20-1126

No.

ORIGINAL

In the Supreme Court of the United States

JOACHIM CARLO SANTOS MARTILLO AND
ANTHONY Z. BONO,
PETITIONERS

v.

UNKNOWN DEFENDANTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF SUFFOLK COUNTY OF THE COMMONWEALTH OF MASSACHUSETTS

Petition for a Writ of Certiorari

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Questions Presented

Does a party asserting ownership to a patent application have a right to a state (commonwealth) action like either a Massachusetts quiet action or a Massachusetts try title action in order to a resolve question of title to said patent application,

- if in a 35 U.S. Code § 145 civil action to obtain a patent, the Federal District Court denies standing to the applicant for lack of clear title,
- if the Court of Appeals for the Federal Circuit upholds the denial of standing in a Rule 36 Affirmance, and
- if there are multiple possible even perhaps contradictory reasons for the Affirmance?

According to 35 U.S. Code § 261 a patent has "the attributes of personal property." In a state (commonwealth) court, does the doctrine of adverse possession apply to a patent application as this doctrine might apply to other private or personal property like land, a car, a painting, etc.?

In a state (commonwealth) quiet or try title action, how dispositive is a finding of fact by the USPTO with respect to ownership?

List of All Parties

The known parties to the proceeding are Petitioners Joachim Carlo Santos Martillo and Anthony Z. Bono.

Corporate Disclosure Statement

There are no parent corporations or publicly held companies in this case.

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JOACHIM CARLO SANTOS MARTILLO AND
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PETITIONERS

v.

UNKNOWN DEFENDANTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF SUFFOLK COUNTY OF THE COMMONWEALTH OF MASSACHUSETTS

Petition for a Writ of Certiorari (continued)

Joachim Carlo Santos Martillo and Anthony Z, Bono (Petitioners) respectfully petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Suffolk County of the Commonwealth of Massachusett in this case.

Opinions and Related Case Materials Below

Because of the failure of most of the Courts either to enter their opinions (*vide supra* p. 11) or to explain their rejection of CAFC or SCOTUS holdings in detail, the Petitioners have included their pleadings and motions in order to elucidate this Petition.

The decision of the Supreme Judicial Court (SJC) of the Commonwealth of Massachusetts, SJ-2020-0580: *Joachim Carlo Santos Martillo and Anthony Z. Bono v. Unknown Defendants to be named* (App. A, *infra* p. 20), is available by email by request to Suffolkcivil.clerksoffice@jud.state.ma.us.[1]

1 Alternative emails for requests are:

- abraham.polayes@jud.state.ma.us and
- stephen.cronin@jud.state.ma.us.

Here is the contact information for the Supreme Judicial Court of Suffolk.
Supreme Judicial Court for Suffolk County
John Adams Courthouse
One Pemberton Square, Suite 1300
Boston, MA 02108-1707
Tel: (617) 557-1110

The Petition to the SJC for Writ of Certiorari to the Massachusetts Court of Appeals, SJ-2020-0580: *Joachim Carlo Santos Martillo and Anthony Z. Bono v. Unknown Defendants to be named* (App. B, *infra* p. 22), is available by email by request to Suffolkcivil.clerksoffice@jud.state.ma.us.

The decision of the Massachusetts Court of Appeals on Motion for Reconsideration, 2019-P-0748: Anthony Z Bono & another vs. Unknown Defendants, June 19, 2020 (App. C, *infra*, p. 34) is available by email request to AppealsCtClerk@appct.state.ma.us.[2]

Plaintiff Motion for Reconsideration in the Massachusetts Court of Appeals, 2019-P-0748: Anthony Z Bono & another vs. Unknown Defendants, June 9, 2020 (App. D, *infra*, p. 36) is available by email request to AppealsCtClerk@appct.state.ma.us.[3]

Plaintiff Motion to Amend in the Massachusetts Court of Appeals, 2019-P-0748: Anthony Z Bono & another vs. Unknown Defendants, June 9, 2020 (App. E, *infra*, p. 39) is available by email request to AppealsCtClerk@appct.state.ma.us.[4]

The decision of the Massachusetts Court of Appeals on Appeal, 2019-P-0748: Anthony Z Bono & another vs. Unknown Defendants, May 26, 2020 (App. F, *infra*, p. 43) is available by email request to AppealsCtClerk@appct.state.ma.us.[5]

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2 Here is the contact information for the Massachusetts Appeals Court.
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Plaintiff Response to Appeals Court Docket Entry Order, 2019-P-0748: Anthony Z Bono & another vs. Unknown Defendants, June 5, 2019 (App. G, *infra*, p. 47) is available by email request to AppealsCtClerk@appct.state.ma.us.[6]

The decision of the Suffolk Superior Court of the Commonwealth of Massachusetts, 1884CV03192: Joachim Carlo Santos Martillo *et al.* vs. Penril Datacomm Networks, Inc. *et al.*, Dec 19, 2018 (App. H, *infra*, p. 55) is available by email request to Suffolkcivil.clerksoffice@jud.state.ma.us.[7]

Plaintiff Bill in Equity of the Suffolk Superior Court of the Commonwealth of Massachusetts, 1884CV03192: Joachim Carlo Santos Martillo *et al.* vs. Penril Datacomm Networks, Inc. *et al.*, Nov 19, 2018 (App. I, *infra*, p. 58) available by email request to Suffolkcivil.clerksoffice@jud.state.ma.us.[8]

Plaintiff Complaint in the Suffolk Superior Court of the Commonwealth of Massachusetts, 1884CV03192: Joachim Carlo Santos Martillo and Anthony Z. Bono vs. Unknown Defendants, Oct 12, 2018 (App. J, *infra*, p. 84) is available by email request to Suffolkcivil.clerksoffice@jud.state.ma.us.[9]

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9 Here is the contact information for the Suffolk Superior Court.

The CAFC Rule 36 Affirmance of the District Court opinion is cited via Realvirt, LLC v. Iancu, 2017-1159 (Fed. Cir. Aug. 14, 2018) (App. K, *infra*, p. 90).

Memorandum Opinion on Standing from the Federal District Court of the Eastern District of Virginia is reported at *Realvirt, LLC v. Lee*, 220 F. Supp. 3d 704 (E.D. Va. 2016), Jul 19, 2016 (App. L, *infra*, p. 92).

The USPTO OPLA decision on proprietary interest can be found in the file wrapper of the 07/773,161 patent application, Sep 30, 2013 (App. M, *infra*, p. 117).

Jurisdiction

The decision of the Supreme Judicial Court of Suffolk was entered on August 28, 2020. The Supreme Court Order of March 19, 2020 (ORDER LIST: 589 U.S.) extended the deadline to file a petition for writ of certiorari to 150 days from the date of the lower court judgment (January 25, 2021). The jurisdiction of this Court is invoked under 28 U.S. Code § 1257 (State courts; certiorari) (a).

Constitutional Provisions Involved

US Constitution Article I Section 8 [Patent and Copyright Clause]

...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries…

US Constitution Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

US Constitution Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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Massachusets, Part the First, Article X

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Statutes Involved

U.S. Code Section 261 of the Patent Act states the following.

> Subject to the provisions of this title, patents shall have the attributes of personal property. The Patent and Trademark Office shall maintain a register of interests in patents and applications for patents and shall record any document related thereto upon request, and may require a fee therefor.
>
> Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.
>
> A certificate of acknowledgment under the hand and official seal of a person authorized to administer oaths within the United States, or, in a foreign country, of a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States, or apostille of an official designated by a foreign country which, by treaty or convention, accords like effect to apostilles of designated officials in the United States, shall be prima facie evidence of the execution of an assignment, grant or conveyance of a

patent or application for patent.

An interest that constitutes an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

Other pertinent statutory provisions are reproduced in the appendix to this petition. (See App. N, *infra*, 118.)

Rules Involved

Federal Circuit Rule 36 Affirmance – Judgment of Affirmance Without Opinion

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence supporting the jury's verdict is sufficient;

(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law.

Massachusetts Appeals Court Rule 23.0: Summary disposition (formerly known as Appeals Court Rule 1:28)

(1) Summary disposition without oral argument

At any time following the filing of the appendix and the briefs of the parties on any appeal in accordance with the applicable provisions of Mass. R. A. P. 14(b), 18, and 19, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify, or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any decision entered under this rule shall be subject to the provisions of Mass. R. A. P. 27 and 27.1.

(2) Citation of summary dispositions

If, in a brief or other filing, a party cites to a decision issued under this rule, the party shall cite the case title, a citation to the Appeals Court Reports where issuance of the decision is noted, and a notation that the decision was issued pursuant to this rule (or its predecessor, Appeals Court Rule 1:28). No such decision issued before February 26, 2008, may be cited.

Statement

This petition for writ of certiorari is directed to a try or quiet title action in the Superior Court of Suffolk County of the Commonwealth of Massachusetts. This action was a case of first impression because no one has ever tried to litigate a try or quiet title case for a patent application in Massachusetts.

The case has a complex history and involves fundamental issues of:

1 US Constitutional law,

2 Massachusetts Constitutional law,

3 US patent law, and

4 Massachusetts private property law.

Introduction

The US Constitution Article I Section 8 (The Patent and Copyright Clause, *vide supra*, p. 9) is terse with respect to the right of an inventor (*vide infra* p. 118) to a discovery. The Framers understood a discovery of an inventor to be an invention.

If one is steeped in the intellectual culture of the late Enlightenment as the Framers were, the right of an inventor to his invention means that

1 the sovereign issues open orders (letters patent or *lettres patentes*) to an inventor to convert a defined region in the realm of knowledge into said inventor's private property for a limited time period after which the region becomes public property just as

2 the English sovereign might issue open orders (letters patent or *lettres patentes*) to a person to convert a defined region in the realm of England to said person's private property.[10]

10 It was commonplace in the generation of the Framers of the US Constitution to consider knowledge to be a realm, whose territory could be mapped. For example, Friedrich Wilhelm Christian Karl Ferdinand Freiherr von Humboldt (22 June 1767 – 8 April 1835), who was a contemporary both of the Framers and also of Kant, points out, "Kant has isolated philosophy in the depths of each man's consciousness; yet no one has made so many and fruitful applications of it to the whole territory of

If US Courts diverge from treating letters patent to an invention (*vide infra* p. 118) as much as possible like letters patent to land, the Courts stray from the original intent of the Framers.

It creates a dilemma if letters patent to an invention constitute private immovable property within the territory of the realm of knowledge because there are no courts of common law in the realm of knowledge.

Congress resolves the dilemma via 35 U.S. Code § 261 (*vide supra* p. 10), which defines the intellectual property made private immovable property by means of letters patent to an invention to have the attributes of personal movable property. A state court has jurisdiction over issues of patent or patent application ownership as it would have jurisdiction over personal movable property even though the law applied must be that of private immovable property. A patent is registered and deeded private immovable property just as real estate can be registered and deeded private immovable property.

Applying private immovable property law to a patent or to patent applications includes applying the doctrine of adverse possession. There is a public interest in keeping land under development by unclouding title to land by this doctrine. Likewise there is a public interest in furthering the development of new inventions by unclouding title to a patent or to a patent application (likely to be prosecuted into a patent) so that an inventor will develop the territory of knowledge as he avoids already claimed or likely to be successfully claimed private immovable intellectual property claimed by another inventor[11] even if many non-inventors claim a strong patent system hinders technological progress.

If an inventor cannot depend on reliable and strong title to a patent or to a patent application, the patent system cannot be considered strong in any way.

Backstory to the Instant Petition

In the 1980s the Petitioners were developing advanced an advanced network switching while they were doing business at Constellation Technologies (Constellation). The President

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knowledge." Kant's late Enlightenment works of Epistemology (*Critique of Pure Reason* or *Prolegomena to Any Future Metaphysics*) are helpful for understanding the original intent of the framers in the Patent and Copyright Clause and why 19th century justices created the judicially recognized exceptions to patent-eligibility.

11 The Framers saw the patent system as a means to attract inventor immigrants, who would advance technology in the United States of America. Making sure an inventor could reclaim title which became clouded is part of the same public interest.

of Clearpoint Research Corporation (Clearpoint) convinced the Petitioners to bring the technology to Clearpoint. The Petitioners had an agreement under which in certain situations the Constellation intellectual property, as it was being extended, would revert to the Petitioners.

On October 8, 1991 Clearpoint filed patent application 07/773,161 ('161 Application) entitled Software Configurable Network Switching Device . This application pertained to a Constellation Technologies invention reduced to practice within the engineering context of Clearpoint.

In 1992 a federal court judge hearing a patent infringement case directed to an unrelated technology imposed an injunction on the sale of a major Clearpoint product. Within a few months Clearpoint ran out of free and operating cash. Clearpoint cancelled the Constellation project and laid off the Petitioners. These actions triggered reversion of the Constellation intellectual property to the Petitioners January 1993, but for fear of legal exposure in future bankruptcy proceedings Clearpoint did not perform the writing required by 35 U.S. Code § 261. In July 1993 Clearpoint sold its residual rights under the reversionary agreement to Penril Datacomm (Penril). Penril never asserted ownership of the Constellation intellectual property including the '161 application and left it for the Petitioners to sort our ownership and title issues associated with the '161 Application. Shorty later Clearpoint went bankrupt, and in August 1993 the '161 Application was placed in the abandoned state.

No successor entity either to Clearpoint or to Penril ever asserted a claim to the '161 Application, and after the last bankruptcy proceeding ended, Clearpoint was revived as a corporation, and Clearpoint performed the writing required by 35 U.S. Code § 261.

In 2007 the Petitioners started the revival of the '161 Application. On Sep 15, 2010 the petition for revival was granted, but at some point the '161 Application was put into Sensitive Application Warning System (SAWS),[12] and in

12 While SAWS is a subject of other federal litigation (e.g., *Morinville et al v. United States Patent and Trademark Office*, US District Court for the District of Columbia, 1:2019cv01779, June 18, 2019), it is not a subject in this litigation.

January 2012 the Office of Patent Legal Administration (OPLA) challenged the Petitioners' title to the '161 Application. On Sep 30, 2013 after review of a legal opinion submitted by the Petitioners, OPLA accepted that "a proprietary interest has been demonstrated and accepts the power of attorney." (*Vide infra*, p. 117.)

Because the proprietary interest was established and the '161 Application was in SAWS, the examination continued but was not a genuine. After rejection of all claims on reconsideration by the PTAB, the patent prosecution entity, RealVirt LLC (RealVirt), to which title of the '161 Application had been transferred, filed in the role of Plaintiff an action in the District Court of the Eastern District of Virginia under 35 U.S. Code § 145 (Civil action to obtain patent).

The District Court dismissed this action for lack of standing (*vide infra* p. 92).

Neither Petitioner was a party to the proceeding in District Court. Yet this proceeding plays a critical role in legal sequence leading to the instant petition. The District Court ignored the USPTO's finding of fact with respect to the ownership of the '161 Application on the grounds that the issue of ownership of the '161 Application was never fully litigated between a plurality of parties

- even though the Plaintiff supplied an opinion based in Massachusetts property law as the USPTO requested and
- even though in Massachusetts title to private property can be fully litigated *ex parte* (*vide infra* p. 120).

While it is true that title to a patent can be intrinsic to application of substantive patent law in federal district court (e.g, double patenting), the same is not true for a patent application because the only controversy that might be litigated in federal district court with respect to a patent application is 35 U.S. Code § 145 (Civil action to obtain patent) and an inventor, who does not hold title may be the Applicant of this statute (*vide infra* p. 119). It is not clear to the Petitioners whether the District Court opined that the Petitioners never had title to the '161 Application or the District Court opined that title to the '161 Application was

clouded.

The District Court's Memorandum Opinion ignored a substantial part of the text of the contract at question (*vide infra* p. 109) and assumed without substantiation or evidence that the filing of '161 Application for patent to an invention meant that the switch of the contract in question had been completed (*vide infra* p. 111). The memorandum opinion also questioned the declarations of the parties to contract in question because obtaining the writing required by 35 U.S. Code § 261 took over a decade even though intellectual property disputes not infrequently take over a decade to be resolved.

The Plaintiff appealed to the CAFC, which upheld the District Court dismissal for lack of standing with a Rule 36 Affirmance. This Affirmance did not explain why the CAFC upheld the District Court. Because during Oral Arguments Judge Newman questioned whether the CAFC should be issuing opinions with respect to state property law, the Petitioners decided to attempt to uncloud title to the '161 Application in Massachusetts Superior Court.

While Massachusetts has statutes to try or to quiet title to private immovable property (*vide infra*, pp. 120-122), it has no comparable statutes to try or to quiet title to intellectual property, which has the attributes of personal property (*vide supra* p. 10). The Petitioners, who were the original parties to the contract, could not afford an attorney to represent them to try or to quiet title to the '161 Application. Nevertheless, every attorney to whom the idea of trying or quieting title was put considered the idea interesting.

The Petitioners researched the law and first filed a *pro se* Complaint in Massachusetts Superior Court (*vide infra* p. 84) and after pushback from the Superior Court filed a *pro se* Bill in Equity in Massachusetts Superior Court (*vide infra* p. 58). While the Petitioners were still learning how to plead and the pleadings could have been improved, the insistence of the Superior Court from the initial hearing through its decision (*vide infra* p. 55) that ownership of the '161 Application was a matter of substantive patent law[13] and to be litigated only in

13 *Vide infra* 28 U.S. Code § 1331 (Federal question) and 28 U.S. Code § 1338 (Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition) p. 118.

federal district seemed completely contrary to the holdings of the CAFC and SCOTUS even if the Petitioners could find no comparable litigation in Massachusetts caselaw.

The Petitioners decided to appeal and filed a Notice of Appeal. Mysteriously the Notice of Assembly was lost, and the Petitioners had to motion to docket late. In granting the motion, the Single Justice ordered the Petitioners to explain the jurisdiction of the Massachusetts Appeals Court. After reviewing the argument of the Petitioners (*vide infra* p. 47), the Single Justice ordered the Petitioners to file an Appeal Brief. The Appeals Court affirmed the Superior Court (*vide infra* p. 43). The Petitioners convinced themselves that the litigation was so unusual that Appeal Brief had to be amended to be more precise in its logic and goals. The Petitioners motioned to amend (*vide infra* p. 39) and motioned for reconsideration (*vide infra* p. 36). The Appeals Court found the motion to amend meritorious but continued to uphold the Superior Court decision (*vide infra* p. 34).

Still aghast that the Massachusetts Courts were rejecting their obligation to adjudicate the title of Massachusetts intellectual property, the Petitioners petitioned the Massachusetts Supreme Judicial Court for Writ of Certiorari to the Massachusetts Appeals Court. In Decision of the Supreme Judicial Court upheld the upholding of the Superior Court by the Appeals Court (*vide infra* p. 20), and the Petitioners feel obligated to bring forward this Petition to the Supreme Court of the United States of America for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Reasons for Granting the Petition

Massachusetts law has a gaping hole with respect to registered and deeded intellectual property, and both the US Constitution and the Massachusetts Constitution[14] demand that this hole be filled.

This petition for a writ of certiorari should be granted.

A. The Massachusetts Superior Court's decision as well as the afffirmance by higher Massachusetts Courts is wrong

In a few situations – usually related to double

14 *Vide supra* US Constitution Amendment VII, US Constitution Article X, and Massachusets, Part the First, Article X p. 9.

patenting issues – title to a patent may be intrinsic to the application of substantive patent law.[15] Even in such situations, a clouded title may be unclouded by resort to litigation in state courts. In the case of the '161 Application, no aspect of the issues related to title is intrinsic to substantive patent law, and it should be possible to litigate the title of '161 Application in state courts. Massachusetts courts are in conflict with the holding of SCOTUS and are wrong. There is even a conflict within Massachusetts courts because the Massachusetts Single Justice Appeals Court appears to agree with the Petitioners' understanding of the holdings of SCOTUS and the CAFC (*vide infra* p. 47).

B. The question presented warrants review and clarifies (1) whether an issue belongs to substantive patent law, (2) whether the behavior of the USPTO, federal courts, and state (commonwealth) courts together unacceptably invites corruption, and (3) whether such corruption-inviting behavior can be tolerated into the future

It is important to clarify which controversies are controversies of substantive patent law. As a precedent, a decision in this litigation would supplement and clarify *Gunn v. Minton*, 568 U.S. 251 (2013) because the case belongs to the area of title law and not to malpractice law.

If SCOTUS forces Massachusetts (and probably other states) to close a hole in title law as it pertains to a patent application, it will enable a patent application holder to perfect his title and to obtain funds to develop products based on his invention if he can obtain an patent on the basis of his patent application. Once the patent issues, a competitor will develop a non-infringing possibly better invention if he wants to avoid paying a royalty. Both results of unclouding title to a patent application foster technological development and benefit the public.

The existence of this gaping hole in title law represents a irresistible temptation to a corrupt official to shakedown an organization that may infringe a patent claim in a patent that could issue from a patent application. On striking a corrupt bargain, such a corrupt official could prevent the issuance of a patent by challenging title to the patent application, and the patent application owner would have no recourse to perfect title. Other corrupt schemes based on this gaping whole in title law can be envisioned.

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15 *Vide infra* 28 U.S. Code § 1331 (Federal question) and 28 U.S. Code § 1338 (Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition) p. 118.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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