THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0206

Union Leader Corporation, et al

v.

Town of Salem
and
Salem Police Relief, NEPBA Local 22
and
Robert Morin, Jr.

BRIEF OF *AMICUS CURIAE,* NEW HAMPSHIRE MUNICIPAL ASSOCIATION IN SUPPORT OF THE TOWN OF SALEM

RULE 7 APPEAL FINAL DECISION OF THE
ROCKINGHAM SUPERIOR COURT

NEW HAMPSHIRE MUNICIPAL
ASSOCIATION

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STATEMENT OF THE FACTS

The New Hampshire Municipal Association defers to the Statement of Facts and of the Case in the Brief of the Town of Salem and relies thereon.

SUMMARY OF THE ARGUMENT

Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) was correctly decided by the court and *stare decisis* requires that it be followed. The plain meaning of the terms "internal personnel practices" in RSA 91-A:5, IV, are clear and unambiguous, calling for neither a narrow nor a broad interpretation, but merely proper deference to the legislature. Use of a balancing test for internal personnel practices would ignore the structural changes brought about through the 1986 amendments to the RSA 91-A:5, IV. Those amendments employed an unmistakable punctuation choice that precludes the use of a privacy balancing test for internal personnel practices. Furthermore, the Legislature's failure to overrule *Fenniman* strongly suggests the legislature has no concerns about *Fenniman* and its progeny.

Fenniman is simple and workable and enables public officials to conduct diligent investigations of employee misbehavior. Departing from the rule in *Fenniman* would jeopardize sound administration of local government employment practices.

The Court should adhere to its long-standing practice of not using a balancing test where the legislature has plainly made its own determination certain records are categorically exempt. The Legislative discussions cited in *Fenniman* also plainly established that the concurrent legislative debate on the passage of RSA 516:36, II, along with the comprehensive amendments to RSA chapter 91-A, was evidence of a legislative determination that internal police investigatory files are categorically exempt internal personnel practices under RSA 91-A:5, IV.

ARGUMENT

I. Fenniman Was Decided Correctly, and Stare Decisis Requires that It Be Followed.

A. The *Fenniman* Decision Was Correct.

In *Reid v. New Hampshire Attorney General,* 169 N.H. 509 (2016), this court questioned a previous court's application of the internal personnel practices exemption in *Union Leader Corp. v. Fenniman,* 136 N.H. 624 (1993). The court in *Reid* stated, "In interpreting the 'internal personnel practices' exemption in *Fenniman,* we twice departed from our customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption." 169 N.H. at 519-20. Nevertheless, the court ultimately followed *Fenniman* in *Reid,* and it emphatically reaffirmed *Fenniman* in *Clay v. City of Dover,* 169 N.H. 681 (2017). The *Fenniman* decision was sound, and was, in fact, hardly a departure from the court's customary jurisprudence.

1. When a Statute's Meaning Is Clear, There Is No Occasion for Further Interpretation.

The *Fenniman* court explained that although it ordinarily interprets the exemptions in RSA 91-A narrowly, the "plain meanings" of the words used in this exemption are themselves quite broad. *See Fenniman,* 136 N.H. at 626. The court's practice of interpreting Right-to-Know Law exemptions narrowly does not negate what has long been this court's first rule of statutory interpretation, which is that it begins with the "plain and ordinary meaning" of the language. If the language is not ambiguous, the court will go no further. *See, e.g., In re Dow & Dow,* 170

N.H. 267, 271 (2017) (quoting *Hoffman v. Town of Gilford,* 147 N.H. 85, 87 (2001)). This fundamental rule applies to cases involving interpretation of the Right-to-Know Law—as the court in *Reid* itself recognized, *see* 169 N.H. at 522.

Applying a "narrow" interpretation to a statutory exemption necessarily presumes that there is room for interpretation—*i.e.,* that the language is ambiguous. But if the court finds that the language is unambiguous, as it did in *Fenniman,* there is no occasion to choose a broad or narrow interpretation. In applying the plain meaning of "internal personnel practices," the *Fenniman* court merely followed its own longstanding practice.

2. A Balancing Test Is Inappropriate for the Exemption for Internal Personnel Practices.

Nor did the *Fenniman* court err in choosing not to apply a balancing test. The court did not overlook previous cases that had applied a balancing test; rather, it considered those cases and determined, correctly, that they were not relevant: "Although we have often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt." 136 N.H. at 627 (citations omitted). This was simply a proper deference to the legislature's intent.

The legislature has stated, in RSA 91-A:5, IV, that certain records should be exempt if "disclosure would constitute an invasion of privacy." This directive necessarily calls for the exercise of judgment—there is no category of records whose disclosure would constitute an invasion of privacy under every imaginable circumstance. Thus, the legislature left it to those charged with handling record requests, and ultimately to the reviewing court, to determine whether disclosure would constitute an invasion of privacy. This court established a balancing test to make that determination. However, that balancing test is useful, and makes sense, *only* in

the context of the invasion-of-privacy inquiry; it does not apply to all of the exemptions under RSA 91-A:5.

The balancing test was first applied in *Mans v. Lebanon School District,* 112 N.H. 160 (1972), when the plaintiff sought access to the names and salaries of all teachers in the school district. At that time, the exemption in RSA 91-A:5, IV, as enacted in 1967, applied to:

> Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, *and other files whose disclosure would constitute an invasion of privacy.*

See 1967 N.H. Laws 251:1, *codified in* RSA 91-A:5, IV (emphasis added). This exemption comprised a series of items ending with the qualifier "whose disclosure would constitute an invasion of privacy." One could reasonably interpret that qualifier —and the *Mans* court did—as applying to every item mentioned in the exemption. *See* 112 N.H. at 162 ("Subsection IV means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed."). The court stated, "In determining whether salaries are exempt as financial information or as private information, the benefits of disclosure to the public are to be balanced against the benefits of nondisclosure to the administration of the school system and to the teachers." *Id*. The court then considered at length whether the public interest in disclosure outweighed the teachers' privacy interest and concluded that it did. *Id*.

The language of paragraph IV remained unchanged until 1986, and subsequent cases during this period followed *Mans* in applying an invasion-of-privacy balancing test when this exemption was invoked. *See, e.g., Perras v. Clements,* 127 N.H. 603, 604-05 (1986) (property appraisal reports prepared for state highway department); *Menge v. City of Manchester,* 113 N.H. 533, 537-38 (1973) (real estate assessment records); *see also Union Leader Corp. v. City of*

Nashua, 141 N.H. 473, 476-78 (1996) (law enforcement records that could embarrass private citizen); *Brent v. Paquette,* 132 N.H. 415, 426-28 (1989) (student names and addresses).

In 1986, however, paragraph IV was amended to read essentially as it does today. A new category of records was added, and the several categories were separated by semicolons:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy.

1986 N.H. Laws 83:6, *codified in* RSA 91-A:5, IV. (A reference to library user and videotape sales and rentals was added later, as was a second sentence.)

The separation of categories in the amended law was not merely a whimsical punctuation choice. There were now four distinct categories of exempt records: (1) records relating to internal personnel practices; (2) confidential, commercial, or financial information; (3) test questions, etc.; and (4) personnel, medical, welfare, *and other files whose disclosure would constitute invasion of privacy.* With the revised language, it became clear that the clause "whose disclosure would constitute invasion of privacy" was meant to modify only the last category; interpreting it to modify the entire paragraph would make no sense. *See, Mountain Valley Mall Associates v. Conway,* 144 N.H. 642, 652 (2000) (discussing the "last antecedent rule," a "general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation").

This is most apparent with respect to "test questions, scoring keys, and other examination data." It is impossible to imagine how disclosure of test questions or scoring keys could constitute an invasion of privacy, so applying the invasion-of-privacy balancing test would

render this exemption meaningless—and yet the exemption is there. Clearly the reason for exempting these records is to prevent someone who expects to be taking an academic, licensing, or employment examination from gaining an unfair advantage—it has nothing to do with personal privacy.

If the invasion-of-privacy element does not apply to the test scores exemption, there is no reason, consistent with the construction of the paragraph, to apply it the other categories, either. And because the *Mans* balancing test was tied specifically to the invasion-of-privacy element, there is no reason to apply the balancing test when that element is not part of the exemption.

Subsequent decisions of this court have extended the balancing test to another category of records in paragraph IV—confidential, commercial, or financial information—but only to that category. In *Chambers v. Gregg,* 135 N.H. 478 (1992), and again in *Union Leader Corp. v. New Hampshire Housing Finance Authority,* 142 N.H. 540 (1997), the court applied the *Mans* balancing test to the "confidential, commercial, or financial information" exemption, without noting that the test had been developed specifically in the context of the invasion-of-privacy exemption, and without questioning whether the balancing test should, after 1986, now be extended to the other items in paragraph IV. *See also, Goode v. New Hampshire Legislative Budget Assistant,* 148 N.H. 551, 554-57 (2002). Although the court's examination of precedent in these cases was somewhat cursory, extending the balancing test to "confidential information" is not unreasonable. Privacy and confidentiality, while not exactly the same thing, are certainly related, and they are both subjective; they exist in varying degrees. What is highly confidential to one person may be less so to another. Legitimate claims of confidentiality, like legitimate claims of privacy, may need to be measured and weighed against the public's interest in disclosure. Thus, application of the balancing test to the exemption for "confidential, commercial, or

financial information" is now firmly embedded in the case law. *But see, Professional Fire Fighters v. New Hampshire Local Government Center,* 163 N.H. 613, 614-15 (2012) (confidential communications protected by the attorney-client privilege are categorically exempt under paragraph IV; no balancing test mentioned).

However, the balancing test has never been applied, either before or since *Fenniman*, to the two other categories of records listed in paragraph IV—internal personnel practices or test questions and other examination data. Nor should it be. Under the privacy and confidentiality exemptions, the balancing test is an essential part of the definition. It is used to determine whether the records at issue fit the description in the statutory exemption—*i.e.,* whether they are sufficiently "confidential" or "private." It is not an additional requirement that is layered on top once the records are found to fit the statutory language. In contrast, whether something is an internal personnel practice, a test question, or a scoring key is not a matter of "balance"—it either is or it isn't. To apply a balancing test to such records would be to impose an additional requirement not found or reasonably implied in the statute.

The legislature has determined that those items are exempt from disclosure—period. It has not left it up to the courts to decide whether they *should* be exempt. If the court finds that the records fit within one of those categories, its inquiry ends; the records are exempt. For the same reason, the balancing test has not been applied to any of the other exemptions in RSA 91-A:5. *See, e.g., ATV Watch v. Department of Transportation,* 161 N.H. 746, 757-61 (2011) (applying exemption for preliminary drafts under paragraph IX and personal notes under paragraph VIII—balancing test not mentioned); *State v. Purington,* 122 N.H. 458, 462 (1982) (grand jury records categorically exempt under paragraph I).

Certainly a court may, and should, consider carefully the specific records in each case to determine whether they meet the statutory definition of "records pertaining to internal personnel practices." This court did that in *Fenniman*, *see* 136 N.H. at 626. It performed the same exercise, with varying results, in *Hounsell v. North Conway Water Precinct,* 154 N.H. 1, 4-5 (2006) (report of investigators hired by employer to investigate claim of employee misconduct was a record pertaining to internal personnel practices); in *Montenegro v. City of Dover,* 162 N.H. 641, 649-50 (2011) (job titles of persons performing certain functions are not an internal personnel practice); in *Reid,* 169 N.H. at 522-26 (investigation conducted by outside party, not at employer's request, was not an "internal" personnel practice); and in *Clay v. City of Dover,* 169 N.H. 681, 686-88 (2017) (evaluation forms completed by search committee when considering candidates for superintendent position were records pertaining to internal personnel practices). However, having determined that the records *do* pertain to internal personnel practices, the court has done its job. The legislature has decided that those records are exempt.

For the *Fenniman* court to apply a balancing test and decide that certain records were not exempt from disclosure, even though they pertained to internal personnel practices, would have been an egregious exercise in judicial law making. The legislature expressly stated that those records are exempt, just as it stated that test questions, preliminary drafts, grand jury records, personal student records, and several other categories of records are exempt. It is not for the courts to substitute their judgment for that of the legislature. The *Fenniman* court got it right.

3. The Legislature's Failure to Amend the Statute Indicates Its Approval of *Fenniman*.

Fenniman was decided 23 years ago. Since then, this court has cited and followed it four times: in *Hounsell,* in *Montenegro,* in *Reid,* and in *Clay*. During that 23-year period, the legislature has taken no action to amend this provision of the statute; this strongly suggests that

the legislature has no concerns about *Fenniman* and its progeny. When "[n]o attempt has been made to change the [statute] in the face of our interpretation of it . . ., we assume that this interpretation met with the legislature's approval." *Cagan's Inc. v. Department of Revenue Administration,* 128 N.H. 180, 183 (1986); *accord Amoskeag Trust Co. v. Preston,* 107 N.H. 330, 333 (1966) ("That [the court's interpretation] has met with approval from our Legislature is apparent from the fact that in the many revisions of the statutes which have occurred through the years, no attempt has been made to change the provision . . . in the face of the court's interpretation of it.") This is similar to the principle that "the long-standing practical and plausible interpretation [of a statute] applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *New Hampshire Retirement System v. Sununu,* 126 N.H. 104, 109 (1985), *quoted in Petition of Warden,* 168 N.H. 9, 15 (2015). Here, the "agency" responsible for the statute's implementation is this court, and the legislature has, by its silence, accepted the "administrative construction."

As this court has stated many times, "if the legislature disagrees with our statutory interpretation, it is 'free to amend the statute as it sees fit.'" *Green v. School Administrative Unit #55,* 168 N.H. 796, 803 (2016) (quoting *Forster v. Town of Henniker,* 167 N.H. 745, 753 (2015)). The legislature is well aware of this option, and it has exercised it frequently, including with respect to interpretation of the Right-to-Know Law. *See, e.g.,* 2016 N.H. Laws 280:1 (amending RSA 91-A:3, II, superseding *Ettinger v. Town of Madison Planning Board,* 162 N.H 785 (2011)); 2016 N.H. Laws 267:1 (amending RSA 21:34-a, superseding *Forster v. Town of Henniker,* 167 N.H. 745, 753 (2015)); 2011 N.H. Laws 234:2, :3 (amending RSA 49-C:12, :33, superseding *City of Manchester v. Secretary of State,* 161 N.H. 127 (2010)); 2009 N.H. Laws

307:6 (amending RSA 674:33, I(b), superseding *Boccia v. City of Portsmouth,* 151 N.H. 85 (2004)); 1992 N.H. Laws 34:1 (amending RSA 91-A:3, II(a) (superseding *Johnson v. Nash,* 135 N.H. 534 (1992)). Further, the legislature considers at least a few amendments to the Right-to-Know Law every year and amends the law *almost* every year, usually amending multiple sections of the law. *See, e.g.,* 2019 N.H. Laws chs. 54, 107, 163; 2018 N.H. Laws chs. 244, 289; 2017 N.H. Laws chs. 165, 234; 2016 N.H. Laws chs. 29, 30, 280, 283.

Given the legislature's constant attention to RSA 91-A and its demonstrated willingness to override court decisions it dislikes, it is evident that it has no concerns about the way this court has interpreted the internal personnel practices exemption. The court's purpose in interpreting and applying a statute is to carry out the legislature's intent, and its decisions on this subject have served that purpose well.

B. *Stare Decisis* Requires the Court to Respect the *Fenniman* decision.

Even if there were something unsound about the *Fenniman* decision, it is the settled law of the state. "The doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *State v. Balch,* 167 N.H. 329, 334 (2015). This court's well-established *stare decisis* doctrine is as follows:

> Generally, we will overrule a prior decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

State v. Cora, 170 N.H. 186, 192 (2017).

The first of these factors weighs heavily in favor of continuing to follow *Fenniman*. The *Fenniman* rule is simple and workable: records pertaining to internal personnel practices are categorically exempt. The *reversal* of *Fenniman* would defy practical workability. It would require the local official or employee receiving a record request to balance, in every case, the public's interest in disclosure against the government's interest in non-disclosure and the individual's privacy interest. Although this may be manageable for a superior court judge assisted by a law clerk who can spend weeks or months researching the statute and case law and writing a ten-page opinion, it will be a challenge for a town clerk or administrative assistant who has little legal training, has a hundred other tasks to manage, and has five business days, *see* RSA 91-A:4, IV, to make a decision. And any citizen who believes the municipality has weighed the factors improperly would have an action in superior court.

The second criterion—whether the existing rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling—leads to the same conclusion. The categorical exemption for internal personnel practices has enabled public officials to conduct diligent investigations and engage in honest review of employee conduct with an assurance of confidentiality; removing that assurance would compromise those activities. And again, requiring town employees to administer a balancing test in every case would create a hardship.

The third and fourth criteria require little discussion. Neither the law nor the facts have changed significantly since *Fenniman* was decided, or since it was reaffirmed in *Reid*. In fact, the court has followed and reaffirmed *Fenniman* repeatedly. There is, therefore, no reason to consider overruling the *Fenniman* decision.

II. The Categorical Rule Barring Disclosure Of Internal Personnel Investigations Is Not Contrary To N.H. Const., Pt. I, Art. 8.

Adhering to sound statutory and constitutional principles and, based upon the language of RSA 91-A:5, IV, this court correctly ruled in *Fenniman* and reaffirmed in *Hounsell* that internal investigations of alleged public employee misbehavior are exempt from disclosure as internal personnel practices. This is not contrary to N.H. Const., Pt. I, Art. 8 which provides in pertinent part:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. ***To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted***.

(emphasis added). Whether any particular limitation on access to public records is unreasonable "must be examined in light of the ability of the public to hold government accountable absent such access." *Associated Press v. State of N.H.,* 153 N.H. 120, 125 (2005). When assessing whether a statutory limitation on access is reasonable, and when *exclusively* considering N.H. Const., Pt. I, Art. 8, this court has, in certain instances, employed a balancing test where the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government. *See, Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *Mans v. Lebanon School Bd*., 112 N.H. 160, 162 (1972). However, the court has eschewed the use of a balancing test where "the legislature has plainly made its own determination that certain documents are categorically exempt." *Fenniman*, 136 N.H. 624, 626 (1993).

In contrast, where the public's right of access to records or proceedings depends upon assessing competing constitutional interests, this court has required that the governmental interest be sufficiently compelling and employ the least restrictive means available to serve the interest that compels nondisclosure. *Associated Press,* 153 N.H. 120, 130 (2005). To determine whether access restrictions are reasonable, this court has stated that it balances the public's right

of access against the competing constitutional interests in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access. *Id.* at 125. No competing constitutional provisions are in issue in this matter.

The constitutionality of a statute is a question of law, which is reviewed *de novo*. *New Hampshire Health Care Assoc. v. Governor*, 161 N.H. 378 (2011). A legislative act should be presumed to be constitutional and will not be declared invalid except upon inescapable grounds. This means that the court we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the Constitution. It also means that when doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality. Finally, the party challenging a statute's constitutionality bears the burden of proof. *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669 (2016).

The 1976 amendment to N.H. Const., pt. I, art. 8 added the last two sentences to that article. As observed by this court in *Hughes v. Speaker of the N.H. House*, 152 N.H. 276, 286 (2005):

> The journal of the 1974 Constitutional Convention reveals that the framers of the 1976 amendment did not intend to make Part I, Article 8 coextensive with RSA chapter 91-A. To the contrary, the framers intended that the amendment would be "a living article" that "changed with the times."(citations omitted). As the amendment's sponsor explained: "The Legislature can make the law – the same law that it has now -- and, if the Legislature sees fit that there are some areas that should be restricted or should be opened, the Legislature can do it, but they can't go and completely repeal the right to know." (citations omitted). The amendment was necessary, the sponsor argued, because it prevented the legislature from "completely doing away with the right to know."

The Legislative discussions cited in *Fenniman* also plainly established that the concurrent legislative debate on the passage of RSA 516:36, II, along with the comprehensive amendments

to RSA chapter 91-A, was evidence of a legislative determination that internal police investigatory files are exempt internal personnel practices under RSA 91-A:5, IV. *See, Fenniman,* 136 N.H. at 627. Furthermore, in *Hounsell* this court made clear that there was nothing in the plain language of RSA 91-A:5, IV indicating the legislature only intended to exempt police internal investigations from disclosure. Rather, as argued by the Conway Water Precinct and accepted by this court in *Hounsell*:

> [The] public policy [behind the internal personnel practices exemption] supports the investigation of complaints of misconduct by *all* public employees so that public bodies and agencies can take appropriate remedial action, especially where such a complaint alleges harassment or intimidation of another employee . . . [and] the disclosure of records underlying, or arising from, internal personnel investigations would deter the reporting of misconduct by public employees, or participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation.

In this case, the trial court's conclusion that the redacted portions of the audit report of the Salem Police Department were exempt from disclosure as internal personnel practices is amply supported by this court's prior decisions. *Fenniman,* 136 N.H. 624 (1993). Departure from the principles stated in *Fenniman, Hounsell* and *Clay* would likely deter the reporting of misconduct by public employees and discourage participation in such investigations for fear of public embarrassment, humiliation, or even retaliation.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully joins in the Town of Salem's requests for relief.

Respectfully submitted,
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October 1, 2019

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26. Further, this brief complies with New Hampshire Supreme Court Rule 16(11), as it does not exceed 9,500 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st of October, 2019 a copy of this AMICUS BRIEF OF THE NEW HAMPSHIRE MUNICIPAL ASSOCIATION has been transmitted via the NH Supreme Court's electronic filing system to the following: Barton L. Mayer, Esquire, Gilles R. Bissonnette, Esquire, Henry R. Klementowicz, Esquire, Richard J. Lehmann, Esquire, Gregory V. Sullivan, Esquire, Charles G. Douglass, III, Esquire, Peter J. Perroni, Esquire, Andrea Amodeo-Vickery, Esquire, Natch Greyes, Esquire and Cordell A. Johnston, Esquire.

Date: 10/1/19 /s/ Stephen C. Buckley
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