MENASHI, *Circuit Judge*, dissenting:

In deciding a choice-of-law question, "the settled rule in Virginia is that the substantive rights of the parties in a multistate tort action are governed by the law of the place of the wrong." *McMillan v. McMillan*, 219 Va. 1127, 1128 (1979). The Virginia Supreme Court has declined to adopt the so-called "'modern' approach" that requires courts to determine which state's law "has the most significant relationship to the occurrence and the parties," generally applying in a case such as this one the law of the plaintiff's domicile. *Id.* at 1129-30 (quoting Restatement (Second) of Conflict of Laws § 145 (1971)). The Virginia Supreme Court has said that "the uniformity, predictability, and ease of application of the Virginia rule" should not be abandoned "for a concept which is so susceptible to inconstancy." *Id.* at 1131. Thus, "Virginia's choice of law rule selects the law of the state in which the wrongful act took place, wherever the effects of that act are felt" and indeed "even when that place differs from the place where the effects of injury are felt." *Milton v. IIT Rsch. Inst.*, 138 F.3d 519, 522 (4th Cir. 1998) (Wilkinson, C.J.).

It is true that, in a case in which a defamatory statement is published to multiple jurisdictions simultaneously, a single "place of the wrong" is not so easily identified. But applying the law of the place where the statements were made closely resembles the Virginia Supreme Court's "place of the wrong" approach. By contrast, the approach that the court predicts the Virginia Supreme Court would adopt—an analysis of "where the plaintiff incurred the greatest reputational injury, with a presumption that absent countervailing circumstances, a plaintiff suffers the most harm in his state of domicile," *ante* at 13-14—resembles the modern approach that the Virginia Supreme Court has rejected. I doubt that the Virginia

Supreme Court would adopt that approach and, even under that approach, I would not conclude that Congressman Nunes suffered the greatest reputational injury from the alleged defamation in California. Accordingly, I dissent.

I

The place of the wrong in a defamation case is where the defamatory statement was published, meaning the place in which a third party first receives it. With a nationwide broadcast, it is not possible to identify one such place, and therefore the Virginia Supreme Court would need to apply a second-best approach. As the court notes, "other courts in *lex loci delicti* jurisdictions" faced with such circumstances "apply the law of the state where a plaintiff incurs the greatest reputational injury, with a presumption that a plaintiff suffers the brunt of the injury in their home state." *Ante* at 20. But, as Nunes points out, other courts specifically applying Virginia's choice-of-law rules have predicted that the Virginia Supreme Court would choose the place from which the defamatory statement was broadcast as the place of publication.[1] The "place of broadcast" rule more

[1] *See, e.g.*, *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604, 608 (E.D. Va. 2005) ("Because Plaintiff alleges that the website in question is controlled from Defendant E–Fense, Inc.'s corporate headquarters located in Virginia, and the allegedly defamatory statements were published on this website, Virginia law applies.") (internal quotation marks omitted); *Scott v. Moon*, No. 2:19-CV-5, 2019 WL 332415, at *3 n.5 (W.D. Va. Jan. 24, 2019) ("Scott alleges that Moon published the statements at issue on a website that he controls from Florida. Accordingly, Florida law applies to Scott's claims against Moon."); *Scott v. Carlson*, No. 2:18-CV-47, 2018 WL 6537145, at *2 n.3 (W.D. Va. Dec. 12, 2018) ("Scott alleges that Carlson, a New York resident, published the statements at issue on a website that he created and on YouTube. Accordingly, New York law applies to Scott's claims against

closely resembles the Virginia Supreme Court's approach to identifying the place of publication, and it is more faithful to the Virginia Supreme Court's decision to adhere to the "place of the wrong" rule and to reject modern approaches based on domicile. Virginia's choice-of-law rules aim to promote predictability by identifying a single place "in which the wrongful act took place, wherever the effects of that act are felt." *Milton*, 138 F.3d at 522. In this case, all the defamatory statements were made in New York. That is the place in which the wrongful act took place.

Focusing on the place in which the tortious conduct occurred—that is, the place of broadcast—resembles the "place of the wrong" approach that the Virginia Supreme Court generally applies. In the simple defamation case involving a local television station or newspaper, the "place of broadcast" rule and the "place of publication" rule will always lead to the same result. The "place of

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Carlson."); *ABLV Bank v. Ctr. for Advanced Def. Stud. Inc.*, No. 1:14-CV-1118, 2015 WL 12517012, at *2 (E.D. Va. Apr. 21, 2015) ("Here, it is undisputed that ABLV's report was published from its office in Washington, D.C. It is irrelevant that the negative effects of that publication were felt in New York; any reputational damage caused by C4ADS occurred everywhere due to the nature of online publication. Thus, D.C. law shall govern the case."); *Mireskandari v. Daily Mail & Gen. Tr. PLC*, No. CL-2019-9418, 2020 WL 8837630, at *12 (Va. Cir. Ct. July 27, 2020) ("Unlike in *Depp* where the alleged defamatory op-ed was first printed and/or uploaded *in Virginia*, Mr. Mireskandari has not alleged the Daily Mail's alleged defamatory article was *first* published in Virginia, as opposed to elsewhere."); *Depp v. Heard*, No. CL-2019-2911, 2019 WL 8883669, at *5 (Va. Cir. Ct. July 25,2019) ("[T]he place of the wrong in this case is the place where the act of publication of Ms. Heard's Op-Ed to the internet occurred."); *Nunes v. Twitter*, No. CL-19-1715-00, 2019 WL 11815060, at *2 (Va. Cir. Ct. Oct. 2, 2019) ("[T]he posts to social media were made in Virginia and therefore the publication occurred in Virginia.").

greatest reputational injury" rule, by contrast, would not. That is because the latter rule relies on different considerations, looking away from the conduct of the tortfeasor and to the effects of that conduct instead.[2]

The "place of greatest reputational injury" rule too closely resembles the "most significant relationship" test that the Virginia Supreme Court has expressly rejected. It employs the same presumption about the plaintiff's domicile. *See ante* at 23 (acknowledging that "the 'most significant relationship' test similarly employs a presumption that 'the state of most significant relationship will usually be the state where the person was domiciled at the time'") (quoting Restatement (Second) of Conflict of Laws § 150(2)). Therefore, the "place of greatest reputational injury" rule "would effectively replace Virginia's traditional rule for tort cases with default application of the law of plaintiff's domicile." *Milton*, 138 F.3d at 522. To the extent that either the "place of greatest reputational injury" rule or the "most significant relationship" rule departs from the domicile presumption, it does so on the basis of a case-by-case analysis of the relationships between the available fora and the dispute between the parties. But that interest-balancing inquiry does not resemble the way that the Virginia Supreme Court approaches

[2] The court denies that its approach looks to the effects of the defamatory statement. *See ante* at 16 ("A consideration of where (or even whether) a third party viewed the content … does not impermissibly focus on the 'effects' of the completed tort."). But we know where a third party viewed the content: nationwide. The court's "greatest reputational injury" approach does not simply look at where the content was viewed; it looks to the effects of its being viewed in multiple jurisdictions in order to determine where it inflicted the greatest injury.

these cases. Instead, it resembles the approach that the Virginia Supreme Court has rejected. *See McMillan*, 219 Va. at 1129 ("The advocates of this 'modern' approach express dissatisfaction with the mechanical application of the place-of-the-wrong rule and impose a duty on the forum court to make an analytical examination of the facts of each case to determine what law should govern the parties' substantive rights."). Even if the court is correct that the "place of greatest reputational injury" analysis is not exactly the same as the "most significant relationship" inquiry, it bears a close family resemblance.

The court criticizes the "place of publication" rule for being "in tension with the Restatement (First) of Conflict of Laws" and the requirements of "Virginia's *lex loci delicti* rule" because it is not based on the place in which third parties viewed the content. *Ante* at 15. That is an odd criticism, given the court's recognition that it is not possible to apply the "place of the wrong" rule in this case because there is no single place in which third parties viewed the content. Neither the "place of broadcast" rule nor the "place of greatest reputational injury" rule reflects the requirements of the First Restatement or the traditional Virginia rule. The question we must answer is whether it is more faithful to that rule to look to the place where the statements were made or the place where the statements had the greatest impact. In my view, the Virginia Supreme Court would choose the former.[3] For that reason, I would apply New York law in this case.

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[3] Because the "place of greatest reputational injury" rule and Virginia's traditional "place of the wrong" rule are based on such divergent considerations, the interaction of the two rules would lead to peculiarities. For example, imagine that the television show in this case had an east coast

The court suggests that it cannot determine on a motion to dismiss where the statements were made because the complaint does not adequately identify that location. *See ante* at 16. If that were true, it would be a reason for *denying* the motion to dismiss rather than granting it. We have observed that "choice-of-law determinations are fact-intensive inquiries that would be premature to resolve at the motion-to-dismiss stage." *Bristol-Myers Squibb Co. v. Matrix Labs. Ltd.*, 655 F. App'x 9, 13 (2d Cir. 2016). If "the complaint itself leaves unanswered questions about critical aspects of the pertinent facts," a court "is well-advised to refrain from making an immediate choice-of-law determination. After all, when there are important holes in the record, discovery will likely illuminate critical facts bearing on the unanswered questions and, thus, on the ultimate question of which state's law should apply." *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 42-43 (1st Cir. 2020). On a motion to dismiss, we resolve such ambiguities in favor of the non-moving party; the ambiguity is not a reason to dismiss the case. *See Bristol-Myers*, 655 F. App'x at 13

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broadcast and a west coast broadcast, each at 8:00 pm in the respective time zones. California law could not possibly apply because the show would have been seen on the east coast—thus completing the tort—three hours before it was seen in California. The "place of the wrong" rule would preclude the application of California law, but the "place of greatest reputational injury" would require an analysis of the depth of Nunes's injury in each of the states along the east coast. In another scenario, the television show might have had a studio audience, in which case the place of publication would indisputably be New York and New York law would apply. The choice of law could turn on these factual quirks because the "place of the wrong" rule focuses on the conduct constituting the tort while the "place of greatest reputational injury" rule focuses on the effects of the tort. Instead of adopting an approach that so diverges from the "place of the wrong" analysis, I would retain the focus on the conduct constituting the tort by looking to the place of broadcast.

(explaining that because the court could not "determine at the motion-to-dismiss stage which law indeed governs … the district court improperly dismissed the [complaint] for failure to state a claim").

In any event, it is no great mystery where the statements took place. Every party and every court involved in these proceedings agrees it was New York. The district court acknowledged that "the location of the reporters and the news organization" as well as the location where "the statements were made" was New York. *Nunes v. CNN, Inc.*, 520 F. Supp. 3d 549, 556-57 (S.D.N.Y. 2021).[4] The U.S. District Court for the Eastern District of Virginia, where this case was originally filed, granted a motion to transfer because "the Southern District of New York … is the more logical and convenient forum in which to adjudicate the claims here presented," given that "[t]he Article was researched, written, and published in New York," the television program "was broadcast from and produced in New York," and the "key witnesses reside in New York." *Nunes v. CNN, Inc.*, No. 3:19-CV-889, 2020 WL 2616704, at *1-*4 (E.D. Va. May 22, 2020). And CNN represented that the "telecast took place in New York" and the reporter "works at CNN's New York office, and wrote the article in New York." Def.'s Mem. in Supp. of Mot. to Transfer 3-4, *Nunes*, 520 F. Supp. 3d 549 (No. 20-CV-03976), ECF No. 14-1. The

[4] The district court predicted, despite those facts, that the Virginia Supreme Court would look to the place of greatest reputational injury instead of the place of broadcast. *See* 520 F. Supp. 3d at 557 ("[T]he governing choice of law rule does not contemplate the application of New York state law based on the location of the reporters and the news organization.").

only reason this case is before us at all is because the location at which the statements were made was apparent to everyone.

I would apply the "place of broadcast" rule even if the place of broadcast could not yet be determined. But no one disputes that the place of broadcast was New York.

II

Even assuming that the court were correct that the Virginia Supreme Court would adopt the "place of greatest reputational injury" rule, however, the district court erred in concluding that the greatest reputational injury occurred in California rather than in Washington, D.C. The district court only cursorily considered the argument that the allegedly defamatory article injured Nunes in Washington "because that is where he performs his role overseeing the activities of the Intelligence Community." *Nunes*, 520 F. Supp. 3d at 557. Yet the complaint alleges that the defamation injured him precisely in his ability to perform that role.

The court insists that "nothing alleged in the complaint suggests countervailing circumstances sufficient to overcome the presumption that [Nunes's] greatest reputational harm occurred in his home state" of California. *Ante* at 24. The amended complaint, however, alleges that CNN "intentionally and unlawfully imped[ed] … [Nunes's] duties as a United States Congressman, including the performance of his duties as a Ranking Member of the House Intelligence Committee during the impeachment inquiry." J. App'x 61. It alleges that CNN aimed to inflict "maximum damage to [his] reputation … and to cause him to be removed from the impeachment inquiry." J. App'x 41. The broadcast and the article were focused

directly on the impeachment inquiry, which was occurring in Washington.

The complaint demonstrates the effect of the allegations on the impeachment inquiry. The article was published in CNN Politics under the headline "Giuliani associate willing to tell Congress Nunes met with ex-Ukrainian official to get dirt on Biden," J. App'x 38, specifically referencing implications for the impeachment inquiry in Washington. The complaint alleges that the Democratic Congressional Campaign Committee and other political actors used the statements to question Nunes's credibility with respect to the impeachment inquiry. J. App'x 47, 48. The House Permanent Select Committee on Intelligence cited the CNN article as part of its "Trump-Ukraine Impeachment Inquiry Report." H.R. Rep. No. 116-335, at 192 n.207. The chairman of the House Armed Services Committee announced that it was "[q]uite likely" that Nunes would "face an ethics investigation over allegations that he met with an ex-Ukrainian official to obtain information about former vice president Joe Biden and his son" that were contained in the CNN statements.[5]

The CNN statements were about, and substantially affected, the impeachment proceedings in Washington. But the amended complaint does not say anything about injury to Nunes's reputation in California. The district court simply asserted that he must have suffered "a greater injury … in the home state that sends him to

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[5] Rosalind S. Helderman & Colby Itkowitz, *Top House Democrat says ethics probe of Nunes is likely over alleged meeting with Ukrainian about Bidens*, Wash. Post (Nov. 23, 2019), *available at* https://www.washingtonpost.com/politics/top-house-democrat-says-ethics-probe-of-nunes-is-likely-over-alleged-meeting-with-ukrainian-about-bidens/2019/11/23/0dde6b22-0e0a-11ea-97ac-a7ccc8dd1ebc_story.html.

Congress as the representative of his district." *Nunes*, 520 F. Supp. 3d at 557. That conclusion is not so obvious that it can be asserted with no analysis of the factual allegations. Those allegations indicate that Nunes was a high-profile figure in the impeachment proceedings in Washington, and CNN's statements about his involvement in the subject matter of those proceedings affected his role. The complaint does not indicate that CNN's statements had any impact in California.

There may be wisdom in the Virginia Supreme Court's adherence to a rule that does not require courts to analyze the impact of defamatory statements to determine the law that applies. But given the court's decision to engage in that sort of analysis, it is difficult to avoid the conclusion the greatest impact in this case was in Washington.

For these reasons, I dissent.