No. 20-366

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Appellants,
v.
NEW YORK, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF THE STATES OF LOUISIANA, ARKANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*

The following States submit this brief as *amici curiae*: Louisiana, Arkansas, Kentucky, Mississippi, Missouri, Nebraska, South Carolina, South Dakota and West Virginia.

Much is at stake for *amici* in this litigation because, one way or another, the Court's decision will affect the apportionment of congressional seats to the States. If illegal immigrants are not excluded from the apportionment base in 2020, Ohio, Alabama, and Minnesota will probably each lose a seat in the House of Representatives.[1] California, New York, and Texas are likely to each gain a seat.[2] Apportionment of these seats is a "zero-sum" process because federal law caps the House at 435 members. *See* 2 U.S.C. § 2a. There are few interests more vital to a State than the extent of its representation in Congress, as this Court has recognized. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 462–63 (2002).

If illegal immigration continues, more seats

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[1] *See* Steven A. Camarota & Karen Zeigler, *The Impact of Legal and Illegal Immigration on the Apportionment of Seats in the U.S. House of Representatives in* 2020, Center for Immigration Studies (Dec. 19, 2019), https://cis.org/Report/Impact-Legal-and-Illegal-Immigration-Apportionment-Seats-US-House-Representatives-2020; Jeffrey S. Passel & D'Vera Cohn, *How removing unauthorized immigrants from census statistics could affect House reapportionment*, Pew Research Ctr. (July 24, 2020), https://www.pewresearch.org/fact-tank/2020/07/24/how-removing-unauthorized-immigrants-from-census-statistics-could-affect-house-reapportionment/.

[2] *Id.*

could be at stake in future years.[3] Thus, this litigation is likely to have an outsized effect on future apportionment for decades to come.

The Court's decision will also affect districting within many—and perhaps all—States.[4] In congressional districting, a state legislature seeks to divide a fixed number of seats among a population unevenly distributed across the State's area. If census figures do not properly reflect the distribution of voters within the States, state legislatures might demarcate boundaries between districts in ways incompatible with the Constitution's requirement that districts be drawn in a manner that gives each vote equal weight. *See generally Wesberry v. Sanders*, 376 U.S. 1 (1964);

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[3] According to the Pew Research Center, "[f]rom 1990 to 2007, the unauthorized immigrant population more than tripled in size—from 3.5 million to a record high of 12.2 million in 2007." Although "that number had declined by 1.7 million, or 14%" by 2017, "[t]here were 10.5 million unauthorized immigrants in the United States in 2017, accounting for 3.2% of the nation's population." Abby Budiman, *Key findings about U.S. immigrants*, Pew Research Ctr. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants.

[4] Drawing the boundaries of a State's congressional districts in light of census data is among the most constitutionally vexing tasks for state governments—and this Court routinely considers cases involving challenges to redistricting plans. *See e.g.*, *Branch v. Smith*, 538 U.S. 254 (2003) (litigation over Mississippi's post-census redistricting); *Bush v. Vera*, 517 U.S. 952 (1996) (litigation over Texas's postcensus redistricting); *Shaw v. Hunt*, 517 U.S. 899 (1996) (North Carolina); *Karcher v. Daggett*, 462 U.S. 725 (1983) (New Jersey); *White v. Regester*, 412 U.S. 755 (1973) (Texas); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (Connecticut).

Reynolds v. Sims, 377 U.S. 533 (1964).

Because so much is at stake, *amici* write to encourage the Court to conclude that excluding illegal aliens from the apportionment base is a permissible policy choice because it is consistent with the Constitution's text and promotes the "constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992). *Amici* accordingly ask the Court to reverse the lower court's "declaration that the Presidential Memorandum is unlawful because the President does not have the authority to exclude illegal aliens from the apportionment base . . . ." App. 101a.

SUMMARY OF ARGUMENT

The founders understood that conducting a census would not be an easy task. For that reason, the Constitution gives Congress broad authority to regulate the details of the undertaking. U.S. Const. art. I, § 2, cl. 3. ("The actual Enumeration shall be made . . . *in such Manner as [Congress] shall by Law direct*." (emphasis added)). Congress, in turn, has given the Secretary of Commerce tremendous power to take the census "in such form and content as he may determine." 13 U.S.C. § 141. When determining apportionment, the Secretary has license to employ policy decisions that promote equality.

This Court has recognized the breadth of the Secretary's authority. *See, e.g.*, *Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Court has approved various policy choices that the Secretary has employed to conduct the census and determine apportionment. As a general rule, a policy

determination will survive judicial review "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation.'" *Wisconsin*, 517 U.S. at 19–20 (quoting *Franklin*, 505 U.S. at 804).

Despite this Court's precedents upholding Secretary policy decisions, the lower court declared President Trump's Memorandum to be unlawful because it directs the Secretary to "take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to" exclude illegal aliens from the apportionment base. 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). The lower court's decision rested heavily on an unreasonable interpretation of the relevant statutory texts and their accompanying legislative history.

The Court should uphold the Memorandum because it is consonant with the Constitution and promotes equality. Including illegal aliens in the apportionment effectively dilutes the relative weight of a person's vote in a district that does not contain many illegal immigrants. That runs headlong into this Court's holding that, "as nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7–8. Thus, by excluding illegal aliens from the apportionment base, the Memorandum promotes equality.

Finally, the Court should uphold the Memorandum because it corrects current incentives that encourage States to enact sanctuary policies in violation of federal law. States should not be

rewarded with extra representation in the House for thwarting federal immigration law.

ARGUMENT

I. FEDERAL LAW DOES NOT PROHIBIT EXCLUDING ILLEGAL ALIENS FROM CONGRESSIONAL APPORTIONMENT.

The lower court declared the Presidential Memorandum unlawful for two reasons: (1) the relevant statutory framework requires apportionment to be based on the results of the census alone; and (2) the Memorandum deviates from 2 U.S.C. § 2a(a)'s command to count the "whole number of persons in each State."

Both of these rationales are misguided because they fail to acknowledge the broad authority the executive branch wields to promote equal representation when determining congressional apportionment. Because the Memorandum promotes equal representation by preventing vote dilution in districts without many illegal immigrants, it fits comfortably within the range of acceptable policy choices that the executive branch may employ when conducting the census and determining apportionment.

A. The executive branch wields broad authority to adopt policies that promote equality for the purposes of determining apportionment.

When declaring the Presidential Memorandum unlawful and enjoining the Secretary

from including the number of illegal aliens in the report as directed by the President, the lower court concluded that the Memorandum violated 13 U.S.C. § 141 and 2 U.S.C. § 2a. In the lower court's view, those statutes dictate that "apportionment must be based on the results of the census alone." App. 73a–78a, 94a–102a. The lower court reinforced this interpretation by resorting to the legislative history of the provisions. *See id.* at 74a–78a.

Justice Scalia warned against relying too heavily on legislative history when determining the meaning of a law: "[T]he use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). The lower court failed to heed this warning, which led it to a result that is inconsistent with the jurisprudence of this Court—which acknowledges the broad authority the Secretary wields to promote the "constitutional goal of equal representation" undergirding the Constitution's system of congressional apportionment. *Franklin*, 505 U.S. at 806.

The lower court's decision is sharply at odds with this Court's opinion in *Franklin*, which recognized that the Secretary commands broad authority to make "judgment[s]" about who should be counted for the purposes of apportionment—even when those judgments are "not dictated by[] the text and history of the Constitution." *Franklin*, 505 U.S.at 806.

In *Franklin*, the Court was asked to prevent the Secretary from counting federal employees temporarily stationed overseas as inhabitants of their home States for the purposes of apportionment.

See id. at 806. The Court ultimately blessed the Secretary's decision to include the federal employees in the apportionment—even though the employees arguably were not "determined by an actual Enumeration of their respective Numbers, that is, a count of the persons in each State." *Franklin*, 505 U.S. at 803 (internal quotation marks omitted). The Court reasoned that "[t]he Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but . . . actually promotes equality." *Id.* at 806.

Franklin is not an outlier in this Court's jurisprudence. On the contrary, it falls within a line of cases approving congressional and executive policy decisions about how to conduct the census and determine apportionment. Since deciding *Franklin*, this Court has reiterated that "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation,' it is within the limits of the Constitution." *Wisconsin*, 517 U.S. at 19–20 (quoting *Franklin*, 505 U.S. at 804); *see also Montana*, 503 U.S. at 462 ("The polestar of equal representation does not provide sufficient guidance to allow us to discern a single constitutionally permissible course.").

Of course, the lower court here concluded that the Memorandum conflicted with the relevant *statutory* scheme, and it did not reach the question of whether the Memorandum violates the Constitution. But there can be little doubt that, under the lower court's narrow view of the relevant statutes it adopted in this litigation, the result of *Franklin* would have come out the other way. Indeed, the lower court gave short shrift to that opinion: "At

most, *Franklin* establishes that the President retains his usual superintendent role with respect to the conduct of the census—and can direct the Secretary to make policy judgments that result in the decennial census." App. 81a. This narrow reading of *Franklin* fails to give that opinion the weight it deserves.

With a proper understanding of the broad authority that the Secretary wields, it is clear that the lower court read the relevant statutes incorrectly. As discussed below, excluding illegal immigrants from the apportionment base enhances equal representation in the House and realigns States' incentives to promote policies consonant with federal law.

B. Statutory language directing the Secretary to count the "whole number of persons" reasonably can be interpreted to exclude illegal aliens.

The lower court also concluded that the Memorandum was *ultra vires* because, in the court's view, the Memorandum conflicts with 2 U.S.C. § 2a(a). According to the court, the statute's command to count "the whole number of persons in each State" cannot bear an interpretation that categorically excludes illegal aliens residing in each State. *See* App. 83a. The court reasoned that the phrase includes illegal immigrants because they are, of course, "persons." And the district court, again, relied heavily on the legislative history of the statute to reinforce its view. *See* App. 87a.

But in no census have the terms "numbers" and "whole persons" been construed to apply to *all*

persons. Tourists and corporate persons have never been counted, even if they happen to be physically present within a State at the time the census data are collected.

The district court's analysis disregarded yet another warning from Justice Scalia, who criticized "wooden" textualism as a methodology for interpreting statutes.[5] He explained that a court should not construe a law's text either strictly or leniently, but "reasonably, to contain all that it fairly means."[6]

The Memorandum's interpretation of the statute comfortably fits within the range of acceptable interpretations and applications adopted by past administrations.

Under federal law, the sojourn of unlawfully present foreign nationals is plagued by instability and uncertainty. Their very presence is unlawful, rendering them subject to criminal penalties and deportation. 8 U.S.C. § 1227(a)(1)(B).

Thus, an unlawfully present foreign national's link to the United States, and to any particular State, is inherently tenuous. Statistical analysis of the growth and migration of the population of such individuals demonstrates this instability. The Pew Research Center announced in 2018 that "[t]he number of unauthorized immigrants in the U.S. fell

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[5] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United State Federal Courts in Interpreting the Constitution and Laws*, in A Matter of Interpretation: Federal Courts and the Law 3, 22 (Amy Gutmann ed., 1997).

[6] *Id.*

to its lowest level in more than a decade."[7] "There were 10.7 million unauthorized immigrants living in the U.S. in 2016, down from a peak of 12.2 million in 2007, according to the new estimates."[8]

Armed with a proper understanding of the broad authority that the Constitution gives to Congress and the executive branch to conduct the census—as discussed above—it is clear that the lower court read § 2a(a) too woodenly. The Court can overturn the lower court's decision merely by concluding that the President and the Secretary have the authority and discretion to exclude illegal aliens from the apportionment base because doing so promotes the constitutional goal of equal representation. *See Wisconsin*, 517 U.S. at 19–20.

C. By diluting votes, illegal immigration inhibits equal representation in the House—a key principle of the Great Compromise between the founders.

This Court has long recognized that federalism principles require equal representation in the House of Representatives. *Wesberry*, 376 U.S. at 14. Indeed, this Court has observed that "the principle solemnly embodied in the Great Compromise" is "equal representation in the House

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[7] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, Pew Research Ctr. (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/

[8] *Id.*

for equal numbers of people." *Id.*; *accord U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 460 (1992); *see also Wesberry*, 376 U.S. at 12–13 (detailing how, through the "Great Compromise" the framers eventually decided to apportion State representation in the federal government: Each State would receive two senators and representation in the House would be based on population).

The inescapable consequence of the lower court's decision, however, is that a congressional district in a State with relatively fewer unauthorized immigrants contains a greater population of eligible voters than a district in a State with relatively more unauthorized immigrants. For example, because of the large unauthorized immigration population in California, the votes of California residents will count for more than the votes cast in States with few unauthorized immigrants. An apportionment that excluded unauthorized immigrants would largely ameliorate these disparities.

The President determined that excluding "illegal aliens from the apportionment base is more consonant with the principles of representative democracy underpinning our system of Government." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). To that end, the President directed the Secretary to "take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to" exclude illegal aliens from the apportionment base. *Id.*

This commonsense direction helps ensure the integrity of the federal system of government by promoting "the constitutional goal of equal

representation." *Franklin*, 505 U.S. at 804.[9] Excluding illegal immigrants from the apportionment base would bring the average district size in affected States nearer to the ideal size: All districts in the nation would contain the same number of lawful residents.

In this way, excluding illegal immigrants from the apportionment base would enhance equal representation in the House. That matters a great deal in this litigation because under the constitutional and statutory schemes—as recognized by this Court and discussed above—the executive branch enjoys broad authority to promote equal representation when tabulating the population for the purposes of congressional apportionment.

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[9] This conclusion is not altered by this Court's observation that *Wesberry*'s strict "mathematical" approach to districting does not transpose perfectly onto interstate apportionment. *See generally Montana*, 503 U.S. at 442; *Franklin*, 505 U.S. at 788; *Wisconsin*, 571 U.S. at 1. *Franklin*, *Montana*, and *Wisconsin* pose no obstacle to applying *Wesberry*'s core principle of equal representation here because those cases merely recognize that *Wesberry* must be adapted to interstate apportionment by granting the executive branch and Congress discretion to conduct the count for apportionment purposes as they see fit. *See, e.g.*, *Wisconsin*, 517 U.S. at 20 (upholding the Secretary's discretion to select a statistical adjustment method privileging "distributive accuracy" over "numerical accuracy"); *Franklin*, 505 U.S. at 806 (upholding the Secretary's discretion over method for allocating military personnel serving abroad for census purposes); *Montana*, 503 U.S. at 452 n.36 (upholding Congress' discretion to choose among various statistical methods for apportioning seats in Congress).

II. FEDERALISM PRINCIPLES MILITATE IN FAVOR OF EXCLUDING ILLEGAL IMMIGRANTS FROM CONGRESSIONAL APPORTIONMENT.

As a general matter, the Constitution ties congressional seat apportionment to the results of the census. U.S. Const. art. I, § 2, cl. 3. A State with a large population is likely to receive more seats in the House than a less populous State. For this reason, a State's population is intimately tied to the amount of influence it wields in the federal government. That is exactly what the founders intended when they struck the "Great Compromise." *See Wesberry*, 376 U.S. at 12–13.

Nearly a century ago, Justice Brandeis famously observed that the States are laboratories of democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). If a State promotes good policies, people will move to that State and its population will flourish.[10] But, in the words of President Ronald

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[10] For example, the number of people who moved to Texas from California increased by 36 percent, according to a 2020 Texas Relocation Report. The 2020 Chairman of Texas Realtors explained that the migration to Texas was very natural because "[i]n addition to its business-friendly environment with no state income tax and abundance of jobs, land and opportunity, Texas is known for its diverse, friendly spirit and culture." According to the report, 86,164 California residents moved to Texas in 2018. *See* Gordon Dickson & Luke Ranker, *If it seems like more Californians are moving into your Texas*

Reagan, "[i]f a State is badly managed," then a person will "vote with his feet" and "go someplace else."[11] Through this ebb and flow, States gain and lose federal influence based on the success of their policies.

Illegal immigration throws a wrench into the machinery of congressional apportionment. The Constitution bestows control of immigration law on the federal government. *See Elkins v. Moreno*, 435 U.S. 647, 664 (1978). By definition, illegal immigration is unsanctioned, and so it should fall outside the bounds of state policy experimentation. *See* 8 U.S.C. § 1101 *et seq*. But there can be little doubt, as scholars have recognized, that "American federalism has meant that states and localities have helped shape immigration policy throughout history, often through deliberate resistance to the federal government."[12]

Some States have amplified federal law by adopting policies discouraging illegal immigration. For example, this Court upheld the constitutionality of an Arizona law that required "state officers to make a reasonable attempt to determine the

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neighborhood, here's why (Jan. 23, 2020), https://www.star-telegram.com/article239570433.html.

[11] The American Presidency Project, Ronald Reagan, Interview With Reporters on Federalism (November 19, 1981), https://web.archive.org/web/20171030211919/http://www.presidency.ucsb.edu/ws/?pid=43277.

[12] Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. Migration & Human Security 509, 510 (2017), https://journals.sagepub.com/doi/pdf/10.1177/233150241700500215.

immigration status of any person they stop, detain, or arrest on some other legitimate basis." *Arizona v. United States*, 567 U.S. 387, 411 (2012) (cleaned up).

Unfortunately, however, other States and local governments have *encouraged* illegal immigration through "sanctuary" policies.[13] These policies include "not providing adequate notice of criminal aliens who are already in custody, releasing criminal aliens back into communities without notice to the federal government, refusing to notify ICE of detained criminal aliens with final removal orders, and the like."[14] Sanctuary policies persist despite polling showing that "[a]n overwhelming majority of Americans believe that cities that arrest illegal

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[13] *See* Department of Homeland Security, *To Make America Safe Again, We Must End Sanctuary Cities and Remove Criminal Aliens* (Feb. 15, 2008), https://www.dhs.gov/news/2018/02/15/make-america-safe-again-we-must-end-sanctuary-cities-and-remove-criminal-aliens; *see also* Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities, Counties, and States*, Center for Immigration Studies (August 25, 2020), https://cis.org/Map-Sanctuary-Cities-Counties-and-States (listing sanctuary cities, counties and States).

[14] Hans von Spakovsky & Charles Stimson, *Enforcing Immigration Law: What States Can Do to Assist the Federal Government and Fight the Illegal Immigration Problem,* Heritage Foundation (Oct. 8, 2019), https://www.heritage.org/immigration/report/enforcing-immigration-law-what-states-can-do-assist-the-federal-government-and; *see also* Department of Homeland Security, *supra* n.13 ("Some jurisdictions do not honor ICE detainer requests to hold or provide adequate notice of release of criminal aliens who are already in custody, endangering the public and threatening officer safety by releasing criminal aliens back into our communities to re-offend.").

immigrants for crimes should be required to turn them over to federal authorities."[15]

Policies friendly to illegal immigration inevitably attract larger numbers of illegal immigrants to the State or local jurisdiction: The United States Department of Homeland Security has observed that sanctuary policies create a "'pull factor' that increases illegal immigration."[16] Unsurprisingly, many of the cities with the largest illegal immigrant populations promulgate sanctuary policies.[17] President Trump's Memorandum observed that "[c]urrent estimates suggest that one State is home to more than 2.2 million illegal aliens, constituting more than 6 percent of the State's entire population." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). That State—California[18]—is likely to gain another seat (at the expense of Ohio, Alabama, or Minnesota) in the 2020 census apportionment unless

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[15] Jonathan Easley, *Poll: Americans overwhelmingly oppose sanctuary cities*, Hill (Feb. 21, 2017), https://thehill.com/homenews/administration/320487-poll-americans-overwhelmingly-oppose-sanctuary-cities.

[16] Department of Homeland Security, *supra* n.13.

[17] *Compare* Jeffrey S. Passel & D'Vera Cohn, *20 metro areas are home to six-in-ten unauthorized immigrants in U.S.*, Pew Research Ctr. (Jun 12, 2019) https://www.pewresearch.org/fact-tank/2019/03/11/us-metro-areas-unauthorized-immigrants/ *with* Vaughan & Griffith, *supra* n.13.

[18] *See* Pew Research Ctr., *U.S. unauthorized immigrant population estimates by state, 2016* (February 5, 2019), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (explaining that California's unauthorized immigrant population stands at 2,200,000).

this Court overturns the decision of the lower court.[19]

As President Trump's Memorandum explained, "States adopting policies that encourage illegal aliens to enter this country and that hobble Federal efforts to enforce the immigration laws passed by the Congress should not be rewarded with greater representation in the House of Representatives." 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). For the federal system to work as envisioned by the founders and ratifiers of the Fourteenth Amendment, congressional apportionment should reward compliance with federal law, not punish it.

CONCLUSION

Amici respectfully ask the Court to uphold the Presidential Memorandum and reverse the lower court.

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[19] *See* Passel & Cohn, *supra* n.1.

Respectfully submitted,

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