Docket No. 17-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID THOMPSON, *et al.*,

Appellants,

v.

HEATHER HEBDON, *et al.*,

Appellees.

On Appeal from the Final Order and Judgment
of the United States District Court for the District of Alaska
(Hon. Timothy M. Burgess, Presiding)

District of Alaska Case No. 3:15-cv-00218 TMB

BRIEF OF FREE SPEECH FOR PEOPLE AND PROFESSOR DAVID FONTANA AS AMICI CURIAE SUPPORTING APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

No amicus has a parent corporation or is owned in part by any publicly held corporation.

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of appellees Heather Hebdon *et al.*[1]

Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy in the constitutional law of campaign finance. Free Speech For People's thousands of supporters around the country, including in Alaska, engage in education and non-partisan advocacy to encourage and support effective government of, for and by the American people.

Professor David Fontana is an Associate Professor of Law at the George Washington University School of Law. His research and teaching interests include constitutional law and comparative constitutional law. He studies how the Constitution protects principles related to geographical self-government. He has a professional interest in ensuring that challenges related to

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief. All parties, through counsel, have consented to submission of this brief.

geographical self-government are resolved by reference to proper understandings of the constitutional history and empirical data related to these issues. He has documented the rise of out-of-district and out-of-state campaign contributions and the problems it has created for constitutional law in a forthcoming article and book. *See* David Fontana, *The Geography of Campaign Finance Law*, 90 S. Cal. L. Rev. 101 (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008378.

SUMMARY OF ARGUMENT

In addition to the anti-corruption interest, Alaska's limits on non-resident contributions in Alaska Stat. § 15.13.072(e)are defensible on the basis of an independent, complementary, and compelling state interest in democratic self-government that the Supreme Court has long recognized. This interest is embedded in the structure of the Constitution, which relies on distinctive state governments—representing and accountable to distinct political communities—to make federalism work properly.

In a closely analogous 2012 case, the Supreme Court affirmed a three-judge court decision confirming that the democratic self-government interest is compelling in a First Amendment challenge to campaign finance limits. *See Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (mem.). Similarly, by limiting financial influence over Alaska state politics by nonresidents, the limitation in this case helps ensure that Alaska is a self-governing political community.

ARGUMENT

I. Alaska has a compelling state interest in democratic self-government.

The Constitution's history and structure reflect a principle of democratic self-government by distinct political communities. This Court has held that a democratic self-government interest is compelling against First Amendment challenges, and the Supreme Court recently affirmed a decision holding it compelling in a challenge to campaign finance limits in particular.

A. The federal structure of our Constitution presumes democratic self-government by states.

At its most basic, "democratic self-government" means that the people who compose a political community marked as distinctive and important by the Constitution choose the individuals that govern that community. The first task is to "defin[e] the scope of the community of the governed and thus of the governors as well." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982). The United States is not a single undifferentiated administrative unit, but rather comprises distinct sovereign states necessarily existing as political communities. Consequently, the Constitution relies on distinctive state governments accountable

to their distinctive political communities to make federalism operate properly.

1. The Founders intended the Constitution to emphasize state self-government.

James Madison's influential arguments in the *Federalist Papers* indicated that the Constitution would feature geographically defined political communities—and of these, state governments would be the most important. *See* David Fontana, *The Geography of Campaign Finance Law*, 90 S. Cal. L. Rev. 107-12 (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008378.

Madison argued that individuals would approach politics differently in different states because their "local situation[s]" would both shape their preferences and give them the power to act on these locally influenced preferences via their state governments. *The Federalist* No. 10, at 75-76 (James Madison) (Charles Kesler ed. 2003);[2] *see also* Fontana, *supra*, at 107-12. Citizens would be defined in important ways by their state political communities because they would have "ties of personal

[2] All references to *The Federalist* cite the 2003 Kesler edition.

acquaintance and friendship, and of family and party attachments" with "a greater proportion of the people" within their states. *The Federalist* No. 46, at 291 (James Madison).[3] A dangerous constellation of political interests "may kindle a flame within their particular States, but will be unable to spread a general conflagration" because each state constitutes a different political community. *The Federalist* No. 10, at 79 (James Madison). But for this to work effectively, there must be "distinct and discernable lines of political accountability . . . . between the citizens and the States," *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring), so that voters can ensure that state government reflects their distinctive preferences.

Madison argued that, in a large country like the United States, these state differences were a positive force ensuring that states would check one another and the federal government. The advantage of a "large over a small republic," *The Federalist* No.

[3] Of course, the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside." U.S. Const. amend. XIV, § 1. The point is only that the constitutional design presumes that states, like the United States as a whole, will be self-governed by their citizens.

10, at 78 (James Madison), was that there would be enough different people in enough different states to generate "distinct and separate" state governments competing with one another. *The Federalist* No. 51, at 320 (James Madison). Similarly, Alexander Hamilton argued that states would have unique capacities to ensure the "attachment" of their constituents and their "minute interests." *The Federalist* No. 17, at 115 (Alexander Hamilton). The Constitution thus features a system of "'dual sovereignty'" that "contemplates that a State's government will represent and remain accountable to *its own citizens*." *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (emphasis added) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

2. The Constitution's text reflects the principle of democratic self-government within states.

The Constitution "creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. Outside these textually enumerated powers, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. The enumeration of certain federal powers in the

Constitution, and the reservation of other powers to the states by the Tenth Amendment,[4] helps ensure sufficient political space for the states to act and define themselves distinctively. The requirements that members of the House of Representatives and the Senate be "Inhabitant[s]" of the states they represent ensures that federal officials will respect the distinctive states that they inhabit. *See* U.S. Const. art. I, §§ 2 (House), 3 (Senate).[5]

3. Federalism's purposes are undermined without state democratic self-government.

Federalism would be substantially undermined if states could not form the "distinct" governments that Madison imagined. *See The Federalist* No. 51, at 320 (James Madison); Fontana, *supra*, at 107-112. The Supreme Court has identified many purposes that federalism serves within the constitutional

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[4] "The 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.

[5] Many other constitutional provisions assume self-government. *See, e.g.*, U.S. Const., art. I, § 2 (specifying that voters eligible to vote for U.S. House of Representatives are the "Electors of the most numerous Branch of the State Legislature"); *id.* art. IV, § 3 (requiring "Consent of the Legislatures of the States concerned" for new states to be formed from existing states); *id.* art. V (providing a key role for the "Legislatures . . . of the several States" in the constitutional amendment process).

structure, and each of them is undermined if states are not distinctive political communities. *See* David Schleicher, *Federalism and State Democracy*, 95 Tex. L. Rev. 763 (2017) (arguing that federalism depends on quality of state democracy and its separation from national politics).

First, state governments are meant to be "more sensitive to the diverse needs" of their populations. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). But to do so, they must reflect the preferences of their distinctive political communities. And there will not be "increase[d] opportunity for citizen involvement in democratic processes," *id.* at 459, if state governments are responding to forces outside their unique communities.

Second, state governments can be "laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The benefit of different "laboratories" is that they produce different policy outputs because of different political inputs. But that is only a benefit "if its citizens choose." If states can be influenced into (or out of) "try[ing] novel social and economic experiments" by out-of-state influence, then this feature of federalism is weakened.

Finally, and most importantly, "the principal benefit of the federalist system is a check on abuses of government power." *Gregory*, 501 U.S. at 459. This check only results from competition between the "distinct and separate departments" that the states constitute. *The Federalist* No. 51, at 320 (James Madison).

B. The state's democratic self-government interest is a "compelling" interest.

The Supreme Court has long recognized that the state's interest in democratic self-government includes definition of the scope of the political community. *See Sugarman v. Dougall,* 413 U.S. 634, 642-43 (1973) ("We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community. We recognize, too, the State's

broad power to define its political community.") (internal quotation marks and citation omitted).[6]

In furtherance of this democratic self-government interest, state governments can protect the autonomy of state functions that "go to the heart of representative government," including selections of "state elective or important nonelective executive, legislative and judicial positions." *Sugarman*, 413 U.S. at 647; *Dunn v. Blumstein,* 405 U.S. 330, 344 (1972) (recognizing state's authority to "preserve the basic conception of a political community" by requiring voters to be bona fide residents).

Notably, the state's democratic self-government interest is not just "important" but "compelling" for purposes of First Amendment analysis. *See Chula Vista Citizens for Jobs & Fair*

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[6] Of course, the Constitution, as amended, limits states' abilities to define people present within their geographic borders as outside the local political community. *See, e.g.,* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . by any state on account of race, color, or previous condition of servitude."). These protections, however, do not grant the right to vote in a particular community—or participate in the full panoply of other, related self-government activities—to those outside its borders.

Competition v. Norris, 782 F.3d 520, 531 (9th Cir. 2015) (en banc) (recognizing that state's interest in "securing the people's right to self-government" is "compelling" in First Amendment challenge to requirement that municipal initiative proponents be electors); *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (3-judge court) (holding that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government"), *aff'd*, 565 U.S. 1104 (2012) (mem.); *see also Dunn*, 405 U.S. at 342-43 (noting that "preserv[ing] the basic conception of a political community" was a compelling interest for Equal Protection Clause strict scrutiny).[7]

Communities recognized as self-governing may therefore limit key activities of self-government to those within their political communities. These include voting, *see id.* at 344;

[7] The state interest here need not be "compelling"; an "important" interest would suffice. *See Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003); *see also Lair v. Bullock*, 798 F.3d 736, 748 (9th Cir. 2015) ("*Eddleman*'s framework is . . . still sound, and the test remains the same going forward"). Since the self-government interest is compelling, *a fortiori* it is important.

proposing initiatives, *see Chula Vista Citizens*, 782 F.3d at 531; enforcing the law as police or probation officers, *see Cabell*, 454 U.S. at 439-47; and teaching in public schools, *see Ambach v. Norwick*, 441 U.S. 68 (1979). *See also Bluman*, 800 F. Supp. 2d at 288-89 ("In our view, spending money to influence voters and finance campaigns is at least as (and probably far more) closely related to democratic self-government than serving as a probation officer or public schoolteacher. Thus, our conclusion here follows almost *a fortiori* from those cases.").

C. The state's interest in democratic self-government embraces political campaign financing.

Political contributions "constitute part of the process of democratic self-government" because they are "an integral aspect of the process by which Americans elect officials to federal, state, and local government offices." *Bluman*, 800 F. Supp. 2d at 288.

In *Bluman*, lead plaintiff Benjamin Bluman, a Canadian citizen in the United States on a three-year visa while living and working in New York, sought to make political contributions and "to print flyers supporting President Obama's reelection and to distribute them in Central Park." 800 F. Supp. 2d at 285. He

challenged, under the First Amendment, a federal law that prohibits foreign nationals (persons who are neither U.S. citizens nor permanent U.S. residents) from making either contributions or expenditures (including independent expenditures) in federal elections.[8] Writing for the three-judge court, Judge Kavanaugh connected this law to the self-government interest:

> It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.

Bluman, 800 F. Supp. 2d at 288.

Crucially, *Bluman* did not rely on the anti-corruption interest that underlies most campaign finance decisions. *See McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). While the precedential effect of the Supreme Court's summary affirmance is limited to the issues necessarily decided

[8] The statute also prohibits foreign nationals from making contributions or expenditures in state or local elections. *See* 52 U.S.C. § 30121.

by the Court, *see Anderson v. Celebrezze*, 460 U.S. 780, 785 n.5 (1983), in *Bluman* these issues are inescapable. The court expressly contrasted the democratic self-government interest upon which it relied with the anti-corruption interest upon which it did *not* rely. *See Bluman*, 800 F. Supp. 2d at 288 n.3 ("[T]he government's anti-corruption interest . . . is not the governmental interest at stake in this case.").[9] Consequently, *Bluman* can only be read as the Supreme Court's recognition of a self-democratic government interest that exists *in parallel with* the anti-corruption interest in regulating campaign financing.

While *Citizens United* and *McCutcheon* have focused on the anti-corruption interest, the same Supreme Court affirmed *Bluman* between those two decisions. *Bluman* relies on a democratic self-government interest that exists apart from the anti-corruption framework. In fact, in *McCutcheon*, Chief Justice

[9] Nor did the FEC's motion to dismiss or affirm the three-judge court's decision urge the Supreme Court to affirm the decision below on any other basis; indeed, it did not even mention the word "corruption." *See Bluman v. FEC*, No. 11-275, FEC Mot. to Dismiss or Affirm (U.S. Sup. Ct. Nov. 14, 2011), https://transition.fec.gov/law/litigation/bluman_sc_bluman_mot_dismiss_affirm.pdf.

Roberts placed campaign contributions among the core activities of democratic self-government:

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.

McCutcheon, 134 S. Ct. at 1440-41 (Roberts, C.J.) (plurality opinion). Yet it is beyond cavil that the government may prohibit foreign nationals from running for office, voting, contributing to candidates' campaigns, or spending money to urge others to vote for a candidate, and that states may prohibit non-residents from running for office or voting. Regardless of the bounds that the Supreme Court has placed on the government's ability to limit these activities based on the anti-corruption interest, the democratic self-government interest is an independent and complementary basis for legislation.

The state of Alaska's choice to limit political contributions in state elections from residents of the lower forty-nine states is analogous to the United States' choice to prohibit political

contributions from foreign nationals.[10] As Judge Kavanaugh noted in *Bluman*, "[i]t follows" from the fact that foreign citizens may be barred from voting in federal elections or serving in federal office that they may be barred from contributing to campaigns. 800 F. Supp. 2d at 288. Likewise, nonresidents may be barred from voting in elections, or serving in elected office, of other states.[11]

While *Bluman* draws on principles as old as the Founding, appellants fail to grapple with how much the decision—and its affirmance by the Supreme Court—changes the legal landscape. Pre-*Bluman* cases from this and other circuits resolving challenges to out-of-jurisdiction campaign financing have never squarely considered *Bluman*'s democratic self-government rationale. *See VanNatta v. Keisling,* 151 F.3d 1215, 1217-18 (9th Cir. 1998) (rejecting limiting campaign contributions based on

[10] This case does not involve independent expenditures.
[11] Of course, *Bluman* involved non-resident citizens of other *countries* who sought to influence *federal* elections, whereas this case involves a non-resident citizen of another *state* who seeks to influence *state* elections. And Wisconsinites do not stand in *precisely* the same relation to Alaska that Canadians do to the United States. But in both cases, they are not full members of the relevant political community.

state's interest in preserving a "republican form of government");[12] *Whitmore v. FEC*, 68 F.3d 1212, 1215 (9th Cir. 1995) (rejecting "free association, equal protection and a republican form of government" claims in an affirmative challenge seeking an injunction banning out-of-state contributions in federal elections); *cf. Landell v. Sorrell*, 382 F.3d 91, 146-48 (2d Cir. 2006) (rejecting limiting out-of-state contributions based on anti-corruption and anti-distortion interests), *rev'd on other grounds sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006).

When out-of-state money supplies a large portion of political contributions, it exerts an influence that can undermine state self-government through multiple mechanisms. Candidates for state office may expect that their chance to raise the money necessary to win their election will be assisted by hiring staffers with close connections to contributors out-of-state, rather than to constituents in-state. *See* Fontana, *supra*, at 130-32. These staffers may be influenced by significant out-of-state

[12] *VanNatta* concerned political contributions from a different legislative district within the same polity. This case, like *Bluman*, concerns contributions from outside the polity, and does not squarely present the question of whether to revisit *VanNatta*.

contributions. *See id*. And the issues that state office candidates run on may tilt towards those of interest to those in "donor" states, at the expense of issues of interest to their constituents. *See id*.

Once elected—aware of the importance of these contributions and the need to generate them again to survive a re-election campaign—state officials will be more likely to direct their energies towards issues and preferences that differ from those of their constituents. *Cf.* Anne E. Baker, *Getting Short-Changed? The Impact of Outside Money on District Representation*, 97 Soc. Sci. Q. 1096 (Nov. 2016) (finding significant empirical relationship between out-of-jurisdiction political contributions, and ideological divergence between Members of Congress and their constituents), http://bit.ly/2v0K1Kc. Thus, large out-of-state contributions undermine democratic self-government by weakening the people's ability to make a "State's government . . . remain accountable to its own citizens," *Printz*, 521 U.S. at 919-20.

II. The people of Alaska could reasonably be concerned about the influence of out-of-state contributions in their state elections.

The people of many American states may reasonably be concerned that large amounts of out-of-state campaign contributions shape the behavior of elected officials. While this phenomenon is not unique to Alaska, it may be particularly pernicious there. The district court found that Alaska is particularly vulnerable to out-of-state interests. E.R. 23-24 (citing testimony of Dr. McBeath and Prof. Painter); *see also State v. ACLU*, 978 P.2d 597, 615 (Alaska 1999) (noting that "two former Alaska governors submitted affidavits in which they affied that contributions from outside the state create serious loyalty problems"). Compared to many other states, Alaska has fewer legislators for out-of-state interests to target, more reason for out-of-state interests to target and influence these legislators because of Alaska's natural resources, and greater difficulties monitoring these efforts because of Alaska's larger geographical size. *See* E.R. 169-70; Supp. E.R. 72-75, 88-89, 91-92, 460-64.

Geographic contribution patterns in Alaska's *federal* elections illustrate why the people of Alaska have reason to be concerned about excessive out-of-state influence. Again, this is not unique to Alaska: "The average member of the House receive[s] just 11 percent of all campaign funds from donors inside the district." Anne Baker, *The more outside money politicians take, the less well they represent their constituents*, Wash. Post, Aug. 7, 2016, http://wapo.st/2bv8MEk; *see also* Brittany H. Bramlett *et al.*, *The Political Ecology of Opinion in Big-Donor Neighborhoods*, 33 Pol. Behav. 565, 565-66 (2011) (finding that donors in 5% of nation's ZIP codes contributed 77% of campaign funds in 2005-2006 election cycle), http://bit.ly/2uXabwL.[13]

In Alaska's recent federal elections, out-of-state contributions dwarf in-state contributions. In the races for Alaska's statewide House seat and its two U.S. Senate seats in the

[13] To be sure, there are differences between out-of-state contributions to state legislators, who legislate primarily on local or state matters, and out-of-state contributions to congressional representatives, who legislate on matters that affect the entire country as well as matters affecting their district and state constituents. But federal election contributions nonetheless provide a useful indicator for comparison.

2012, 2014 and 2016 election cycles, out-of-state contributions dominated overwhelmingly.[14] For example, in the competitive 2014 Senate election, then-Sen. Mark Begich received 77% of his contributions from out-of-state; contributions from California and New York exceeded the total from Alaska.[15] His opponent in that race, (now Sen.) Dan Sullivan, received 86% of his contributions from out-of-state; he received more contributions from the Cleveland metropolitan area than Anchorage.[16] In essence, Alaska's 2014 Senate election was funded mostly by people who live (far) outside its political community.

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[14] *See* Ctr. for Responsive Politics, *Alaska Senate 2016 Race: Geography Data*, https://www.opensecrets.org/races/geography?cycle=2016&id=AKS2; *Alaska Senate 2014 Race: Geography Data*, https://www.opensecrets.org/races/geography?cycle=2014&id=AKS1; *Alaska District 01 2016 Race: Geography Data*, https://www.opensecrets.org/races/geography?cycle=2016&id=AK01; *Alaska District 01 2014 Race: Geography Data*, https://www.opensecrets.org/races/geography?cycle=2014&id=AK01; *Alaska District 01 2012 Race: Geography Data*, https://www.opensecrets.org/races/geography?cycle=2012&id=AK01 (all last visited July 25, 2017).

[15] Ctr. for Responsive Politics, *Sen. Mark Begich, Contributions by Geography,* https://www.opensecrets.org/politicians/geog.php?cycle=2014&cid=N00029901&type=I (last visited July 25, 2017).

[16] Ctr. for Responsive Politics, *Sen. Dan Sullivan, Contributions by Geography*, https://www.opensecrets.org/politicians/geog.php?cycle=2014&cid=N00035774&type=I (last visited July 25, 2017).

In fact, *all* of Alaska's recent federal elections are dominated by out-of-state money.[17] Consequently, the people of Alaska could reasonably fear that, without limits such as Alaska Stat. § 15.13.072(e), their state elections would become similarly dominated, threatening the state's democratic self-government.

CONCLUSION

This court should acknowledge that, in addition to the anti-corruption interest, Alaska's non-resident contribution limit also serves the compelling interest of preserving state self-government, and affirm the judgment below.

Respectfully submitted this 26th day of July 2017.

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[17] The lowest percentage of out-of-state contributions from any victorious candidate in those elections was 63% (Rep. Don Young, 2016). *See supra* note 14.

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Date: 7/26/2017

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/s/ Ronald A. Fein
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July 26, 2017