No. 20-1029

In the Supreme Court of the United States

CITY OF AUSTIN, TEXAS, PETITIONER

v.

REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, *et al.*,

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

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a public-interest law firm dedicated to defending the essential foundations of a free society, including free speech and the free exchange of ideas. As part of our First Amendment practice, we often litigate whether challenged laws are content-based or content-neutral. *See*, *e.g.*, *Cent. Radio Co.* v. *City of Norfolk*, 811 F.3d 625 (4th Cir. 2016); *Wag More Dogs, LLC* v. *Cozart*, 680 F.3d 359 (4th Cir. 2012); *Neighborhood Enters.* v. *City of St. Louis*, 644 F.3d 728 (8th Cir. 2011). We also often address arguments about facial and as-applied relief like those pressed by the City of Austin here. For these reasons, the Institute for Justice has an interest in the proper resolution of this case.[1]

SUMMARY OF ARGUMENT

First Amendment doctrine can be complex, but Austin's off-premises law is unmissably content-based. The ordinance applies to commercial speech and noncommercial speech alike. And the content-based distinctions are stark. For example, a billboard advocating for or against abortion rights would not be a disfavored "off-premises" sign. *See* Pet. Br. 39 (noting that under Austin's law, signs expressing "beliefs or views . . . are often not off-premises at all, because they do not advertise off-premises activities"). But for a billboard publicizing an abortion-rights rally, the analysis would be different; unlike the ideological billboard, the rally billboard would "advertis[e] a[n] . . . activity . . . not located on the site where the sign is installed" and in turn trigger off-premises designation.

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[1] In accordance with Rule 37.6, no counsel for a party authored this amicus brief in whole or in part and no person other than the Institute for Justice, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

J.A. 52. A billboard urging readers to support a pro-choice candidate? That would be an off-premises sign also; it "advertis[es] a . . . person" located elsewhere. *See* J.A. 52. But one subjecting that same candidate to criticism? Possibly not, since attack ads typically are not understood as "advertising" the person attacked. *See* J.A. 52.

In short, Austin's definition of off-premises signs is "replete with content-based distinctions." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 174 (2015) (Alito, J., concurring). That makes it a straightforward candidate for strict scrutiny, and Austin's arguments do not counsel otherwise. As its top-line theory, Austin maintains (Br. 38) that its law singles out off-premises signs based not on their content but on "the lack of nexus between the sign and its location." But that is descriptively wrong; it is true that Austin favors signs whose content has a "locational nexus" to their host site, but it also favors ones with no nexus to any site at all—for example, ones praising or criticizing a religion or policy or philosophy. Pet. Br. 19, 39. Even were the ordinance as Austin describes it, moreover, a law that seeks to align a sign's content with its location presents obvious opportunities for the government to intrude on "the free exchange of ideas." Pet. Br. 41. The experience of one of amicus's clients—a doggy-daycare owner forced to replace a mural of cartoon dogs with one of birds—illustrates that danger vividly.

Austin's broader theory of facial relief—which parses commercial speech versus noncommercial—is likewise without merit, not least because Austin acknowledges that nothing in its off-premises law depends on whether a billboard's message is commercial or noncommercial.

ARGUMENT

I. Real-world examples highlight that Austin's off-premises ordinance is content-based.

As respondent's brief ably demonstrates, Austin's off-premises ordinance is content-based because it "draws distinctions based on the message" conveyed. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). Much like the Town of Gilbert's sign code in *Reed*, Austin's law creates a baroque hierarchy of speech under which, for example, a billboard criticizing religion gets more favorable treatment than one publicizing a nearby place of worship. Austin's arguments to the contrary misportray its law, and its focus on "locational nexus" reduces to content discrimination by another name.

A. Austin's off-premises ordinance draws peculiarly content-based lines.

Austin's off-premises ordinance applies to commercial speech and noncommercial speech alike (Pet. Br. 8-9), and it singles out so-called off-premises signs for special restrictions based on the message conveyed. Signs that "advertis[e] a business, person, activity, goods, products, or services not located on the site where the sign is installed" are off-premises signs. J.A. 52. So, too, are signs that "direct[] persons to any location not on that site." J.A. 52. On the other hand, signs advertising "businesses, persons, products, services, or activities offered on-premises" are not off-premises signs and enjoy lighter restrictions. U.S. Br. 5. And unusually, signs "that do not refer to any premises at all" enjoy favored status as well—for example, ones with purely ideological messages. Pet. Br. 10, 39; *see generally* Cert. Reply Br. 12 ("[T]he City's interpretation is the one that counts.").

In this way, Austin's law reflects a hierarchy of content that is if anything more convoluted than that in *Reed*. A billboard identifying a place of worship, for instance, would likely qualify as a disfavored off-premises sign, either because it "advertis[es] a[n] . . . activity . . . not located on the site where the sign is installed" or because it "direct[s] persons to any location not on that site."

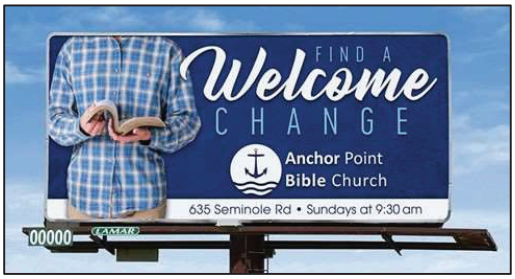

Figure A[2]

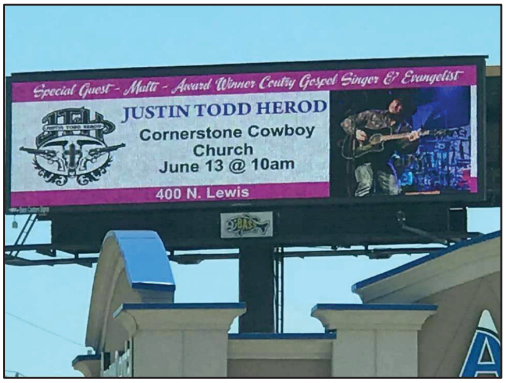

Figure B[3]

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[2] Anchor Point Bible Church, *New billboard for our community* (Mar. 27, 2019), https://tinyurl.com/2t998td2.

[3] Justin Todd Herod, *This is so cool! Never have I . . .* , Facebook (June 11, 2021), https://tinyurl.com/dfasp4bw.

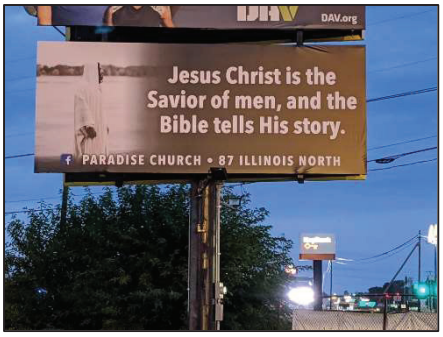

Figure C[4]

By contrast, billboards simply criticizing, questioning, or commenting on religion likely would not be considered off-premises signs. Unlike a billboard advertising a church or a mosque, such issue-oriented billboards often "do not refer to any premises at all," meaning they are not subject to the special restrictions reserved for off-premises signs. *See* Pet. Br. 10.

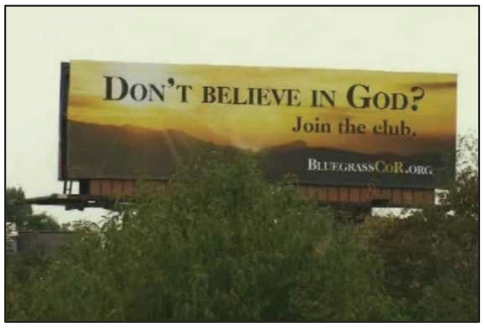

Figure D[5]

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[4] Paradise Church, *Congratulations church the billboard is up . . .*, Facebook (Aug. 25, 2020), https://tinyurl.com/n4j2ptzf.

[5] *Lexington billboard promotes atheism*, WAVE News (Sept. 18, 2012), https://tinyurl.com/r2245h43.

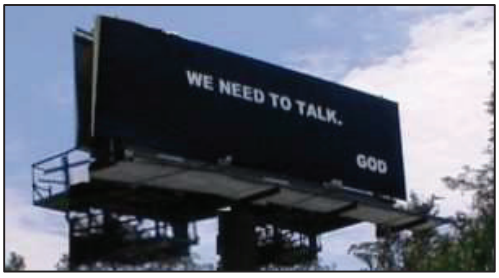

Figure E[6]

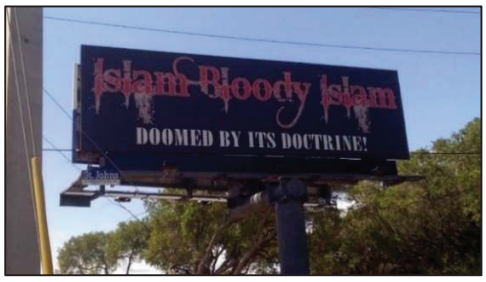

Figure F[7]

Nor are Austin's content-based lines unique to religious speech. A billboard advocating for or against gun control[8] or immigration[9] in the abstract probably would not be regulated as an off-premises sign. In the federal

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[6] Wicomico Presbyterian Church, *Breath of Life* (Apr. 30, 2019), https://tinyurl.com/95923zdy.

[7] *Billboard stirs controversy in St. Augustine*, Fox 35 Orlando (Apr. 12, 2016), https://tinyurl.com/w243b3n8.

[8] Joe Moylan, *2nd Amendment billboard wars underway in Weld County*, Greeley Tribune (Apr. 24, 2019), https://tinyurl.com/4aa5ms9m.

[9] Owen Daugherty, *Florida billboards call on US to stop 'locking up' kids to mark World Children's Day*, The Hill (Nov. 20, 2019), https://tinyurl.com/45e78y7a.

government's words, it would "not advertise businesses, persons, products, services, or activities at all." U.S. Br. 5 (characterizing Austin's code). But adjust the content and the regulatory treatment changes with it. Say that instead of advocating gun control in general, a billboard were to instead tout a specific pro-gun-control candidate. In Austin, that change in content would change the regulatory classification. Now, the sign would "advertis[e] a . . . person . . . not located on the site where the sign is installed," thus triggering restriction as an off-premises sign. J.A. 52; *see also* C.A. Oral Arg. 26:51-27:39. Adjust the content a third time and the analysis changes yet again: while a billboard *praising* the candidate fits neatly within Austin's definition of off-premises sign, one *condemning* her does not. Few English speakers, after all, would say that an attack ad "advertis[es]" the person attacked.

In fact, Austin's law raises endless questions that can be resolved only by scrutinizing content at a granular level. Consider a billboard declaring, "Choose Life No Matter What."[10] That is likely not an off-premises sign; to borrow again from the federal government's formulation, it does "not advertise businesses, persons, products, services, or activities at all." U.S. Br. 5. But the analysis might well be different for a billboard declaring that "Abortion Is Legal in All of Texas,"[11] which publicizes "a

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[10] Jennifer Brinker, *Billboard messages along St. Louis highways promote pro-life theme*, St. Louis Rev. (Mar. 8, 2019), https://tinyurl.com/kw95hwjk.

[11] *Cf.* Mike Schell, *ACLU's 'Abortion is legal in Ohio' billboard takes aim at Lebanon*, WXIX (July 12, 2021), https://tinyurl.com/2jupkkkj.

service[] not located on the site where the sign is installed." The examples go on. A billboard advocating for or against the legalization of marijuana?[12] Probably not an off-premises sign. One declaring that marijuana is legal in a neighboring State?[13] Probably off-premises, advertising as it does a product located not just on a different tract of land, but in another jurisdiction altogether.

Simply, Austin's sign code suffers the precise defects that drove the Court's analysis in *Reed*. As in *Reed*, a "[c]hurch's signs inviting people to attend its worship services" in Austin "are treated differently from signs conveying other types of ideas"—ones quoting religious texts, for example, or praising a creed or condemning it. 576 U.S. at 164; *see also* pp. 5-6, *supra*. *Reed*'s hypothetical philosophy signs would receive haphazardly different treatment in Austin too. A billboard "inform[ing] its reader of the time and place a book club will discuss John Locke's Two Treatises of Government" would be a disfavored off-premises sign. 576 U.S. at 164. One "expressing the view that one should vote for one of Locke's followers in an upcoming election" would be an off-premises sign as well. *Id.* One highlighting that same candidate's weaknesses, however, might not be. *See* p. 7, *supra*. And as for one "expressing an ideological view rooted in Locke's theory of government"? Surely not. 576 U.S. at 164; *see also* Pet. Br. 39.

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[12] Joseph Flaherty, *Marijuana Foes Strike Back in Phoenix's Pot Billboard Battle*, Phoenix New Times (Dec. 13, 2017), https://tinyurl.com/x8bp3ty4.

[13] Lisa Backus, *Legal weed billboard creating a buzz on I-91*, Conn. Post (Jan. 22, 2019), https://tinyurl.com/ywftfhps.

If anything, Austin's ordinance magnifies the faults identified in *Reed*. For all their shortcomings, the content-based distinctions in the Town of Gilbert were relatively clear. Not so in Austin, which, as detailed above, distinguishes between (1) signs publicizing people, activities, and things located on other premises, and (2) signs that "do not refer to any premises at all." Pet. Br. 10. That jigsaw distinction—notably absent from the federal Highway Beautification Act (*see* U.S. Br. 4)—is intractably content-based, "introduces confusing line-drawing problems," and merits the most searching judicial review. *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1889 (2018).

B. Austin's arguments do not rehabilitate its law.

Austin offers no legal standard under which its law would be content-neutral while the Town of Gilbert's would remain content-based.

1. Austin contends, foremost, that its "off-premises rule regulates all subjects and viewpoints equally" and simply "[r]egulat[es] signs differently based on a locational nexus." Br. 38, 41. But that account of the law is descriptively inaccurate. Under Austin's off-premises ordinance, countless billboards may bear messages with no nexus to their location and still avoid being classified as off-premises signs. Ones expressing "beliefs or views," for instance, "are often not off-premises" signs "because they do not advertise off-premises activities." *See* Pet. Br. 39. Meanwhile, a neighboring billboard that urges passers-by to vote for a candidate with those same views or beliefs—or to attend a rally espousing those views or beliefs—would be regulated differently. Whatever might be said of ordinances in other cities (or, for that matter, of the Highway Beautification Act), Austin's off-premises

ordinance does not simply "operate[] based on the relationship between the sign and its location." Pet. Br. 12.

Even accepting Austin's framing, moreover, a rule requiring a nexus between content and location is self-evidently content-based. And the resulting potential for censorship is real. Take dog-lover Kim Houghton (one of our former clients), who faced the converse of Austin's off-premises law in Arlington, Virginia. In 2010, she opened Wag More Dogs, a doggy daycare in the Shirlington neighborhood. In preparation for the grand opening, she painted one side of the building—abutting a dog park—with a whimsical mural of dogs, bones, and paw prints:

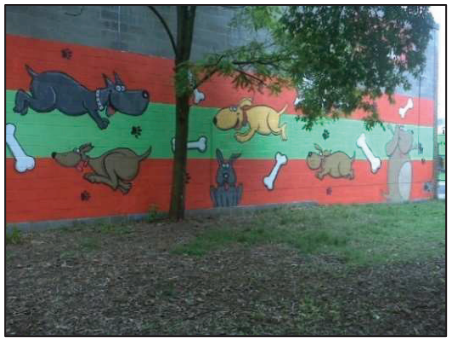

Figure G[14]

For that, Arlington threatened to shut her down. In the county's view, the mural's canine theme "identif[ied] the products or services available on the premises or advertis[ed] a use conducted thereon," meaning the painting was not a work of art but an illegal "business sign." *Wag More Dogs, LLC* v. *Cozart*, 680 F.3d 359, 362 (4th Cir. 2012) (quoting sign ordinance). Put differently, the mural

[14] Tom Jackman, *Arlington's Wag More Dogs Mural comes down*, Washington Post (Sept. 25, 2012), https://tinyurl.com/35fhmh49.

displayed too great a locational nexus with its host structure. The ordinance's scope, one official stressed, was unmistakably content-based:

> For the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs, bones, paw prints, pets, people walking their dogs, etc. In other word[s] . . . , the mural can not . . . show anything that has any relationship with your business. If it does, then it becomes a sign.

Id. at 363.

With little choice, Kim Houghton acceded to Arlington's demands. At first, she masked her mural with tarps. *Id.* at 364 ("[Arlington] subsequently issued Wag More Dogs a final certificate of occupancy . . . under the condition that the tarps remain in place over the painting."). And when the Fourth Circuit ultimately exercised "pragmatic judgment" and upheld the ordinance as content-neutral, *id.* at 365, she whitewashed the dogs and substituted a species with no nexus to her store: birds.

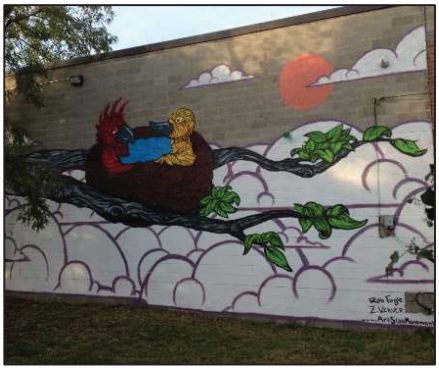

Figure H

Pre-*Reed*, Kim Houghton's experience was far from unique. Elsewhere in Arlington, a tobacconist substituted a mural of a man smoking a blue whale in place of a cigar. "It doesn't make a lot of sense," the store manager said, "but the county made us do it." Taylor Holland, *When a cigar becomes a whale, a sign becomes art*, Washington Examiner (Sept. 26, 2012), https://tinyurl.com/2a5tcawd.

These examples spotlight both the virtue of *Reed*'s bright-line standard and the shortcomings of Austin's alternative. Contrary to Austin's view (Br. 41), "[r]egulating signs differently based on a locational nexus" can absolutely "hinder the free exchange of ideas." In its *Wag More Dogs* opinion, in fact, the Fourth Circuit deployed reasoning much like Austin's here. The government's benign "objectives," the court remarked, "mitigate any concern" with its "cursory examination" of a speaker's message or with its "looking generally at what type of message a sign carries to determine where it can be located." 680 F.3d at 368-69 (citations omitted); *see also Cahaly* v. *Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (abrogating *Wag More Dogs*'s reasoning in light of *Reed*).

2. Austin also suggests (Br. 14, 47) that strict scrutiny is unwarranted because its law does not ban off-premises signs outright but merely prevents their being digitized. But because "[t]he distinction between laws burdening and laws banning speech is but a matter of degree," a "content-based burden[] must satisfy the same rigorous scrutiny as . . . content-based bans." *United States* v. *Playboy Ent. Grp.*, 529 U.S. 803, 812 (2000). Austin acknowledges that its digitization rule amounts to a "restriction" on speech (Br. 45), and because that restriction is content-based, it calls for strict scrutiny.

3. Austin contends (Br. 12) that the court of appeals' "read-the-sign approach" is "unworkable." Yet Austin, for its part, presents no workable alternative. It maintains that its ordinance is content-neutral because "it operates based on the relationship between the sign and its location." Br. 12. But besides portraying the ordinance inaccurately (*see* pp. 9-10, *supra*), that characterization is just an elegant way of avoiding the word *content*. The off-premises ordinance does not regulate the relationship between sign—as a physical object—and location; it regulates the relationship between the sign's *content* and its location, and in so doing, it cements an arbitrary pecking order of messages. Whatever Austin's motives, a law that applies in this way merits strict scrutiny. And whatever its criticisms of the court of appeals' "rigid and formulaic approach" (Br. 32), Austin presents no alternative that would excuse its law as content-neutral while holding the Town of Gilbert's content-based.

II. Austin's view of facial relief lacks merit.

Separately, Austin suggests that the ordinance's breadth should be its saving grace. As the parties agree, Austin's off-premises ordinance applies to commercial and noncommercial speech alike; while it is attuned keenly to a sign's content, it is indifferent to whether that content is commercial advertising. *See, e.g.*, Pet. App. 23a. That indiscriminate scope, Austin contends, should insulate the law from facial invalidation. Whatever might be said of the law's application to noncommercial speech (so the argument goes), the law is constitutional as to speech that counts as commercial. Because those applications to commercial speech are inoffensive, Austin continues (Br. 50-52), the law cannot be facially invalid.

Austin is wrong. To start (and as respondent's brief elaborates (at 42-45, 47)), it is far from clear that the off-premises ordinance would be constitutional even if written to cover commercial speech alone. More fundamentally, Austin's invitation for the courts to slice, dice, and salvage its law misperceives the judiciary's role. Respondent's facial challenge is "predicated on a constitutional infirmity in the terms of the statute itself." Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 391 (1998). By its terms and as authoritatively construed, Austin's off-premises ordinance imposes special burdens on certain signs based on their content. In doing so, it is blind to whether a particular sign conveys speech that is commercial or noncommercial. Pet. Br. 51. So whether a class of commercial speech could validly be restricted under a differently written law is beside the point. No matter how flawed, most facially invalid statutes will at times blunder into speech or conduct that would not be privileged under a differently formulated rule of law. But if in doing so a statute "operates on a fundamentally mistaken premise," the prospect that it may hit upon a stopped-clock right answer "is little more than fortuitous" and does not immunize it from facial challenge. *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984).

The federal Stolen Valor Act illustrates the point. Much like Austin's off-premises ordinance, the Stolen Valor Act defined a set of regulated speech without regard to its commercial or noncommercial characteristics. 18 U.S.C. § 704(b) (2006). Of that speech, a subset—falsehoods in commercial advertisements—plainly would not be protected under the First Amendment. *Ibanez* v. *Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136,

142 (1994). In *Alvarez*, however, the Court's plurality did not hold the Act facially valid on the strength of those potential applications to misleading commercial speech. Rather, the plurality applied strict scrutiny to the rule of law Congress chose to enact—one blind to any line between commercial and noncommercial speech and by its terms reaching "false statement[s] made at any time, in any place, to any person." *United States* v. *Alvarez*, 567 U.S. 709, 722 (2012); *see also* U.S. Br. at i, *Alvarez*, 567 U.S. 709 (No. 11-210) ("The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.").

The same principles apply here. The City of Austin might well be able to enact a valid law singling out off-premises commercial speech for a digitization ban. Then again, it might not. *See* Resp. Br. 42-45, 47. Either way, the ordinance it passed is not so limited. Pet. App. 23a; *see also* Cert. Reply Br. 11 (insisting, despite all textual cues to the contrary, that the city's 2017 amendment "clearly encompass[es] commercial and noncommercial speech"). The Court's inquiry, in turn, is bounded by the ordinance as it is written. In that ordinance, nothing looks to whether a billboard's message is commercial or noncommercial. The law instead embodies a blanket rule applicable to all signs and regulating all messages based on an intricate set of content-based distinctions. Because Austin has not justified those distinctions under the appropriate level of scrutiny (or even tried), the court of appeals was correct to hold the law invalid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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