No. 22-352

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The American Rescue Plan Act of 2021, Pub. L. No. 117-2, Tit. IX, Subtit. M, 135 Stat. 223 (42 U.S.C. 801 *et seq.*) provided nearly $200 billion in new federal grants to help States mitigate the fiscal effects of the COVID-19 pandemic. 42 U.S.C. 802(a)(1) and (b)(3)(A). The Act gives States considerable flexibility in using the funds but specifies that a State "shall not use the funds * * * to either directly or indirectly offset a reduction in the net tax revenue of such State" resulting from changes in state tax law during the covered period. 42 U.S.C. 802(c)(2)(A) (the offset provision). Shortly after the Act's passage, petitioner Missouri sued the Secretary of the Treasury, seeking to enjoin the Secretary from enforcing a "'broad' interpretation" of the offset provision, under which a State could not "'enact[] *any* tax-reduction policy that would result in a net reduction of revenue through 2024'" without risk of "'forfeiting its COVID-19 relief funds.'" Pet. App. 5a. The district court and court of appeals held that Missouri lacks Article III standing because "there is no threatened application of the broad interpretation," which the Treasury Department "has never endorsed or adopted." *Id.* at 10a; see *id.* at 24a. The question presented is:

Whether federal courts have Article III jurisdiction over Missouri's suit seeking to enjoin the Secretary of the Treasury from enforcing a hypothetical interpretation of the offset provision that the Treasury Department has disavowed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 39 F.4th 1063. The opinion, memorandum, and order of the district court (Pet. App. 14a-27a) is reported at 538 F. Supp. 3d 906.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2022. The petition for a writ of certiorari was filed on October 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, Tit. IX, Subtit. M, 135 Stat. 223 (42 U.S.C. 801 *et seq.*), Congress established a Coronavirus State Fiscal Recovery Fund. 42 U.S.C. 802. The Fund provided nearly $200 billion in new federal grants to

help States and the District of Columbia "mitigate the fiscal effects" of the COVID-19 pandemic. 42 U.S.C. 802(a)(1); see 42 U.S.C. 802(b)(3)(A).

Section 802(c) establishes parameters for States' "Use of funds." 42 U.S.C. 802(c)(1) (emphasis omitted). Section 802(c)(1) provides that States may use fiscal recovery funds to cover broadly defined categories of costs incurred through December 31, 2024, including: providing assistance to households, businesses, and industries affected by the pandemic; providing premium pay to workers performing essential work during the pandemic; paying for state government services to the extent of revenue losses due to the pandemic; and making necessary investments in water, sewer, or broadband infrastructure. *Ibid.*

In turn, Section 802(c)(2) establishes two "restriction[s] on [the] use" of fiscal recovery funds. 42 U.S.C. 802(c)(2) (emphasis omitted). One is that a State may not deposit the fiscal recovery funds "into any pension fund." 42 U.S.C. 802(c)(2)(B). The other, the offset provision at issue here, provides that:

> A State or territory shall not use the funds provided under this section * * * to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase.

42 U.S.C. 802(c)(2)(A). The "covered period" began on March 3, 2021, and ends on the last day of the state fiscal year "in which all funds received by the State * * *

have been expended or returned to, or recovered by" the Treasury Department. 42 U.S.C. 802(g)(1).

A State can receive its grant of fiscal recovery funds after certifying to the Treasury Department that it "requires the payment * * * to carry out the activities specified in" Section 802(c) and "will use any payment * * * in compliance with" that provision. 42 U.S.C. 802(d)(1). If a State does not use its fiscal recovery funds in compliance with Section 802(c), the Treasury Department may require the State to repay "an amount equal to the amount of funds used in violation of" Section 802(c). 42 U.S.C. 802(e). "[I]n the case of a violation of" the offset provision, the Treasury Department may require a State to repay the lesser of "the amount of the applicable reduction to net tax revenue attributable to such violation" and the total amount of fiscal recovery funds the State received. 42 U.S.C. 802(e)(1); see 42 U.S.C. 802(e)(2).

2. Congress authorized the Treasury Department "to issue such regulations as may be necessary or appropriate to carry out" Section 802. 42 U.S.C. 802(f). On May 10, 2021, the Department published on its website an interim final rule implementing Section 802, including the offset provision. *Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed. Reg. 26,786 (May 17, 2021); see *id.* at 26,807-26,811, 26,823. In January 2022, the Department issued a final rule. *Coronavirus State and Local Fiscal Recovery Funds*, 87 Fed. Reg. 4338 (Jan. 27, 2022); see *id.* at 4423-4429, 4452-4453. The interim final rule and final rule "are substantially the same" in their implementation of the offset provision. Pet. App. 4a n.3.

The regulations describe the circumstances in which the Treasury Department will consider a State "to have

used funds to offset a reduction in net tax revenue." 31 C.F.R. 35.8(b). Specifically, the regulations explain that a State would violate the offset provision if: (1) the State implements a change in law that it either assesses has had or predicts will have the effect of reducing net tax revenue; (2) the reduction caused by the change is more than de minimis, meaning it exceeds one percent of the State's 2019 net tax revenue, adjusted for inflation; (3) the State reports a reduction in its net tax revenue relative to its inflation-adjusted 2019 net tax revenue; and (4) that reduction is greater than the sum of other changes to the State's net tax revenue. *Ibid.*

Those "other changes" to net tax revenue that can permissibly offset tax cuts include changes resulting from "the effects of macroeconomic growth" and certain "[r]eductions in spending." 31 C.F.R. 35.8(b)(4) (emphasis omitted). First, a State does not violate the offset provision if it cuts taxes but maintains its prior level of net tax revenue due to macroeconomic growth. 31 C.F.R. 35.8(b)(4)(i); see 87 Fed. Reg. at 4427 ("Safe harbor") (emphasis omitted). Second, a State does not violate the offset provision if it cuts taxes but maintains its prior level of net tax revenue by reducing expenditures of state funds in a "[d]epartment[], agenc[y], or authorit[y]" where it is not spending fiscal recovery funds. 31 C.F.R. 35.8(b)(4)(ii)(A); see 87 Fed. Reg. at 4427 ("Covered spending cuts"). In short, the regulations make clear that a State is free to cut taxes, so long as it can afford to offset the tax cut with its own funds, rather than with the fiscal recovery funds.

3. Missouri filed this suit on March 29, 2021, soon after Congress enacted the ARPA but before the Treasury Department had issued its interim final rule. Pet. App. 5a. Missouri's complaint "describe[d] two

potential interpretations of the" offset provision. *Ibid.* Under Missouri's preferred interpretation, the offset provision "merely prohibits the States from taking COVID-19 relief funds and deliberately applying them to offset a specific tax reduction of a similar amount." *Ibid.* By contrast, "[u]nder a second, 'broad' interpretation" Missouri posited, the offset provision "'would prohibit a State from enacting *any* tax-reduction policy that would result in a net reduction of revenue through 2024 or risk forfeiting its COVID-19 relief funds.'" *Ibid.*; see D. Ct. Doc. 1, at 3 (Mar. 29, 2021). Missouri sought a preliminary injunction against the Secretary of the Treasury's enforcement of the broad interpretation. Pet. App. 5a-6a; D. Ct. Doc. 1, at 18.

The district court dismissed Missouri's suit, holding that Missouri lacked Article III standing and that the suit was unripe. Pet. App. 14a-27a. The court explained that the offset provision "does not prohibit States from proposing, enacting, or implementing legislation that cuts taxes for [their] citizens and businesses," but rather "'merely restricts a State's ability to use *federal funds* distributed under the [ARPA] to offset a reduction in net tax revenue.'" *Id.* at 22a-23a (second set of brackets in original). And "[b]ecause the ARPA does not prohibit a State from implementing its own tax policy," the court reasoned, "Missouri does not face a credible threat" that the Treasury Department would seek to recoup funds "if [Missouri] decides to pass tax cutting measures." *Id.* at 23a. Accordingly, the court concluded that Missouri's claims rest "upon contingent future events that may not occur," and emphasized that construing the offset provision "well in advance of any adverse effect and in a wholly[ ] non-actionable hypothetical context" would be "'too remote and abstract an

inquiry for the proper exercise of the judicial function.'" *Id.* at 25a-26a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court explained that "Missouri's complaint and appeal make clear * * * that the State is not challenging" the offset provision (which the court called the "Offset Restriction") "as written, but rather a specific potential interpretation of the provision"—"the 'broad interpretation'" noted above. *Id.* at 9a. The court observed that Missouri had "develop[ed] no argument as to how it has suffered a concrete injury under" any other theory, including a theory that the offset provision "is unconstitutionally vague." *Id.* at 9a n.5. For that reason, the court deemed inapposite the Ninth Circuit's decision in *Arizona* v. *Yellen*, 34 F.4th 841 (2022), where that court concluded that Arizona had standing to raise constitutional challenges to the offset provision "*as written*," as opposed to "challeng[ing] a hypothetical 'broad interpretation.'" Pet. App. 9a n.5 (citation omitted).

The court of appeals then held that Missouri lacked Article III standing to seek to enjoin the Secretary of the Treasury from applying the "broad interpretation." Pet. App. 10a. "The problem for Missouri," the court reasoned, "is that there is no threatened application of the broad interpretation," because the Treasury Department "has never endorsed or adopted [that] interpretation." *Ibid.* To the contrary, "throughout this litigation, the Secretary has been clear that a recipient of ARPA funds will be deemed to have violated the Offset Restriction only if it cannot account for net revenue losses through non-ARPA sources." *Ibid.*

The court of appeals further explained that "Missouri has not alleged any intent to engage in conduct that is proscribed by the Offset Restriction on its face

or the Secretary's interpretation of it." Pet. App. 11a. "While Missouri's complaint alleges that its legislature was then considering tax-reduction policies," the court observed, "such policies alone do not violate ARPA or any interpretation of ARPA embraced by the Secretary." *Ibid.* Instead, the court emphasized, the offset provision "simply prohibits states from cutting taxes in a way that reduces net revenue more than a de minimis amount and then failing to" offset that reduction by means other than the use of fiscal recovery funds, "such as through organic economic growth, increases in revenue from other sources, or spending cuts in sectors" where the State is not spending fiscal recovery funds. *Ibid.*

"Simply put," the court of appeals explained, Missouri has asked the federal courts "to declare, in the abstract, what a statute does not mean" and "to enjoin a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without alleging any concrete, imminent injury from the Secretary's actual interpretation." Pet. App. 12a. "That," the court concluded, "would be a quintessential advisory opinion." *Ibid.*

ARGUMENT

Missouri contends (Pet. 21) that it has Article III standing to seek to enjoin the Secretary of the Treasury from enforcing a "broad reading" of the offset provision. But as the court of appeals correctly held, Article III does not permit Missouri to challenge a hypothetical interpretation of the offset provision that the Treasury Department has disavowed. Pet. App. 12a-13a. Contrary to petitioner's submission (Pet. 14-21), the court's decision is consistent with the Ninth Circuit's decision in *Arizona* v. *Yellen*, 34 F.4th 841 (2022). And this case

would be an exceedingly poor vehicle for addressing "the meaning and constitutionality" of the offset provision, Pet. 27, because Missouri lacks standing and the lower courts never reached the merits. This Court's review is unwarranted.

1. The court of appeals properly held that no Article III jurisdiction exists over Missouri's suit. See Pet. App. 12a-13a.

a. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes" and "do not issue advisory opinions." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). Thus, to establish Article III standing, "a plaintiff must show (i) that [it] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Ibid.* And when, as here, a plaintiff seeks to challenge the "threatened enforcement of a law," it must allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute,'" and "'a credible threat'" that the statute will be enforced against the plaintiff. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158-159 (2014) (citation omitted).

The court of appeals correctly held that Missouri lacks Article III standing under those principles. As the court explained, Missouri does not challenge the offset provision "as written, but rather a specific potential interpretation of the provision—the 'broad interpretation.'" Pet. App. 9a. Under that interpretation, the offset provision "would prohibit a State from enacting *any* tax-reduction policy that would result in a net reduction of revenue through 2024" without risk of "forfeiting its

COVID-19 relief funds." *Id.* at 5a. But "[t]he problem for Missouri * * * is that there is no threatened application of the broad interpretation." *Id.* at 10a.

To begin with, the offset provision's plain terms foreclose such an interpretation. Section 802(c)(1) first sets out in broad terms the permissible uses of fiscal recovery funds by States. 42 U.S.C. 802(c)(1). Missouri does not challenge Congress's identification of those uses. The offset provision, in turn, simply provides a "restriction" on the "use of funds" under Section 802. 42 U.S.C. 802(c)(2) (emphasis added). And it does not say that a State that accepts fiscal recovery funds cannot cut taxes. It says only that such a State "shall not use" the fiscal recovery funds "to either directly or indirectly offset a reduction in the net tax revenue of such State * * * resulting from a change in law" that reduces taxes. 42 U.S.C. 802(c)(2)(A). Under the provision, then, a State receiving fiscal recovery funds that "anticipates revenue decreases" from a tax cut may not use the fiscal recovery funds "to offset those decreases" rather than for the purposes identified in Section 802(c)(1). Pet. App. 11a n.6. Instead, the State "must find a way within its own budget to offset those decreases," *ibid.*—for instance, through increased state revenues (due to economic growth or tax increases) or through reducing certain expenditures. The offset provision thereby only prevents a State from using fiscal recovery funds "as part of that balancing process," by enacting tax cuts that it could not afford but for the influx of fiscal recovery funds. *Ibid.*

The Treasury Department's regulations implement the offset provision's plain terms and thus "explicitly disclaim[]" the broad interpretation that Missouri allegedly feared. Pet. App. 12a. As discussed above, the

Department's regulations make clear that the offset provision allows States that accept fiscal recovery funds to also cut taxes, so long as they can afford to pay for those tax cuts using other funds, such as revenue from economic growth or reductions in spending outside areas where they spend fiscal recovery funds. See 87 Fed. Reg. at 4423-4429; 31 C.F.R. 35.8(b)(4).

Accordingly, "there is no threatened application of the broad interpretation" upon which Missouri's suit is premised. Pet. App. 10a. The court of appeals thus correctly concluded that Missouri alleges "a 'conjectural or hypothetical' injury" and seeks "a quintessential advisory opinion." *Id.* at 12a (citation omitted). Federal courts lack Article III jurisdiction to resolve claims of that nature. See *TransUnion*, 141 S. Ct. at 2203.

b. Missouri's contrary arguments lack merit. Missouri contends (Pet. 22) that because it has now cut taxes, it faces a risk of recoupment under the offset provision. But as already explained, tax cuts simpliciter do not violate the offset provision, and Missouri has "not alleged that" any tax cuts it has enacted "would reduce net [tax] revenue and that it would fail to offset the reduction through permissible means." Pet. App. 11a.

Missouri errs in asserting that the court of appeals "demanded" that Missouri "'confess that [it] will in fact violate the law.'" Pet. 23 (citation omitted; brackets in original). The court expressly recognized that "a plaintiff generally need not 'confess that he will in fact violate [a] law' in order to challenge it." Pet. App. 11a (quoting *Susan B. Anthony List*, 573 U.S. at 163) (brackets in original). It simply asked whether Missouri had alleged "an intention to engage in a course of conduct" that it plausibly feared the Treasury Department would regard as violating the offset provision, finding that

Missouri had failed to do so. *Ibid.* (quoting *Susan B. Anthony List*, 573 U.S. at 159).

Missouri also seeks (Pet. 24, 26) to assert harms unrelated to the broad interpretation of the offset provision, such as "sovereign interests" in receiving an unambiguous offer of federal funds and "costs" in complying with the Treasury Department's regulations. But Missouri failed to "develop[]" those theories below, instead solely contending that it was "injured by a 'threatened' 'broad interpretation' that has never been adopted." Pet. App. 9a n.5. The court of appeals accordingly declined to address those other theories. *Ibid.* And this Court's "traditional rule * * * precludes a grant of certiorari" on issues that were "not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

2. a. Petitioner errs (Pet. 14-21) in contending that the decision below conflicts with the Ninth Circuit's decision in *Arizona* v. *Yellen*, *supra*. There, Arizona maintained that the offset provision is "ambiguous and coercive," in violation of the Spending Clause and Tenth Amendment. 34 F.4th at 853. The court held that Arizona had standing to raise those constitutional claims, based "on its theory of realistic danger of enforcement, and alternatively, on its theory of injury to sovereign rights." *Ibid.*[1]

Here, the court of appeals expressed no disagreement with the Ninth Circuit's decision in *Arizona*. Rather, it distinguished *Arizona* because, "unlike Missouri,

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[1] In finding standing, the Ninth Circuit emphasized that it accepted Arizona's "allegations" about "what the Offset Provision means and how it may be enforced" solely for jurisdictional purposes and was not passing on "the merits of Arizona's claims." *Arizona*, 34 F.4th at 853.

Arizona did not challenge a hypothetical 'broad interpretation' of the Offset Restriction but instead argued that, *as written*, the Offset Restriction is unconstitutionally ambiguous and unduly coercive." Pet. App. 9a n.5 (citation omitted). To the extent Missouri sought to raise any comparable theory here, the court explained, it "develop[ed] no argument as to how it has suffered a concrete injury" under that theory. *Id.* at 9a-10a n.5.

b. After Missouri filed its petition, the Sixth Circuit issued two decisions that are consistent with the court of appeals' holding here. First, in *Ohio* v. *Yellen*, No. 21-3787, 2022 WL 17076102 (Nov. 18, 2022), the Sixth Circuit held that Ohio's constitutional challenge to the offset provision was moot. *Id.* at *6.[2] The court observed that Ohio's challenge (like Missouri's) rested principally on the proposition that the Treasury Department "*could* read the Offset Provision in a broad way—as barring *any* tax cut during ARPA's covered period—and thus that [a State] risked recoupment should it exercise its sovereign prerogative to cut taxes." *Ibid.* "Yet," the court emphasized, the Department has "repeatedly disavowed" that "reading of the statute." *Ibid.* Favorably citing the court of appeals' decision in this case, the Sixth Circuit found no "reasonable possibility of a recoupment action predicated on that broad reading." *Id.* at *7.

Second, in *Kentucky* v. *Yellen*, No. 21-6108, 2022 WL 17076099 (Nov. 18, 2022), the Sixth Circuit considered a suit by Kentucky and Tennessee contending that the offset provision "is an ambiguous, coercive, and

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[2] Although the court framed its holding in terms of mootness rather than standing, its basic determination was that it lacked Article III jurisdiction due to the lack of a "live case[] or controvers[y]." *Ohio*, 2022 WL 17076102, at *5.

commandeering condition attached to [the ARPA] funds." *Id.* at *1. The court determined "that Kentucky's challenge is nonjusticiable" because it turned on the broad interpretation of the offset provision that the Treasury Department had "disavowed." *Id.* at *2; see *id.* at *12. But the court found Tennessee's challenge justiciable because the court believed that Tennessee had "adduce[d] additional evidence of a distinct theory of injury: that Treasury's Rule (and the underlying Offset Provision it implements) burden the State with compliance costs," such as "additional labor and other expenses that Tennessee must incur to ensure that its recent and proposed tax cuts do not violate the Offset Provision." *Id.* at *2; see *id.* at *13.

Even accepting the Sixth Circuit's jurisdictional analysis in *Kentucky*, Missouri is in the position of Ohio and Kentucky, not Tennessee. Like Ohio's and Kentucky's claims, Missouri's claim rests on the broad interpretation of the offset provision that the Treasury Department has disavowed. Pet. App. 9a-10a. And unlike Tennessee, Missouri neither alleged a compliance-cost theory of injury in its complaint nor adduced any evidence to support such a theory. See *id.* at 9a-10a n.5.

3. Finally, Missouri contends (Pet. 27-31) that the Court should grant the petition in order to address the merits of its challenge to the offset provision. But there is no basis in this case for evaluating any merits issues concerning the offset provision. For the reasons already discussed, there is no Article III case or controversy, so this Court would lack jurisdiction to even reach the merits. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Even if the Court believed it had jurisdiction, the Court ordinarily does not decide merits questions "in the first instance" where, as here,

both lower courts resolved the case on threshold grounds. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citation omitted). And Missouri's framing of its claim as a statutory challenge to a hypothetical broad interpretation of the offset provision—as opposed to a constitutional challenge to the provision as written—makes this case an especially undesirable candidate for resolving any constitutional issues.

Moreover, the fact that this case has not proceeded past the threshold preliminary-injunction stage further counsels against review. To the extent the Court were inclined to consider "the meaning and constitutionality of the" offset provision, Pet. 27, it should await a case arising from a decision on a permanent injunction. Indeed, two district courts that ultimately ruled in favor of other challenges to the offset provision at the permanent-injunction stage had previously denied preliminary injunctions to the plaintiff States. Compare *Ohio* v. *Yellen*, 539 F. Supp. 3d 802, 821-822 (S.D. Ohio 2021) (denying preliminary injunction), and *West Virginia* v. *United States Dep't of Treas.*, No. 21-cv-465, 2021 WL 2952863, at *10 (N.D. Ala. July 14, 2021) (same), with *Ohio* v. *Yellen*, 547 F. Supp. 3d 713, 740-741 (S.D. Ohio 2021) (granting permanent injunction), rev'd in part and vacated in part, No. 21-3787, 2022 WL 17076102 (6th Cir. Nov. 18, 2022), and *West Virginia* v. *United States Dep't of Treas.*, 571 F. Supp. 3d 1229, 1255 (N.D. Ala. 2021) (same), appeal pending, No. 22-10168 (11th Cir. argued Sept. 13, 2022).

More broadly, reviewing the merits of Missouri's challenge to the offset provision would be premature at this juncture given the lack of percolation in the courts of appeals. Only a single court of appeals panel—the Sixth Circuit panel in *Kentucky*—has addressed the

merits of a State's challenge to the offset provision, holding that the provision cannot be enforced against Tennessee because the court believed the provision "does not clearly explain" certain aspects of its operation. See 2022 WL 17076099, at *17. The Sixth Circuit has extended the deadline for filing a petition for rehearing en banc in that case to January 18, 2023. See Letter, *Kentucky*, *supra*, No. 21-6108 (Nov. 30, 2022). And additional cases presenting challenges to the offset provision are pending before the Fifth Circuit, *Texas* v. *Yellen*, No. 22-10560 (docketed June 7, 2022), and the Eleventh Circuit, *West Virginia*, *supra*, No. 22-10168. Any consideration of the offset provision by this Court would benefit from further percolation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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