UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	**No. 8:22-cr-00259-WFJ-AEP**
Plaintiff,	)	
	)	
vs.	)	
	)	
PENNY HESS,	)	
	)	
Defendant.	)	

OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS

Defendant, Penny Hess, by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 59(b)(2), objects to various facts and legal conclusions contained in the Magistrate Judge's Report and Recommendation on her Motion to Dismiss. Ms. Hess asks this Court to reject the Report and Recommendation and to grant her Motion to Dismiss.

A. Introduction

This Objection is filed on behalf of Defendant Penny Hess, and it applies equally to the other two African People's Socialist Party (APSP) Defendants, Omali Yeshitela and Jesse Nevel. The APSP is an activist group founded in 1972. It communicates with its followers through public speeches, rallies, and through a party-owned newspaper and radio station. Throughout its fifty year history, APSP leaders have visited numerous foreign countries to attend conferences on issues important to the party.

The indictment alleges that after attending a 2015 Anti-Globalization conference

in Moscow, the APSP defendants "entered into partnership" with a Russian national tied to the Russian government "to publish pro-Russian propaganda, as well as other information designed to cause dissension in the United States and to promote secessionist ideologies." ECF No. 12, ¶¶ 1-2. This alleged partnership made them "agents" of Russia under 18 U.S.C. § 951, and their failure to register with the Attorney General of the United States made them subject to arrest and prosecution.

The indictment alleges that the APSP defendants disseminated "Russian propaganda and disinformation" through published articles, public speeches and political activity. ECF No. 12, ¶ 26(c). As the government conceded at the hearing before the Magistrate Judge, the political views and utterances described in the indictment are not inconsistent with the APSP defendants' core beliefs and activism throughout their fifty-year history. Tr. 52. According to the government, "the alignment or interest or the antagonism of interest ... is irrelevant, if it's done at the direction and control [of Russia]." Tr. 53.

As set forth in the Motion to Dismiss, publicly available historical materials relating to the APSP, such as published speeches and articles, reveal that the APSP's positions with respect to Russia did not change in any material way following its chairman's 2015 visit to Moscow. This fact has not been disputed by the government. Thus, the indictment charges the APSP defendants with spreading "Russian propaganda and disinformation" for expressing views that are identical to the views they expressed prior to Defendant Yeshitela's visit to Moscow in 2015.

B. Standard of Review

The District Court reviews a magistrate judge's report and recommendation in accordance with Rule 59, Federal Rules of Criminal Procedure, and 28 U.S.C. § 636(b)(1). Rule 59(b)(3) provides that the "district judge must consider *de novo* any objection to the magistrate judge's recommendation." Fed. R. Crim. P. 59(b)(3). This standard requires the district judge to "give fresh consideration to those issues to which specific objection has been made by a party." *United States v. Raddatz*, 447 U.S. 667, 675 (1980) (citations omitted); *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 502, 512 (11th Cir. 1990) (citations omitted). "The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions." *Id*.

OBJECTIONS TO REPORT AND RECOMMENDATION

I. The Report and Recommendation Erred in Finding that Lawful Political Speech Criticizing the U.S. Government is not Protected by the First Amendment Because the Government has Alleged that the Speaker is Under the Direction or Control of Russia.

It is undisputed that the Superseding Indictment challenged here in the Motion to Dismiss targets political speech and activism. The Overt Acts relating to the APSP defendants all involve their expression of political beliefs through published articles, public speeches and political activity. ECF No. 12, Overt Acts 4, 8-12, 16, 19-26, 30, 45-52, 56, 58, 68-71, 73, 75. The political views charged in the indictment are mostly critical of U.S. foreign policy relating to Russia, and are consistent with the views

publicly expressed by the APSP for fifty years.

It is also beyond dispute that this case is unique. This appears to be the first case in the eighty year history of 18 U.S.C. § 951 in which the statute has been used to prosecute activists for engaging in lawful political speech. In every other prosecution under Section 951, the defendants were alleged to be secret operatives who commit crimes such as espionage on behalf of foreign governments[1]; or they were alleged to be unregistered lobbyists helping a foreign government obtain some action item sought from the U.S. Government.[2]

On its face, Section 951 covers a person who "acts" in the United States as an agent of a foreign government. 18 USC § 951(a). The Statute does not mention "speech," and no prior case has been identified in which a defendant was prosecuted solely for making political speeches at the alleged direction of a foreign government.

It is axiomatic that political speech and dissent are core values protected by the First Amendment. See e.g. *Meyer v. Grant*, 486 U. S. 414, 421 (1988) (First Amendment

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[1] *See, e.g. United States v. Campa*, 529 F.3d 980 (11th Cir. 2008) (defendants prosecuted under Section 951 for committing espionage on behalf of Cuba and for conspiring to murder Cuban exiles); *United States v. Dumeisi*, 424 F.3d 566, 570 (7th Cir. 2005) (defendant prosecuted under Section 951 for transmitting sensitive information to Iraqi officials about dissidents living in the U.S.); *United States v. Duran*, 596 F.3d 1283 (11th Cir. 2010) (defendant prosecuted under Section 951 for committing bribery or extortion on behalf of the Venezuelan government).

[2] *See, e.g. United States v. Rafiekian*, 991 F.3d 529, 540-41 (4th Cir. 2021) (defendant prosecuted under Section 951 for entering secret agreement with the government of Turkey to help foster the criminal prosecution and extradition of a dissident living in Pennsylvania who President Erdogan blamed for an attempted coup, and to lobby Congress for public hearings on the dissident and his activities).

was fashioned "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); *Buckley v. Valeo*, 424 U.S. 1, 40 (1976) (political expression is "at the core of our electoral process and of the First Amendment freedoms"); *NAACP v. Button*, 371 U.S. 415, 431 (1963) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."); *Herndon v. Lowry*, 301 U.S. 242, 259 (1937) (peaceful agitation for a change of our form of government is within the guaranteed liberty of speech).

The Magistrate Judge finds that, "Defendants' speech alone[3] is not necessarily 'acts' within the gambit of Section 951, but when done at the alleged direction of a foreign government, such speech does rise to the level of 'acts' within the meaning of Section 951." ECF No. 157, p. 9. This finding – that speech done "at the alleged direction of a foreign government" rises to the level of "acts" and consequently loses its

[3] The Magistrate Judge also finds that "Defendants' conduct rather than mere speech is present within the meaning of Section 951 because the Overt Acts allege that the speeches, publications, traveling, and hosting virtual conferences were done at the direction of the Russian Government." ECF No. 157, p. 21. However, all political speech involves certain actions or conduct, such as traveling to make a speech, and the Supreme Court has never sought to distinguish protected speech from the actions necessary to engage in that speech. *See, e.g. NAACP v. Button*, 371 U.S. 415 (1963) ("solicitation" of legal or professional business was protected speech where, "[f]or the NAACP, litigation is a form of political expression"); *Meyer v. Grant*, 486 U. S. 414, 421 (1988) (paying petition circulators was protected political speech; the First Amendment protects defendants' "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). Thus the fact that the Indictment alleges that defendants traveled to give a speech or host a conference does not take this case out of First Amendment jurisprudence.

First Amendment protections – is unprecedented and in conflict with nearly a century of Supreme Court decisions.

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), the defendant was convicted under an Oregon "criminal syndicalism" statute for assisting in the conduct of a public meeting, otherwise lawful, held under the auspices of the Communist Party. She was sentenced to seven years in prison. *Id*. at 358. The Supreme Court reversed. It explained: "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." *Id*. at 365.

Under *De Jonge*, the Indictment against the APSP defendants must be dismissed. The defendants' participation in peaceable assemblies and lawful public discussions cannot be the basis for a criminal charge. The First Amendment demands that political speech be judged by the content of the utterances, and not on the relations of the speaker. The Indictment here makes no allegation that any of the utterances charged as Overt Acts transcended the bounds of the freedom of speech which the Constitution protects. The APSP defendants are not alleged to have incited "imminent lawless action"[4]; nor are they alleged to have disseminated State secrets or obscene materials; nor are they alleged to have used their words to commit any criminal act such as fraud or extortion. The utterances charged in this indictment are pure political speech. The

[4] *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Overt Acts charge the APSP defendants with demanding reparations from their government for past crimes against African people; opposing the banning of Russia from the 2016 Olympic Games; and opposing their government's actions arming Ukraine and fueling its conflict against Russia.

The Magistrate Judge finds that *De Jonge* is inapplicable because the prosecution of the APSP defendants is "content-neutral" and analogous to a "time, place, and manner" regulation, whereas the prosecution of the defendant in *De Jonge* was based on the content of her speech. ECF No. 157, pp. 14-17. This finding is erroneous and should be rejected by this Court.

A content-neutral prosecution is one in which the "governmental interest is unrelated to the suppression of free expression" and where the infringement of First Amendment freedoms is "incidental" and "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding law that prohibits mutilation of a draft card).

We agree with the Magistrate Judge that Section 951 is content-neutral on its face. Section 951 is a criminal statute that was never intended to target speech. Its plain language applies to a person who "*acts* in the United States as an agent of a foreign government ...." 18 U.S. C. § 951 (a) (emphasis added). As the District Court stated in *United States v. Al Malik Alshahhi*, "Section 951 regulates conduct, that is, acting as a foreign agent. Therefore, its 'effect on speech would be only incidental to its primary effect on conduct.'" 2022 U.S. Dist. LEXIS 110730, at *4 (E.D.N.Y. 2022).

However, as the Magistrate Judge acknowledges, facially content neutral laws will be considered content-based regulations of speech when adopted by the government because of disagreement with the message the speech conveys. ECF No. 157, p. 17 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)). In *Cohen v. California*, 403 U.S. 15 (1971), the defendant was convicted of breach of the peace for wearing a jacket displaying an offensive word to protest the Vietnam War and the draft. Although the breach of peace statute was directed at conduct and not speech, and was content-neutral, the Supreme Court recognized that Cohen was being prosecuted under the statute because of the government's disagreement with the message. Accordingly, the State was required to show a "compelling reason" to prevent Cohen from delivering his message, and his conviction was reversed. *Id*. at 18-19.

The Magistrate Judge finds that *Cohen* is not controlling for the following reasons:

> Unlike *Cohen*, the prosecution against Defendants is based upon conduct rather than merely speech, as determined above in Part A. Defendants' speeches and publications alone are not necessarily "acts," but when done at the direction of a foreign government, such speeches and publications rise to the level of "acts" within the meaning of Section 951.

ECF No. 157, p. 18.

However, as previously shown, there is no Supreme Court case to support the Magistrate Judge's finding that political speech becomes conduct (and loses its First Amendment protection) when alleged to be done at the direction of a foreign government. Moreover, if this finding were correct, then the defendant's conduct in *De Jonge* – organizing a lawful public meeting on behalf of the Communist Party – would

have risen to the level of an "act" which is not protected by the First Amendment.

The indictment itself is indisputable proof that this prosecution is not content-neutral. The APSP defendants are not merely charged with entering "into partnership" with a Russian national, they are charged with disseminating "Russian propaganda and disinformation."[5] ECF No. 12, ¶¶ 2c and 26c. Thus, as the face of the indictment makes clear, the government is prosecuting the APSP defendants because of its disagreement with the content of their speech.

The timing of the prosecution is also revealing. According to the indictment, Defendant Yeshitela became an agent of Russia in 2015, following his trip to Moscow. In February 2022, Russia invaded Ukraine, and the United States began sending tens of billions of dollars in weapons and other aid to support Ukraine in its fight with Russia. In February and March 2022, the APSP defendants organized public speeches expressing their opposition to the U.S. involvement in the crisis in Ukraine. These rallies against the war are charged as overt acts in the indictment. In July 2022, the government raided APSP offices and the private homes of its leaders who were named as unindicted

[5] Although the government alleges dissemination of "propaganda and disinformation," it does not allege that the APSP defendants said anything that was untrue. According to the government, the term "disinformation" does not refer to information that is necessarily false. Rather, it refers to information that favors the Russian government. ECF No. 130, p. 5, n.2. Further, even if it could be objectively proven that APSP defendants disseminated an untruth, their speech would still be protected. An "erroneous statement is inevitable in free debate," and "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *New York Times Co. v. Sullivan*, 376 U. S. 254, 271-72 (1964) (citation omitted).

conspirators in a federal indictment. In April 2023, the APSP defendants were formally charged in a superseding indictment.

Accordingly, the Magistrate Judge's finding that this is a content-neutral prosecution is belied by the record and must be rejected by this Court. It is hard to imagine a case with facts that more clearly reveal a government motive to "restrict expression because of its message, its ideas, its subject matter, or its content." *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). If the APSP defendants had formed an identical partnership with a Ukrainian national and organized rallies in support of the U.S. government's decision to arm Ukraine, they would not have been prosecuted or charged with disseminating Ukranian propaganda.

Further, as pointed out in the Motion to Dismiss, it has been widely reported in papers such as the New York Times that prominent Washington research groups [a.k.a. think tanks] regularly receive "tens of millions of dollars from foreign governments ... while pushing United States government officials to adopt policies that often reflect the donors' priorities."[6] None of these prominent D.C. think tanks are ever prosecuted under Section 951 as unregistered foreign agents. Yet, members of the APSP, a small group of black activists who received about $7,000 to support speaking tours, are prosecuted under Section 951 for their disfavored speech. We point out this fact, not to challenge prosecutorial discretion or to support a claim of selective prosecution, but

[6] *See Foreign Powers Buy Influence at Think Tanks*, The N.Y. Times, Sept. 7, 2014, https://www.nytimes.com/2014/09/07/us/politics/foreign-powers-buy-influence-at-think-tanks.html.

instead as further evidence that the APSP is being targeted for prosecution because of the content of its speech and its activism against a war that the government was urging the American people and their representatives in Congress to support. Of course, people are free to disagree with the APSP's views regarding Russia and Ukraine. It is undisputed, however, that their utterances were lawful and their rallies peaceable. The First Amendment therefore demands that they be allowed to express their views, free from government harassment and criminal prosecution.

In support of its finding that political speech done at the alleged direction or control of a foreign government loses free speech protections, the Magistrate Judge cites a single decision from the Seventh Circuit, *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005). ECF No. 157, p. 10. In *Dumeisi*, the government prosecuted a publisher of an Arabic language newspaper under Section 951, alleging that he was a secret operative for Iraqi intelligence. *Dumeisi*, 424 F.3d at 570. On appeal from his conviction, the Appellate Court found the evidence sufficient to prove defendant's guilt where the evidence showed: (1) Mr. Dumeisi submitted written reports to Iraqi officials on dissidents living in the U.S.; (2) "he printed provocative articles in his paper in order to learn more about the Opposition"; and (3) he produced false press passes for Iraqi officials. *Id.* at 581.

Also on appeal, Mr. Dumeisi challenged the adequacy of the following jury instruction relating to his publishing activities:

The First Amendment to the Constitution protects the right to free speech

> and the freedom of the press. This means that individuals are permitted to express views that are controversial or even despicable. The speech that Mr. Dumeisi gave at the Iraqi Mission and newspaper articles he authored or published are protected by the First Amendment. The speech and newspaper articles, as well as Mr. Dumeisi's opinion and political views, are to be considered only insofar as they may pertain to issues of motive and intent.

Id. at 579. Dumeisi argued that the court should have instead given his requested instruction that read, "It is not a violation of 18 U.S.C. § 951(a) to publish a news article." The Seventh Circuit disagreed, finding that "the instruction given meets the concern he raised at trial that his First Amendment-protected speech would be used as the sole basis for a guilty verdict." *Id*. The Court further stated:

> Given that an element of § 951 is acting "subject to the direction or control of a foreign government or official," 18 U.S.C. § 951(d), and there was evidence suggesting that Dumeisi published certain articles at the behest of the IIS, we find this publication relevant and agree with the district court that Dumeisi's proposed instruction would have been "misleading as to the law."

Id.

The Magistrate Judge interprets the Seventh Circuit's decision in *Dumeisi* as a finding that "articles published under the direction or control of [a foreign] government thereby constitut[e] 'acts' under the statute." ECF No. 157, p. 10. This is an incorrect interpretation of *Dumeisi*. The *Dumeisi* Court held that it was proper to instruct the jury that "newspaper articles [Dumeisi] authored or published are protected by the First Amendment." *Dumeisi*, 424 F.3d at 579. This instruction applied equally to articles published "at the behest of" Iraqi officials. Thus, political articles did not lose First

Amendment protection when published at the behest of a foreign government. There, however, the evidence showed that Dumeisi "printed provocative articles in his paper in order to learn more about the Opposition" which intelligence he reported back to Iraqi officials. *Id.* at 581. Thus, the jury was properly instructed that it could consider Dumeisi's articles "as they may pertain to issues of motive and intent." *Id*. at 579. In other words, where Dumeisi printed provocative articles in order to learn more about dissidents so that he could pass that information on to Iraqi officials, the jury was permitted to consider those actions as relevant evidence of his motive and intent to spy for the Iraqi government.

In the case at bar, there is no allegation that the APSP defendants were spies for Russia or that they ever published articles for any nefarious purpose unrelated to their activism. The indictment makes a general allegation that the APSP defendants agreed to publish articles "designed to cause dissension in the United States." ECF No. 12, ¶2. But causing dissension is consistent with the legitimate goals of an activist group. Activists encourage their followers to question their leaders and to dissent from government policies. Protestors against the Vietnam War encouraged Americans to question official statements about the progress of the war and about why we were fighting in Vietnam, and they encouraged dissent. Thus, they were causing dissension in the United States.

Accordingly, the Magistrate Judge's finding that "articles published under the direction or control of the Russian government" (ECF No. 157, p. 10) are not protected

by the First Amendment is incorrect and should be rejected by this Court.

Finally, the Magistrate Judge finds, in a footnote, that even if "this Court were to agree with Defendants that Section 951 is a content-specific statute as applied, it survives strict scrutiny" because the government has an "interest in knowing the identity of those acting on behalf of a foreign government within the United States (citing *Duran*, 596 F.3d at 1295)" and "the only burden [it] imposes is notification to the Attorney General." ECF No. 157, p. 20 n.5. This finding should be rejected for several reasons.

First, while the government may have "interest" in knowing that the leaders of an activist group have a partnership with a foreign government, there is no precedent suggesting that this interest is so "compelling" as to justify criminalizing political speech. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (where a criminal law trenches upon the area of political speech, the burden that must be overcome to justify the law "is well-nigh insurmountable").

Second, the suggestion that this prosecution imposes only a minimal burden on speech – notification to the Attorney General – is incorrect. As the Supreme Court has repeatedly held, a "requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 540 (1945). *See also Dombrowski v. Pfister*, 380 U.S. 479, 495 (1965) (requirement that members of activist group must register as Communist-front organization or be prosecuted was invalid); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164-167 (2002)

(registration requirement to engage in door-to-door advocacy struck down).

Further, the record shows that the APSP defendants were never notified about any requirement to register with the Attorney General. Nor were they offered any opportunity to challenge the government's contention that their alleged "partnership" with Ionov invokes Section 951. Rather, their first notification came on July 26, 2022, when their homes and offices were raided by armed federal agents. Also, Section 951 "is a general intent crime," that imposes no obligation on the government to prove that the defendants had any knowledge of the notification requirement. *Duran*, 596 F.3d at 1292. Moreover, as the Supreme Court has recognized, a pending criminal prosecution of an activist group has a chilling effect upon the exercise of First Amendment rights, as does the mere existence of a criminal law which can be used to target political speech at the government's discretion. *See Dombrowski*, 380 U.S. at 486 ("free expression [is] of transcendent value to all society, and not merely to those exercising their rights").

Third, this is not a national security case. There is no allegation in the indictment that the APSP defendants, or any of their utterances, pose any risk to the security of our nation. They are non-violent activists who advocate to change their government's policies and priorities. They do not propose violent overthrow of the government or totalitarian dictatorship. Their activism, targeted in this indictment, is at the core of the values protected by the First Amendment. The Magistrate Judge's finding effectively seeks to create a Russia exception to the First Amendment. This Court should reject that finding.

II. The Report and Recommendation Overlooks Flaws in the Indictment which Provides no Factual Details to Support the Charge that Defendants were Under Direction or Control of Russia.

While the allegations of the indictment must be taken as true for purposes of a Motion to Dismiss, the indictment falls well short of alleging that the APSP defendants were under the direction or control of Defendant Ionov or of Russia. Rather, the indictment alleges a partnership agreement, under which Ionov made certain requests. If those requests aligned with the APSP defendant's ideology, they assented; if not, they refused.

The indictment tracks the language of the statute in alleging that, after 2015, the APSP defendants expressed their political views at the "direction or control of a foreign government." However, its factual allegations fail to provide even the most basic information about the alleged agreement with Ionov, such as its terms, obligations, or compensation. Rather, the indictment describes the agreement between the APSP and Ionov as a "partnership" (ECF 12, ¶¶ 1-2, 26(c)) or as a "bilateral cooperation program." ECF 12, Overt Act 63. The indictment also alternates between describing communications from Ionov as "directives" and as "requests." *See, e.g.* ECF 12, Over Act 57 (Ionov sent a "request" for APSP defendant to send video congratulations to the people of Donetsk); ECF 12, Overt Act 8 (Ionov "direct[ed]" APSP defendant to write petition).

Further, the amount of financial support that the APSP is alleged to have received from Ionov is far too small to justify any presumption that the defendants were under

his direction or control. According to the indictment, the APSP received about $7,000 over six years of their alleged collaboration. Most of these funds were sent in 2016 to support the APSP's 4-city speaking tour on the issue of reparations. The APSP defendants sent Ionov a detailed budget and request for $12,405 to cover food, shelter and transportation for the tour. The funds sent by Ionov did not even cover the APSP's out-of-pocket costs for this one event. No serious-minded person could find that the trivial amounts of financial support from Ionov turned the APSP defendants into agents of Russia. And even if the indictment did allege that any of the APSP's utterances were financed by Russia, that allegation would not affect free speech protections. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U. S. 254, 266 (1964) (That the New York Times was paid for publishing a political advertisement "is as immaterial in this connection as is the fact that newspapers and books are sold.")

These deficiencies in the indictment are not mentioned in the Report and Recommendation. We urge this Court to consider them as an additional ground to reject the Magistrate Judge's recommendation.

WHEREFORE, based upon the foregoing, the Defendant, PENNY HESS, respectfully moves this Honorable Court to sustain her objection to the Magistrate Judge's Report and Recommendation and moves this Honorable Court to grant Ms. Hess's Motion to Dismiss the Indictment.

DATED this 9th day of February 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2024, a true and correct copy of the foregoing was furnished by using the CM/ECF system with the Clerk of the Court, which will send notice of the electronic filing to:

Daniel J. Marcet, AUSA

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