CAPITAL CASE

No. 22-7412

In the

Supreme Court of the United States

DARRYL DAVID BARWICK, *Petitioner*,

v.

RON DESANTIS, GOVERNOR OF FLORIDA, ET AL.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Eleventh Circuit denying a stay of execution where the underlying 42 U.S.C. § 1983 action is "little more than an attack" on this Court's "settled precedent."

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OPINION BELOW

The Eleventh Circuit's decision affirming the district court's denial of a motion to stay the execution and denying a motion to stay the execution filed in the appellate court is reported at *Barwick v. Governor of Florida*, 2023 WL 3089873 (11th Cir. Apr. 26, 2023) (No. 23-11277-P).

JURISDICTION

On April 13, 2023, Barwick, a Florida death row inmate with an active death warrant, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a 42 U.S.C. § 1983 action raising two claims regarding his state clemency proceedings in the federal district court. *Barwick v. DeSantis*, 4:23-c-v-146-RH (N.D. Fla). He also filed a motion to stay

his execution to litigate the § 1983 action. The Defendants responded to the motion to stay. On April 18, 2023, the district court denied the motion to stay the execution. (Doc. #21).

Barwick appealed the district court's denial of the motion to stay the execution to the Eleventh Circuit and also filed a motion to stay the execution in the Eleventh Circuit. On April 26, 2023, the Eleventh Circuit denied the motion to stay the execution filed in the appellate court. *Barwick v. Gov. of Fla.*, 2023 WL 3089873 (11th Cir. Apr. 26, 2023).

On April 28, 2023, Barwick filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Barwick seeks review of a decision of the Eleventh Circuit affirming the district court's denial of a motion to stay his execution to litigate a 42 U.S.C. § 1983 action rasing due process challenges to Florida's clemency process.

Facts of the crime

On March 31, 1986, after observing the victim sunbathing at her Panama City apartment complex, Barwick returned to his home to retrieve a knife and walked back to the apartment complex. He followed the victim into her apartment, stabbed her thirty-seven times, wrapped her in a comforter, and left her body in the bathroom for her sister to find when she returned to their shared apartment that evening. Bloody fingerprints were found on the victim's purse and wallet, and her bathing suit had been displaced. Semen was found on the comforter wrapped around her body, and it was determined that Barwick was included within the two percent of the population who could have left the stain. Barwick was arrested and confessed to law enforcement and multiple family members. *Barwick v. State*, No. SC2023-0531, slip op. at 2 (Fla. April 28, 2023).

Procedural history of current § 1983 action

On April 29, 2021, the clemency interview took place with Barwick and his clemency counsel present. *Barwick*, 2023 WL 3089873 at *2. At the start of the interview Commissioner Richard Davison informed Barwick and his clemency counsel that the Commission was "not here to review what happened during Barwick's court proceedings or to determine his innocence or guilt." *Id.* at *2. Rather, the purpose of the interview was to give Barwick "an opportunity to make any statements or comments concerning commutation to life of the death sentence imposed." *Id.* Barwick

told the two Commissioners about the childhood abuse he suffered at the hands of his father. After the interview, clemency counsel submitted reports and letters, including a letter from Dr. Hyman H. Eisenstein explaining that Barwick "has a history of multiple brain injuries," which may have impaired his ability to remember the facts of his crimes. On April 3, 2023, Governor DeSantis denied clemency and issued a death warrant.

Ten days later, on April 13, 2023, Barwick, represented by CHU-N, filed a § 1983 action in the Northern District of Florida raising two claims regarding Florida's clemency process: (1) that the process was "standardless" in violation of due process; and (2) the clemency officials were not impartial in violation of the due process requirement of neutral and detached magistrates. *Barwick v. DeSantis*, 4:23-cv-146-RH (N.D. Fla.) (Docs. #2,#3). On the same day, CHU-N also filed a motion to stay the execution. (Doc. #5).

The next day, on April 14, 2023, all Defendants filed an amended Rule 12(b)(6) motion to dismiss for failure to state a claim. (Doc. #12). The Defendants also filed a response to the motion to stay relying primarily on *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring), and *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1330-33 (11th Cir. 2015). (Doc. #14).

On April 17, 2023, CHU-N filed a response to the motion to dismiss. (Doc. #15). On the same day, the CHU-N also filed a reply to the response to the motion to stay. (Doc. #19).

On April 18, 2023, the district court denied the motion to stay the execution. (Doc. #21). The district court concluded that the procedures afforded to Barwick "provided whatever minimal level of process was due." *Id.* at 3. The district court noted that Barwick was represented by an attorney during clemency. *Id.* The district court concluded that Barwick was afforded "as good or better process" than the plaintiffs in

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring), and *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1330-33 (11th Cir. 2015), and therefore, here, "as in *Woodard* and *Gissendaner*, the due-process claim falls short." *Id.*

The district court then addressed three additional points. (Doc. #21 at 4). The district court first addressed the statement made at the beginning of the clemency interview by the clemency officials that they were not there to "determine guilt or innocence," which was the basis for the second due process claim regarding impartiality. *Id.* at 4. The district court pointed out that while the officials asked a number of detailed questions about the crime, "they also asked about the mitigating circumstances." *Id.* The clemency officials showed "little sympathy, but they were not myopic." *Id.*

The district court then addressed the assertion that no capital defendant had been granted clemency in the last 40 years. (Doc. #21 at 4). The district court rejected this comparative standard made without knowing the facts of the other cases where clemency was denied and stated that the issue was "this *one* case." *Id.* at 4 (emphasis in original). The district court noted that while there were substantial mitigating circumstances, this was a "horrific crime, and it was not his first." *Id.* The district court concluded, based on the record, that Barwick "was denied clemency because the members of the clemency board found the mitigating circumstances insufficient to outweigh the crime and the criminal history." *Id.* at 5.

The district court then addressed the assertion that Florida clemency was standardless. (Doc. #21 at 5). The district court noted the Eleventh Circuit precedent holding Florida's standards were sufficient. *Id.* The district court then opined a "more detailed set of criteria" would help avoid arbitrariness and unwarranted disparity, but detailed standards could prevent the clemency board from considering mitigation "of

every kind." *Id.* The district court stated that more detailed standards were unlikely to have made any difference. The district court then denied the motion to stay the execution to consider the due process claims raised in the § 1983 action. *Id.* at 6.

The CHU-N then filed a notice of appeal of the district court's denial of the motion to stay to the Eleventh Circuit. (Doc. #22).

The Eleventh Circuit denied the motion to stay the execution filed in its court concluding Barwick did "not have a substantial likelihood of success on the merits." *Barwick v. Gov. of Fla.*, 2023 WL 3089873, at *7 (11th Cir. Apr. 26, 2023).

On April 28, 2023, Petitioner Barwick, represented by CHU-N, filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE ELEVENTH CIRCUIT DENYING A STAY OF EXECUTION WHERE THE UNDERLYING 42 U.S.C. § 1983 ACTION IS "LITTLE MORE THAN AN ATTACK" ON THIS COURT'S "SETTLED PRECEDENT."

Petitioner Barwick seeks review of the Eleventh Circuit's decision denying a motion to stay his execution pending the appeal to ultimately litigate his 42 U.S.C. § 1983 action in the district court. Pet. at 15. Barwick asserted in his § 1983 action that state clemency proceedings must have detailed standards to comport with due process. He claimed Florida's clemency process violates even minimal due process because it is "standardless." The Eleventh Circuit concluded that Barwick did not have a substantial likelihood of success on the merits of his due process claims and denied a stay. There is no conflict between this Court's jurisprudence requiring only minimal due process in the clemency context under *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), and the Eleventh Circuit's decision. Nor is there any conflict between this Court's jurisprudence regarding stays of executions and the Eleventh Circuit's decision denying a stay. This Court recently addressed stays of executions and urged courts to dismiss § 1983 actions that are based on speculative theories including those that amount to "little more than an attack on settled precedent." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019). The underlying § 1983 action amounts to nothing "more than an attack on" this Court's long "settled precedent" of *Woodard*. This § 1983 action raising due process challenges to Florida's clemency process is beyond speculative — it is frivolous. There is also no conflict between the circuit courts or state courts of last resort and the Eleventh Circuit's decision. Opposing counsel points to no decision from any federal circuit court or state supreme court holding, or even hinting, that a clemency process without detailed standards violates the minimal due process standard required of clemency proceedings. The petition should be denied.

The Eleventh Circuit's decision in this case

The Eleventh Circuit denied a stay of execution. *Barwick v. Gov. of Fla.*, 2023 WL 3089873 (11th Cir. Apr. 26, 2023). The Eleventh Circuit described Florida's clemency process noting it does not enumerate specific factors to be considered in determining clemency. *Barwick*, 2023 WL 3089873, at *1-*2. The Eleventh Circuit then detailed Barwick's own clemency process. *Id.* at *2. The Eleventh Circuit determined that it had jurisdiction concluding that a challenge to a state's clemency process is properly brought in a § 1983 action. *Id.* at *4 (relying on *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005), and *Nance v. Ward*, 142 S.Ct. 2214, 2221 (2022)).

The Eleventh Circuit recounted that familiar four-prong test for granting a stay of execution explaining that a petitioner must establish all four prongs. *Barwick*, 2023 WL 3089873, at *3. The Eleventh Circuit then explained that of the four prongs necessary for a stay, the "first and most important question" is whether the movant can demonstrate a substantial likelihood of success on the merits and noted that their decision would ultimately begin and end with that first prong. *Id.* at *4. The Eleventh Circuit discussed *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), at length, as well as the Eleventh Circuit caselaw following *Woodard*, such as *Gissendaner v. Comm'r, Ga Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015). *Id.* at *5-*6. The Eleventh Circuit noted the law was "clear" that a state's clemency process is subject only to "minimal procedural safeguards." *Id.* at *6 (quoting *Woodard*, 523 U.S. at 289). The Eleventh Circuit stated that the Constitution does not require the State to provide detailed standards for its clemency process. *Id.* at *7. The Eleventh Circuit then concluded that Barwick did "not have a substantial likelihood of success on the merits" and denied the stay. *Id.* at *7.

Minimal due process and state clemency proceedings

There is no federal constitutional due process right to specific standards in state clemency proceedings. There are only minimal due process limits on state actors in the clemency context. Clemency officials, for example, may not flip a coin to decide whether to grant clemency and they may not entirely deny a defendant access to the clemency process.

In *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998), Justice O'Connor, in her concurring opinion, concluded that "some ***minimal*** procedural safeguards apply to clemency." (emphasis in original). Justice O'Connor observed that judicial intervention "might" be warranted if a state official flipped a coin to determine whether to grant clemency or where the State arbitrarily denied a prisoner "any" access to its clemency process. In *Woodard*, Ohio only gave the capital inmate a few days notice of the clemency hearing; excluded his counsel from the clemency interview; and did not allow Woodard to testify or submit documentary evidence at the hearing. *Woodard*, 523 U.S. at 289-90; *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1294 (11th Cir. 2020) (discussing the facts of *Woodard*). But the Supreme Court, including Justice O'Connor, still concluded that Ohio had not violated minimal due process.

Here, Barwick was given many months notice of the clemency interview. Barwick was appointed state clemency counsel over a year before the interview. His clemency counsel was allowed to be present at the interview and both clemency counsel and Barwick were permitted to present any and all mitigation evidence they wanted to present at the interview. Clemency counsel, as well as other attorneys, were permitted to make written submissions to the clemency board after the interview. As the district court found, this amount of due process was equal to, or greater than, the inmate in *Woodard* was afforded.

Due process, in the clemency context, consists of being given notice of clemency and an opportunity to participate and present mitigation. *Cf. Kaley v. United States*, 571 U.S. 320, 357 (2014) (stating the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Barwick was given that level of due process and more. Florida also provided him with clemency counsel. § 940.031(1)-(3), Fla. Stat. (2022); *Babb v. State*, 92 So.3d 281 (Fla. 5th DCA 2012) (holding a different public defender may be appointed as clemency counsel). Barwick's clemency counsel was appointed over a year before the clemency interview.[1] There was no due process violation in Florida's clemency process.

Regarding the claim that the clemency officials were not impartial based on a statement made at the beginning of the clemency interview that clemency was not to determine innocence or guilt, there was no due process violation because clemency officials are not required to be neutral and detached magistrates. *Gardner v. Garner*, 383 Fed. App'x. 722, 728 (10th Cir. 2010) (rejecting a due process lack of impartiality claim regarding the Attorney General being on the clemency board and observing that appearance of impropriety challenges are a "weak predicate for a due process claim" in "extra-judicial" contexts). This Court does not mandate that juries be required to listen to residual doubt arguments at the penalty phase. *Oregon v. Guzek*, 546 U.S. 517, 523-27 (2006) (explaining that residual or lingering doubt is not relevant to the sentence); *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (refusing to recognize an Eighth Amendment right to have residual or lingering doubt considered as a mitigating factor). Surely clemency boards are not required to do so either and they

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[1] Florida's clemency statute does not create a right to clemency counsel but it allows the clemency board to appoint clemency counsel to capital defendant and it is standard practice to do so. And that standard practice was allowed in this case.

certainly should not be required to do so in a case where the defendant confessed to his brother shortly after the murder and then to two investigators and years later to defense mental health experts. There is no claim of actual innocence in this case, so, the fail-safe aspect of clemency is not at issue. *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (noting that, over the past century, "clemency has been exercised frequently in capital cases" when demonstrations of 'actual innocence' have been made).

Even if neutral and detached magistrates were required in clemency proceedings, the clemency officials taking Barwick's guilt as a given does not mean they would not consider the facts and circumstances of the crime and any mitigation he presented into consideration when deciding whether to grant him clemency. It simply meant the interviewers would not permit Barwick to argue about the fairness of his trial or to argue, in the absence of new evidence, that he was not the murder. As the district court found, while the clemency officials asked a number of detailed questions about the crime, "they also asked about the mitigating circumstances." (Doc. #21 at 4).

Moreover, the questions about the crime were not really focused and fixated on guilt, as opposing counsel insists, the questions were focused more on motive, which would be useful information in determining future dangerousness and rehabilitation. Both are important considerations when contemplating reducing a sentence to a life sentence to protect both the prison guards and the other inmates. There are no limits on the types of questions clemency officials may ask a person seeking clemency — nor should there be. The statement at the start of the clemency interview did not violate due process.

This Court's jurisprudence regarding stays of execution

Recently this Court addressed a stay of execution in *Bucklew v. Precythe*, 139

S.Ct. 1112 (2019). Bucklew, a death-row inmate whose appeals and habeas review of his conviction and sentence had been finished over a decade ago, filed a § 1983 action, 12 days before his scheduled execution, raising an Eighth Amendment challenge to the use of the drug pentobarbital as a method of execution. He was granted a stay of execution and then litigated the § 1983 action for years. This Court, after clarifying the legal standards for method of execution challenges, concluded that the State was entitled to summary judgment on the Eighth Amendment claim. *Id.* at 1133.

This Court then addressed stays of executions. *Bucklew*, 139 S.Ct. at 1133-34. This Court first observed that both the State and the victims have an important interest in the timely enforcement of a sentence, which had been "frustrated" by the § 1983 action and stays of executions granted to litigate that action. *Id.* at 1133. His appeals and habeas review had been finished over a decade ago but he managed to secure delay after delay of his execution based on stays being granted to litigate the § 1983 action. *Id.* at 1133-34. The § 1983 action had resulted in five years of delay and yielded "two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court." *Id.* at 1134. And all of that was a result of a § 1983 action that amounted "to little more than an attack on settled precedent" that could not even "survive summary judgment." *Id.* The *Bucklew* Court then decried that the people of Missouri and the surviving victims deserved "better." *Id.* Both the majority and principal dissent agreed that the long delays that are now typical in capital cases are "excessive." *Id.* The Court then observed that the role of courts handling § 1983 actions in capital cases was to resolve such lawsuits "fairly and expeditiously." And courts need to "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id.* Last-minute stays of execution "should be the extreme exception, not the norm." *Id.* The *Bucklew* Court urged courts to invoke their "equitable powers" to "dismiss or curtail suits that are

pursued in a dilatory fashion or based on speculative theories." *Id.* at 1134; *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (noting, that after *Nelson v. Campbell*, 541 U.S. 637 (2004), was decided, "a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day).

Barwick's § 1983 action is nothing "more than an attack" on this Court's long "settled precedent" of *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). Indeed, the precedent in this case is even more than settled and of longer vintage than the precedent at issue in *Bucklew*. And, just like the underlying § 1983 action in *Bucklew* was meritless, the underlying § 1983 action in this case is meritless. Indeed, this § 1983 action could not even survive a Rule 12(b)(6) motion to dismiss for failure to state a claim based on *Woodard* and the controlling Eleventh Circuit precedent following *Woodard*, such as *Gissendaner v. Comm'r, Ga Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015).

The *Bucklew* Court exhorted federal courts to use their equitable powers to dismiss "speculative" actions filed to delay the execution but federal courts should be even more vigilant regarding frivolous actions filed to delay the execution. In this case, the underlying § 1983 action itself, the appeal to the Eleventh Circuit, as well as the petition filed in this Court, are all simply delay tactics. Courts should not even consider granting certiorari review or staying an execution in connection with frivolous lawsuits because it just encourages the filing of frivolous claims on the eve of the execution. *Cf. Price v. Dunn*, 139 S.Ct. 1533, 1538 (2019) (Thomas, J., concurring in the denial of certiorari) (explaining granting a stay of execution in the face of unexplained delays "only encourages the proliferation of dilatory litigation strategies" that the Supreme Court has "repeatedly sought to discourage"). This Court should do as it urged the lower courts to do in *Bucklew* and invoke its equitable powers to deny the petition for writ of certiorari and deny the corresponding motion to stay the

execution filed in this Court. A stay of execution should not even be considered when the underlying action is itself merely a dilatory tactic.

No conflict with this Court's stay jurisprudence

There is no conflict between this Court's stay-of-executions jurisprudence and the Eleventh Circuit's decision affirming the district court's denial of a stay or denying the stay itself. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review).

Normally, a court may grant a stay only if: (1) there is a substantial likelihood of success on the merits; (2) the party will suffer irreparable injury; (3) the stay will not substantially harm the other litigant; and (4) the stay would not be adverse to the public interest. That is the standard the Eleventh Circuit used to deny a stay. *Barwick*, 2023 WL 3089873, at *3.

But when seeking a stay in this Court based on a petition for writ of certiorari, the movant must show: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). The standard for stays of execution derives from the standard for stays developed in civil cases. *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983) (citing *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell. J., in chambers). Barwick must establish all of the factors, not merely one or two of the factors. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (holding that an inmate seeking a stay of execution "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits") (emphasis added).

A § 1983 action that is due to be dismissed for failure to state a claim cannot be a valid basis for a motion to stay. The due process challenge to Florida's clemency

process is totally meritless under this Court's decision in *Woodard*. As the Eleventh Circuit concluded, Barwick "does not have a substantial likelihood of success on the merits." *Barwick*, 2023 WL 3089873, at *7. Barwick fails the first factor for a stay, which ends the analysis.

There is no conflict between this Court's stay jurisprudence in capital cases and the Eleventh Circuit's decision in this case.

No conflict with the other federal circuit courts or state supreme courts

There is also no conflict between any federal circuit court or state court of last resort and the Eleventh Circuit's decision in this case denying a stay. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict among the federal circuit courts regarding whether a stay of execution should be granted at the 11th hour to litigate a § 1983 action that is nothing more than an attack on this Court's settled precedent. Opposing counsel does not cite any case from any circuit court holding that a stay of execution should be granted in such circumstances. Nor is there any conflict among the federal appellate courts or the state courts of last resort regarding the issue of whether a capital defendant, who was given notice of the clemency interview and an opportunity to be heard and who was provided with clemency counsel, was denied the minimal due

process afforded in the clemency context, as a matter of federal constitutional law. Opposing counsel does not cite any case from any circuit court holding that minimal due process was violated on similar facts, which is hardly surprising given the facts of *Woodard*. There is no conflict between the federal appellate courts or the state supreme courts and the Eleventh Circuit's decision in this case.

Because there is no conflict with this Court or with the federal circuit courts or state supreme courts, review should be denied.

Accordingly, this Court should dismiss the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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