IN THE SUPREME COURT OF WISCONSIN

Case No. 2020AP1718-OA

JERE FABICK,

Petitioner,

V.

TONY EVERS, IN HIS OFFICIAL CAPACITY
AS THE GOVERNOR OF WISCONSIN,

Respondent.

NON-PARTY BRIEF OF AMICI CURIAE DEREK LINDOO, BRANDON WIDIKER, AND JOHN KRAFT IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae Derek Lindoo, Brandon Widiker, and John Kraft are Wisconsin residents and taxpayers who are required to follow the mandates of both the previous and current Emergency Order #1 requiring all Wisconsinites to wear masks as well as any other orders issued by Respondent Governor Evers based on the emergency powers he is unlawfully exercising through Executive Orders #82 and #90.

Amici are also the plaintiffs in *Lindoo v. Evers*, No. 20-CV-219 (Wis. Cir. Ct. Polk Cty. 2020), a lawsuit pending in Polk County Circuit Court which alleges that Respondent Evers' serial public health emergency declarations violate Wis. Stat. §323.10 and that, if they do not, §323.10 constitutes an unlawful delegation of legislative power to the executive.

SUMMARY OF ARGUMENT

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> – Montesquieu, *The Spirit of the Laws*, Book XI, Ch. VI

For the second time this year, this Court is presented with an attempt by the executive branch to use the occasion of a public health challenge to unilaterally seize and wield virtually unlimited governmental power. *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶1, 391 Wis. 2d 497, 942 N.W.2d 900 ("This case is about the assertion of power by one unelected official, Andrea Palm, and her order to all people within Wisconsin to remain in their homes, not to travel and to close all businesses that she declares are not 'essential' . . . .").

This time around it is the Governor, and he claims the ability to "[i]ssue such orders as he . . . deems necessary for the security of persons and property," Wis. Stat. §323.12(4)(b), *for so long as he deems the circumstances warrant*. In other words, the Governor

effectively claims title to the very legislative power the state constitution vests in the Legislature. *See* Wis. Const. Art. IV, §1.

As Petitioner's brief demonstrates, the statutes on which the Governor purports to rely do not authorize this breathtaking claim of authority. Wisconsin Stat. §§323.10 and 323.12 *do* give the Governor the ability to exercise extraordinary emergency powers when he declares a public health emergency—but those powers come with an expiration date. Specifically, Wis. Stat. §323.10 limits the duration of such an emergency, stating that "[a] state of emergency *shall not exceed 60 days*, unless the state of emergency is extended by joint resolution of the legislature" (emphasis added). Under the statute there is one, *and only one*, way for the state of emergency to exceed 60 days—and that is by joint resolution of the Legislature. No such resolution has been passed.

Amici will not further address the statutory argument, because Wis. Stat. § 323.10 is clear on its face (and fully discussed in Petitioner's brief). What this brief will address is the consequences of an alternate statutory ruling: if this Court agrees

with the Governor's position that Chapter 323 allows the Governor to declare serial states of emergency based upon the same public health problem (thus allowing the Governor to exercise the extraordinary powers set forth in Chapter 323 for as long as the Governor deems appropriate) then the statutory framework violates the state constitution.

This is so because Wisconsin's Constitution clearly vests the legislative power in the Senate and Assembly alone, Wis. Const. Art. IV, § 1, and the Legislature may not simply give that power away. *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931). The constitutional separation of powers is not for the benefit of those who hold those powers; it is the bedrock of liberty. *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶45, 382 Wis.2d 496, 914 N.W.2d 21 (plurality opinion). For that reason, each branch must "jealously guard" and exercise its constitutional responsibilities. *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶31, 376 Wis.2d 147, 897 N.W.2d 384. In particular, this Court "must be

assiduous in patrolling the borders between the branches. This is not just a practical matter of efficient and effective government. [The Court] maintain[s] this separation because it provides structural protection against depredations on our liberties." *Tetra Tech EC, Inc.*, 382 Wis. 2d 496, ¶45 (plurality opinion).

This Court polices delegations of authority from the Legislature to the executive branch in this context via the nondelegation doctrine, which currently provides that delegations of legislative power are permissible so long as "the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971).

It was not always this way. In the past, Wisconsin courts went further and enforced *substantive* restrictions on delegations of power. *See e.g.*, *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) ("[A] law must be complete, in all its terms and provisions, when it leaves the legislative branch of the

government, and nothing must be left to the judgment of the . . . delegate of the legislature . . . ."); *see also State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897) (prior to making rules and regulations "there must first be some substantive provision of law to be administered and carried into effect").

As explained below, this approach better comports with the state constitution's division of power amongst the three branches, an "essential precaution in favor of liberty," The Federalist No. 47, and this Court should thus return to it.

Ultimately, however, if this Court interprets Chapter 323 to permit the Governor to exercise sweeping emergency powers indefinitely, the statutory framework violates either understanding of the nondelegation doctrine. That which is "deem[ed] necessary for the security of persons and property" is simply not a meaningful substantive standard for the Governor to apply—it leaves every major policy decision to the executive

branch. And, without §323.10's 60-day durational limit, adequate procedural safeguards are utterly lacking.[1]

ARGUMENT

I. Separation of powers imposes limits on the delegation of legislative powers.

Constitutional limits on the "delegation" of legislative authority to the executive fall into two broad categories. The first can be seen as a "substantive" limit on the Legislature's ability to transfer authority to the executive. This limitation prevents the Legislature from delegating the "legislative power" in the first place. Instead, when the Legislature wants to authorize the executive branch to take some action, the Legislature is required to provide adequate substantive direction to the executive so that it can be said that the executive is simply carrying out legislative policy. If there is adequate substantive direction, then there has

[1] Because such an expansive delegation of legislative power is plainly unconstitutional, it is unlikely the legislature actually authorized it. *See, e.g.*, *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶21, 376 Wis. 2d 528, 898 N.W.2d 70 (courts "generally avoid[] interpreting statutes in a way that places their constitutionality in question").

not been a "delegation" of legislative power because the Legislature is still making the policy decisions in question.

The second category instead emphasizes the need for procedural safeguards on the exercise of legislative power by the executive. In this view, a greater degree of law- or rulemaking authority may be exercised by the executive branch if it is sufficiently limited by procedural safeguards. This "procedural" limit is less concerned with what the executive is permitted to do, than how they are permitted to do it.

As explained below, "substantive" limits on the delegation of legislative power have not been recently enforced, with most courts, including this Court, instead attempting to limit overbroad delegations by insisting on procedural safeguards. But the U.S. Supreme Court seems increasingly open to enforcing substantive limits, and this Court should as well. The case for substantive limits was most recently made by Justice Neil Gorsuch in his dissent in *Gundy v. United States*, ___ U.S. ___, 139 S. Ct. 2116,

2133–35 (2019) as he explained the reasons for substantive limits as a check on the accumulation of power in one person or body.

Justice Gorsuch explained that the framers insisted on a separation of powers because they "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Id.* at 2134. To check an "excess of law-making," they required, as did the framers of Wisconsin's Constitution, bicameralism—with different houses of the legislative branch elected at different times by different constituencies and for different terms of office—and that legislation receive the chief executive's approval or obtain enough support to override his veto. *Id.*

Second, Justice Gorsuch explained that the constitution's "detailed processes for new laws were also designed to promote deliberation." *Id.* As Hamilton explained in The Federalist No. 73, "the greater the diversity in the situations of those who are to examine" a law, the fewer "missteps which proceed from the contagion of some common passion or interest."

Delegating the legislative power to the executive defeats these checks on power by allowing the power to be exercised by one person without consultation, deliberation or moderation.

Third, Justice Gorsuch observed, "[t]he framers understood, too, that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.* He noted that "[b]y requiring that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear." The people would and could hold the legislature accountable for the laws it passed. *Id.*

Delegation of legislative authority cannot be used to avoid these limitations.

a. The U.S. Supreme Court is poised to reinvigorate a substantive non-delegation doctrine.

Originally, the U.S. Supreme Court imposed substantive limits on delegation. In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), the Court required delegations to contain an

"intelligible principle," stating: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act by Congress] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. The Court upheld a delegation from Congress in that case because the Court found that Congress had described, with clarity, its policy and plan and then authorized a member of the executive branch to carry it out. *Id.* at 405.

That rule requiring Congress to set the policy and requiring intelligible principles to be followed by the agency initially seemed to work. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). But given a perceived need by some to permit the growth of the administrative state, the rule came under increasing criticism and stopped being used to invalidate delegations. *See Mistretta v. United States*, 488 U.S. 361, 371-372 (1989).

But the U.S. Supreme Court has not entirely abandoned the principle. It has required express authorization of the discretion

to decide major policy questions. *Paul v. United States,* 140 S.Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases). And in *Gundy,* the U.S. Supreme Court gave its strongest indication yet that there is a need to reinvigorate the doctrine, with four of the eight justices sitting on the case outright calling for such reevaluation. *See Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring in the judgment); *see also id.* (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). Justice Kavanaugh (who did not participate in *Gundy*) has further stated that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." *Paul,* 140 S.Ct. at 342.

b. This Court, likewise, should again require substantive limits on the delegation of legislative authority.

Like its federal counterpart, this Court has moved away from substantive limits on delegation and has increasingly allowed delegations of legislative power to the executive branch. In the decades after statehood, this Court did not hesitate to strike down

delegations of legislative powers to the executive branch, adopting substantive non-delegation protections. *See, e.g.*, *Dowling*, 65 N.W. at 741 ("[A] law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the . . . delegate of the legislature . . . ."); *see also Burdge*, 70 N.W. at 350 (prior to making rules and regulations "there must first be some substantive provision of law to be administered and carried into effect").

In *State v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928), however, this Court moved to a more lenient standard for evaluation of claimed delegations of legislative authority:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our Constitution in the Legislature, and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . .

Id. at 941.

Although this Court has not explicitly foreclosed substantive limits on the delegation of legislative authority, it now permits the delegation of legislative power to the executive so long as "the purpose of the delegating statute is ascertainable and there are procedural safe-guards to insure that the board or agency acts within that legislative purpose," *Husar*, 49 Wis. 2d at 536. This Court even approves "broad grants of legislative powers" where there are "procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (emphasis added) (citing *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). While "the nature of the delegated power still plays a role in Wisconsin's non-delegation doctrine," "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer v. Doyle*, 2004 WI 52, ¶79 & n.29, 271 Wis. 2d 295, 680 N.W.2d 666; *see also id.* at ¶¶54-55.

But a return to first principles, and reviving substantive limits on delegation of legislative authority, would be more faithful

to the sole vesting of the legislative power in the Legislature, a much sounder protection of individual liberty, and an appropriate restraint on law-making by the executive branch. Both substantive and procedural protections are necessary.

c. If Chapter 323 confers unlimited authority on Governor Evers to take whatever steps he wishes to address COVID-19, it is unconstitutional.

This case illustrates why a substantive non-delegation doctrine—one that requires the Legislature to make and not to delegate major policy determinations—is required.

Wis. Stat. 323.12(4)(b) authorizes Wisconsin's governor, during a state of emergency that he or she declares, to "[i]ssue such orders as he or she deems necessary for the security of persons and property." Governor Evers clearly interprets Wis. Stat. §323.10 as a grant of plenary legislative authority in this area, using the delegation to order all Wisconsinites to wear coverings on their faces until further notice. It is easy to understand why: "such orders as he or she deems necessary for the security of persons and property" is a delegation of almost unlimited scope.

But the state constitution does not allow this kind of delegation, which implicates all of the evils the separation of powers is designed to protect against. "Do whatever you think necessary" is not a direction to carry out legislative policy but an unlimited license to *create* that policy. It is nothing but the announcement of a "vague aspiration" and an assignment to the Governor to do what he thinks best. *Gundy,* 139 S.Ct. at 2133 (Gorsuch, J., dissenting). It neither defines nor limits the measures that can be taken, much less provides guidance as to when more severe measures can be taken. It places no limit on the duration (at least as interpreted) or geographic scope of restrictive measures and provides no guidance for the Governor to make such determinations. In sum—and again, if the Governor's statutory interpretation is correct—the Legislature has given the Governor unlimited, unilateral legislative power; no amount of procedural protection could remedy such an abdication of authority. If this is not a violation of the separation of powers, nothing is.

This Court need not discern an exact standard for non-delegation or even decide whether substantive limitations on the delegation of legislative authority ought to be limited to major policy decisions. Whether all Wisconsinites should be required to wear face coverings is clearly a major policy question. However, such standards are available. In the past, this Court has said that "a law must be complete . . . and nothing must be left to the judgment of the . . . delegate of the legislature . . . ." *Dowling*, 65 N.W. at 741, or that "there must first be some substantive provision of law to be administered and carried into effect." *Burdge*, 70 N.W. at 350.

Federal cases have required that the Legislature supply an "intelligible principle" and describe with "clearness . . . its policy and plan." *J.W. Hampton, Jr., & Co.*, *supra*, 276 U.S. at 405, 409. More recently, Justice Gorsuch suggested asking a series of questions: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to

measure them? And most importantly, did [the Legislature], and not the Executive Branch, make the policy judgments?" *Gundy,* 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

A general grant of the authority to "do what you think is necessary" clearly flunks any such test. It makes the Governor a mini-legislature empowered to make any law to control infectious disease.

Indeed, the Michigan Supreme Court recently came to a similar conclusion in the analogous context of analyzing emergency powers exercised by Michigan's governor to address COVID-19. *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020). There it explained that allowing Michigan's governor "free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time," namely the ability to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," constituted an unlawful

delegation of legislative power to the executive. *Id.* at *18. "The powers conferred by" state law, the court added, "simply cannot be rendered constitutional by the standards 'reasonable' and 'necessary,' either separately or in tandem." *Id.*

All of this is not to say that policies to cope with COVID-19 are unnecessary. It is not even to say that the particular policy adopted here is not justified. The question becomes *who* gets to make such policy decisions, and *how*. If Chapter 323 permits the Governor to indefinitely decide by decree how to address the spread of disease—or any other emergency—that necessarily involves the making of law. Our Constitution says that the Legislature must do that in accordance with Article IV.

II. Even under existing non-delegation case law the statutory provisions relied upon by the Governor are unconstitutional.

Even if this Court declines to fully restore Wisconsin's non-delegation doctrine, existing case law is clear that the powers granted to the Governor under Chapter 323 may be permitted only "where there are procedural and judicial safeguards against

arbitrary, unreasonable, or oppressive conduct of the agency," *Westring*, 71 Wis. 2d at 468 (emphasis added) (citing *Schmidt*, 39 Wis. 2d 46). That is, when Wisconsin courts review the constitutionality of a delegation of legislative power, "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer*, 271 Wis. 2d 295, ¶79 & n.29; see also *id.* at ¶¶54-55.

Here, there *is*, or *could be*, a procedural safeguard in place: namely, the fact that a state of emergency expires after 60 days and may only be extended by an affirmative vote of the Legislature. That is the underlying procedural safeguard which ensures the Governor does not overstep his delegated authority. The Legislature has said that such emergency powers are available for 60 days. During that 60-day window a Governor is free to exercise his emergency powers to deal with the emergency but if he is doing his job properly he should also develop a plan for dealing with the public health problem after the expiration of the 60-day period.

For instance, he could propose specific legislation to the Legislature to deal with the problem on a long-term basis or he could instruct one of his agencies to promulgate lawful administrative rules to deal with the problem. If he thought he needed more time to do these things he could also ask the Legislature to extend the state of emergency past 60 days. Or he could leave it to local governments to address COVID-19 via powers properly delegated to them by the Legislature by statute.

But the thing he cannot do is the one thing he has actually done—unilaterally extend his emergency powers. Without this procedural safeguard, the Governor could simply extend a state of emergency in perpetuity if he wanted, or stack states of emergency on top of each other, taking up broad emergency powers whenever he so wished and for as long as he liked. That is not what our Constitution allows.[2]

[2] By the same logic, the Legislature would similarly be prohibited from extending an emergency indefinitely, which would amount to impermissibly giving its power away. *See In re Constitutionality of Section 251.18, Wis. Statutes*, 236 N.W. at 718.

Although the Legislature is able to *rescind* a unilaterally extended state of emergency, that provision is not an adequate procedural safeguard, for several reasons.

At the outset, whether a safeguard is "adequate" logically depends on the scope of the power delegated—where, as in this case, expansive powers are granted, stronger safeguards are needed to ensure that the power is not exercised in a manner injurious to the public. *Cf. Panzer*, 2004 WI 52, ¶55 ("We normally review both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present."); *id.* at ¶57 ("What may seem an adequate procedural safeguard for a delegation of power to an administrative agency may be wholly inadequate when power is delegated directly to another branch of government. The delegation of power to a sister branch of government must be scrutinized with heightened care to assure that the legislature retains control over the delegated power.").

The ability to rescind a state of emergency does not constitute an adequate procedural safeguard. There will be times when the two houses of the Legislature are controlled by different parties, with the Governor of the same party as one of them. In such a case it might not be possible (due to partisan politics) for the Legislature to rescind such a state of emergency, and then the State of Wisconsin would be subject to unilateral rule by the Governor for whatever period of time the Governor deemed appropriate.

In any event, the failure to rescind an emergency is not the same as approval. All it means is that as little as one house has failed to act. This stands our Constitution on its head. It would transform a system from one in which *laws are made by the Legislature with an executive veto* into one in which *laws are made by the Governor subject to a legislative veto*. If anything like the separation of powers set forth in our Constitution—as opposed to judicial musings about what government "requires"—is to be protected, this is no safeguard at all.

In *Lindoo* (see *supra*) the Governor cited *Panzer* as authority that Wis. Stat. §323.10 is not unconstitutional for lack of procedural safeguards. In *Panzer* the Court was examining the powers of "Wisconsin's governors to negotiate gaming compacts with Indian tribes," *Panzer*, 271 Wis.2d 295, ¶2, and concluded that a statute delegating to the governor the ability to negotiate contained adequate procedural safeguards because the Legislature retained the ability to repeal or amend the delegating statute or to "appeal to public opinion." *Id.* at ¶71.

Panzer is inapposite for multiple reasons. First, Indian gaming negotiations are a less significant sphere of action than a delegation to the Governor to order *anything* thought necessary to safeguard persons or property during a declared "emergency" that can be extended indefinitely by the Governor alone. As noted above, where a larger scope of legislative power is delegated, it follows that more robust procedural safeguards are necessary to guard against "arbitrary, unreasonable, or oppressive conduct."

Second, the Court in *Panzer* found that Governor had *exceeded* his authority in various ways, effectively mitigating the delegation problem by applying substantive limits. *Id.* ¶¶73–82, 103–111.

Third, the safeguards found adequate in *Panzer* make more sense in the context of negotiating a compact, where there is only one thing for the Legislature to review every few years—but the same is not true here. And if this Court were to read *Panzer* as holding that the ability to repeal or amend statutes or appeal to public opinion is *always* a sufficient procedural safeguard, then the procedural-safeguard requirement is a nullity because the Legislature virtually always has that power.

In sum, to the extent that the Court determines that Wis. Stat. §323.10 allows the Governor to either unilaterally extend a state of emergency beyond 60 days, or to declare serial states of emergency for the same underlying public health problem—as Governor Evers has done here—then Wis. Stat. §323.10 is

unconstitutional as an invalid delegation because it lacks adequate procedural safeguards.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask the Court to grant the Petitioner the relief he requests.

Dated: November 3, 2020.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font, and with this Court's Order dated October 28, 2020. The length of this brief is 4,392 words, calculated using Microsoft Word.

Dated: November 3, 2020.

Anthony LoCoco

CERTIFICATION REGARDING AN ELECTRONIC BRIEF

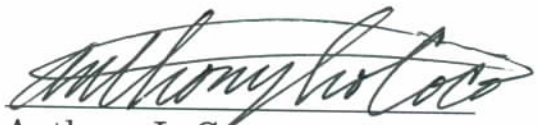
I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

Dated: November 3, 2020.



Anthony LoCoco

CERTIFICATE OF SERVICE

I, Anthony LoCoco, attorney for *Amici Curiae*, hereby certify that on November 3, 2020 I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

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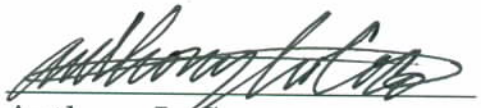

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