No. 21-11159
Case argued January 3, 2022; decided February 17, 2022

In the United States Court of Appeals for the Fifth Circuit

DAVID SAMBRANO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DAVID CASTILLO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; KIMBERLY HAMILTON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DEBRA JENNEFER THAL JONAS, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; GENISE KINCANNON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; SETH TURNBOUGH, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-01074-P

PLAINTIFFS-APPELLANTS' OPPOSITION TO DEFENDANT-APPELLEE'S MOTION TO VACATE PANEL OPINION AND DISMISS APPEAL AS MOOT

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159
David Sambrano, individually and on behalf of all others similarly situated, et al. v. United Airlines, Inc.

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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INTRODUCTION

United's motion raises two related questions. *First*, is this appeal moot now that United has decided to allow Plaintiffs to return to their previous positions? And *second*, if this appeal is moot, is it appropriate to vacate the panel decision that found United was irreparably harming its employees? The answer to both questions is no, and for similar reasons: United voluntarily chose to discontinue its discriminatory actions and return Plaintiffs to their previous positions. Accordingly, the Court should deny United's motion.

Taking the second question first: United concedes that vacatur "is *not* appropriate when" a case becomes moot "due to the 'unilateral action of the party' seeking vacatur." Mot. at 10 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71–72 (1997)). That principle is fatal to United's motion, which seeks vacatur of the panel decision precisely because of United's voluntary decision "that all employees" on indefinite unpaid leave may "return[ ] to their previous jobs." *Id.* at 1. Moreover, all equitable factors weigh against vacatur. The panel concluded that United engaged in a months-long campaign of discrimination and harassment against employees of faith, and there is every reason to believe that United will do so again in the future. *Sambrano v. United Airlines*, 2022 WL 486610, at *7–10 (5th Cir. 2022) (per curiam). Indeed, United has already threatened to do so on multiple occasions in just the last week. Leaving the panel decision intact—which will

support entry of a preliminary injunction if the district court so chooses—serves as a critical check against United's return to its discriminatory ways. Accordingly, United falls far short of demonstrating that this Court should grant the "extraordinary" and "equitable" remedy of vacatur. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26, 29 (1994).

But vacatur is also inappropriate because the appeal is *not* moot. Indeed, United's voluntary decision to cease temporarily its unlawful actions prevents a finding of mootness. While United has finally reversed course to allow employees to return to their previous positions, that decision was legally "voluntary," and it is certainly not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 189 (2000). Quite the opposite: Everything points to a serious risk that United will imminently return to its unlawful ways. *See, e.g.*, Mot., Ex. A-1 (threatening to "reevaluate" the return to work). In such circumstances, the Supreme Court holds that the "voluntary cessation" exception precludes a finding of mootness. *Friends of the Earth*, 528 U.S. at 189.

Of course, United's desire to vacate the panel decision is understandable: It paints a damning picture of United and the ways its CEO bullied employees by threatening that "very few" religious exemptions would be granted and mocking employees who "all the sudden decid[ed], 'I'm really religious.'" *Sambrano*, 2022

WL 486610, at *9. As the district court concluded, those facts "compelling[ly] and convincing[ly]" show United's discrimination and retaliation. ROA.3275. But, under controlling law, United cannot escape the panel's judgment about its actions through vacatur. Rather, the panel decision must remain in place precisely because of the depth and perniciousness of United's unlawful actions.

ARGUMENT

I. Regardless of how the Court decides the mootness question, vacatur is not appropriate.

Whether the Court concludes that this appeal is now moot, it should not vacate the panel decision for at least two reasons. *First*, United caused the changed circumstances by its voluntary decision, which cuts against vacatur. *Second*, the equitable factors require denial of United's motion. Indeed, the panel decision is profoundly important for this case, and it remains important despite United's unilateral change. Vacating the decision, moreover, would give United license to reimpose irreparable harm on its employees by returning them to indefinite unpaid leave.

1. United concedes (at 10) that vacatur is inappropriate when mootness is caused by the "unilateral action of the [losing] party seeking vacatur." (cleaned up). By contrast, the Supreme Court has explained that vacatur may be appropriate when mootness is caused by the *prevailing* party's effort to prevent the losing party from seeking "a favorable judgment" through "voluntary action that moots the dispute,"

thereby allowing the prevailing party to improperly "retain the benefit of the judgment." *Arizonans for Official English*, 520 U.S. at 48–49, 71–72, 75. But here, Plaintiffs—the prevailing party in this appeal—have not changed course or caused any potential mootness. Rather, the changed circumstances are due entirely to *United's* voluntary action, which prevents vacatur. *See id.*

United's attempt (at 9–10) to nonetheless obtain vacatur by arguing that its employees are returning due to "happenstance" or factors beyond its control is misguided. As discussed in the following section, Plaintiffs' return to work is solely the result of United's voluntary decision, and United cannot pin that decision on any external factors beyond its control. United alone had the authority and ability to bring back its employees at all stages of this litigation, and United alone exercised that authority to bring its employees back only *after* the panel issued its decision finding that United was irreparably harming its employees.

For that reason, United's repeated insistence (at 8–9) that vacatur is appropriate because "intervening events led to mootness" is nothing more than an attempt to deflect blame for its own prior actions. Indeed, United fails to cite any authority remotely suggesting that vacatur would be appropriate on the facts here, and none of the cases United cites (at 8–9) for its "intervening events" arguments can save it. For example, in *Smith v. Texaco, Inc.*, 281 F.3d 477 (5th Cir. 2002) (per curiam), this Court vacated an opinion on an interlocutory issue—class

certification—after the case settled and was dismissed with prejudice. *Id.* at 478–79. Similarly, in *Stewart v. Southern Railway Co.*, 315 U.S. 784 (1942), the parties had settled the dispute while the appeal was pending, and the Court vacated the previous decision. *Id.* at 784. There has been no settlement here, and the case has not been dismissed. Accordingly, these cases bear no resemblance to this action. Moreover, United overlooks the limited reach of both decisions as, generally, "mootness by reason of settlement does not justify vacatur of a judgment under review." *Bonner Mall*, 513 U.S. at 29.

In the two other cases United cites (at 8–9), this Court followed a similar path. There, the intervening event justifying vacatur was that the underlying case had either proceeded to final judgment while an interlocutory appeal was pending, *United States v. Miller*, 685 F.2d 123 (5th Cir. Unit B 1982) (per curiam), or had been dismissed, *United States v. Caraway*, 483 F.2d 215, 216 (5th Cir. 1973) (en banc). At most, these cases suggest that vacatur may be appropriate when a final judgment in a case moots an interlocutory appeal or the government in a criminal case dismisses an indictment. Neither situation is presented here, and these cases therefore do not support United's motion.

United is also incorrect in comparing its about-face (at 10) to policy changes that occur after a change in presidential administrations. As the authority United cites confirms, the action in those cases truly *is* moot, as the new administration has

reversed the policy of the previous administration, thereby confirming that there is no reasonable expectation that the prior policy could return for several years. For instance, as the United States explained in its brief requesting vacatur in *Mayorkas* (Mot. at 10), the Supreme "Court has recognized that vacatur is appropriate where" the policy changes of a new administration "render further review of [an underlying] decision moot." Pet'rs' Suggestion of Mootness & Mot. to Vacate the J. of the Ct. of Appeals at 13, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), No. 19-1212, 2021 WL 2287172, at *13; *accord* Pet'rs' Mot. to Vacate & Remand in Light of Changed Circumstances at 19, *Biden v. Sierra Club*, 142 S. Ct. 46 (2021), No. 20-138, 2021 WL 2458459, at *19 ("Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor." (quoting *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 622 (1974)).

Put simply, nothing United has done demonstrates mootness with the clarity that occurs after a change in administration. Instead, Scott Kirby, with his "skepticism and apparent disdain for any religiously-motivated" employees, remains United's CEO, and there would be nothing to prevent him from reinstating the

unlawful unpaid leave policy if the pressure of an adverse opinion were removed. ROA.3276-77. Indeed, United has already laid the groundwork to do so.

In sum, the Court should not vacate the panel decision because of United's unilateral action.

2. But vacatur is also inappropriate because equitable factors weigh against it. To be sure, vacatur may be appropriate where "public interests support vacatur." *DeOtte v. State*, 20 F.4th 1055, 1065 (5th Cir. 2021). And, as United notes (at 8), it is within a court's "discretion based on equity" to vacate a previously issued decision. But United misses the mark when it suggests that these factors weigh in favor of vacatur.

First, United suggests (at 9), without support, that vacatur is appropriate because the panel decision "was divided, with a panel member expressly inviting en banc review." Given the number of decisions issued with divided panels, it speaks volumes that United cannot identify any authority supporting this argument.

Second, United argues (at 9) that vacatur is appropriate because, in its view, the panel's decision not to publish the opinion "intend[ed] to give the opinion no precedential impact beyond the immediate parties." Putting aside United's changing tune—it now tries to benefit from the lack of publishing after previously criticizing the panel for "improper[ly]" failing to publish its decision, Pet. For Reh'g En Banc at 3—this argument cuts against United. United is correct that the opinion had

significant implications for the immediate parties. But that remains true today. The panel decision serves as a strong deterrent to United's again returning employees to indefinite unpaid leave, given the significant likelihood that the panel decision will lead to a preliminary injunction in the district court.[1] Indeed, the opinion was strong enough to cause United to finally do something it had refused to do for months—temporarily discontinue one part of its unlawful actions. Leaving the opinion in place is critical to ensuring that United does not reverse course.

Third, United argues (at 9) that vacatur is appropriate to "prevent the possibility that litigants or district courts will rely on the per curiam opinion despite its unpublished status." But that misses the mark by a mile. Irrespective of United's decision to return its "accommodated" employees to work, it remains true that a panel of this Court determined that forcing employees to choose between their jobs and their faith causes irreparable harm. That remains the case today and, by electing not to publish the interlocutory decision, all three judges on the panel already took steps to ensure that other litigants and district courts give the decision the appropriate level of consideration. But nothing about the panel's underlying conclusion has

[1] Indeed, based on United's course of conduct—including its recent threats to return employees to unpaid leave—Plaintiffs will maintain their request for a preliminary injunction upon remand to the district court, and this Court's opinion will be an important part of those district court proceedings.

changed—*i.e.*, that United irreparably harmed its employees. That remains true, and it is now the law of this case.

Accordingly, vacatur is inappropriate because United itself caused the changed circumstances and because all equitable factors weigh against vacatur.

II. In any event, this appeal is not moot because of United's voluntary cessation of unlawful actions.

Vacatur is also inappropriate because this appeal is not moot. Rather, the controversy between the parties remains live. And United—as the party "claiming that its voluntary [action] moots the case"—has failed to carry its "heavy" and "formidable burden" of showing the Court "that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189. Instead, in the last week alone, United has confirmed multiple times that it may reinstate its policy imminently. *See, e.g.*, Mot., Ex. A-1.[2] Accordingly, the Court should deny United's motion because any changed circumstances were the result of United's voluntary choice, which United itself has stated it may reverse at any time. On those facts, the "voluntary cessation" exception to mootness applies.

[2] In addition to this statement, counsel for Plaintiffs is aware that United has included the same warning about reversing course in various other communications with individual employees regarding the return to work.

A. United's decision to change its policy was voluntary.

At the outset, United's argument (at 10) that Plaintiffs are returning to work by "happenstance" blinks reality. United alone has held the authority throughout this litigation to bring back its employees. And United alone decided for more than six months to keep its "accommodated" employees on unpaid leave or in less desirable jobs. United cannot show that anyone else forced it to bring its employees back. Nor does United have any real explanation for why (at 10) "changing pandemic conditions and public-health guidance" suddenly *require* United to recall its "accommodated" employees to work. Rather, United decided that it made sense to return Plaintiffs to their jobs only *after* the panel found that United had irreparably harmed its employees by putting them to the coercive choice between jobs or jabs. But, even then, United still had a choice after that decision: leave its employees on indefinite unpaid leave (at least pending the district court's decision on a preliminary injunction) or bring them back now.

This reality is confirmed by United's own declarant, Kirk Limacher, who stated that it was "*United*'s determination" that employees may return to work. Mot., Ex. A at 3 (emphasis added). And if that were not enough, United's notice to its employees emphasized its own role in the policy change by explaining United's "plan to welcome back" employees and how United is "confident [it] can safely" do so. Mot., Ex. A-1. And, of course, United then emphasized that it can reverse the

decision at any time, expressly reserving the right to "reevaluate the appropriate safety protocols." *Id.* None of this language suggests that the choice to bring United's employees back was anything but voluntary, at least at this stage of the litigation.

B. Because United's decision to return its employees was voluntary, this appeal is not moot.

It follows, then, that because United's decision was voluntary and not permanent, this appeal is not moot. To be sure, as United notes (at 4–5), a case is *typically* rendered moot if the "event" the Plaintiffs seek occurs. But that general principle does not apply when, as here, the event that occurred was the defendant's *voluntarily* stopping the unlawful activity. Rather, as Judge Smith explained in a similar context, the question is "whether it can be said with assurance that there is *no reasonable expectation* that the wrong will be repeated." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (emphasis added). United cannot come close to satisfying that standard, and the voluntary cessation exception therefore precludes a determination that this appeal is moot.

1. At the outset, each of the cases United cites (at 5–6) confirms that the voluntary cessation doctrine applies here because of United's strategic decision to change course during litigation.

Take this Court's opinion in *Center for Biological Diversity v. BP America Production Co.*, 704 F.3d 413, 425 (5th Cir. 2013). United cites it (at 5) for the

proposition that the voluntary cessation doctrine applies to voluntary activities taken to "stave off litigation," implying that the doctrine does *not* apply to forced actions or actions beyond the control of the parties. But that only confirms the applicability of the voluntary cessation doctrine here: United voluntarily took steps to avoid further litigation, suddenly reversing course when it appeared likely the district court would enter a preliminary injunction against it based on the persuasive panel decision. That is a far cry from *Center for Biological Diversity*, where the defendant's action "occurred at the insistence of the federal government acting pursuant to the extraordinary powers granted to the President[.]" *Id.* at 425. There, the Court concluded that the defendant was not motivated to change course by a fear of future litigation, but rather because the federal government had directed it to stop the challenged activity. *Id.*

In contrast, United cannot identify any comparable legal directive that it bring Plaintiffs back to work. Rather, United made that decision for strategic reasons during litigation, and *Center for Biological Diversity* confirms that the voluntary cessation exception to mootness applies in such circumstances.

In the next case United cites (at 5), *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), the Supreme Court confirmed that the voluntary cessation doctrine is inapplicable if it is "absolutely clear" that the challenged action cannot recur. *Id.* at 94–95. As the Supreme Court has explained, that clarity is necessary because the

voluntary cessation doctrine otherwise exists to prevent defendants from avoiding litigation by mooting a case whenever the threat of litigation arises, only to "return to [their] old ways" when the threat subsides. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Notably, unlike the "absolute[ ]" clarity that the Supreme Court discussed in *Already*, the *Grant* Court confirmed that "mere *professions* of intention would not suffice" to moot a case. *Pullum v. Greene*, 396 F.2d 251, 256 (5th Cir. 1968) (emphasis added); *accord United States v. Atkins*, 323 F.2d 733, 739 (5th Cir. 1963) (explaining that a party's nonbinding assurance that it "will not return to the discriminatory practices" is insufficient to moot a case).

Accordingly, United's reliance on *Already* is misplaced. Unlike United's voluntarily statement here that Plaintiffs may return temporarily, in *Already* Nike voluntarily entered an "unconditional and irrevocable" covenant that "prohibit[ed] [it] from filing suit" or "making any claim *or* any demand" against the other party. *Already*, 568 U.S. at 93. Given that *binding* covenant, the Supreme Court concluded that it was "absolutely clear" that the case was moot. *Id.* at 102.

United has done nothing of the sort here. In fact, United has not even offered a "mere profession[ ] of [its] intention" not to return to its unlawful ways. *Grant*, 345 U.S. at 632. Instead, as explained above, United has repeatedly reserved its right to reverse its decision at any point. Thus, each case United cites confirms that the voluntary cessation exception applies.

2. For the same reason, United incorrectly argues (at 6) that the Court would have to engage in "unwarranted speculation about the future of the pandemic" to conclude that Plaintiffs may be placed back onto unpaid leave. There is nothing speculative about this possibility: As explained above (at 9), United has repeatedly reserved the right to do so.

Further, United's erratic and contradictory actions throughout this litigation make it reasonably likely that United will again change course and place Plaintiffs back on unpaid leave. For example, United told the district court that it could not possibly return its employees to work before the "nationwide daily case counts" were less than "10,000 new cases per day for at least 21 consecutive days on a rolling 7-day average." ROA.3177. Yet, as of this writing, the nationwide case counts are nearly three times that amount.[3] And United is still allowing Plaintiffs to return to work. Accordingly, the only thing speculative is the notion that United will make decisions based on safety or data. As it is entirely reasonable to conclude that United will attempt to return its employees to unpaid leave, the voluntary cessation doctrine applies here and precludes a finding of mootness.

[3] *COVID Data Tracker, Daily Update for the United States*, CDC (last visited Mar. 13, 2022), https://tinyurl.com/2p8unxsm (showing a 7-day moving average of 30,934 cases as of March 15, 2022).

3. Undeterred, United argues (at 6–7) that, even if the case is not "moot as an Article III matter," the appeal should nevertheless be dismissed because Plaintiffs no longer face any "imminent" irreparable injury. According to United (at 7), any time a party voluntarily changes course after a court finds that it has caused irreparable injury, there is a "lack of need" for any further "determination by [the] court," and thus the matter is moot. But this approach would render the voluntarily cessation doctrine meaningless in cases involving preliminary injunctions. Yet this Court and others regularly apply the voluntary cessation exception even to cases seeking injunctions based on imminent irreparable injury. And that is why this Court has held in the injunction context that a party's "voluntary cessation of its allegedly violative … practices does *not* preclude a finding of irreparable injury." *Doe*, 994 F.2d at 166 (Smith, J.); *see also S.E.C. v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("cessation of illegal activity does not *ipso facto* justify the denial of an injunction"); *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) ("The propriety of injunctive relief cannot be foreclosed by a promise to discontinue what has been an established pattern of wrongdoing."); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800–01 (4th Cir. 2001) (same). In short, voluntary cessation of unlawful activity does not destroy the "imminence" necessary to support a preliminary injunction.

None of the cases on which United relies (at 7) suggests otherwise. For example, this Court's decision in *In re Gulf Aerospace Corp.*, 449 F.2d 733, 734 (5th Cir. 1971), did not discuss the changed "facts and circumstances" at issue there or why they were relevant to its conclusion that it no longer needed to address the preliminary injunction. Given the Court's conclusory treatment of the issue, it is difficult to rely on it as a statement of law, and it hardly establishes a principle weighing against the voluntary cessation doctrine.

And while the next case United cites (at 7), *Meltzer v. Board of Public Instruction of Orange County*, addresses the mootness issue in some detail, it differs significantly from this case. 548 F.2d 559, 567–68 (5th Cir. 1977). There, a defendant school board promised a court that it would comply with an order requiring it to stop sponsoring Bible reading and other devotional activities. *Id.* at 563–65. Though the party was not *enjoined* from continuing its policy, it agreed to discontinue the policy because it was clear that it *would be* enjoined if the activity continued and, moreover, because a court order had found that activity unlawful. *Id.* Thus, there was no risk of imminent harm.

Here, by contrast, United has not promised that its unlawful activities will not recur. And there has not yet been a finding that United's indefinite unpaid leave policy is unlawful. Instead, United has repeatedly stated that it may later "reevaluate" and potentially reverse its decision to allow "accommodated"

employees to return to work. Mot., Ex. A-1. Accordingly, the underlying dispute remains very active, as United continues to threaten its employees with indefinite unpaid leave—a risk that remains imminent.

United's final case (Mot. at 7), *Burndy Corporation v. Teledyne Industries*, 748 F.2d 767 (2d Cir. 1984), likewise bears no resemblance to this one. There, a party had labeled non-compliant products as compliant with an industry standard. *Id.* at 769. Although the party "*immediately*" rectified the error, the district court nevertheless found that the company's previous advertisements had violated federal law. *Id.* at 769–70. However, the court concluded that the company's actions precluded any need for an injunction because the company had immediately changed course and, after obtaining a benefit for doing so, would have no incentive to violate federal law anew. *Id.* While no court could reasonably find a likelihood of *imminent* harm in those changed circumstances, they are not remotely close to the facts of this case, where United has repeatedly forecasted that it may change course and return its employees to unpaid leave.

For all these reasons, nothing United has done to date undermines the panel's finding of irreparable harm, and the voluntary cessation doctrine precludes a finding of mootness, both as an Article III matter and as to the question of imminence.

CONCLUSION

The current state of the pandemic is irrelevant to the questions before the Court. The only relevant question is whether United remains free to reinstate its unlawful unpaid leave policy. United has repeatedly stated that it may do so. Under binding precedent, that means this appeal is not moot, and the panel decision should not be vacated. Rather, the opinion should remain in place as a much-needed check against a recurrence of United's discriminatory, retaliatory and unlawful behavior.

March 17, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on March 17, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4,169 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Additionally, I certify that (1) any required redactions have been made in compliance with 5th Cir. R. 25.2.13; and (2) the document has been scanned with the most recent version of Microsoft Defender virus detector and is free of viruses.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: March 17, 2022