Congress of the United States
Washington, DC 20515

July 11, 2016

Honorable James B. Comey
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535

Dear Director Comey:

We write with regard to the FBI's decision to not recommend Secretary Clinton's case for prosecution for failure to safeguard classified national security information. Secretary Clinton clearly placed our nation's secrets in peril and your decision to not refer the case for prosecution has created a cloud over our nation's justice system. No one is above the law and the American people deserve a more robust explanation for your decision to not recommend criminal charges against the former Secretary.

You stated Tuesday at your press conference, "In looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts." It did not take long, however, for us to perform a simple legal search to find a case[1] where a Marine was found guilty and sentenced to confinement, forfeiture of pay for three years, and a reduction to the lowest enlisted grade, for failing to report that he mistakenly took classified documents from his workplace after he cleaned out his desk. While this particular Marine, out of fear, failed to disclose that he had thrown these documents into his gym bag, even though the court found that he was planning on destroying them once he arrived at his new duty station, his conviction under 18 U.S.C. § 793(f) for "gross negligence" was upheld by the U.S. Court of Appeals for the Armed Forces. The court's reasoning is illustrative:

> The purpose of the federal espionage statute is to protect classified documents from any unauthorized procedures such as "remov[al] from its proper place of custody" regardless of the means of removal, and it was appellant's gross negligence that was the proximate cause of the classified document's removal. We stated in *United States v. McGuinness* that "it is clear that Congress intended to create a hierarchy of offenses against national security, ranging from 'classic spying' to merely losing classified materials through gross negligence."[2]

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[1] *U.S. v. Roller*, 42 M.J. 264 (1995).
[2] *Id.* at 266 (citations omitted).

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The military court's reasoning went directly to the point on the Marine's culpability – "gross negligence that was the proximate cause of the classified document's removal." The Espionage Act was passed by Congress with the understanding that various standards of culpability can be attributed to one who has failed to protect national security secrets. Even though the Marine in the foregoing case did not intend to harm national security, the retention of classified documents in an unsecure manner was sufficient to establish "gross negligence."

Following your press conference, former Attorney General Michael Mukasey said, "I was particularly distressed to hear that he [Director Comey] said there was no intention to violate the law when the laws involved don't require an intention to violate the law." You seem to have picked a new standard out of thin air – "extreme carelessness" – to describe the actions of Secretary Clinton and her staff. We do not understand the need to have cited any lack of intent on the part of Secretary Clinton when the law sets forth a felony violation for something less than intentional conduct – "gross negligence."

On Tuesday, the FBI assumed the role of prosecutor and not simply investigator and took the unprecedented act of proclaiming that no reasonable prosecutor would bring such a case. Based on the perception that a decision has been made by the FBI that has seemingly ignored facts that the FBI itself found in its own investigation, we have additional questions that are aimed at ensuring that the cloud which now hovers over our justice system is at least minimally pierced:

1) As a former prosecutor, please explain your understanding of the legal difference between actions performed with "gross negligence" and those done "extremely carelessly." How did you determine that "extreme carelessness" did not equate to "gross negligence?"

2) You said that no reasonable prosecutor would decide to prosecute the Clinton case on the evidence found by FBI agents during the Bureau's investigation over the past year. We have multiple former prosecutors in Congress, and it is not far-fetched for many of us to envision a successful prosecution of someone for doing far less than that which was committed by Secretary Clinton. Is your statement not an indictment and prejudgment against any Assistant United States Attorney who is now tasked with reviewing the evidence you presented Tuesday? In your judgment, does it not follow that you would think that a prosecutor who moved forward with the instant prosecution of Secretary Clinton would be "unreasonable?"

3) Are you aware of any internal opinions by FBI agents or management who were intimately aware of the Clinton investigation which differed from your eventual decision to not recommend the case for prosecution?

4) You mentioned that Top Secret Special Access Programs (SAPs) were included in emails sent and received by Secretary Clinton. SAP material is some of the most highly classified and controlled material of the U.S. Government. If an agency of the U.S. Government were to encounter similar information from a foreign adversary, it would be extremely valuable data for us to exploit. Did the FBI assess how SAP information, due

to its controlled nature, ever made it onto unclassified systems that were not air-gapped or physically blocked from outside Internet access? Is it not "gross negligence" to permit such SAP data to leave the confines of the most protective and secure governmental enclaves? Or even "intentional" conduct that allowed that to happen?

5) You mentioned that this investigation stemmed from a referral from the Inspector General of the Intelligence Community to determine whether classified information had been transmitted on an unclassified personal system. Following your investigation, it is clear that Secretary Clinton transmitted classified information on an unclassified system. Secretary Clinton on multiple occasions has said that she did not send or receive classified information or information marked as classified.[3] In light of your decision to also not refer a false statements charge under 18 U.S.C. § 1001 for prosecution, we can only presume that Secretary Clinton admitted during her interview with your agents that she, in fact, sent and received emails containing classified information. Please confirm.

6) Are you aware of whether any deleted emails which the FBI was able to forensically recover from Secretary Clinton's servers pertained to the Clinton Foundation?

7) You stated Tuesday, "Given that combination of factors, we assess it is possible that hostile actors gained access to Secretary Clinton's personal e-mail account." Is the FBI's Counterintelligence Division still involved in determining the level of damage related to possible exploitation of Secretary Clinton's or her associates' email accounts and other communications?

8) If the FBI performed a background check on an applicant for employment with the FBI or elsewhere in the U.S. Government, and that applicant engaged in conduct committed by Secretary Clinton, would a security clearance ever be granted to that person?

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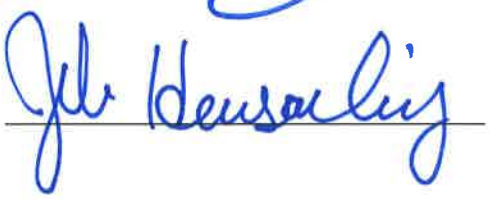
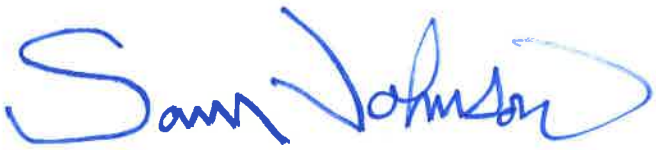
[3] *See* Eugene Kiely and Robert Farley, FactCheck.org, "Clinton's Handling of Classified Information," July 5, 2016. The following statements were made by Secretary Clinton, as cited by FactCheck.org, a non-partisan, non-profit project of the Annenberg Public Policy Center of the University of Pennsylvania.

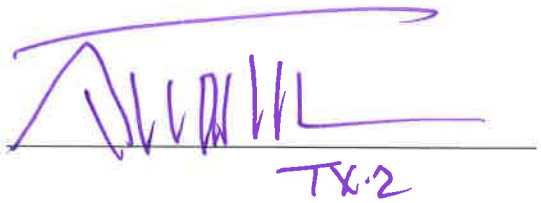
> ***Clinton, March 10, 2015****: I did not email any classified material to anyone on my email. There is no classified material. So I'm certainly well-aware of the classification requirements and did not send classified material.*
> ***Clinton at a Democratic debate, Feb. 4****: I never sent or received any classified material.*
> ***Clinton at a Democratic debate, March 9:*** *But here's the cut to the chase facts. I did not send or receive any emails marked classified at the time.*
> ***Clinton on CBS' "Face the Nation," May 8****: There was never any material marked classified that was sent or received by me.*
> ***Clinton on NBC's "Meet the Press," July 3****: I never received nor sent any material that was marked classified.*

We look forward to your prompt response.

Sincerely,



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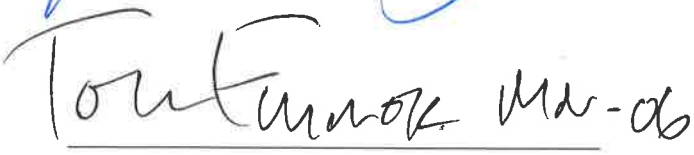
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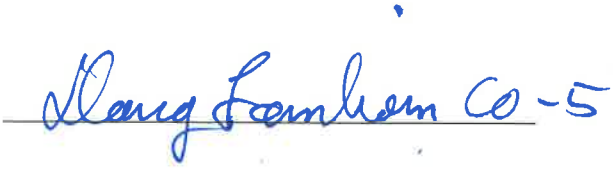
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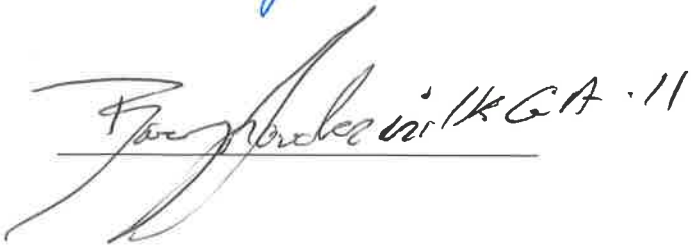
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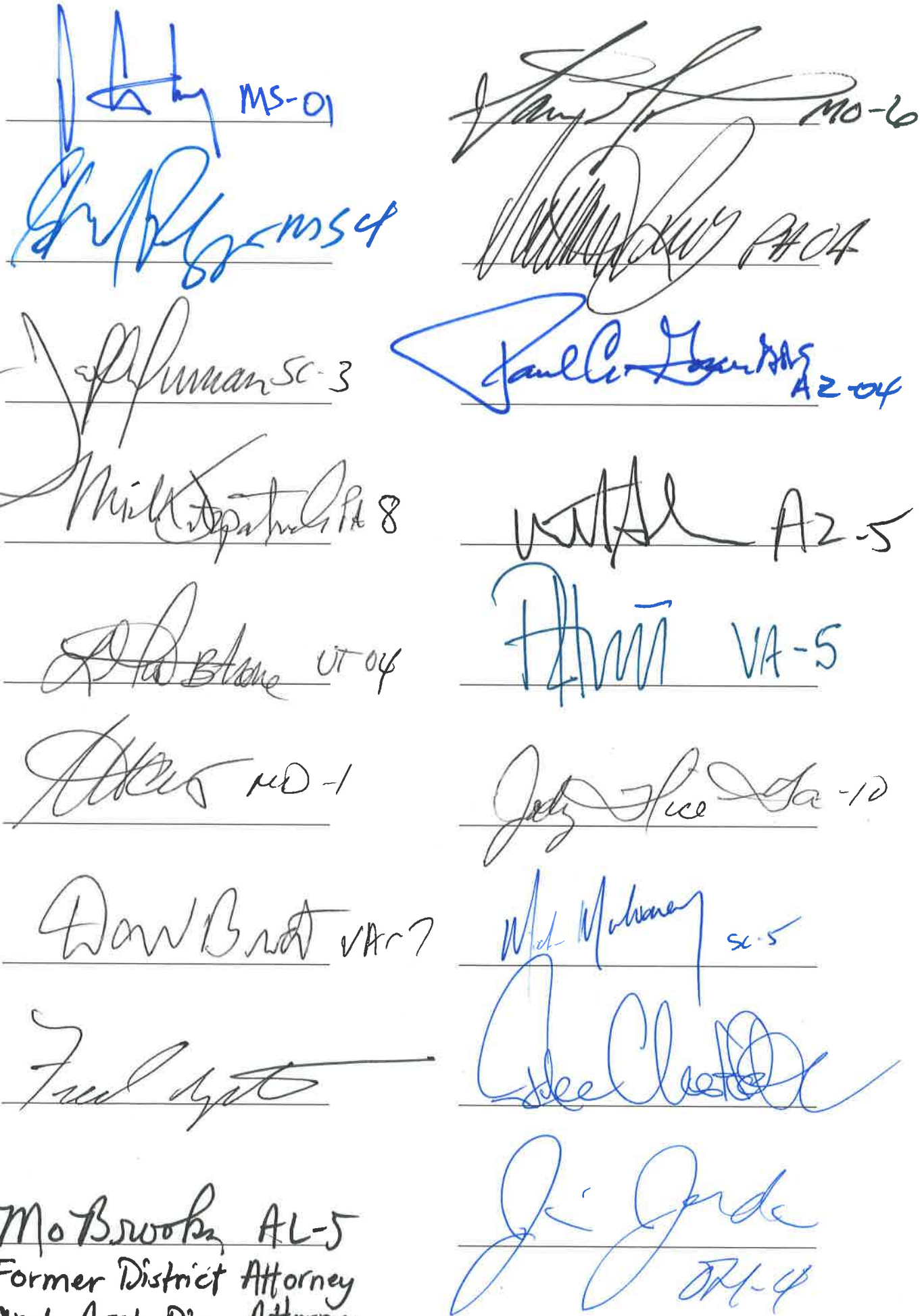

Mo Brooks AL-5
Former District Attorney
and Asst. Dist. Attorney

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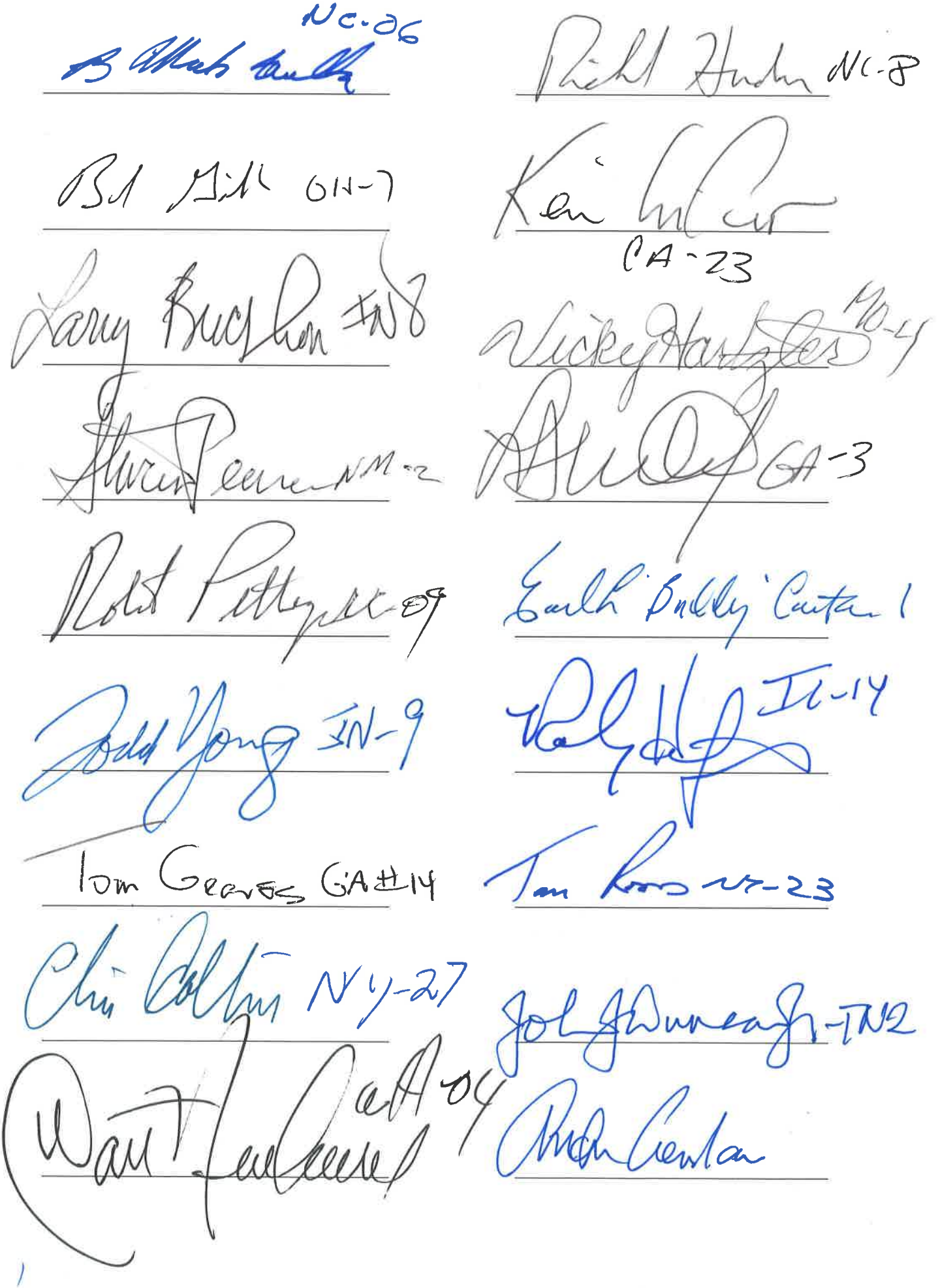
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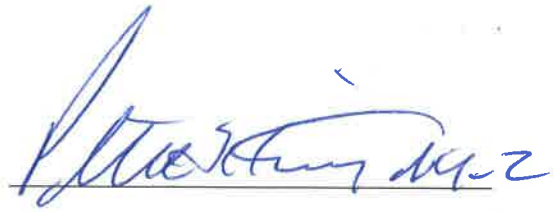
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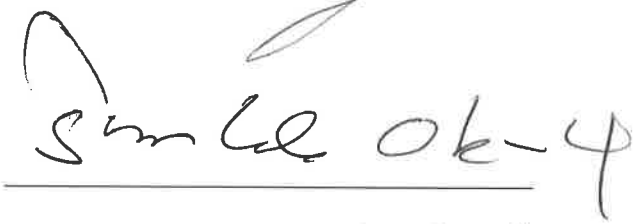
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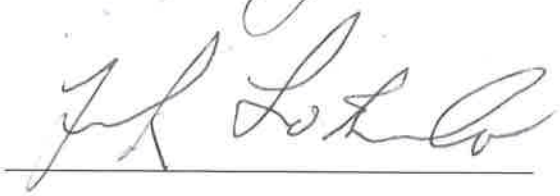

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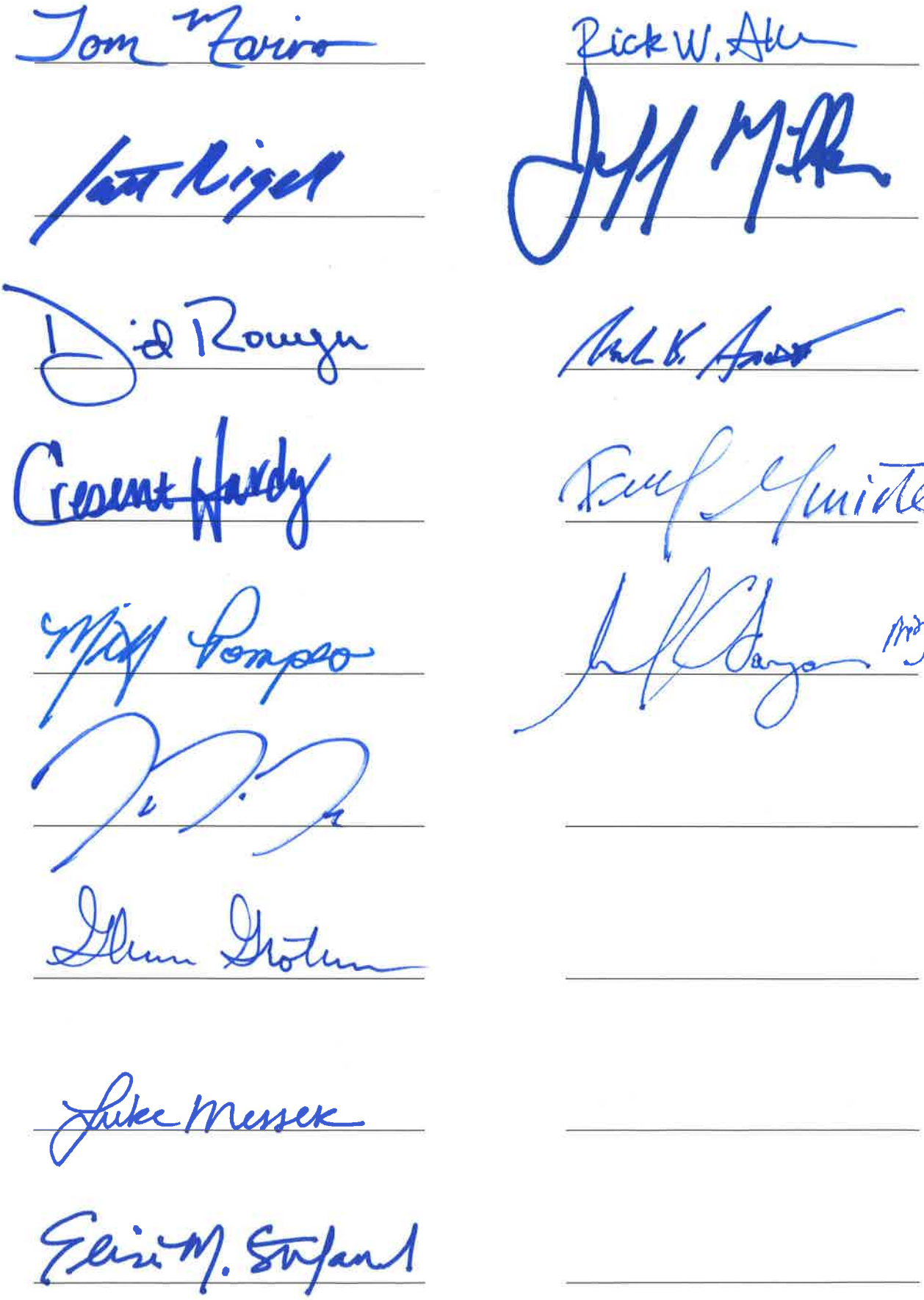
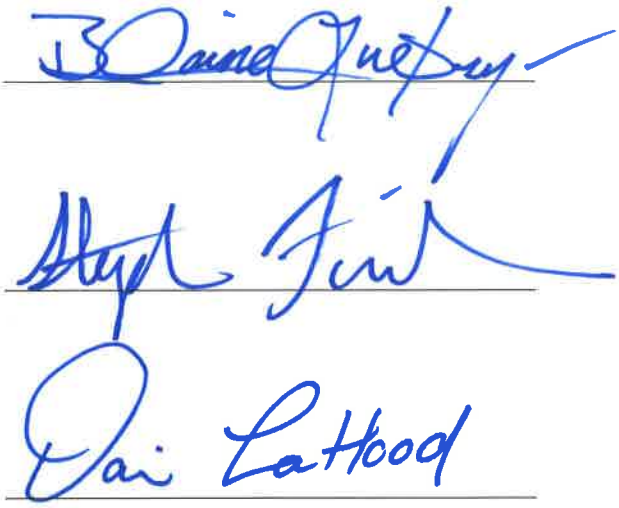
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