

No. 26-193

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IN THE  
**Supreme Court of the United States**

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BETHANY M. HALL,  
*Petitioner,*

v.

A. SCOTT FLEMING, DIRECTOR, VIRGINIA  
STATE COUNSEL OF HIGHER EDUCATION  
*Respondent.*

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

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether this Court should overrule *Locke v. Davey*, 540 U.S. 712 (2004).

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## INTRODUCTION

For decades, this Court has authorized States to decline to fund particular categories of instruction—namely, those that prepare students to minister, which is “essentially a religious endeavor.” *Locke v. Davey*, 540 U.S. 712, 721 (2004). The Court ruled that the refusal to fund ministry education does not violate the Free Exercise Clause because “training for religious professions and training for secular professions are not fungible.” *Id.* Nothing has changed. There is a clear distinction between the two.

Virginia has applied that distinction with its Tuition Grant Assistance Program. The Grant Program provides grants to full-time undergraduate students to pay for tuition, room, board, books, and other education-related expenses. The grants may be used at public and private colleges and universities, including certain religious institutions. However, the grants may be used only for educational programs that do not constitute “religious training or theological education.” Hall was ineligible to receive funds under the Grant Program because she chose to pursue an ineligible major in ministry.

The Court should decline Hall’s invitation to overrule *Locke*. First, contrary to Hall’s assertion, this Court has not abrogated *Locke*, but has consistently reaffirmed its narrow holding. The district court and Fourth Circuit correctly concluded such. Second, this case is not the proper vehicle to address the question presented in light of Virginia’s long historical tradition against funding the clergy.

This Court should deny the petition.

## COUNTERSTATEMENT

### A. Virginia's Tuition Assistance Grant Program

In 1972, the Virginia General Assembly passed the Tuition Assistance Grant Act. Va. Code §§ 23.1-628 to -635. The Act provides financial assistance to Virginia residents who choose to attend accredited, private, nonprofit colleges and universities in Virginia. JA8. The State Counsel of Higher Education for Virginia ("SCHEV") is responsible for administering the Virginia Tuition Assistance Grant Program ("Grant Program"), and it has promulgated regulations governing the program. Va. Code § 23.1-629; 8 Va. Admin. Code §§ 40-71-10 to -70. Appellee A. Scott Fleming is the Director of SCHEV and is responsible for its operations. Pet. App. 2a.

For Virginia undergraduate students to be eligible for a grant under the Grant Program, they must be "obligated to pay tuition as full-time. . . students at an eligible institution." Va. Code § 23.1-631(a). Students can use grant funds to pay for tuition, fees, room, board, books, supplies, and other education-related expenses. 8 Va. Admin. Code § 40-71-10 (defining "Cost of Attendance"); 8 Va. Admin. Code § 40-71-50(B). Grants for undergraduate students are limited to four academic years, may be used only toward associate or baccalaureate degrees, and may be used only for educational programs that do not constitute "religious training or theological education." Va. Code § 23.1-631(B)-(C); 8 Va. Admin. Code § 40-71-10 (defining "Eligible Program"); 8 Va. Admin. Code § 40-71-40(D)(2); JA9.

The terms "religious training" and "theological education" are derived from Article VIII, Section 11 of

the Constitution of Virginia. *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 689–90 (Va. 2000). The Supreme Court of Virginia has construed “theological education” as being “applicable to a seminary or other institution whose purpose is to prepare students for vocations associated with ordination, such as rabbi, minister, or priest.” *Id.* at 690. The phrase “religious training” is “applicable to institutions or departments within institutions whose purpose is preparation of students for religious vocations other than those associated with ordination.” *Id.* The Grant Program’s limited prohibition on grant funding for degrees preparing students to minister is what Hall now characterizes as a prohibition on funding for programs that are “too religious.” Pet. at i.

Under SCHEV’s regulations for the Grant Program, students enrolled in undergraduate programs “that provide religious training or theological education, classified as [National Center for Education Statistics’ Classification of Instructional Programs (“CIP”)] Code 39-series programs, are not eligible” for grants. 8 Va. Admin. Code §§ 40-71-10 (defining “Eligible Program”), 40-71-40. The U.S. Department of Education’s National Center for Education Statistics developed CIP Codes to support “the accurate tracking and reporting of fields of study and program completions activity.” *CIP: The Classification of Institutional Programs*, NAT’L CTR. FOR EDUC. STATISTICS, <https://perma.cc/3XLX-NTAF>. CIP Code 39-series programs “prepare individuals for the professional practice of religious vocations.” *Detail for CIP Code 39*, NAT’L CTR. FOR EDUC. STATISTICS, <https://perma.cc/V7MY-9545>. A student who declares a double major that includes an eligible major and an ineligible CIP Code 39 major is still

eligible to receive a grant, so long as she does not take more classes in the ineligible major than those taken for the eligible major during any given semester. 8 Va. Admin. Code § 40-71-10 (defining “Eligible Program”).

Students enrolled at religious colleges and universities in Virginia, including Liberty University, are eligible to participate in the Grant Program if they meet the relevant qualifications. Pet. App. 2a n.2.

### **B. Factual background**

Petitioner Bethany M. Hall is a full-time student at Liberty University. Pet. App. 2a. Liberty University is “a Christian higher education institution.” *Palmer v. Liberty Univ., Inc.*, Nos. 21-2390, 21-2434, 2023 U.S. App. LEXIS 18467, at \*3 (4th Cir. June 30, 2023). Before starting classes in August 2023, Hall applied for the Grant Program. Pet. App. 2a. In February 2023, Liberty University’s financial aid office informed Hall that she was eligible to receive the maximum Grant Program grant for the 2023–2024 academic year, in part because she had identified her intended major as “Music Education: Choral.” Pet. App. 3a–4a.

But soon after the academic year began, Hall changed her major to “Youth Ministries” and then to “Christian Leadership and Church Ministries”—both of which are CIP Code 39 majors. Pet. App. 4a, 24a. Liberty University’s financial aid office subsequently informed Hall that due to her choice of major, she was ineligible to receive a grant through the Grant Program. Pet. App. 4a. The University informed Hall that SCHEV regulations provide that Grant Program funds “shall be used for undergraduate work ‘other

than those leading to religious training or theological education.” JA 11–12.

A few months later, Hall changed her major to “Music and Worship,” with a focus on “Youth Ministries.” Pet. App. 4a; JA 11–12. This is also a CIP Code 39 major. Pet App. 4a. Liberty University’s financial aid office informed Hall that her new major was also ineligible for the Grant Program. *Id.* Hall did not receive a Program grant for the 2023–2024 and 2024–2025 academic years. *Id.*

### C. Procedural background

Hall sued Fleming, in his official capacity as the Director of SCHEV, in federal district court, alleging that the Grant Program violated the Free Exercise Clause of the First Amendment. Pet. App. 4a. Fleming moved to dismiss the complaint because *Locke v. Davey*, 540 U.S. 712 (2004), controlled and foreclosed Hall’s claim. *Id.* Hall conceded that *Locke* was still good law and that “her situation aligns with the one faced by the undergraduate student pursuing a religious vocation major in *Locke*.” Pet. App. 4a–5a (internal quotation marks omitted). Nevertheless, Hall contended that this Court effectively abrogated and overruled *Locke* in three recent Free Exercise Clause cases: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020); and *Carson v. Makin*, 596 U.S. 767 (2022). Pet. App. 5a.

The district court dismissed Hall’s complaint with prejudice, concluding that her claim was “directly analogous to the plaintiff’s in *Locke*.” *Id.* The district court also rejected Hall’s contention that this Court

had effectively abrogated and overruled *Locke*, concluding instead that those cases “reaffirm *Locke*’s holding and support its application to” this case. *Id.* (internal quotation marks omitted).

Hall appealed, asserting the same arguments. *Id.* The Fourth Circuit affirmed the district court’s ruling. Pet. App. 13a. First, the Fourth Circuit concluded that this case is “directly analogous” to *Locke*. Pet. App. 7a–8a. Both Hall and Davey “pursue[d] a major in a religious vocation at a private religious college.” Pet. 7a. “Both state statutes allow students to take religious courses, so long as the funding does not go toward an ineligible major.” *Id.* And both students’ “choice of majors rendered them ineligible for a tuition grant.” *Id.*

Second, the Fourth Circuit concluded that this Court did not abrogate *Locke* in *Trinity Lutheran*, *Espinoza*, and *Carson*. Pet. App. 8a–12a. In *Trinity Lutheran*, the Court concluded the Missouri Department of Natural Resources’ grant program for the purchase of rubber playground surfaces violated the Free Exercise Clause because the Department policy categorically disqualified religious schools from eligibility. Pet. App. 8a (citing 582 U.S. at 453, 462). The Court distinguished *Locke* because (1) Washington chose not to fund a category of instruction, rather than categorically denying Trinity Lutheran Church a grant solely because it was a church; and (2) declining funds to support church leaders “lay at the historic core of the Religion Clauses,” whereas there is no similar history for a grant program to use recycled tires for playground surfaces. Pet. App. 9a. In *Espinoza*, the Court held that Montana’s law prohibiting the use of tuition assistance grants at

private religious schools violated the First Amendment. Pet. App. 9a–10a (citing 591 U.S. at 467–68, 470–71, 476). The Court again distinguished *Locke* because (1) Washington chose not to fund a category of instruction—preparing for ministry—rather than barring all aid to a religious school simply based on its religious identity; and (2) unlike the strong historical basis for declining to fund the training of clergy, there is no “historic and substantial state interest” in Montana’s decision to disqualify religious schools from aid. Pet. App. 10a. Most recently, in *Carson*, the Court concluded that Maine’s tuition assistance program for certain school districts violated the First Amendment because the funds could not be used at private religious schools. Pet. App. 10a–11a (citing 596 U.S. at 771–72, 774–76). And again, the Court emphasized that *Locke* was different, for the same reasons expressed in *Trinity Lutheran* and *Espinoza*. Pet. App. 11a.

## **REASONS FOR DENYING THE WRIT**

### **I. *Locke* has not been undermined by recent case law**

*Locke v. Davey* is still good law—its justifications remain valid, and it has not been undermined by this Court’s recent Free Exercise cases.

#### **A. The *Locke* decision and Washington’s scholarship program**

In *Locke*, the State of Washington established a scholarship program to help gifted students with postsecondary education expenses. 540 U.S. at 715. Students could use the scholarship at nationally accredited private religious institutions. *Id.* at 716. But pursuant to statute and the State’s constitution,

students could not use the state-funded scholarship to pursue a devotional-theology degree. *Id.* Davey received a scholarship, chose to study at an eligible private Christian college, and decided to double major in pastoral ministries and business management/administration. *Id.* at 717. The pastoral ministries degree was a devotional-theology degree excluded under the scholarship program. *Id.* The financial aid office informed Davey that he could not use the scholarship to pursue the devotional-theology degree, and he filed suit. *Id.*

This Court held that the scholarship program did not violate the Free Exercise Clause of the First Amendment. *Id.* at 715. The law did not seek to suppress or sanction religious practices, nor deny ministers the right to participate in the political community. *Id.* at 720. The scholarship program did not force students to choose between their religious beliefs and receiving a government benefit. *Id.* at 720. Indeed, the program was inclusive, rather than hostile, to religion because students were permitted to use the funds at religious institutions and take devotional theology courses. *Id.* at 724–25.

Instead, the State “merely chose[] not to fund a distinct category of instruction.” *Id.* at 721. The Court emphasized that “[t]raining someone to lead a congregation is an essentially religious endeavor.” *Id.* at 721.

The Court observed that there was a deep historical tradition against funding the clergy. At the time of the founding, many State constitutions prohibited “using tax funds to support the ministry.” *Id.* at 723 (collecting State constitutional provisions). Indeed, some of the most prominent public outcry

against taxpayer support for the ministry occurred in Virginia. *Id.* at 722 & n.6; *infra* at 13–17. “That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforce[d] [the Court’s] conclusion that religious instruction is of a different ilk.” *Id.* at 723 (emphasis in original).

In light of the “historic and substantial state interest” against funding the ministry, the Court concluded that Washington’s “denial of funding for vocational religious instruction” is not “inherently constitutionally suspect.” *Id.* at 725.

**B. The Court’s decisions in *Trinity Lutheran, Espinoza, and Carson* have consistently reaffirmed *Locke***

This Court’s recent Free Exercise Clause decisions have not undermined *Locke*. To the contrary, the Court has consistently offered two principal justifications for *Locke*: (1) States can choose not to fund a category of instruction, and (2) opposition to funding the ministry lays at the historical core of the Religion Clauses. These justifications remain valid today.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), the Court considered a Free Exercise challenge to Missouri Department of Natural Resource’s competitive grant program for schools to purchase recycled rubber playground surfaces. 582 U.S. at 453–54. Because the Department had an express policy to deny grants to applicants owned or controlled by religious entities, based on the State’s constitution, the Department denied Trinity Lutheran’s grant application. *Id.* at

455–56. The Court concluded that the grant program violated the Free Exercise Clause because it denied a public benefit based solely on the religious status of the recipient. *Id.* at 462–63.

The Court distinguished the grant program at issue from scholarship program in *Locke*. First, the Court emphasized that, in *Locke*, “the State had ‘merely chosen not to fund a distinct category of instruction.’” *Id.* at 464 (quoting *Locke*, 540 U.S. at 721). There, the plaintiff was denied funds because he planned to use them “to prepare for the ministry.” *Id.* In contrast, Trinity Lutheran was denied funds solely based on its religious status. *Id.* Second, while opposition to funding the ministry “lay at the historic core of the Religion Clauses, there was no similar history for a grant program for recycled rubber playground surfaces. *Id.* at 465 (citing *Locke*, 540 U.S. at 721–22). Additionally, the scholarship program in *Locke* “went ‘a long way toward including religion in its benefits’” because students could use the funds at religious schools and take devotional theology courses, whereas the program at issue in *Trinity Lutheran* categorically excluded religious schools. *Id.* (quoting *Locke*, 540 U.S. at 724).

In *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), the Court considered a Free Exercise challenge to Montana’s program that granted tax credits to taxpayers who donate to organizations that award scholarships for private school tuition. 591 U.S. at 468–69. The Montana Department of Revenue promulgated “Rule 1,” which prohibited the use of scholarships at religious schools, consistent with the no-aid provision of the Montana Constitution. *Id.* at 470. The Court concluded that

the scholarship program violated the Free Exercise Clause because it barred religious schools from receiving a public benefit based solely on their religious status. *Id.* at 476.

The Court again distinguished *Locke*, based on the same justifications advanced in *Trinity Lutheran*. First, in *Locke*, the State chose “not to fund a distinct category of instruction”—training ministers to lead a congregation. *Id.* at 479 (internal quotation marks omitted) (citing 540 U.S. at 721). Aside from that “narrow restriction,” students could use the scholarship funds at religious schools. *Id.* at 480. In contrast, the Montana no-aid provision barred all funding to religious schools based solely on religious status, making schools and parents choose between receiving a public benefit and their religious beliefs. *Id.* “Second, *Locke* invoked a ‘historic and substantial’ state interest in not funding the training of clergy,” *id.* (quoting 540 U.S. at 725), which “was a central subject of founding-era debates,” *id.* (citing 540 U.S. at 722–23). No similar “historic and substantial” tradition justified Montana’s disqualification of religious schools from receiving government aid. *Id.*

Most recently, in *Carson v. Makin*, 596 U.S. 767 (2022), the Court considered a Free Exercise challenge to Maine’s tuition assistance program for parents of students in school districts that do not operate a secondary school. 596 U.S. at 771–72. Under the program, the school district would transmit the tuition assistance payment to the public or private school of the parent’s choice. *Id.* at 773. But by statute, only nonsectarian schools could receive payments. *Id.* at 774–75. Based on the “unremarkable principles” advanced in *Trinity Lutheran* and

*Espinoza*, the Court concluded that the program violated the Free Exercise Clause because it denied religious schools from receiving a public benefit based solely on their religious status. *Id.* at 780.

Once again, the Court distinguished *Locke* based on the same justifications articulated in *Trinity Lutheran* and *Espinoza*. First, the program in *Locke* declined to fund a particular category of instruction—“the essentially religious endeavor” of training ministers. *Id.* at 788 (citing 540 U.S. at 721). Second, *Locke* turned on a “historic and substantial state interest” against using taxpayer monies to fund the clergy. *Id.* (citing 540 U.S. at 722, 725). And as explained in *Espinoza*, there is no comparable “historic and substantial tradition” against providing aid to religious schools. *Id.* (citing 591 U.S. at 480).

The Court emphasized *Locke*’s “narrow focus”: it authorizes States to exclude funding for “vocational religious degrees.” *Id.* at 789. That is precisely what Virginia has done with the Grant Program.

## **II. This case is factually on all fours with *Locke***

The facts here are “directly analogous” to *Locke*, and Hall concedes as much. Pet. App. 7a. Like the plaintiff in *Locke*, Hall is an undergraduate student at a private Christian college who chose a major to prepare her for ministry. *Id.* Like Washington’s statute, the Grant Program allows students to attend religious institutions and take religious courses, so long as the funding does not go toward an ineligible major—a major that prepares an individual for a career in ministry. *Id.* In fact, the Grant Program is *more* inclusive of religion than the scholarship

program in *Locke*, because students may pursue a double major that includes an otherwise ineligible CIP Code 39 major, so long as the student does not take more classes in the ineligible major than those taken for the eligible major during any given semester. Pet. App. 7a n.6; 8 Va. Admin. Code § 40-71-10 (defining “Eligible Program”). Both Hall and the *Locke* plaintiff chose majors that rendered them ineligible to receive a tuition grant. Pet. App. 7a. And both students challenged their respective state statutes that prohibited the use of tuition assistance grants toward religious vocational degrees as violating the Free Exercise Clause. Pet. App. 7a–8a.

In *Locke*, this Court concluded that such programs do not violate the Free Exercise Clause. *Supra* at 8. And unremarkably, the Fourth Circuit reached the same conclusion. Pet. App. 2a. Virginia has chosen to not fund a category of instruction. And this Court has acknowledged that Virginia has a historic and substantial state interest in not funding the clergy.

### **III. This case is not the proper vehicle to overrule *Locke* given Virginia’s rich history against funding the ministry**

This Court has repeatedly recognized Virginia’s longstanding tradition against funding the ministry. See, e.g., *Locke*, 540 U.S. at 722 & n.6; *Everson v. Bd. of Educ.*, 330 U.S. 1, 11–13 (1947). In *Everson*, this Court noted that “Virginia’s resistance to taxation for church support was crystallized in the famous ‘Parsons’ Cause’ argued by Patrick Henry in 1763.” *Id.* at 11 n.10. Indeed, in *Locke*, the Court noted that “the most famous example of public backlash” against using taxpayer funds to support the clergy occurred in Virginia. 540 U.S. at 722 & n.6. In 1785, the Virginia

General Assembly debated “A Bill Establishing a Provision for Teachers of the Christian Religion,” which would have required citizens to pay a tax, the proceeds of which would be used to direct payments to Christian churches and give undirected monies to the public treasury for seminaries of learning. *Locke*, 540 U.S. at 722 n.6. James Madison penned his famous Memorial and Remonstrance, fiercely arguing against the bill. In it, he emphasized that “no person, either believer or non-believer, should be taxed to support a religious institution of any kind.” *Everson*, 330 U.S. at 12. The importance and influence of Madison’s Remonstrance have not gone unnoticed by this Court. See *Lee v. Weisman*, 505 U.S. 577, 589–90 (1992); *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968). Madison was not the sole opponent. Several other groups, including religious groups, spoke out against it. See *Everson*, 330 U.S. at 12 n.12. After significant public outcry, the bill was defeated.

Instead, in 1786, the General Assembly passed Thomas Jefferson’s “Bill for Establishing Religious Freedom,” which prohibited religious assessments. *Locke*, 540 U.S. at 722 n.6. It provided that “no man shall be compelled to . . . support *any* religious worship, place, or ministry *whatsoever*.” *Id.* (emphasis added). The Act served as the model for Virginia’s own Constitution, which prohibits assessments “for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.” Va. Const. art. I, § 16. As this Court has previously said, the Act laid the foundation for the First Amendment’s protections against governmental intrusion on religious liberty. *Everson*, 330 U.S. at 13; *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

Jefferson’s Act remains codified today, and the rights asserted therein remain the policy of Virginia. Va. Code §§ 57-1, 57-2. Historians have described Jefferson’s Act as having “influenced the American theories of Church-State separation and religious freedom more than any other historical factor.” 1 Anson Phelps Stokes, *CHURCH AND STATE IN THE UNITED STATES* 366 (1950); *see also* Martin E. Marty, *The Virginia Statute Two Hundred Years Later*, in *THE VIRGINIA STATUTE OF RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 1, 1 (Merrill D. Peterson & Robert C. Vaughan eds., 1988) (describing Jefferson’s Act as “the most decisive element in an epochal shift in the Western world’s approach to relations between civil and religious spheres of life”).

When interpreting the First Amendment’s Religion Clauses, this Court looks to “historical practices and understandings.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022). “[T]he line that courts and governments must draw between the permissible and the impermissible” must “accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.” *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (internal quotation marks omitted). This was no less true in *Locke*, where the Court examined “the historic and substantial state interest at issue” and concluded there was nothing in Washington’s own history that “suggests animus towards religion.” 540 U.S. at 725. And more recently, *Carson v. Makin*, 596 U.S. 767 (2022), reaffirmed that “*Locke*’s reasoning expressly turned on what is identified as the historic and substantial state interest” against using “taxpayer

funds to support church leaders.” *Id.* at 788 (internal quotation marks omitted).

The state interest that *Locke* relied on to uphold Washington’s law is not only more robust in Virginia; it originated in substantial part in Virginia. Virginia’s state interest as explained *supra* is extensive and predates the federal Constitution in sharp contrast to Washington’s state interest in *Locke*. And there can be no serious argument that Virginia’s historic tradition is animated by religious hostility given that the entire purpose of Madison’s Remonstrance and Jefferson’s Act was to *protect* religion. Thus, this case presents a stronger historical justification for the rule enunciated in *Locke* than even *Locke* did.

That alone would be reason alone to deny the petition. Overruling a decision that has withstood multiple assaults over the last twenty years is fraught enough as it is. But doing so on facts—and history—that go far beyond those that led to the original decision would require significantly more than simply declaring *Locke* as overruled. It would require grappling with the extensive Virginia-specific anti-establishment history and determining whether that history, rather than the more meager history in *Locke*, justifies the continuation of the *Locke* rule.

And even if the Court were inclined to do so, Virginia’s history presents another challenge. It is the direct lineal precursor for the Religion Clauses in the First Amendment, and thus is deeply intertwined with the history from which the Religion Clauses emerged. Untangling such doctrinal strands does not make for a clean vehicle to overrule *Locke*. Indeed, it

risks unnecessarily muddling the evolving jurisprudence in this area.

Given Virginia’s “historic and substantial” state interest against funding the ministry, this case is not the appropriate vehicle for deciding the question presented.

### CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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