No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, INC., *et al.*,

Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CITIZENS DEFENDING FREEDOM IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Citizens Defending Freedom, submits this brief.[1] *Amicus Curiae* is a non-profit 501(c)(3) organization that works to ensure every American citizen is equipped and empowered to stand for and preserve their constitutional rights and freedoms for themselves and future generations. Citizens Defending Freedom is committed to helping safeguard the principle that state and federal governments promulgate laws that are constitutional and follow the rule of law. *Amicus Curiae* supports the principle that elected State officials, politically accountable to the citizenry, ought to promulgate public policy—not unelected members of the judiciary—that protects the health and safety of children.

Amicus Curiae cares deeply about the social and legal impact of public policy as it affects children and their well-being. *Amicus Curiae* devotes its resources to creating a better and safer world for children. Citizens Defending Freedom has worked on the frontlines to protect children from explicit and inappropriate materials in the public libraries and in schools throughout the nation. It partners with Kirk Cameron and BRAVE Books to provide wholesome content. Citizens Defending Freedom helps to vet education curricula and, when

1. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity who is a party to the case made a monetary contribution to the preparation or submission of this *Amicus Curiae* brief.

needed, advocates for the removal of materials that are not age-appropriate for children or would harm their healthy development. *Amicus Curiae* champions parental rights and the fundamental right of parents to control the upbringing, education, and care of their children. *Amicus Curiae* serves the American public and seeks to educate communities on the local level regarding constitutional issues, the rights of the State, and the rights of individuals, parents, and citizen groups. The outcome of this case and the fate of H.B. 1181 will have a direct effect on Citizens Defending Freedom and the people it serves, including on its decisions regarding the allocation of its resources and on its work to educate and defend the constitutional rights of its members, donors, and all Americans.

Amicus Curiae files this brief to encourage this Honorable Court to uphold the Fifth Circuit's decision and allow States and its citizens to appropriately protect children from explicit and pornographic content that has a direct and harmful impact on their health and well-being.

Amicus Curiae has expertise regarding the technological and practical aspects of protecting minors online. Through its work with schools, libraries, and families, *Amicus* has firsthand experience with both the inadequacy of existing protective measures and the feasibility of age verification requirements. This experience provides unique insight into the issues before the Court.

BACKGROUND

The Texas Legislature, in a 164 to 1 vote, enacted House Bill 1181 ("H.B. 1181") to safeguard children from pornography. H.B. 1181 requires pornographic websites

to verify the age of their users before permitting access to the website's content. App. 171a. Specifically, the Texas law requires compliance from commercial operators of pornographic websites with "more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code § 129B.002(a). H.B. 1181 provides a comprehensive definition for what constitutes "sexual material harmful to minors," even detailing which displays of nudity and acts pertaining to sexual intercourse trigger the law. Tex. Civ. Prac. & Rem. Code § 129B.001(6). H.B. 1181's age verification requires visitors to pornographic websites to "provide digital identification" or otherwise "comply with a commercial age verification system" to confirm that the user is over 18 years old and legally allowed to access the sexual material. Tex. Civ. Prac. & Rem. Code §129B.003(b). H.B. 1181's age verification model has been widely implemented by commercial website operators for the use of alcohol, tobacco, rental cars, fantasy sports, and gambling platforms. J.A. 49, 185-91, 194, 198, 201, 209.

Petitioners, who filed this case under several business entity names including "Free Speech Coalition, Inc.," are porn distributors, sellers, and individuals who obtain commercial gain from pornography. Resp. at 3-6 (citing ROA. 19-24, 249-51, 399). Petitioners claim that their pornographic websites should not have to comply with H.B. 1181's age verification requirement because it violates their First Amendment rights. The district court issued a pre-enforcement injunction against the Texas law, which the Fifth Circuit stayed pending appeal. App. 165a-168a. The Fifth Circuit reversed the district court and properly upheld H.B. 1181 under *Ginsburg v. New York*, 390 U.S. 629 (1968).

SUMMARY OF THE ARGUMENT

Texas House Bill 1181 represents a carefully crafted, narrowly tailored solution to a pressing problem that has grown exponentially worse in the twenty years since this Court's decision in *Ashcroft II*, the widespread exposure of minors to online pornography through commercial websites. This Court has long recognized that obscene materials are not protected by the First Amendment and that children require special protection from such materials. With this Court's previous rulings on obscene materials that may be accessible, and therefore harmful to children, three critical developments justify upholding the law:

First, the technological landscape has fundamentally changed. When *Ashcroft* was decided, neither smartphones nor tablets existed, social media was in its infancy, and high-speed internet access was limited. Today, 91% of teenagers own smartphones, giving them constant private access to the internet. The filtering technologies the *Ashcroft* Court suggested as less restrictive alternatives have proven inadequate in this new environment.

Second, commercial pornography websites actively market to and profit from minor users while taking no meaningful steps to verify age, despite having ready access to the same verification technologies they use for payment processing. This commercial conduct places the law squarely within traditional state regulatory authority over business practices that harm minors.

Third, twenty years of experience has demonstrated that less restrictive alternatives are ineffective. Industry self-regulation has failed, parental controls are easily circumvented, and filtering software cannot keep pace with evolving technology. Only direct regulation of commercial providers can effectively address this pressing public health crisis.

From a public policy perspective, a child's access to explicit sexual material is at an all-time high, as are the harmful effects imposed on children that follow exposure to such inappropriate material at a young age. Petitioners argue that H.B. 1181 requires this Court to apply strict scrutiny and outdated reasoning. Petitioners wish to use the freedoms of the First Amendment to block the State of Texas from using its police powers to protect children from pornography by directly preventing minors from accessing pornographic websites. Given the twenty years of technological advancement since this Court's opinion in *Ashcroft II*, the negative societal implications of widespread pornography in the hands of children, and Petitioner's commercial purpose for its pornographic websites, it is clear that now is the time for this Court to restore rational basis review when analyzing the regulation of commercial child pornography for legitimate government purposes and to restore the precedent this Court set in cases like *Ferber* and *Ginsberg*.

ARGUMENT

I. CHILDREN DESERVE TO BE PROTECTED FROM PETITIONERS' PORNOGRAPHIC WEBSITES, WHICH INFLICT REAL AND UNWANTED PSYCHOLOGICAL AND PHSYICAL HARM.

The unwanted exposure of children to sexually explicit material is higher than ever.[2] Surveys indicate that 42% of children in the United States own a smartphone by age 10, and 91% of children own a smartphone by age 14.[3] The number of children who have access to the internet via a smart phone in their pocket, an iPad, laptop, or other device has grown exponentially.[4] The amount of time that children spend on-line has also exploded. Common Sense Media reports that children from ages 8-12 spend an estimated 5.5 hours on a screen per day, while children 13-18 spend over 8 hours a day on a screen.[5]

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2. https://www.unh.edu/ccrc/sites/default/files/media/2022-03/online-victimization-of-youth-five-years-later.pdf, last visited Nov. 21, 2024.

3. https://www.forbes.com/health/family/best-age-for-first-cell-phone/#:~:text=Recent%20survey%20data%20suggests%2042,the%20complexity%20of%20this%20decision., last visited Nov. 21, 2024; https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web_0.pdf ?utm_source=substack&utm_medium=email, last visited Nov. 21, 2024; https://www.pewresearch.org/internet/2020/07/28/childrens-engagement-with-digital-devices-screen-time/, last visited Nov. 21, 2024.

4. *Id.*

5. https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web_0.pdf, last visited Nov. 21, 2024.

Given the sea change in screen and internet accessibility, especially for children, it is not surprising that access to and use of pornographic websites by children has also increased over the years. Research shows that 93% of boys and 62% of girls have encountered pornography over the internet before reaching age 18.[6] And the majority of these encounters, 83% according to one study, are unwanted and occur while children are scrolling the web for a different purpose.[7] Researchers believe these unwanted encounters are, in part, due to marketing directed at children.[8] There are seemingly endless ways that pornography distributors can use to enter into the digital world of a child who uses the web.[9]

Some pornography websites, such as Pornhub which is operated by Petitioner MG Freesites Ltd., has come under scrutiny after multiple sources reported that the website specifically targets children in their marketing.[10]

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6. https://www.unh.edu/ccrc/sites/default/files/media/2022-03/the-nature-and-dynamics-of-internet-pornography-exposure-for-youth-under-18.pdf, last visited Nov. 21, 2024.

7. https://www.unh.edu/ccrc/sites/default/files/media/2022-03/online-victimization-of-youth-five-years-later.pdf, last visited Nov. 21, 2024.

8. https://www.unh.edu/ccrc/sites/default/files/media/2022-03/online-victimization-of-youth-five-years-later.pdf, last visited Nov. 21, 2024.

9. https://5rightsfoundation.com/resource/pathways-how-digital-design-puts-children-at-risk/, last visited Nov. 21, 2024.

10. Resp. at 3 (citing ROA.21); https://exoduscry.com/articles/how-pornhub-goes-after-your-children/, last visited Nov. 21, 2024.

Pornhub infamously posted a meme of Disney's Baby Yoda staring at a screen with the Pornhub name and logo reflecting in the character's eyes and the phrase "10 seconds after my parents leave the house" written across the meme, communicating that Baby Yoda was using the porn website and concealing it from his parents.[11] The text of the meme promoted the secret use of the pornographic website by a child without the parents' knowledge. Indeed, much of a child's encounters with pornographic material are in private and are intentionally concealed from parents and adults.[12]

Respondents have established, and Petitioners do not contest, that children have access to pornographic websites and that protecting children from the litany of serious psychological and physical harms that correspond with exposure to pornography in children is a compelling governmental interest. J.A. at 158, 160-63. Petitioners, however, argue that since their pornographic material can be legally accessed by adults, they do not have to comply with Texas law, even when their non-compliance directly makes pornography available and accessible to children without age verification. Petitioners' conduct is akin to a Tobacco company using a cartoon to market

11. https://exoduscry.com/articles/how-pornhub-goes-after-your-children/, last visited Nov. 21, 2024; https://thebridgehead.ca/2020/04/24/the-porn-industry-is-tagging-hardcore-videos-with-disney-characters-and-paw-patrol-to-hook-children/; last visited Nov. 21, 2024; https:// www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-traffcking.html, last visited Nov. 21, 2024.

12. https://abc13.com/secret-apps-hiding-smartphone-content/1096421/, last visited Nov. 21, 2024.

its product in a way that appeals to children, making its cigarettes available through an online store, and then never checking if the purchaser is of legal age to buy them. Petitioners cannot use the First Amendment to hide from the natural consequences of their commercial enterprise, which makes pornography available to children. The reason is simple: the First Amendment does not protect a child's exposure or participation in pornography. *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, this Court recognized a State's right to protect the physical and psychological well-being of children who participate in the production of sexually explicit material, which might otherwise be protected by the First Amendment but that poses a danger of exploitation or harm to a child. *Id.* at 760-65. In *Ferber*, this Court accepted that a State may go beyond a mere prohibition of pornographic materials that involves children when it is not possible to protect children adequately without prohibiting or regulating the entire exhibition and dissemination of the material. *Id.* at 760-61. In other words, Petitioners do not have a First Amendment right to disseminate pornographic material on their website when children are accessing it, even when restricting the material's availability requires age verification of adults, who may lawfully visit their websites. "[T]he evil to be restricted" in the form of the distribution of pornography to children, "overwhelmingly outweighs the expressive interests" raised by Petitioners. *Id.* at 763. Here, the State of Texas' interest in regulating and prohibiting the illegal dissemination of pornography to children by Petitioners is a constitutional and valid use of their police power. And this Court's holdings in *Ashcroft v. Free Speech Coalition (Ashcroft I)*, 535 U.S. 234 (2002), and *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004), do not mandate otherwise.

II. PETITIONERS' WRONGHEADED INTERPRETATION OF *ASHCROFT I AND II* WOULD STRIP TEXAS OF ITS RIGHT TO ADDRESS AND REGULATE THE ONGOING AND ILLEGAL DISSEMINATION OF PORNOGRAPHY TO CHILDREN.

The police powers of the State, in their simplest form, "authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government[.]" *Munn v. Illinois*, 94 U.S. 113 (1877). The States enjoy broad police power in their pursuit to protect public health, safety, and welfare when a citizen is using property, here a commercial website, in a manner that injures children. *Cohens v. Va.*, 19 U.S. (6 Wheat) 264, 428 (1821); *Brown v. Md.*, 25 U.S. (12 Wheat) 419, 443 (1827). There is no argument that the injury at issue here, the dissemination of pornography to children, is illegal under Texas Criminal law. H.B. 1181 prohibits a minor from accessing illegal pornographic materials without age verification.

Here, unlike the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(A) ("CPPA") that the Court struck down in *Ashcroft I*, H.B. 1181 does not involve the regulation of images of "virtual children," images created to looked like minors by computer imaging but did not exist. 535 U.S. at 239-40. Instead, H.B. 1181 addresses the very real harm that is happening to real children due to the continuous access and dissemination of illegal pornography, sometimes accessed without intentionally pursuing it. In *Ashcroft I*, this Court found that the harm addressed by the CPPA was "indirect" because it

regulated the use of virtual imagery that might lure a person into developing an appetite for child sexual assault or might heighten the probability of child abuse. *Id.* at 240-42. Here, H.B. 1181 addresses the direct dissemination of pornography from a commercial website to a child under the age of 18. The evil in question is the unlawful conduct of putting pornography in the hands of children who are too young to possess it. H.B. 1181, unlike the CPPA analyzed in *Ashcroft I*, is aimed at closing a distribution network for pornography by verifying that the person accessing the website's material is of legal age. *Id.* at 249-50. In *Ashcroft I*, the Court stated that the CPPA did not serve that purpose but indirectly sought to protect children from the potential actions of "those who would commit other crimes." *Id.* at 252. In other words, the federal statute's connection to its stated goals were too attenuated.

Two years later, in *Ashcroft II*, this Court upheld an injunction that prevented the enforcement of Congress' next attempt to protect children from on-line pornography, the Child Online Protection Act (COPA), 47 U.S.C. § 231, finding that strict scrutiny applied to the regulation of the sale of sexually explicit material on the internet. 542 U.S. at 660-62. COPA required that the sale of pornography be accomplished by using a credit card, a digital age verification certificate, or "any other reasonable means that are feasible under technology." *Id.* at 661. A violation of COPA was punishable by "severe criminal penalties" including a large monetary fine and imprisonment. *Id.* at 660-61. After an evidentiary hearing, the district court found that the use of "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online[.]" *Id.* at 663. Twenty years has passed since *Ashcroft II*, a

decision that this Court noted did not even reflect "current technological reality" when it was decided. *Id.* at 671. In 2004, no one owned a smartphone, let alone children. The iPad was not invented. Facebook was almost still an idea in Mark Zuckerberg's dorm room. The world was not as technologically savvy as it is today. But, importantly, this Court was not presented with a sufficient evidentiary record to address the parties' arguments.

Seemingly concerned by this, the Court noted that the parties would have an opportunity to present further evidence regarding the "relative restrictiveness and effectiveness of alternatives to the statute." *Id.* at 673. And here we are, 20 years after the summary opinion in *Ashcroft II*, and the accessibility and use of on-line pornography by children is at an all time high. The filters that appear to present a reasonable alternative in *Ashcroft II*, in no uncertain terms, have not worked. Children are consuming more and more sexually explicit material, and without even intentionally pursuing it. Distributors of pornography use technology never imagined in 2004 to draw children into the unwanted opening of porn websites. And, at the same time, in the last twenty years, technology has provided advancement after advancement for children to conceal their consumption of internet pornography with everything from fake applications on the phone to using private browsing modes, to proxy websites, etc. It is more apparent than ever that the solution for regulating the receipt of pornographic material by children is by addressing it at its source—the websites that disseminate the pornography and by holding those who provide sexually explicit material to children accountable.

Further, the Fifth Circuit properly cast aside the outdated, outlier holding in *Ashcroft II* and restored this Court's historical precedent, which protects children from the ongoing harm of illegal business practices that expose them to sexually explicit materials. The holding in *Ashcroft II* skimmed over the First Amendment analysis that much occur here, in this challenge brought by Petitioners, who are all commercial entities who profit from the pornography industry and who engage in constitutionally unprotected behavior such as providing pornography to children. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 831 (2000). Regulation of commercial pornography and its distribution to children, on the facts of the case before this Court, with all that we know in 2024, calls for rational basis review. *See Ginsberg v. New York*, 390 U.S. 629 (1968); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)

III. THIS COURT'S OBSENITY DOCTRINE HOLDINGS, DEMONSTRATED IN CASES SUCH AS *GINSBERG*, EQUIP THE STATES TO ADDRESS CONTEMPORARY CHALLENGES, INCLUDING THE ON-LINE DISSEMINATION OF PORNOGRAPHY TO CHILDREN.

The constitutional foundation for H.B. 1181 rests on over sixty years of Supreme Court jurisprudence that has consistently recognized both the States' compelling interest in protecting minors and their authority to regulate obscene materials. When viewed through this historical lens, H.B. 1181 represents a measured, constitutionally sound response to the unprecedented challenges of the digital age.

The constitutional framework for state regulation of obscene materials begins with the Supreme Court's landmark decision in *Roth v. United States*, 354 U.S. 476 (1957). *Roth* remains the cornerstone of state authority to regulate obscene materials, particularly where the protection of minors is concerned. The constitutional framework begins with *Roth*'s foundational holding that obscenity falls outside First Amendment protection. The Court explicitly declared that "obscenity is not within the area of constitutionally protected speech or press." *Roth*, 354 U.S. at 485. The Court elaborated:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

Id. at 484.

Critically, the Court further emphasized that "the protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* This distinction between protected speech and obscenity provides the foundation for H.B. 1181's regulatory framework. By distinguishing between protected speech and obscenity, *Roth* provided States, including the State of

Texas, with the constitutional foundation to exercise their police powers in protecting public welfare, particularly concerning minors. If anything, the internet's unlimited reach and accessibility have made this principle more critical. When *Roth* distinguished between protected speech and obscenity, the Court could not have envisioned today's digital landscape where children carry unlimited access to explicit content in their pockets. Yet the Court's reasoning—that the First Amendment was designed to protect the "unfettered interchange of ideas" rather than obscene content—provides a crucial foundation for modern regulation.

The Supreme Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), established the crucial principle that States may employ different standards when protecting minors from obscene materials. The Court's explicit holding provides direct support for H.B. 1181: "We conclude that the constitutional powers of the state to regulate the sale of material to minors are not limited to those that might be denied to adults . . . . Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children." *Ginsberg*, 390 U.S. at 636-37. The Court specifically approved New York's "variable obscenity" approach, noting:

> the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals

> of its community by barring the distribution to children of books recognized to be suitable for adults.

Id. at 636 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966)).

Crucially for H.B. 1181's defense, *Ginsberg* applied rational basis review: "[t]o sustain state power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641. *Ginsberg* upheld New York's right to prohibit the sale of "girlie magazines" to minors—a far more restrictive measure than H.B. 1181's age verification requirement. Where New York could completely bar minors' access to materials "harmful to minors," surely Texas may implement a less restrictive verification requirement that preserves access for adults while protecting children.

Just as New York could prohibit the sale of "girlie magazines" to minors in 1968, Texas may require age verification for online pornographic content in 2024. Importantly, *Ginsberg* applied rational basis review in protecting youth from harmful materials and provides strong support for H.B. 1181's constitutionality. *Miller v. California*, 413 U.S. 15 (1973), further reinforced State authority to regulate obscene materials by rejecting a national standard in favor of a community-based evaluation. The Court explicitly rejected a national standard:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring

> that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.

Miller, 413 U.S. at 32. The Court established its now-famous three-part test. *Id.* at 24 (citations omitted) ("The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."). And the Court emphasized State authority to regulate based on local values: "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. Texas, through its democratic processes, has chosen to implement protective measures that reflect its communities' values—precisely the type of state-level decision-making *Miller* endorsed.

Miller also specifically addressed commercial exploitation of obscene material: "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a misuse of the great guarantees of free speech and free press." *Id.* at 34.

This Court's traditional precedent, revealed in cases such as *Miller*, *Ginsberg*, and *Ferber*, allows States to

properly regulate on-line pornography and prevent its illegal dissemination to children, such as Texas has in H.B. 1181. In all this, the outliers are *Ashcroft I* and *Ashcroft II*, which the last twenty years have shown inadequate. This Court should restore a State's ability to protect the health and safety of children from online dangers. Affirming the Fifth Circuit's holding will accomplish this goal and restore this Court's pre-*Ashcroft II* precedent, allow States to regulate child pornography to protect vulnerable children from continued psychological and physical harm, and prevent pornography distributors, like Petitioners, from using the First Amendment as a shield from its unconscionable business practices that so negatively affect children.

CONCLUSION

Because H.B. 1181 properly regulates the illegal dissemination of pornography to children, the Fifth Circuit properly applied rational basis review in upholding Texas' age verification requirement. This Honorable Court should, therefore, uphold the decision of the appellate court.

Respectfully submitted,

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