No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

vs.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 8 U. S. C. § 1252(e)(2), removing habeas corpus jurisdiction as to some alien removal cases, violates the Suspension Clause of the Constitution as applied to an inadmissible alien apprehended immediately after illegal entry.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Although this is not a criminal case and Thuraissigiam is not accused or convicted of any major crime, the case has important implications for cases involving

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

major crimes. The Court of Appeals took a broad view of the Suspension Clause, extending the reach of constitutionally required habeas corpus jurisdiction far beyond the limits understood at the time of adoption. That expansive view threatens the ability of Congress to deal with aliens engaged in terrorism or other major crimes by detaining them or swiftly removing them. That result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Vijayakumar Thuraissigiam is a citizen of Sri Lanka who fled his country for Mexico in June 2016. *Thuraissigiam* v. *Dept. of Homeland Security*, 917 F. 3d 1097, 1101 (CA9 2019). Late one evening in February 2017, Thuraissigiam crossed the U. S. border approximately four miles west of the San Ysidro port of entry. He was apprehended nearly immediately (25 yards north of the border) by U. S. Customs and Border Protection ("CBP") agents. *Ibid*. Because he lacked the documentation required by 8 U. S. C. § 1182(a)(7), he was determined to be excludable and was placed in expedited removal proceedings. *Ibid*.

Thuraissigiam claimed a fear of returning to Sri Lanka and, pursuant to 8 U. S. C. § 1225(b)(1)(A), was referred for an interview with an asylum officer. *Ibid*. Based on the interview, the asylum officer determined that Thuraissigiam had not established a credible fear of persecution. This determination was approved by the asylum officer's supervisor. Pursuant to 8 U. S. C. § 1225(b)(1)(B)(iii)(III), Thuraissigiam requested review of the decision by an immigration judge. On *de novo* review, the immigration judge affirmed the negative credible fear finding. The case was then returned to U. S. Immigration and Customs Enforcement ("ICE")

for Thuraissigiam's removal. An expedited removal order was entered. *Ibid*.

In January 2018, Thuraissigiam filed a habeas corpus petition in the U. S. District Court for the Southern District of California arguing that his expedited removal order violated his statutory, regulatory, and constitutional rights. He sought to vacate the order and be given a " 'new, meaningful opportunity to apply for asylum and other relief from removal.' " *Id.*, at 1101-1102.

The District Court dismissed Thuraissigiam's petition for lack of subject matter jurisdiction concluding that 8 U. S. C. § 1252(e) does not authorize jurisdiction over his claims. *Thuraissigiam* v. *Dept. of Homeland Security*, 287 F. Supp. 3d 1077, 1080 (SD Cal. 2018). The District Court also rejected his argument that foreclosing judicial review of his claims violated his rights under the Suspension Clause. In so holding, the District Court concluded that Thuraissigiam could invoke the Suspension Clause, but because 8 U. S. C. § 1252(e) provides three limited avenues of judicial review of expedited removal orders, the statute does not suspend the writ, and therefore does not violate the Suspension Clause. See 287 F. Supp. 3d, at 1082.

Thuraissigiam appealed. The Ninth Circuit reversed and remanded. While the court agreed that the statute precludes habeas corpus review of Thuraissigiam's claims, it held that this preclusion violates the Suspension Clause as applied to him. See 917 F. 3d, at 1100.

This Court granted certiorari on October 18, 2019.

SUMMARY OF ARGUMENT

The Constitution's guarantee of the "Privilege of the Writ of Habeas Corpus" necessarily raises the question of who are the holders of the privilege. Lawyers of the founding era understood a "privilege" to be something granted by government only to certain persons or places, unlike universal rights. In *Yamataya* v. *Fisher*, this Court recognized the distinction between aliens who had become "part of the population" and those who had not.

The common law and founding era cases regularly cited for the proposition that aliens were entitled to habeas corpus review of their detention actually demonstrate that the law recognized distinctions among aliens. Those living in the country owed a duty of "local allegiance" with a corresponding entitlement to protection of the law, while those with more tenuous connections did not.

There is no constitutional requirement that Congress maintain the availability of habeas corpus for aliens at its high-water mark. The understanding of the privilege at common law is the constitutional minimum, and anything beyond that is within the discretion of Congress.

Boumediene v. *Bush* is a deeply flawed decision, based on an inadequate historical analysis, that extended the constitutional entitlement to the writ beyond the original understanding. While there is no need in this case to overrule *Boumediene*, this Court need not and should not extend it to an additional category of aliens.

ARGUMENT

I. Some aliens are holders of "the privilege of the writ of habeas corpus," but those with little connection to this country are not.

A. Holders of the Privilege.

Article I, § 9, cl. 2, of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." As understood in the Founding era, a privilege necessarily had holders. Unlike "unalienable Rights" with which "all Men" are "endowed by their Creator," see Declaration of Independence, para. 2 (1776), a privilege was something conferred by government, and not on everyone. See Natelson, The Original Meaning of the Privileges and Immunities Clause, 43 Ga. L. Rev. 1117, 1130-1133 (2009). Natelson summarizes the definitions of "privilege" from popular legal dictionaries of the day as containing four elements: "(1) a benefit or advantage; (2) conferred by positive law; (3) on a person or place; (4) contrary to what the rule would be in absence of the privilege." *Id*., at 1130 (citing Jacob, A New Law-Dictionary (1762), "then the most popular legal dictionary in America"); *id*., at 1130-1131 (noting congruent definitions in other eighteenth century law dictionaries)); see also Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1836 (2009) (contrasting natural rights with government-conferred privileges).[2]

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2. A dictum in Justice Bushrod Washington's solo opinion in *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-552 (No. 3,230) (CC ED Pa. 1823) implying that "privileges" were natural rights was unsupported by authority, contained serious internal contradictions, and did not represent the general opinion at the time, according to Natelson. See 43 Ga. L. Rev., at 1122-1125.

Hamburger identifies the holders of the privilege of the writ of habeas corpus within the context of the larger concept of persons who are "within the protection of the law" as distinguished from those who are "beyond the protection of the law." See Hamburger, 109 Colum. L. Rev., at 1827-1828. Protection of the law was part of a fundamental concept of the reciprocal relation between allegiance to the sovereign and protection by the sovereign. See *id*., at 1838-1840. Even so, protection was not limited to citizens. Foreigners within a country owed a duty of "local allegiance," an obligation to obey the law and a reciprocal entitlement to protection of it. See *id*., at 1847. This "local allegiance" concept did not apply to all foreigners, however.

> "[I]f foreigners came to the country in a manner that created a presumption of allegiance to the government and its law, they too had a right to protection. Other foreigners, however, even if visiting, had no right to protection. Although some of them might receive a partial grant of protection from the government, this was only a matter of legislative and executive policy." *Ibid*.

The latter point is important. The fact that habeas corpus review of particular issues has been extended to particular persons at various points in history does not mean that similarly situated persons are constitutionally entitled to habeas review in similar circumstances today despite a subsequently enacted statute to the contrary. Congress has extended and retracted various aspects of habeas corpus throughout history. See, *e.g.*, *Williams* v. *Taylor*, 529 U. S. 362, 410-413 (2000) (43-year-old rule of *de novo* review of state judgments replaced by 28 U. S. C. § 2254(d)); Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 932, 945-953 (1998). As to any person who is not a holder of the constitutional privi-

lege, Congress can retract a form of review it previously extended or retract a form of review that the courts extended in the absence of a statute on point.

The constitutional limit should now be recognized unequivocally as the limit understood at the time the Constitution was adopted. It is high time to drop the hedge words in the statement of *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001), that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.' " (Emphasis added). The Suspension Clause protects the writ as it existed in 1789, period. See *Boumediene* v. *Bush*, 553 U. S. 723, 833-834 (2008) (Scalia, J., dissenting). Everything else is subject to congressional modification. Restricting Congress's authority further than the original Constitution restricted it is a violation of the Constitution's separation of powers by the judiciary. *Ibid*. The legitimacy of judicial review of statutes is premised on the rules set forth in the Constitution being permanent until the people change them through the amendment process. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). The Suspension Clause cannot evolve to increase its scope any more than the original jurisdiction of this Court at issue in *Marbury* could evolve to embrace original writs to executive officers. Enforcing the limits placed by the people until the people change them by amendment is the whole point.

It is true, of course, that "at common law a petitioner's status as an alien was not a *categorical* bar to habeas corpus relief." *Boumediene*, 553 U. S., at 747 (emphasis added). Yet it is equally true that a petitioner's alien status is not irrelevant. Some aliens are holders of the privilege, and some are not. See Hamburger, 109 Colum. L. Rev., at 1921-1922.

B. Part of the Population.

The fact that the United States has generously extended constitutional protections to aliens living within the country does not support a conclusion that we must extend the full panoply of constitutional protections to every alien who sets foot on United States soil. The government's ability to grant or deny constitutional rights depends on whom that right was placed in the Constitution to protect. See *Johnson* v. *Eisentrager*, 339 U. S. 763, 770-771 (1950). "Mere *lawful* presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when [an alien] makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Id.*, at 770 (emphasis added). "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Ibid*. The question in this case is where Thuraissigiam is on that scale and where one must be to be considered a holder of the privilege.

In *Yamataya* v. *Fisher*, 189 U. S. 86 (1903),[3] this Court used the term "part of the population" to describe the degree of association needed before an alien acquired constitutional rights regarding admission and removal, the same concept that Hamburger calls being "within protection." Yamataya was a citizen of Japan who arrived on a ship, and there is no indication that there was anything clandestine about her entry. *Id*., at 87. A few days later, upon further investigation, it was determined that she was in fact a "person likely to

3. In the official reports, *Yamataya* is captioned "The Japanese Immigrant Case," see *id*., at 86, and n. 1, and it is often cited that way.

become a public charge" and fell within a class of aliens excluded from admission by statute. *Ibid.*

Yamataya filed a habeas petition in federal district court claiming the procedure used did not provide her with due process of law. *Id.*, at 87-88. This Court did not actually decide any constitutional questions. It held that the relevant statutes should be interpreted to provide notice and an opportunity to be heard. *Id*., at 100-101. Construing the statute through a constitutional avoidance lens, the Court held that it would be improper for immigration authorities "arbitrarily to cause an alien, who has entered the country, and has become *subject in all respects to its jurisdiction,* and *a part of its population*, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard...." *Id*., at 101 (emphasis added). The Court left

> "on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed ...." *Id*., at 100.

Exactly where Yamataya fell on the spectrum did not need to be decided because her claim that she had not been given due process should have been presented through administrative channels. See *id*., at 102.

C. Common Law and Founding-Era Cases.

To determine the original understanding of who held the "privilege of the writ of habeas corpus" in 1789, one must examine cases from the common law preceding independence, the Founding era, and the period after ratification of the Constitution but close

enough in time that they can reasonably be expected to reflect the same view of the law. See *St. Cyr*, 533 U. S., at 301-302, and n. 16. These cases are consistent with the view expressed in *Johnson* and *Yamataya* that aliens who are "part of the population" are entitled to the same privilege as citizens, but many with more attenuated connection to the country are not.

In *Sommersett* v. *Stewart*, 98 Eng. Rep. 499 (K. B. 1772), Sommersett was a slave purchased in Africa and taken to Virginia, where slavery was legal. His owner, Stewart, brought him to England, where his advocates argued it was not. See *id*., at 499. Although not originally from Britain or any of its possessions, he had been brought into the British Empire legally and permanently. He could be considered a "part of its population" within the broad meaning of *Yamataya*, even if not a citizen. The court heard his case on the merits without objection and granted relief. See *id.*, at 510.

The *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K. B. 1810) is similar. Saartje Baartman, a native of South Africa and member of the Hottentot nation, was said to be "remarkable for the formation of her person" and was being exhibited to curious Londoners "under the name of the Hottentot Venus." *Id.*, at 344. Third parties, doubtless appalled by this spectacle, alleged "that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British Governor, (who extends his peculiar protection in nature of a guardian over the Hottentot nation *under his government*...) ...." *Ibid*. (emphasis added). Although Ms. Baartman may not have been considered a British subject in the strict sense of the word, neither was she a stranger to the British Empire. The court evidently regarded her as a resident of a British protectorate and

a person within the protection of the Crown.[4] See *id*., at 344-345.

In *Lockington's Case*, 5 Am. L. J. 92 (Penn. 1813), the petitioner was a resident alien who had come to reside in the United States before the war began. See *id*., at 92. The Chief Justice of Pennsylvania expressly distinguished the situation of such a resident alien from a prisoner of war "brought among us by force; and his interests were never, in any manner, *blended with those of the people of this country*." *Id*., at 97 (emphasis added). On the merits, Lockington was found to be properly in custody and was remanded. See *id*., at 103.

In contrast, aliens with weaker connections were turned away by the courts. In *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C. P. 1779), the three sailors were undisputedly captured as enemy aliens and prisoners of war in the first instance, but they claimed they had ceased to be such by their voluntary service on an English merchant vessel. See *id*., at 775. The holding was that on their own showing they were enemy aliens and prisoners of war and as such the courts "can give them no redress." *Id*., at 776.

Even more compelling claims were turned away. In *King* v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759), Schiever was a Swedish subject who claimed he had been forced into service on a French privateer before the privateer was captured by the English. See *id*., at 551. He then became England's prisoner of war. Schiever produced an affidavit to support his petition for habeas corpus that characterized him as a prisoner of war and, like in *Three Spanish Sailors*, the court denied relief. *Id*., at 551-552.

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4. On motion of the Attorney General, the court appointed investigators to determine if she was a willing participant and dismissed the proceedings upon determining that she was. *Ibid*.

In another report of the same case, *Schiever's Case*, 96 Eng. Rep. 1249 (K. B. 1759), there is a more extended report of the holding. From this report, it appears that *Schiever* is a case that supports the argument that aliens who are not "part of the population" or whose interests have never "blended" with the people of the United States and are otherwise unconnected with the country are not eligible for habeas relief.

> "[Schiever] is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war. His being a native of a nation not at war does not alter the case, for by that rule many French prisoners might be set at liberty, as they have regiments of many other kingdoms in their service, as Germans, Italians, &c.
>
> "But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State." *Id.*, at 1249.

Properly understood, *Schiever* refutes rather than supports the proposition that alien prisoners of war were holders of the privilege of habeas corpus. What he and others received was a preliminary inquiry to determine whether they were persons inside or outside of allegiance and protection, and if found to be outside their cases were dismissed. See *Hamburger*, 109 Colum. L. Rev., at 1889-1891.

Hamburger notes that the behavior of governors and legislatures during this era also sheds light on who was within the protection of the law, and thus a holder of the habeas privilege, and who was not. For the executive to detain citizens in wartime without judicial interference, a suspension of the writ by the legislature was needed. See *id*., at 1914-1915. For aliens who were

subjects of hostile foreign entities,[5] however, no suspension was thought to be necessary. See *id*., at 1932-1939.

The original understanding, then, is that some aliens had sufficient connection to the country to be entitled to the same habeas corpus privilege as citizens and some did not. This understanding is consistent with the assessment of *Johnson* v. *Eisentrager*, 339 U. S., at 770, that the rights of aliens lie on a scale which increases as they "increase[] [their] identity with our society." See *supra*, at 8.

There is no constitutional requirement that Congress calibrate the scale at the maximum level of generosity that has existed at any time in our history. It is immaterial that courts have in the past generally allowed the use of habeas corpus to test the legality of exclusion at the threshold. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 213 (1953). The Constitution guarantees the privilege of the writ of habeas corpus to the holders of the privilege as understood at the time of ratification; as to everyone else, the decision is for Congress to make.

II. *Boumediene* should be limited to its facts and not preclude decision on this point.

In *Boumediene* v. *Bush*, 553 U. S. 723 (2008), this Court was asked to decide if noncitizen enemy alien combatants captured abroad by the U. S. miliary and detained at the United States Naval Station at Guantanamo Bay, Cuba, were entitled to the constitutional privilege of habeas corpus. *Id*., at 732. As dis-

5. The requisite hostility could include an undeclared war against a nonstate entity, such as the Barbary pirates. Contrary to common belief, these are not new problems. See *id*., at 1934.

cussed *supra*, nearly six decades before *Boumediene*, this Court was also asked in *Eisentrager* to decide if noncitizen enemy aliens captured abroad by the U. S. military and detained at the United States Army-controlled Landsberg Prison in Germany were entitled to the constitutional privilege of habeas corpus. *Eisentrager* said no. *Boumediene*, however, said yes.

Boumediene was decided by a bare majority. It is a deeply flawed opinion for the reasons explained at length by Justice Scalia in dissent, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito. On the territorial aspect of the case, the majority effectively overruled the clear holding of *Eisentrager* without admitting it was doing so. See *id*., at 835 (Scalia, J., dissenting). On the facts of the case, the conclusion was utterly unsupported by history. "Despite three opening briefs, three reply briefs, and support from a legion of *amici*, petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to [habeas] jurisdiction" in the case "of aliens captured and held outside sovereign territory." *Id*., at 847; see also Hamburger, 109 Colum. L. Rev., at 1882, and n. 195.

As scathing as the dissent's criticisms were, *Boumediene*'s deficiencies went even further. *Boumediene* looked to *St. Cyr* for guidance regarding the early precedents this Court has relied upon when examining the historical scope of the writ and broadly declared that "[w]e know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief." *Boumediene*, 553 U. S., at 747. This broad claim

> "overlooks the crucial distinction between aliens who were within protection and those who were outside it. In the traditional understanding, it was not disputed that all persons within protection,

> regardless of their alienage, had the protection of the law. In particular, the protection of the law was enjoyed by all citizens, all lawfully visiting aliens in amity, and even (to a lesser degree) licensed enemy aliens. It is therefore to be expected that many aliens could obtain writs of habeas. What is more relevant is to understand *which* aliens could get habeas. Once the question is thus narrowed, it can be seen that habeas was not available to aliens outside allegiance and protection and, indeed, could never be given to some of them, notably prisoners of war, whose status was incompatible with allegiance. They did not owe allegiance and therefore did not have the protection of the law." Hamburger, 109 Colum. L. Rev., at 1888.

Without acknowledging what *Eisentrager* referred to as the "inherent distinctions" between different categories of enemy aliens, see 339 U. S. at 769, *Boumediene* further expounded "that common-law courts entertained habeas petitions brought by enemy aliens detained in England—'entertained' at least in the sense that the courts held hearings to determine the threshold question of entitlement to the writ." *Id.*, at 747 (citing to *Sommersett's Case*, 20 How. St. Tr. 1 80-82 (1772); *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C. P. 1779); *King* v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759); *Du Castro's Case*, 92 Eng. Rep. 816 (K. B. 1697). The "threshold question" in these cases involved "preliminary proceedings about the *status* of the [petitioners]" to ascertain whether they were entitled to the "privileges of Englishmen." Hamburger, 109 Colum. L. Rev., at 1891 (emphasis added).

By lumping all aliens together in its discussion of status, *Boumediene* ignored the important difference between aliens with established ties to this country and those without any. In Hamburger's terms, some aliens

are "within protection" and some are "outside protection," but *Boumediene* did not discuss the distinction. See 109 Colum. L. Rev., at 1997. In *Yamataya*'s terms, some aliens have become "part of the population" and some have not. The statute at issue in *Boumediene* might have been unconstitutional as applied to a legal permanent resident alien who had been detained, rightly or wrongly, as an alleged unlawful combatant yet constitutional as applied to an otherwise similarly situated alien who had never set foot in the United States. These cases would be different in the same sense that *Lockington* was different from *Schiever*. See *supra*, at 11-12. Yet the opinion contains no discussion of these differences.

The doctrine of *stare decisis* counsels that precedents should not be overturned lightly, but overruling *Boumediene* is not the question before this Court. The question is whether to extend it. "It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U. S. 587, 615 (2007) (plurality opinion). "We do not extend *Flast*,[6] but we also do not overrule it. We leave *Flast* as we found it." *Ibid.*; see also *Silverman* v. *United States*, 365 U. S. 505, 512 (1961) ("by even a fraction of an inch").[7]

So in this case, the Court need not overrule *Boumediene*, but it should decline to extend it. The misguided and incomplete historical analysis of that decision

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6. *Flast* v. *Cohen*, 392 U. S. 83 (1968).

7. The concurrence in *Hein* would have overruled *Flast*, see *id.*, at 618 (Scalia, J., concurring in the judgment), so the plurality opinion is the decision on narrower grounds and controlling. See *Glossip* v. *Gross*, 576 U. S. __, 135 S. Ct. 2726, 2738, n. 2, 192 L. Ed. 2d 761, 775, n. 2 (2015).

should not be extended to give a constitutional entitlement, beyond the reach of Congress, to another class of aliens who are not "part of the population." The question of unlawful combatants held in indefinite detention can be reexamined if and when the occasion calls for it.

As a would-be immigrant whose only connection with this country is stepping illegally a few yards inside the border, Thuraissigiam is not a holder of the constitutional privilege of the writ of habeas corpus. Whether and to what extent that writ is available to him is entirely within the power of Congress to decide.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

December, 2019

Respectfully submitted,

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