No. 19-6039

IN THE

Supreme Court of the United States

CAMILO ANDRES LANDAZURI VARGAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

"The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). One power authorizes Congress to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations." U.S. Const., art. I, § 8, cl. 10. In the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70501 *et seq*., Congress invoked that power to legislate not only extraterritorially but universally. Under the MDLEA, the United States now routinely interdicts, prosecutes, and imprisons foreign nationals for drug trafficking on vessels half-way around the world, even where the drugs are not destined for the United States. When it comes to drug trafficking on the high seas, the United States now acts as the world's law giver and enforcer.

This global law-enforcement operation would have baffled the Framers. As explained by Professor Eugene Kontorovich in a pair of scholarly articles,[1] the Define and Punish Power permits Congress to exercise universal jurisdiction only over piracy; all other felonies (such as drug trafficking) require a U.S. nexus. That conclusion is compelled by the constitutional text, the views of influential Founders like John Marshall, Joseph Story, and James Wilson, and, most importantly, a pair of this Court's early precedents: *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) and *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). The government's brief in opposition ignores all of this authority. *See* BIO 8–9.

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[1] The "Define and Punish" Clause and the Limits of Universal Jurisdiction, 103 Nw. U. L. Rev. 149 (2009); Beyond the Article I Horizon: Congress' Enumerated Powers and Universal Jurisdiction Over Drug Crimes, 93 Minn. L. Rev. 1191 (2009).

So too have the lower courts. In doing so, they have uniformly yet casually blessed the MDLEA's constitutionality. That widespread but improper enlargement of federal legislative power requires immediate correction. Absent intervention by this Court, criminal prosecutions under the MDLEA will continue in earnest, exceeding Congress' limited authority, imprisoning those with no connection to the United States, and requiring the expenditure of substantial federal resources. Only this Court can rein in this unprecedented global exercise of American legal might.

The MDLEA's constitutionality is thus a question of exceptional importance, implicating the limits of an enumerated power in the criminal context. Yet that fundamental question has gone unaddressed by this Court. The Court has not interpreted the Define and Punish Power since 1820, and its early precedents have created confusion. That confusion must be clarified. The Define and Punish Power provides the exclusive constitutional basis for the MDLEA, which has been used for decades to haul thousands of foreign nationals into federal courts and federal prisons. And although that statute represents Congress' most breathtaking exercise of extraterritorial criminal authority, this Court has never interpreted it.

The time has come for the Court to interpret the MDLEA and to clarify Congress' Define and Punish Power. The government does not dispute that this case would be an excellent vehicle to do so. Accordingly, the Court "should grant certiorari [on the first question] and reaffirm that our Federal Government is one of limited and enumerated powers, not the world's lawgiver." *Baston v. United States*, 137 S. Ct. 850, 850 (2017) (Thomas, J., dissenting from the denial of certiorari).

I. THIS PROSECUTION EXCEEDS CONGRESS' ENUMERATED POWERS

The MDLEA exceeds Congress' constitutional authority under the Define and Punish Power where, as here, there is no nexus with the United States.

A. The MDLEA Exceeds Congress' Power Under the Felonies Clause

In the decision below, the Eleventh Circuit held that, even without a U.S. nexus, the MDLEA is a valid exercise of Congress' authority to define and punish "Felonies committed on the high seas." Pet. App. A4–7. That holding, also adopted by other circuits, *see* BIO 9, is wrong as a matter of text, history, and precedent.

1. Textually, the Define and Punish Power contains three distinct grants of authority: the power to define and punish piracy; the power to define and punish felonies committed on the high seas; and the power to define and punish offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–59 (1820) (employing cannon against surplusage to this provision). Critically, however, piracy was both a "felony" and an "offense against the law of nations." So why did the Framers enumerate it? Because piracy was the one crime of universal jurisdiction; as such, it was subject to prosecution by all nations, regardless of nexus. By separately enumerating piracy, the text strongly suggests that other felonies *did* require a jurisdictional nexus before they could be prosecuted in the United States. *See* Kontorovich, Define and Punish, at 152, 159, 163, 165, 167.

2. That textual understanding is supported by the historical context.

a. The dual purposes of Felonies Clause contemplated a U.S. nexus. First, that Clause was designed to ensure the uniformity of criminal law on the high

seas. *See id.* at 169–71. Unlike piracy, felonies varied from state to state, subjecting American seamen to multiple criminal codes. Eliminating that variability would only be necessary if there was some initial nexus to the United States. Second, by subjecting American vessels or seamen to federal law, the Felonies Clause was designed to avoid conflict between America and foreign nations. Again, no such conflict would be created by vessels or seamen that lacked any nexus to the United States. In short, the Felonies Clause was "about rearranging power between the new federal government and the states, safely entrusting to the national government those powers previously held by the states." *Id.* at 170. It was not an "outward projection of [U.S.] jurisdiction." *Id.*

b. The Framers were heavily influenced by Emmerich de Vattel and Cornelius van Bynkershock, international-law scholars who viewed universal jurisdiction as extraordinary and as limited only to piracy. *Id.* at 173–74 & nn.124, 130. Their formalistic and territorial views about jurisdiction and sovereignty were soon embraced by Chief Justices Jay and Marshall. *See id.* at 172 & nn.120, 122 (citing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812) (Marshall, C.J.); and *Henfeld's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (Jay, C.J.)). But "allowing for general universal jurisdiction over any felony at sea would be in tension with the widespread understandings of sovereignty and jurisdiction that informed the Framers." *Id.* at 174.

c. Due to "many of the Framers' concerns about congressional aggrandizement, it would be odd if Congress were given authority to legislate

universally without an express statement, or without someone noticing the implication." *Id.* at 168. The Anti-Federalists, "who were not shy about exaggerating the potentially imperial powers of the new government, would have raised this issue during the ratification process" had they understood that Congress possessed authority to "legislate felonies for the rest of the world." *Id.* Meanwhile, many influential statesmen and jurists—including proponents of broad federal power—expressed the contrary view, including James Wilson, John Marshall, Joseph Story, John Quincy Adams, and Henry St. George Tucker. *Id.* at 198.

For example, Justice Wilson (also a Framer) expressed that view in 1791 when instructing grand juries about the scope of a 1790 Act that, due to shoddy draftsmanship, appeared to extend universal jurisdiction to crimes beyond piracy. *Id.* at 174–76 (citing An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, ch. 9). He opined that such an exercise of congressional power would be unconstitutional. *See id.* at 176–77 (citing James Wilson, Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 1791)). Justice Story later expressed the same view, and even distinguished classic piracy from crimes that were labeled piracy by statute. *See id.* at 178–79 (citing Joseph Story, A Charge Delivered to the Grand Juries of the Circuit Court (1819)). "This insistence on the distinction between piracy proper and everything else directly corresponds to the constitutional distinction between piracies and felonies." *Id.* at 179.

In addition, John Marshall, then a freshman legislator, gave a famous speech on the floor of the House of Representative in 1800 defending President Adams'

extradition of a British mutineer who committed murder on a British ship. In doing so, he explained that Congress had constitutional authority to exercise universal jurisdiction only over piracy; Congress could not exercise such jurisdiction even over a heinous felony like murder. *See id.* at 179–84 (citing 10 Annals of Cong. 600 (1800) (statement of Marshall, J.)). His speech reflected that "the jurisdictional distinction between piracies and felonies had to be maintained." *Id.* at 184.

3. This understanding culminated in two of this Court's precedents, which make clear that piracy was the only crime subject to universal jurisdiction.

a. In an opinion by Chief Justice Marshall, the Court in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) recognized that, the Constitution "having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States." *Id.* at 630. Nonetheless, the Court declined to read the 1790 Act as conferring universal jurisdiction over piracy. Although the statute did so when read literally, the Court found that Congress could not have intended that result because the statute also included offenses beyond classic piracy. *See id.* at 631–34. While *Palmer* ultimately interpreted the 1790 Act, that interpretation derived from the Court's understanding—consistent with Marshall's earlier House speech—that Congress could not exercise universal jurisdiction over non-piratical felonies. Notably, neither the prosecutor nor Justice Johnson in dissent disputed that constitutional limitation. *See id.* at 617–18, 620 (prosecutor argument); *id.* at 641–

42 (op. of Johnson, J.). And that limitation was so important to enforce that the Court declined to interpret the statute to confer universal jurisdiction even over classic piracy, the one crime that Congress had the constitutional power to universally define and punish. *See* Kontorovich, Define and Punish, at 185–88.

b. In *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820), the Court applied *Palmer* and held that the 1790 Act also did not cover murder on a foreign vessel by a foreign national. *See id.* at 196–98. The Court explained that "there exist well-known distinctions between the crimes of piracy and murder," and the former "is considered as an offence within the criminal jurisdiction of all nations. . . . Not so with the crime of murder." *Id.* at 197. Thus, the statute did "not extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship. But [it was] otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress." *Id.* (emphasis added). The Court explained that Congress could not enlarge its constitutional power merely by labeling murder as piracy; otherwise, "what offence might not be brought within their power by the same device?" *Id.* at 198. Thus, the Court concluded, Congress "had no right to interfere" in the murder at issue. *Id.* As in *Palmer*, *Furlong*'s statutory interpretation was driven by an understanding of the constitutional limits of Congress' power, which permitted it to exercise universal jurisdiction over piracy alone. *See* Kontorovich, Define and Punish, at 190–91.

4. Even Congress understood that its authority was so circumscribed. In 1820, Congress sought to eradicate the slave trade by declaring it a form of piracy;

yet Congress still insisted on a U.S. nexus. *Id.* at 194 (citing Act of May 15, 1820, ch. 113, §§ 4–5, 3 Stat. 600). "Despite its strong desire to do so, Congress felt that it could not legislate on a purely universal basis unless the offense had truly acquired the status of piracy through the practice of nations." *Id.* at 195. "Congress's failure to extend universal jurisdiction to slave trading is significant evidence of how it understood the constitutional limits on its [Define and Punish] powers." *Id.* at 196. "Such legislative restraint, exercised by men who had seen the Constitution adopted in their lifetime" and who wanted to eliminate the slave trade, is powerful evidence that Congress itself believed that it could constitutionally define and punish non-piratical felonies only if they had a U.S. nexus. *Id.*

* * *

In sum, the Felonies Clause does not permit Congress to exercise universal jurisdiction over non-piratical felonies like drug-trafficking. This Court's precedents in *Palmer* and *Furlong* compel that conclusion. And that conclusion is confirmed by the constitutional text, historical context, and views of leading jurists, statesmen, and even Congress itself. Like the government, the lower courts have failed to engage with these historical arguments. Some courts have upheld the MDLEA's constitutionality without meaningful analysis. *See, e.g.*, *United States v. Ballestas*, 795 F.3d 138, 146–47 (D.C. Cir. 2015); *United States v. Perlaza*, 439 F.3d 1149, 1158–60 (9th Cir. 2006). Others have done so in the face of different defense arguments. *See, e.g.*, *United States v. Aybar-Ulloa*, 913 F.3d 47, 52–53 (1st Cir. 2019) (argument based on international law); *United States v. Campbell*, 743 F.3d

802, 809–12 (11th Cir. 2014) (argument that Congress may only punish capital felonies); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1054–56 (3d Cir. 1993) (argument that due process required a nexus). And others have simply overlooked the import of text, history, and precedents above. *See, e.g.*, *United States v. Suerte*, 291 F.3d 366, 372–75 (5th Cir. 2002). In every case, the lower courts have enlarged an enumerated power of Congress. Only this Court can undo that expansion.

B. The MDLEA Exceeds Congress' Power Under the Piracy Clause

The government has recently defended the MDLEA's constitutionality not under the Felonies Clause, but on the ground that stateless vessels fall under the Piracy Clause. *See Alexander v. United States*, BIO 7–8 (U.S. No. 17-7879) (May 2018). Because the court of appeals did not address the Piracy Clause, Pet. App. A-7 & n.7, this Court could simply remand for that court to address it in the first instance. Regardless, the government's argument misreads this Court's precedents.

1. "Piracy" is a constitutional term of art. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (Story, J.), the Court surveyed the common law and explained that "piracy is only a sea term for robbery"; as such, "its true definition" is simply "robbery upon the sea." *Id.* at 161–62; *see Talbot v. Jansen*, 3 U.S. (Dall.) 133, 160 (1795) ("What is called robbery on the land, is piracy if committed at sea"). Needless to say, "[d]rug trafficking does not in any way resemble piracy." Kontorovich, Beyond Article I, at 1218. Because drug trafficking is not "piracy," as defined at common law and understood at the Founding, Congress may not exercise universal jurisdiction over that offense under the Piracy Clause.

2. Disregarding the established definition of "piracy," the government has suggested that any offense committed by a stateless vessel is piracy, even where that vessel does not actually engage in piracy. The government has cited *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820) and *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820), but those cases do no support that sweeping proposition.

Klintock held that the 1790 Act applied to an individual who who fraudulently stole a foreign vessel. And *Holmes* held that the 1790 Act applied to a murder committed on vessel possessed by pirates. In those cases, the Court distinguished its earlier decision in *Palmer* on the ground that they involved stateless as opposed to foreign vessels, and the statute covered the former but not the latter. *Klintock*, 18 U.S. (5 Wheat.) at 151–52; *see Holmes*, 18 U.S. (5 Wheat.) at 416–417. Read in context, these decisions do not mean that the Piracy Clause permits the exercise of universal jurisdiction over any and all stateless vessels.

Indeed, *Klintock* and *Holmes* were statutory decisions that did not address Congress' constitutional authority at all. Doing so was unnecessary for two reasons. First, both cases actually involved piracy. Before discussing the statelessness of the vessel, *Klintock* expressly held that the defendant's conduct was piracy, as it involved a "robbery on the high seas." 18 U.S. (5 Wheat.) at 149–50; *see id.* at 153 (reiterating that the conduct "does amount to piracy," and that the statute applied to "all persons on board all vessels which throw off their national character by crui[s]ing piratically *and committing piracy* on other vessels") (emphasis added). Similarly, in *Holmes*, the defendant had committed piracy by capturing the vessel

before murdering its master. 18 U.S. (5 Wheat.) at 414. Thus, any exercise of universal jurisdiction over the murder would have again been supported by the underlying piracy. Second, it is doubtful that universal jurisdiction was even invoked at all in *Klintock* or *Holmes* due to substantial American connections. In *Klintock*, the defendant was an American citizen. 18 U.S. (5 Wheat.) at 144. And, in *Holmes*, one of the defendants was American, and other defendants also had substantial ties to the United States. 18 U.S. (5 Wheat.) at 414–15, 418–19.

Admittedly, "it is hard to know what to make of the *Klintock* and *Holmes* cases." Kontorovich, Define and Punish, at 191. Their holdings would benefit from clarification. But the Court should clarify that they do not hold that any stateless vessel is subject to universal jurisdiction under the Piracy Clause, even where it is not actually engaged in piracy. Rather, these decisions are best understood as an "end-run around" the unsatisfying statutory decisions in *Palmer* and *Furlong*. *Id.* at 193. "Thus, even after these decisions, Congress could not declare non-American vessels stateless for the purpose of acquiring jurisdiction over nonpiratical or nonuniversal crimes." *Id.* Yet that is precisely what Congress did in the MDLEA.

3. The government suggests that "piracy" includes *other* conduct that has become subject to universal jurisdiction. BIO 8–9. But that would still not save the MDLEA because there is "no state practice, and a palpable lack of support in relevant legal sources, for treating drug trafficking as a universally cognizable crime." Kontorovich, Beyond Article I, at 1223–27. In any event, because the Constitution "specifically names piracy, rather than referring to the concept of

universal jurisdiction," "a pure textualist or original meaning view would limit application of such jurisdiction under [the Define and Punish Power] exclusively to piracy." Kontorovich, Define and Punish, at 199. There is no basis to depart from the constitutional text and its established meaning at the time of the Framing.

II. THE ARTICLE I QUESTION IS IMPORTANT, RECURRING, AND UNSETTLED

The Article I question warrants review by this Court. *See* Sup. Ct. R. 10(c).

1. Determining the limits of the Define and Punish Power is an unsettled question of exceptional importance. As discussed above, the Court has not addressed that enumerated power in 200 years. And there remains substantial disagreement about the meaning of the Court's early precedents. Without guidance from this Court, the lower courts have afforded Congress free rein to define and punish crimes that occur thousands of miles away without any nexus to the United States. If such an expansive exercise of federal authority is to be permitted, this Court should be the one to do so. And because that question goes to the very structure of our system of government, this Court has previously granted certiorari to address the limits of Congress' Article I powers absent any circuit split. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 853–54 (2014); *Gonzales v. Raich*, 545 U.S. 1, 9 (2005); *Lopez*, 514 U.S. at 552. The same result is warranted here.

2. Indeed, this fundamental question of constitutional law recurs frequently. For the last few decades, the MDLEA has been routinely used to prosecute and imprison foreign nationals for drug trafficking. Although precise statistics are unavailable, one author has reported that, between 2012 and 2017,

over 2,700 foreign nationals were brought to the United States for prosecution under the MDLEA, a substantial increase from prior years. Seth Free Wessler, The Coast Guards' 'Floating Guatanamos,' N.Y. Times Magazine (Nov. 20, 2017). And although reported appellate decisions represent only a fraction of the prosecutions brought, there are scores of reported MDLEA decisions challenging the lack of U.S. nexus, reflecting the recurring nature of the problem.

In the Eleventh Circuit alone, MDLEA defendants have been raising the Article I challenge for the last fifteen years,[2] even after that circuit squarely rejected any nexus requirement. *See United States v. Estupinan*, 453 F.3d 1336, 1338–39 (11th Cir. 2006); *United States v. Rendon*, 354 F.3d 1320, 1324 (11th Cir. 2003). The government cites eleven unsuccessful cert. petitions raising this issue, BIO 8, but they only confirm its recurring nature. And ten of those eleven petitions

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[2] *See, e.g.*, *United States v. Garcia-Solar*, 775 F. App'x 523, 534–35 (11th Cir. 2019); *United States v. Valois*, 915 F.3d 717, 722 (11th Cir. 2019); *United States v. Castillo*, 899 F.3d 1208, 1214 (11th Cir. 2018); *United States v. Ruiz-Murillo*, 736 F. App'x 812, 817–18 (11th Cir. 2018); *United States v. Hernandez*, 864 F.3d 1292, 1303 (11th Cir. 2017); *United States v. Cortes*, 698 F. App'x 966, 968 (11th Cir. 2017); *United States v. Cruickshank*, 837 F.3d 1182, 1187–88 (11th Cir. 2016); *United States v. Walton*, 627 F. App'x 911 (11th Cir. 2015); *United States v. Persaud*, 605 F. App'x 791, 795 (11th Cir. 2015); *United States v. Campbell*, 743 F.3d 802, 809–12 (11th Cir. 2014); *United States v. Brant-Epigmelio*, 429 F. App'x 860, 864 (11th Cir. 2011); *United States v. Estrada-Obregon*, 270 F. App'x 978, 980–81 (11th Cir. 2008); *United States v. Estupinan-Estupinan*, 244 F. App'x 308, 309–10 (11th Cir. 2007); *United States v. Sinisterra*, 237 F. App'x 467, 470–71 (11th Cir. 2007); *United States v. Vargas-Medina*, 203 F. App'x 298, 299–300 (11th Cir. 2006); *United States v. Martinez*, 202 F. App'x 353, 354 n.1 (11th Cir. 2006); *United States v. Moreno*, 199 F. App'x 839, 840 n.1 (11th Cir. 2006); *United States v. Humphries-Brant*, 190 F. App'x 837, 838–39 (11th Cir. 2006); *United States v. Garcia*, 182 F. App'x 873, 875–77 (11th Cir. 2006); *United States v. Estupinan*, 453 F.3d 1336, 1338–39 (11th Cir. 2006); *United States v. De Armas*, 180 F. App'x 70, 72 n.2 (11th Cir. 2006); *United States v. Urena*, 140 F. App'x 879, 881–82 (11th Cir. 2005).

arose from the Eleventh Circuit.[3] Thus, the Article I/nexus challenge will persist as long as the government continues to bring "[t]he majority of these cases . . . in the 11th Circuit." Wessler, *supra*; *see* 46 U.S.C. § 70504(b)(2) (authorizing the government to select any venue for offenses committed on the high seas). With no end in sight, there is no reason for this Court to delay review any longer.

To the contrary, a constitutional cloud will continue to hang over these cases absent review by this Court. That state of affairs is untenable given the human stakes and administrative costs involved. As Petitioner's case reflects, the vast majority of foreign nationals prosecuted under the MDLEA are not kingpins; they are impoverished fishermen and farmers from rural Central and South America. And although they lack any connection at all to the United States, they often receive harsh ten-year mandatory-minimum sentences. *See* Pet. App. A-2; 46 U.S.C. § 70506(a)-(b); 21 U.S.C. § 960(b). In addition to that real human cost, MDLEA prosecutions require substantial federal resources. Coast Guard cutters and helicopters constantly patrol international waters in search of go-fast boats, and the government then transports detainees over great distances to the United States, often under grim physical and psychological conditions. *See* Wessler, *supra* (describing conditions); Pet. App. A-2 (recounting that Petitioner was held at sea for 17 days). Given the high stakes for both the government and defendants, the Court should clarify the constitutionality of this large swath of federal criminal cases.

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[3] Notably, none of the recent petitions have thoroughly laid out the historical arguments above. *See, e.g.*, *Cruickshank v. United States*, Reply Br. 5–6 (U.S. No. 17-8953) (July 2018) (devoting just one page of reply brief to the Article I issue).

3. The government does not dispute that this case would be an excellent vehicle to do so. Petitioner preserved his Article I argument below, moving to dismiss the indictment on that basis and reiterating that argument on appeal. Dist. Ct. Dkt. Entry 25 at 2–9; Pet. C.A. Br. 11–20. Bound by circuit precedent, the lower courts squarely rejected that argument, holding that the MDLEA was constitutional as applied to Petitioner. Pet. App. A-4–7; Dist. Ct. Dkt. Entry 28. In so holding, the court of appeals expressly acknowledged that the record did not "provide[ ] any facts demonstrating that [Petitioner] had a plan or intent to bring the cocaine to the United States." Pet. App. A-2; *see* Dist. Ct. Dkt. Entry 51 (factual proffer). Finally, Petitioner's guilty plea did not waive his constitutional challenge to the MDLEA. *Class v. United States*, 138 S. Ct. 798, 801–03 (2018). Thus, the Article I question is cleanly presented here, and a favorable resolution would be outcome determinative.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question.

Respectfully submitted,

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