18-8926 ORIGINAL

No. _____



# In The Supreme Court of the United States

DONALD C. JACKSON,

*Petitioner*,

vs.

PRIYE T. MUKORO, CERSANDRA D. TEAGUE AND DANNY MYERS,

*Respondents*,

**On Petition For Writ Of Certiorari**
**To The Court of Appeals, First District**
**Houston, Texas**

## PETITIOIN FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the First District Texas reversibly erred when it reversed the Judgment of the trial court and rendered judgment granting the appellants' motion for summary judgment based on qualified immunity and dismissing the claims against them. The Court held that because the retaliatory act alleged by Jackson is *de minimis* and would not deter a person of ordinary firmness from further exercising his constitutional rights, Jackson has failed to raise a fact issue on his retaliation claim?

## PARTIES TO THE PROCEEDINGS

(1) DONALD C. JACKSON, Plaintiff and Petitioner;

(2) PRIYE T. MUKORO, Defendant and Respondent;

(3) CERSANDRA D. TEAGUE, Defendant and Respondent;

(4) DANNY MYERS, Defendant and Respondent.

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The memorandum opinion of the First District Court of Appeals was filed April 19, 2018, and is not reported but is available at ***Mukoro v. Jackson***, 01-17-00466-CV, 2018 WL 1864630 (Tex. App.---Houston [1st Dist.] Apr. 19, 2018). **(App. 17a – 29a).**

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the First District Court of Appeals of Texas for which Jackson seeks review was issued on April 19, 2018. The Texas Supreme Court order denying Jackson's timely petition for review was filed on December 28, 2018. **(App. 30a)**. This petition for writ of certiorari is filed within 90 days of the Texas Supreme Court's denial of petition for review, under Rules 13.1 and 29.2 of this Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**First Amendment in pertinent part provides:**

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

**Fifth Amendment in pertinent part provides:**

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**Fourteenth Amendment:**

**Section 1 in pertinent part provides:**

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

**42 U.S.C. § 1983 in pertinent part provides:**

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

**42 U.S.C. § 1997e(a) in pertinent part provides:**

**(a) Applicability of administrative remedies**

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

**Article I, Section 19 of the Texas Constitution states:**

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

## STATEMENT OF THE CASE

### A. Procedural History:

Jackson was an inmate in the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ"), who is currently on parole. On April 11, 2006, proceeding pro se, he filed a civil rights action pursuant to 42 U.S.C. § 1983 in the 412th District Court of Brazoria County, Texas, seeking declaratory judgment, injunctive relief, compensatory and punitive damages. ***C.R. 12.*** Jackson alleged that pursuant to prison regulations the Defendants deprived him of property without just compensation and due process, in violation of the United States Constitution and

Article I sections 17 and 19 of the Texas Constitution. He also claimed the Defendants conspired in their efforts to deprive him of property in retaliation for exercising his rights of access to the courts and for use of the administrative grievance procedure, in violation of the First Amendment of the United States Constitution.

The Defendants filed a Motion for Summary Judgment on May 4, 2015, **(C.R. 152)**, and an Amended Motion for Summary Judgment on May 15, 2015. **C.R. 398.** An Interlocutory Judgment was rendered on May 23, 2015. The District Court granted in part and denied in part the Defendants' Amended Motion for Summary Judgment, which stated: "It is hereby **ORDERED** that Defendants' Amended Motion for Summary Judgment is **Denied** as to Teague, Myers, and Mickoro (sic) and Granted as to Kukua and Guyton on the issue of retaliation; Granted as to all due process claims; Denied as to Teague, Myers, and Mickoro (sic) and Granted as to Kukua and Guyton on the issue of conspiracy," **(App. 31a),** and that the jury trial will commenced on January 2, 2018. The Defendants filed a timely notice of interlocutory appeal on June 20, 2017. The trial date of January 2, 2018 was removed from the trial docket awaiting the decision of the First District Court of Appeals.

In ***Mukoro v. Jackson***, 01-17-00466-CV, 2018 WL 1864630 (Tex. App.---Houston [1st Dist.] Apr. 19, 2018), the First District Court of Appeals' judgment stated: "[t]he Court **affirms** the trial court's judgment." **(App. 32a).** However, the Court's opinion contains the presence of some inconsistent conclusions. The Court held: "The authorities cited in ***Jones v. Copeland***, No. 07-11-00437-CV, 2012 WL 3536764 (Tex. App.---Amarillo, Aug. 16, 2012, no pet.) (mem. op.) support our

conclusions that, even accepting the alleged acts of retaliation as true, Jackson's typewriter and fan 'would not deter the ordinary person from further exercise of his rights.' Indeed, Jackson has not been deterred from exercising his First Amendment right to complaining about a prison official's misconduct, as evidenced by his continued litigation in this case since 2006." The Court then reversed the judgment of the trial court and render judgment granting the [defendants'] motion for summary judgment based on qualified immunity and dismissing the claims against them. **(App. 27a @ ¶3; 27a–28a; and 29a).** The Texas Supreme Court denied Jackson's Petition for Review on November 16, 2018. **(App. 30a).**

**B. Facts Giving Rise to this Case**

On February 15, 1996, following the revocation of his parole, Jackson was transferred to the Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ") and assigned to the Ramsey-I Unit in Rosharon, Brazoria County, Texas. While incarcerated at the Ramsey-I Unit, Jackson acquired ownership/authorized possession of a Smith Corona XL-1000 typewriter that was issued to him by the Ramsey-I Unit building major.

On January 28, 1998, Jackson was transferred from the Ramsey-I Unit and reassigned to the Ramsey-II Unit (now the A.M. "Mac" Stringfellow Unit), hereinafter, Stringfellow Unit. Incontrovertible evidence show, that upon Jackson's transfer, he had in his possession, inter alia, his Smith Corona XL-1000 typewriter that is verified by TDCJ's (Form I-136 "Personal Property Receipt") dated 01/28/98. ***C.R. 338*** and ***C.R. 462-463***.

On or about May 13, 1998, pursuant to TDCJ's Administrative Directive (AD-03.72 "Offender Property"), a correctional officer at the Stringfellow Unit conducted a periodic inspection of Jackson's housing area. ***C.R. 334*** at [¶ VI(A) "Monitoring Requirements"]. Upon requesting documentation for proof of his Smith Corona XL-1000 typewriter, Jackson presented to her the (Form I-136 "Personal Property Receipt"), identifying the property in his possession that prison officials at the Ramsey-I Unit inventoried and prepared upon his transfer to the Stringfellow Unit. The correctional officer then informed Jackson that he needed documentation provided by the Stringfellow Unit, thus advising him to contact the Stringfellow Unit inmate property officer (who at that time was not Defendant Teague) for the appropriate documentation.

On May 14, 1998, upon contacting and talking with the Stringfellow Unit property officer, he instructed Jackson to bring his typewriter and documentation of ownership to his office. Upon complying with his instructions, the property officer accidently dropped the typewriter while examining the bottom side of the typewriter, causing the plastic housing to shatter. As a result of the property officer's mishap, he replaced Jackson's Smith Corona XL-1000 typewriter with another Smith Corona typewriter in grey case. The Stringfellow Unit property officer then issued Jackson a (Form I-31 "Personal Property Receipt"), indicating Jackson's ownership/authorize possession of the typewriter, and that it was approved and signed by the Stringfellow building captain. ***C.R. 309*** and ***C.R. 469.***

On August 6, 1998, Jackson purchased a 10" White Box Fan from the Stringfellow Unit Commissary. ***C.R. 340; C.R. 342*** at *(paragraph 30);* and ***C.R. 442*** at *(paragraph 30).* The Stringfellow Unit Commissary manager, Patricia Tarkenton, then issued Jackson a (Form I-31 "Personal Property Receipt"), which indicated Jackson's ownership/authorize possession of the fan, that it was incoming from the commissary, and that it was approved and signed by the Stringfellow assistant warden. ***C.R. 311; C.R. 313*** and ***C.R. 471.***

On December 14, 2004, when Jackson returned from his medical appointment at the Ellis-II Unit, he discovered that his typewriter and fan had been damaged and that Defendant Myers was the one who had transported Jackson's personal property to the Stringfellow Unit storage facility. On December 22, 2004, as a result of the damage, Jackson filed a Step 1 prison grievance requesting that his typewriter and fan be fixed or replaced because the items had been damaged by Defendant Myers, when he transported the property to storage, when Jackson left the unit on medical leave. ***C.R. 346*** and ***C.R. 435.***

On January 4, 2005, Defendant Teague, instructed Officer Collins to confiscated Jackson's typewriter and fan ***(C.R. 351*** *"Defendant Teague's Response to Request for Admission No. 2"),* with the intentional perversion of truth in order to induce Officer Collins to confiscate Jackson's property under the guise of questionable ownership. ***C.R. 349*** ("Disposition of Confiscated Offender Property"); ***C.R. 465*** ("Disposition of Confiscated Offender Property"). Defendant Teague fraudulently insist that she examined Jackson's prison file and found no documentation showing

ownership of his typewriter. ***C.R. 359-360*** *("Defendant Teague's Answer to Interrogatory Nos. 3-4).* However, the defendants' own documents in support of their motion for summary judgment clearly show Jackson's ownership/authorized possession of, inter alia, his typewriter and fan. ***C.R. 469; C.R. 471.*** In addition, attached to these records was a business record affidavit by Janice Ferneil, who stated:

> "I am employed as the Inmate Property Officer at the A.M. "Mac" Stringfellow Unit. I am the custodian of the attached records of the Texas Department of Criminal Justice. These records are kept by the Texas Department of Criminal Justice in the regular course of business, and it was the regular course of business of the Texas Department of Criminal Justice for an employee or representative of the Texas Department of Criminal Justice, with knowledge of the act, event, condition, or opinion recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The TDCJ Offender Property Inventory Records of Offender Donald Jackson, TDCJ #220004, including all papers demonstrating all ownership of property and any investigations involving Offender Jackson, Donald, TDCJ #220004 property, and any documentation showing the confiscation of Offender Jackson, Donald, TDCJ #220004 property, from January 28, 1998 to then present attached hereto, and are the original or exact duplicates of the originals. These property records include all papers demonstrating Offender Jackson's ownership of property, any investigations involving Offender Jackson's property and any documents regarding the confiscation of Offender Jackson's property from January 28, 1998 to present."

***C.R. 454.***

Jackson claims that the unlawful confiscation and destruction of his typewriter and fan were in retaliation to his petition for redress of a prison grievance, ***(C.R. 353*** *"Defendant Teague's Response to Request for Admission No. 12"* and ***(C.R. 359*** "Defendant Teague's Response to Interrogatory No. 3"***)***, alleging damage to his typewriter and fan, that is protected by the First Amendment of the United States

Constitution, as applied to the states by the Fourteenth Amendment of the United States Constitution. ***Procunier v. Martinez***, 416 U.S. at 406.

Pursuant to TDCJ's Offender Grievance Operations Manual, Defendant Mukoro, the Unit Grievance Investigator ("UGI"), was required to review Jackson's grievance to determine what statements and documentation are necessary to process his property claim. ***C.R. 385*** (Processing a Property Grievance at paragraph 2). She was then required to review Jackson's Unit Classification File or the issuing Property Office for copies of registration papers (PROP-02 or I-31) for registered property items such as fans, radios, watches, rings, typewriters, etc. ***C.R. 386*** (Processing a Property Grievance at paragraph 5). She was also required to attach all documentations to the grievance. ***C.R. 385*** (Processing a Property Grievance at I. "Investigation"). In spite of her requirements, Defendant Mukoro intentionally neglected attaching the TDCJ Offender Proper Inventory Records of Jackson ***(C.R. 454*** "Business Record Affidavit of Janice Ferneil"***)*** to his grievance, in a conspiracy with Defendant Teague, to conceal Jackson's ownership/authorized possession of his typewriter and fan. ***C.R. 455, 459, 466, 469, 470,*** and ***471.***

## REASON FOR GRANTING THE WRIT

### A. Review Is Warranted Because The Opinion By The Three Panel Justices Of The First District Court Of Appeals Of Texas Conflicts With An Opinion Of The Third, Seventh, and Ninth Circuit Courts Of Appeals As Well As Holdings Contained In Opinions Of This Court.

The Supreme Court Rules 10(a), (b) and (c) allows review on a writ of certiorari when: "(a) a United States Court of Appeals has entered a decision in conflict with the decision of another States Court of Appeals on the same important matter; (b) a

state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals; or (c) a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Jackson points out that evidence convincingly show that Defendant Teague admitted confiscating Jackson's typewriter and fan only after he filed his grievance relating to their damage. ***C.R. 353*** *"Defendant Teague's Response to Request for Admission No. 12."* She then states that the confiscation of Jackson's property was in accordance with TDCJ's policy. ***C.R. 359*** "Defendant Teague's Response to Interrogatory No. 3." In ***Logan v. Zimmerman Brush Co.***, 455 U.S. 422, 102 S.Ct. 1148, 71 L. Ed. 2d 265 (1982), this Court held that post-deprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to an established state procedure, rather than random and unauthorized action. In the instant case, evidence clearly show that Defendant Teague admitted confiscating Jackson's property pursuant to TDCJ policy. In his original complaint, Jackson alleged that pursuant to prison regulations, the Defendants deprived him of property without just compensation and due process, in violation of the Fifth Amendment and Fourteenth Amendment of the United States Constitution and Article I sections 17 and 19 of the Texas Constitution. ***C.R. 12.*** In ***Wolff v. McDonnell***, this Court held, "Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law." 418 U. S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

In ***Procunier v. Martinez***, this Court held, "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee . . . courts will discharge their duty to protect constitutional rights." 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). In addition, in ***Hudson v. Palmer***, this Court held, "[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts." 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). But the most important factor in considering the issue in the case at bar is cited in ***United States v. Classic***, where this Court held, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). However, it appears that this Court has only applied the *de minimis* doctrine in a relatively small number of cases. Through studying these cases, it becomes apparent that no tests exist and large gaps appear, causing great uncertainty as to whether the *de minimis* principle applies in a prisoner's retaliation First Amendment case. Consequently, in ***Elk Grove Unified School Distrtict v. Newdow,*** Justice O'Connor's concurrence included one of the most important statements to date concerning the *de minimis* doctrine: "[t]here are no *de minimis* violations of the Constitution — no constitutional harms so slight that the courts are obliged to ignore them. 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring)." Also, in reference to the *de minimis* doctrine, in ***Goss v. Lopez,*** this Court held, "(c) A 10-day suspension from

school is not *de minimis* and may not be imposed in complete disregard of the Due Process." 419 U.S. 565 (1975). In ***Carey v. Piphus***, this Court also emphasized that, "a party who proves a violation of his constitutional rights is entitled to nominal damages even when there is no actual injury. 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

In citing ***Carey***, the Fifth Circuit Court of Appeals held, "[a] violation of constitutional rights is never *de minimis,* a phrase meaning so small or trifling that the law takes no account of it." ***Lewis v. Woods***, 848 F. 2d 649, 651 (5th Cir. 1988). However, in ***Morris v. Powell***, 449 F.3d 682 (5th Cir. 2006), a case decided since ***Lewis,*** the Court appears to have retreated from this position. In ***Morris***, the plaintiff alleged that prison officials at the Telford Unit assigned him to a more taxing job in the kitchen in retaliation for the exercise of his constitutional right to file complaints against Powell. He also claimed that his transfer to the allegedly less desirable Terrell Unit was an act of retaliation. In deciding the issues, the Court acknowledged that whether an allegation of *de minimis* retaliatory acts can support a retaliation claim is an issue of first impression in this court. The Court points out that the *de minimis* standard enunciated by its sister circuits is consistent with the court's own precedent. With this standard in mind, the Court

held that the district court did not err in granting summary judgment on plaintiff's job transfer claims, but remanded to the district court for further consideration of the retaliatory prison transfer claim. ***Id.*** at 687-88.

In adopting the contrary *de minimis* standards set forth in ***Morris*** and several federal and state courts, the First District Court of Appeals of Texas stated that since Jackson fails to raise a fact issue on the third element of retaliation, i.e., retaliatory adverse act **(App. 24a @ ¶3)** , it concluded that even accepting the alleged acts of retaliation as true, Jackson's typewriter and fan "would not deter the ordinary person from further exercise of his rights **(App. 27a @ ¶3)**. . . as evidenced by his continued litigation in this case since 2006." **(App. 28a @ ¶1).** Wherefore, the Court reversed the judgment of the trial court and rendered judgment granting the [Defendants] motion for summary judgment based on qualified immunity and dismissing the claims against them. **(App. 29a)**.

## CIRCUIT COURT SPLIT

Other Court of Appeals are deeply divided over the *de minimis* conclusion reached by the First District Court of Appeals of Texas. As the Fifth Circuit held in ***Lewis***, Jackson asserts that a violation of constitutional rights should never be *de minimis*. Defined by Black's Law Dictionary as: "(1) Trifling; negligible. (2) Of a fact or thing so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary (10th ed. 2014) (emphasis added).

In ***Rhodes v. Robinson***, 380 F.3d 1123 (9th Cir. 2004), the Ninth Circuit Court of Appeals dealt with the equal elements in Jackson's case, i.e., "[d]o the exhaustive efforts of an incarcerated prisoner to remedy myriad violations of his First Amendment rights demonstrate that his First Amendment rights were not violated at all?" The Court pointed out that their cases, in short, are clear that any retribution

visited upon a prisoner due to his decision to engage in protected conduct is sufficient to ground a claim of unlawful First Amendment retaliation — whether such detriment "chills" the plaintiff's exercise of his First Amendment rights or not. ***Id.*** at 1131-1132. Surely Rhodes's allegation that the officers destroyed his property and assaulted his person are sufficient to ground his cause of action. The Court held, "the consequences of a contrary holding would be remarkably perverse. Indeed, adopting the rule proposed by the officers and embraced by the district court would prevent virtually any prisoner retaliation suit from reaching federal court. As Rhodes repeatedly observes, the Prison Litigation Reform Act of 1995 ("PLRA") establishes strict prerequisites to the filing of prisoner civil rights litigation. Most notably, PLRA requires that "No action shall be brought with respect to prison conditions under ... 42 U.S.C.1983, or any other Federal law, by a prisoner ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Section 1983 provides:

> "PLRA's exhaustion requirement applies to all inmate suites about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." ***Porter v. Nussle***, 534 U.S. 516, 532 (2002).

In ***Russell v. Bodner***, 489 F. 2d 280 (3rd Circuit 1973), in retaliation to a prisoner's threat to file administrative action, a prison guard entered the prisoner's cell and confiscated seven packs of the prisoner's cigarettes. The district court dismissed as frivolous, after filing, but before the service of process or of any responsive pleading or motion. The Third Circuit Court of Appeals held, "Judged according to the standard of ***Haines v. Kerner***, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed.

2d 652 (1972) (per curiam), and of ***Gittlemacker v. Prasse***, 428 F.2d 1, 6 (3d Cir. 1970), the complaint sufficiently alleges that the guard, relying on his position and authority as such, entered the plaintiff's cell and confiscated his cigarettes without justification. Accepting these allegations as true, as in the present posture of the case we must, the guard's action was under color of state law within the meaning of 42 U.S.C. 1983. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." ***United States v. Classic***, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941). ***Russell***, at 281 (ADAMS, J. concurring in the judgment) ("I am constrained to concur in the result reached by the Court in this case, and do so solely on the ground that the complaint sufficiently states a section 1983 cause of action to survive a motion to dismiss. Having been reluctantly persuaded that the ancient maxim "*de minimis non curat lex*" does not apply to civil rights actions such as the one presented here, it is my view that this Court has no choice but to conclude that the district court erred in dismissing the complaint as frivolous"). ***Id.*** at 282.

In ***Hessel v. O'Hearn***, 977 F.2d 299 (7th Cir. 1992), (quoting Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 550 (1947), the district judge granted summary judgment for the defendants, holding, inter alia, . . . that the theft of the cans of soda pop was rendered nonactionable by the venerable legal maxim *de minimis non curat lex.* On appeal, the court of appeals noted, "It would be a strange doctrine that theft is permissible so long as the amount taken is

small-that police who conduct searches can with impunity steal, say, $10 of the owner's property, but not more." As a result, the court held that "this maxim [*de minimis*] is never applied to the positive and wrongful invasion of another's property." ***Id.*** at 303.

This Court should clarify the most important statement concerning the *de minimis* standard to resolve an acknowledged and entrenched conflict among the federal and state courts across the country on an important and frequently recurring question on whether the fact a prisoner, who was engaged in constitutionally protected activity, fails to raise a fact issue on the third element of retaliation because he was not deterred from exhausting his administrative remedies. ***Hudson v. Palmer***, 468 U.S. at 523; cf. 42 U.S.C. § 1997e(a).

Under a proper standard, Jackson's evidence justifies a trial on the merits. Evaluated under a correct legal standard, Jackson's evidence was more than sufficient to raise genuine issues of material fact for trial. Most significantly, it is undisputed that contrary to her determination, Defendant Teague's Amended Motion for Summary Judgment contains evidence of Jackson's Ownership/Authorized possession of his typewriter and fan. ***C.R. 469, 471.***

## CONCLUSION

Based on the foregoing, Donald C. Jackson respectfully submit that this Petition for a Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the First District Court of Appeals of Texas.

Dated: April 15, 2019.

Respectfully submitted,

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