No. 11-556

IN THE

Supreme Court of the United States

MAETTA VANCE,
Petitioner,
v.
BALL STATE UNIVERSITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Respondent before this Court in favor of affirmance.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a 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 other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., as amended, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding the appropriate legal standards for determining who is a supervisor for Title VII vicarious liability purposes.

Since 1976, EEAC has participated in numerous cases in this Court raising substantive and procedural issues related to litigation of employment discrimination claims, including the proper interpretation and application of Title VII in the context of

hostile work environment claims.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers in particular.

STATEMENT OF THE CASE

This case arises from the allegations by Petitioner Maetta Vance that four fellow employees of Ball State University—Saundra Davis, Connie McVicker, Karen Adkins, and Bill Kimes—subjected her to unlawful race harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Pet. App. 28a.

Vance worked at Ball State University from 1989 until her termination in 2009,[3] most recently as a full-time catering assistant in the Banquet and Catering Department of University Dining Services. Pet. App. 27a. During the relevant timeframe, Vance was the only African-American employee in her department. Pet. App. 1a. In 2005, Vance complained that she was threatened by a co-worker, Saundra Davis, and that another employee, Connie McVicker, directed racially offensive language towards her and other African-Americans. Pet. App. 29a-32a. The University investigated and issued McVicker a writ-

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[2] *See, e.g., Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[3] Respondent states that Vance was terminated after telling a co-worker that she "needed to get a .380 rifle and kill" Respondent's Director of Employee Relations. Vance's discharge is not an issue in this proceeding. Brief for Respondent, at 6.

ten warning. Pet. App. 34a. It could not confirm the allegations against Davis. Pet. App. 31a.

Vance claimed that she continued to suffer harassment at the hands of McVicker and Davis. She also claimed that Karen Adkins and Bill Kimes engaged in various other discrete acts contributing to the hostile work environment. Vance eventually sued Ball State for unlawful Title VII harassment and retaliation. Pet. App. 2a.

The district court examined the conduct of each of the four individuals implicated in the complaint. As to Adkins and Kimes, who it is undisputed are supervisors, the district court found their alleged harassing conduct isolated and insufficient to create a hostile work environment. Pet. App. 55a-59a. As to McVicker, whom Vance also agrees is not a supervisor, the district court found her conduct to be offensive and unacceptable, but nevertheless insufficiently severe or pervasive to create an objectionably hostile working environment. Pet. App. 61a-68a. Further, the district court noted that Vance had not established a basis for employer liability as to the conduct of McVicker, because Ball State, after learning of McVicker's conduct, acted promptly to address the misconduct. *Id.* Consequently, the district court held that the steps taken by the employer were reasonably calculated to foreclose subsequent harassment. *Id.*

The parties dispute whether Davis is a supervisor or co-worker. Pet. App. 53a. The evidence that Davis might be a supervisor came from Vance's assertion that Davis "is part of management because she doesn't clock in." Pet. App. 54a. However, Vance also stated that "she does not actually know whether Ms. Davis is one of her managers because 'one day she's a

supervisor, one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent.'" *Id.* In spite of the slim evidence of supervisory duties, the district court did not definitively resolve the question, finding that "[e]ven assuming … Davis periodically had authority to direct the work of other employees, such power would still not be sufficient to establish a supervisory relationship for the purpose of Title VII …." *Id.*

Seventh Circuit precedent, the district court pointed out, states that "[a]n employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context." *Id*. (citation omitted). Because it found no evidence that "Davis had the ability to 'hire, fire, demote, promote, transfer, or discipline'" Vance, the district court concluded that Ball State could not be held liable on that basis. *Id.* And because Ball State exercised reasonable care to address and correct the complained of conduct, Vance was unable to recover for co-worker harassment under a negligence theory. *Id.*

On appeal, the Seventh Circuit agreed that Vance could not be considered a supervisor, noting that a supervisor "is someone with the power to directly affect the terms and conditions of … employment" and that "authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" Pet. App. 12a. Vance petitioned for a writ of certiorari, which this Court granted on June 25, 2012. *Vance v. Ball State Univ.*, 183 L. Ed. 2d 673 (2012).

SUMMARY OF ARGUMENT

This case has been characterized as presenting the choice between a narrow supervisor liability rule—under which an employer cannot be held vicariously liable for workplace harassment unless the perpetrator has express authority to hire, fire, promote, discipline, or transfer an employee—and a broad rule—under which the employer will be vicariously liable if the perpetrator merely has the authority to direct the work of other employees. This Court should reject both extremes.

To ensure that the supervisor liability rule encompasses both individuals with the power to take tangible job actions, as well as those who are not so authorized but who have virtually unchecked authority over their subordinates, this Court should hold that an employer may be vicariously liable for unlawful harassment committed only by those to whom the employer has delegated meaningful and substantial authority over terms and conditions of the victim's employment. Such a rule would serve to protect employees having to endure harassment by bad actors whose conduct is facilitated by their actual authority—if not position and/or title—while at the same time minimizing the risk that employers will be found strictly liable for alleged harassment by virtually any employee with any measure of staff oversight responsibilities.

Regardless of the standard the Court adopts, the judgment of the Seventh Circuit should be affirmed because the conduct alleged is insufficient as a matter of law to rise to the level of actionable Title VII harassment.

ARGUMENT

I. ADOPTION OF THE BROAD SUPERVISOR TEST ENDORSED BY PETITIONER WOULD DRAMATICALLY AND UNREASONABLY EXPAND THE SCOPE OF EMPLOYER VICARIOUS LIABILITY FOR WORKPLACE HARASSMENT UNDER TITLE VII

A. The "Direction Of Work Activities" Standard For Determining Who Is A "Supervisor" In The Title VII Context Is Unworkable And Is Inconsistent With This Court's Well-Established Title VII Jurisprudence

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibits discrimination, including harassment, on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). This Court long has held that Title VII also "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" on the basis of any Title VII-protected characteristic. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). Indeed, in extending the statute's prohibition to the sexual harassment context, the Court in *Meritor* noted that several lower courts had "applied this principle to harassment based on race, religion, and national origin." 477 U.S. at 66 (citations omitted). Citing favorably to the Fifth Circuit's ruling in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), it observed:

> [The] phrase 'terms, conditions or privileges of employment" in [Title VII] is an expansive

> concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Id. (citations and quotations omitted).

Twelve years later in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court established standards for corporate liability for unlawful workplace harassment perpetrated by supervisors. It held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Faragher*, 524 U.S. at 780. Specifically:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer

> had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. at 807-08; *see also Ellerth*, 524 U.S. at 765.

Thus, under both *Faragher* and *Ellerth*, only the actions of "a supervisor with immediate (or successively higher) authority over the employee" can impose vicarious liability on an employer for harassment under Title VII. 524 U.S. at 765. This focus on supervisory action is reinforced by the Court's explanation in *Ellerth* that the affirmative defense is unavailable only "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

This Court made clear in *Ellerth* that imposing strict liability on an employer is warranted only when a supervisor exercises his or her authority to make an employment decision that directly affects a subordinate in a tangible, real way. "A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury … . The

supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762; *see also Meritor*, 477 U.S. at 72 (Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible").

Because the "direction of work activities" standard proposed by Petitioner would expand considerably the universe of individuals whose conduct may be attributed to the employer for vicarious liability purposes, it stands in direct conflict with sound principles established by this Court in *Meritor*, *Faragher*, and *Ellerth*.

B. The "Direction Of Work Activities" Test Improperly Blurs The Line Between Supervisors And Non-Supervisors And Thus Is Of Little, If Any, Practical Value

Petitioner has endorsed a broad formulation of the supervisory liability rule, Brief for Petitioner, at 45, which will trigger vicarious liability based not only on the ability of an employee to take a tangible job action, but also on the ability of an employee to direct the work activities of other employees.

In *Mack v. Otis Elevator Co*., 326 F.3d 116 (2d. Cir. 2003), the Second Circuit considered allegations by an elevator mechanics' helper that her employer was vicariously liable for the hostile work environment created by the actions of James Connolly, the mechanic in charge at the office building where they both worked. The Second Circuit observed that "Connolly was the senior employee regularly on site and that … he had and exercised the authority to

make and oversee the daily work assignments of the mechanics and mechanics' helpers" at the place of employment. 326 F.3d at 127. Thus, even though Connolly did not have the power to hire, fire, demote, promote, transfer, or discipline, the Second Circuit found that he was a "supervisor" as a matter of law for the purposes of imputing liability under Title VII to his employer. *Id.* at 126-27.

In doing so, the Second Circuit declined to adopt the rule articulated by the Seventh Circuit in *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027 (7th Cir. 1998), which described supervisory authority as primarily consisting of the "power to hire, fire, demote, promote, transfer, or discipline an employee." 163 F.3d at 1034. The Second Circuit characterized *Parkins* as "focus[ing] on those attributes of an employee that enable him or her to take tangible employment actions with respect to subordinates." *Mack*, 326 F.3d at 126. Dismissing *Parkins* as expressing too narrow a standard, the Second Circuit observed:

> The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether the authority given by the employer to the employee *enabled* or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.

Id. (emphasis added).

The Second Circuit, in *Mack*, cites with approval written enforcement guidance developed and published by the EEOC in 1999, which defines "supervisor" in this context as an individual with "authority

to undertake or recommend tangible employment decisions affecting the employee; *or* … authority to direct the employee's daily work activities." U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Compl. Man. (June 18, 1999).[4] According to the EEOC, even one "who is temporarily authorized to direct another employee's daily work …" may be deemed a supervisor "during that time period." *Id*.

The purported policy reasons behind the broad rule have raised many questions. As one district court noted, for instance:

> If the true determinant of whether or not an individual is a Title VII "supervisor" is the degree to which the harasser's authority enabled or materially augmented his or her ability to create a hostile work environment and/or restricted the victim's ability or freedom to resist, then why should employers not also be responsible for harassment enabled by indirect or informal grants of authority? For example, seniority, history of performance, perceived favor on the part of management, and the existence of personal relationships with supervisors can all operate to enable a harasser and restrain a victim's actions in response, even where the harasser is not technically the victim's superior.

Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 915 (E.D. Tenn. 2003). If liability rules are to apply differently depending on whether a harasser is a supervisor, these questions suggest that

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[4] *Available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited Oct. 24, 2012).

the broad rule does not rest on firm ground as a matter of public policy.

Nor does it rest on firm ground as a matter of law. In describing the "aided in the agency relation" standard, this Court in *Ellerth* observed:

> In a sense, most workplace tortfeasors are aided in accompanying their tortuous objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims. Were this to satisfy the aided in the agency relation standard, an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced neither by the EEOC nor any court of appeals to have considered this issue.

Ellerth, 524 U.S. at 760 (citations omitted). If mere employment of the harasser enabled the conduct to occur, perhaps by proximity and regular contact, the Second Circuit's reasoning implies that the employer could be held vicariously liable even for harassment by and among peers, whose "authority" for making workplace decisions may be much more a matter of perception than reality. Yet, *Ellerth* plainly states that "[t]he aided in the agency relationship standard … requires the existence of something more than the employment relationship itself." *Id*.

The practical problem with an overly broad definition of supervisor in the Title VII context is that it simply does not reflect the realities of today's American workplace. Many workplaces are now designed to be flatter, with fewer levels of management. Work relationships are also more likely to be project-based and collaborative, with different

employees taking leadership roles at different times and on different projects. *See, e.g.*, Raghuram Rajan & Julie Wulf, *The Flattening Firm: Evidence from Panel Data on the Changing Nature of Corporate Hierarchies*, 88 Rev. Econ. & Stat. 759 (Nov. 2006). Employees may direct the work of co-workers on one project and in turn be directed by those same co-workers on other projects. Direction of some work activities thus is plainly insufficient to determine whether or not an individual is a "supervisor" for Title VII purposes.

As an example of how workplace management styles have changed, consider the issue of performance reviews. The ability of an employee to review a co-worker in the past may have been indicia of supervisory authority. However, today performance reviews are not only undertaken by supervisors, but also by subordinates and even by those outside the company.

As justification for a broad supervisor liability, proponents point out that one of the supervisors responsible for the harassment in *Faragher* had no authority to take tangible employment actions. *See, e.g., Whitten v. Fred's, Inc.,* 601 F.3d 231, 245 n.6 (4th Cir. 2010). Yet the harasser in *Faragher* was "'granted virtually unchecked authority' over [his] subordinates, 'directly controlling and supervising all aspects of [Faragher's] day-to-day activities.' 524 U.S. at 808 (citation omitted). It is also clear that Faragher and her colleagues were 'completely isolated from the City's higher management.'" *Id.* Imposition of the broad rule is not the only viable means of checking the type of unbridled discretion at issue in *Faragher*, however, and in fact would create more confusion that it would resolve.

C. The National Labor Relations Act's Treatment Of The Term "Supervisor" Is Not Instructive

Nor should the Court look beyond Title VII for guidance. Petitioner suggests, incorrectly, that the definition of the term "supervisor" found in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, further supports adoption by this Court of a broad supervisor liability rule in the Title VII context. Brief for Petitioner, at 27-28. Specifically, Petitioner refers to this Court's treatment of the NLRA's definition of "supervisor" with respect to the collective bargaining rights of charge nurses in *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) and *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). However, these cases are singularly unhelpful in defining the term in the Title VII context.

In contrast to Title VII, which does not define the term, the NLRA expressly defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The term is very important in the administration of the NLRA because supervisors are excluded from many of the Act's protections. Supervisors have no right, for instance, to collectively

bargain and cannot strike or engage in other protected concerted activity.[5] The policy reasons for excluding supervisors from NLRA coverage are many, not the least of which is that Congress did not want pro-management supervisors in the same bargaining unit with rank and file employees. Such a practice would allow management to spy on union meetings or, conversely, would make it difficult, if not impossible, for management to compel supervisors to remain loyal to the company in a labor dispute—a task that would be impossible if the supervisor were subject to union discipline. Those considerations have no bearing on the question of vicarious liability under Title VII and this Court therefore should reject Petitioner's contrary suggestion.

II. VICARIOUS LIABILITY FOR WORKPLACE HARASSMENT SHOULD BE LIMITED TO THE UNLAWFUL ACTIONS OF THOSE TO WHOM THE EMPLOYER HAS DELEGATED SUBSTANTIAL AND MEANINGFUL CONTROL OVER THE TERMS AND CONDITIONS OF AN INDIVIDUAL'S EMPLOYMENT

The broad rule Petitioner advances is both impractical and inconsistent with Title VII jurisprudence. Interpreting supervisory status to include those to whom the employer has delegated substantial and meaningful control over the terms and conditions of

[5] *See N.L.R.B. v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 572-73 (1994) ("The National Labor Relations Act (Act) affords employees the rights to organize and to engage in collective bargaining free from employer interference. The Act does not grant those rights to supervisory employees, however, so the statutory definition of supervisor becomes essential in determining which employees are covered by the Act").

employment of others, however, would effectuate the objectives of Title VII without blurring the line between supervisor and non-supervisor so much as to be of no practical value whatsoever.

As the Seventh Circuit observed in *Parkins*:

> [I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

Parkins, 163 F.3d at 1034.[6]

Adopting a "substantial and meaningful control" test would ensure that vicarious liability is triggered in appropriate cases without unduly broadening the definition and rendering meaningless the distinction between supervisory and non-supervisory workers. Consider, for example, application of such a rule to the facts of two cases decided in circuits using broad rules: *Mack v. Otis Elevator*, 326 F.3d 116 (2d Cir. 2003), and *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010). In *Mack*, the harasser directed the par-

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[6] The rule announced by the *Parkins* court was consistent with this Court's decisions in *Faragher* and *Ellerth*. However, the Seventh Circuit's application of the *Parkins* rule has changed further over time and now appears to require that an individual have the power to directly hire, fire, promote, demote, discipline or transfer a subordinate employee in order to qualify as a supervisor. *See, e.g., Rhodes v. Ill. Dep't of Transp.,* 359 F.3d 498, 506 (7th Cir. 2004); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002).

ticulars of each of Mack's work days and was the senior employee on the work site. 326 F.3d 116, 127 (2d Cir. 2003). Mack and her co-workers did not have regular access to more senior employees. *Id*. at 125. In *Whitten*, the harasser was a store manager who was usually the most senior employee present in the store. He directed daily activities, controlled the victim's schedule, and possessed and actually exercised the authority to discipline Whitten by giving her unfavorable assignments and work schedules. As noted by the Fourth Circuit, the harasser "had power and authority that made Whitten vulnerable to his conduct 'in ways that comparable conduct by a mere co-worker would not.'" 601 F.3d at 246 (citation omitted).

The unifying theme in *Mack* and *Whitten* is not merely that the harassers could direct some work activities of the victims. It is that, although they did not have the power to implement tangible job actions, the harassers were delegated virtually unchecked authority over their subordinates and that the subordinates were insulated from others in management. This gave them the power to meaningfully and substantially impact their victims' terms and conditions of employment.

This Court should hold that the supervisor liability rule announced in *Faragher* and *Ellerth* does not apply when an employee merely directs some daily activities of another employee, but instead requires meaningful and substantial control over subordinate employees' terms and conditions of work. Such a rule would serve to protect employees from having to endure harassment by bad actors whose conduct is facilitated by their actual authority while minimizing the risk that employers will be found strictly liable

for alleged harassment by virtually any employee with any measure of oversight responsibilities.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the court below be affirmed.

Respectfully submitted,

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