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1/10/2025 12:09 PM
Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL BOREN, an individual,

Plaintiff-Appellant-Cross-Respondent,

v.

GARY GADWA, an individual,

Defendant-Respondent,

and

SARAH C. MICHAEL, an individual,

Defendant-Respondent-Cross-Appellant,

and

JON CONTI, an individual; RICHARD DOUGLAS FOSBURY, an individual; DOES 1–20,

Defendants.

Supreme Court Case No. 50604-2023

District Court No. CV19-22-0051

JOINT BRIEF OF DEFENDANTS-RESPONDENTS GARY GADWA AND SARAH MICHAEL IN SUPPORT OF PETITION FOR REHEARING

Appeal from the District Court of the Seventh Judicial District for Custer County
Honorable Stevan H. Thompson, District Judge, Presiding

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INTRODUCTION

The First Amendment fiercely guards Americans' voices on matters affecting their community—and for good reason. Whether it consists of speaking out on public issues or petitioning the government, such public participation is "more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). And courts presiding over lawsuits that target expression about matters of public concern are the only line of defense for citizens dragged into costly litigation for exercising First Amendment rights.

Thus, Respondents ask that the Court grant rehearing, not only to affirm the dismissal of Petitioner Michael Boren's defamation claims, but also to ensure that Idaho courts exercise their role as First Amendment gatekeepers. Respondents have not asked this Court to legislate an anti-SLAPP law from the bench, or to impose new pleading standards. Nor is either needed. At its core, Boren's lawsuit typifies a lawsuit attacking expressive freedoms that the First Amendment and Rule 12(b)(6) are more than enough to thwart. One cannot artfully plead around the Constitution.

Rehearing is warranted because the Court's December 6, 2024, Opinion overlooks three key First Amendment and pleading principles. First, it does not address First Amendment protections for expression on matters of public concern or the vigilance courts must exercise as First Amendment stewards. Second, it opens the door for vague and obscure defamation allegations, which will encourage speech-chilling lawsuits, deprive defendants of fair notice, and handcuff courts from serving as vigilant First Amendment gatekeepers. And third, it does not address the specific First Amendment constraints on defamation claims that Respondents raised, including protected opinion and actual malice.

Respondents urge the Court to grant rehearing, apply the principles the Opinion overlooks to Boren's lawsuit, and affirm dismissal. Even if the Court is not inclined to grant rehearing to affirm, Respondents urge the Court to grant rehearing to make clear that defamation plaintiffs must

allege enough to give fair notice of their claims and to allow courts to fulfill their First Amendment gatekeeping role when deciding Rule 12(b)(6) motions.

ARGUMENT

I. Because Courts Must Be Vigilant in Protecting First Amendment Freedoms, They Must Be Gatekeepers When Presiding Over Lawsuits Targeting Expression on Public Issues.

Defendants ask this Court to grant rehearing to make clear that Idaho courts "must be especially vigilant against assaults on speech in the Constitution's care." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338–39 (5th Cir. 2020), *as revised* (Oct. 30, 2020). And that includes lawsuits attacking the First Amendment rights securing public participation. After all, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (citation omitted).

Responding to the district court's and Respondents' concerns that Boren's lawsuit carries the hallmarks of a strategic lawsuit against public participation (SLAPP), this Court took the "opportunity to make clear that this is not a SLAPP act case." Op. 8. But Respondents have never argued this is a "SLAPP act case." In fact, Respondents clarified they are not "asking this Court to create anti-SLAPP law out of whole cloth" or impose a heightened pleading standard for defamation lawsuits. Resp. Br. 45–47.

Instead, Respondents have urged the Court to seize a different opportunity—affirming that Idaho courts can and should dismiss lawsuits like Boren's *despite* Idaho lacking an anti-SLAPP statute. *Id*. at 47, 49–50. Of course, anti-SLAPP statutes make it easier for defendants and courts to thwart speech-chilling lawsuits. But Idaho courts do not need an anti-SLAPP statute to dismiss lawsuits, like Boren's, that on their face target speech on matters of public concern and petitioning activity. *Id.* at 47. The First Amendment and Idaho's Rule 12(b)(6) standards already do the necessary work. *Id.* at 47, 49–50; *see also infra* Section II.

As the Supreme Court has repeatedly explained, the First Amendment constrains defamation and other tort claims targeting expression about public officials and figures, political hyperbole, and opinions about matters of public concern. In the cornerstone case of *New York Times Co. v. Sullivan*, the Court held the First Amendment requires public officials to prove actual malice when suing for libel. 376 U.S. 254, 270 (1964). Soon after, it held the First Amendment protected uttering "blackmail" in a heated public debate from a defamation suit, affirming First Amendment protection for opinions, rhetoric, and hyperbole over public issues. *Greenbelt Coop. Publ'g Ass'n v. Bresler,* 398 U.S. 6, 14 (1970); *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (affirming that statements of pure opinion on matters of public concern "receive full constitutional protection" from libel claims). And in *Snyder*, it held the First Amendment protected a provocative protest at a fallen marine's funeral against an emotional distress claim, because the protest spoke to matters of public concern. 562 U.S. at 454, 458–59.

Without these constitutional constraints, government officials, wealthy businessmen, and other powerful figures could use the courts as a weapon to silence their opponents and chill others from speaking out on important community issues. And even with these constraints, this case highlights how they often try "to use litigation to intimidate opponents' exercise of rights of petitioning and speech." *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 228 (Minn. 2014) (citation omitted); *see also* John C. Barker, *Common-Law and Statutory Solutions to the Problems of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 406 (1993) (explaining how SLAPP plaintiffs "seek to silence their critics by forcing them to spend thousands of dollars to defend themselves").

So while courts should be "conscious of their important role in providing protection to individual reputation," they must be especially "vigilant about the potential 'chilling effect' the

threat of defamation actions can have on public debate." *600 W. 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 933 (N.Y. 1992). Idaho courts should be no less vigilant when considering motions to dismiss defamation claims that target expression on matters of public concern and petitioning activity, something this Court has shown before. In *Weeks v. M-P Publications, Inc.*, the Court upheld the dismissal of a defamation lawsuit targeting a newspaper editorial criticizing a city councilman who fired a police chief—without the benefit of an anti-SLAPP law, and decades before states started passing those laws. 95 Idaho 634, 639, 516 P.2d 193, 198 (1973). Upholding the First Amendment freedom to express "[p]olitical epithets and hyperbole" and "editorial opinion," this Court rightly recognized that "political freedom ends when the government can use the courts to silence, to chill or to dampen the vigor of public debate." *Id.*

Weeks is just one example Respondents provided of courts dismissing lawsuits targeting public participation without the aid of an anti-SLAPP statute. Resp. Br. 19, 31, 46–47 (citing *Weeks*; *Harris v. Warner ex rel. Cnty. of Maricopa*, 527 P.3d 314, 319–22 (Ariz. 2023); *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992), aff'd, 616 N.Y.S.2d 98 (App. Div. 1994); *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prod., Inc.*, 858 S.E.2d 795, 799 (N.C. 2021); *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 525 (N.D. Ill. 1990)). And those cases extend beyond government officials using lawsuits to attack dissent like the councilmen in *Weeks*; they include the wealthy and powerful using the courts to try to silence public debate. *E.g. Harris*, 527 P.3d at 316 (United States Senate candidate); *Gordon*, 590 N.Y.S.2d at 651 (landowner and real estate investor); *Westfield Partners*, 740 F. Supp. at 524 (real estate developer). These cases show Gadwa and Michael did provide "common law authority" showing courts dismissing lawsuits absent the "legislative creation" of anti-SLAPP statutes.[1]

[1] They accordingly ask the Court to reconsider its contrary statement in the Opinion. Op. 8.

More to the point, these cases underscore a court's gatekeeper function in dismissing defamation lawsuits that fail at the pleading stage, including lawsuits lacking allegations necessary to overcome constitutional protections for expression on public issues and petitioning activity. Boren's vague and conclusory allegations do no more than target Gadwa's and Michael's protected criticism of Boren's CUP application, presenting the Court with occasion to cement this vital gatekeeping role for the state's courts and Idahoans' expressive freedoms. Respondents urge the Court to take it.

II. Even With Liberal Pleading Standards, Stating a Claim for Defamation Requires More Than Vague Allegations and Treating the Words of One as the Words of Many.

When courts review pleadings, including those for defamation, they "should focus on ensuring that a just result is accomplished." *Navo v. Bingham Mem. Hosp.*, 160 Idaho 363, 374, 373 P.3d 681, 692 (2016) (citation omitted) (cleaned up). And when a defamation suit rests on vague allegations and obscure claims about what a defendant said or published—as Boren's does—the only "just result" is Rule 12(b)(6) dismissal. Just as vague and obscure statutes targeting expression fail to give citizens fair notice and chill First Amendment freedoms, so do vague and obscure allegations targeting citizens who voice concerns on community matters. *See, e.g.*, *State v. Barney*, 92 Idaho 581, 586–87, 448 P.2d 195, 199–200 (1968) (explaining that vague statutes reaching expression fail to give fair notice and infringe freedom of speech). In the same way, those insufficient allegations handcuff courts from assessing whether an alleged defamatory statement is actionable. For these reasons, Respondents urge the Court to grant rehearing and reconsider what a plaintiff must allege to state a claim for defamation involving protected expression.

A. Lumping libel defendants together, without alleging who said what, fails to give fair notice and jeopardizes collective expression.

The Court's Opinion opens the door to plaintiffs suing a host of outspoken community members for the words of one, just because those speakers were on the opposing side of a public

debate. That is a chilling outcome for both individual and collective expression on public issues. Even more, it defies textbook pleading principles. Respondents urge the Court to grant rehearing, conclude that Boren failed to state a defamation claim by lumping together 23 defendants without specifying who said what, and close the door on similar lawsuits.

"When multiple defendants are sued the complaint should name the individual offenders and connect the defamatory statements that form the basis of the suit with each of the defendants as appropriate." 2 Rodney A. Smolla, *Law of Defamation*, § 12:47 (2d ed. 2024). Courts in notice-pleading states have readily applied this black-letter principle. For example, the Mississippi Court of Appeals held several plaintiffs failed to state a defamation claim under "the relaxed, notice-pleading requirements of Mississippi Rule of Civil Procedure 8," because they "failed to specify which of the twelve plaintiffs was slandered by which of the two defendants." *Chalk v. Bertholf*, 980 So. 2d 290, 298–99 (Miss. Ct. App. 2007). Likewise, a New York appellate court recently held that despite New York's liberal pleading standards, a plaintiff failed "to state a viable defamation claim" because the complaint did "not set forth, inter alia, the actual words complained of, the dates of the alleged statements, or the persons to whom the statements were allegedly made." *Sternberg v. Wiederman*, 225 A.D.3d 820, 821–22 (N.Y. App. Div. 2024); *see also Diagnostic Devices, Inc. v. Pharma Supply, Inc.*, No. 3:08-CV-149-RJC-DSC, 2009 WL 3633888, at *13 (W.D.N.C. Oct. 30, 2009) (applying North Carolina law in holding plaintiff failed to state a libel claim because it did not allege "who said what to whom" and "when and where the allegedly defamatory statements were made").

At bottom, the rule that plaintiffs allege enough to connect an individual defendant with each alleged defamatory statement tracks the "key issue in determining the validity of a complaint"—fair notice. Op. 9 (quotation omitted). Yet although Boren did not "specifically

identify which statements were made by which defendants," the Court's Opinion concludes it was enough for him to lump the Defendants together in a nebulous "opposition group" and sue them collectively. Op. 12. True, a short and plain statement of a claim suffices under Idaho's rules. Yet Boren's shotgun pleading is anything but. Resp. Br. 9, 31–32 (citing examples from Boren's First Amended Complaint). Nor did Boren correct this flaw in his proposed Second Amended Complaint. For example, he mentions Gadwa only as among the "Defendants," in identifying the parties, and in listing the causes of action. *See generally* R. pp. 1011–39.

If the Court allows such conclusory and vague allegations to suffice, it will leave many future defamation defendants guessing at the exact accusations they face. That's not fair notice. *See Barney*, 92 Idaho at 586–87, 448 P.2d at 199–200 (holding a statute that did "not clearly indicate who is subject to its sanctions" infringed First Amendment rights). And the resulting chill on public debate will be significant. Who would dare dissent, if he risks being dragged through costly litigation based on the words of another dissenter? To that end, the Court should grant rehearing, affirm that defamation allegations like Boren's warrant dismissal, and ensure future defamation plaintiffs do not tread the same path.

B. Under any pleading standard, a plaintiff fails to state a claim if they do not allege actual language and context of the accused defamatory statements.

"Despite the trend in civil litigation toward 'notice' pleading rather than 'fact' pleading," the Court's Opinion departs from "the tradition in defamation actions . . . requir[ing] that the specific defamatory language be pleaded." Smolla, *supra*, § 12:47. Even though Boren failed to recite, quote, or attach any meaningful part of Gadwa's or Michael's statements he believed defamatory (other than a few out-of-context words from the *Post-Register* op-ed Gadwa

commented in, R. p. 23 ¶ 34, p. 43 ¶ 34),[2] the Court's Opinion concludes he alleged enough to survive the motions to dismiss. Op. 11–12. The Court should grant rehearing and adopt the traditional legal rule, or else risk handcuffing Idaho courts and rewarding obscure pleading—to free expression's detriment.

If defamation plaintiffs can state a claim despite obscuring the words and context of what they allege is defamatory, "the court is handicapped" in performing its gatekeeper role, because "the court cannot actually determine if the statement is legally defamatory." *Trail v. Boys & Girls Clubs of Nw. Indiana*, 845 N.E.2d 130, 136–37 (Ind. 2006). In effect, "without knowing the precise language of the statement allegedly uttered, the court cannot analyze whether the statement is objectively verifiable as true or false—a critical question in determining whether a defamation action may lie." *BLK III, LLC v. Skelton*, 506 P.3d 812, 817–18 (Ariz. Ct. App. 2022), *as amended* (Feb. 17, 2022) (affirming dismissal where "broad summaries" of allegedly defamatory material failed "to allow the court to determine that they contained objectively verifiable statements of fact.). The same holds for "the context in which the statements are made," because that informs a court of "whether they are of a character which the First Amendment protects." *Wellman v. Fox*, 825 P.2d 208, 210 (Nev. 1992); *see also BLK III*, 506 P.3d at 817.

Boren's vague and conclusory allegations about what Respondents said exemplify this problem. While the Court concluded "many of the [alleged] statements assert that Boren committed crimes or violated regulations" or "lied to government officials" (Op. 11), it is not so straightforward. Without the actual words Boren claims Respondents used, or the context of those words, no court can assess whether Boren is suing for objectively verifiable statements that Boren

[2] Boren dropped his allegations about the *Post-Register* op-ed from his proposed second amended complaint. *See generally* R. pp. 1011–39. That simply underscores his inability to state a claim against Gadwa, and is another reason for granting rehearing.

broke the law, or instead is suing over Respondents' opinions and rhetoric. Even more, the Opinion altogether overlooks the principle that context is key. That's a crucial omission. Context is essential, for instance, to determine if an accusation of "lying" is opinion or an objectively verifiable statement of fact. *Underwager v. Channel 9 Austl*., 69 F.3d 361, 367 (9th Cir. 1995).

Imagine land developer Bill sues Joe for defamation, alleging Joe called him a "murderer." But what Joe said is, "The city lets these out-of-state developers get away with murder, building pools and watering grass at all hours," posting it on a Facebook debate about ongoing drought restrictions. Joe's words might embarrass Bill, but they are not actionable defamation, especially in the context of a rough-and-tumble social media discussion about a community concern.

Yet under the Court's Opinion, Bill's lawsuit would survive Joe's motion to dismiss, because he obscured Joe's actual words and their context. That outcome creates a perverse incentive for plaintiffs to silence their opponents by hiding the ball—especially if courts bar defendants from attaching their actual words to a motion to dismiss.[3] And it strips defendants of fair notice and forces them into costly discovery for uttering something non-actionable, which will chill others from exercising their First Amendment freedoms.

Idaho courts must be able to halt defamation claims targeting protected opinion and other non-defamatory statements on matters of public concern at the motion to dismiss stage. The First Amendment requires nothing less. *See infra* Section III. Thus, if a defamation plaintiff obscures the words and context of what he alleges is a defamatory statement, it warrants dismissal. While the Court might view that rule as in tension with Rule 9(i), Respondents urge the Court to grant

[3] Here, Boren's allegations referenced more than his "CUP application" and "his notice of appeal" (Boren filed no notice of appeal over the CUP). *See* Op. 7. For instance, he specifically referenced a Post-Register opinion piece and the CUP grant appeal. R. pp. 43–44. On that basis, the Court should also reconsider its Opinion on the scope of what is incorporated by reference. Op. 7.

rehearing and hold that stating "defamatory matter" "generally" is not a license to deprive defendants and presiding courts of specific words and context. Doing so would track "the tradition in defamation actions." Smolla, *supra*, § 12:47. And whatever tension may exist between Rule 9(i) and First Amendment protections, the Constitution requires the Court to resolve that tension in the First Amendment's favor. U.S. Const., Art. VI, Cl. 2 (Supremacy Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating First Amendment right to freedom of speech against the states).

III. To State a Claim for Defamation Against Expression About a Matter of Public Concern or a Public Figure, Plaintiffs Must Also Meet First Amendment Requirements.

The Court should also rehear this appeal to address the First Amendment limits on defamation claims targeting expression about public issues and public figures. The Opinion missteps here in two ways. First, it overlooks the First Amendment constraints Respondents raised, like protected opinion and the actual malice requirement. Second, it suggests those constraints are affirmative defenses, rather than part of what is required to state a defamation claim.

The Opinion mentions only the "First Amendment's petitioning clause," suggesting Respondents did not assert other First Amendment protections. Op. 8. But they did. For instance, Respondents explained why Boren's lawsuit warranted dismissal because it targeted "statements of opinion" that "enjoy the constitutional protection provided by the First Amendment." Resp. Br. 33–36 (quoting *Elliott v. Murdock,* 161 Idaho 281, 287, 385 P.3d 459, 465 (2016)). Likewise, Respondents pointed out how, because Boren is a public figure, the First Amendment required him to sufficiently allege actual malice, which his conclusory allegations failed to do. Resp. Br. 36–39. Yet nowhere in its Opinion does the Court address either protected opinion or actual malice. The Court should grant rehearing to address these vital constitutional protections Respondents raised.[4]

[4] Although the district court focused on the petitioning clause, Gadwa and Michael asserted below the free speech clause generally, the opinion versus fact distinction, and actual malice, both directly

Granting rehearing is also important to make clear that First Amendment constraints on defamation claims, like those Respondents raised, are part of what it means to state a claim under Rule 12(b)(6). Both the opinion versus fact distinction and the public figure rule are especially apt issues for gatekeeping courts to consider on a Rule 12(b)(6) motion, because they are questions of law. *See, e.g., Wellman,* 825 P.2d at 210 ("Whether the objectionable statements constitute fact or opinion is a question of law." (citing *Harte–Hanks, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989))); *Jankovic v. Int'l Crisis Grp*., 822 F.3d 576, 585 (D.C. Cir. 2016) (whether plaintiff is a public figure is question of law); *see also* Tr. 161–62 (Boren's attorney conceding the public figure question is for the court). Nor are they affirmative defenses, as the Opinion suggests. *See* Op. 8–9. Rather, a plaintiff's allegations must meet those First Amendment requirements to avoid Rule 12(b)(6) dismissal.

When a plaintiff sues over protected opinion or political hyperbole, he fails to state a defamation claim, no matter how liberally a court construes the factual allegations. In fact, this Court confirmed that very principle in *Nampa Charter School*, *Inc. v. DeLaPaz*, affirming the 12(b)(6) dismissal of a libel and slander action targeting letters that expressed "opinion on a matter of public concern." 140 Idaho 23, 28, 89 P.3d 863, 868 (2004). *Weeks* is another prime example. 95 Idaho at 639, 516 P.2d at 198; *see also Harris*, 527 P.3d at 319–22 (dismissing defamation claim for failure to state a claim because it targeted protected opinion). Likewise, when the face of a complaint shows the plaintiff is a public figure, but it fails to allege more than conclusory statements about whether the defendant knowingly or recklessly spoke a falsehood, the court should dismiss the lawsuit for failure to state a claim. *See, e.g.*, *Page v. Oath Inc*., 270 A.3d 833,

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and through joining in Defendant Richard Fosbury's motion to dismiss. R. pp. 163–67; 187–88; 367–69; 763; 888–89.

849–51 (Del.), *cert. denied*, 142 S. Ct. 2717 (2022) (dismissing defamation lawsuit for failure to sufficiently allege actual malice); *Peterson v. Gannett Co. Inc*., No. CV-20-00106-PHX-MTL, 2020 WL 7714539, at *5 (D. Ariz. Dec. 29, 2020), aff'd, No. 21-15057, 2021 WL 5507338 (9th Cir. Nov. 24, 2021) (dismissing defamation claim because the plaintiff, a limited purpose public figure, alleged only conclusions on actual malice).

Despite Boren's efforts to plead around the Constitution, his First Amended Complaint and proposed Second Amended Complaint failed to state a claim because they clashed with First Amendment protections for opinion on matters of public concern and speech about public figures, as Respondents detailed. Resp. Br. 33–39, 44. Granting rehearing will both uphold Respondents' constitutional freedoms and clarify for Idaho's citizens and trial courts that First Amendment protections matter on Rule 12(b)(6) motions.

IV. The Court's Opinion Risks Confusing and Overburdening Trial Courts, Further Endangering Expressive Freedom on Public Issues Across Idaho.

By omitting any discussion of First Amendment constraints on tort claims, like protection for opinions on matters of public concern and the actual malice standard for public figures, the Court's Opinion diverges from its prior decisions in *Weeks* and *Nampa Charter School.* That inconsistency risks confusing trial courts. Even worse, it risks trial courts ignoring First Amendment protections on motions to dismiss, imperiling public participation across Idaho.

Nor are Idahoans alone facing risk from vague and shotgun-pled defamation lawsuits targeting speech on community issues and petitioning activity. So are Idaho's courts. While public debate spawns many bruised egos for those involved in public matters, hurt feelings are no grounds for a lawsuit. *See Weeks*, 95 Idaho at 639, 516 P.2d at 198 (those who "entered the arena of public debate . . . should not complain over ribald or robust criticism of their public action."). But if

allegations like Boren's can evade motions to dismiss, lawsuits based not on reputational harm but bruised egos risk clogging Idaho's courts.

The district court correctly warned, "in this case, there is the potential for a great chilling effect on constitutional rights not just for these named defendants but for all the members of the public who spoke on this issue which was undoubtedly a matter of public concern in which they were entitled to involvement." R. p. 944. Even if this Court is not inclined to grant rehearing to affirm the district court, it should grant rehearing to narrow its Opinion, guide trial courts on First Amendment protections at the motion to dismiss stage, and explain what stating a claim for defamation requires when plaintiffs target the First Amendment freedoms ensuring citizens can voice concerns to their government and their fellow citizens about public issues.

Dated: January 10, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2025, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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