VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 24th day of August, 2020.

Present: All the Justices

Linda Park, et al., Petitioners,

against Record No. 200767

Ralph S. Northam, Governor of Virginia, et al., Respondents.

Upon a Petition for a Writ of Mandamus

Petitioners, Linda Park, owner of a hibachi restaurant in Fredericksburg, Virginia, and Jon Tigges, owner of an event venue in Loudoun County, Virginia, petition for a writ of mandamus directed to Governor Ralph Northam and the Commonwealth's Commissioner of Health, Norman Oliver, declaring various orders the respondents have issued in response to the COVID-19 pandemic "void and of no effect" and directing Commissioner Oliver to inform his subordinates to cease enforcing those orders. For the following reasons, we dismiss the petition.

In March 2020, the respondents began issuing Executive Orders ("EO") and Orders of Public Health Emergency ("HO") to combat COVID-19. In EO Fifty-One, Governor Northam declared a state of emergency. In the weeks that followed, the respondents issued several orders limiting public and private gatherings, restricting restaurant and retail businesses, directing schools to cease in-person instruction, and requiring most recreational and entertainment businesses to temporarily close. Subsequent orders began a multi-phase reopening process. When the petition was filed on June 9, 2020, Park's restaurant, Fujiya House, was located in an area that had entered Phase Two of reopening under the provisions of Amended EO Sixty-Five and Amended HO Six (collectively, "Amended EO 65"). Tigges' event venue, Zion Springs, located in the "Northern Virginia Region," was in Phase One of re-opening on June 9 under the provisions of Third Amended EO Sixty-One and Third Amended HO Three (collectively, "Amended EO 61"). Under those Phase One restrictions, Zion Springs could not host in-person gatherings of more than ten people. Pursuant to Amended EO 65, the Northern Virginia Region

entered Phase Two on June 12, 2020. The Phase Two restrictions increased the limit on in-person gatherings to no more than fifty people, with exceptions not applicable here. Pursuant to Code § 44-146.17, Amended EO 65 made violating this gathering limit a Class 1 misdemeanor.

Amended EO 65 also included a provision broadly governing the operation of restaurants. The provision allowed restaurants to provide delivery, take-out, and indoor and outdoor dining so long as they (1) limited occupancy to fifty percent of the lowest occupancy load provided on their certificate of occupancy, (2) limited party size to no more than fifty patrons, (3) seated parties at least six feet apart, (4) substantially eliminated self-service food items, (5) closed bar seats and congregating areas except to through traffic, (6) required employees who interact with customers to wear face coverings, (7) employed certain sanitation protocols, and (8) adhered to the Guidelines for All Business Sectors, including the specific guidance for restaurant and beverage services, which were incorporated into the EO by reference. Amended EO 65 stated (1) the restaurant provision was promulgated pursuant to Commissioner Oliver's powers under Code § 32.1-13, (2) the Virginia Department of Health ("VDH") had authority to enforce the provision, and (3) violating the provision was "a Class 1 misdemeanor pursuant to [Code] § 32.1-27." Amended EO 65 provided that Amended EO 61 expired on June 12, 2020.

On July 1, 2020, pursuant to EO Sixty-Seven and HO Seven (collectively "EO 67"), Governor Northam and Commissioner Oliver ordered all of Virginia into Phase Three of re-opening. In relevant part, EO 67 allows indoor and outdoor gatherings of up to 250 people. In connection with this limit, EO 67 places special restrictions on attending "religious services" that, among other things, require non-family members to be seated six feet apart and practice social distancing at all times and require food and drink to be distributed in single-serving containers. As in the previous orders, violating EO 67's gathering limit or its requirements for religious services is a Class 1 misdemeanor pursuant to Code § 44-146.17.

Further, EO 67 allows restaurants to provide in-person dining without a capacity limit but otherwise substantially retains the mandates of Amended EO 65 regarding the operation of restaurants. EO 67's restrictions on restaurants are "issued pursuant to [Code] § 32.1-13" and

violating them is a Class 1 misdemeanor.[1] Amended EO 67 provides that Amended EO 65 expired on June 30, 2020.

In addition to the phased re-opening orders, Tigges' and Park's customers are subject to the requirements of EO Sixty-Three and HO Five (collectively, "EO 63") requiring, with certain exceptions, "[a]ll patrons in the Commonwealth aged ten and over" to wear a face covering when "entering, exiting, traveling through, and spending time inside" certain enumerated locations, including food and beverage establishments, entertainment or recreation businesses, and "[a]ny other indoor place shared by groups of people who are in close proximity to each other."[2] EO 63 allows patrons to remove face coverings for numerous reasons, including participation in religious rituals and while eating or drinking. VDH has authority to enforce EO 63, which is "issued pursuant to [Code] § 32.1-13," and violating EO 63 is a Class 1 misdemeanor pursuant to Code § 32.1-27.

Park complains that, because Fujiya House provides "hibachi-style dining" and has no outdoor seating, it has had "no practical business" since the "original shutdown order." Park asserts it is critical for her restaurant's continued existence that she be able to serve patrons within her restaurant at its hibachi tables. Park further alleges that, although Fujiya House should have been permitted to operate at fifty percent capacity under Amended EO 65's Phase Two restrictions on restaurants, the Rappahannock Health Department ("RHD") refused to allow Fujiya House to serve customers "in the traditional, hibachi-style." Instead, RHD mandated that Fujiya House only serve food prepared in its kitchen. Park asserts that, due "solely" to this "meaningless," "ad hoc," and "arbitrary" distinction between food prepared on a hibachi grill and food prepared in a kitchen, Fujiya House remained "closed indefinitely" even though it should have been allowed to operate under the loosened restrictions of Phase Two. Park contends RHD is a sub-agency of VDH and is thus under Commissioner Oliver's control. Further, the petition proclaims generally that EO 63's requirement that patrons of businesses

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[1] Effective July 31, 2020, Governor Northam imposed additional restrictions, including lower capacity and gathering limits, in the Eastern Region, which includes Virginia Beach, Chesapeake, Norfolk, Suffolk, Portsmouth, Hampton, Williamsburg, Newport News, Poquoson, James City County, and York County. Amended EO 68 and HO Eight. These additional restrictions do not apply to petitioners' businesses.

[2] EO 63 also requires that certain employees of "essential retail businesses" wear face coverings, but this provision does not apply to the petitioners' businesses.

wear face coverings at certain times has "an immediate and chilling effect on service businesses, which rely on person-to-person contact."

Tigges asserts that, due to the orders' limiting the size of in-person gatherings to ten and then fifty people and the uncertainty regarding what restrictions Governor Northam and Commissioner Oliver might impose in the future, Zion Springs is "closed indefinitely" and is losing current and future revenue because its clients cannot reliably plan events. Tigges adds that, even if Zion Springs were to host events, "the nature of most events would be badly compromised" by the face-covering requirement because it provides no "exceptions regarding ceremonies, photographs, performers, and areas where there is substantial space for distancing." In short, Tigges claims he "has been put out of business."

Tigges submits also that his closing Zion Springs has prevented unspecified clients from exercising their right to engage in constitutionally protected speech. To support this assertion, Tigges maintains that a majority of Zion Springs' clients were "exercising their constitutionally protected right to engage in the act of matrimony in a manner of their choosing[, and] [o]ther clients . . . conducted retreats at which political speech was delivered." Tigges notes also that violating the gathering limit is a Class 1 misdemeanor and he claims that neither he nor his clients can predict how Governor Northam or Commissioner Oliver will exercise their discretion to enforce the limit, thus "effectively ban[ning] all public gatherings."

Against this regulatory backdrop and the alleged resulting injuries to their respective businesses and clients, the petitioners claim Governor Northam's and Commissioner Oliver's orders were unlawful for numerous reasons. First, the petitioners assert the gathering limit imposed by Amended EO 61, and, by apparent extension, the gathering limit in Amended EO 65, were "facially unconstitutional" because they restricted lawful assemblies in a manner that was not narrowly tailored to protect public health. Petitioners argue also that, even if the executive orders were not facially unconstitutional, they exceeded "the powers given to the executive" because, "[a]t a high level," they (1) suspended laws or their execution without legislative consent, (2) took more property than is necessary for the public use without due process, and (3) contravened the proscription of Va. Const. art. I, § 6 that Virginia citizens "cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law which they have not, in like manner, assented for the public good." The petitioners contend Amended EO 61 further violated the

Virginia Constitution by enacting a local, special, or private criminal law to prohibit assembling with ten or more people only in the Northern Virginia Region.

Additionally, the petitioners suggest Governor Northman has misused his power to respond to emergencies under Code § 44-146.17 because the relevant orders have been in force for "an unlawful amount of time, without any attempt at legislative ratification" and they exceed in scope and effect the actions the statute permits a governor to take when responding to the threat of a communicable disease. Finally, the petitioners claim Governor Northam and Commissioner Oliver have improperly exercised their respective statutory emergency powers by not complying with the Virginia Administrative Process Act, Code §§ 2.2-4000 to -4031. As relief, the petitioners request

> a writ of mandamus, directed to Respondents Dr. Ralph S. Northam and Dr. M. Norman Oliver, holding that the orders referenced above are *ultra vires* and otherwise in violation of the Virginia Constitution, and are . . . therefore void and of no effect; directing respondent Oliver to inform all of his subordinates within the Commonwealth's Department of Health to cease all actions designed to enforce the Orders, and for such other and further relief as this Court deems necessary and proper.

Considering the allegations in the petition, we conclude first that the petitioners do not have standing to challenge the face-covering requirements of EO 63. "The concept of standing concerns itself with the characteristics of the [individuals] who file[] suit" and their interest in the outcome, and the requirements of standing apply to petitioners seeking writs of mandamus. *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc.*, 273 Va. 107, 120 (2007) (internal quotation marks and citations omitted); *see Moreau v. Fuller*, 276 Va. 127, 134 (2008) (applying standing requirements to Commonwealth Attorney's application for a writ of mandamus in a matter involving an ongoing criminal prosecution). To have standing to challenge governmental action, a party must allege facts indicating he or she has suffered a "particularized" or "personalized" injury due to the action. *Wilkins v. West*, 264 Va. 447, 460 (2002); *Howell v. McAuliffe*, 292 Va. 320, 330-33 (2016) ("It is incumbent on petitioners to allege facts sufficient to demonstrate standing" and discussing *Wilkins*). It is not enough to simply "tak[e] a position and then challeng[e] the government to dispute it," a party must demonstrate a ripe justiciable controversy by alleging an "actual or potential injury in fact based on present rather than future or speculative facts." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va.

354, 361, 365-66 (2017) (internal quotation marks omitted). In other words, to establish their standing to seek mandamus relief, the petitioners had to identify a specific statutory right to relief or a direct — special or pecuniary — interest in the outcome of this controversy that is separate from the interest of the general public.[3] *Goldman v. Landsidle*, 262 Va. 364, 372-73 (2001). The purpose of this personalized injury requirement is to prevent courts from improvidently answering "abstract questions that may be interesting and important to the public but lack any real errors injuriously affecting the complaining litigants." *Howell*, 292 Va. at 335 (internal quotation marks omitted).

In relevant part, EO 63 potentially requires Park's and Tigges' guests to wear face coverings at certain times.[4] The only allegation in the petition that conceivably contends this requirement affects Park or her business is the assertion that it has "an immediate and chilling effect on service businesses, which rely on person-to-person contact." This general and conclusory speculation, offered without any factual support, is insufficient to establish Park's standing. *Lafferty*, 293 Va. at 361 (to establish standing, a complaint must allege an actual or potential injury in fact based on "present rather than future or speculative facts") (internal quotation marks omitted). Tigges fares no better. To Park's bare suggestion of a chilling effect, he adds only that if he were to host events, the face covering requirement would "badly compromise[]" them because its exceptions are not broad enough. Like Park, Tigges offers no facts to support this assertion, and his bald concern that clients may be less satisfied with his services cannot afford him standing. *See Lafferty*, 293 Va. at 361-62 (explaining that, standing alone, a student's factually unsupported assertion of fear of discipline for violating his school's revised anti-discrimination policy did not establish an "injury sufficient for standing" to challenge the policy's legality). Additionally, the petition does not attempt to establish that any "compromise" in the quality or nature of the events Tigges hosts might translate to a more

[3] Although the petitioners assert the respondents have transgressed several statutes, they do not claim any of those statutes "gives them a legally enforceable right to have a court compel the [respondents] to perform [their] duties in the manner they request." *Goldman*, 262 Va. at 374.

[4] Although Amended EO 61's and Amended EO 65's restrictions applicable to restaurants required that certain employees wear face coverings, Park does not assert the requirement injured or might injure her business.

concrete injury to Tigges' or his clients' legally protected interests.[5] *See Livingston v. Va. Dept. of Transp.*, 284 Va. 140, 154 (2012) ("A party has standing if it can show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest.") (internal quotation marks omitted).

Similarly, Park has not demonstrated her standing to challenge Amended EO 65.[6] The only relevant injury Park asserts is that RHD's refusing to allow her to serve customers "in the traditional, hibachi-style" was the "sole cause" of her restaurant's indefinite closure. Missing, however, is any allegation of fact demonstrating RHD's hibachi ban was mandated by or stemmed from its enforcing, either correctly or incorrectly, the relevant orders or the various guidelines they incorporate. *See Wilkins*, 264 Va. at 460 (to establish standing, a party must allege facts indicating she has suffered a "particularized" or "personalized" injury due to the challenged governmental action). Instead, Park asserts only that RHD prevented her from utilizing her hibachi tables despite that, under Amended EO 65, she should have been allowed to operate at fifty percent capacity. Park does not explain when or under what circumstances she learned she could not serve "hibachi-style" nor does she describe what, if any, rationale or authority RHD provided for the prohibition. *See Avery v. Beale*, 195 Va. 690, 706 (1954) ("[T]he person questioning the constitutionality of a legislative enactment must clearly show that in its operation he has been injured thereby."). Moreover, while Amended EO 65 included provisions broadly controlling the operation of restaurants and required they adhere to numerous incorporated guidelines, neither the orders nor the guidelines prohibited, or even mentioned,

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[5] Tigges' affidavit, provided for the first time in reply to the respondents' motion to dismiss, states that, due in part to the face covering requirements, two clients canceled weddings after the Phase Three restrictions became effective under EO 67. These new allegations do not bear on our consideration of Tigges' standing because the petitioners have not sought or been granted leave to amend the original petition. *See* Rule 1:8 ("No amendments shall be made to any pleading after it is filed save by leave of court."). Moreover, the wedding cancellations Tigges identifies occurred at least several weeks after the petition was filed and, thus, could not retroactively cure his lack of standing. *See Kocher v. Campbell*, 282 Va. 113, 119 (2011) (explaining an action filed by a party who lacks standing is a legal nullity and, accordingly, a standing defect cannot be retroactively cured by events that occur after an action is filed); *Wells v. Lorcom House Condominiums' Council of Co-Owners*, 237 Va. 247, 253-54 (1989) (where a plaintiff had no standing to institute an original action, a plaintiff with standing cannot be later substituted to save the action).

[6] Although the petition also challenges Amended EO 61, Amended EO 65 governed Park's restaurant when the petition was filed.

hibachi service.[7] *See* Code § 8.01-386 (governing when, in a civil case, a court may take judicial notice of the law, statutory or otherwise). Considering this absence and the wide-ranging nature of the regulations on restaurants, any inference of a connection between the actions of RHD or its agents and the challenged orders that might be raised by their mere correlation or coincidence does not sufficiently establish Park's standing.[8] *See Lafferty*, 293 Va. at 363 (refusing to consider a speculative inference to establish standing); *Fleenor v. Dorton*, 187 Va. 659, 665 (1948) (explaining that a court could not infer a fact necessary to obtain a writ of mandamus where the fact was not alleged); *see also Hertz v. Times-World Corp.*, 259 Va. 599, 607 (2000) (mandamus is an extraordinary remedy that will be denied in doubtful cases).

Further, although the ten-person limit on the size of gatherings that applied to Tigges' business when the petition was filed provided him standing to challenge Amended EO 61, we conclude his claims must be dismissed as moot because there is no indication he continues to suffer an injury stemming from the current or expired gathering limits. *See Cupp v. Bd. of Sup'rs of Fairfax Cnty.*, 227 Va. 580, 590 (1984) (holding nursery owners had standing to challenge the constitutionality of a local ordinance because "[t]hey had a direct stake in [the] ordinance that would curtail or control what they could sell in their business"). Mandamus is an "extraordinary" remedy that lies only to "compel a public official to perform a purely ministerial duty imposed upon the official by law." *Morrissette v. McGinniss*, 246 Va. 378, 382 (1993). Because mandamus is prospective, it cannot "undo," "vacate," "correct," or "revise" a public official's completed actions, no matter how erroneous, nor does it lie to simply "inquire and

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[7] In their motion to dismiss, the respondents inform us for the first time that VDH's website includes "Phase Two Requirements and Best Practices" for restaurants. According to the respondents, those requirements and practices include that "[c]ustomers may not sit at hibachi style tables that are actively being used for cooking" but that "customers may be seated at these tables for service as long as food preparation is not occurring at that table." Although this prohibition does not appear in Amended EO 65 or the guidelines it incorporates, neither the petitioners nor the respondents explain how or under whose authority the reference to hibachi style tables came to be on VDH's website. Accordingly, it does not affect our assessment of Park's standing.

[8] As noted above, the orders challenged in the petition have expired and been replaced by EO 67. Because Park's failure to establish her standing leaves us without jurisdiction to consider her claims, we do not reach the question of whether those claims have been rendered moot in whole or in part. *See Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 226 (1988) ("Standing to maintain an action is a preliminary jurisdictional issue . . . .").

adjudicate." *In re Commonwealth of Va.*, 278 Va. 1, 9-10 (2009); *Morrissette*, 246 Va. at 382. The Court will deny a petition as moot where the requested relief would be ineffective or nugatory due to an intervening change in the law or other circumstances. *See Flanagan v. Central Lunatic Asylum*, 79 Va. 554, 555 (1884) (holding mandamus petition was moot where a change in the law made it beyond the power of respondents to comply with the writ even if it was awarded).

We conclude Tigges' challenge to Amended EO 61 and Amended EO 65 is moot because, first, the Northern Virginia Region where Zion Springs is located is no longer subject to the allegedly unconstitutional "special" restrictions. Moreover, although a change in a challenged law will not moot the controversy if the new law continues to harm the complainant in "the same fundamental way," *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 662 (1993), EO 67's 250-person limit is twenty-five times greater than the ten-person limit in effect when the petition was filed and five times greater than the subsequent fifty-person limit. Despite these significant increases, Tigges has not amended his claims.

Additionally, the relevant facts alleged in the petition, which include only that Zion Springs is "a venue for large gatherings," do not indicate the current limit on gatherings impedes Tigges' or his customers' ability to hold weddings or other events. Tigges does not assert otherwise in reply to the motion to dismiss. Instead, Tigges merely posits that the weddings he hosts are now subject to EO 67's regulations specific to gatherings that qualify as "religious services."[9] Tigges suggests those religious service restrictions will operate to "ban" dancing or sitting with non-household members and require that any food or drink be served in single-serving containers. However, Tigges has not explained or proffered any facts to support his assumption that Governor Northam or anyone with authority to enforce the religious service restrictions might regard a wedding held at his private event venue as subject to those restrictions. *Cf. Lafferty*, 293 Va. at 361 (fear of discipline or sanction for violating a policy is not, standing alone, a sufficient "injury" to establish standing). Finally, although Tigges' affidavit in reply to the motion to dismiss notes his two clients who recently cancelled weddings

[9] Tigges asserts also that the continued existence of the face covering requirement sustains a live controversy but, as discussed above, Tigges failed to establish his standing to challenge that requirement.

did so in part because of uncertainty regarding whether Virginia might return to lower limits on the size of gatherings, Tigges' current or potential clients' declining to hold events because of their subjective fear of such a development is too indefinite and attenuated to maintain a live controversy.

We also decline Tigges' request to consider the legality of the expired orders because Governor Northam has suggested he might reinstate their restrictions should conditions warrant. *See Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 452 (2013) (although it should be applied sparingly, the "capable of repetition, yet evading review" exception to the mootness doctrine allows the Court to decide issues in disputes that are "short-lived by nature"). As we have previously stated when denying mandamus relief, we will not "anticipate prospective conditions which may never arise in order to declare a law unconstitutional." *Lehman v. Morrissett*, 162 Va. 463, 470 (1934).

Even were we willing to do so, Tigges' claims would not offer an appropriate occasion because the petition does not seek relief that is available by mandamus and that would clearly relieve Tigges from the limits on the size of gatherings. As noted above, mandamus lies only to "compel a public official to perform a purely ministerial duty imposed upon the official by law," and "[a] ministerial act is one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Moreau*, 276 Va. at 135. Accordingly, a mandamus petitioner must identify a clear, specific duty a respondent has neglected and seek to force him or her to fulfill that duty. *See Cartwright v. Commonwealth Transp. Com'r of Va.*, 270 Va. 58, 63 (2005) (mandamus will issue only when there is a clear and specific legal right to enforce or a duty which ought to be performed); *Legum v. Harris*, 205 Va. 99, 102 (1964) ("It is essential to the issuance of a writ of mandamus that the legal right of the plaintiff . . . to the performance of the particular act, sought to be compelled, be clear, specific, and complete.") (internal quotation marks omitted).

Although mandamus is forward looking and does not lie to "undo" completed actions, the petitioners' prayer for relief first requests we do just that by holding Governor Northam's and Commissioner Oliver's relevant orders invalid. The prayer culminates by asking only that we direct Commissioner Oliver to instruct his subordinates not to enforce the orders. However, there is no indication in the allegations or argument before us that, even if we commanded

Commissioner Oliver as the petitioners demand, Tigges would be effectively relieved from any current or future limit on gatherings. As described above, the challenged orders each specifically state that certain provisions, like the restrictions on restaurants and other types of businesses, were issued and criminally enforceable pursuant to Commissioner Oliver's emergency powers under Code §§ 32.1-13 and -27. The violation of other restrictions, such as those on the size of gatherings, was made a misdemeanor under Governor Northam's Code § 44-146.17 power. Despite this explicit demarcation, the petitioners supply no facts or explanation indicating Commissioner Oliver or his subordinates in VDH have any authority or discretion to enforce criminal laws generally or, more specifically, orders Governor Northam issues or makes subject to criminal sanction under Code § 44-146.17(1). *See Bd. of Sup'rs of Amherst Cnty. v. Combs*, 160 Va. 487, 496 (1933) (a mandamus petitioner "must show a clear legal right to have the duty sought to have coerced, *done in the manner specified in the application and by the defendant.") (internal quotation marks omitted and emphasis in original).* Without such, it is at best unclear whether directing Commissioner Oliver to command his subordinates not to enforce the relevant orders could provide any actual relief to Tigges. *See id.* at 496-97 ("If it appear that the writ would be ineffectual to accomplish the object in view, either from the want of power of the respondent to perform the act required, or on the part of the court granting the writ to compel its performance, the court will refuse to interfere.") (internal quotation marks omitted); *see also Fleenor*, 187 Va. at 666 ("While reasonable opportunity should be afforded a litigant to secure an adjudication of his rights on the pleadings before the court, and sub[s]tance should be looked to rather than form, it was not the duty of the court, of its own motion, to thrust upon the litigant a different procedure and relief from that which he relied on and sought.").

Accordingly, the petition is dismissed.

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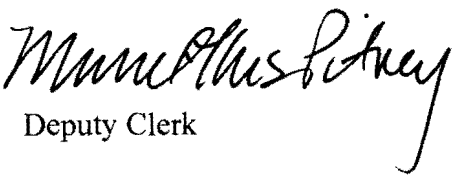
By: 

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