BLAISDELL 3322, LLC; BLOOMINGTON 4035, LLC; BRYANT AVENUE PROPERTIES LLC; COLFAX APARTMENTS LLC; COLFAX VILLAS I, LLC; DUPONT PROPERTIES LLC; FLETCHER PROPERTIES, INC.; FRANKLIN VILLA PARTNERSHIP, L.L.P.; FREMONT APARTMENTS, LLC; FREMONT TERRACE APARTMENTS, L.L.C.; GARFIELD COURT PARTNERSHIP, L.L.P.; GASPARRE NEW BOSTON SQUARE, LLC; GATEWAY REAL ESTATE, L.L.C.; JEC PROPERTIES, LLC; LAGOON APARTMENTS, LLC; LL LLC; NORTHERN GOPHER ENTERPRISES, INC.; PATRICIA L. FLETCHER, INC.; and RAY PETERSON,

Plaintiffs-Appellants

STATEMENT PURSUANT TO FEDERAL RULE 35(b)

Counsel states that the three judge panel's decision conflicts with the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) and this Court's recent decision in *Heights Apartments, LLC v. Walnut Trails, LLLP*, No. 21-1278 (April 5, 2022). The Panel applied an analysis expressly repudiated in *Cedar Point* in determining whether the City of Minneapolis' Fair Chance Ordinance, Minneapolis Code of Ordinances, §244.2030 (the "Ordinance"), effectuates a *per se* physical taking of the Appellant owners' and residential landlords' property for a public use. In *Heights Apartments*, this Court found *Cedar Point* controlling in holding that plaintiffs' stated a viable claims that the Governor's eviction moratorium constituted a constitutional taking. Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.

These proceedings also involve the question of exceptional public importance of whether government may impinge private property owners' fundamental right to exclude for the public purpose of addressing perceived affordable housing shortages. The Panel decision affects every owner of residential tenancies in Minneapolis. The Ordinance is one of many existing or planned enactments that seize control of the tenant screening process for the avowed purpose of compelling landlords to accept applicants they would otherwise deem to present too risky.

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FACTUAL AND PROCEDURAL BACKGROUND

Appellants each own and/or manage multi-unit buildings in Minneapolis leased for residential use. JA40-47, 169, 175, 185, 191-95. They constitute a broad spectrum of residential landlords, including both large corporate entities and management companies, as well as individuals personally owning and managing a limited portfolio. *Id.* ("Landlords" refers to residential property owners and managers who lease property to residential tenants.)

Leasing to responsible tenants is crucial to landlords. JA170-71, 177, 186-87, 196. Leases involve the demise of exclusive possession of property to individuals that may not easily be terminated. While ensconced in a property, tenants may stop paying rent, damage the property or disturb other tenants. This conduct deprives landlords of funds to meet debt servicing obligations and pay property taxes, inflicts uninsured property loss and damages tenant relations. Tenants are often judgment proof, so landlords may also be denied reimbursement of their losses.

To avoid these issues, landlords establish well established tenant screening criteria predictive of a tenants' likelihood of defaulting, causing damage, or engaging in disruptive conduct. JA170-71, 177, 186, 196. These criteria exclude tenants on the basis of their criminal record, credit score and history, past evictions and other negative rental history. JA171, 177, 187, 196. There is no dispute that an applicant with a criminal record presents a heighted risk of default or disruptive

conduct. Individuals burdened with a criminal record experience difficulty finding employment, so they may lack the funds necessary to pay the rent. Recently released inmates also often experience difficulty adjusting to freedom. Landlords also rely upon the credit scores provided in third-party credit reports. JA180, 199. Those scores are calculated through analytics validated to be predictive of consumers' likelihood of defaulting on their obligations. JA180, 199. Landlords furthermore investigate prior rental history to identify conduct of concern. JA180, 200. Conversely, prior successful tenancy is probative of future success as a tenant. *Id.*

In September 2019, the Minneapolis City Council enacted the Ordinance. It establishes general screening criteria based on criminal background and credit and rental history, and prohibits landlords from adopting more exclusive screening criteria unless they conduct individual assessments. Ordinance at §204.2030(c)(1). The individual assessment option requires landlords to accept and consider any supplemental evidence applicants submit within the context of criteria specified in the Ordinance. *Id*., §204.2030(d). Landlords must inform the applicant in writing of the basis for denying an application and explain why the supplemental evidence did not negate the concern resulting in the denial. *Id*., §204.2030(e)(2). Noncompliance subjects landlords to criminal prosecution, revocation of rental licenses, administrative fines, restrictions, or penalties, and any other remedy available at equity or law. *Id.* § 244.2030(g).

The Ordinance is part of a trend of local governments seeking to shift responsibility for resolving perceived shortages of affordable housing from government agencies to private landlords. *See, e.g.* Seattle Municipal Code § 14.09; Portland City Code § 30.01.086; Oakland Ordinance No. 135181; St. Paul Ordinance 20-14, § 193.04; Berkeley Ordinance No. 7,692-N.S; Kansas City Ordinance No. 190935; Philadelphia City Code § 9-810. Each of these enactments controls the tenant screening process with a goal of coercing landlords to expand the range of tenants to whom they will rent. In doing so, they strip landlords of one of their most important rights – the right to choose who may or may not enter their property.

Appellants filed a Complaint against the City of Minneapolis challenging the Ordinance under the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause (and similar provisions of the Minnesota Constitution). The District Court denied Appellants' Motion for a Preliminary Injunction, ruling they had not shown a likelihood of success on the merits.

Of significance here, on the takings claim, the District Court concluded that the Ordinance merely regulated the tenant selection process by defining the process landlords must following in reviewing tenant applications. JA312. In support of this conclusion, it found that landlords were free to reject tenants under the individual assessment option. The District Court further held that Appellants failed to demonstrate that this regulatory scheme constituted a constitutional taking under the

balancing test articulated in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978) because they had not submitted adequate evidence of the economic harm and/or that the Ordinance interferes with Appellants' distinct investment-backed expectations. JA313-14.

Appellants appealed, arguing that the District Court erred by failing to address their argument that the Ordinance constrained landlord choice notwithstanding the individual assessment option. Appellants alternatively argued that, even if the Ordinance merely regulated the tenant screening criteria process, it still impinges upon landlords' fundamental right to exclude.

This latter argument anticipated the Supreme Court's subsequent ruling in *Cedar Point*. As set forth in greater detail hereinafter, the Court held that authorizing entry upon a person's property effectuates a physical taking regardless of whether this authorization is granted in a regulatory enactment. It also stressed that the right to exclude is one of the fundamental sticks in the bundle of property rights.

Unfortunately, *Cedar Point* was decided after briefing was complete in this case. Appellants informed the Court of *Cedar Point* through a citation to additional authorities pursuant to FRAP 28(j) and addressed it in oral argument. But, they did not have the opportunity to give it the attention it would have received in their briefs.

The Panel affirmed. *301, 712, 2013 and 3151 LLC v. City of Minneapolis*, 27 F.4th 1377 (8th Circ. 2022). It agreed with the District Court that the Ordinance only

regulates the tenant assessment process. While recognizing that an ordinance requiring landlords to rent to tenants they otherwise would not might effectuate a physical invasion, the Panel concluded that the Ordinance really only restricted landlords' use of their property since it ultimately only required them to follow the individual assessment's procedural provisions. *Id*. at 1383. But, the Panel reached this conclusion without considering the overall impact of applying the individual assessment procedures upon tenant selection. It did not address Appellants' arguments on this point, in part, because it appeared to misunderstand them as directed to establishing a regulatory taking. *Id*., 1831-34.

Appellants' accordingly seek Panel rehearing so that it may consider the impact of the individual assessment option consistent with the requirements of *Cedar Point*. They also seek rehearing *en banc* so that the entire Court may consider the crucial policy and constitutional issues presented in this case.

ARGUMENT

A. Rehearing By The Panel Or *En Banc* Should Be Granted Over Issues Of Fundamental Importance After Giving Full Consideration To *Cedar Point* And Appellants' Arguments

"The purpose of a petition for [panel] rehearing ... is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 990 (8th

Cir. 2010). *See also*, 16A Charles Alan Wright, Arthur R, Miller, & Edward H. Cooper, Federal Practice & Procedure § 3986.1 (4th ed. 2008) ("It should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings.").

The Panel did not apply the constitutional analysis established in *Cedar Point*. In *Heights Apartments*, this Court held *Cedar Point* controlling over *Yee v. City of Escondido*, which the Panel in this case discussed at length, as to the plaintiffs' Takings Clause claim. *Heights Apartments, LLC v. Walz, supra*, slip op. p. 17. While noting *Cedar Point*, the Panel here repeated the Ninth Circuit's error in that case by focusing on the nature of the Ordinance rather than its impact. Granting rehearing will afford the Panel (or the Court *en banc*) the opportunity to fully consider the issues in light of this controlling Supreme Court decision.

Appellants also argued that the Ordinance creates forced leaseholds by specifying screening criteria. *See, Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (forced leaseholds constitute takings). The Panel agreed that an "ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical invasion taking." *301, 712, 2013 and 3151 LLC*, 27 F.4th at 1383 (8th Cir. 2022). It nevertheless concluded that the Ordinance does not have this effect since landlords may exercise the individual assessment option. *Id*. The Panel simply assumed, however, that with the

option to conduct individual assessments, the Ordinance is not coercive. And, though it addressed Appellants' arguments that the individual assessment option is coercive, it did so only within the context of whether Appellants established a regulatory taking under *Penn Central*. *Id.* at 1389-84. While Appellants alternatively maintained that the Ordinance would constitute a taking even if purely regulatory,[1] they primarily argued that an enactment inhibiting the criteria or process landlords utilize for tenant screening constitutes a physical taking. Indeed, as previously noted, the fundamental basis of the Appellants' appeal was the District Court's failure to address these arguments. Panel rehearing should be granted so that they may now be considered.

Beyond that, the issues presented are of exceptional importance. Appellants raise serious constitutional challenges to the troubling impingement upon their property rights in an effort to fix social welfare issues. They object to government

[1] In the District Court, Appellants argued that the Ordinance constituted a "regulatory" taking under *Penn Central* because of the burdens conducting an individual assessment imposes. They did not raise that argument on appeal. (Appellants' Brief on Appeal, pp. 1-2.) Appellants did make a *Penn Central* argument, but contended only that the character of the invasion the Ordinance authorized resulted in a regulatory taking regardless of its attendant burdens. (Appellants' Brief on Appeal, pp. 35-36 (quoting *Hodel v. Irving*, 481 U.S. 704 (1987) (regulation constituted a regulatory taking even though it did not significantly interfere with owners' investment backed expectations because "the character of the Government regulation . . . is extraordinary," in that it "amount[ed] to virtually the abrogation of" an essential stick in the bundle of rights."). Without abandoning that argument, Appellants do not seek rehearing *en banc* or reargument of that contention.

exercising control over the private party tenant selection process to a degree well beyond anything ever previously considered. So, a broad spectrum of landlords joined this case. And, its resolution will affect the rights of those well beyond the parties. The Ordinance is not an isolated enactment. It is the product of a misguided movement advocating the refocusing of efforts to address housing issues from direct government involvement to requiring landlords to rent to individuals they believe present an unacceptable risk of default or disruptive behavior.

Kansas City, Missouri, which has adopted a similar Ordinance, for instance, is located in the Eighth Circuit. Kansas City Ordinance No. 190935. And, other jurisdictions within the Eighth Circuit may be considering similar ordinances. The Court's decision will dictate their permissibility. This case is also one of several challenges to these so-called fair chance housing ordinances. *See e.g.*, *Newcomb v. City of Portland*, No. 3:20-cv-000294-SI (D. Or.); *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash.). The decision here will influence the national debate. As such, it deserves the attention of the full Court.

The procedural posture of this case might normally serve as a disincentive to granting rehearing *en banc* since it arises from the denial of a motion for a preliminary injunction. But, a reversal would be case dispositive. And, forcing appellants to proceed to a final judgment will subject them to irreparable harm until

a trial is held, and allow a model for similar fair chance ordinances to be adopted in the interim.

B. The Ordinance Impinges Landlords' Right To Exclude And Constitutes A Per Se Constitutional Taking

The Fifth Amendment specifies that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The "paradigmatic taking requiring just compensation" is a direct invasion of a property right. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

> [P]hysical takings require compensation because of the unique burden they impose: ***A permanent physical invasion***, however minimal the economic cost it entails, ***eviscerates the owner's right to exclude others from entering and using her property*** – perhaps the most fundamental of property interests.

Id. at 539 (emphasis added). *See also, United States v. General Motors Corp.*, 323 U.S. 373, 270-71 (1943) (government physically takes property when it exercises eminent domain powers). That occurs where occupation is appropriated by "the State, or [] a party authorized by the State". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 n.9 (1982).

Takings clause jurisprudence has evolved to recognize that regulation of property may so interfere with its use that a taking occurs even without a direct physical invasion. *Penn Central Trans. Co. v. New York City*, *supra*. In *Penn Central*, the Court adopted a multi-factor analysis to assess whether a regulation has

this impact. Those factors include "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

In *Cedar Point*, however, the Supreme Court clarified that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." 141 S.Ct. at 2072. So, the Court concluded:

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

Id. (citations omitted).

The Panel repeated the Ninth Circuit's error in determining that the Ordinance only constitutes a regulation of the use of property because of the individual assessment option. *301, 712, 2013 and 3151 LLC*, 27 F.4th at 1383. The Panel focused on the nature of the individual assessment, deeming it process oriented and therefore only restricting use of landlords' property. *Id*. at 1383-85.

To the contrary, while landlords may still decline applicants on a case-by-case basis, they are dissuaded from rejecting every applicant failing to meet more

exclusive screening criteria. So, the Ordinance's ultimate result is to force landlords to rent to tenants they would otherwise reject. That is its whole point. Otherwise, why create the extensive process it establishes?

Process drives result. The Ordinance requires landlords maintaining more exclusive screening criteria to accept and "consider" any evidence an applicant may submit. Ordinance §244.2030(d). Consider means "to take into account". *Merriam-Webster On-Line Dictionary*, www.merriam-webster.com/consider. And, the supplemental evidence must be considered in light of specified factors. Ordinance §244.2030(d). Applying this standard will compel landlords to accept tenants they would otherwise reject. Landlords are dissuaded from doing otherwise by the requirement to explain in writing why any tendered supplemental evidence did not ameliorate the reason for the denial and specification of criminal penalties, license forfeiture and civil fines. The acceptance of a tenant application based on consideration of supplemental evidence a landlord is compelled to consider is involuntary. It results in the conveyance of a property interest to individuals who the landlord would otherwise exclude. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 525 (1981) (Brennan, J., concurring) (noting, although regulation had exceptions, the "practical effect" amounted to a ban).

For example, under the Ordinance, the period during which landlords may generally exclude tenants for criminal convictions begins from the date of

sentencing. §244.2030(c)(1). While what exactly constitutes the date of sentencing is unclear, it certainly refers to an event occurring before an offender is incarcerated. As sentences for many crimes exceed the Ordinance's permitted exclusionary period, landlords applying the inclusive screening criteria might be prohibited from considering an inmate's crimes from the moment they are released. Conversely, landlords generally adopt screening criteria under which the exclusionary period begins at the release from prison. JA177-79, 197-99. And, with good reason. Even the data cited in the Ordinance establishes high recidivism rates in the post-release period while a former inmate is adjusting to normal life. §244.2030(a). Unless landlords are free uniformly to reject applicants' supplemental evidence, they will be coerced to accept tenants sooner after their release from prison than specified in their screening criteria. They must do so even though they continue to believe the applicant presents a risk of default or disruptive behavior beyond what they would otherwise be willing to assume.

Even if the application of the screening criteria did not constrain landlord choice, the *Cedar Point* Court recognized the right to exclude as "'one of the most treasured' rights of property ownership." 141 S. Ct. at 2072 (quoting *Loretto*. 458 U.S. at 435). It cited approvingly Blackstone's description of the "very idea of property" as entailing "'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any

other individual in the universe.'" *Id.*, (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)). The right to solely and despotically exclude means government may not tell an owner how to go about making that decision.

In *Heights Apartments*, the Court held that the Appellant's Complaint sufficiently alleged that the Governor's eviction moratorium during the COVID Pandemic constituted a *per se* taking under *Cedar Point*. *Heights Apartments, LLC v. Walz, supra*, slip op. p. 2. The Court held the moratoria to constitute a taking even though they were temporary, only required landlords to continue renting to tenants they voluntarily selected, were subject to numerous exceptions, and did not impact the landlords' right to pursue delinquent rent payments. In so ruling, the Court concluded that:

> *Cedar Point Nursery* controls here and *Yee*, which the Walz Defendants rely on, is distinguishable. The rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing property past the leases' termination.

Id. at 17. If executive orders only temporarily interfering with the right to evict constitute a taking, then an Ordinance that controls the entire tenant selection process certainly is.

The Panel acknowledged these arguments, but as set forth previously, appears to have misunderstood them only as directed to establishing a regulatory taking. *301, 712, 2013 and 3151 LLC*, 27 F.4th 1377 at 1383-85. The point here is not that performing individual assessments so interferes with the use of property that it

impairs property value to the extent of constituting a constitutional taking. It is that, even with the individual assessment option, the Ordinance results in physical takings and otherwise impinges the right to exclude. That is what appellants meant in arguing that the individual assessment option is "illusory." *Id*. at 10 (quoting Appellants' Brief on Appeal). It does not change the Ordinance's coercive impact.

Beyond that, the physical invasion the Ordinance authorizes is significant. Leases convey property interests and exclusive possession – a fundamental attendant right of property ownership – of the demised premises. *Goodwin v. Clover*, 98 N.W. 322, 323 (Minn. 1904) (describing a tenant's rights as the "right to occupy" and the "*superior right* to the possession of the land") (emphasis added). That shifts authority to determine who may enter the property to the tenant. *Loretto*, 458 U.S. at 436 ("To require, as well, that an owner permit another to exercise complete dominion literally adds insult to injury.").

The Ordinance also addresses every factor landlords consider in evaluating tenant applications. Its individual assessment option imposes extensive requirements, including considering all supplemental evidence the **applicant** deems pertinent. Giving applicants control of what the landlord considers in screening an application turns the entire process on its head. And, the obligation to explain in writing every denial is a further burden. The right to exclude is seriously impinged where it is exercised in a manner and based on factors dictated to the property owner.

The Ordinance's true impact is further illustrated by its fundamental purpose. U.S. Const. amend. V. ("nor shall private property be taken for public use, without just compensation."). It is not an exercise of the City's police powers. And, is not a typical regulation of the landlord-tenant relationship, such as to provide for tenant health and safety or to prohibit perceived predatory practices. Rather, as the Ordinance's Findings and Purpose section plainly establishes, it is social welfare legislation. The Ordinance refers to "the persistent low vacancy rates, increases in rent, and stagnant wages for renters" making it "difficult for renters to access safe, affordable housing in Minneapolis." Ordinance, §244.2030(a)(2). To remedy these issues, the City seeks to "[i]ncreas[e] housing access and promot[e] housing stability". *Id*. §244.2030(a)(24).

Using one segment of society's property to benefit another segment is taking property to address a public burden. *Arkansas Game & Fish*, 568 U.S. at 31 ("Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens"). Taking property for the purported purpose of providing others greater housing access is no different than condemning it to build a highway or public building. It is a constitutional taking that may not proceed without just compensation.

CONCLUSION

Rehearing *en banc* or by the Panel should be granted to give full consideration of the serious constitutional challenges presented to the impingement of Appellants' fundamental property rights.

Respectfully submitted,

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Dated: April 11, 2022

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Rule 35(b)(2) of the Federal Rules of Appellate Procedure because it contains 3,814 words, excluding the parts of the petition exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This petition complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in proportionally spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

As required by Eighth Circuit Local Rule of Appellate Procedure 28A(h), this petition has been scanned for viruses and is virus free.

*/s/Cassandra M. Jacobsen_*
Cassandra M. Jacobsen

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I electronically filed the foregoing Petition with the Clerk of the Court of 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.

/s/Cassandra M. Jacobsen
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