No. 19-99

In the
Supreme Court of the United States

NORTHERN KENTUCKY AREA DEVELOPMENT DISTRICT,
Petitioner,

v.

DANIELLE SNYDER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, preempted Ky. Rev. Stat. § 336.700(2) (since amended as of June 27, 2019), which invalidated arbitration agreements between a government entity and an employee of such, or whether the statute instead presented a "generally applicable contract defense" that could withstand preemption under the FAA.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption. None of the parties have a parent corporation.

STATEMENT OF RELATED PROCEEDINGS

The following cases are directly related to the Petition before the Court:

Snyder v. Northern Kentucky Area Development District, Kentucky Supreme Court, Case No. 2017-SC-000277-DG, Judgment entered on September 27, 2018, and Petition for Rehearing denied on April 18, 2019.

Snyder v. Northern Kentucky Area Development District, Kentucky Court of Appeals, Case No. 2015-CA-001167-MR, Judgment entered on May 12, 2017.

Snyder v. Northern Kentucky Area Development District, Boone Circuit Court, Case No. 14-CI-01622, Order denying NKADD's Motion to Stay the Proceedings and Compel Arbitration entered on March 23, 2015, and Order denying NKADD's Renewed Motion to Compel Arbitration entered on July 17, 2015.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment of the Constitution provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Section 2 of the Federal Arbitration Act, herein "FAA", 9 U.S.C. § 2, provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Ky. Rev. Stat. § 336.700, prior to June 27, 2019, provided that:

> [N]o employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

It **has since been amended** and, as of June 27, 2019, Ky. Rev. Stat. § 336.700 **provides**:

> (2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary and except as provided in subsection (3) of this section, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.
>
> (3) Notwithstanding subsection (2) of this section:
>
> (a) Any employer may require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment."

INTRODUCTION

Certiorari should not be granted in this case. This petition has been made with disregard to the Kentucky Legislature's action in response to the issue through their amendment of Ky. Rev. Stat. § 336.700. Alternatively, the Respondent has not argued that the FAA was not generally applicable to contracts in Kentucky. The Respondent has argued that the FAA is not applicable to contracts pertaining to public employment contracts made with the Commonwealth, as the FAA does not govern or restrict a sovereign state's right to enter into contracts.

LEGAL STANDARD

The Court, authorized by Congress, has retained the ability to govern its own grounds for its appellate jurisdiction. *See Clements v. Gonzales*, 496 F. Supp. 2d 70, 74 (D.D.C. 2007). Additionally, it has been long held that appeal to the Supreme Court of the United States is not a matter of right, but one of "judicial discretion." *Id*. at 72. Pursuant to Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Certiorari is only be permitted where there is a case of importance generally to the public or where there is an ideological conflict between the Circuit Courts of Appeal. Settlement. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

COUNTER STATEMENT OF THE CASE

Respondent, Danielle Snyder ("Ms. Snyder"), is a former employee of the Appellant, Northern Kentucky Area Development District ("NKADD"), a taxpayer-funded political subdivision of the Commonwealth of Kentucky. In October of 2011, NKADD offered Ms. Snyder a job as a receptionist. As a condition of her employment, Ms. Snyder was required to sign an arbitration agreement that would waive her right to a court or jury trial for any future legal claim that manifested during her employment. It is undisputed that NKADD conditioned Ms. Snyder's employment on signing an agreement to arbitrate future claims, though the employment condition, at the time of

signing, was in violation of Ky. Rev. Stat. § 336.700(2). This statute previously prohibited employers from conditioning a person's prospective employment on his or her agreement to waive rights or arbitrate future claims.

Following Ms. Snyder's hiring, she was promoted and eventually discovered fraudulent expenditures on the company credit card. (Pet. App. 31). She reported this activity and was punished by being sent to an educational seminar that only "bad employees" were sent. (Pet. App. 31). She continued to report ongoing fraudulent expenditures to the Executive Director of the NKADD. The Executive Director met with Ms. Snyder on August 5th and informed her that she was under investigation and asked her what it would take for her to resign. Ms. Snyder refused to resign, and she was terminated on August 11th, 2014. Ms. Snyder then filed in state court a statutory action against NKADD for violation of the Kentucky Whistleblower law, under Ky. Rev. Stat. § 61.102, and refusal of payment for worked overtime. Ky. Rev. Stat. § 61.102 is a special remedy statute that allows public employees to file suit when adverse actions have been taken against them by a public employer following a reporting of a violation of Kentucky or Federal law. (Resp. App. 5-7).

In response to the action, NKADD sought to compel arbitration, which was denied by the Boone County Circuit Court which opined that the FAA did not apply to the agreement, and even if it did, it did not preempt Ky. Rev. Stat. § 336.700(2). (Pet. App. 49). NKADD continued to pursue arbitration of the action. Again, the Boone County Circuit Court denied the motion to

compel, after being re-assigned to a new judge. (Pet. App. 33-43).

The NKADD appealed that decision to the Kentucky Court of Appeals. (Pet. App. 16). The Court of Appeals found that the FAA preempted Ky. Rev. Stat. § 336.700(2) when an employer is a private entity. (Pet. App. 23). They did not hold that it preempted the statute when it is a public entity stating that the Commonwealth was allowed to deal with how government entities handled their own contracts. (Pet. App. 28). The Court of Appeals ultimately found that the arbitration agreement between Ms. Snyder and NKADD was invalid and affirmed the lower court's decision. *Id*.

The Petitioner then moved for discretionary review with the Kentucky Supreme Court. (Pet. App. 1) That Court also found that the FAA did not preempt the Kentucky statute. (Pet. App. 14). The Kentucky Supreme Court held that Ky. Rev. Stat. § 336.700(2) fell under a "generally applicable contract defense", as provided by *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). (Pet. App. 10-11). The Court also found that the statue does not single out arbitration clauses. (Pet. App. 11). As such, in ruling that the statue was a law of general applicability, it correctly asserted that the statute treated arbitration agreements equally to any other contract and found for Ms. Snyder. (Pet. App. 14)

The NKADD then filed this petition for writ of certiorari.

REASONS TO DENY THE PETITION

I. THE ISSUE BEFORE THE COURT IS NOW MOOT DUE TO AMENDMENTS MADE BY THE KENTUCKY LEGISLATURE TO KY. REV. STAT. § 336.700.

In response to the decision issued by the Kentucky Supreme Court, the Kentucky Legislature amended Ky. Rev. Stat. § 336.700, which, as of **June 27, 2019,** renders the issue in this case **moot**. This court should thus deny the petition as the amended statute allows for the requirement of an employee by an employer to execute an arbitration agreement as a condition or precondition of employment. *See* Ky. Rev. Stat. § 336.700. As cited by the Petitioner, the previous language of the statute read:

> [N]o employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

(Pet. Writ. for Cert. at i, Resp. App. 1). Since the opinion of the Supreme Court of Kentucky was issued, the legislature has amended the statute to read:

> (2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary and except as provided in subsection (3) of this section, no employer shall require as a condition or precondition of employment that any

> employee or person seeking employment waive or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.
>
> (3) Notwithstanding subsection (2) of this section:
>
> (a) Any employer may require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment.

Ky. Rev. Stat. § 336.700. (Resp. App. 2-5). As the new language of the statute directly remedies the issue presented by the petitioner, this case is now moot and this Court should deny the petition before it.

II. THE APPLICATION OF THE FAA IS LIMITED BY THE AUTHORIZATION OF THE STATE.

Even if this issue was no longer moot, the Respondent concedes that the FAA did preempt Ky. Rev. Stat. § 336.700 prior to the June 27, 2019 amendment. Respondent has never argued at any court below that the FAA does not govern generally. The only issue that the Respondent litigated is that the FAA does not apply to a state government's ability to regulate contracts made with state government. The Kentucky Legislature has the authority to regulate any agreements made between state government entities and their employees.

As this Court has held repeatedly our government operates under a constitutional system of federalism and separation of powers, in which the sovereign rights of the states should be given the utmost respect and not unduly abridged. *United States v. Lopez*, 514 U.S. 549 (1995). Despite federal policy favoring arbitration, the NKADD cannot rely on an interpretation that would unconstitutionally tread on Kentucky's sovereign right to govern its internal affairs.

The Boone Circuit Court succinctly explained, both principles of federalism and the Tenth Amendment to the United State Constitution militate against NKADD's position. (Pet. App. 34-43). In enacting Ky. Rev. Stat. § 336.700, the Kentucky General Assembly lawfully withheld the authority of its political subdivisions to enter into pre-employment arbitration agreements. Likewise, in enacting the Kentucky Whistleblower Act (Ky. Rev. Stat. § 61.102), the General Assembly gave the public taxpayers an important role in its enforcement. The right of the Kentucky legislature to enact both of these statutes, which unquestionably regulate the internal affairs of the state, must be afforded the constitutional respect it deserves. The undersigned counsel has been unable to locate a single case construing the FAA as superseding a state's constitutional authority to regulate the internal affairs and powers of its political subdivisions. The FAA does not govern or restrict a sovereign state's right to enter contracts.

An example of this is clearly present in a case that this court has previously denied cert. *W.M. Schlosser Co. v. Sch. Bd. of Fairfax Cty.*, 980 F.2d 253 (4th Cir.

1992), cert denied 113 S. Ct. 2340 (1993).[1] In *Schlosser*, the Fourth Circuit held that a state's laws that withheld authority from its local governments to enter into arbitration agreements were not pre-empted by the FAA, and any attempt by the local government to execute an arbitration agreement was invalid and unenforceable as a matter of law. Presented before the Court in that case, an out-of-state construction contractor had filed a motion under the FAA to compel arbitration against a Virginia public school board. *Id.*

In denying the contractor's motion, the Fourth Circuit first cited to Virginia's well-established "Dillon" rule that local governing bodies such as counties, municipal corporations, and school boards "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable." *Id.* at 255 (internal citations omitted). The Court then noted that a Virginia procurement statute requiring its local governments to settle contractual disputes in a specific manner evidenced an intent by the Virginia General Assembly that the school board did not have the ability to arbitrate contractual disputes. *Id.* at 256-57. The Court expressly rejected the contractor's contention that the Dillon rule was pre-empted by the FAA, finding it was a rule of

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[1] Note that *Schlosser* was superseded by statute as stated in *Russell Cty. Sch. Bd. v. Conseco Life Ins. Co.*, 2001 WL 1593233 (W.D. Va. 2001). The Virginia General Assembly passed legislation after *Schlosser* was decided granting public bodies the specific authority to enter into arbitration agreements similar to the current case.

general applicability that defines and invalidates all ultra vires acts of local governing bodies. *Id*. at 259. Finally, the Court explained, "As a general rule of contract formation, [the Dillon rule] constitutes a ground[] as exists at law or in equity for the revocation of any contract within the meaning of 9 U.S.C. § 2. As such, it falls within the exception to section 2's general rule of enforceability of arbitration provisions, and therefore is not preempted by the FAA." *Id*. (internal citations and quotations omitted).

The District of Columbia Court of Appeals has also agreed on multiple occasions with *Schlosser* in finding that where a state statute designates a specific forum for claims against the state to be made, it acts as a prohibition against a public official's authority to enter into an arbitration agreement on behalf of a governmental entity, and any purported agreement made in violation of that prohibition is void and unenforceable, regardless of the FAA's policy favoring arbitration. *See District of Columbia v. Greene*, 806 A.2d 216 (D.C. 2002); *followed by Bank of America, N.A. v. District of Columbia*, 80 A.3d 650 (D.C. 2013), cert denied, 134 S. Ct. 2293 (2014). In expressly rejecting the argument that the FAA pre-empts state law restrictions on the authority of public officials to bind local governments to arbitration, the District of Columbia Court of Appeals highlighted the flawed logic in the FAA pre-emption argument:

> What [the pre-emption] argument does is to mistake the authority of a state to bar enforcement of otherwise valid arbitration agreements -- a power denied the state except

> insofar as § 2 permits -- for the authority of a government contracting for goods or services in its own behalf to refuse to agree to arbitrate disputes…
>
> In effect, then, the statute withholds from the District's contracting officers the power to agree to arbitration (or, for that matter, to agree to any form of dispute resolution other than administrative), just as any private corporation or individual may refuse to arbitrate. It is a basic principle of District law that a contracting official cannot obligate the District to a contract in excess of his or her actual authority."

Greene, 806 A.3d at 221-22. Notably, this issue has been fully litigated as the U.S. Supreme Court denied certiorari in both the *Schlosser* and *Bank of America* cases.

The rule under Kentucky law in this case calling for strict construction of the powers of its political subdivisions is identical to the laws of Virginia and the District of Columbia, both of which have been upheld against challenges that they are pre-empted by the FAA.

Further, in enacting Ky. Rev. Stat. § 336.700, prior to its recent amendment, the Kentucky General Assembly has done nothing more than recognized the weight of the bargaining positions between employers and employees and has sought to place them in an equal bargaining position. By making it unlawful for employers to condition the prospect of employment on an agreement to arbitrate, the General Assembly has

simply ensured that employers cannot use their superior bargaining power to coerce job applicants into accepting such agreements through ultimatum.

Ky. Rev. Stat. § 336.700 bolsters the federal policy in favor of arbitration, because it ensures that any valid arbitration agreement between an employer and employee will have been the result of the **mutual consent** of the parties, rather than **coercion**, which is entirely consistent with the aims of the FAA itself. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("Arbitration under the Act is a matter of consent, not coercion…"); *see also Valued Servs. of Ky., LLC v. Watkins*, 309 S.W.3d 256, 263-64 (Ky. Ct. App. 2009) ("There is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device.") (internal citations omitted)). If an employer and employee enter into an arbitration agreement for consideration separate and distinct from the position of employment itself, which, of course, could even include their mutual assent to arbitrate claims, it makes it that much more difficult to refute the validity of such agreements.

However, the aforementioned arguments are only applicable to the former language of the statute. That statute has been since amended by the Kentucky Legislature and renders the decision of the Kentucky Supreme Court and the issue brought in the petition for writ of certiorari moot.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Old Version of Ky. Rev. Stat. § 336.700:

"336.700 Prohibition against requiring waiver of statutory rights as a condition of employment

(1) As used in this section, "employer" means any person, either individual, corporation, partnership, agency, or firm, that employs an employee and includes any person, either individual, corporation, partnership, agency, or firm, acting directly or indirectly in the interest of an employer in relation to an employee; and "employee" means any person employed by or suffered or permitted to work for an employer.

(2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law."

Newly Amended Version of Ky. Rev. Stat. § 336.700:

"336.700 Prohibition against requiring waiver of statutory rights as a condition of employment; exceptions; arbitration agreements

(1) As used in this section, "employer" means any person, either individual, corporation, partnership, agency, or firm, that employs an employee and includes any person, either individual, corporation, partnership, agency, or firm, acting directly or indirectly in the interest of an employer in relation to an employee; and "employee" means any person employed by or suffered or permitted to work for an employer.

(2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary and except as provided in subsection (3) of this section, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

(3) Notwithstanding subsection (2) of this section:

(a) Any employer may require an employee or person seeking employment to execute an agreement for arbitration, mediation, or other form of alternative dispute resolution as a condition or precondition of employment;

(b) Any employer may require a former employee to execute an agreement to waive an existing claim as a condition or precondition for the rehiring of the former employee as part of a settlement of pending litigation or other legal or administrative proceeding;

(c) Any employer may require an employee or person seeking employment to execute an agreement to reasonably reduce the period of limitations for filing a claim against the employer as a condition or precondition of employment, provided that the agreement does not apply to causes of action that arise under a state or federal law where an agreement to modify the limitations period is preempted or prohibited, and provided that such an agreement does not reduce the period of limitations by more than fifty percent (50%) of the time that is provided under the law that is applicable to the claim; and

(d) Any employer may require, as a condition or precondition of employment, an employee or person seeking employment to agree for the employer to obtain a background check or similar type of personal report on the employee or person seeking employment in conformance with a state or federal law that requires the consent of the individual prior to an employer's receipt or use of such a report.

(4) An arbitration agreement executed by an employer and an employee or a candidate for employment under subsection (3)(a) of this section shall be subject to general contract defenses as may be applicable in a particular controversy, including fraud, duress, and unconscionability.

(5) In accordance with the Federal Arbitration Act, arbitration under subsection (3)(a) of this section shall safeguard the effective vindication of legal rights, including:

(a) Providing a reasonable location for the arbitration;

(b) Mutuality of obligation sufficient to support the agreement to arbitrate;

(c) Ensuring procedural fairness for the parties to access arbitration, including a fair process for selecting an impartial arbitrator and the equitable, lawful allocation of arbitration costs between the parties;

(d) Ensuring that the parties to the agreement shall have at least one (1) channel for the pursuit of a legal claim, either by requiring the claim to be arbitrated individually pursuant to the agreement or otherwise; and

(e) Empowering the arbitrator to award all types of relief for a particular type of claim that would otherwise be available for a party through judicial enforcement, including punitive damages as provided by law.

(6) An arbitrator selected to arbitrate an agreement entered into pursuant to this section shall disqualify himself or herself if he or she has any of the conflicts enumerated under KRS 26A.015(2).

(7) If an arbitration agreement fails to specify the manner of procedure to govern the arbitration process, such as, for example, by failing to designate arbitral protocols promulgated by the American Arbitration

Association or similar organization, then the arbitrator shall use the Kentucky Rules of Civil Procedure in the conduct of the arbitration.

(8) This section shall apply prospectively and retroactively. Any provision of an agreement executed prior to June 27, 2019, that violates the requirements of subsection (3)(c) of this section shall be stricken from the agreement and shall not operate to invalidate the entire agreement.

(9) The provisions of this section shall not apply to collective bargaining agreements entered into between employers and the respective representatives of member employees."

Kentucky Whistleblower Act 61.102:

"61.102 Reprisal against public employee for disclosure of violations of law prohibited; construction of statute

(1) No employer shall subject to reprisal, or directly or indirectly use, or threaten to use, any official authority or influence, in any manner whatsoever, which tends to discourage, restrain, depress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the Kentucky Legislative Ethics Commission, the Attorney General, the Auditor of Public Accounts, the Executive Branch Ethics Commission, the General Assembly of the Commonwealth of Kentucky or any of its members or employees, the Legislative Research Commission or any of its committees, members or employees, the judiciary or any member or employee of the judiciary, any law enforcement agency or its employees, or any

other appropriate body or authority, any facts or information relative to an actual or suspected violation of any law, statute, executive order, administrative regulation, mandate, rule, or ordinance of the United States, the Commonwealth of Kentucky, or any of its political subdivisions, or any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety. No employer shall require any employee to give notice prior to making such a report, disclosure, or divulgence.

(2) No employer shall subject to reprisal or discriminate against, or use any official authority or influence to cause reprisal or discrimination by others against, any person who supports, aids, or substantiates any employee who makes public any wrongdoing set forth in subsection (1) of this section.

(3) This section shall not be construed as:

(a) Prohibiting an employer from requiring that an employee inform him or her of an official request made to an agency for information, or the substance of testimony made, or to be made, by the employee to legislators on behalf of an agency;

(b) Permitting the employee to leave his or her assigned work area during normal work hours without following applicable law, administrative regulations, rules, or policies pertaining to leave, unless the employee is requested by the Kentucky Legislative Ethics Commission or the Executive Branch Ethics Commission to appear before the commission, or by a

legislator or a legislative committee to appear before a legislative committee;

(c) Authorizing an employee to represent his or her personal opinions as the opinions of his or her employer; or

(d) Prohibiting disciplinary or punitive action if an employee discloses information which he or she knows:

1. To be false or which he or she discloses with reckless disregard for its truth or falsity;

2. To be exempt from required disclosure under the provisions of KRS 61.870 to 61.884; or

3. Is confidential under any other provision of law."