

Case No. A-07-000010

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IN THE SUPREME COURT FOR THE STATE OF NEBRASKA

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STATE OF NEBRASKA, AND THE NEBRASKA STATE PATROL,

Appellees,

v.

ROBERT HENDERSON,

Appellant

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APPEAL FROM THE DISTRICT COURT OF  
LANCASTER COUNTY, NEBRASKA

Honorable Jeffre P. Chevront, District Judge

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**BRIEF OF AMICUS CURIAE  
ANTI-DEFAMATION LEAGUE**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading organizations fighting bigotry, discrimination, and anti-Semitism. ADL is a pro-civil rights organization that takes specific concrete steps to combat hate, including monitoring hate groups and extremists and sharing its expertise with law enforcement. In fact, in 2007 over 20,000 members of law enforcement attended ADL’s trainings or received ADL’s publications about hate groups, extremists, and hate crimes. ADL also authored the model hate crime statute which was tested and approved by the Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

ADL believes that for the Nebraska State Patrol (“NSP”) to effectively combat hate crimes and ensure the public’s trust, it must zealously protect its reputation as a professional organization that protects Nebraskans of all races. ADL is concerned that if the NSP were to reinstate Robert Henderson (“Henderson”) as a Nebraska State Trooper, despite Henderson’s known affiliation with a white supremacist, racist organization, the public trust in NSP would be undermined. Based upon ADL’s unique perspective as a national civil rights organization that is also engaged in the fight against hate groups and that works collaboratively with national, state, and local law enforcement to combat discrimination and hate-motivated criminal activity, ADL urges this Court to uphold the district court’s decision vacating the Arbitrator’s reinstatement of Henderson.

## **STATEMENT OF JURISDICTION**

ADL joins in the Appellees’ Statement of Jurisdiction.

## STATEMENT OF THE CASE

ADL joins in the Appellees' Statement of the Case, including the Nature of the Case, the Issues Tried in Court Below, How the Issues were Decided, and the Standard of Appellate Review.

## PROPOSITIONS OF LAW

I. Law enforcement entities have a significant government interest in regulating the speech activities of its officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.

*Omaha Police Union Local 101 IUPA v. City of Omaha*, 274 Neb. 70 (2007).

*Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983).

II. Public employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment, but employees lose the statutory protection of the Act if the conduct or speech constitutes "flagrant misconduct," which includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline, and would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and batter or racial discrimination.

*Omaha Police Union Local 101 IUPA v. City of Omaha*, 274 Neb. 70, 86 (2007).

III. Applying the *Pickering v. Board of Education*, 391 U.S. 563 (1968) balancing test, the first question in analyzing a First Amendment claim asserted by a public employee is whether the employee's speech is a matter of public concern.

*Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

IV. A public employee has the burden of establishing that his speech was of a public concern.

*Tindle v. Caudell*, 56 F.3d 966, 970 (8th Cir. 1995).

V. The court must balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

*Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

VI. The primary focus of the balancing test is to determine whether the speech undermines the effective functioning of the public employer's enterprise, and a showing of actual disruption is not always required.

*Tindle v. Caudell*, 56 F.3d 966, 971, 972 (8th Cir. 1995).

*Barnard v. Jackson Co., Mo.*, 43 F.3rd 1218 (8th Cir. 1995).

VII. There are six factors to use in weighing the competing interests of the public employer and employee, and the weight given to any factor depends on the case: 1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and 6) whether the speech impeded the employee's ability to perform his or her duties.

*Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995).

*Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993).

IX. The burden is on the Government to make two showings: (1) that the employee's activity was likely to interfere with Government operations; and (2) that the Government acted in response to that likely interference and not in retaliation for the content of the speech.

*Locurto v. Giuliani*, 447 F.3d 159, 175-176 (2nd Cir. 2006).

X. Where a government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations.

*Locurto v. Giuliani*, 447 F.3d 159, 179 (2nd Cir. 2006).

XI. The effectiveness of a police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, evenhandedly, and without bias, and if the police department treats a segment of the population of any race with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.

*Pappas v. Giuliani*, 290 F.3d 143, 146-147 (2nd Cir. 2002).

XII. The type of repercussions that would likely result if respect for the law enforcement was eroded includes: citizens are less likely to report crimes, offer testimony as witnesses, rely on the police for protection, and believe that arrests are made without regard to race, and citizens will have the belief that the opinions in the racist materials are the views of the police department's officers, not just those of the publisher of such materials.

*Pappas v. Giuliani*, 290 F.3d 143, 147 (2nd Cir. 2002).

XIII. The KKK is a violent, criminal, and racist organization and the sheriff's office is a law enforcement agency, the members of which are subject to greater First Amendment restraints than most other citizens.

*McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985).

XIV. Efficient law enforcement requires mutual respect, trust, and support, and mere membership in an organization without specific advocacy of any illegal conduct of the organization is constitutionally protected.

*McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985).

XV. A law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties.

*McMullen v. Carson*, 754 F.2d 936, 940 (11th Cir. 1985).

*Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998).

#### **FACTS**

ADL joins in the Appellees' Statement of the Facts submitted in this matter.

#### **ARGUMENT**

ADL concurs with the Appellees that Nebraska Courts may vacate the decision of an arbitrator on the grounds that it violates the public policy of the State. Henderson contends that the State failed to establish a well-defined, dominant public policy which he violated and that the District Court's defined public policy was a personal observation and nothing more. Reply Brief for Appellant at 4 and 11. ADL disagrees and asserts that there are two well established public policies which would serve as grounds for vacating the Arbitrator's award of reinstatement: 1) instilling public confidence in the law enforcement institution, generally, and in the NSP, specifically; and 2) opposing discrimination based on race, sex, creed or national origin, especially by the State's own employees. Moreover, contrary to Henderson's allegation that

failing to reinstate him will violate his rights to free speech and association, the State did not violate his rights. As a law enforcement officer, he became a member of a racist organization, participated in that organization through postings on its website, and solicited other klansmen and klanswomen to contact him through his personal address. NSP had no choice but to weigh the State's interest against his alleged free speech rights and terminate his employment. This Court should affirm the District Court's order overturning the Arbitrator's decision.

I. REINSTATEMENT OF HENDERSON VIOLATES THE STATE'S WELL-ESTABLISHED PUBLIC POLICY OF INSTILLING PUBLIC CONFIDENCE IN THE LAW ENFORCEMENT INSTITUTION.

This Court has been clear that law enforcement entities have a "significant government interest in regulating the speech activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and *instill public confidence in the law enforcement institution.*" *Omaha Police Union Local 101 IUPA v. City of Omaha*, \_\_\_N.W.2d\_\_\_, 274 Neb. 70, 82 (2007) citing *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983) (Emphasis Added). Having a police officer who maintains a dual identity as the "White knight in Ne" and who aligns himself with KKK interests, is against the public interest, especially given the well known history of the KKK. If Henderson is permitted to return to the NSP, it will undermine rather than instill public confidence in the NSP and the State.

A. Henderson's Comments and Conduct Constitute "Flagrant Misconduct" Under *Omaha Police Union*, and Are Not Protected.

Given that Henderson's claims arise from a collective bargaining agreement governed by the Industrial Relations Act and that Henderson's postings related to work related activities, the Court should evaluate Henderson's free speech and association claims utilizing the same legal standard it articulated in *Omaha Police Union*. This Court held:

[P]ublic employees belonging to a labor organization have the protected right to engage in conduct and make remarks, including publishing statements through the media, concerning wages, hours, or terms and conditions of employment. However, employees lose the statutory protection of the Act if the conduct or speech constitutes "flagrant misconduct." Flagrant misconduct includes, but is not limited to, statements or actions that (1) are of an outrageous and insubordinate nature, (2) compromise the public employer's ability to accomplish its mission, or (3) disrupt discipline. It would also include conduct that is clearly outside the bounds of any protection, including, for example, assault and battery or racial discrimination.

274 Neb. at 86. ADL is not asking this Court to reject the Arbitrator's factual findings; rather, ADL asks this court to find that the Arbitrator "should have applied a different standard. . . to resolve protected speech issues" in this public sector employment case. *Id. at 72.*

Taken individually or separately, Henderson's conduct rose to the level of "flagrant misconduct" as defined in *Omaha Police Union*: his membership in a racist organization affiliated with the KKK, his postings on its website (those identifying himself as a law enforcement officer in Omaha, Nebraska), his solicitation of other klansmen and klanswomen to contact him through his e-mail or phone, and his belief in "God Country Race." It is simply beyond dispute that a police officer who aligns himself with the KKK's racist ideologies compromises the ability of his employer to administer justice and will be disruptive of discipline.

1. Henderson's Statements Compromise the NSP's Ability to Accomplish its Mission.

The Arbitrator found that Henderson held "personal philosophies that would disgust many citizens of Nebraska. . . ." (T153). The Arbitrator noted that Henderson felt antagonism toward non-whites and indicated that "[w]hen Trooper Robert Henderson chose to join the Knightsparty.com website in June of 2004, he set forth a series of events that will likely have repercussions for the Nebraska State Patrol and his own life and career for many years to come." (T134, 136). The Arbitrator acknowledged that Henderson's conduct did not instill public confidence in the NSP,

because he could "not begin to fathom the level of disgust, fear, or apprehension that citizens who are members of groups traditionally victimized by various factions of the KKK would feel when pulled over for a traffic stop (or otherwise detained) by a member of a police agency that is known to have employed, or employ a member (or former member) of the KKK." (T134-135). Henderson's conduct compromises the ability of the NSP to accomplish its mission of equal law enforcement protection and service to all citizens. Indeed, Henderson readily admitted that he knew that his racial insensitivity, bigotry, or bias, either on the job or in his personal life, would not be looked on favorably by the public (E3[15,12-14]:5, Vol. II) (E3[15,20]:5, Vol. II); would create a perception that he was a prejudiced person (E3[15,21-22]:5, Vol. II); and would tarnish or ruin the reputation of the NSP (E3[15,27-28]:5, Vol. II). The Arbitrator's conclusions demonstrate that Henderson's conduct violated Nebraska's public policy and that his conduct compromised the NSP's ability to fulfill its mission.

## 2. Henderson's Statements and Conduct Disrupt Discipline.

After the discovery of Henderson's membership in the KKK, Henderson's presence within the NSP has had a negative impact on the Patrol, its Command Staff and Henderson's fellow officers. The Arbitrator determined that NSP's command staff expressed their "disgust. . . regarding [Henderson's] decision to align himself with the Ku, Klux, Klan, through his KnightsParty.com membership" and "that most police officials," including two of Henderson's witnesses, "would have the hair on their neck stand on end were they to learn one of their officers was a member of the KKK." (T151) (E2,374-77;381-84:5, Vol. II). The record is clear that the reinstatement of Henderson would disrupt discipline within the NSP by command staff and other law enforcement officers feeling disgust for Henderson.

### 3. Henderson's Statements and Conduct amount to Racial Discrimination.

There is no dispute that Henderson was a member of an organization that advocates discrimination. While Henderson would argue that mere membership in an organization does not rise to the level of discrimination and that he "never engaged in racially discriminatory acts," (Brief of Appellants at 23, 25), the facts in this case belie those assertions. Contrary to Henderson's assertions, the record demonstrates that Henderson took several overt actions, which taken together, rose to the level of discriminatory conduct: joining the KKK, paying membership dues, receiving a password and username, accessing secured parts of the organization's web site, and making web postings soliciting other klanswomen and klansmen to contact him (especially those in law enforcement). If the Court finds that such actions do not rise to the level of discriminatory conduct, ADL points the Court's attention to one very specific act: Henderson pulled over Mr. Patton, an African-American man, and Mr. Patton claimed harassment. (T122) As Henderson admitted in his web posting, before he made the stop, Henderson believed that Mr. Patton was bothering his fiancé and that her and Mr. Patton's supervisors would not take action because Mr. Patton was black. (T126). While Henderson may have had a legitimate reason to give Mr. Patton a warning, the evidence, including Henderson's own words in his postings, suggest that his decision to pull Mr. Patton over was pre-textual—a clearly overt act of discrimination based on the fact that Mr. Patton was black. When NSP determined that Henderson had not engaged in any misconduct in this instance, the record shows that the NSP was unaware that he belonged to a racist organization, that he held the belief in "God Country and Race" and that "whites [were] loosing their rights slowly," or most importantly, that Henderson's purpose in pulling Mr. Patton over was to send a message to him

to stay away from his fiancé. Based upon the record, the ADL asserts that Henderson's actions were discriminatory.

B. The NSP Did Not Violate Henderson's Free Speech And Association Rights Because Henderson's Conduct And Comments Are Not Protected Under *Pickering v. Board of Education*.

Even if this Court determines that the *Omaha Police Union's* "flagrant misconduct" standard does not apply in this instance, the record nonetheless supports the conclusion that Henderson's conduct undermines the State's ability to instill public confidence in the NSP under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The first question is whether the employee's speech is a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 142 (1983). Henderson bears the burden of establishing that his speech was of a public concern. *Tindle v. Caudell*, 56 F.3d 966, 970 (8th Cir., 1995) (wearing black face at an off duty party which included co-workers was not speech of a public concern and therefore not protected). Contrary to the legal conclusion of the Arbitrator, Henderson failed to meet his burden of establishing that his speech relating to the specific incident with Mr. Patton and his fiancé was a matter of public concern.

Assuming for the sake of argument that Henderson's postings and conduct are a matter of public concern, the Court must then balance the interests of the employee, "as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The Eighth Circuit has explained that "the primary focus of the test is to determine 'whether the speech undermines the effective functioning of the public employer's enterprise.' " *Tindle*, 56 F.3d at 971 citing *Barnard v. Jackson Co., Mo.*, 43 F.3rd 1218 (8th Cir. 1995)). A showing of actual disruption is not required. *Tindle*, 56 F.3d at 972. Several

jurisdictions have faced the issues presented before this court and concluded that the governmental entity was within its rights to discipline and to terminate the offending law enforcement personnel. See e.g. *Tindle*, 56 F.3d at 970; *Locurto v. Giuliani*, 447 F.3d 159 (2nd Cir. 2006); *Pappas v. Giuliani*, 290 F.3d 143 (2nd Cir. 2002); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Dible*, supra .

Henderson attempted to discount *Tindle's* value (Reply Brief of Appellants at 12); however, Henderson failed to acknowledge the fact that the court in *Tindle* evaluated Tindle's actions under the second prong of the test to determine whether his conduct (wearing a blackface at a Halloween party) undermined the functioning of the department. The court in *Tindle* identified six factors to use in weighing the competing interests of the employer and employee:

"1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and 6) whether the speech impeded the employee's ability to perform his or her duties."

*Id.* at 971 citing *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir.1993), *cert. denied*, 510 U.S. 1072 (1994). The weight given to any one factor depends on the circumstances of each case. *Id.* Here, applying *Tindle's* factors, it is clear that Henderson's actions undermined the functioning of the NSP.

In addition to *Tindle*, the Second Circuit recently reached a similar conclusion in *Locurto*, *supra*. Therein, the court held that "the burden is on the Government to make two showings: (1) that the employee's activity was likely to interfere with Government operations and (2) that the Government acted in response to that likely interference and not in retaliation for the content of the speech." 447 F.3d at 175-176. In analyzing part one of the test, the *Locurto* court noted that

the government needed only to establish that the speech "threatened" to interfere with the government's operations. *Id.* at 178. The court then explained that "where a government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations." *Id.* at 179. The court in *Locurto* went on to hold that the City of New York legally terminated several police and firefighters for being involved in a Labor Day Float which included many racially derogatory comments. In the instant situation, Henderson's actions went far beyond participating in a parade float, as he became a member of a racist organization, made racist remarks on the website (which was accessible to those willing to pay \$35.00), acknowledged that the situation with Mr. Patton as being racially motivated in part, and solicited other klansmen and klanswomen in law enforcement to contact him.

Henderson argues that "even under the analysis of *Pappas v. Giuliani*, 290 F.3d 143 (2<sup>nd</sup> Cir. 2002), the State's arguments fail." Reply Brief for Appellants at 14. ADL strongly disagrees. In *Pappas*, the Second Circuit held that a police officer's free speech rights were not violated when the police department terminated him for his anonymous dissemination of racist materials. *Id.* The *Pappas* court noted that the:

effectiveness of a police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. . . . [internal citation omitted]. If the police department treats a segment of the population of any race. . . with contempt, so that the particularly minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.

*Id.* at 146-47. The court listed an abundance of repercussions that would likely result if respect for the law enforcement was eroded including: citizens are less likely to report crimes, offer testimony as witnesses, rely on the police for protection, and believe that arrests are made

without regard to race. *Id.* at 147. The court emphasized that one of the most damaging repercussions when a police officer disseminated racist materials was the belief among the community that the opinions in the racist materials are the views of the police department's officers, not just those of the publisher of such materials. *Id.*

The Eleventh Circuit reached a similar conclusion in *McMullen*, *supra*, when it held that a county sheriff's office did not violate the First Amendment rights of a clerical employee when the sheriff's office discharged that employee for actively participated in an organization that was committed to violent, criminal, and racist conduct, antithetical to enforcement of laws by state officers. In *McMullen*, a clerical employee in the sheriff's office was fired after he was interviewed on a locally televised news broadcast as a recruiter for the KKK. In finding that McMullen's First Amendment rights had not been violated, the Eleventh Circuit noted two critical factors: (1) the KKK is a violent, criminal, and racist organization and (2) the sheriff's office is a law enforcement agency, the members of which are subject to greater First Amendment restraints than most other citizens. 754 F.2d at 938. Henderson focuses on the fact that in applying the *Pickering* balancing test, the *McMullen* court explained that on the one hand "efficient law enforcement requires mutual respect, trust, and support," but on the other hand, "mere membership in an organization without specific advocacy of any illegal conduct of the organization is constitutionally protected." *Id.* at 939. However, the court in *McMullen* held that the employee was not a passive member in the KKK. *Id.* at 939. The court noted: "a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the

ability of law enforcement agency to perform effectively its public duties." *Id.* at 940. See also, *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998) (holding that the Illinois Department of Corrections' interests in maintaining safety and avoiding racial violence outweighed a terminated employee's interests in associating with and promoting the KKK). The court further held there was no reason for the sheriff's department to wait for a disruption in the office and destruction of working relationship before terminating the employee. *Id.* See also, *Weicherding* (holding that Department of Corrections need not wait until a riot breaks out before acting to quell a dangerous situation, including suspending or terminating a prison guard's employment for promoting a KKK rally).

Henderson attempts to distinguish these cases by asserting that he was a passive member. Henderson was not a passive member. Rather, Henderson joined an affiliate of the KKK, acknowledged his loyalty to the racist organization, posted comments on the racist organization's website (including a reference to the incident about Mr. Patton whom he pulled over in a pretextual and racist manner and a declaration that "[w]hites are loosing their rights slowly" and that he believed in "God Country Race"), identified himself as a law enforcement officer in Omaha, Nebraska, and solicited other klansmen and klanswomen with his same beliefs to contact him. (T121, T125, T126). Henderson also provided his email address rhender@cox.net, which appears to be derived from his name "Robert Henderson," to everyone with access to the internet site. Applying the standards set forth in *Pickering*, the State did not violate Henderson's First Amendment rights when it terminated his employment with the NSP. Henderson's volitional actions, which he acknowledged should be discreet because of his law enforcement job, erode the public's confidence in the equal law enforcement protection to all citizens, regardless of race.

Accordingly, this Court should affirm the district court's holding overturning Henderson's reinstatement.


II. REINSTATEMENT OF HENDERSON VIOLATES THE WELL ESTABLISHED PUBLIC POLICY OF THE STATE AGAINST CONDONING ACTS OF DISCRIMINATION.

ADL concurs with the District Court and the Appellees that there is a well established public policy in the State of Nebraska against discrimination. For the reasons set forth in Section I, A, 3 above, ADL asserts that Henderson's actions rose to the level of discriminatory conduct and, as such, violate the State's well established public policy against discrimination.

**CONCLUSION**

Based upon the above, ADL respectfully requests that the Court sustain the District Court's decision vacating the Arbitrator's award.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two true and correct copies of the above and foregoing brief was sent by regular United States mail, postage prepaid, on this 12<sup>th</sup> day of February, 2007, to the following:

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A handwritten signature in black ink, appearing to read 'Tom Stine', is written over a horizontal line. The signature is cursive and extends to the right of the line.

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