Case No. 24-1610

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRYAN S. MICK,
Plaintiff-Appellee,
v.
BARRETT GIBBONS, et al.,
Defendant-Appellees,

NEBRASKA STATE PATROL,
Third-Party Appellant.

On Appeal from the United States District Court
for the District of Nebraska
The Honorable John M. Gerrard, District Judge

BRIEF OF MEDIA OF NEBRASKA AND COMMON CAUSE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF BRYAN MICK AND ENCOURAGING AFFIRMANCE OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

Media of Nebraska is a nonprofit corporation registered in Nebraska. Common Cause is a nonprofit corporation with a Nebraska chapter. Amici have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF THE *AMICI CURIAE'S* INTEREST

Amici, Media of Nebraska and Common Cause Nebraska, are at the forefront of free press and accountability efforts in Nebraska.

Media of Nebraska is a nonprofit organization formed in 1972. Its members include the Nebraska Press Association, the Nebraska Broadcasters Association, Nebraska Daily Publishers, Journal-Star Printing Company, and the Omaha World-Herald. Media of Nebraska's purpose is to monitor and safeguard the freedom-of-the-press rights enshrined in the First Amendment to the U.S. Constitution. The organization fulfills its mission primarily through legislative advocacy.

Common Cause Nebraska is a nonprofit organization with an active Nebraska chapter. Common Cause was founded as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable to the interests of ordinary people. Common Cause is dedicated to strengthening democracy through government transparency and accountability, which it achieves through education, legislative advocacy, and litigation. Amici have the

authority to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2), as all parties have consented to its filing.[1]

Amici have an extraordinary interest in the outcome of this case. News media, like Media of Nebraska's members, has a First Amendment interest in information litigants acquire through discovery, including information acquired through nonparty discovery from states. Expanding sovereign immunity to bar access to this discovery would interfere with the press's ability to gather and report information about matters of public concern. Additionally, Nebraska journalists are uniquely positioned to respond to arguments in the states' Amicus Brief regarding the purported sufficiency of public records laws. Specifically, the states assert that public records laws are sufficient to ensure governmental transparency in the absence of nonparty discovery. Nebraska journalists know first-hand the limits of this argument.

[1] No party's counsel authored this brief in whole or in part. No party or any party's counsel contributed money intended to fund preparation or submission of this brief. No person or entity, other than the *amici curiae*, their members, or their counsel contributed money intended to fund preparation or submission of this brief.

Likewise, Common Cause's mission statement includes creating "open, honest, and accountable government that serves the public interest." The organization works toward this mission, in part, through public records requests and legislative advocacy. As discussed below, the Court's decision in this case will meaningfully impact Common Cause's ability to effectuate its mission in Nebraska.

ARGUMENT

Amici urge the Court to affirm the District Court's Memorandum and Order for two reasons. First, the Nebraska State Patrol (NSP)'s sweeping interpretation of sovereign immunity undermines government transparency and access to information. Under NSP's theory, if the state is a nonparty—which is nearly always the case—critical materials in the state's possession are undiscoverable. Such a sweeping interpretation threatens litigants, journalists, and the public alike by denying access to critical government information.

Second, public records laws are an inadequate substitute for civil discovery. Information that is highly relevant in litigation against government officials and entities, including investigatory records, personnel files, and eyewitness testimony, is often exempt from

disclosure under state public records laws. Even when documentary information is technically available under public records laws, it is often subject to arbitrary and exorbitant fees that make it out of reach for most Americans. Also, government compliance with records laws is low—excessive delays are common, and states often deny requests without proper justification.

I. NSP's sweeping interpretation of sovereign immunity threatens core democratic principles.

An inscription above the main entrance of the Nebraska State Capitol proclaims, "Salvation of the State is Watchfulness in the Citizen." For that inscription to have meaning, government must be open and accessible to the public. NSP's sweeping interpretation of sovereign immunity threatens this principle by foreclosing a critical source of information and evidence: nonparty discovery.

NSP's proposed rule presents obvious consequences for federal and state court litigants: if adopted, certain parties will lose access to critical evidence needed to prove their claims in court. This has the practical effect of limiting individual rights "because lawsuits are the central mechanism for enforcing and protecting rights in the United States." Alexandra Lahav, *In Praise of Litigation* 5 (Oxford University Press)

(2017). For example, a recent lawsuit filed in Nebraska alleges Eighth Amendment violations by several correctional officers in their individual capacities. *See Carter v. Frakes*, No. 8:23-cv-485, (D. Neb. Feb. 2, 2024). Although the Nebraska Department of Corrections is not a party to the suit, it undoubtedly possesses information relevant to the case, including internal investigative records, disciplinary actions, medical records, and policy manuals. Under NSP's theory, *none* of this information is discoverable.

NSP's proposed rule also threatens government accountability and democratic principles more generally. The value of litigation goes beyond resolving individual disputes. "Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency by revealing information crucial to individual and public decision making; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard." Lahav, *supra*, at 1–2. These values are each undermined if states have wholesale immunity from responding to third-party discovery.

For example, journalists frequently rely on information litigants obtain through discovery—including information initially in the sole

possession of state agencies—to expose government misconduct. Records obtained through litigation, as well as court records themselves, are "more important than just about any other source of information[ ]" for investigative journalists.[2] By closing the door to third-party discovery from the states, journalists and the public ultimately lose access to critical information that fosters transparency and fuels public participation.[3] Indeed, information that came to light through litigation has influenced groundbreaking, Pulitzer-winning journalism, revealing state government failures, wrongdoing, and overreach, including:

- Reporting from *The Boston Globe* that "used thousands of pages of court records" to reveal state governments' failures to share information about dangerous truck drivers, resulting in serious injuries and deaths;[4]

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[2] Roy Shapira, *Law As Source: How the Legal System Facilitates Investigative Journalism,* 37 YALE L. & POL'Y REV. 153, 183 (2018).

[3] *See* Gustavo Ribeiro, *(Marked Confidential): Negative Externalities of Discovery Secrecy*, 100 DENV. L. REV. 171, 208 (2022) ("Individuals need access to publicly relevant information to vote, deliberate, consume, and make other well-informed decisions.").

[4] *See* Vernal Coleman et al., *Blind Spot (Part 1)*, BOSTON GLOBE (August 18, 2020), https://www0.bostonglobe.com/metro/2020/08/18/blind-spot/41Nm0tiZdEM5VDyYqNR0FN/story.html; *Matt Rocheleau, Vernal Coleman, Laura Crimaldi, Evan Allen and Brendan McCarthy of the Boston Globe*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/matt-rocheleau-vernal-coleman-laura-

- Reporting from *The New York Times* that exposed the abuse of adults with mental illness in state-regulated homes in New York. The report was the "first full accounting of deaths of adult home residents." The state produced records of only *three* of nearly 1,000 deaths in response to a public records request, so the reporters relied heavily on court records in their analysis;[5]
- A series of articles in *Newsday* covering police officers' abuse of disability pension funds. The reporters relied on court records after the public bodies were unresponsive to public records requests.[6]

This kind of reporting is crucial for holding powerful state actors accountable and initiating policy change.

Immunizing states from nonparty discovery would undermine government transparency, the information-generating value of litigation and, ultimately, the public's ability to understand what their government

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crimaldi-evan-allen-and-brendan-mccarthy-boston-globe (last accessed Sept. 3, 2024).

[5] *See* Clifford J. Levy, *Broken Homes*, N.Y. TIMES (April 18, 2002), https://www.nytimes.com/2001/04/18/nyregion/broken-home-a-special-report-for-mentally-ill-chaos-in-an-intended-refuge.html; *Clifford J. Levy of The New York Times*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/clifford-j-levy (last accessed Sept. 3, 2024).

[6] *See Brian Donovan and Stephanie Saul of Newsday, Long Island, NY*, THE PULITZER PRIZES, https://www.pulitzer.org/winners/brian-donovan-and-stephanie-saul (last accessed Sept. 3, 2024).

is doing in their name. A government that can shield reasonable, relevant information from the public cannot adequately be held to account. This Court should reject NSP's sweeping application of sovereign immunity to nonparty discovery.

II. Public records laws are insufficient alone to ensure governmental transparency.

State public records laws embody many of the democratic ideals and principles discussed above. In Nebraska, for example, "the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government." *State ex rel. BH Media Grp., Inc. v. Frakes*, 305 Neb. 780, 787, 943 N.W.2d 231, 240 (2020). As a result, public records laws in this state are construed liberally in favor of disclosure. *Frederick v. City of Falls City*, 289 Neb. 864, 874, 857 N.W.2d 569, 577 (2015).

In practice, however, even the most expansive public records laws are burdened by excessive fees and worryingly low compliance rates. These realities place important public documents out of reach for many Americans who cannot afford to challenge government delay or noncompliance in court. Further, public records laws were never intended to produce the same type or breadth of information as

discovery—whereas the scope of federal discovery is broad, public records laws are limited to documents existing at the time of the request. Even then, responsive information is often withheld under expansive exceptions to disclosure.

A. Public records laws are incompatible with broad discovery authorized by the federal rules.

Public records laws were never intended to supplement or supplant federal court discovery. These sources of information sharing are fundamentally different in nature and scope—information available through discovery is often unavailable through public records laws.

This case underscores these differences. NSP's appeal centers on the purported application of sovereign immunity to a Rule 30(b)(6) deposition of a corporate representative. If NSP prevails, litigants will be unable to question certain government employees under oath. Contrary to arguments made on appeal, nothing in state public records laws will restore this critical tool of litigation fact-finding because public records statutes, unlike the federal rules of discovery, do not provide for depositions or questioning of government officials.[7]

[7] *See, e.g., Times v. City of Racine Bd. of Police*, 866 N.W.2d 563, 577 (2015) ("[T]he public records law does not require an authority to provide

Public records laws are also subject to multiple exceptions that do not exist in discovery rules. In Nebraska, for example, the following documents may be withheld from the public: (1) personal information regarding students, prospective students, or former students, (2) medical records, (3) trade secrets and other proprietary and commercial information, (4) investigatory records of law enforcement and other public bodies charged with investigation or examination of persons, (5) records relating to the death of an employee arising from or related to their employment, (6) information related solely to the protection of public property or persons within public property, and (7) job application materials. Neb. Rev. Stat. § 84-712.05. Depending on the nature of the case, all of this information is discoverable under the federal rules.

Many public records laws also limit *who* can seek records. Nineteen states restrict access to public records by people in custody, either through statute or court decisions. This includes 11 states that signed on to the states' Amicus Brief in support of the NSP—Texas, Alabama, Arkansas, Connecticut, Florida, Louisiana, Ohio, South Carolina, Utah,

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requested information if no record exists, or to simply answer questions about a topic of interest to the requester.") (internal quotations omitted).

Virginia, and West Virginia.[8] In these states, *pro se* litigants who are incarcerated lack the ability to obtain *any* information through public records requests.[9] This means *pro se* litigants in many state prisons will lack any ability to gather evidence from the state—even under public records laws. Practically, this makes it impossible for individuals to remedy even blatant civil rights violations occurring in state prisons and permits egregious abuses to go unchecked.[10] In addition, several states

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[8] *See* Andrea C. Armstrong, *Access Denied: Public Records and Incarcerated People*, 19 U. ST. THOMAS L.J. 220, 228-29 (2023).

[9] Approximately 50,000 cases are filed in federal court per year by *pro se* litigants who are incarcerated. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, United States Courts (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019.

[10] *See* Alysia Santo et al., *Guards Brutally Beat Prisoners and Lied About it. They Weren't Fired*, N. Y. TIMES (May 19, 2023), https://www.nytimes.com/2023/05/19/nyregion/ny-prison-guards-brutality-fired.html (detailing hundreds of cases where correctional officers physically abused prisoners, many of which resulted in successful excessive force lawsuits); *Scandal at Wisconsin's Oldest Prison Reignites Calls to it Shut Down*, NPR (June 11, 2024), https://www.npr.org/2024/06/11/nx-s1-5002264/scandal-at-wisconsins-oldest-prison-reignites-calls-to-it-shut-down (discussing two Wisconsin prison employees facing felony charges for alleged neglect resulting in two inmate deaths); Mitch Perry, *After a Scathing Report on Sexual Abuse at FL's Female Prison in 2020, Has Anything Changed?,* FLORIDA PHOENIX (Dec. 21, 2022) (discussing years of sexual abuse by correctional officers in a Florida facility and resulting lawsuits).

require public records requestors to be state residents.[11]

Overall, public records statutes, even when faithfully followed, do not provide the same access to information that is available through nonparty discovery. NSP's theory would effectively immunize state officials—not because they have qualified immunity, but because of a lack of access to evidence. As discussed in the preceding section, this not only harms litigants; by authorizing states to operate in the dark, it also prevents the public from holding wrongdoers accountable or making changes through the political process.

B. Even where records are technically available, exorbitant costs pose a barrier to access.

A second limitation to public records laws is exorbitant fees for access. Such fees often act as a *de facto* denial to access—meaning even records subject to disclosure are withheld because the requestor cannot pay the assessed cost. Even if the requestor successfully fights the cost imposed, their access is, at best, delayed.

Recent Nebraska case law illustrates how state governments deny public access to records through prohibitive costs. In *Nebraska*

[11] Ark. Code Ann. § 25-19-105; Del. Op. Atty. Gen. 96-IB01, 1996 WL 40922 (1996); Tenn. Code. Ann. § 10-7-503; Va. Code Ann. § 2.2-3700.

Journalism Trust v. Nebraska Department of Environment & Energy, a nonprofit newsroom submitted a public records request to a state agency seeking emails from certain employees. 316 Neb. 174, 3 N.W.3d 361 (2024). At the time, the newsroom's reporters were investigating rising nitrate levels in Nebraska's drinking water. In response to the request, the agency demanded the reporters pay more than **$44,000** *before* beginning the search. *Id.* at 178, 3 N.W.3d at 366. Ironically, the agency justified this cost estimate based on a purported estimate of the time it would take to review and *withhold* responsive records from the reporters under statutory exceptions to disclosure. *Id.* at 179, 3 N.W.3d at 367.[12]

This story is not unique. Amici are aware of numerous other requestors in Nebraska receiving cost estimates for tens of thousands or even upward of a million dollars in response to public records requests. Nor is this problem specific to Nebraska. A citizen who requested records in Richmond, Virginia was recently charged $223 to access *one* email.[13]

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[12] Less than a week after the Nebraska Supreme Court affirmed the agency's charges, the Nebraska Legislature amended the public records act to prohibit charging resident requestors for the services of any person to review records seeking a legal basis to withhold them from the public. Neb. Rev. Stat. § 84-712(3)(c).

[13] Staff Report, *FOIA Friday: $223 for one email, Portsmouth needs redo on pay records*, VIRGINIA MERCURY (July 26, 2024),

Other jurisdictions also continue to charge huge fees—tens of thousands or even *millions* of dollars—for public records.[14]

Additionally, the fees charged by public bodies are often arbitrary or duplicative. For example, in 2017, the Texas Department of Criminal Justice demanded $1.1 million to respond to a request for investigatory records of sexual assaults in state correctional facilities. Serna, *supra* note 14. The *same* records request was filed with a separate state office, which charged just $551.39. *Id.* In Alaska, the Governor's office

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https://virginiamercury.com/2024/07/26/foia-friday-223-for-one-email-portsmouth-needs-redo-on-pay-records/.

[14] *E.g.*, Ginny LaRoe, *Pricing the Public Out of Public Records*, FIRST AMENDMENT COALITION (May 11, 2023), https://firstamendmentcoalition.org/2023/05/pricing-the-public-out-of-public-records/ (California county demanding over $84,000 to respond to two records requests); Nick Grube, *Many States Charge Insane Fees for Access to Public Records*, HUFFINGTON POST (Oct. 17, 2013), https://www.huffpost.com/entry/fees-for-public-records_n_4119049 (detailing multiple six-figure cost estimates for public records in Hawaii); Bill Dedman, *Want Palin's e-mails? That'll be $15 million*, NBC NEWS (October 16, 2008), https://www.nbcnews.com/id/wbna27228287 (charging over $900 to search a single state employee's email account and over $15 million dollars just to *search* for emails from Palin); Albert Serna Jr., *MuckRock survey of FOIA fees points to uneven picture across the U.S.: from $2 in Washington state to $431 per request in Idaho*, MUCKROCK (December 20, 2023), https://www.muckrock.com/news/archives/2023/dec/20/muckrock-survey-of-foia-fees-points-to-uneven-picture-across-the-us/ (providing a $2.1 million dollar fee estimate for a request related to the State's election process).

"repeatedly tried to charge different news organizations the cost to reconstruct the same email account of the governor, her senior staff and other employees." Dedman, *supra* note 14. "Each time an email [was] requested, the office quote[d] the same cost of $960.31 for thirteen hours to recover and search each employee's emails." *Id.*

These are not outlier incidents—in many states, the cost of public records requests places records outside of reach for ordinary Americans and news organizations alike. In 16 states, the median cost for a *single* public records request is over $100. Serna, note 14. In the five states that have the highest median costs for records—South Dakota, Nebraska, Alaska, Tennessee, and Idaho—the median cost ranges from $262 to $430 per request. *Id.* As one journalist stated, when "you see $500 or $600 over and over again . . . you really have to think, can I afford to pay this? Are people going to care enough about these documents to actually buy them . . . It becomes a big gamble, it can become a very real stressor on your editorial budgets." *Id.*

In sum, public records fees often preclude meaningful access. If states are immunized from nonparty discovery, litigants will face significant, and often arbitrary, costs to obtain records through public

records laws. Because media often relies on court records for reporting, the impact on government transparency and accountability will be felt by litigants and the public alike.

C. Low compliance rates undermine transparency.

Public records laws are also undermined by low government compliance. A review of 32 open-records audits between 1997 and 2004 found that public employees complied with public records requests just 59% of the time.[15] Compliance was higher for simpler requests, such as requests for minutes of public meetings (93%), but far lower for law enforcement records (58%), criminal incident reports (55%), and logs of criminal incidents (29%). *Id.* Compliance has not improved with time. Data between 2010 and 2018 shows that compliance ranged from a high of 65% in Washington and Idaho, to a low of 10% in Alabama.[16]

Delayed responses are also common. More than 20% of states have no statutory response time, so it is possible for requestors to never receive

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[15] Daxton R. Stewart, *Let the Sunshine In, or Else: An Examination of the 'Teeth' of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265, 269 (2010).

[16] David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Record Statutes on Agency Transparency in the United States*, GLOBAL RSCH. ON TRANSPARENCY CONF. 11 (June 26, 2019).

a response from the government.[17] Approximately 20% of states have vague requirements that the government "respond promptly" or within a "reasonable amount of time," which is often coupled with no reasonable enforcement mechanism. *Id.* at 9–10.

Even when response deadlines exist, they are often missed. States with statutory response deadlines of 1 to 5 days have an average response time of *51 days*. *Id.* at 5. For states with a deadline between 6 and 30 days, the average response time is 63 days. *Id.* Some states have an average response time near or over *100 days*. *Id.* at 3. Overall, receiving no response or a delayed response is one of the biggest obstacles to accessing public records. *Id.* at 4.

In addition to lengthy delays, Requestors also face unlawful denials. For example, in New Mexico—a state with one of the highest rates of officer-involved shootings—law enforcement agencies issue blanket denials for requests for records about these very shootings.[18] The New Mexico Department of Public Safety routinely denies public records

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[17] Sanders & Stewart, *Ghosted by Government*, JCI Vol. 3, No. 3:1, 8–9 (October 2021).

[18] Nicolas T. Davis, *Illuminating the Dark Corners: The New Mexico Inspection of Public Records Act's Law Enforcement Exception*, 50 N.M. L. REV. 59, 71–72 (2020).

requests unless those actions are challenged in litigation. *Id.* at 72. These blanket denials are not supported by New Mexico law and raise serious concerns—especially if nonparty discovery is disallowed. *See id.*; *Jones v. City of Albuquerque Police Dep't*, 470 P.3d 252, 262 (N.M. 2020) ("Nowhere does the plain language of Section 14-2-1(A)(4) exempt from IPRA inspection requirements all law enforcement records relating to an ongoing criminal investigation.")

Recent public records responses by the Nebraska Governor's office provide another example of public records denials that are unsupported by the law. Governor Jim Pillen took an unprecedented step to shield his office's communications, denying requests for his emails based on "executive privilege" and the "deliberative process privilege."[19] Neither of these exceptions exist in Nebraska's public records laws, the Nebraska Constitution, or case law. *See generally* Neb. Rev. Stat. § 84-712 et seq.; Neb. Const.; *see also State ex rel. Veskrna v. Steel*, 296 Neb. 581, 601, 894 N.W.2d 788, 802 (2017) (noting the United States Supreme Court has

[19] Sara Gentzler, *Nebraska Governor's Use of 'Executive Privilege' to Withhold Records Troubles Transparency Advocates*, FLATWATER FREE PRESS (Aug. 17, 2023), https://flatwaterfreepress.org/nebraska-governors-use-of-executive-privilege-to-withhold-records-troubles-transparency-advocates/.

rejected overly broad claims of executive privilege under public disclosure laws). Governor Pillen also failed to provide a description of the records withheld, which is required by Nebraska law. Gentzler, *supra* note 19; Neb. Rev. Stat. § 84-712.04.

Unfortunately, wrongful denials and other noncompliance often go unchallenged. Much of the public and news media lack the resources to pursue litigation, especially when they are not guaranteed to recover attorney fees. *See* Sanders & Stewart, *supra* note 17, at 5 (finding that mandatory fee shifting was the only remedy that correlated with higher compliance, but fee shifting is only required in a handful of states). Even if noncompliance is challenged, access can be denied for months or years, particularly if there is an appeal.

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Public records laws are insufficient to guarantee governmental transparency. They are riddled with exceptions and undermined by high fees and low compliance. Because of these deficiencies, immunizing state governments from nonparty discovery will enable them to operate in the dark and avoid accountability—through the courts, the press, and the political process. That is antithetical to our democracy.

CONCLUSION

For these reasons, Amici respectfully requests this Court affirm the District Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,938 words according the word count function of Microsoft Word.

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/s/Daniel J. Gutman

CERTIFICATE OF SERVICE

I certify that on September 4, 2024, I filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing ot be served on all parties' counsel of record.

/s/Daniel J. Gutman