No. 21-1100

In the Supreme Court of the United States

3M COMPANY & ARIZANT HEALTHCARE, INC.

Petitioners,

v.

GEORGE AMADOR,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE* [1]

This Court held in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that, in performing its gatekeeping function over expert evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" as well. *Id.* at 589. This principle is now embedded in Rule 702. See Fed. R. Evid. 702(b)-(d); *id.*, advisory committee note to 2000 amendments.

The court of appeals below, however, applied an approach to the admissibility of expert testimony that effectively relieves courts of their responsibility to meaningfully evaluate the reliability of expert evidence, holding that the plaintiff's experts' testimony had to be admitted because it was not "so fundamentally unsupported by its factual basis that it can offer no assistance to the jury." Pet. App. 12 (quotation marks omitted); see also *id.* at 33-34. That test—whether expert evidence is "so fundamentally unsupported" as to be literally useless to the jury—adds nothing to the baseline requirement of relevance applicable to all evidence, expert and lay alike.

The Eighth Circuit's decision below thus deepens the already profound discord among the lower courts as to the proper application of the reliability criteria introduced by *Daubert* and now set forth in Rule 702. What is more, the tremendous liability at issue in

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[1] All parties received timely notice of *amici*'s intent to file this brief pursuant to Rule 37.2(a), and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

modern national tort and product-liability cases like this one frequently turns on the admissibility of competing expert evidence, making nationwide uniformity in this area especially critical. Without this Court's intervention, the divergent approaches to *Daubert* among the circuits will continue to provide opportunities for abusive forum shopping by plaintiff's attorneys. *Amici* urge the Court to grant certiorari to ensure scientific evidence is assessed consistently, no matter where in the country a case is tried.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, non-profit association that represents the nation's leading biopharmaceutical and biotechnology companies. PhRMA's mission is to advocate for public policies that encourage

the discovery of life-saving and life-enhancing medicines. PhRMA's members invest billions of dollars each year to research and develop new drugs, more than 500 of which have been approved since 2000. The members of PhRMA closely monitor legal issues that affect the entire industry, and PhRMA often offers its perspective in cases raising such issues.

The Retail Litigation Center, Inc. (RLC) is the only trade organization solely dedicated to representing the retail industry in judicial proceedings. The RLC's members collectively employ millions of workers across the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts and regulatory agencies with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Amici thus have a strong interest in ensuring that federal evidentiary standards, particularly those dealing with expert scientific evidence, are enforced rigorously and evenhandedly across the nation.

SUMMARY OF ARGUMENT

Amici urge the Court to grant review to resolve the standard governing the admissibility of expert evidence. This question is of enormous practical importance for litigation across the country. There is widespread divergence as to the judicial role in policing the admission of expert evidence. And the court of appeals' decision here flatly contravenes *Daubert*'s essential holding. Further review is warranted.

First, expert evidence—and therefore the standards for determining its admissibility—has taken on an outsized role in modern litigation, particularly in

the mass tort and product-liability arena. More and more, the ultimate question of liability is driven by the admissibility of competing expert witnesses; indeed, the admission of an adverse expert report can bring crushing pressure on a defendant to settle what might otherwise be a meritless case. In this context, the district court's gatekeeping function under *Daubert* takes on critical importance, and circuit-by-circuit disparities in the standards guiding that function cannot be tolerated.

Second, the court of appeals here has departed from the core holding of *Daubert*: that in order to be admissible, expert testimony must be "not only relevant, but reliable" as well. *Daubert*, 509 U.S. at 589. By applying a standard that eliminates meaningful review of reliability, the decision below deepens substantial divergences apparent across the circuits. The Court should grant certiorari to restore uniformity to this vitally important inquiry.

ARGUMENT

The Court should resolve the standard governing admissibility of expert evidence and confirm the vitality of *Daubert*'s core holding.

Certiorari is warranted to ensure uniform, nationwide application of the rules governing the admission of scientific and other expert evidence. The Eighth Circuit's decision below adds to an already confused state of affairs in the lower courts by departing from the key insight of *Daubert* itself. *Amici* urge the Court to grant certiorari to address this inconsistent application of its precedents in a critically important area of federal procedure.

A. Consistent nationwide standards for expert evidence are essential, particularly in the mass tort context presented here.

The gatekeeping function of the district courts in screening out unreliable scientific and other expert evidence, as prescribed by Rule 702 and *Daubert*, is a matter of critical significance to the proper functioning of the federal judicial system. Indeed, "[t]he importance of *Daubert*'s gatekeeping requirement cannot be overstated." *United States* v. *Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004); accord, *e.g.*, *Dodge* v. *Cotter Corp.*, 328 F.3d 1212, 1226 (10th Cir. 2012) (noting "the fundamental importance of properly performing the gatekeeper function.").

1. The importance of *Daubert* and its assurance of reliable expert testimony only continues to grow as modern trials become increasingly reliant on expert witnesses. "[S]cience in all its forms—hard science, soft science, even so-called 'junk' science—has in recent years invaded the courtroom to an unparalleled extent." Hon. Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 Seton Hall L. Rev. 1379, 1379 (2008). Indeed, "[s]cientific issues" now "permeate the law." Hon. Stephen Breyer, *Introduction*, *in* Federal Judicial Center, *Reference Manual on Scientific Evidence* 3 (3d ed. 2011); see also *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 148-149 (1997) (Breyer, J., concurring) (Because "modern life * * * depends upon the use of artificial or manufactured substances, such as chemicals," it is "particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability * * * points toward the right substances and does not destroy the wrong ones."). The failure of courts to take their gatekeeping responsibility

seriously, and to welcome only reliable expert testimony into the judicial process, undermines the judicial system and injures the parties, who depend on that system for fair and accurate determinations of legal liability.

As this case demonstrates, unreliable expert testimony sometimes is the only evidence on which a plaintiff's case—or thousands of related cases—rests. And even when other evidence is available, expert evidence often has an oversized impact on the jury. The Federal Rules "grant expert witnesses testimonial latitude unavailable to other witnesses" (*Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 148 (1999)), allowing them to offer "opinions * * * that are not based on firsthand knowledge or observation" (*ibid.*), including opinions on the "ultimate issue" in a case (Fed. R. Evid. 704(a)). Experts are granted this authority even though their "testimony often will rest upon an experience confessedly foreign in kind to [the jury's] own." *Kumho*, 526 U.S. at 149 (quotation marks omitted). As a result, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. Misleading testimony can thus lead to incorrect and ultimately unjust judgments.

Moreover, because expert testimony can have such a disproportionate influence on juries, the admission of unreliable expert testimony frequently imposes hydraulic pressure on the rest of the litigation. Defendants that confront adverse expert rulings often feel compelled to settle, rather than take their chances with a jury, even when there are real doubts about the science supporting particular testimony. See Margaret A. Berger, *The Admissibility of Expert Testimony*, *in* Federal Judicial Center, *Reference Manual on Scientific Evidence* 19 (3d ed. 2011) ("[A]n inability by the

defendant to exclude plaintiffs' experts undoubtedly affects the willingness of the defendant to negotiate a settlement."); Rakoff, *supra*, at 1391 (recounting that, in a mass pharmaceutical products liability action, "shortly after my [*Daubert*] decision came down, most of the 800 cases settled, for amounts that seemingly reflected the mid-point nature of what I allowed in the way of expert testimony.").

In multi-plaintiff toxic tort and product liability cases in particular, if the plaintiffs' expert testimony is admitted, "a defendant often feels irresistible pressure to settle the action rather than risk a battle of the experts at trial that, if the defendant loses, can cost exponentially more than the settlement cost of the action." Christopher R.J. Pace, *Admitting and Excluding General Expert Testimony: The Eleventh Circuit Construct*, 37 Am. J. Trial Advoc. 47, 48 (2013). Indeed, such "plaintiffs' likelihood of success is commonly driven by the admissibility of their experts' general causation testimony under Rule 702 of the Federal Rules of Evidence and *Daubert*." *Ibid.*

In other words, as one court of appeals recently explained, the "risk" of "exposing jurors to 'dubious scientific testimony' that can ultimately 'sway[]' their verdict * * * is notably amplified in products liability cases, for 'expert witnesses necessarily must play a significant part' in establishing or refuting liability." *Sardis* v. *Overhead Door Corp.*, 10 F.4th 268, 275 (4th Cir. 2021) (first quoting *Nease* v. *Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017), then quoting *Chace* v. *General Motors Corp.*, 856 F.2d 17, 20 (4th Cir. 1988)). This case thus presents an excellent vehicle to reach an issue that—while undoubtedly important—in many instances is not fully litigated through verdict or appeal due to settlement.

2. Not only are the stakes of the *Daubert* decision generally higher in the mass tort and product liability contexts than elsewhere, but the consequences of disuniformity in the governing standards is felt more acutely in this area as well. Plaintiffs' attorneys may often steer putative nationwide classes to courts in circuits with an unusually lenient standard for admitting expert evidence, thereby frustrating the uniform administration of justice. Or, if cases are consolidated and assigned using the multi-district litigation (MDL) mechanism, the governing evidentiary standard—which can frequently be dispositive of liability (see Pace, *supra*)—will be left up to the vagaries of that procedural device.

Indeed, cases consolidated using the MDL procedure make up a huge portion of federal civil litigation—traditionally around half of the civil caseload each year, and growing ever higher. See, *e.g.*, Robert Klonoff, *The Judicial Panel on Multidistrict Litigation: The Virtues of Unfettered Discretion*, 89 UMKC L. Rev. 1003, 1003 & n.10 (2021) ("MDL cases constituted 51.9 percent of the civil caseload in the federal district courts" as of 2018); Pet. 35 (citing statistics showing that number at 62.7% as of 2020). Yet there are no firm standards governing the venue in which the MDL cases will be consolidated; what is more, the venue decision made by the multi-district litigation panel is effectively unreviewable, as it can be challenged only by mandamus. 28 U.S.C. § 1407(a), (e); see Klonoff, *supra*, at 1009 ("[T]he [Judicial Panel on Multidistrict Litigation] has articulated no formula or standard for selecting the district court."); *id.* at 1014 (noting that "the author has found only one case since the adoption of the MDL statute in 1968 granting mandamus to overturn" an MDL consolidation order).

While MDL cases are consolidated only for "pretrial proceedings" (28 U.S.C. § 1407(a)), as just explained, the pretrial *Daubert* decision is often decisive in either requiring dismissal of an entire MDL if the expert is excluded, or forcing a settlement if he or she is qualified. See pages 6-7, *supra*; U.S. Chamber Institute for Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* 4 (Feb. 2021) ("As a practical matter, whether or not expert testimony is admissible often makes or breaks mass tort litigation. If a plaintiff's expert testimony on general causation * * * is found unreliable and inadmissible, the case must fail."), https://perma.cc/9WF2-73PU. Thus, when the standards for admitting expert evidence differ among the circuits—as exemplified by the Eighth Circuit's opinion below—the critical determination that will make or break thousands of individual tort actions can come down to a discretionary and effectively unreviewable decision from the multi-district litigation panel.

That is no way to run a legal system whose ultimate end is justice and predictability. The Court should take this opportunity to restore nationwide uniformity in the application of *Daubert* and Rule 702.

B. The Eighth Circuit's approach to *Daubert* departs from this Court's precedents and further undermines national uniformity.

As the petition demonstrates, the decision of the Eighth Circuit here perpetuates an admissibility standard irreconcilable with *Daubert* itself. And it is symptomatic of discordant approaches to expert evidence apparent among the lower courts. The Court should grant review to ensure uniform nationwide treatment of scientific and other expert evidence.

1. The Court held in *Daubert* that, under Rule 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" as well. *Daubert*, 509 U.S. at 589; see also *Joiner*, 522 U.S. at 142 (reiterating this requirement). Indeed, the focus on reliability—on top of the baseline standard of relevance applicable to all evidence—is what distinguishes the Rules' treatment of expert evidence from lay testimony. *Daubert*, 509 U.S. at 592; see also *Kumho*, 526 U.S. at 152 ("The objective" of "*Daubert*'s gatekeeping requirement" is "to ensure the reliability and relevancy of expert testimony"); Fed. R. Evid. 702, advisory committee note to 2000 amendments ("Rule 702 has been amended in response to [*Daubert*]," which "charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. * * * The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case.").

But the Eighth Circuit's law—exemplified and further entrenched by the decision below—undermines this bedrock principle. See Pet. 19-26. By holding that expert evidence must be admitted unless it is "'so fundamentally unsupported' by its factual basis 'that it can offer no assistance to the jury'" (Pet. App. 12 (quoting *Loudermill* v. *Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988)); see Pet. App. 33-34), the court of appeals has essentially rendered Rule 702's reliability inquiry meaningless. Indeed, if evidence is so unsupported that it provides "no assistance to the jury," then it is not even relevant, never mind reliable. Cf. Fed. R. Evid. 401 ("Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). The

Eighth Circuit's approach thus does no independent work distinct from the relevance inquiry, despite this Court's instruction that the two inquiries are independent. *Daubert*, 509 U.S. at 589.

To be sure, there is nothing wrong with the proposition that expert testimony should be excluded if it is fundamentally unsupported; of course such testimony should not be allowed to go before the jury. The problem is that, at some point, the Eighth Circuit transformed this test from functioning as a *necessary* condition for the admission of expert testimony, and started viewing it as a *sufficient* condition. Compare *Loudermill*, 863 F.2d at 570 ("[I]f an expert opinion is so fundamentally unsupported that it can offer no assistance to the jury, then the testimony should not be admitted."), with, *e.g.*, *Johnson* v. *Mead Johnson & Co.*, 754 F.3d 557, 562 (8th Cir. 2014) ("[E]xclusion of [an] expert's opinion is proper '*only* if it is so fundamentally unsupported that it can offer no assistance to the jury.'") (emphasis added) (quoting *Wood* v. *Minnesota Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997)).[2]

It is that rule—that expert testimony may be excluded "*only* if it is so fundamentally unsupported that it can offer no assistance to the jury" (*Johnson*, 754 F.3d at 562 (emphasis added))—that reads the

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[2] Accord, *e.g.*, *West Plains, L.L.C.* v. *Retzlaff Grain Co.*, 870 F.3d 774, 789 (8th Cir. 2017) ("*Only* if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.") (emphasis added) (quoting *Katzenmeier* v. *Blackpowder Prod., Inc.*, 628 F.3d 948, 952 (8th Cir. 2010)); *Synergetics, Inc.* v. *Hurst*, 477 F.3d 949, 956 (8th Cir. 2007) ("An expert's opinion should be excluded *only* if that 'opinion is so fundamentally unsupported that it can offer no assistance to the jury.'") (emphasis added) (quoting *Bonner* v. *ISP Tech., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001)).

reliability factors first enunciated by this Court in *Daubert* out of Rule 702. Compare Fed. R. Evid. 702(a) (requiring only that "the expert's specialized * * * knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"), with Fed. R. Evid. 702(b)-(d) (additionally requiring "sufficient facts or data"; "reliable principles and methods"; and that "the expert has reliably applied the principles and methods to the facts of the case"). And it is that inappropriate rule that the court of appeals has applied here. See Pet. App. 33-34 (agreeing with "the MDL court's determination that there are weaknesses in the factual basis for Plaintiffs' medical experts' general causation opinions," and that those experts "failed to grapple adequately with the shortcomings of [the underlying evidence]," but nonetheless reversing the district court's exclusion of the experts because their opinions were not "so fundamentally unsupported that they had to be excluded"). The Court should grant certiorari to address this departure from Rule 702's implementation of *Daubert*'s core holding.

2. The Eighth Circuit's rule only adds to existing nationwide confusion over the proper application of the *Daubert* and Rule 702 reliability factors.

As the petition demonstrates, there is considerable divergence among the circuits in their application of the criteria for reliability under Rule 702. The Fourth Circuit, for example, strictly polices the requirement that the district court ensure the reliability of a proffered expert's testimony, rather than treating such challenges as going solely to the weight of testimony as the Eight Circuit did here. Compare, *e.g.*, *Nease*, 848 F.3d at 230 ("For the district court to conclude that Ford's reliability arguments simply 'go to the weight the jury should afford [the expert's] testimony' is to delegate the court's gatekeeping

responsibility to the jury," thus "abus[ing] its discretion.") and *Sardis*, 10 F.4th at 282-283 (similar), with Pet. App. 33 ("Certainly, there are weaknesses in the dirty-machine theory," but "redress for such weaknesses lies in cross-examination and contrary evidence rather than exclusion."). The First Circuit, on the other hand, appears to side with the court of appeals below. See, *e.g.*, *Milward* v. *Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22-23 (1st Cir. 2011) (reversing a district court for "challeng[ing] the factual underpinnings" of a an expert's opinion, which the court characterized as "flaws [that] * * * go to the weight of [the] opinion, not its admissibility").

Relatedly, a group of circuits hold that "any [analytical] step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible" (*In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)),[3] analysis that is incompatible with the Eighth Circuit's holding here and expressly rejected by the Ninth Circuit (see *City of Pomona* v. *SQM N. Am. Corp.*, 750 F.3d 1046, 1047-1048

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[3] See also, *e.g.*, *Knight* v. *Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir. 2007) ("[T]he expert's testimony must be reliable at each and every step or else it is inadmissible. The reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia.") (quotation marks omitted); *Amorgianos* v. *National R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("To warrant admissibility [under *Daubert*], it is critical that an expert's analysis be reliable at every step."); *Dodge* v. *Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003) ("Under *Daubert*, any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.") (quotation marks omitted); *Buland* v. *NCL (Bahamas) Ltd.*, 992 F.3d 1143, 1151 (11th Cir. 2021) (similar).

(9th Cir. 2014) (rejecting the "any step" approach in favor of analysis under which "a minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method does not render expert testimony inadmissible.")).

Indeed, the Ninth Circuit has been described generally as employing an approach to Rule 702 "that set[s] it apart from most other[]" circuits, based on its "interpret[ation] of *Daubert* as liberalizing the admission of expert testimony." Hon. Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2050-2052 (2020) (collecting cases); *see also In re Roundup Prods. Liab. Litig.*, 358 F. Supp. 3d 956, 960 (N.D. Cal. 2019) ("[D]istrict judges * * * must account for the fact that a wider range of expert opinions (arguably much wider) will be admissible in this circuit."); cf., *e.g.*, *Elosu* v. *Middlefork Ranch Inc.*, __ F.4th ___, 2022 WL 534345, at *5 (9th Cir. Feb. 23, 2022) ("[T]he judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.") (quotation marks omitted).

The Court should grant review to resolve this substantial lack of uniformity pervading the lower courts' evaluation of expert evidence. Review is imperative to avoid incentivizing forum shopping and to ensure that the happenstance of an MDL result does not itself impose undue settlement pressure on litigants. See pages 6-9, *supra*. Those harmful effects on our system could all be avoided by this Court simply reinforcing *Daubert*'s key admonition: "[A]ny and all scientific testimony or evidence admitted [must be] not only relevant, but reliable," too. *Daubert*, 509 U.S. at 589.

3. Finally, the importance of the individual ruling in this MDL case further supports review. Cf. pages 8-

9, *supra* (noting how the MDL procedure aggravates inter-circuit disparities in the application of *Daubert* and Rule 702).

Here, the Eighth Circuit's application of an inappropriately lax standard meant the difference between the grant of summary judgment, on the one hand, and over 5,200 individual product-liability cases moving forward against a gold-standard FDA-approved medical device used in 50,000 surgeries *daily*, entirely on the basis of made-for-litigation expert reports that even the court of appeals admitted are problematic. See Pet. 7, 34; Pet. App. 33. The costs associated with such litigation will not be isolated to the defendant company; instead, they will ultimately be passed along to the broader economy. The confused state of *Daubert* case law throughout the circuits—along with the Eighth Circuit's departure from the fundamental teaching of *Daubert* itself—is reason enough for this Court's review. But the intense importance of reaching the correct result in the sprawling multi-district litigation at issue here further warrants this Court's scrutiny.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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