No. 19-1035

IN THE SUPREME COURT OF TEXAS

Angela Davis, as President of NEA-Dallas (a Local Affiliate of Texas State Teachers Association), on behalf of All Affected Members and Named Individuals

Petitioners,

v.

Mike Morath, Commissioner of Education of The State of Texas, and Dallas Independent School District, A Public Body Corporate,

Respondents.

On Petition for Review
From the Third Court of Appeals, Austin, Texas;
Court of Appeals No. 03-18-00377-CV

NEA-DALLAS'S PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	This is an appeal of a court of appeals opinion regarding the Commissioner of Education's grant of the school district's Plea to the Jurisdiction on NEA-Dallas teachers' claims for violations of law in their annual appraisal.
Trial Court:	345th Judicial District Court, Travis County, Texas, Cause No. D-1-GN-17-002145, the Honorable Amy Clark Meachum presiding
Trial Court's Disposition:	The trial court affirmed the Commissioner of Education.
Parties in the Court of Appeals:	Appellant: Angela Davis, as President of NEA-Dallas (a Local Affiliate of Texas State Teachers Association), on behalf of All Affected Members and Named Individuals; Appellees: Mike Morath, Commissioner of Education of the State of Texas; and Dallas Independent School District, A Public Body Corporate.
Court of Appeals:	Court of Appeals for the Third District in Austin
Justices Participating in the Court of Appeals Decision:	Justice Gisela D. Triana (author of the opinion) Justice Thomas J. Baker Justice Melissa Goodwin (dissenting author)
Court of Appeals' Disposition:	The judgment of the trial court was affirmed in part in part in favor of Dallas Independent School District and the Commissioner of Education, and was also reversed and remanded to the Commissioner of Education for further proceedings. No motions for rehearing were filed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter under Texas Government Code section 22.001(a) because the question of law presented is important to the jurisprudence of this state. Namely, this case presents an important question about the applicability of ripeness in the school-district grievance process. Ripeness is a fundamental jurisdictional threshold that must apply to all litigants—including in a grievance process. Moreover, this case presents an important question about a school district's ability to reduce teacher overall compensation after the teacher is no longer permitted to unilaterally resign from a contract of employment. This Court should reverse the Commissioner of Education's erroneous dismissal of Petitioners' grievance appeal, and remand for further proceedings on the merits of NEA-Dallas's legal arguments. An appeal was first brought to the court of appeals in accordance with Texas Government Code section 22.001(c).

ISSUES PRESENTED

1. The court of appeals held that the Commissioner of Education erred in dismissing NEA-Dallas's appraisal grievance as untimely. Applying the same analysis, the court of appeals held that the Commissioner of Education did not err in dismissing the grievance as to components of the TEI appraisal system. Did the court of appeals err in not reversing both parts of the Commissioner of Education's decision?

2. Texas law prohibits reduction of a teacher's salary unless notification of that reduction is provided to the teacher no less than 45 days before the start of the school year. Here, the teachers' net pay was decreased during the school year without prior notification. This issue was raised at the local level. Did the court of appeals err in affirming the Commissioner of Education's dismissal of this issue based on the court of appeals' erroneous holding that it was not raised at the local level?

STATEMENT OF FACTS

The court of appeals has laid out the background of this case correctly, with a few key additions noted herein.

I. The DISD TEI Teacher Appraisal System

Until the 2014-2015 school year, Dallas Independent School District ("DISD") used, as most Texas public school districts do, the system of teacher appraisal developed by the Commissioner of Education (the "Commissioner"). During the 2014-2015 school year, the Commissioner's appraisal instrument was known as the Professional Development and Appraisal System ("PDAS"). On May 22, 2014, DISD's Board of Trustees voted to approve and utilize a locally developed appraisal process in its Board Policy (in lieu of the Commissioner's PDAS system). (Joint 1, A.R. 950-959.) The District's modified Board Policy DNA(Local) sets forth the TEI system. (Joint 1, A.R. 955.) The modified DNA(Local) policy provided, *inter alia*, that:

> 1. "Teachers shall be evaluated annually in accordance with the locally developed evaluation system written in compliance with Texas Education Code 21.351, 21.352, and 21.353";
>
> 2. "Teachers will be evaluated on an annual basis";
>
> 3. "The implementation of the compensation section of [DNA(Local)] begins subsequent to completing the 2014-2015 evaluation cycle."

(Joint 1, A.R. 950-959.) The DISD Board of Trustees did not approve the TEI

Teacher Guidebook—which sets forth any "components" of the TEI giving rise to this appeal—but rather the Guidebook is an internal draft manual updated periodically. (See Joint 1, A.R. 949.)

On or about September 18, 2015, DISD teachers received their very first "Scorecards," appraising each teacher's 2014-15 (the prior school year) performance. (Joint 1, A.R. 887, 897, 2805-2897, 3722-3724). The Scorecard was the first and only document informing teachers of each component of their annual appraisal, including specific results related to the TEI evaluation components:

- Teacher Performance
- Student Experience
- Student Achievement

Receipt of the Scorecards triggered NEA-Dallas's timeline to file a grievance, which NEA-Dallas did in a timely manner. NEA-Dallas's grievance raised concerns about those Scorecards—including the appraised components. (Joint 1, A.R. 887, 897.) NEA-Dallas did not grieve the Board Policy itself, and the Board Policy is not the subject of this appeal. The subject of this appeal is the Scorecard appraisals and the components rated therein.

II. Compensation for Many DISD Teachers Was Reduced Under TEI

In the fall of 2015, DISD teachers learned the amount of their salary for the 2015-16 school year. DISD gave no cost-of-living adjustments for teachers for the 2015-16 school year. For the 2015-16 school year DISD's benefit and compensation

plan was changed such that the employee's share of the cost of health insurance costs increased. (Joint 1, A.R. 820.) As a result, for all those teachers who did not receive a "bonus," the teachers' overall compensation was reduced. (Joint 1, A.R. 820; Joint 1, A.R. 3788.) This issue was raised at the local level. (Joint 1, A.R. 820.)

III. DISD's Grievance Process

According to the DISD grievance process in effect at the time of this grievance, Board Policy DGBA(Local) provided that "[a] grievance form must be filed no later than ten days from the date the employee first knew or, with reasonable diligence, should have known of the decision or action giving rise to the grievance or complaint." (Joint 1, A.R. 2800.) The "decision or action" in this appeal was receipt of the Scorecards, including the TEI components which affected teachers for the first time. In its timely filed grievance, NEA-Dallas made numerous arguments that each challenged individual Scorecard was void and invalid, and premised upon an unlawful appraisal system. All of those complaints are included in the Local Record, and were presented to DISD at the local level. (Joint 1, A.R. 3777-85.) Each of the NEA-Dallas class members was aggrieved by his or her unlawful Scorecard, and components of TEI. DISD's actions violated the school laws of this state and the Commissioner's rules regarding educator appraisal.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Commissioner erred in determining that NEA-Dallas failed to exhaust administrative remedies, depriving him of jurisdiction. The court of appeals then considered whether substantial evidence exists to support the Commissioner's decision to dismiss the grievance appeal as untimely, or on some other reasonable basis. The court of appeals held that the Commissioner erred in finding that the appraisal grievance was untimely, but did not err in finding that the grievance regarding the components of the TEI was untimely. However, it is axiomatic that a teacher appraisal grievance is not ripe until the teacher receives that appraisal. This grievance was filed after the teachers received their very first TEI appraisals. The arguments made by NEA-Dallas regarding the TEI components were timely filed, part and parcel of and inextricable from, the arguments regarding their very first TEI appraisals.

The court of appeals also held that the teachers' pay decrease after the school year had begun was not raised at the local level, however the issue *was* raised at the local level and should be reviewed in this appeal. This Court should reverse these errors so that the Commissioner must rule on all of NEA-Dallas's arguments on the merits.

ARGUMENT

I. The Commissioner has jurisdiction over the entire grievance appeal.

The Commissioner's jurisdiction in this case is set forth in Texas Education Code § 7.057: "A person may appeal in writing to the commissioner if the person is aggrieved by actions or decisions of any school district board of trustees that violate the school laws of this state." Here, NEA-Dallas has alleged and pled violations of law involving the Commissioner's jurisdiction. (Joint 1, A.R. 314-15 ¶ 14-15, A.R. 317 ¶¶ 25-28.) The court of appeals applied its prior precedent, correctly holding that the Commissioner erred in determining that NEA-Dallas failed to exhaust administrative remedies, depriving him of jurisdiction. *See Tex. Comm'r of Educ. v. Solis*, 561 S.W.3d 591 (Tex. App.—Austin 2018, pet. denied).

The court of appeals then considered whether substantial evidence exists to support the Commissioner's decision to dismiss the grievance appeal as untimely or on some other reasonable basis—holding that the Commissioner erred in finding that the appraisal grievance was untimely, but did not err in finding that the grievance regarding the components of the TEI was untimely. However, NEA-Dallas filed one grievance, raising violations of law involving both the appraisals *and* the TEI components, and was filed timely in accordance with DISD's board policy—within ten days of the teachers' receipt of their Scorecard appraisals. The 2015 Scorecards giving rise to this grievance appeal were the *very first* appraisals incorporating the TEI

components, and receipt of those Scorecards triggered NEA-Dallas's *very first* opportunity to grieve the unlawful components. The court of appeals erred in holding that part of NEA-Dallas's grievance was untimely.

II. No grievance was ripe before receipt of the Scorecards.

No claims made in NEA-Dallas's grievance were ripe until the Scorecards were issued in the fall of 2015. "Ripeness is an element of subject matter jurisdiction." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). As such, the question of ripeness is subject to *de novo* review by this Court. *Id.* "The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes." *Id.*

Until the NEA-Dallas teachers received their Scorecards, any dispute regarding the components of TEI, or the manner in which TEI appraisals were conducted, would have been premature. Had a grievance regarding the Scorecards been filed before those Scorecards were received, DISD would have dismissed those grievances as not ripe. *E.g.*, *Holman v. Arp Indep. Sch. Dist.*, Docket No. 093-R8-805 (Comm'r Educ. 2007). (*See also* Decision at 23 (citing cases).) The violations of law alleged in NEA-Dallas's grievance all arose from TEI *as it was implemented in the Scorecards*.[1]

[1] In *McAllen Federation of Teachers, Local 6329 v. McAllen Independent School District*, a group of teachers filed a grievance on September 11, 2009 asserting that the school district was not providing compensation as required under the Texas Education Code. Docket No. 042-R10-

There is no evidence that the teachers received the Guidebook materials relied upon by DISD as notice of the violations of law in the NEA-Dallas teachers' Scorecards. Even if such evidence existed, the Guidebook states that it is "purely intended to facilitate discussion and obtain feedback." (Joint 1, A.R. 979.) The District would not have heard a grievance related to the Guidebook—a document it only issued for purposes of discussion. The grievance was not ripe until, on September 18, 2015, the class members each received their Scorecards, which were apparently issued pursuant to DISD's discussion-and-feedback resource, the Guidebook.

However, even if the Court were to consider the draft Guidebook documentation provided by DISD, none of the violations of law would have actually come to pass for teachers prior to their receipt of the Scorecards. It is fundamental that a case "is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Save our Springs Alliance v. City of Austin*, 149 S.W. 3d 674, 683 (Tex. App.—Austin 2004, no pet.). *See also Tex. v. U.S.*, 523 U.S. 296 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events

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0310 (Comm'r Educ. 2013). The school district argued that the teachers should have known the terms of their compensation after a board vote on August 24, 2009—making the grievance untimely. The Commissioner held that the vote on August 24 was not specific enough to trigger the requirement to file a grievance—and only when the actual salary schedule was adopted was the grievance timeline triggered. Similarly, here, the vote adopting the TEI Board Policy was not specific enough to give NEA-Dallas knowledge that the Scorecards would be calculated and issued in violation of state law. Indeed, the Board Policy cited by DISD states that the TEI appraisal process *would indeed comport with state law*. Finally, the policy may have authorized the TEI concept, but TEI process and procedures were not yet effectuated, and certainly had not been implemented.

that may not occur as anticipated, or indeed may not occur at all.'"); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). The Austin Court of Appeals explains:

> For a controversy to be justiciable, there must be a real controversy between the parties that will be actually resolved by the judicial relief sought. . . . The doctrine has a pragmatic, prudential aspect that is directed toward [conserving] judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes. Moreover, avoiding premature litigation prevents courts from entangling themselves in abstract disagreements, while allowing other branches of government and governmental agencies to perform their functions unimpeded.

Id. (internal quotes omitted). *See also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849 (Tex. 2000) (affirming trial court's dismissal of claim where no concrete injury had occurred to plaintiff students alleging disparate impact of school district testing); *Patterson*, 971 S.W.2d at 443 ("A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass.").

The Commissioner likewise applies the ripeness doctrine in school cases. *E.g.*, *Holman v. Arp Indep. Sch. Dist.*, Docket No. 093-R8-805 (Comm'r Educ. 2007). In *Holman*, a parent filed a grievance related to a board policy requiring uniforms to be worn at its middle school. *Id.* The parent grieved the uniform policy because her children would go to the middle school the next year, and she had a religious objection to the uniforms. The Commissioner dismissed the appeal, stating that notwithstanding

the fact that the parent would be affected by the policy in the next school year—the claim was not yet "ripe."

The court of appeals in this case correctly held that NEA-Dallas was not required to file a grievance over the Scorecard appraisals until *they received the appraisals*. The teacher appraisal grievance was not ripe until the NEA-Dallas teachers received their Scorecard appraisals. Only when they received their Scorecards, did the alleged violations of law related to the TEI components actually come to pass. NEA-Dallas could not have known of these violations until they received the Scorecards.

The Commissioner held that the claims should have been brought when DISD adopted its teacher-appraisal Board Policy, when the teachers were trained on TEI, or at the time the Guidebook was published. (Joint 1, A.R. 9.) The court of appeals held that the Commissioner could have reasonably concluded that as it relates to the TEI components. (Decision at 32.) However, there is no evidence in the record that a) the Board Policy itself gave any notice of the violations of law reflected in the Scorecards; b) any teacher training would have revealed on the violations of law reflected in the Scorecards; or c) the teachers had notice of the Guidebook—to the extent it gave notice of any violations of law reflected in the Scorecards. And even if they had, the violations of law alleged in NEA-Dallas's grievance did not arise until the appraisal process was complete and the teachers received their Scorecards.

The court of appeals' reasoning in this case—that an unlawful Board Policy would be permissible unless a teacher filed a grievance complaining about the policy within ten days of the school board's approval of the policy, regardless of whether any harm had occurred—is contrary to fundamental ripeness principles. (*See also* Joint 1, A.R. 8-9 ("Since the adoption of a policy is a decision or action, under [DISD's] grievance policy, if teachers are making a facial challenge to a policy they would be required to file grievances within ten business days of when they knew of or with reasonable diligence should have known of the policy that was adopted in order to exhaust administrative remedies.").) This logic—imposing a ten-day statute of limitations on school district employees for violations of law by their employers in the adoption of a policy—is not only inequitable, it is erroneous and compels reversal by this Court. At the time the Board Policy was adopted by the Board, no teachers had been appraised or even observed under TEI. NEA-Dallas grieved the Scorecard appraisals in a timely manner.

III. Certain TEI "components" constitute significant violations of law.

The Commissioner has developed a teacher appraisal system that school districts may use. *See Hous. Fed'n of Teachers v. Hous. Indep. Sch. Dist.*, Docket No. 007-R10-09-2012 (Comm'r Educ. 2014) (citing Tex. Educ. Code § 21.351). Alternatively, a school district may choose not to use the Commissioner's appraisal system, and create its own locally adopted appraisal system. *See id.* "[S]tatute and

rule require that a school district's alternative appraisal system must be developed according to a particular process and must contain certain elements." *Id.*

Prior to July 1, 2016, the Commissioner's Rules for teacher appraisal provided certain basic safeguards for teachers appraised either using the Commissioner's recommended appraisal system (PDAS), or a locally adopted system. A number of these safeguards for teachers during the appraisal process which were entirely circumvented by TEI. (Appellants' Br. 16-19.) For example, teachers are not permitted to request a second appraisal under TEI. Moreover, the use of students' standardized tests scores as an evaluation component and factor in determining teachers' compensation in the absence of transparent calculation methods violates the District's duty to appraise teachers "based on observable, job-related behavior." Tex. Educ. Code § 21.351(a). These and other unlawful components of the TEI warrant review on the merits by the Commissioner. The court of appeals erred in affirming the Commissioner's rejection of NEA-Dallas's legal arguments regarding the TEI components.

IV. NEA-Dallas raised the issue of compensation at the local level.

DISD violated a basic teacher protection in reducing teachers' overall compensation after the teachers were no longer able to unilaterally resign from their contracts of employment. By way of background, all Texas public school teachers are employed under a probationary, term, or continuing contract. Tex. Educ. Code

§ 21.002(a). Notwithstanding these contracts, the teacher is permitted to unilaterally end the employment relationship by giving written notice of resignation no later than 45 days before the first day of instruction. Tex. Educ. Code §§ 21.105, 21.160, 21.210. This affords the teacher an opportunity to determine whether to continue employment with a district, by establishing a deadline for the teacher to resign. After the 45th day before the first day of instruction, a teacher can not resign unless the school district accepts such resignation. The Commissioner has held that these provisions are "remedial" in nature—to be given "the most comprehensive and liberal construction possible." *See, e.g.*, *United Educators Ass'n v. Arlington Indep. Sch. Dist.*, No. 012-R10-1102 (Comm'r Educ. 2004).

The Commissioner has further held that a certified term contract teacher's salary can be lawfully reduced, *if* the school district gives the teacher notice of that reduction before the deadline by which the teacher can unilaterally resign. *See, e.g.*, *Perales v. Robstown Indep. Sch. Dist.*, Docket No. 052-R10-104 (Comm'r Educ. 2006). However, it is well established that a school district cannot lawfully reduce the teacher's compensation after the last date the teacher can exercise his right to unilaterally resign from his contract (45 days before the first instructional day of the upcoming school year). *See, e.g.*, *Bowman v. Lumberton Indep. Sch. Dist.*, 801 S.W.2d 883 (Tex. 1990); *Ector County TSTA/NEA v. Alaniz*, 2002 WL 31386061 (Tex. App.—Austin, October 24, 2002, pet. denied); *Weslaco Fed'n of Teachers v.*

Tex. Educ. Agency, 27 S.W.3d 258 (Tex. App.—Austin 2000, no pet.); *Sierra v. Lake Worth Indep. Sch. Dist.*, 2000 WL 1587652 (Tex. App.—Austin, October 26, 2000, no pet.); *Bledsoe v. Huntington Indep. Sch. Dist.*, Docket No. 033-R10-1103 (Comm'r Educ. 2014).

In *United Educators Association v. Arlington Independent School District*, the Commissioner held that compensation is a "very significant consideration when one is determining whether one wishes to continue an employment relationship." In that case, the Commissioner examined the school district's local supplement to the Texas Education Code's minimum salary schedule, stating:

> Not knowing whether one would continue to receive at least the same local supplement places teachers in the position of not having sufficient information to determine whether they wish to maintain a contractual relationship with a school district for another year.

In *San Elizario Educators Assoc. v. San Elizario Independent School District*, Docket No. 222-R3-392 (Comm'r Educ. 1994) and *Guier v. Dallas Independent School District*, Docket No. 213-R3-589 (Comm'r Educ. 1991), the Commissioner examined overall compensation and the opportunity for the teacher to resign without penalty. *Guier* would prohibit pay cuts, maintaining the "same level of compensation" after the unilateral resignation period has passed. *San Elizario* would require that the previous salary schedule (and steps) be continued. While a raise is not guaranteed (unless required by the state minimum salary schedule), "If a school

district does not adopt a new salary schedule until teachers can no longer unilaterally resign from their contracts, it must at a minimum *not reduce* the amount of each teacher's *compensation*." *United Educators Ass'n v. Arlington Indep. Sch. Dist.*, No. 012-R10-1102 (Comm'r Educ. 2004) (emphasis added).

Here, none of NEA-Dallas's members received any warning whatsoever that their total compensation for the 2015-16 school year might be reduced from the prior school year. But in fact what occurred is that the cost of the teachers' insurance benefits increased from the 2014-15 school year to the 2015-16 school year. This issue was raised at the local level. (Joint 1, A.R. 820.) When that increased cost of insurance benefits was deducted from the teachers' salaries—which had not changed from the previous school year—the result was a reduction in overall compensation. While the Commissioner concluded that there was no record that any of NEA-Dallas's class members "received a decrease in total compensation," NEA-Dallas's members have provided pay stub information plainly reflecting the reduction in compensation. (Joint 1, A.R. 6.) Because the teachers were unaware of the reduction in their overall compensation until the beginning of the 2015-16 school year—well after the time for unilateral resignation had passed—such reductions were unlawful.

As a result of the aforementioned actions, DISD has breached the class members' contracts of employment, which has caused and will continue to cause each member of the NEA-Dallas class monetary harm. Neither party introduced the

grievants' contracts into evidence during the grievance proceeding. However, it cannot be disputed that most of the class members worked for DISD in the 2015-2016 school year. This was undisputed throughout the grievance process. The NEA-Dallas members filed the grievance as a current contract teachers at various campuses at DISD. (Joint 1, A.R. 1684-87.)

Accordingly, notwithstanding the fact that no party introduced the contracts into the record at the local level, it is well-established in Texas law that the regulations and operational policies adopted by a school board form part of the contract and the employee's employment is subject thereto. *See Myrtle Springs Indep. Sch. Dist. v. Hogan,* 705 S.W.2d 707 (Tex. Civ. App.-Texarkana 1985, writ ref'd n.r.e.); *Bowen v. Calallen Indep. Sch. Dist.,* 603 S.W. 2d 229 (Tex. Civ. App. – Corpus Christi 1980, writ ref'd n.r.e.); *Arlington Indep. Sch. Dist. v. Weekly*, 313 S.W.2d 929 (Tex. Civ. App. –Fort Worth 1958, writ ref'd n.r.e.). This is consistent with the general principle that "laws which subsist at the time and place of the making of the contract…enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *See Cent. Educ. Agency v. George West Indep. Sch. Dist.*, 783 S.W. 2d 200 (Tex. 1989). Accordingly, Respondent's violations of Board policy and §7.057 of the Education Code as described herein, and DISD's failure to give notice of the reduction of the grievants' compensation by

the deadline established in §21.210 of the Education Code, violated each of NEA-Dallas's class members' employment contracts with DISD.

CONCLUSION AND PRAYER

Petitioners pray this Court grant their Petition, reverse the complained-of parts of the court of appeals opinion, and allow Petitioners to proceed to the merits on this entire matter to the Commissioner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitations of Texas Rules of Appellate Procedure 9.4(i)(2)(D) because it contains 3,676 words, excluding the parts of the brief exempted by Texas Rules of Appellate Procedure 9.4(i)(1).

2. This brief complies with the type face requirements of Texas Rules of Procedure 9.4(e) because this brief has been prepared using Microsoft Word in fourteen (14) point Times New Roman style font.

Signed this 16th day of January 2020.

*/s/Giana Ortiz*_____
Giana Ortiz

CERTIFICATE OF SERVICE

In accordance with Tex. R. App. P. 9.5, the undersigned certifies that a copy of this Brief was served on the following counsel of record on the 16th day of January 20202, through the electronic filing manager, as well as by email from my office to:

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Signed this 16th day of January 2020.

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