**No. _____**

In the

Supreme Court of the United States

_____

**Antonio Ballesteros**,

*Petitioner,*

v.

**United States of America**,

*Respondent.*

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether GPS Data prepared specifically for an ongoing investigation and culled from several databases is machine-generated data that implicates the Sixth Amendment right to confrontation.

II. Whether the Sentencing Commission intended to create a strict liability standard when it wrote "involved the importation" of methamphetamine in Sentencing Guidelines section 2D1.1(b)(5).

## PARTIES TO THE PROCEEDING

Petitioner is Antonio Ballesteros, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio Ballesteros seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Ballesteros*, 751 Fed. Appx. 579 (5th Cir. Feb. 4, 2019) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

## JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on Feb. 4, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Confrontation Clause of the Sixth Amendment and United States Sentencing Guideline § 2D1.1(b)(5). The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend VI. USSG § 2D1.1(b)(5) states:

> If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

USSG § 2D1.1(b)(5).

## STATEMENT OF THE CASE

The government indicted Petitioner, Mr. Ballesteros, on one count of conspiring to distribute drugs in violation of 21 U.S.C. § 846. At trial, its case relied heavily on wire intercepts and GPS location data. The government presented GPS data prepared for the criminal investigation and culled from various databases that AT&T had labeled as unreliable. The district court admitted this data absent testimony from the individual who had selected the specific databases used to compile the GPS coordinates, absent testimony from an AT&T employee, which had furnished the data, and absent any other testimony bearing on how the GPS databases are maintained and operated by AT&T. The jury convicted Mr. Ballesteros.

According to the police officer who sponsored the data, AT&T provided GPS data in response to a search warrant stating that there was probable cause to believe that Mr. Ballesteros was involved in drug trafficking activities. Probable cause is the requisite standard for a criminal indictment. The email AT&T generated in response to law enforcement's request was prominently marked with the following directive:

> Please exercise caution in using these records for investigative purposes as location data is sourced from various databases which may cause location results to be less than exact.

The lack of a competent witness at trial deprived Mr. Ballesteros the opportunity to examine how the various databases from which AT&T gleaned its information work; where those databases were located; why the results of those databases are

sometimes imprecise and other aspects that bear on the reliability of that evidence. Mr. Ballesteros' inability to explore these facts violated his Sixth Amendment rights.

At sentencing, the Court imposed a two-level enhancement because the offense involved the importation of methamphetamine. No evidence at trial showed that Mr. Ballesteros was involved with the importation of methamphetamine. The importation adjustment provides for an increased Guideline range when "the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully..." USSG §2D1.1(b)(5). The Fifth Circuit has previously held – and was bound to hold here – that the phrase "that the defendant knew were imported unlawfully" refers only to "listed chemicals." *United States v. Serfass*, 684 F.3d 548, 551-552 (5th Cir. 2012)(citing GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING 297 (William A. Sabin ed., 11th ed., 2011)); *see also*, *United States v. Foulks*, 747 F.3d 914, 914-15 (5th Cir. 2014). In support of its conclusion in *Serfass*, the Fifth Circuit cited GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING (William A. Sabin ed., 11th ed., 2011), for the proposition that the verb "were" would agree only with the plural noun "chemicals," and not with "methamphetamine." *See Serfass*, 684 F.3d at 551-552. It accordingly reasoned that the defendant need know that "listed chemicals" were imported unlawfully to

receive the adjustment, but need not know that methamphetamine" (or "amphetamine") was imported unlawfully. But in fact, the GREGG MANUAL says precisely the opposite: that a plural-agreeing verb may be used in connection with a disjunctive list, even if some of the elements in the list are singular. *See* GREGG REFERENCE MANUAL, pp. 297-298. Proper use of this treatise would have led the court below to conclude that defendants may not receive an adjustment unless the methamphetamine was known by the defendant to have been imported unlawfully.

Mr. Ballesteros appealed, arguing that the admission of the GPS data violated his constitutional to confrontation. He also preserved the issue for further review of whether USSG § 2D1.1(b)(5) allows for the imposition of a two-level enhancement where that has been no showing that the defendant was involved with the importation of methamphetamine. The court of appeals affirmed.

## REASONS FOR GRANTING THIS PETITION

### I. This Court should clarify the Sixth Amendment's reach to machine-generated data in criminal trials.

The Sixth Amendment states that in all criminal prosecutions the accused has the right to be confronted with the witnesses against him. U.S. Const. amend VI. That clause "guarantees an opportunity for effective cross-examination…" *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985)). Testimonial statements implicate the right to confrontation. Statements are testimonial "when the circumstances objectively indicate that there is no…ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also, Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2714 n.6, 2716-17 (2011), *Michigan v. Bryant*, 131 S.Ct. 1143, 1155-57, 1165 (2011), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) and *Crawford v. Washington*, 541 U.S. 36, 51-51 (2013). The right to confrontation is abridged when a testimonial statement is put before the jury that a defendant cannot confront:

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

*See Crawford v. Washington*, 541 U.S. at 68 (2004).

Machine generated data today plays an ever-increasing role in criminal trials. Yet, this Court has not spoken to what extent it falls within the contours of the Sixth Amendment. *See Bullcoming v. New Mexico*, 564 U.S. 647, 674 (2011)

(Sotomayor, J., concurring). One prominent jurist has captured the problem this silence presents:

> The United States Supreme Court has not decided whether machine-generated results invariably lie beyond the reach of the confrontation clause, and I express no ultimate view on this issue here. I simply note that as a result of ever more powerful technologies, our justice system has increasingly relied on ex parte computerized determinations of critical facts in criminal proceedings--determinations once made by human beings. A crime lab's reliance on gas chromatography may be a marked improvement over less accurate or more subjective methods of determining blood-alcohol levels. The allure of such technology is its infallibility, its precision, its incorruptibility. But I wonder if that allure should prompt us to remain alert to constitutional concerns, lest we gradually recreate through machines instead of magistrates the civil law mode of ex parte production of evidence that constituted the "principal evil at which the Confrontation Clause was directed."

*See People v. Lopez*, 55 Cal. 4th 569, 606 (2012) (Liu, J., dissenting).

When confronted with machine generated outputs, courts have adopted a formalistic approach. They place those outputs outside the reach of the Sixth Amendment reasoning that the declarant is a machine; the output is not an assertion for hearsay purposes; and the machine data does not establish or prove past events. *See United States v. Washington*, 498 F.3d 225 (4th Cir. 2007); *see also, United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015)(collecting cases showing that machine outputs are not hearsay, and then relying on that premise to show that the Confrontation Clause does not reach non-hearsay).

This approach threatens the principles underlying the Sixth Amendment's right to confrontation and its utility. As this Court has recognized, "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006). A

machine, programmed to generate information for the use of prosecuting a specific individual, during the course of a criminal investigation, implicates more than mere chain of custody issues. *C.f. Lizarraga-Tirado*, 789 F.3d at 1110. The data often serves as the most conclusive evidence generated against a defendant—which he or she should have the fullest opportunity to confront.

Indeed, "though courts have widely concluded that machine-generated data does not require the testimony of the analyst who operated the machine, the consensus is not unanimous." *See* Brian Sites, *Rise of the Machines: Machine-Generated Data and the Confrontation Clause*, 16 Colum. Sci & Tech. L. Rev. 36, 57 (2014). Many majority opinions have drawn vigorous dissents. *See, e.g., United States v. Washington*, 498 F.3d 225, 232 (Michael, J., dissenting); *State v. Roach*, 95 A.3d 683, 698-701 (N.J. 2014) (Albin, J., dissenting); *cf. Pendergrass v. State*, 913 N.E.2d 703, 711 (Ind. 2009) (Rucker, J., dissenting) (not addressing the machine-generated testimony doctrine, but stating "despite whatever ambiguity *Melendez-Diaz* may have created on the question of who must testify at trial, it appears to me the opinion is clear enough that a defendant has a constitutional right to confront at the very least the analyst that actually conducts the tests").

It is true that the Sixth Amendment does not require the testimony of every person found in the chain of custody for a specific piece of evidence. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009). But in those circumstances where an operator has exercised a degree of control over a machine's output, he or she should come within the Sixth Amendment's reach. "By attributing machine-

generated testimony to the controlling analysts…[this Court]…would also recognize that forensic machines are simply sophisticated tools that humans use to make assertions about the world." *See* Brian Sites, Rise of the Machines: Machine-Generated Data and the Confrontation Clause, 16 Colum. Sci & Tech. L. Rev. 36, 92-93 (2014).

Here, it is clear AT&T compiled information from various databases in response to a specific law enforcement request. The goal was to generate data for an ongoing criminal investigation. AT&T recognized the imprecision of its efforts and clearly flagged the data it provided as unreliable. Still, the district court and reviewing court treated the data as "the output of a computer program"—and did so without giving due consideration to the human intervention in gathering in gathering the data, the selection of specific databases, and whether the margin of error that AT&T cautioned against was on account of human or technological limitations. In doing so, it insulated a critical piece of evidence from confrontation.

## II. This Court should clarify whether USSG § 2D1.1(b)(5) creates a strict liability standard.

This Court's Rule 10 cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This case presents neither an erroneous factual finding, nor a properly stated rule of law. It asks for relief from a plainly erroneous rule of decision, which is likely to add years of unjust imprisonment to the sentences of a large number of defendants. In this respect it is not a fact-bound decision, but rather one that addresses an important and recurring

legal issue. *Cf. Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (fact-bound decision are "the type of case in which we are most inclined to deny certiorari.")

The Fifth Circuit applies USSG § 2D1.1(b)(5) as a strict liability enhancement. *See United States v. Foulks*, 747 F.3d 914, 914-15 (5th Cir. 2014)(citing to *United v. Serfass,* 684 F.3d 548, 550 (5th Cir. 2012) for the proposition that "the enhancement applied to a defendant who possessed and distributed imported methamphetamine, even absent any showing that he knew it was imported.") This application adds years of erroneous imprisonment to the sentences of a large number of drug offenders. The court below has summarily declined to address its own error, and the Sentencing Commission is not likely to address the problem. The reputation of judicial proceedings would suffer if the decision below were left in place, and there is no reasonable alternative to summary intervention by this Court. Section 3553(a) of Title 18 requires consideration of the Federal Sentencing Guidelines prior to the imposition of a federal felony term of imprisonment. *See* 18 U.S.C. §3553(a)(4).

Although the Guidelines are advisory, they are the "starting point and initial benchmark" of the sentencing process, and they remain influential. *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). Approximately 30% of methamphetamine sentences fall within the sentencing guidelines, and three of the top five districts prosecuting these offenses are in the Fifth Circuit. U.S. Sentencing Commission, Quick Facts: Methamphetamine Trafficking, (July 2018) available at

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Methamphetamine_FY17.pdf, last visited May 6, 2019.

Mr. Ballesteros was subject to a two-level adjustment to his Guideline offense level for dealing in imported methamphetamine. The adjustment in question appears in at USSG §2D1.1(b)(5), and it applies if:

> The offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals *that the defendant knew were imported unlawfully*...

USSG §2D1.1(b)(5)(emphasis added). He faced a Guidelines range of 360 months - life; in the absence of that enhancement, his range would be 324 to 405 months.

The Fifth Circuit has held that the phrase "that the defendant knew were imported unlawfully" modifies only "listed chemicals," and does not modify "methamphetamine." *United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012)(citing GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING 297 (William A. Sabin ed., 11th ed., 2011)). It has reasoned that the verb "were," appearing in that phrase is plural, and that it therefore agrees with "listed chemicals," but not with "methamphetamine." *See id*. at 551-552. It explained:

> in constructing the phrase, "that the defendant knew were imported unlawfully," the drafters of the Guidelines employed the plural verb, "were." That plural verb matches the plural noun, "chemicals." The enhancement obviously applies when the offense involves "the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully." By contrast, however, there is no other plural noun in the subject guideline to which the verb "were" could apply. In particular, that plural verb cannot apply to the sentence's disjunctive subject,

> "amphetamine or methamphetamine," because —according to the rules of grammar—"If the subject consists of two or more singular words that are connected by or . . . the subject is singular and requires a singular verb." hypothetically, the clause had been drafted to read "amphetamine or methamphetamine were imported," it would not have been grammatically correct. Simply put, then, the actual phrase, "that the defendant knew were imported unlawfully," cannot apply to "the importation of amphetamine or methamphetamine."

*Id*. (quoting GREGG REFERENCE MANUAL at 297).

But neither the grammatical principle set forth in this passage nor the court's use of the reference material were accurate. In fact, a plural verb may agree with all elements of a disjunctive list, even if some or all of these elements are themselves singular. The same grammar reference used by the panel notes that the addition of one plural noun to a disjunctive list makes a plural-agreeing verb appropriate, so long as the plural noun is closest to the verb:

> If the subject consists of two or more singular words that are connected by or, either, .. or, neither. , . nor, or not only . . . but also, the subject is singular and requires a singular verb . . . . If the subject consists of two or more plural words that are connected by or, either . . . or, neither . . . nor, or not only . . . but also, the subject is plural and requires a plural verb . . . . If the subject is made up of both singular and plural words connected by or, either.. . or, neither . . . nor, or not only ... but also, the verb agrees with the nearer part of the subject. Since sentences with singular and plural subjects usually sound better with plural verbs, try to locate the plural subject closer to the verb whenever this can be done without sacrificing the emphasis desired.

GREGG REFERENCE MANUAL, pp. 297-298.

The decision below thus relies on a simple error of grammar, and a failure to consult the correct rule in a grammar book. The point is not especially debatable – Mr. Ballesteros' case would be little different if he had been given another four

years imprisonment on the basis of an error of arithmetic, or a typographical mistake.

In this case the mistake has produced a Guideline range whose minimum is 36 months longer than appropriate. But the damage is not limited to this case. In less than three years after *Serfass*, the Fifth Circuit courts had eight occasions to apply its rule regarding mental states and methamphetamine importation. *United States v. Moreno*, 2015 U.S. App. LEXIS 1552 (5th Cir. Jan. 30, 2015) (unpublished); *United States v. Sellers*, 589 Fed. Appx. 262, 2015 U.S. App. LEXIS 61 (5th Cir. 2015) (unpublished); *United States v. Rosales*, 580 Fed. Appx. 258, 2014 U.S. App. LEXIS 16726 (5th Cir. 2014) (unpublished); *United States v. Foulks*, 747 F.3d 914, 2014 U.S. App. LEXIS 4512 (5th Cir. 2014); *United States v. Holt*, 493 Fed. Appx. 515, 2012 U.S. App. LEXIS 20287 (5th Cir. 2012) (unpublished); *Hernandez v. United States*, 2013 U.S. Dist. LEXIS 142638 (N.D. Tex. June 5, 2013) (unpublished); *United States v. Horta-Figueroa*, 2013 U.S. Dist. LEXIS 941 (N.D. Tex. Jan. 3, 2013) (unpublished); *Ruiz v. United States*, 2012 U.S. Dist. LEXIS 89050 (N.D. Tex. June 27, 2012) (unpublished). And litigants continue to preserve error. *United States v. Welch*, ___ Fed. Appx. ___, 2019 U.S. App. LEXIS 9011 (5th Cir. 2019) (unpublished).

This survey, of course, radically understates the volume of litigation in which the *Serfass* rule will add years of erroneous imprisonment to a criminal sentence. The cases cited above represent only a sample of those defendants who bother to raise the issue in the face of a contrary controlling circuit opinion. As construed by

the court below, the adjustment applies in a great majority of methamphetamine trafficking cases, since overwhelming percentages of methamphetamine originates overseas in the contemporary market. See Sandra Dribble, Record border meth seizures, UT San Diego, Jan. 3, 2015, available at https://www.sandiegouniontribune.com/news/border-baja-california/sdut-record-border-meth-seizures-california-2015jan03-story.html, last visited May 6, 2019 ("The DEA estimates that 90 percent of the meth consumed in the United States is manufactured in labs south of the border."); Associated Press, Mexican cartels fill demand for meth in USA, USA Today, Oct. 11, 2012, available at https://www.usatoday.com/story/news/nation/2012/10/11/mexico-cartels-meth/1626383/, last visited May 6, 2019, ("Although Mexican meth is not new to the U.S. drug trade, it now accounts for as much as 80 percent of the meth sold here, according to the Drug Enforcement Administration.") Yet, there is no reason to believe that street level traffickers who find themselves in federal court have any idea of the ultimate source of their methamphetamine. Thus, in a large number of cases, the scienter question is dispositive.

Only the Ninth Circuit has refused to endorse *Serfass*' reading of USSG § 2D1.1(b)(5), and perhaps more on account of the procedural posture of the case before it:

> Only one circuit has approved the government's proffered reading of U.S.S.G. § 2D1.1(b)(5) that would dispense with the requirement that the defendant actually know the drugs were imported. In *United States v. Serfass*, the Fifth Circuit stated that the plain language of § 2D1.1(b)(5) supports the conclusion that the increase applies to "a defendant who possesses methamphetamine that had itself been

> unlawfully imported" regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). We decline to adopt the Fifth Circuit's conclusion here—particularly where the government never advanced this argument in the district court and sought to apply the increase only on the basis of jointly undertaken criminal activity under U.S.S.G. § 1B1.3, and the district court made no determinations about the scope of the jointly undertaken criminal activity as required by the Sentencing Guidelines.

*See United States v. Job*, 871 F.3d 852, 871-872 (9th Cir. 2017). Yet disunity in the courts below has not been essential to the exercise of this Court's summary disposition authority. This Court has repeatedly found summary reversal appropriate when an error is manifestly obvious in the decision below, if leaving the decision in place would call the fairness or integrity of judicial proceedings into question. Often, intervention is necessary because a lower court appears to have disregarded or defied the controlling precedent of this Court. *See Spears v. United States*, 555 U.S. 261 (2009) (per curiam); *Nelson v. United States*, 555 U.S. 350 (2009) (per curiam); *Nevada v. Jackson*, __ U.S __, 133 S. Ct. 1990 (2013) (per curiam); *Marshall v. Rodgers*, __ U.S __, 133 S. Ct. 1446 (2013) (per curiam); *Parker v. Matthews*, __ U.S __, 132 S. Ct. 2148 (2012) (per curiam); *Wetzel v. Lambert*, __ U.S __, 132 S. Ct. 1195 (2012) (per curiam); *Hardy v. Cross*, __ U.S __, 132 S. Ct. 490 (2011) (per curiam); *Bobby v. Dixon*, __ U.S __, 132 S. Ct. 26 (2011) (per curiam); *Cavazos v. Smith*, __ U.S __, 132 S. Ct. 2 (2011) (per curiam).

The present case does not involve a lower court defying this Court's guidance. But leaving the decision in place would be similarly corrosive to the reputation and integrity of judicial proceedings. It is one thing to leave in place a rule or opinion that may be substantively wrong out of respect for the independent judgment of a

lower court. The rule applied below, however, does not stem from a controversial judgment call, but from a simple, objectively demonstrable error, comparable to one of arithmetic or clerical mistake. Mistakes of the kind at issue in *Serfass* are the inevitable result of the fact judicial institutions are populated by human beings, distinguished jurists though they may be. Mistakes by themselves do not damage the reputation of the judiciary. Stubbornly clinging to an obvious, objectively demonstrable error, however, does tend to undermine the reputation and integrity of the judiciary, particularly when it produces substantial increases in a term of imprisonment. The court below has summarily declined to revisit its decision, even after the error was called to its attention. *See United States v. Abiles*, 588 Fed.Appx. 387 (5th Cir. 2014)("Barreto Abiles alternatively asserts that this court erred in *United States v. Serfass*, 684 F.3d 548, 549-50, 553 (5th Cir. 2012), when it determined that there is no scienter requirement under § 2D1.1(b)(5)..we do not entertain this argument…) The reputation of judicial proceedings would be enhanced by correcting this error.

Finally, it is not appropriate to wait for resolution by the Sentencing Commission. This Court has observed that "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton v. United States*, 500 U.S. 344, 349 (1991). It thus cautioned that it might become "more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts." *Braxton*, 500 U.S. at 349. In the

present case, however, there are no "conflicting judicial decisions" likely to trigger Commission intervention. There is instead a plainly erroneous reading of the Commission's work. Nor can the Commission be expected to amend the Guideline to speak more clearly to the issue. It has already spoken clearly, and was simply misunderstood by a court that is unwilling to revisit an obvious error. This Court has seen fit to intervene by way of summary reversal in similar cases of Guideline error, in which the Commission cannot reasonably be expected to speak any more clearly to the issue. *See Salinas v. United States*, 547 U.S. 188 (2006). It should do so here.

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 6th day of May, 2019.

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