

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 81513

SONJIA MACK,
Appellant,

v.

BRIAN WILLIAMS; JAMES DZURENDA;
ARTHUR EMLING, JR.; and MYRA LAURIAN,
Respondents.

FILED

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On Response to Order Accepting Certified Question from
the U.S. District Court for the District of Nevada
Case No. 2:18-cv-00799-APG-VCF
Honorable Judge Andrew P. Gordon, U.S. District Court Judge

**BRIEF OF AMICI STEPHEN LARA AND
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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that judges and justices of this Court may evaluate possible disqualification or recusal.

Stephen Lara is an individual. The Institute for Justice is a non-profit public interest law firm. The law firm whose partners or associates have or are expected to appear for Amici is PISANELLI BICE PLLC.

DATED this 1st day of November 2021.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Stephen Lara is currently suing the Nevada Highway Patrol based on the unlawful seizure of his life savings. *See Lara v. State*, No. CV21- 01595 (Second Judicial Dist., Washoe Cty., filed Aug. 31, 2021). His lawsuit alleges that NHP violated his rights under Article I, Sections 8 and 18 of the Nevada Constitution and seeks declaratory and injunctive relief, monetary damages, and nominal damages. The defendants in *Lara* recently moved to stay proceedings pending the outcome of this case. Because Lara's case could be impacted by this Court's decision—particularly his claim for damages—he wishes to be heard on the certified questions.

Lara is represented *pro bono* by the Institute for Justice (IJ) and its associated attorneys in Nevada. IJ is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. Government accountability is a cornerstone of any free society. Therefore, a key part of IJ's mission is litigating cases involving private enforcement of constitutional rights at the state, local, and national level.¹ Several of IJ's recent cases have

¹ *See, e.g., Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Excessive Fines Clause applies to state and local forfeitures); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (striking down economic regulations based on the substantive-due-process protections of the Texas Constitution and rejecting a series of justiciability and immunity arguments from the government).

addressed qualified immunity.² And it regularly files amicus briefs on issues germane to the certified questions.³

Amici have separately moved the Court for leave to file this brief and do so out of time under Rules 29(a) and (f) of the Rules of Appellate Procedure.

² See, e.g., *Brownback v. King*, 141 S. Ct. 740 (2021); *Serrano v. Customs & Border Patrol*, 975 F.3d 488 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2511 (2021); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020); *Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

³ See, e.g., *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

INTRODUCTION

This is a case about first principles. The framers and ratifiers of the Nevada Constitution emphasized the primacy of individual rights and made them enforceable against the government. The Nevada Legislature has repeatedly expanded the capacity of ordinary people to sue the government. And, for more than 150 years, this Court has recognized that the state is susceptible to constitutional challenges in the courts of general jurisdiction. With these bedrock principles in focus, only a lawyer could argue that private citizens are powerless to enforce the Nevada Constitution or that state officials are categorically immune from its commands.

Below, amici explain how the text of the Nevada Constitution, state statutes, and case law all align to make answering the certified questions straightforward. Yes, there is a private right of action under Article 1, Sections 8 and 18. In such a case, state officials have only those immunities adopted by the Legislature or recognized at common law. And courts may order declaratory and injunctive relief, compensatory damages, or nominal damages based on the text of the Constitution, state law, and common law.

A right without a remedy is no right at all. Amici aim to show the Court that this first principle of governmental accountability applies with full force in Nevada.

ARGUMENT

I. Ordinary People Can Sue To Enforce Their Rights Under The Nevada Constitution.

A core purpose of state constitutions is to protect people's rights against the government. The Nevada Constitution is no exception. Like virtually every other state, Nevada's founding charter reflects the primacy of individual rights by listing them first, *see* Nev. Const. art. 1, describing them at length, *see id.* §§ 1–24, and emphasizing their importance in unmistakable terms, *see id.* § 1 ("All men are by Nature free and equal and have certain inalienable rights" including "defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness."); *id.* § 2 ("[a]ll political power is inherent in the people" and "[g]overnment is instituted for the protection, security and benefit of the people"); *id.* § 20 ("This enumeration of rights shall not be construed to impair or deny others retained by the people."). The framers and ratifiers of the Nevada Constitution would not have bothered to include so much detail about individual rights if they meant for them to be unenforceable.

Amicus Stephen Lara illustrates why the Nevada Constitution matters. In February 2021, Lara—a recently retired Marine sergeant—was traveling to Portola, California to visit his teenage daughters and shop for a home nearby. He was heading westbound on I-80 outside Reno, driving below the

speed limit, when an NHP trooper pulled him over for an "unsafe lane change." Other troopers began arriving. Over the course of his 90-minute detention, Lara truthfully answered all the officers' questions. He admitted that he had a large amount of cash, told them what the money was for, and even showed them receipts documenting where it came from.

None of that mattered. An NHP sergeant ordered the seizure of all of Lara's money—\$86,900—for the stated purpose of turning the money over to the U.S. Drug Enforcement Administration for federal adoption.⁴ There was nothing illegal in Lara's car. He was not arrested. He has not been charged with any crime. Yet, to get his money back, Lara had to sue the United States in federal court. *See Lara v. U.S. Drug Enft Admin.*, No. 3:21-cv-00394-MMD-wgc (D. Nev. filed Aug. 31, 2021). After his story made national headlines, DEA pledged to return his money. *See Matt Zapotosky, A former Marine was pulled over following a truck too closely.*

⁴ Adoptions rely on the U.S. Department of Justice's Equitable Sharing Program, under which state and local law enforcement seize property under state law and federal agencies pursue civil forfeiture under federal law. The federal agency pays 80% of the proceeds back to the seizing agency and keeps 20% for itself. In Nevada, law enforcement agencies use adoption to avoid this state's comparatively robust protections for property owners in forfeiture proceedings and limits placed on how much forfeiture money per year an agency can keep. *See* NRS 179.1173(4) (requiring clear and convincing evidence connecting property to a forfeitable crime); NRS 179.1187(2)(d) (requiring agencies with more than \$100,000 in forfeiture funds to pay 70% of the excess to the State Education Fund).

Police took nearly \$87,00 of his cash. Washington Post, Sept. 1, 2021, <https://wapo.st/3Eo2Oi5>. Two weeks ago, DEA finally returned the money and, this week, Lara will dismiss his federal action without prejudice.

Now Lara must turn to Nevada's courts to seek damages and prevent the same thing from happening in the future. As demonstrated below, unlike federal courts, Nevada's courts are courts of general jurisdiction. Articles 4 and 6 of the Nevada Constitution make the courts guardians of Article 1. The Nevada Declaration of Rights presumes a government structure in which citizens can petition the judiciary to enforce their rights against the executive and legislative branches. The Nevada Legislature has gone several steps beyond this basic constitutional command, specifically authorizing suits for money damages against state officials who violate a person's constitutional rights, as well as suits for declaratory and injunctive relief.

Together, the text of the Nevada Constitution and state statutes answer the first two certified questions—whether there is a private right of action under Article 1, Sections 8 and 18—with a resounding "yes."

a. The Constitution Permits Suits Against The State.

Without a mechanism for enforcement, no constitution is worth the paper it is written on.

The framers and ratifiers of the Nevada Constitution understood this, and so they provided for judicial enforcement of constitutional rights. Under Article 6, Section 1, "[t]he judicial power of this State is vested in a court system" This "judicial power" includes "suit[s] against [the] state," under Article 4, Section 22 ("Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution."). The forum for such a suit is "[t]he District Courts in the several Judicial Districts of this State" which "have original jurisdiction in *all cases* excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6 § 6 (emphasis added). Constitutional analysis begins with constitutional text. And the Nevada Constitution makes the state subject to suit and gives the Legislature the power to establish procedural devices to accomplish that constitutional design.

The constitutional text should also be understood against its common law backdrop. High courts across the country have recognized that their states' governing charters, like Nevada's, permit equitable enforcement of constitutional rights against state and local governments. *See, e.g., Ladd v. Real Estate Comm'n.*, 230 A.3d 1096, 1108 (Pa. 2020) (holding that "the General Assembly's police powers are also limited and subject to judicial review"); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76–

77 (Tex. 2015) (rejecting the argument that sovereign immunity bars claims for alleged constitutional violations); *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (collecting cases). These cases (and many others) make clear that the constitution is the state's highest law and that everyone—not just government officials—has the right to challenge state action based on its guarantees.

In more than 150 years of statehood, Nevada's courts have repeatedly recognized this so-called private right of action. *See, e.g., S. Pac. Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187, 189–90 (1964) (holding that state due process claims could be brought against the Public Service Commission); *Saunders v. State*, 70 Nev. 480, 481–82, 273 P.2d 970, 970–71 (1954) (recognizing claim for damages as compensation under the Nevada Constitution's Takings Clause); *Marymont v. Nev. State Banking Bd.*, 33 Nev. 333, 111 P. 295, 303 (1910) (holding a banking act unconstitutional under Article 1, §§ 1, 8, & 20); *State v. Preble*, 18 Nev. 251, 2 P. 754, 754 (1884) (holding an official's acts did not accord with the constitutional right granted by Article 1, § 16 [repealed in 1924] and issuing a writ of mandamus allowing a foreigner to purchase land). In recent years, too, this Court has repeatedly assumed that a private right of action exists, including for money damages. *See, e.g., City of Fernley v. State, Dep't of Tax*, 132 Nev. 32, 366

P.3d 699 (2016) (assuming a constitutional damages claim is appropriate when deciding which statute of limitations applies); *Ransdell v. Clark Cty.*, 124 Nev. 847, 192 P.3d 756 (2008) (resolving constitutional damages claim on the merits without suggesting any problem with bringing the claim directly under the Nevada Constitution). None of these cases would make sense if courts did not have the power to adjudicate disputes over a person's constitutional rights. *See City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362, 302 P.3d 1118, 1128 (2013) ("This court has long recognized that the judiciary as a coequal branch of government has the inherent power to protect itself and to administer its affairs. Inherent judicial power stems from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence." (internal quotation marks and citations omitted)).

To summarize, under Article 6, the courts are charged with exercising the "judicial power" against the executive and legislative powers. The text of the constitution gives courts the sole responsibility of adjudicating disputes between ordinary people and the state government. If any doubt remained, Article 4 authorizes "suit[s] against the State as to all liabilities" provided some mechanism is "made by general law." Since statehood, this Court has understood this constitutional structure as providing a private right of action

against the government, including an action for damages. And, as demonstrated by the next section, the Nevada Legislature has adopted several mechanisms "by general law" to allow, if not encourage, such "suit[s] against the State."

b. The Legislature Has Authorized Suits Against The State.

In addition to the private right of action built into the Constitution, the Nevada Legislature has authorized suits against the state.

Like every other state, Nevada has adopted the Uniform Declaratory Judgements Act. *See* NRS Chapter 30. The UDJA provides a cause of action for:

[A]ny person . . . whose rights, status or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.

NRS 30.040(1).

This broad grant of capacity to sue specifically includes constitutional claims. *See* NRS 30.130 (providing "if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard"). Amicus Stephen Lara is currently relying on this provision to seek prospective declaratory and

injunctive relief in his suit against NHP. *See* Compl. ¶¶ 16–17, *Lara v. State*, No. CV21-01595 (Second Judicial Dist., Washoe Cty., filed Aug. 31, 2021).

The injunction statute, NRS Chapter 33, likewise gives courts broad discretion to order an injunction when (1) a person's rights depend on "restraining the commission . . . of the act complained of," (2) there would be "great or irreparable injury to the plaintiff," and (3) "the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights." NRS 33.010. Despite adopting many subsections designed to cabin and further define courts' injunctive powers, *see* NRS Chapter 33, the Legislature has not in any way limited the power of courts to issue injunctions against the state or its political subdivisions.

Even if the UDJA and injunction statutes did not exist, however, Nevadans would have a common-law equitable cause of action to enforce their constitutional rights. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."); *see also City of Sparks*, 129 Nev. at 363, 302 P.3d at 1128 ("Thus, the courts, whose judicial functions involve hearing and resolving legal controversies, possess the authority to take any actions that are inherent or

incidental to that function."). Even under federal law, where qualified immunity frequently bars claims for compensatory damages, it is blackletter law that plaintiffs can always seek an equitable remedy to enjoin unconstitutional executive action. *See Free Enter. Fund*, 561 U.S. at 491 n.2.

Beyond claims for injunctive and declaratory relief, the Legislature has specifically authorized private causes of action against the state by waiving its sovereign immunity. *See* NRS 41.031 (providing that the state "consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations"). It has even expressly provided for jury-determined damages for successful mandamus actions against government officials, *see* NRS 34.270, which this Court has applied in cases where the mandamus action was based on a constitutional violation, *see Gulbranson v. City of Sparks*, 89 Nev. 93, 95, 506 P.2d 1264, 1265 (1973).

There are, of course, limitations on the state's waiver of immunity. For example, no award may exceed \$150,000, NRS 41.035(1), and officials can defeat a lawsuit by demonstrating their actions were authorized by law or effectively out of their control, NRS 41.032(1). But these limitations only underline the general rule that ordinary people can sue the state government for violating their state constitutional rights.

II. The State, Its Subdivisions, And Its Agents Are Not Immune From Suits To Enforce The Nevada Constitution.

The Legislature has plainly and emphatically decided that there is no immunity from suit for claims against the government arising from the Constitution. Accordingly, this Court need not consider whether it would be constitutional for the state to immunize itself from suit because the Legislature has waived any immunity that it could assert. The state has expressly "waive[d] its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1). That waiver extends to "all political subdivisions of the State." *Id.* And by defining circumstances under which "an officer or employee of the State" may not be sued, the statute recognizes that as a general matter officers and employees may indeed be sued. *See* NRS 41.032.⁵

Following the statutory text, this Court has broadly construed Nevada's waiver of immunity. *See Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007) ("Nevada's qualified waiver of sovereign immunity is

⁵ The Legislature's enactment of a broad waiver of immunity largely codified the direction of the state's common law, in which the "trend was toward the judicial abolition of [the doctrine of sovereign immunity]." *State v. Silva*, 86 Nev. 911, 914, 478 P.2d 591, 593 (1970).

to be broadly construed."). For example, this Court recently held that Nevada's waiver of immunity included consent to damages liability under the federal Fair Labor Standards Act. *See Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 476 (2021). Rejecting the government's efforts to read the waiver of sovereign immunity narrowly, this Court held that Nevada's waiver applies beyond just for tort actions. *See id.* ("To hold that the State is immune from any claim that does not sound in tort would be a dramatic and atextual curtailment of Nevada's waiver of sovereign immunity."). Instead, Nevada law recognizes that "the State should generally take responsibility when it commits wrongs." *Id.* If that principle reaches wage-and-hour rules, it surely extends to enforcing Article 1's Declaration of Rights.

It follows that Nevada's waiver of immunity is broad and subject only to specifically defined exceptions. *See* NRS 41.031(1) (waiving immunity "except as otherwise provided" in particularly enumerated statutory sections). Those exceptions are exceptionally precisely defined. *See, e.g.*, NRS 41.0331 (immunity for constructing fence at abandoned mine); NRS 41.0332 (no action against school districts for negligent acts of volunteer crossing guards); NRS 41.033 (no action may be brought for failing to inspect a building). This finely reticulated statutory framework suggests that additional exceptions to the broad waiver of immunity should not be

casually implied. *See Echeverria*, 495 P.3d at 476 ("If the Legislature meant to pass a law that waived immunity from one category of liabilities only, it could have easily done so expressly.").

Given such clear statements of law and policy, it is hard to see how state courts could import the doctrine of qualified immunity into Nevada law. Qualified immunity is a gloss on a *federal* statute, 42 U.S.C. § 1983, based on a unique set of judge-made policies. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (explaining that the federal doctrine of qualified immunity derives from "principles not at all embodied in the common law"). By contrast, there is no basis in Nevada law for importing an atextual gloss on a federal statute. On the contrary, the Nevada Legislature has rejected official immunity in unambiguous terms.

Assuming a statutory basis for qualified immunity exists in Nevada (and there is none), still, this Court should decline to adopt the doctrine. An atextual gloss of the kind applied to Section 1983 by federal courts is fundamentally unworkable at the state level. Qualified immunity for state officials would run counter to the principles of the Declaration of Rights, the structure of Articles 4 and 6, and policies articulated by the Nevada Legislature. And even if all these legal hurdles could somehow be overcome,

adopting a state form of qualified immunity would still be unwise.⁶ The federal doctrine has caused grievous injustices as laid out exceptionally well in the Roderick and Solange MacArthur Justice Center's amicus brief.⁷

In a similar vein, this Court should not stretch the immunities that do exist in Nevada law to reach claims that the government or its agents have violated the Nevada Constitution. In particular, the discretionary-function exception drawn from NRS 41.032(2) should not be interpreted to apply to suits for constitutional violations. This exception only applies where the "judgment is of the kind that the discretionary-function exception was designed to shield," and what it is meant to shield is "prevent[ing] judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy." *Martinez*, 123 Nev. at 445–46, 168 P.3d at 728–29. A decision to violate the Nevada Constitution is decidedly not the kind of legitimate policy choice that the discretionary-function

⁶ Indeed, this Court's own precedent supports not adopting qualified immunity for state law claims. See *Paulos v. FCH1, LLC*, 136 Nev. 18, 22–25, 456 P.3d 589, 593–95 (2020) (grappling with issue preclusion arguments to state law claims under NRS 41.031 following a dismissal in federal court based on qualified immunity and never discussing extending qualified immunity to bar the appellants' state law claims).

⁷ Amici agree with MacArthur that "experience in the federal courts has shown [that] qualified immunity is unworkable and unjust." Br. of Amicus RSMJC at 1. They urge the Court to reject qualified immunity for all the reasons MacArthur has ably explained.

exception is meant to protect. *Accord Loumiet v. United States*, 828 F.3d 935, 939, 943 (D.C. Cir. 2016) (applying the same test under federal law and adopting the view of most circuit courts "that the discretionary-function exception does not shield government officials from . . . liability when they exceed the scope of their constitutional authority"). Simply put, Nevada officials have no discretion to violate the Constitution. *See City of Fernley*, 132 Nev. at 42, 366 P.3d at 706 ("[T]he principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.").

III. Available Remedies Include Declaratory And Injunctive Relief, Monetary Damages, And Nominal Damages.

Finally, the Court should recognize that courts have a broad range of remedies available when an ordinary person challenges the constitutionality of state action.

Some remedies are created by statute. *See* Part I-B *above*. These include the power to enter a declaratory judgment, *see* NRS 30.040(1), order an injunction, *see* NRS 33.010, or award damages, *see* NRS 41.031.

Regardless of legislative decisions, however, constitutional rights have always been understood to carry with them, at minimum, equitable remedies to enjoin unconstitutional actions. *See Free Enter. Fund*, 561 U.S. at 491 n.2. This makes sense. A right without a remedy is no right at all. That is why, for

as long as the United States has been a republic, and Nevada a state, ordinary people have had the right to petition courts for redress when the government violates constitutional rights. Any view that leaves constitutional rights unenforceable in court would neuter their protections, making them meaningless. This Court should not relegate the Nevada Constitution to the dustbin of history in this way. Just the opposite: This Court should preserve and affirm the right of the people to seek judicial redress when government officials break their oaths to uphold the state's governing charter.

CONCLUSION

Amici urge this Court to answer the certified questions as follows:

1. Is there a private right of action under Nevada Constitution Article 1, § 8? Yes.
2. Is there a private right of action under Nevada Constitution Article 1, § 18? Yes.
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense? All defenses available at common law that have not been otherwise abrogated. At minimum, the Court should squarely reject the federal doctrine of qualified immunity.
4. If there is a private right of action, what remedies are available to a plaintiff for these claims? All remedies dictated by the text of Articles 3 and

6 of the Nevada Constitution and those adopted by the Nevada Legislature, including equitable relief and money damages.

DATED this 1st day of November 2021.

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Institute for Justice*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2020 in 14-point font, Georgia style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because it contains 4,148 words excluding those parts exempted by rule.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions if this Brief does not conform to the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of November 2021.

/s/ Jordan T. Smith
Jordan T. Smith
Bar No. 12097

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29th day of September 2021, I served a true and correct copy of the foregoing Brief of *Amici Curiae* Stephen Lara and Institute for Justice as filed, byway of the Supreme Court's electronic filing system to the following:

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DATED this 1st day of November 2021.

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