No. 11-1226

In the Supreme Court of the United States

JOSE GARCIA-TORRES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an exception exists to the Court's holding in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), that the exclusionary rule does not apply in removal proceedings for "egregious violations" of the Fourth Amendment committed by local law enforcement.

2. Assuming such an "egregious violation" exception exists, whether it can be triggered just because a reasonable officer should have known his conduct violated the Fourth Amendment.

3. Whether, notwithstanding 8 U.S.C. 1252(a)(2)(B), 8 U.S.C. 1252(a)(2)(D) permits judicial review of the agency determination that petitioner failed to demonstrate the "exceptional and extremely unusual hardship" required to establish eligibility for cancellation of removal under 8 U.S.C. 1229b(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 660 F.3d 333. The decisions of the Board of Immigration Appeals (Pet. App. 12-18) and the immigration judge (Pet. App. 19-39, 40-46) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2011. A petition for rehearing was denied on January 11, 2012 (Pet. App. 52). The petition for a writ of certiorari was filed on April 10, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, a native and citizen of Mexico, last entered the United States—without being admitted or paroled—in 1997. Pet. App. 1. Prior to his 1997 entry,

petitioner had been apprehended and returned to Mexico on four occasions for attempting to enter the United States without being admitted or paroled. *Id.* at 29.

In October 2006, while unlawfully present in the United States, petitioner married a United States citizen, and, in January 2007, their son was born in the United States. Administrative Record (A.R.) 375, 378. In June 2007, petitioner's wife filed an I-130 Petition for Alien Relative on behalf of petitioner. A.R. 1090; see Pet. App. 16-17. In August 2008, petitioner's wife filed for divorce and conceded sole custody of their son to petitioner. *Id.* at 16, 34-35; A.R. 285-286, 940. The end of the marriage removed the approved I-130 as a potential basis for adjustment of petitioner's status. A.R. 940.

b. At about 4 a.m. on August 25, 2007, "acting on a tip that alcohol was being consumed in violation of a local ordinance prohibiting drinking after 1:30 a.m.," St. Charles, Missouri police officers entered a restaurant named "Mexico on Main." Pet. App. 2. According to petitioner's affidavit, the police knocked, and, when petitioner opened the door partway, they pushed the door open and entered. A.R. 1098. Once inside, the police examined the restaurant's liquor license and arrested several individuals inside the restaurant, including petitioner. Pet. App. 2, 7.

After petitioner was booked, the police informed Immigration and Customs Enforcement (ICE) that they suspected that he was a foreign national lacking legal status. Pet. App. 2, 41, 45; A.R. 95, 116, 135. An ICE officer telephonically interviewed petitioner while he was in local custody, and petitioner freely admitted that he was an alien present in the United States without having been admitted or paroled. Pet. App. 2, 41, 44; A.R. 95. Shortly thereafter, ICE took custody of peti-

tioner, re-interviewed him, processed fingerprint and other record checks that linked him to his prior unsuccessful attempts to enter the country, and prepared an I-213 Record of Deportable/Inadmissable Alien. Pet. App. 2-3; A.R. 95, 101-103. ICE then issued a Notice to Appear, charging petitioner as removable pursuant to 8 U.S.C. 1182(a)(6)(A)(i). Pet. App. 20.

Petitioner was never prosecuted for any offense in Missouri, and, based on the state court's determination that the initial arrest "was based on false information [and] there [wa]s no probable cause at the time of the action," the record of the August 25, 2007 arrest was expunged. Pet. App. 48.

c. Before an immigration judge, petitioner denied the factual allegations and the charge of removability, and declined to answer questions relating to his alienage. Pet. App. 41, 45. Petitioner filed a motion to suppress the I-213 form and all evidence obtained as a result of the arrest based on allegedly egregious Fourth Amendment violations by the local police. *Id.* at 13-14, 20 n.1, 42. Petitioner also moved to terminate the proceedings, contending that the government could not prove alienage or removability without the fruits of the arrest. *Ibid*. Petitioner did not claim that ICE's conduct was either egregious or in bad faith. *Id.* at 42 n.4, 44; A.R. 74.

The immigration judge denied both motions, ruled that petitioner is removable, and offered him the opportunity to apply for relief from removal. Pet. App. 44-45; A.R. 107, 1147-1151. The immigration judge explained that although the motion made "the case that the original arrests by Missouri state authorities may have been improper," there was no allegation or evidence of misconduct by ICE. The immigration judge therefore con-

cluded that the motion did not make a prima facie case for suppression of the documents and that the probative value of the evidence was not undermined. Pet. App. 44-45.

In February 2008, petitioner then filed an application for cancellation of removal, alleging that his then-wife and son (both United States citizens) would endure "exceptional and extremely unusual hardship" in the United States if he were removed to Mexico. Pet. App. 21-23; A.R. 1063-1078. In the application, petitioner acknowledged that he is a citizen of Mexico and that he last entered the United States in 1997 without inspection. Pet. App. 20; A.R. 1063-1064, 1075. In the alternative, he also applied for voluntary departure. Pet. App. 20. As relevant here, the immigration judge determined that petitioner had met his burden to show continuous presence, but had not established good moral character or exceptional and extremely unusual hardship to his qualifying relatives. *Id.* at 16-18, 30-37. The immigration judge thus denied those applications and ordered petitioner removed. *Id.* at 38-39.

d. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 12-18.

The BIA did "not rule on whether the local police officers took any illegal action." Pet. App. 14-15. Noting that the "identity of a person cannot be suppressed as fruit of an unlawful detention[,]" and that Department of Homeland Security (DHS) officers "had no role in the initial unlawful arrest or subsequent detention of [petitioner]," the BIA held that "the information relating to [his] alienage is not subject to suppression." *Id.* at 15. The BIA further found that the challenged evidence "was probative and its use was not fundamentally unfair[,]" and that petitioner had "failed to establish that

an egregious constitutional violation was committed by the DHS in the instant case" or "any other reason that the evidence of alienage should be suppressed." *Ibid.*

Regarding cancellation of removal, the BIA determined that the immigration judge's factual findings regarding hardship were not clear error, Pet. App. 15-16; that the immigration judge cumulatively considered all the relevant factors, *id.* at 17; and, on de novo review, that "the hardships faced by [petitioner's] wife and child are not exceptional and extremely unusual," *id.* at 15-18.

2. The court of appeals denied petitioner's petition for review. Pet. App. 1–11.

a. The court of appeals noted that it had "expressed doubt whether even an egregious violation by state or local officers could justify exclusion in a federal immigration proceeding." Pet. App. 6-7 (citing *Lopez-Gabriel* v. *Holder*, 653 F.3d 683, 686 (8th Cir. 2011)). The court did not resolve that issue, however, because the government had not raised it. *Id.* at 7.

b. Rather, "[a]ssuming for the sake of analysis that an egregious constitutional violation by local officers could justify exclusion of evidence in a federal immigration proceeding," the court of appeals concluded "there is no basis for exclusion in this case." Pet. App. 7. The court stated that the warrantless entry of business premises and arrest in this case, in which the police acted on a tip, would be a "mere garden-variety error, if a Fourth Amendment violation at all." *Ibid.* The court found no evidence of any "egregious conduct," rejecting in a footnote "the Ninth Circuit's standard * * * that an 'egregious violation' is nothing more than a 'bad faith' violation, and that such bad faith exists simply where 'a reasonable officer should have known that the conduct at issue violated the Constitution.'" *Id.* at 7 & n.4 (quot-

ing Pet. C.A. Br. 19 (citing *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1447-1448 (9th Cir. 1994))). The court reasoned that "[s]uch a standard would likely eviscerate *Lopez-Mendoza* insofar as the Fourth Amendment prohibits only 'unreasonable' searches and seizures and the Ninth Circuit's standard applies whenever 'a reasonable officer should have known' his conduct was illegal." *Id.* at 7 n.4.[1]

c. The court of appeals refused to adjudicate petitioner's challenge to the immigration court's denial of cancellation-of-removal relief. Pet. App. 9-11. The court observed that it lacked jurisdiction to review denials of discretionary relief based on hardship under 8 U.S.C. 1252(a)(2)(B)(i) and (D), except for "constitutional claims or questions of law raised upon a petition for review." Pet. App. 9-10. The court held that neither of the errors alleged by petitioner—(1) that "the Agency failed to cognize the hardship caused by [petitioner's son] being completely unable to see his mother if [petitioner] were removed;" or (2) that "the Agency considered the other hardships presented only individually, rather than cumulatively," *id.* at 10 (quoting Pet. C.A. Br. 31)—raised a question of law, and that those claims were thus "barred from appellate review." *Id.* at 10-11.

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[1] The court also rejected petitioner's due process argument that he had been denied a "fundamentally fair removal hearing" as a result of the alleged Fourth Amendment violation. Pet. App. 8-9. The court explained that "[a]ll claims of an unconstitutional search or seizure must be addressed solely in terms of the Fourth Amendment, not the 'fundamental fairness' requirement 'under a "substantive due process" approach.'" *Ibid.* (quoting *Graham* v. *Connor*, 490 U.S. 386, 388, 395 (1989)). Petitioner does not raise any due process claim before this Court.

ARGUMENT

1. Petitioner asserts (Pet. 8) that the court of appeals erred by failing to recognize an "egregious violation" exception to the Court's holding in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), that the exclusionary rule does not apply in removal proceedings. Petitioner further asserts (Pet. 10-14) a conflict among the circuits on that question. Petitioner is incorrect on both points.

a. This Court's decision in *Lopez-Mendoza* does not create an exception to the inapplicability of the exclusionary rule in removal proceedings for "egregious violations" of the Fourth Amendment. In *Lopez-Mendoza*, this Court held that the exclusionary rule for Fourth Amendment violations does not apply in civil deportation proceedings, because the societal costs of imposing the exclusionary rule in such proceedings outweighed the deterrence value. 468 U.S. at 1050. Four of the five Justices in the *Lopez-Mendoza* majority added, without elaboration, the following observation:

> [W]e do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. Cf. *Rochin* v. *California*, 342 U.S. 165 (1952). At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.

Id. at 1050-1051 (plurality opinion) (footnote omitted).

Aside from being purely dictum, that statement did not command a majority of the Court. Moreover, even the four Justices who joined it did not say that they

would have held that the exclusionary rule *did* apply in such circumstances. They simply noted that *Lopez-Mendoza* did not involve such circumstances, and thus at most reserved the question. Accordingly, even had the decision below rejected an "egregious violation" exception (which it did not do, see Pet. App. 7; p. 10, *infra*), it would not have conflicted with any decision of this Court.

On the merits, the fact that a violation in a particular case may be egregious does not materially alter the broader calculus for exclusionary-rule purposes: the societal costs of excluding material derivative evidence is the same (*e.g.*, burdening immigration courts and permitting an alien unlawfully present to continue that violation, *Lopez-Mendoza*, 468 U.S. at 1044-1047), while the marginal deterrence of excluding such evidence is not necessarily greater than from excluding evidence from other Fourth Amendment violations (*id.* at 1042-1043). Moreover, the Board's long-established evidentiary standard—that "[t]o be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the fifth amendment," *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980); see *Lopez-Mendoza*, 468 U.S. at 1051 n.5—negates the need for a separate "egregious violation" exception.

The justification for an exception is particularly weak in a case, like this one, where the alleged violation was committed by a separate sovereign, *i.e.*, local law enforcement rather than federal immigration officials. Any deterrence benefit from excluding derivative evidence in the immigration proceedings would be highly attenuated, at best, as local law enforcement are not primarily charged with enforcement of the federal immigration

laws. See *United States* v. *Janis*, 428 U.S. 433, 457-458 (1976) ("[C]ommon sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign."); see also Pet. App. 5-7 & n.1.

b. In any event, no conflict exists among the courts of appeals on the question whether an "egregious violation" of the Fourth Amendment by local law enforcement constitutes an exception to *Lopez-Mendoza*'s general rule against application of the exclusionary rule in civil removal proceedings.

Petitioner asserts that the decision below conflicts with decisions of the First, Second, and Ninth Circuits that "have confirmed * * * that the exclusionary rule applies in removal proceedings when evidence is acquired as a result of an egregious violation of the alien's Fourth Amendment rights." Pet. 12 (citing *Kandamar* v. *Gonzales*, 464 F.3d 65 (1st Cir. 2006); *Almeida-Amaral* v. *Gonzales*, 461 F.3d 231 (2d Cir. 2006); *Lopez-Rodriguez* v. *Mukasey*, 536 F.3d 1012 (9th Cir. 2008)). To be sure, all three of those circuits have concluded that such an exception exists in cases involving alleged constitutional violations by federal agents. See *Kandamar*, 464 F.3d at 70-71; *Almeida-Amaral*, 461 F.3d at 234-236; *Lopez-Rodriguez*, 536 F.3d at 1018.

The decision below, however, does not conflict with those decisions. It noted only that the Eighth Circuit had expressed doubt that "even an egregious violation *by state or local officers* could justify exclusion in a *federal* immigration proceeding[,]" which does not necessarily imply doubt about the existence of some exception for egregious violations by federal immigration officers.

Pet. App. 6-7 (citing *Lopez-Gabriel* v. *Holder*, 653 F.3d 683, 686 (8th Cir. 2011) (addressing the question of different sovereigns)) (emphasis added).

The Eighth Circuit here, moreover, expressly declined to decide the narrower question for alleged violations by local law enforcement. Instead, it simply "[a]ssum[ed] for the sake of analysis that an egregious constitutional violation by local officers could justify exclusion of evidence in a federal immigration proceeding." Pet. App. 7.[2] The reservation of that issue obviously does not create a conflict with the other courts of appeals decisions cited above.

2. Assuming arguendo the existence of an "egregious violation" exception in a case involving different sovereigns, the court of appeals correctly concluded that the local police's conduct in this case did not rise to that level. Pet. App. 7. In the course of doing so, the court of appeals (in a footnote) declined to adopt the Ninth Circuit's standard for egregiousness. *Id.* at 7 n.4. That footnote, however, does not warrant further review in this case. First, unlike the Ninth Circuit's outlying standard, the court of appeals' notion of egregiousness is consistent with *Lopez-Mendoza* and common sense.

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[2] In *Puc-Ruiz* v. *Holder*, 629 F.3d 771 (2010), the Eighth Circuit stated that this Court in *Lopez-Mendoza* "limited its holding to circumstances that do not involve 'egregious violations,'" and "it is reasonable to read *Lopez-Mendoza* as showing that eight justices would have applied the exclusionary rule in circumstances where evidence was obtained through an 'egregious' Fourth Amendment violation." *Id.* at 778 & n.2. As reflected in its subsequent opinion in *Lopez-Gabriel*, however, the court in *Puc-Ruiz* concluded that it was unnecessary to decide the existence of such an exception. *Ibid.;* see *Lopez-Gabriel*, 653F.3d at 686 ("[T]he application of the exclusionary rule to an immigration case involving such violations has not been resolved in this circuit.").

Second, this case involves two different sovereigns—a materially distinguishing factor. Third, the facts here might not implicate any conflict with the Ninth Circuit's standard because the alleged conduct is arguably not egregious under even that standard. Fourth, the record indicates the existence of independent bases to affirm the immigration courts' orders absent reliance on any excludable evidence.

a. Although *Lopez-Mendoza* did not define an "egregious violation," it contrasted such a violation with the facts in that case, *i.e.*, "credible evidence gathered in connection with peaceful arrests by INS officers." 468 U.S. at 1050-1051. The "egregious violation" reference was supported by a "Cf." citation to *Rochin*, a case involving forcible stomach-pumping that caused the defendant to vomit. *Id.* at 1051; see *Rochin*, 342 U.S. at 166. Those data points in the Court's opinion indicate that egregiousness—as its plain meaning suggests—requires a particularly odious or violent Fourth Amendment violation, or at least one that substantially undermines the probative value of the evidence.

The court of appeals correctly declined (Pet. App. 7 n.4) to adopt the Ninth Circuit's much broader—and unsupportable—formulation of egregiousness. In the Ninth Circuit's view, "[w]hen evidence is obtained by deliberate violations of the fourth amendment, or *by conduct a reasonable officer should know is in violation of the Constitution*, the probative value of that evidence cannot outweigh the need for a judicial sanction." *Adamson* v. *Commissioner*, 745 F.2d 541, 545 (1984) (emphasis added). Although it did not exclude any evidence in *Adamson* (a tax case), the Ninth Circuit subsequently has applied that standard to exclude evidence from removal proceedings based on the conduct of federal offi-

cers. See *Lopez-Rodriguez*, *supra*; *Orhorhaghe* v. *INS*, 38 F.3d 488, 492-493 (1994); *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441 (1994).

As the court of appeals explained below, the Ninth Circuit's standard for egregiousness—essentially adopting the test for qualified immunity—would tend to eviscerate *Lopez-Mendoza*'s general bar on application of the exclusionary rule in removal proceedings. Presumably any case where an officer's mistake of law could be considered unreasonable would satisfy the Ninth Circuit's broad exception. See Pet. App. 7 n.4.

It is not surprising that no other court of appeals—including the decision below—has adopted that approach. While the First, Second, and Eighth Circuits have attempted to define the scope of the "egregious violation" exception, none of them aligns with the Ninth Circuit's far-reaching formulation. See *Kandamar*, 464 F.3d at 70-72 (rejecting a claim that an "intimidating atmosphere" in a National Security Entry-Exit Registration System interview required exclusion of evidence as "egregious violations of Fourth Amendment or other liberties," because there was no "specific evidence of any government misconduct by threats, coercion or physical abuse * * * that would constitute egregious government conduct") (internal quotation marks omitted); *Almeida-Amaral*, 461 F.3d at 234-236 ("[W]hile the lack of any valid basis whatsoever for a seizure sets the stage for egregiousness, more is needed. Thus, exclusion may well be proper where the seizure itself is gross or unreasonable *in addition to* being without a plausible legal ground, *e.g.*, when the initial illegal stop is particularly lengthy, there is a show or use of force, etc." or "if the stop was based on race (or some other grossly improper consideration).") (emphasis added); *Puc-Ruiz*, 629 F.3d

at 778-779 ("While 'egregious' violations are not limited to those of physical brutality, *Lopez-Mendoza* requires more than a violation to justify exclusion.") (citation omitted).

b. As discussed above (pp. 8-10, *supra*), this case involves two different sovereigns: the alleged Fourth Amendment violation was committed by local police, whereas the removal proceedings were instituted by federal immigration officials and were civil in nature. Because the prospect of deterrence in these circumstances is particularly weak, it is unclear whether the Ninth Circuit's egregiousness standard—heretofore applied to exclude evidence in immigration cases involving Fourth Amendment violations by federal officers, see pp. 11-12, *supra* (citing cases)—would apply even had this case arisen in that circuit.[3] Accordingly, the present inter-sovereign context does not give rise to a conflict warranting this Court's resolution. At the very least, the Court should await either a Ninth Circuit decision excluding evidence from immigration proceedings based on conduct of state or local officers, or a conflicting decision from another circuit in which federal officers commit the alleged Fourth Amendment violation.

c. Assuming it applies at all in the different-sovereign context, it is entirely unclear whether the facts in this case would satisfy even the Ninth Circuit's capacious notion of an egregious Fourth Amendment viola-

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[3] In *Martinez-Medina* v. *Holder*, 673 F.3d 1029 (2011), the Ninth Circuit noted the existence of the "egregious violation" exception in a removal case in which a local sheriff committed the alleged Fourth Amendment violation. The court, however, did not address the local-officer distinction and did not even determine whether there had been a violation because it concluded that any violation would not have been egregious. See *id.* at 1034-1037.

tion. The local police in this case acted based on a tip of allegedly illegal consumption of alcohol at the restaurant where the police made a warrantless entry. Pet. App. 7.[4] In finding "no evidence of any 'egregious conduct'" in the record here, the court of appeals observed that the violation alleged is a "mere garden-variety error, if a Fourth Amendment violation at all." *Ibid.* The fact that the court of appeals expressed doubt whether the police's conduct even violated the Fourth Amendment severely undermines any conclusion that a reasonable officer should have known that the conduct at issue violated the Fourth Amendment. Accordingly, even if petitioner succeeded in convincing the Court to apply the Ninth Circuit's lenient standard of egregiousness, presumably he would not prevail on the facts of this case. That makes this case a poor vehicle to resolve any conflict in the egregiousness standard.

d. Finally, a potential alternative ground for affirming the finding of removability exists here: the federal government already possessed independent evidence of petitioner's alienage from his prior immigration records, which the agency connected to him by his name and fingerprints. A.R. 101-103. Because the body and identity of a person is not suppressible (see Pet. App. 15), the preexisting government records obtained from petitioner's identity information is likewise not suppressible. See *People* v. *Tolentino*, 926 N.E.2d 1212, 1214-1215 (N.Y. 2010) (citing *United States* v. *Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir.), cert. denied, 130 S. Ct. 74 (2009); *United States* v. *Bowley*, 435 F.3d 426, 430-

[4] Although a state court document indicates that petitioner's arrest was based on "false information," Pet. App. 48, there is no indication in the record that the police knew the tip was false or otherwise unreliable.

431 (3d Cir. 2006); *United States* v. *Roque- Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *Hoonsilapa* v. *INS*, 575 F.2d 735, 737 (9th Cir. 1978)), cert. granted, 131 S. Ct. 595 (2010), dismissed as improvidently granted, 131 S. Ct. 1387 (2011). So even if the government could not rely on petitioner's admission of his unlawful status or other statements derived from the initial arrest, the pre-existing immigration records provide an independent basis for deeming petitioner removable.

3. Petitioner also seeks review on a distinct issue: whether the court of appeals erred in determining that petitioner's cancellation-of removal claims did not raise questions of law, but rather challenged discretionary hardship determinations, and that it thus lacked jurisdiction to review those claims. It is undisputed that courts are statutorily barred from reviewing factual questions or challenges to the agency's exercise of discretion pertaining to cancellation of removal, *i.e.*, "any judgment regarding the granting of relief under [8 U.S.C.] 1229b." 8 U.S.C. 1252(a)(2)(B)(i). Although courts may review "questions of law," 8 U.S.C. 1252(a)(2)(D), the court of appeals here correctly held that petitioner merely sought to "cloak[] an abuse of discretion argument in constitutional [or legal] garb." Pet. App. 10 (citations omitted; brackets in original). In any event, the case-specific question of whether the particular claims at issue raise questions of law for purposes of Section 1252(a)(2) does not warrant this Court's review. Nor does petitioner allege (see Pet. 21-24) any conflict among the courts of appeals on this issue warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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