No. 22-714

In the Supreme Court of the United States

HARRY C. CALCUTT, III,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in both questions presented, which bring before the Court issues that arise frequently in connection with judicial review of federal agency actions. The court of appeals held that a court may not resolve a separation-of-powers claim brought by a party seeking prospective relief unless there is concrete proof that the agency decision would have been different but for the unconstitutional restriction. That standard will be impossible to satisfy in the overwhelming majority of cases. Businesses, and corporate officers and directors, are frequent respondents in administrative enforcement actions brought not only by the Federal Deposit Insurance Corporation (FDIC), but by the many other federal agencies that regulate the day-to-day activities of

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus curiae* timely provided notice of intent to file this brief to all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curia*e, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

businesses nationwide. The Chamber therefore has a strong interest in ensuring that courts provide appropriate remedies when agency authority is vested in officials who are improperly insulated from the accountability that the Constitution requires.

The Chamber also has a strong interest in the petition's first question, which concerns a fundamental principle of administrative law that, prior to the majority's ruling below, was well-settled. Courts have consistently held—following this Court's decision in *SEC* v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943)—that when a court reviewing a federal agency decision determines that the decision rests on erroneous interpretations of the governing statute, and the decision involves the exercise of discretion, the court must remand the matter to the agency.

Here, however, the court of appeals found that the FDIC applied an incorrect causation standard, but decided for itself that the correct standard was satisfied, refusing to remand to allow the FDIC to exercise its discretion. The Chamber's members frequently are parties to agency adjudications and are subject to a panoply of regulations promulgated by agencies. The Chamber therefore has an interest in ensuring that agencies base their decisions on the correct legal requirements established by Congress, and that when an agency fails to do so, the action is sent back.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from an enforcement proceeding that the FDIC commenced against petitioner. The case was heard by an administrative law judge (ALJ), who found that petitioner had committed unsafe and unsound banking practices and recommended a fine

and lifetime ban from the banking industry. Those determinations were upheld by the FDIC Board.

The court of appeals rejected petitioner's constitutional challenges to the Board's and ALJ's for-cause removal protections without resolving the substance of those claims. It interpreted *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021), to bar such separation-of-powers challenges unless the claimant provides specific, "concrete" proof that the agency decision would have been different in the absence of the removal restriction.

The court of appeals' holding will have far-reaching adverse consequences if it is permitted to stand. This Court has repeatedly explained that an available remedy is essential to ensure that plaintiffs will have an incentive to bring lawsuits to vindicate the Constitution's structural protections. The court of appeals' proof-of-a-different-outcome requirement will be impossible to satisfy in virtually all cases and will therefore effectively eliminate any incentive for parties to assert these separation-of-powers challenges and any possibility that courts will decide them.

The decision thus allows rogue officers flying below the President's radar to make decisions inconsistent with the President's policies, undermining the ability of the people to control the exercise of Executive power by choosing a President whose views they support. Review is essential to prevent the neutering of this critical element of our constitutional system.

In addition, the court of appeals' holding is contrary to this Court's precedents. When addressing a claim for prospective relief, like petitioner's challenge to his lifetime ban, the Court has invalidated statutory restrictions violating separation-of-powers principles—and awarded appropriate prospective relief—

without requiring a showing that the agency would have reached a different decision if the decisionmaker had not been protected by unconstitutional removal restrictions. Nothing in *Collins* disturbed those precedents. Indeed, the Court had no occasion to consider them, because *Collins* involved only *retrospective* relief. And even if *Collins* were relevant to the question here, it would support petitioner Calcutt, because the *Collins* Court relied only on the "possibility" of an injury as a basis for remanding to decide remedy.

The court of appeals committed a second independent error that also warrants this Court's review. The court correctly found that the FDIC had applied erroneous legal standards, but—by a 2-1 vote—held that the Board's errors were harmless based on the majority's own assessment of the record evidence. That violates the long-settled principle of administrative law, grounded in this Court's *Chenery* decisions, that when a reviewing court determines that an agency based its decision on an erroneous legal standard, and the agency decision involves the application of discretion, the court must remand the case to allow the agency to exercise its discretion under the proper legal rule.

The majority here not only failed to apply this settled principle—it invented a broad "exception" that would allow a reviewing court to uphold an agency decision invalid on the grounds cited by the agency whenever the court concludes that the agency might have reached the same result. That exception would eviscerate *Chenery I*, *supra*, and its progeny—and prevent agencies from reconsidering a decision in light of their expertise, which is essential for businesses operating in heavily regulated industries. The Court

should grant the petition to correct that patently erroneous holding.

ARGUMENT

I. The Court Should Review The Holding Below That A Removal Restriction May Be Challenged Only Upon "Concrete" Proof That The Agency Would Have Reached A Different Result Without The Restriction.

The court of appeals refused to address Calcutt's separation-of-powers challenges to the statutory removal restrictions on the FDIC Board and ALJs—concluding that Calcutt would not be entitled to any remedy even if there were a constitutional violation. Pet. App. 32a-40a. It held that the essential prerequisite for a remedy is a "concrete showing" of prejudice, which it defined as proof that the agency would have reached a different result if the removal restriction did not exist. Pet. App. 36a.

That holding will protect virtually every removal restriction against constitutional challenge on separation-of-powers grounds. Leaving unconstitutional restrictions in place will obstruct the Constitution's plan for ensuring accountability to the people for exercises of Executive power: giving the President authority over the officials who exercise that power.

Moreover, the court of appeals believed, erroneously, that its holding was compelled by this Court's decision in *Collins*. A significant number of lower courts have reached the same conclusion. This Court's intervention is therefore necessary to correct that misreading of its precedent.

A. The court of appeals' rule would thwart the Constitution's structural protections for ensuring accountability to the people.

The court of appeals' holding will have far-reaching consequences. By eliminating any incentive to assert removal restriction challenges—because courts will be prevented from addressing those challenges—the decision allows rogue officers flying below the President's radar to make decisions inconsistent with the President's policies. That undermines the ability of the people to control the exercise of Executive power by choosing a President whose views they support.

1. Invalidating statutory restrictions that violate the separation of powers is essential to ensuring that Executive officials are "accountable to political force and the will of the people." *Freytag* v. *Commissioner*, 501 U.S. 868, 884 (1991). This Court has therefore emphasized that parties who bring valid separation-of-powers challenges are "entitled to relief," *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018), and it has rejected rules that would "create a disincentive to raise" such challenges, *Ryder* v. *United States*, 515 U.S. 177, 183 (1995); see also *Lucia*, 138 S. Ct. at 2055 n.5 (stating that the remedy in a separation-of-powers case should be crafted to further the "structural purposes" of the separation of powers).

The court of appeals' holding eliminates any incentive to challenge removal restrictions. A claimant almost never will be able to produce concrete proof that, but for an unconstitutional removal restriction, the President would have replaced an official or that the official would have altered his behavior to cohere to the President's policies. See *Collins*, 141 S. Ct. at 1789. That is because, as this Court has recognized, it

is exceedingly rare for there to be "clear-cut" evidence of harm from an unconstitutional removal restriction, such as a situation where the President "attempted to remove [an officer] but was prevented from doing so by a lower court decision" or the President "made a public statement expressing displeasure with actions taken by [an officer] and * * * asserted that he would remove the [officer]" if a statutory removal restriction "did not stand in the way." *Ibid.*

Administrations do not monitor the day-to-day activities of agencies and their officers in search of conflicts with the President's views—nor could they do so given the thousands of decisions made each day by agencies promulgating regulations and guidance and adjudicating enforcement actions. And the President's advisors do not sit around "contemplat[ing] the option" of removing Executive officers whose tenures are protected by statute. *Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part); see *Cmty. Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) (acknowledging the President has "no awareness at all" of the actions of many Executive officers), cert. granted, No. 22-448 (Feb. 27, 2023), and cert. denied, No. 22-663 (Feb. 27, 2023).

The court of appeals provided no guidance regarding the evidence that courts should "consult when inquiring into the President's" state of mind or the circumstances when it might be necessary to obtain "testimony from him or his closest staff" in order to ascertain his mental state. *Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part). And it is doubtful that "'[t]he Framers [decided to] rest our liberties on * * * minutiae' like * * * what might have transpired in another timeline" if there were not a statute circumscribing the President's removal power. *Id.* at

1797 (quoting *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 500 (2010)).

The "rational litigant" therefore "will not bother to assert" a separation-of-powers claim because doing so will not "advance the litigant's related interests." Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014). Further, "a remedy that offers no advantages at all to the remedy-seeking plaintiff" will have little chance of "foster[ing] remediation of similar structural wrongs in the future." *Id.* at 521.

2. Effectively precluding challenges to removal restrictions will leave in place unconstitutional limitations on the President's authority, disrupting the Constitution's plan for ensuring accountability to the people.

The decision-making processes of officers who believe they are protected from removal is different than those of officers who must recognize their accountability to the President. As this Court has explained, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *id.* at 727 n.5 (noting that the "desire to avoid removal" motivates officers to "pleas[e]" those who can remove them). There is nothing to prevent an officer without fear of reprisal from taking actions that are contrary to the President's program.

The court of appeals' holding thus encourages rogue Executive actions that "bog the Executive down with the 'habitual feebleness and dilatoriness' that

comes with a 'diversity of views and opinions'" from those who are not on the President's agenda. *Seila L. LLC* v. *CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting The Federalist No. 70, at 476 (J. Cooke ed. 1961) (Alexander Hamilton)).

The likelihood of rogue actions also subverts the ability of the people to hold the President to account. The Framers conferred the entire Executive power on one person—the President—whose "political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness of the people.'" *Seila*, 140 S. Ct. at 2203 (quoting The Federalist No. 70, at 479). But unless there is "a clear and effective chain of command" from the President to his officers, it is impossible for "the public [to] 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund*, 561 U.S. at 498 (quoting The Federalist No. 70, at 476).

The court of appeals' rule, if it is permitted to stand, will therefore subvert the Constitution's essential connection between the will of the people and the exercise of Executive power.

3. This Court's review is warranted now because lower courts are divided over how to interpret *Collins* and are issuing decisions, based on *Collins*, deterring litigants from bringing separation-of-powers challenges. As Calcutt's petition explained, the court of appeals' holding is in significant tension with the approaches taken by other circuits. Pet. 28-29. Further, district courts have increasingly relied on the court of appeals' reasoning to reject removal-based challenges. Pet. 28 n.1.

A number of those decisions have warned that future litigants are "[un]likely" to state separation-of-powers claims based on statutory for-cause restrictions on removing ALJs if the decisions rendered by those ALJs do not rise to the level that they "concern the President."[2]

The Court should grant review to correct the court of appeals' erroneous interpretation of its precedents. Otherwise, that approach will continue to spread to other courts, extinguishing any incentive for litigants to assert removal restriction challenges.

B. Requiring proof that an agency would have made a different decision absent the removal restriction violates this Court's precedents.

The court of appeals held that a request for prospective relief based on the claim that an agency decisionmaker was protected by an unconstitutional removal restriction may proceed only if the party demonstrates that the adjudicator would have reached a different decision in the absence of the restriction. Pet. App. 38a-40a. That holding is doubly wrong. *First*, it rests on a fundamental misunderstanding of *Collins* v. *Yellen*, *supra*. *Collins* involved only retrospective relief. Other decisions of this Court

[2] *Sharon M.* v. *Comm'r of Soc. Sec.*, No. 21-cv-3957, 2022 WL 2948946, at *10 (S.D. Ohio July 26, 2022), report and recommendation adopted *sub nom. Sharon M.* v. *Kijakazi*, 2022 WL 4545248 (S.D. Ohio Sept. 29, 2022); *Kelli H.* v. *Comm'r of Soc. Sec.*, No. 21-cv-1097, 2022 WL 2816269, at *10 (S.D. Ohio July 19, 2022), report and recommendation adopted *sub nom. Kelli R. H.* v. *Comm'r of Soc. Sec.*, 2022 WL 3355251 (S.D. Ohio Aug. 15, 2022); *Julie P.* v. *Comm'r of Soc. Sec.*, No. 21-cv-4170, 2022 WL 2352454, at *10 (S.D. Ohio June 30, 2022), report and recommendation adopted, 2022 WL 3083523 (S.D. Ohio Aug. 3, 2022).

do not impose such a requirement in connection with a claim for prospective relief.

And even if *Collins* did inform the prospective-relief question, *Collins* itself held that the "possibility" of harm is sufficient.

1. The *Collins* Court had no occasion to address the issue of prospective relief for an unconstitutional restriction on removal authority. The *Collins* petitioners were Fannie Mae and Freddie Mac shareholders who challenged the dividend formula established by the Federal Housing Finance Agency (FHFA), as Fannie's and Freddie's conservator, under an agreement with the Department of Treasury. 141 S. Ct. at 1775. The shareholders contended that the agreement was implemented by FHFA Directors who were insulated from plenary presidential control by a statutory for-cause removal restriction. *Ibid.* The Court agreed. *Id.* at 1783-87.

But while the case was pending, FHFA eliminated the at-issue dividend formula. *Collins*, 141 S. Ct. at 1779. As a result, the shareholders "no longer ha[d] a live claim for prospective relief." *Id.* at 1787. The only remaining "remedial question * * * concern[ed] retrospective relief" for "compensable harm." *Id.* at 1787-89.

On that question, the Court declined to grant automatic relief based on the unconstitutional removal restriction. Instead, the Court stated that the availability of relief turned on whether the restriction had "inflicted harm" on the shareholders by altering the government's actions. *Collins*, 141 S. Ct. at 1789. The Court then remanded the case for the lower courts to "resolve[] in the first instance" whether "the unconstitutional removal provision inflicted harm" on the

shareholders by, for example, thwarting "the President['s] * * * attempt[] to remove a Director" who had "taken" "actions" with which the President disagreed. *Ibid.*

The Court has taken a markedly different approach when a party seeks prospective relief based on a separation-of-powers violation. In that context, the Court has repeatedly rejected the view that a plaintiff must "show that the challenged act would not have been taken if the responsible official had been subject to the President's control." *Seila*, 140 S. Ct. at 2196; see also *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (explaining that parties can challenge an agency's failure to fulfill a procedural requirement "even though [they] cannot establish with any certainty" that fulfilling the requirement will alter the agency's action).

For instance, *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, *supra*, was a challenge brought by an accounting firm subject to the Board's reporting requirements and auditing standards. The Court held unconstitutional a dual for-cause limitation on the removal of Board members. 561 U.S. at 487-88, 492-508. The Court then concluded that the accounting firm was "entitled to declaratory relief sufficient to ensure that" the requirements to which it was subject would "be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. It explained that such forward-looking equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* at 491 n.2 (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001)).

The *Free Enterprise* Court did not remand for the harm inquiry prescribed in *Collins*—whether "the

President might have replaced one of the confirmed [FHFA] Directors * * * or a confirmed Director might have altered his behavior." *Collins*, 141 S. Ct. at 1789. A separation-of-powers violation, the Court explained, "may create a 'here-and-now' injury that can be remedied by a court" without delving into hypotheticals. *Free Enter. Fund*, 561 U.S. at 513 (quoting *Bowsher*, 478 U.S. at 727 n.5).

The court of appeals should have followed that same course here. Calcutt was subject to a restriction that is indisputably forward-looking in nature—a ban on engaging in "future banking activities." Pet. App. 74a. Calcutt was therefore entitled to relief—redetermination of his case by decisionmakers not subject to unconstitutional removal restrictions.

2. Even if *Collins* did provide relevant instruction on how courts should consider prospective relief for separation-of-powers violations, the court of appeals misread that decision to require a "concrete showing" of harm. Pet. App. 36a.

The shareholders in *Collins* alleged only "the possibility" of harm from the unconstitutional removal restriction: The "President *might* have replaced one of the confirmed [FHFA] Directors * * * or a confirmed Director *might* have altered his behavior." *Collins*, 141 S. Ct. at 1789 (emphases added). The Court acknowledged that prejudice from violations of the separation of powers is not always "clear-cut" and that courts must credit the "possibility" that an unconstitutional removal restriction "could" inflict harm. *Ibid.* The Court remanded the case for the lower courts to conduct the harm inquiry "in the first instance." *Ibid.* It did so because the "federal parties dispute[d] the possibility" of harm. *Ibid.*

Yet on the court of appeals' reading of *Collins*, a remedy is never warranted "by the very possibility that harm *might* occur"—rather, a "concrete showing" is always required. Pet. App. 36a. As just explained, however, *Collins* held the opposite. The Court held that a remand to consider a potential remedy was justified by the "possibility that the unconstitutional removal restriction" caused injury. *Collins*, 141 S. Ct. at 1789. And as explained in Calcutt's petition (at 28-29), the heightened standard adopted by the court of appeals is in significant tension with the approaches taken by other circuits that have applied *Collins*.

* * * * *

Either way the court of appeals' remedy holding is construed—as misapplying *Collins* to the question of prospective relief, or as misreading *Collins* to require proof of prejudice before a remand may be ordered—this Court should correct the error and provide much needed guidance to the lower courts on the standard for entertaining claims seeking prospective remedies for separation-of-powers violations.

II. The Court Of Appeals' No-Remand Holding Must Be Reversed.

A fundamental principle undergirding the federal agency regulatory system is that agencies should apply their "technical expertise" to make "informed discretion[ary]" decisions. *Marsh* v. *Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)). After all, the core justification for creating these agencies in the first place is that "the expert's familiarity with industry conditions" is helpful for determining the regulation appropriate for particular sectors of the economy. *Am. Trucking Ass'ns* v. *United States*, 344 U.S. 298,

310 (1953). And regulated businesses then can look to agency precedent to ascertain the rules of the road governing their activities.

The essential corollary of this principle is that courts may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency" by upholding agency action based upon "findings [that] might have been made," *Chenery I*, 318 U.S. at 88, 94, or by "substituting what [the court] considers to be a more adequate or proper basis" for the action, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); see *Nat'l R.R. Passenger Corp.* v. *Bos. & Me. Corp.*, 503 U.S. 407, 420 (1992).

"[A] court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan* v. *EPA*, 576 U.S. 743, 758 (2015). If the agency's "grounds are inadequate," a court must remand for the agency either to provide "a fuller explanation of the agency's reasoning at the time of the agency action" or to take "new agency action." *DHS* v. *Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (emphases omitted).

The majority below violated this long-settled, fundamental principle—as the FDIC itself has acknowledged. Because this issue arises frequently in connection with judicial review of agency action, this Court's intervention is essential to correct the exceptions to that principle invented by the majority below—exceptions that could swallow the *Chenery* rule in a wide range of regulatory contexts if they were permitted to stand.

The court of appeals correctly recognized that the FDIC applied an impermissibly lenient causation

standard in determining whether Calcutt's actions had one of the impermissible effects identified in the statute. Pet. App. 60a-63a. But, instead of remanding for the agency to consider in the first instance whether the evidence satisfied that requirement, the majority determined for itself that the evidence was sufficient to establish causation—preventing the agency from exercising its discretion to determine whether the evidence satisfied the proper causation standard and any appropriate sanction based on what even the majority acknowledged was a reduced set of sanctionable actions. See Pet. 15-16.

That is precisely what *Chenery* prohibits, as the government concedes. FDIC C.A. Reh'g Br. 3-4; FDIC Stay Response 13-16.

The deck is often already stacked in favor of the regulator in administrative proceedings, and the court of appeals' approach would only exacerbate that problem. It would deprive regulated parties of the reasonable expectation that an administrative agency's action would stand or fall based on the agency's stated reasons. And it would likewise deprive them of the opportunity to make arguments to their regulator in the first instance—a valuable opportunity for businesses that must operate under a web of technical requirements.

The majority stated that a remand "would be in tension with the substantial-evidence standard of review for factual findings." Pet. App. 72a (citing 5 U.S.C. § 706(2)). But that standard simply describes the amount of evidence necessary to "[]support[]" agency factual findings under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E); see *Biestek* v. *Ber-*

ryhill, 139 S. Ct. 1148, 1154 (2019). It does not empower courts to uphold agency action based on an incorrect legal standard—as the dissenting judge below explained. Pet. App. 125-26 (Murphy, J., dissenting).

The court of appeals also erred in holding that a remand "would risk contradicting the harmless-error rule" under the Administrative Procedure Act. Pet. App. 73a; see 5 U.S.C. § 706 (courts must take "due account * * * of the rule of prejudicial error"). That principle simply prevents a remand that "would be an idle and useless formality," *Morgan Stanley Cap. Grp. Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008), because the purported error had "no bearing on * * * the substance of [the] decision reached" by the agency, *Mass. Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 248 (1964). It does not permit a court to assume that if the agency had applied the correct legal standard it would have exercised its discretion in the same way—or imposed the exact same penalties—simply because it "might have" done so. *Chenery I*, 318 U.S. at 94.

The majority's no-remand rule is not limited to the FDIC. If permitted to stand, that novel approach would fundamentally alter review of federal agency actions within the Sixth Circuit and create a conflict with every other circuit. See Pet. 19-22. It therefore warrants review and correction.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse the judgment below and order that the action be remanded to the FDIC.

Respectfully submitted.

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