

<p>ANTONIO FUSTER and BRIANNA DEVINE,</p> <p>Plaintiffs/Petitioners,</p> <p>v.</p> <p>TOWNSHIP OF CHATHAM and GREGORY LaCONTE, in his official capacity as records custodian,</p> <p>Defendants/ Respondents.</p>	<p>Supreme Court of New Jersey, Docket No. _____</p> <p>On Petition for Certification from a Final Judgment of the Appellate Division, Docket No. A-1673-22</p> <p><u>A Civil Action</u></p> <p>Sat Below:</p> <p>Hon. Lisa Rose, J.S.C. Hon. Morris G. Smith, J.S.C. Hon. Lisa Perez Friscia, J.S.C (t/a)</p>
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PETITION FOR CERTIFICATION BRIEF AND APPENDIX

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STATEMENT OF THE MATTER INVOLVED

In late 2020, after George Floyd was murdered and the public demanded police reform, the Legislature passed the Body-Worn Camera Law (BWCL), N.J.S.A. 40A:14-118.3 to -118.5, which requires most law enforcement officers to wear a body-worn camera (BWC). The published opinion below is the first Appellate Division decision since the BWCL's enactment to address the right to access BWC videos under the Open Public Records Act (OPRA). Respectfully, the decision ignores the plain language of two sections of the BWCL in favor of applying a "judicial privilege" that is inapplicable to this case. As a result, the BWCL's guarantee of access to BWC videos, both to the public as well as to the individuals who appear on those videos, is significantly undermined.

Plaintiffs are a married couple seeking a BWC video from Chatham. The video depicts Plaintiff Antonio Fuster's report to police that his child accused an adult male relative of sexual misconduct. Although Chatham gave Plaintiffs detailed police investigation reports in response to OPRA requests—documents that are exempt as criminal investigatory records—it refused to grant them access to the BWC video of Fuster simply speaking to the police. Plaintiffs seek the video because the reports do not accurately reflect what Fuster told police about the relative, who was not criminally charged.

Plaintiffs have a right to access this video pursuant to two distinct provisions of the BWCL. First, N.J.S.A. 40A:14-118.5(k) provides that the “subject” of a BWC video “shall be permitted to review the [BWC] recording in accordance with the provisions of [OPRA].” This access is guaranteed to “effectuate” the statutory right of “any member of the public who is a subject of the [BWC] recording” to request a three-year retention period for the video. Ibid.; N.J.S.A. 40A:14-118.5(j)(2)(e). Second, N.J.S.A. 40A:14-118.5(l) states that “only the following [BWC] recordings shall be exempt from public inspection” under OPRA. It lists four categories of videos, none of which apply.

Despite finding that Fuster was a subject of the BWC recording who invoked his right to review the video and agreeing that the video did not fall within any of the enumerated exemptions, the Appellate Division nonetheless held that Plaintiffs were not entitled to access the BWC video under OPRA. It held that the video was exempt pursuant to case law that has “long-established that information received by law enforcement regarding an individual who was not arrested or charged is confidential and not subject to disclosure.” (PCa2)¹ (citing N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Off., 447 N.J. Super. 182, 204 (App. Div. 2016) (hereinafter “BCPO”). The cases referred to

¹ PCa = Plaintiff’s Petition for Certification Appendix

are old judicial opinions finding that law enforcement investigative records were not accessible under OPRA's predecessor, the Right to Know Law (RTKL), and are highly confidential.

The panel also concluded that Plaintiffs are not entitled to the BWC recording under the common law right of access. Despite finding that Plaintiffs have a "strong personal interest in disclosure," (PCa22), the panel concluded the common law balancing test weighed against access because doing so would undermine "law enforcement efforts" and discourage other witnesses from coming forward. *Ibid.* It found that the "interest of the accused cannot be ignored" because that individual "would face irremediable public condemnation" if the "uncharged accusations" were made public. (PCa23).

QUESTIONS PRESENTED

1. Whether OPRA's general exemptions apply to a BWC video where the BWCL expressly states that "only" the four enumerated categories of videos "shall be exempt from public inspection"?
2. Whether OPRA's general exemptions can trump the BWCL's clear language that the subject of the video shall be permitted to review the video to effectuate the right to request a longer retention period?
3. Whether the purported "law enforcement privilege" discussed in

BCPO applies under the facts of this case where the victim’s father seeks only his own verbatim complaint to police and where victims are entitled to access their own records under statutory law?

4. Whether Plaintiffs can access the video under the common law?

**ERRORS COMPLAINED OF AND
COMMENTS CONCERNING THE OPINION**

I. The Appellate Division Erred by Ignoring the BWCL’s Plain Language, Which Expressly States That Only Four Categories of BWC Videos Shall Be Exempt from Public Access and Guarantees the Subject of a BWC Video the Right to Review the Video

A. The BWCL

In November 2020, the Legislature enacted the BWCL, L.2020, c. 128 and L.2020, c. 128, which requires every uniformed officer to wear a BWC except in limited circumstances. N.J.S.A. 40A:14-118.5(c). The BWCL also regulates the retention of BWC videos, as well as public access to them.

Generally, all BWC videos are subject to a minimum 180-day retention period. N.J.S.A. 40A:14-118.5(j). However, N.J.S.A. 40A:14-118.5(j) lists the types of BWC videos that must be maintained for a longer period of time. Among other circumstances, a BWC recording “shall be retained for not less than three years if voluntarily requested by: . . . (e) any member of the public who is a subject of the body worn camera recording[.]” N.J.S.A. 40A:14-118.5(j)(2)(e).

“To effectuate subparagraph (e) . . . the member of the public . . . shall be permitted to review the body worn camera recording in accordance with the provisions of [OPRA] to determine whether to request a three-year retention period.” N.J.S.A. 40A:14-118.5(k).

Regarding public access to BWCs, the BWCL states:

Notwithstanding that a criminal investigatory record does not constitute a government record under [OPRA], only the following body worn camera recordings shall be exempt from public inspection:

- (1) [BWC] recordings not subject to a minimum three-year retention period or additional retention requirements pursuant to subsection j. of this section;
- (2) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to paragraph (1) of subsection j. of this section² if the subject of the body worn camera recording making the complaint requests the body worn camera recording not be made available to the public;
- (3) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (a), (b), (c), or (d) of paragraph (2) of subsection j.³ of this section; and

² This provision requires a three-year retention period if it shows an encounter in which a complaint against the officer has been filed.

³ These provisions require three-year retention periods where a law enforcement officer or his supervisor requested it for enumerated reasons.

- (4) [BWC] recordings subject to a minimum three-year retention period solely and exclusively pursuant to subparagraph (e), (f), or (g) of paragraph (2) of subsection j. of this section if a member, parent or legal guardian, or next of kin or designee requests the [BWC] recording not be made available to the public.

[N.J.S.A. 40A:14-118.5(l) (emphasis added).]

B. The Panel Erred in Ignoring Fuster’s Statutory Right to Review the BWC Video as a Subject of the Video

The panel recognized that Fuster “had standing to request review of the video as a member of the public who was the ‘subject of the [BWC] video.’”⁴ (PCa13) (citing N.J.S.A. 40A:14-118.5(k)). Nonetheless, it denied Fuster his statutory right to review the footage. According to the panel, subsection (k) guaranteed Fuster the right to review the footage only “in accordance with the provisions of [OPRA],” which it concluded means that OPRA’s general exemptions could apply. It then applied OPRA to find that the video is exempt pursuant to BCPO, 447 N.J. Super. 182. Respectfully, this holding ignores the plain language of the BWCL and the legislative intent.

N.J.S.A. 40A:14-118.5(j)(2)(e) states that a BWC video shall be retained

⁴ This term means “any law enforcement officer, suspect, victim, detainee, conversant, injured party, or other similarly situated person who appears on the body worn camera recording and shall not include a person who only incidentally appears on the recording.” N.J.S.A. 40A:14-118.5(a).

for at least three years if the subject of the video requests such a retention period. “To effectuate” that right to seek the longer retention period, Subsection (k) provides that the subject of the video “shall be permitted to review” the BWC video pursuant to OPRA. By never mentioning the “to effectuate” language in its opinion, the panel ignored Subsection (k)’s singular purpose to enable subjects of videos to make informed decisions as to whether to request the longer retention schedule by watching the videos. The panel treated the subject of the video on par with any member of the public who could file an OPRA request. Clearly the Legislature intended to give the subject of the video special access, otherwise there would be no need to include Subsection (k) in the BWCL.

A common sense reading of Subsection (k) is that “pursuant to the provisions of [OPRA]” simply means the subject is entitled benefit from OPRA’s procedures to access the video. This includes receiving a response within seven business days and having a cause of action if access is not granted. Subsection (k) is not an invitation for an agency to cite an exemption within OPRA to deny access,⁵ as the Appellate Division erroneously concluded.

C. The Panel Erred by Denying Access to a BWC Video That Falls Outside the “Only” Exemptions Permitted by the BWCL

⁵ A provision of OPRA might justify redacting a video, so long as the video is still subject to public access. If a video shows gory images, nudity, or someone’s driver’s license, OPRA’s privacy provision would likely justify blurring.

The plain language of the BWCL law expressly states that “only the following body worn camera recordings shall be exempt from public inspection.” N.J.S.A. 40A:14-118.5(l). The fourth category of BWCs is relevant in this case because the BWC video is subject to a three-year retention period solely because Fuster, as the subject of the video, requested that it be maintained for three years.⁶ But because Fuster has not requested that the video be confidential, the video is not exempt from disclosure.

The panel found that “it is undisputed that the four enumerated exemptions under N.J.S.A. 40A:14-118.5(l) do not apply.” (PCa13). After citing three paragraphs of case law explaining that a statute’s plain language controls, the panel then ignored the BWCL’s plain language and concluded the BWC is exempt from disclosure anyway. Without much reasoning, it concluded:

Again, we note that subsection (l) of N.J.S.A. 40A:14-118.5, which provides the exemptions, is preceded by subsection (k), which requires even a member of the public who is subject of a recording or a subject’s parent or legal guardian “to review the [BWC] recording in accordance with the provisions of [OPRA].” N.J.S.A. 40A:14-118.5(k). Had the Legislature intended to preclude the application of OPRA’s confidentiality exemption or the judicially recognized

⁶ Because Chatham refused to fulfill Fuster’s OPRA request for the video to effectuate his right to request the longer retention period, Plaintiffs were concerned the video might be deleted. Thus, both Plaintiffs repeatedly invoked the BWCL and stated they wanted the longer retention period.

confidentiality exemption, it would have provided for such an exclusion. . . . We also observe the Legislature did not amend OPRA to limit its application to the BWCL.

[(PCa15)].

The Legislature did not need to amend OPRA or state that other confidentiality provisions could not apply because it clearly stated in N.J.S.A. 40A:14-118.5(l) that “only” the enumerated list of BWC videos “shall be exempt from public inspection.” To the extent the Appellate Division found a conflict between OPRA and the BWCL, the BWCL controls because it is the more specific law. State v. Anicama, 455 N.J. Super. 365, 381 (App. Div. 2018) (“It is a well-established precept of statutory construction that when two statutes conflict, the more specific controls over the more general.”). OPRA governs access to broad categories of government records generally, but by passing the BWCL the Legislature “specifie[d] when video footage from a body camera is exempt from the State’s [O]pen [P]ublic [R]ecords [A]ct.” Sponsor’s Statement to A. 4312 (Aug. 24, 2020).⁷

⁷ The Sponsor’s Statement also makes it clear that the Legislature intentionally treats BWC videos differently than dash camera recordings, which this Court has found to be exempt. Sponsor’s Statement to A. 4312 (“Recent case law has held that police video recordings are exempt from public disclosure under the State’s open public records act because they pertain to criminal investigations. Notwithstanding this law, the bill specifies that video footage from a body worn camera is not subject to public inspection only when . . .”).

D. The Panel Erred in Citing Old RTKL Cases and BCPO

The Appellate Division found the BWC video in this case is rendered confidential pursuant to judicial case law that held that “information received by law enforcement regarding an individual who was not arrested or charged is confidential and not subject to disclosure.” (PCa2) (citing BCPO, 447 N.J. Super. at 204). But, importantly, the cases upon which BCPO⁸ relies are simply decisions applying the RTKL and finding that certain law enforcement records did not meet the definition of “public record” because they were not required by law to be made. See, e.g., Nero v. Hyland, 76 N.J. 213, 225 (1978) (“We hold that character investigations made at the behest of the Governor as chief executive in connection with a contemplated nomination are not public records under the [RTKL.]”). Had any of those law enforcement records been subject to the RTKL, then the “privilege” discussed in those cases would not have exempted them. See N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 19 (1992) (recognizing the legislature could make records subject to the RTKL even if they were subject to the privilege).

Here, the Legislature made it clear in passing the BWCL that “only”

⁸ BCPO involved records such as complaints and police reports that were criminal investigatory records and not subject to OPRA.

certain categories of BWC videos “shall be exempt from public inspection.” In this case, although the privilege discussed in BCPO might apply to other types of law enforcement records relating to the investigation into Plaintiffs’ relative,⁹ it cannot apply to a record that the Legislature has expressly made public. The Appellate Division erred in allowing outdated judicial case law to override the Legislature’s decision to make BWC videos public.

Making matters worse, the Appellate Division failed to recognize that the “privilege” discussed in the old RTKL cases is not absolute. See Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204-05 (App. Div. 2008). “[W]here there are present considerations of fundamental fairness or other considerations of a compelling nature such as outweigh the imperative of the interests of the State in protecting and maintaining the confidentiality of the information, an exception is made and disclosure may be had.” River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 544 (App. Div.), certif. denied, 81 N.J. 58 (1979).

The policy reasons underlying the purported qualified privilege simply do not apply to this case. In BCPO, the court explained the policy considerations

⁹ It might have applied to the police reports which summarized the interview with the male relative because those reports are criminal investigatory records. Defendants produced those reports, however. Plaintiffs do not understand why the detailed police reports could be released to them, but not Fuster’s conversation with the police.

as follows: (1) “Confidentiality is vital not only because it serves to protect government resources of information, but also because it enhances the effectiveness of investigative techniques and procedures.” 447 N.J. Super. at 203 (quoting Nero, 76 N.J. at 225); (2) “[E]ven inactive investigatory files may have to be kept confidential in order to convince citizens that they may safely confide in law enforcement officials.” Ibid.; and (3) “[T]he grant of confidentiality protects the privacy interest of the individual who, lacking an opportunity to challenge allegations in court, would face irremediable public condemnation.” Id. at 204.

Here, Plaintiffs are not the target of the investigation seeking to learn more about an investigation into their conduct. See State v. Marshall, 148 N.J. 89 (denying access where criminal defendant sought investigative files about his own case); Nero, 76 N.J. 213 (denying access to a report of a “four-way” investigation into Nero, which resulted in him not being appointed to a public office). They are not seeking investigative reports like in those cases—they are simply seeking a copy of their own complaint, which exists in video form.

Additionally, unlike BCPO, this is not a request by a newspaper or third party seeking to learn whether an individual has been accused of a crime or investigated for criminal conduct. Plaintiffs know that the male relative was

accused of criminal conduct because they filed the report. They also know that there was a criminal investigation and the outcome.

Finally, secrecy is not necessary “in order to convince citizens that they may safely confide in in law enforcement officials.” BCPO, 447 N.J. Super. at 203. Plaintiffs are the individuals who confided in the police, and they seek the record precisely because the police did not accurately document their complaint in the police report. No victim will be discouraged from going to the police because of a decision that gives a victim the right to access their own records, a right they already have. See Point I(E). Therefore, the privilege discussed in BCPO simply does not apply to the facts of this case.

E. The Panel Erred in Denying Plaintiffs’ Common Law Claim

The Appellate Division agreed that Plaintiffs have “a strong personal interest in disclosure.” (PCa22). Without applying each common law balancing factor, however, the panel concluded that the “interests militate against disclosure.” Ibid. The panel focused heavily on the fact that the uncharged relative has an interest in keeping the public from knowing he was investigated. But Plaintiffs already know the full details of what is on the tape—it simply records Fuster making a complaint to police. They have not made any public statements about the allegations or given the detailed police reports to the press

because they value their child’s privacy.¹⁰ Access to the video, which Fuster could have recorded on his own device, does not change that.

The panel also heavily weighed the “risk of discouraging [others from] reporting . . . crimes when a third party is able to obtain BWC footage of the reporting party’s police interview.” But that risk is simply not present here because the person seeking access is the person who made the complaint. Treating victims of crimes with fairness, compassion, and respect is the public policy of this state. See N.J. Const., art. I, para. 22. Crime victims are also entitled to access records relating to the crimes perpetuated against them without being charged. See N.J.S.A. 52:4B-36.2. The BWCL codifies these policies by granting the subject of the video, the parent of a minor who is the subject of the video, or a deceased subject’s next of kin the right to review the video. N.J.S.A. 40A:14-118.5(j)(2)(e), (f), (g), and (k).

REASONS WHY CERTIFICATION SHOULD BE GRANTED

This petition meets multiple criteria under Rule 2:12-4:

A. An Unsettled Question of Public Importance

¹⁰ Plaintiffs carefully have not used gender pronouns for their child and they asked that their initials be used given that this case is impounded and involves allegations of sexual abuse against a child. They also have never used the male relative’s name, nor identified his relationship to the child.

This case is of extreme public importance. After George Floyd was murdered in May 2020, the public demanded police reform and our policymakers responded. The Attorney General issued Law Enforcement Directive 2020-5, which required disclosure of the names of officers who received major discipline for the first time in New Jersey history. This Court upheld that Directive, and later provided a path for the public to access police internal affairs reports for the first time. See In re Att'y Gen. Directive, 246 N.J. 462 (2021); Rivera v. Union Cnty. Pros. Office, 250 N.J. 124 (2022).

The Legislature also passed several reforms, including the BWCL. By requiring every uniformed officer in the state to wear a BWC and appropriating \$58 million to departments to purchase BWCs, the Legislature showed its commitment to transparency and accountability.

“Police body cameras have become an essential part of community policing today,” said Assemblymembers Cleopatra Tucker, Herb Conaway, Verlina Reynolds-Jackson, and Shavonda Sumter, in a joint statement. . . . A body camera is only one way of ensuring greater transparency and accountability for law enforcement, and to rebuilding community relations; however, it will be a uniquely powerful tool in getting there.”

[Press Release, Governor Murphy Signs Legislation to Bring Changes to the Use of Body Worn Cameras by New Jersey Law Enforcement, Office of Gov., Nov 24, 2020.]

When the BWCL was signed, it was heralded not only by politicians and

racial justice advocates, but also by those within the law enforcement community. Ibid. (quoting the New Jersey State Police Benevolent Association president as saying, “This bill will ensure transparency for both the public and our law enforcement members. It will enhance officer safety and help us continue the extraordinarily high level of service we continue to provide the residents of our state.”). Everyone recognizes that public access to BWC videos provides a fair and neutral depiction of law enforcement counters.

The decision below contradicts the Legislature’s intent to ensure that only four categories of BWCs can be withheld from the public to provide the greatest transparency possible. A finding that BWC videos relating to a person who is investigated but not charged are exempt from public access will shield the public from gaining access to videos of the police using deadly force, since every police officer who uses deadly force is investigated and the resulting grand jury proceedings have rarely resulted in indictments. It would contradict the very purpose of the BWCL, and its express language,¹¹ if videos of uses of force were excluded from public access based on decades’ old case law applying the RTKL.

As a result of the decision below, police departments will no doubt seek

¹¹ See N.J.S.A. 40A:14-118.5(j)(3)(b) (requiring additional retention periods for uses of force and therefore making the video public pursuant to N.J.S.A. 40A:14-118(1)).

to shield videos relating to officers who were investigated but not charged. See, e.g., Eric Umansky, How Police Have Undermined the Promise of Body Cameras, ProPublica, Dec. 14, 2023 (“Hundreds of millions in taxpayer dollars have been spent on what was sold as a revolution in transparency and accountability. Instead, police departments routinely refuse to release footage — even when officers kill.”). Because the decision is published, lower courts will feel obligated to approve those denials of access.

Furthermore, it is unclear whether the BCPO decision is limited to those who are criminally investigated or if it could also apply to one who is investigated for a disorderly persons offense, a DWI, or an administrative rule violation. The decision below threatens access to videos the public needs to see. For example, assume an officer is being investigated by the internal affairs unit because a BWC video shows an intoxicated mayor stumbling and slurring and the officer allowing the mayor to leave without charges. The video is subject to access because none of the BWCL’s four exemptions apply. But, because the mayor was investigated by the officer and not charged, the agency may have a basis to withhold the video from the public based on the decision below.

OPRA is also an important tool for defendants because prosecutors do not always disclose exculpatory material during discovery. See Bill Weichert, Cops

Found Guilty of Official Misconduct for False Police Reports, NJ.com, Nov. 5, 2015 (police video not produced in discovery but obtained through OPRA led to defendant's charges being dropped and the officers instead being criminally convicted in State v. Trinidad, 241 N.J. 425 (2020)). But the decision below threatens access if the video depicts a subject who was also investigated as a potential accomplice, but not criminally charged.

Another core component of the BWCL is granting the subject of the video the right to review the BWC video and the right to ask that it be retained for three years, perhaps so the subject has time to file litigation or take other actions. The panel's decision guts that right if the video also relates to a person who was investigated but not charged. It also enables agencies to argue that other OPRA exemptions justify denying the subject access. It is not difficult to imagine how the decision below can deprive others of their right to review videos.

For example, if a minor suspect appears on the BWC video, N.J.S.A. 40A:14-118.5(j)(2)(f) and (k) gives the parent or legal guardian the right to review the video and to request a longer retention period. But, per the panel's decision, that right can be trumped by N.J.S.A. 2A:4A-60, a much older law that renders records relating to juveniles charged as delinquent confidential.

This Court has never decided a case involving access to BWCs, even

though many officers have been equipped with BWCs for years. See, e.g., Attorney General Law Enforcement Directive No. 2015-1 (regulating BWCs for those agencies that deploy them); Richard Rivera LLC v. Twp. of Bloomfield, Docket No. A-3338-17T1 (App. Div. Dec. 18, 2019) (granting access to a BWC video from a 2018 shooting). Additionally, because the plaintiff in BCPO, 447 N.J. Super. 182, did not petition for certification, this Court has not had the opportunity to determine whether the decades old RTKL case law cited in that case can even constitute an exemption under OPRA. The case law essentially consists of an outdated common law analysis, was largely modified by this Court's landmark decisions in Rivera, 250 N.J. 124, and N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017). The BCPO decision itself was called into question by Judge Nelson Johnson, J.S.C. (Ret'd) in New Jersey Open Public Records & Meetings (Gann 2023). Finally, no court has addressed a victim's right to access their own records under the Victim's Bill of Rights and Constitution. N.J.S.A. 52:4B-36.2

B. Conflicting Decisions

The BCPO decision upon which the panel below relies conflicts with this Court's decision in Lyndhurst, 229 N.J. at 565. In Lyndhurst, this Court held that dash camera videos showing police uses of deadly force must be disclosed to

the public. This is true even though there is a grand jury presentation to determine whether the officers should be criminally investigated. Like in Lyndhurst, most officers are cleared of any criminal wrongdoing, but the videos should still be released. Per the Appellate Division's decision below, a BWC of such a shooting would be exempt if the officers are not charged.

C. The Interest of Justice Mandates Certification

The interest of justice warrants certification where a decision is “palpably wrong, unfair or unjust” and involves the interests of more than just the parties to the dispute. Mahony v. Danis, 95 N.J. 50, 52 (1983). The decision below not only deprives Fuster of his statutory right to review the video as a subject of the video, it also threatens the transparency that the Legislature provided to the public when it mandated BWCs. This Court's intervention is necessary.

CONCLUSION

As argued above, the Court should grant Certification in this case.

Respectfully Submitted,

Pashman Stein Walder Hayden, P.C.

January 26, 2023

/s/ CJ Griffin

RULE 2:12-7 CERTIFICATION

I certify that this Petition presents substantial questions and is filed in good faith and not for purposes of delay.

Pashman Stein Walder Hayden, P.C.

January 26, 2023

/s/ CJ Griffin