

**No. 18-15051**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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AMA MULTIMEDIA, LLC.

*Plaintiff-Appellant,*

v.

MARCIN WANAT

*Defendant-Appellee.*

On Appeal from the United States District Court  
for the District of Arizona  
No. 2:15-cv-01674-ROS  
Hon. Roslyn O. Silver

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**BRIEF OF THE COPYRIGHT ALLIANCE AS AMICUS CURIAE  
IN SUPPORT OF PETITION FOR EN BANC REHEARING**

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September 10, 2020

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amicus curiae the Copyright Alliance states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Date: September 10, 2020

/s/ Michael Kientzle  
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Pursuant to Federal Rule of Appellate Procedure 29(a), amicus curiae the Copyright Alliance respectfully submits this brief in support of en banc rehearing.<sup>1</sup>

### **STATEMENT OF INTEREST**

The Copyright Alliance is a non-profit, non-partisan, public interest and educational organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. The Copyright Alliance represents more than 1.8 million creators and 13,000 organizations across the United States. Copyright Alliance members participate in the entire spectrum of creative industries—including writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, and video game and software developers—including many large and small businesses that are harmed by the unauthorized use of their works.

Amicus and its members embrace the lawful use of the internet to ensure a vibrant digital marketplace for their creative works. Unauthorized and infringing uses of their works undermine members' abilities to exploit that marketplace and protect their livelihoods. Copyright Alliance members thus have an interest in being

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<sup>1</sup> Pursuant to Federal of Appellate Procedure 29(a)(4)(E), the Copyright Alliance states that no counsel for any party authored this brief in whole or in part; no party nor party's counsel made a monetary contribution intended to fund preparing or submitting this brief; and no person other than the Copyright Alliance, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

able to enforce their copyrights against internet services that infringe their works either directly or by facilitating user infringement. And that interest extends to advocating for fair and predictable standards for asserting personal jurisdiction in United States courts over foreign-based internet services that infringe U.S. copyrights. That said, it bears emphasis that the Copyright Alliance also represents companies and associations whose members engage in internet commerce and therefore are interested in balanced rules that establish personal jurisdiction in appropriate circumstances with reasonable limiting principles.

### **SUMMARY OF ARGUMENT**

Internet piracy is a major threat to U.S. copyright owners, costing billions of dollars in lost revenues annually. Countless copyright pirates base their businesses outside of the United States, even as millions of their customers use the services to infringe copyrighted works in the United States. This harm is felt not only by AMA Multimedia LLC (“AMA”), but by all types of copyright owners and content creators, from major TV production companies to individual bloggers and podcasters. Copyright law is the primary vehicle to protect content owners against this problem. The majority’s decision, however, threatens to eviscerate that protection by immunizing foreign website operators from suit in this country, even when they infringe U.S. copyrights, operate websites that are extremely popular in

the United States, and earn substantial advertising revenue from their American audience.

The majority's decision is wrong as a matter of law. It improperly transforms the flexible personal jurisdiction analysis—under which, in the current procedural posture, factual issues must be construed in AMA's favor—into a highly demanding standard under which numerous relevant forum contacts are discarded or downplayed. And it fails to meaningfully confront the most basic question of due process: whether the defendant's contacts with the United States, taken as a whole, indicate that the defendant has reasonably anticipated being haled into court here.

The only reasonable conclusion to draw from the totality of Marcin Wanat's contacts with the United States is that he deliberately exploited the American marketplace and should have known that he could be called to account for his actions in a U.S. court. The United States is the largest audience for his website. He derives more revenue from advertisements targeted at American website visitors than he does from advertisements targeting any other national audience. His website is designed to appeal to an American audience, and invokes the protection of U.S. copyright law. The majority wrongly ignored or downplayed these facts, and as a result immunized Wanat and many other infringers of U.S. copyrights from suit in the United States, in contravention of this Court's well settled case law. Judge Gould's dissent correctly analyzed the issues and reached the right conclusion. The

full Court should grant rehearing in order to close the dangerous loophole that the majority's decision has opened.

## ARGUMENT

### **I. The Majority's Decision Undermines the Interests of All U.S. Copyright Owners.**

The majority's decision, if allowed to stand, threatens the ability of *all* U.S. copyright owners to enforce their rights in domestic courts when those rights are infringed by foreign actors via the internet. Closing the courtroom door to U.S. copyright owners pursuing claims against foreign website operators, without regard for the popularity of the website in the United States or the revenue the website operator derives from his American audience, would create a significant incentive for aspiring infringers to do exactly what Wanat has done here and will only exacerbate the already serious problem of internet piracy.

The harm of the majority's decision will be felt by all American copyright owners. Many foreign-based websites and apps facilitate copyright infringement in the United States, affecting copyright owners ranging from TV production companies to video game studios. *See Is the DMCA's Notice-and-Takedown System Working in the 21st Century?*, Hearing before the Subcomm. on Intellectual Prop. of the Comm. on the Judiciary, 116th Cong. 7 (2020) (Statement of Jonathan Berroya, Interim President and CEO of the Internet Ass'n) (emphasizing the importance of enforcement against foreign pirate websites because most digital

infringement originates overseas). In its most recent Review of Notorious Markets, the United States Trade Representative lists foreign-based peer-to-peer networks, torrent sites, cyberlockers, and illegal downloading and streaming sites that engage in large scale piracy online and cause significant harm to U.S. copyright owners and the economy. *See* Office of the U.S. Trade Representative, *2019 Review of Notorious Markets for Counterfeiting and Piracy*, [https://ustr.gov/sites/default/files/2019\\_Review\\_of\\_Notorious\\_Markets\\_for\\_Counterfeiting\\_and\\_Piracy.pdf](https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf). This piracy targets American-made movies, TV shows, music, video games, and software. *Id.*

The District Court's opinion threatens to immunize internet piracy across the board, so long as the proprietor of the website at issue resides abroad and shrewdly relies on intermediaries to tap the U.S. market. Under the District Court's ruling, a foreign individual may (1) operate a website that is accessible across the United States, (2) infringe or facilitate the infringement of substantial numbers of U.S. creative works via the website, and (3) derive substantial revenues from advertisements targeted to the website's U.S. audience—all without fear that he will ever be haled into a U.S. court. This creates a significant hurdle for enforcement of U.S. copyrights, as many U.S.-based copyright owners—including thousands of small and medium-sized businesses that the Copyright Alliance represents—do not have the resources to bring enforcement litigation in foreign jurisdictions. Even for

those entities that can afford to pursue their rights overseas, it is hardly fair to require them to seek redress in foreign courts for widespread infringement of U.S. copyrights caused by U.S.-based use of a foreign defendant's website, particularly where a foreign court may not enforce U.S. laws to the same extent as would a U.S. court.

The ability to proceed with enforcement actions in U.S. federal courts is critical to the effective protection of U.S. copyright owners from online infringement. For example, last year, copyright owners achieved a significant victory against Omniverse One World Television, Inc. ("Omniverse"), an entity that supplied unauthorized streams of copyrighted movie and television content via the internet. *See ACE Secures Consent Judgment for \$50 Million in Damages and Permanent Injunction Against Omniverse*, Alliance for Creativity and Entert., <https://www.alliance4creativity.com/news/ace-secures-consent-judgment-for-50-million-in-damages-and-permanent-injunction-against-omniverse/>. They secured this victory within a year of filing litigation, in part because Omniverse was subject to personal jurisdiction in federal district court in California. *See Complaint, Paramount Pictures Corp. v. Omniverse One World Television, Inc.*, 2:19-cv-01156-MWF-AS (C.D. Cal.).

In contrast, in several recent cases involving foreign entities that facilitate domestic copyright infringement over the internet, copyright owners' efforts have

been bogged down in years-long disputes over personal jurisdiction. *See e.g., Lang Van, Inc. v. VNG Corp.*, 8:14-cv-00100-AG-JDE (C.D. Cal) (copyright infringement claim filed January 22, 2014 currently on appeal to the Ninth Circuit following dismissal for lack of personal jurisdiction); *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020) (reversing, nearly two years after the plaintiffs filed their complaint, the district court's dismissal for lack of personal jurisdiction). The claims that are the subject of this appeal were first filed more than five years ago.

The majority's ruling will only exacerbate the problem of internet piracy and the difficulties that U.S. copyright owners face enforcing their rights against foreign website operators who facilitate infringement in this country. The full Court should grant rehearing in order to evaluate these important issues.

## **II. Exercising Specific Personal Jurisdiction over Wanat is Consistent with Federal Rule of Civil Procedure 4(k)(2).**

In upholding the dismissal of AMA's claims, the majority misread this Court's precedents governing personal jurisdiction over parties whose contacts with a forum occur over the internet. As a result, it applied an incorrect legal standard that would leave copyright owners without judicial recourse in the United States against foreign website operators whose websites infringe copyrights in the United States.

AMA asserts that Wanat is subject to specific personal jurisdiction in U.S. federal court under Fed. R. Civ. P. 4(k)(2). *AMA Multimedia, LLC v. Wanat*, No.

18-15051, slip op. at 11 (9th Cir. Aug. 17, 2020) (“Slip op.”). Rule 4(k)(2) “corrects a gap in the enforcement of federal law” which previously permitted foreign actors to escape the application United States law despite “having contacts with the United States sufficient to justify the application of United States law” because the foreign actor could not be subject to the jurisdiction of any particular state. Fed. R. Civ. P. 4(k)(2) advisory committee’s note to 1993 amendment. Under the Rule, the due process analysis is “nearly identical to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between [the defendant] and the forum state, we consider contacts with the nation as a whole.” *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007).

The Ninth Circuit employs a three-part test to determine whether a court may exercise specific personal jurisdiction over a foreign defendant consistent with due process. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). *First*, “the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.” *Id.* *Second*, the “claim must be one which arises out of or relates to the defendant's forum-related activities.” *Id.* And *third*, the “exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.” *Id.*

In cases sounding in tort, the focus of first prong is on “purposeful direction,” analyzed under the *Calder* “effects” test. *Calder v. Jones*, 465 U.S. 783 (1984). That test requires that the defendant have “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Schwarzenegger*, 374 F.3d at 803. Relevant contacts are those the defendant himself creates with the forum state; a plaintiff may not demonstrate minimum contacts by pointing to contacts between the plaintiff and the forum state, or to the unilateral actions of unrelated third parties. *Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

The due process inquiry, however, cannot be reduced to a mechanical test. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985). At bottom, the question is whether the defendant’s contacts with the forum, taken as a whole, indicate that the defendant “must reasonably anticipate being haled into court there.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984). This is a flexible standard. *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1188 n.2 (9th Cir. 2002). Moreover, where, as here, the District Court has not held an evidentiary hearing, Ninth Circuit precedent requires only that a plaintiff make a *prima facie* showing of jurisdictional facts to survive dismissal. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). In assessing the plaintiff’s *prima facie* case, the District Court is required to accept uncontroverted allegations in the complaint

as true and construe factual disputes in the plaintiff's favor. *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Group*, 905 F.3d 597, 602 (9th Cir. 2018).

The majority erroneously converted this flexible standard, under which factual issues must be construed in AMA's favor, into a highly demanding one under which it ignored or minimized the importance of numerous relevant forum contacts. In so doing, the majority reached a conclusion that is in direct conflict with this Court's precedents, and inconsistent with those of other federal Courts of Appeals.

A. The Majority Misapplied Ninth Circuit Precedent in Ruling that Wanat Had Not "Expressly Aimed" His Activity at the United States.

The majority focused its due process analysis on the first prong of the *Schwarzenegger* three-part test, whether Wanat "purposefully direct[ed] his activities" at the United States. Slip op. at 12-21. Applying the *Calder* "effects" test, it concluded that AMA failed to demonstrate purposeful direction because Wanat had not "expressly aimed" his activity at the United States. *Id.* Viewed as a whole, however, the record demonstrates just the opposite—that Wanat's connection to the forum is more than merely "random, fortuitous, or attenuated," and therefore exercising specific personal jurisdiction over Wanat complies with due process. *See Burger King*, 471 U.S. at 486.

More Americans visit the ePorner website than do citizens of any other country, and ePorner earns more revenue from its American audience than it does from any other national audience. ePorner is designed to attract an American

audience. Through the ePorner website, Wanat and ePorner users infringe substantial quantities of U.S. copyrights, including by transmission of copyrighted content to U.S. users, even as Wanat invokes the protections of U.S. copyright law. Taken together, and construed in AMA's favor, these facts are more than sufficient to demonstrate that Wanat "continuously and deliberately exploited" the United States market and therefore "must reasonably anticipate being haled into court there." *Keeton*, 465 U.S. at 781.

*1. The United States is ePorner's Most Important Market.*

The United States is the most important market for ePorner, as measured by audience size and, almost certainly, by advertising revenue. More than nineteen percent of all visitors to ePorner are located in the United States, representing a larger share of visitors than those of any other country. Slip op. at 6. ePorner, through a third-party advertising service, sells advertising on the ePorner website that is geo-targeted to visitors, including those in the United States. Slip op. at 18. As Judge Gould correctly observed in dissent, given the size of the domestic audience for ePorner, ePorner's sale of advertising that is geo-targeted to that audience, and the premium commanded by advertisements sold in the United States, it is a virtual certainty that Wanat's ePorner website generates more revenue in this country than it does in any other. Slip op. at 34 (Gould, J. dissenting).

This Court previously held that specific personal jurisdiction could be exercised over a defendant in materially identical circumstances. *Mavrix*, 647 F.3d at 1232. In *Mavrix*, a Florida-based copyright owner sued Brand Technologies, Inc., an Ohio corporation, in the Central District of California, alleging that Brand infringed its copyrighted celebrity photographs by posting them to its website. *Id.* at 1221-23. In assessing whether the Central District could exercise specific personal jurisdiction over an Ohio resident based on the availability of the infringing website in California, the Ninth Circuit gave significant weight to the fact that Brand had contracted with a third party advertising service to sell advertisements on its website that were of interest to a California audience. *Id.* at 1230. The Ninth Circuit ruled that it was appropriate to consider these advertisements as relevant forum contacts *regardless* of whether it was Brand or the third party advertisers who specifically targeted California residents, explaining that “[t]he fact that the advertisements targeted California residents indicates that Brand knows—either actually or constructively—about its California user base, and that it exploits that base for commercial gain by selling space on its website for advertisements.” *Id.*

The majority dismisses *Mavrix*, and the size of ePorne’s U.S. audience, apparently in reliance on the Supreme Court’s decision in *Walden v. Fiore*. *See* Slip op. 17-18. In the majority’s view, *Walden* prohibits consideration of the size of the U.S. audience and the advertisements on ePorne that target that audience because

“the third-party advertiser’s behavior cannot be attributed to the defendant as a contact.” *Id.* at 18 n.6. *Walden* says no such thing; it only prohibits consideration of “unilateral” third-party acts as relevant forum contacts. *Walden*, 571 U.S. at 284, 291. Here, in contrast, the third-party advertising service is acting on behalf of Wanat, and to his—likely substantial—financial benefit. Nothing in *Walden* prohibits consideration of third-party forum contacts when they are made on behalf of the defendant.

Nor should the fact that the advertisements on ePorner are the product of “geo-targeting” using visitors’ IP addresses distinguish this case from *Mavrix*. Slip op. at 18-19. Whether the third-party advertising service uses geo-targeting or not, the result is the same: the website displays advertisements that are tailored to American visitors by American advertisers, and ePorner benefits financially from those U.S.-focused advertisements. For the same reasons that website operators should not be able to avoid personal jurisdiction in their biggest advertising market by strategically outsourcing tailored advertisement sales to outside contractors, *see Mavrix*, 647 F.3d at 1230, website operators should likewise not be able to avoid personal jurisdiction in their biggest market by outsourcing tailored advertisement sales in this market to a geo-targeting algorithm. “Wanat may have foreseen that ePorner would attract a substantial number of viewers in the United States,” Slip op. at 17, and by electing

to engage in geo-targeted advertising, Wanat knew, either actually or constructively, that its U.S. viewers would receive U.S.-focused advertisements.

Moreover, Wanat facilitated the targeting of a U.S. advertising audience by collecting U.S. user data. The Fourth Circuit’s recent decision in *UMG Recordings, Inc. v. Kurbanov* is instructive on this point. 963 F.3d 344 (4th Cir. 2020). There, as here, a foreign website operator sold geo-targeted advertisements on its websites, such that his website displayed relevant advertisements to its American visitors. The Fourth Circuit considered these geo-targeted advertisements to be relevant and important forum contacts notwithstanding the use of geo-targeting technology, explaining that “at a minimum, [Defendant] facilitates targeted advertising by collecting and selling visitors’ data” and “he earns revenues precisely because the advertising is targeted to visitors in Virginia.” *Id.* at 354. The Court should reach the same conclusion here, where the ePorner terms of service agreement expressly states that the website “use[s] cookies, web beacons and other information . . . to provide targeted advertising based on your country of origin and other personal information,” ER 30-32, and Wanat derives significant revenue from the sale of geo-targeted advertisements.

## 2. *ePorner Infringes U.S. Copyrights.*

AMA alleges that Wanat infringes its copyrighted works by “copying, displaying, and distributing” them via the ePorner website. ER 671-674. These

allegations further support a finding that Wanat “expressly aimed” his activity at the United States; however, the majority disregards them because it believes that the infringing content on ePorner “is primarily uploaded by its users.” Slip op. at 17. This is an error for at least two reasons.

*First*, AMA alleges that Wanat *himself* posts infringing content to the ePorner website, in addition to whatever content users may upload. In its Amended Complaint, AMA alleges that portions of the ePorner website’s layout are comprised of unauthorized copies of its copyrighted images, which Wanat uses to organize different categories of content available on the site. *See* ER 667 at ¶ 31; ER 124 (depicting such alleged infringement). The majority ignores that allegation in its analysis. This sort of “individualized targeting,” while no longer dispositive of the “expressing aiming” inquiry, remains relevant when combined with the other forum contacts at issue here. *See Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1070 (9th Cir. 2017).

*Second*, regardless of who uploads the infringing content to Wanat’s website, AMA’s allegation is that it is *Wanat* who infringes its copyright by distributing that content to U.S. users; those unauthorized distributions are themselves relevant forum contacts. AMA alleges that the website hosts, and distributes to U.S. users, at least 80 unauthorized copies of its own copyrighted works. *See, e.g.*, ER 671 ¶ 57. The act of distributing infringing copies of AMA’s copyrighted works in the United

States—where ePorner has a substantial user base—itself creates a relationship between Wanat and the forum. *See Keeton*, 465 U.S. at 781 (“There is no unfairness in calling [defendant] to answer for the contents of [its] publication wherever a substantial number of copies are regularly sold and distributed.”).

*3. Additional Evidence Further Demonstrates that Wanat Intentionally Sought to Exploit the U.S. Market.*

Several other aspects of the ePorner website, together with the foregoing forum contacts, further demonstrate that Wanat expressly aimed his activities at the United States. *First*, Wanat’s ePorner website, at the time the lawsuit was filed, used a U.S.-based nameserver that promised fast connection speeds to U.S. users. Slip op. at 20. *Second*, the website invoked the protection of U.S. intellectual property laws in its terms of service. ER 480-83. *Third*, the website is offered in English, which facilitates access to the site by an American audience. *See, e.g.*, ER 30-32, 120-22. Taken together with the size of the website’s U.S. audience and AMA’s allegations of infringement of U.S. copyrights, these facts are more than sufficient to demonstrate that Wanat expressly aimed his activities at the United States.

**B. AMA’s Claims Arise Out of Defendant’s Forum-Related Contacts and Exercising Specific Personal Jurisdiction Over Wanat is Reasonable.**

The majority scarcely comments upon the second and third *Schwarzenegger* factors, which address (1) the relationship between a defendant’s forum contacts and a plaintiff’s claims; and (2) the reasonableness of exercising jurisdiction over a

defendant. It finds in favor of Wanat on both of these issues with almost no analysis. Slip op. at 21, n.9. The majority is wrong; as set forth below, AMA's claims arise out of Wanat's forum contacts, and exercising jurisdiction over Wanat would be reasonable. *Schwarzenegger*, 374 F.3d at 802.

AMA's copyright infringement claim plainly arises out of Wanat's forum contacts. Wanat operates ePorn.com, which allegedly transmits videos and images into the United States that infringe AMA's copyrights. The facts set forth above demonstrating Wanat's forum contacts are part and parcel of his operation of that website. *See Mavrix*, 647 F.3d at 1228–1229. As Judge Gould correctly recognized, the operation of the website is a “but for” cause of AMA's infringement claim, and therefore Wanat's actions in operating the website are related to AMA's copyright infringement claim. *See* Slip op. at 43 (Gould, J. dissenting); *see also Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995) (contacts are sufficiently related if “‘but for’ the contacts between the defendant and the forum state, the cause of action would not have arisen.”) If ePorn were not available to the American audience, and did not host content that infringed U.S. copyrights, AMA would not have a claim for copyright infringement against Wanat.

Moreover, exercising specific personal jurisdiction over Wanat is reasonable. In light of the widespread problem of copyright infringement occurring on or facilitated by foreign websites, the United States has a significant interest in ensuring

that U.S. copyright owners may bring enforcement claims in U.S. federal court against foreign website operators transmitting copyrighted content into the United States. *See, e.g., Freestream Aircraft (Bermuda) Ltd.*, 905 F.3d at 607 (“forum state’s interest in adjudicating the dispute” and “the importance of the forum to the plaintiff’s interest in convenient and effective relief” are factors in assessing reasonableness). As Judge Gould observed, “the United States has a strong interest in enforcing federal intellectual property laws and providing redress for injuries felt within its borders.” Slip op. 45 (Gould, J. dissenting). Wanat has not and cannot demonstrate that any burden he would face if required to litigate in the United States would outweigh that interest. As a result of advancements in communication technology, it has never been easier to litigate a case in this country while residing in another. *Cf. Panavision Int’l, L.P. v. Toepfen*, 141 F.3d 1316, 1323 (9th Cir. 1998) (“in this era of fax machines and discount air travel, requiring [an individual residing in Illinois] to litigate in California is not constitutionally unreasonable”) (internal quotation omitted). Indeed, as litigants have demonstrated around the country throughout the course of the COVID-19 pandemic, modern technology makes possible remote depositions and even remote trials. *See, e.g., Mihali Vrasmasu, and Vanessa Offutt, Five Tips for Conducting Remote Video Depositions*, Am. Bar Ass’n (Jul. 31, 2020), <https://www.americanbar.org/groups/litigation/>

committees/pretrial-practice-discovery/practice/2020/five-tips-for-conducting-remote-video-depositions/.

## CONCLUSION

For all of these reasons, the decision below should be reversed.

Dated: September 10, 2020

Respectfully submitted,

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