IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1375
Lower Tribunal Case Nos. 2010-CA-001803, 1D10-3676

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida, *et al.*,

Appellants,

v.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.

BRIEF OF GOVERNOR CHARLIE CRIST AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

Governor Charlie Crist appears as amicus curiae in this matter in furtherance of his constitutional obligation to "take care that all laws be faithfully executed." Art. IV, § 1(a), Fla. Const. In this case, the Governor seeks to ensure faithful execution of article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, which collectively require that a statement accurately describing the substance of a proposed constitutional amendment appear on the ballot in clear and unambiguous language. While the Governor is generally able to rely on other officials within the executive branch to directly discharge his obligation of faithful execution, the Secretary of State is unable to do so in this case because she was named as a defendant due to her ministerial role in the ballot placement process.

The accuracy requirement of article XI, section 5, codified in section 101.161, is intuitively central to the integrity of our constitutional democracy. When the people of Florida are presented with an opportunity to amend their constitution, it is absolutely essential that they are presented with the information they need, in terms they can understand.

The people have a fundamental right to collectively decide whether to amend the Constitution. This fundamental right would be rendered meaningless if the substance of a proposed amendment could be misrepresented on the ballot or

presented to the people in an indecipherable manner. Moreover, the ballot clarity protections of article XI, section 5 and section 101.161 are of unique significance in this case because the challenged amendment proposed by a joint resolution of the Legislature ("Amendment 7") would, if approved by voters, eviscerate two other amendments proposed by citizen initiative ("Amendments 5 and 6"). The Legislature's use of unclear and inaccurate ballot language in such circumstances jeopardizes two fundamental aspects of Florida's participatory democracy—it prevents voters from casting an informed ballot on the legislative proposal, and, even more significantly, it directly burdens the people's right to amend their constitution by citizen initiative.

SUMMARY OF ARGUMENT

The ballot clarity requirements of article XI, section 5, Florida Constitution, and section 101.161, Florida Statutes, demand of the Legislature nothing less than full, clear, and accurate disclosure of the chief purposes and effects of a proposed constitutional amendment submitted to the voters for approval. Article XI, section 5 "plays no favorites"—its "strict minimum requirements" apply "across-the-board to *all* constitutional amendments, including those arising in the Legislature." *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (emphasis in original). Thus in evaluating the Legislature's attempted compliance with article XI, section 5, the

Legislature is not entitled to the typical deference furnished by the Court as a matter of respect between coequal branches of state government.

Even if the Legislature's demand for deference is not foreclosed by *Armstrong*, the Court should foreclose it here. The people are the ultimate sovereign in Florida, and all residual political power resides in them. *See* art. I, § 1, Fla. Const. Accordingly, the Court should hold that the respect owed the Legislature as a coordinate branch of government must yield to the respect owed to the people when the Court construes constitutional provisions, such as article XI, section 5, which directly implicate the balance of power between the people and the Legislature. Further, the Legislature should be held to the strictest possible standard where, as here, it seeks to expand its own power through the constitutional amendment process.

Appellants' extensive reliance on legislative history in their brief does far more to prove that Amendment 7's title and summary fail to satisfy the ballot clarity requirement than it does to rationalize reversal of the trial court's order. The voters will not have the benefit of Appellants' carefully chosen commentaries of legislators and their staff when confronting Amendment 7's confusing text on Election Day. At best, this history is irrelevant because the question of whether Amendment 7 can be ascribed a constitutional meaning through deferential rules of construction has nothing to do with the test for compliance with article XI, section

5. At worst, it constitutes a tacit admission that Amendment 7 is so impenetrable and bewildering that not even its chief advocates can defend the amendment without discovering and construing a series of ambiguities in a manner highly deferential to its legislative drafters.

The reality is that Amendment 7's language is irretrievably confusing and misleading. Thus the mere recitation of that language in the ballot summary woefully fails to inform, especially when read together with a ballot title that appears calculated to convince voters that Amendment 7 imposes "standards" for the Legislature to follow in drawing legislative districts when, in truth, it does the exact opposite: it obliterates standards the Legislature would *otherwise* have to follow in drawing these districts. Simply put, Amendment 7 constitutes an expansion of legislative power deceptively packaged as a restriction on legislative power. The trial court was correct to strike it from the ballot.

ARGUMENT

Article XI, section 5 of the Florida Constitution and section 101.161, Florida Statutes, require that a ballot submitting "a constitutional amendment . . . to the vote of the people" contain a summary conveying "the substance of [the] proposed amendment . . . in clear and unambiguous language," explaining "the chief purpose of the measure." § 101.161, Fla. Stat. (providing also for a ballot title "by which the measure is commonly referred to or spoken of"). This "truth in packaging" law

serves an indispensible purpose in the democratic process: ensuring that the people of Florida have notice of what they must decide when they are asked whether or not to amend their constitution. *Armstrong*, 773 So. 2d at 13.

Amendment 7's ballot title and summary violate article XI, section 5 and section 101.161 because they are inaccurate. They misleadingly represent the amendment's purpose as providing standards for the Legislature to follow in redistricting when the amendment does precisely the opposite: it eliminates binding standards that confine the Legislature's power to draw legislative districts by relegating those standards to mere aspirational guidelines.

Appellants attempt to escape this reality by acknowledging the text of Amendment 7 is ambiguous, then according the Legislature significant deference in construing Amendment 7 and applying that same level of deference to the title and summary. The Court should reject the creative and serpentine logic of Appellants' argument because it would result in an end-run around the ballot clarity requirement, which this Court has described as necessary for our constitutional democracy to "function effectively" and "remain viable." *Armstrong*, 773 So. 2d at 21. At most, Appellants establish that the ballot title and summary are hopelessly ambiguous, rendering the ballot language impermissibly unclear as opposed to impermissibly false. For the reasons stated in Appellees'

brief and for the reasons developed below, the trial court's order should be affirmed.

I. The Legislature's ballot title and summary are not entitled to deference.

Appellants contend, through winding logic, that a ballot title and summary drafted by the Legislature must be construed in a manner, if possible, that will sustain its validity. In reaching that conclusion, Appellants begin with the familiar axiom that actions of the Legislature are entitled to deference and should be upheld if susceptible to any construction that will avoid invalidity. *See* IB at 8. While their application of this maxim to the text of the proposed amendment appears permissible under *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956), *quoted in Armstrong*, 773 So. 2d at 14, Appellants' next leap is far less logical. After construing ambiguities in the proposed amendment in the light most favorable to them, they next contend that the ballot title and summary satisfy the "strict minimum standard for ballot clarity" mandated by article XI, section 5, *Armstrong*, 773 So. 2d at 21, by mimicking the language of the amendment.

Appellants' attempt to use the artifice of legislative deference as an end-run around article XI, section 5 must be rejected for several reasons. First, this Court made unmistakably clear in *Armstrong* that the Legislature is not entitled to a free pass from the requirements of article XI, section 5. To the contrary, the Legislature's obligation to describe its proposed amendments to the voters in clear

and accurate terms is no less strict than the people's obligation to do the same through the citizen initiative process. The ballot clarity "requirement plays no favorites-it applies across-the-board to *all* constitutional amendments, including those proposed by the Legislature." *Id.* (emphasis in original).

Further, even if *Armstrong* does not settle the issue, the Court should hold that the Legislature is not entitled to deference with respect to the ballot clarity requirement because the interests underpinning article XI, section 5 are far removed from the interest from which the general rule of legislative deference is derived. As Appellants implicitly acknowledge, that general rule owes its existence in Florida to the separation of powers doctrine, embodied in article II, section 3 of the Florida Constitution, which requires the Court to accord "the respect due to a coordinate branch [of state government]." *See* IB at 8. This Court recognized that same interest in *Armstrong* in acknowledging that the doctrine of legislative deference has "a measure of" utility when the Court conducts its review of legislatively proposed constitutional amendments. *Armstrong*, 773 So. 2d at 14 (recognizing deference owed to the Legislature as a coequal branch where deference is not foreclosed by "strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature").

However, the respect owed by and between the coequal branches of state government is not relevant to the ballot clarity requirement. The interest at stake with respect to ballot language is paramount, particularly with regard to legislatively proposed constitutional amendments, because of the respect that all branches of state government owe to their sovereign. In Florida, "sovereignty resides in the people." *Armstrong*, 773 So. 2d at 14 (quoing *Gray*, 89 So. 2d at 790); *see also* art. I, § 1, Fla. Const. ("All political power is inherent in the people."). In balancing the deference this Court owes the Legislature, as a coordinate branch of government, and the deference this Court owes the people, as the sovereign power in our constitutional democracy, the deference owed to the people must always prevail. Accordingly, irrespective of the deference this Court owes the Legislature in other contexts, the paramount deference owed to the people should require this Court to demand nothing less of the Legislature than strict, unwavering compliance with article XI, section 5.

As this Court explained in *Armstrong*, the purpose of the ballot clarity requirement "is to ensure that each voter will cast a ballot based on the full truth." *Armstrong*, 773 So. 2d at 21. In evaluating whether this requirement has been met, this Court has stated it "look[s] not to the subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself." *Id.* at 18. In light of the purpose of this evaluation—the clarity of what is

represented to the voters—the Legislature has no entitlement to deference, under article II, section 3 or otherwise, to place language before the voters that consists of something less than "the full truth." While deferential rules of construction may be appropriate in construing the text of an amendment, they are useless in determining to whether the ballot presents voters with "plain unequivocal language." *Advisory Op. to Atty. Gen. ex rel. Local Trustees*, 819 So. 2d 725, 730 (Fla. 2002).

If anything, the Legislature should be held to a stricter standard, particularly with respect to proposed amendments such as Amendment 7, through which the Legislature seeks to expand its own power. *See Smathers v. Smith*, 338 So. 2d 825, 828, 828 n.12 (Fla. 1976) (Legislators should have an "even more compelling notice-giving need[]" for constitutional amendments than for legislation, because "there is no executive 'check' for errors, omissions, and inconsistencies."). This Court has held that when the Legislature "attempt[s] to substantively alter a constitutional check and balance on its power [via legislation,] it is *not* owed judicial deference, great or otherwise." *Browning v. Florida Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1068 n.14 (Fla. 2010) (emphasis in original). The Court should similarly conclude that when the Legislature seeks to obtain additional power through the constitutional amendment process, its representations to the voters should be intensely scrutinized. All branches of

government owe the voters the fairest opportunity possible to understand the checks on state power they are being asked to relinquish.

As explained in detail below, Appellants' entire brief constitutes an acknowledgment that charitable rules of construction are necessary to decipher what the Legislature intended the proposed amendment to accomplish. Because those charitable rules of construction are unavailable to clarify a legislatively drafted ballot title and summary, Appellants' brief effectively demonstrates why the trial court's order must be affirmed.

II. Legislative history is irrelevant, at best, to the issue of whether Amendment 7's purpose and effect are clearly stated on the ballot.

In their initial brief, the Appellants rely heavily on legislative history to establish that the Legislature did not intend Amendment 7 to abrogate any redistricting standards that currently exist in the Florida Constitution. *See* IB at 20–28. Appellants' reliance on legislative history constitutes a tacit acknowledgement that the text of the amendment is ambiguous, because legislative history is "irrelevant" if meaning "can be discerned from the language" of the legislative pronouncement itself. *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005); *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000)

While it is certainly true that there is no *plain* meaning of the language of Amendment 7 or its ballot title and summary, the legislative history propounded by Appellants does nothing to cure this violation of article XI, section 5. Rather, the

Appellants' *post hoc* efforts to ascribe a meaning to the text only emphasize that the title and summary impermissibly hide the ball. Use of legislative history to clarify Amendment 7's intended purpose and effect cannot be appropriate because the pertinent question for ballot clarity purposes is whether *the voters* will be adequately informed when they cast their votes, not whether the Legislature *intended* a constitutional purpose. Voters will not have the benefit of transcripts of floor debates and committee hearings when they read the ballot title and summary in the voting booth.

Further, Appellants' assertion that the comments of a handful of legislators and staffers illuminate the true meaning of Amendment 7, and derivatively, the corresponding ballot language, is fundamentally illogical in the context of article XI, section 5. A ballot proposal "must stand on its own merits and not be disguised as something else." *Armstrong*, 773 So. 2d at 14–16. The "subjective criteria espoused by the amendment's sponsor" is irrelevant to this analysis. *Id.* at 18. What "counsel for the Florida House explained to members of the Rules and Calendar Council" in April, for example, *see* IB at 22, will be of no assistance to a voter confronted with the mystifying language of Amendment 7's ballot summary.

If meaning can be discerned from the text, then legislative history is irrelevant. Yet legislative history is equally irrelevant to unclear ballot language because the "ballot title and summary will be the only information that is available

to voters." *Florida Dep't of State v. Slough*, 992 So. 2d 142, 148–49 (Fla. 2008). Courts consider voter approval of an unclear ballot proposal a "nullity," not because the amendment is insusceptible to *any* meaning, but because an amendment is not "*accurately* represented on the ballot." *Id.* at 146 (emphasis in original). Thus Appellants' reliance on legislative history proves nothing more than that the ballot language is fatally inaccurate.

III. The ballot title and summary are unclear because they fail to alert Voters that Amendment 7 will neutralize other proposed amendments.

The legislative history set forth in Appellants' initial brief confirms that the ballot title and summary fail to alert voters to Amendment 7's purpose of altering the effect of Amendments 5 and 6. Appellants readily assert that "the entire current of the legislative debate concerned the anticipated consequences of Amendments 5 and 6." IB at 22–23 (quoting a legislator's explanation that the "intent" of Amendment 7 was "to respond to the proposed change in the process of Amendments 5 and 6"). The purpose of Amendment 7 was to undermine the binding standards proposed by Amendments 5 and 6. Yet Amendment 7's title and summary fail to notify voters of this aim, instead falsely suggesting the opposite—that the amendment would *create* binding standards rather than destroy them.

Accepting *arguendo* Appellants' conclusion that Amendment 7 could have no possible effect on *existing* redistricting standards, Amendment 7's summary makes no sense without reference to the provisions of Amendment 5 and 6.

Amendment 7 requires the state to "balance and implement the standards in the State Constitution," yet the Appellants adamantly insist that the *existing* standards are "absolute, objective requirement[s]" that are not susceptible to balancing. IB at 11–15 (arguing that Amendment 7 only "envision[s]" a "weighing and balancing of *equal* standards," i.e., standards not currently in the constitution, because the existing "standards cannot be defeated by other standards"). Thus, according to Appellants' argument, the only "provision of Article III" available for "balancing" with the discretionary considerations of Amendment 7 are the standards in Amendment 5 and 6—*which Amendment 7 was designed to weaken.*

Rather than make Amendment 7's purpose clear, the title and summary lead the reader on a labyrinthine quest for meaning, raising along the way—but failing to answer—questions relating to which standards are to be balanced and where they are to be found. Assuming the "balancing" language in Amendment 7 has some meaning in Appellants' argument, it can only be the relegation of the mandatory requirements proposed by Amendments 5 and 6 to optional factors for the Legislature's consideration, in the Legislature's discretion.

Appellants attempt to excuse the Legislature's failure to mention this chief purpose of Amendment 7 in the ballot language, relying on an unfounded interpretation of the ballot clarity requirement: that a title and summary must state the amendment's purpose *unless that purpose is to weaken or subvert the effect of*

other amendments on the ballot—in this case, Amendments 5 and 6. *See* IB at 9. Neither the constitution, nor the statute, nor case law carves out such an exception to the unqualified requirement that, *whatever* the proposed amendment's chief purpose may be, *that purpose must be clearly stated.* Accepting Appellants' argument would give future legislatures free reign to sabotage any proposed amendment by nullifying its effect with another amendment, all the while disguising their true purpose with impunity.

The purpose of the ballot clarity requirement—to ensure that the title and summary do not "hide the ball" from voters, *Slough*, 992 So. 2d at 147—is subverted no matter what kind of "ball" unclear ballot language "hides." Hiding a proposed amendment's effect on existing constitutional provisions and hiding its effect on other amendments on the ballot equally deceive the people who are entitled to be informed of the effect of their votes. Thus the Court should reject out of hand any contention that concealing a conflict with the provisions of Amendments 5 and 6 constitutes a deception that is not legally cognizable because those proposed amendments do not presently *exist* in the Constitution.

Furthermore, if all three of the amendments are approved by voters, then Amendment 7 would indeed affect "existing" constitutional provisions—those that would come into existence when Amendments 5 and 6 are added simultaneously to the addition of Amendment 7. Proposed amendments that directly contradict each

other need not necessarily refer to each other when, by virtue of their language and simultaneous existence on the ballot, they fairly apprise voters of the choice being presented. *See, e.g.*, *Citizens for Term Limits & Accountability, Inc. v. Lyons*, 995 So. 2d 1051, 1055 (Fla. 1st DCA 2008) (approving the presentation of "alternatives to the electorate on the same ballot" where the "statement explaining [one] proposal inform[ed] voters in no uncertain terms" of its effect on another item on the ballot).[1] However, a proposed amendment's title and summary violate article XI, section 5 and section 101.161 when they obscure the fact that a vote for one proposed amendment would vitiate the effect of another on the same ballot. *Cf. Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988) (finding proposition language "fatally defective" where its failure to alert voters of conflict with another ballot item subjected voters to "bewildering and conflicting decision-making").

Moreover, Amendment 7's placement directly following Amendments 5 and 6 heightens its deceptiveness. Its title mimics the other redistricting amendments, repeating almost verbatim that it too provides "STANDARDS FOR [THE] LEGISLATURE TO FOLLOW IN . . . REDISTRICTING." Given that Amendment 7's actual effect would be the opposite of the preceding

[1] *See also Advisory Op. to Att'y Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 118–21 (Fla. 2009) (approving title and summary of amendment requiring "[v]oter approval of growth management plan changes . . . if 10% of the voters in the city or county sign a petition calling for such a referendum" where "competing proposed amendment would" make voter approval mandatory).

amendments—eliminating standards instead of establishing them—its appearance on the ballot with an almost identical title guarantees that voters will be subjected to the type of "bewildering and conflicting decision-making" that courts have decried as "fatally defective." *Id.* In light of this, the Court should decline Appellants' invitation to create an exception to the rule that Article XI, section 5 prohibits drafters of ballot language from omitting an amendment's chief purpose when that purpose is to injure another amendment proposed on the same ballot.

IV. Word-for-word recitation of the amendment text does not render the ballot language clear, because the title and amendment are misleading.

Appellants argue that, because the summary repeats the text of the actual amendment almost verbatim, the summary is *ipso facto* clear and valid. To the contrary, the Florida Constitution requires more than the literal accuracy achieved by parroting the amendment's text. The ballot must also convey "the *true* meaning, and ramifications, of an amendment," and must not mislead the voter. *Askew v. Firestone*, 421 So. 2d 151, 151, 155–56 (Fla. 1982) (emphasis added). If the text of the amendment does not express its purpose plainly and unequivocally, as is the case with Amendment 7, then the summary must employ adequate language to ensure that voters have been clearly apprised of the chief purpose of the amendment.

Appellants cobble together quotations from various opinions in which summary language virtually identical to an amendment's text was held to be

sufficiently accurate. *See* IB at 28–30 (and cases discussed therein). From this, Appellants leap to the conclusion that divergence from the language of a proposed amendment is the *sine qua non* of a ballot clarity violation. To be sure, a ballot title and summary that "impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment" may mislead voters. *Advisory Op. to Att'y Gen. re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1237 (Fla. 2006). However, it does not follow that direct quotation of an amendment's language ensures that a summary will *never* mislead voters. *See Advisory Op. to Att'y Gen. re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 488 (Fla. 2007) (finding summary language "follow[ed] the proposed constitutional amendment very closely *and* [wa]s not misleading") (emphasis added).

To the contrary, this Court's precedent makes clear that nearly identical language does not assure ballot clarity. In *Askew v. Firestone*, this Court invalidated a joint resolution even though the proposed amendment's change to an existing constitutional provision was "as stated" in the ballot summary, because "the stated change [wa]s only incidental to the true purpose and meaning of [the constitutional provision] in its entirety." 421 So. 2d at 156. Discussing *Askew*, this Court subsequently noted that "[a]lthough the ballot summary *faithfully tracked the text of the proposed amendment*, the summary failed to explain" the

amendment's intended effect. *Armstrong*, 773 So. 2d at 14–16 (emphasis added). A ballot may be rendered "deceptive or misleading" not only by the language it uses, but also by the "omission of words and phrases," *Slough*, 992 So. 2d at 149—a danger that is not necessarily averted by merely repeating the amendment's text. *See Armstrong*, 773 So. 2d at 7 (holding ballot clarity must ensure that "each voter casts a ballot based on the *full* truth").

Additionally, this Court has cautioned that "the ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Slough*, 992 So. 2d at 148. Thus Appellants' argument that a summary's verbatim recital of amendment text alleviates "any concerns regarding inaccuracy," IB at 31, promises too much. The ballot title's stated purpose of "providing standards for the legislature to follow" is directly counter to Amendment 7's actual purpose of eliminating binding standards by making all criteria discretionary. When "read together" with the confusing language of the amendment, it will mislead voters, preventing them from casting an intelligent and informed ballot. *Id.* at 148; *cf. Armstrong*, 773 So. 2d at 18 (invalidating a joint resolution because the "main effect of the amendment . . . far outstrip[ped] the stated purpose" on the ballot).

The doubtfulness of Appellants' contention that use of the exact text of the amendment immunizes it from the ballot clarity requirement becomes even clearer

in light of Amendment 7's failure to define the amorphous concept, "community of common interests." A ballot summary is "misleading" and "must be stricken" where undefined terms place its meaning "within the subjective understanding of each voter to interpret." *Advisory Op. to Att'y Gen. re People's Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects*, 699 So. 2d 1304, 1308–1309 (Fla. 1997) (concluding that definitions of terms such as "in fairness," "loss in fair market value," and "common law nuisance" were necessary for clarity), *overruled on other grounds in Advisory Op. to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968 (Fla. 2009). Thus verbatim recitation of Amendment 7 cannot inform voters of its legal ramifications when it fails to define "community of common interests," a phrase that is not frequently used by the common voter and lacks a plain meaning. *See Advisory Op. to Att'y Gen. to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 898–99 (Fla. 2000) (invalidating a proposal that failed to define "otherwise unlawful classification" and "bona fide qualification based on sex").

The people of Florida "deserve nothing less than clarity when faced with the decision of whether to amend [the] state constitution." *Slough*, 992 So. 2d at 149. "[I]t is the foundational document that embodies the fundamental principles through which organized government functions." *Id.* In defiance of that

requirement, the Legislature's ballot proposal employs what this Court has decried as "wordsmithing" that masks the true effect of a proposed amendment. *Id.* (recognizing that deceptive wording can be used "to enhance the chance of passage"). Accordingly, the Court should conclude that the trial court did not err in removing Amendment 7 from the ballot.

CONCLUSION

For the foregoing reasons, Governor Crist respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,

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