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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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FORUM FOR ACADEMIC AND INSTITUTIONAL :  
RIGHTS, a New Jersey membership corporation, :  
SOCIETY OF AMERICAN LAW TEACHERS, INC. a :  
New York corporation, COALITION FOR EQUALITY, :  
a Massachusetts association, RUTGERS GAY AND :  
LESBIAN CAUCUS, a New Jersey association, PAM :  
NICKISHER, a New Jersey resident, LESLIE FISCHER, :  
a Pennsylvania resident, and MICHAEL BLAUSCHILD, : COMPLAINT  
a New Jersey resident, :  
: 03 Civ. \_\_\_\_\_  
: Plaintiffs, :  
: v. :  
: DONALD H. RUMSFELD, in his capacity as U.S. :  
Secretary of Defense; ROD PAIGE, in his capacity as :  
U.S. Secretary of Education; ELAINE CHAO, in her :  
capacity as U.S. Secretary of Labor; TOMMY :  
THOMPSON, in his capacity as U.S. Secretary of Health :  
and Human Services; NORMAN MINETA, in his :  
capacity as U.S. Secretary of Transportation; and TOM :  
RIDGE in his capacity as U.S. Secretary of Homeland :  
Security, :  
: Defendants. :  
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**PRELIMINARY STATEMENT**

1. This case is about the freedom of educational institutions, specifically law schools, to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion. It is about whether the

government may compel law schools to lend their resources, personnel, and facilities to propagate a message they abhor—a message of discrimination that violates the core values they inculcate in their students and faculty. The names and addresses of the parties to this lawsuit are: Plaintiff Forum for Academic and Institutional Rights, Inc. (“FAIR”) is a membership corporation organized under the laws of the State of New Jersey and its address is Dwyer & Dunnigan, L.L.C. c/o Andrew Dwyer, 17 Academy Street, Suite 1010, Newark, NJ 07102. Plaintiff The Society of American Law Teachers (“SALT”) is a corporation whose members are law faculty and its address is Society of American Law Teachers c/o Paula C. Johnson, Syracuse University College of Law, E.I. White Hall, Syracuse, NY 13244. Plaintiff The Coalition for Equality is an association whose address is The Coalition for Equality c/o Gerald Mays and Sara Smolik, Boston College Law School, 885 Centre Street, Newton, MA 02459. Plaintiff Rutgers Gay and Lesbian Caucus is an association whose address is Center for Law and Justice, 123 Washington Street, Newark, NJ 07102. Plaintiff Pam Nickisher is an individual whose address is 63 Marrow Street, Newark, NJ 070103. Plaintiff Leslie Fischer, Ph.D. is an individual whose address is 63 Marrow Street, Newark, NJ 07013. Michael Blauschild is an individual whose address is 101 Bleeker Street, No. 64, Newark, NJ 07102.

Defendant Donald Rumsfeld is the Secretary of Defense whose address is 1000 Defense Pentagon, Washington, D.C. 20301-1000. Defendant Rod Paige is the Secretary of Education whose address is United States Department of Education, 200 Constitution Ave., N.W., Washington, DC 20202. Defendant Elaine Chao is the Secretary of Labor whose address is United States Department of Labor, 200 Constitution Ave., N.W.,

Washington DC 20210. Defendant Tommy Thompson is the United States Secretary of Health and Human Services whose address is United States Department of Health and Human Services, 200 Independence Ave., S.W., Washington, DC 20201. Norman Mineta is the Secretary of Transportation whose address is United States Department of Transportation, 400 7th Street, S.W., Washington, DC 20590. Tom Ridge is the Secretary of Homeland Security whose address is Department of Homeland Security, Washington, DC 20528.

2. For over a decade, nearly every accredited law school has maintained policies against offering their resources, support, or endorsement to any employer that discriminates. Their non-discrimination policies apply whether the employer discriminates on the basis of race, national origin, gender, veteran status or any number of other attributes that, in their judgment, bear no relation to merit — including sexual orientation. In following this policy, law schools do not simply make a statement that invidious discrimination is a moral wrong and impart that view to their students; they also commit themselves to behave in a manner consistent with their core value of judging people solely on their merits.

3. When law schools' non-discrimination policies came into conflict with the military's policies on sexual orientation—an employment policy that is, in the estimation of law faculties nationwide, invidiously discriminatory—they exercised their expressive and associational rights to enforce their non-discrimination policies even-handedly against military recruiters as they did against any other employer.

4. Congress responded in 1994 by enacting the so-called Solomon Amendment, which requires every institution of higher education to give military recruiters access to campus on pain of losing federal money. The purpose, the sponsors made clear, was to “send a message over the wall of the ivory tower” to “treat our Nation’s military with the respect it deserves.” 140 Cong. Rec. 11,441 (1994). Both the statute and its execution have become increasingly strict in the intervening years. In its current iteration, as interpreted by the military, the Solomon Amendment co-opts the career services staff, message centers, vehicles of communication, and on-campus interview rooms of a law school, by threatening to cut off virtually all federal funds—not just to the law school, but to the entire university of which they are a part—unless the law school suspends its non-discrimination as applied to the military. As of the fall of 2003, for the first time, virtually all law schools in the nation have been forced to accept and support military recruiters on campus, under protest, in violation of the law schools’ non-discrimination policies. This is the culmination of an effort that was launched by the Department of Defense (“DOD”) in December 2001 and that has been fought and negotiated by law schools around the country for the last year and a half. Over the summer of 2003, it became clear that virtually every law school in the country had been forced to violate its non-discrimination policy under the threat of the Solomon Amendment.

5. Plaintiffs turn to this Court to vindicate the right of law schools and law professors to choose for themselves, free from government interference, how best to advance their educational missions; what messages to articulate to their communities; and

how to communicate those messages. Only this Court can restore the open environment of equality, mutual respect, and dignity that law professors and law students have grown to cherish and expect.

### **JURISDICTION AND VENUE**

6. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) and (e).

### **THE PARTIES**

#### **Plaintiffs**

7. Plaintiff Forum for Academic and Institutional Rights, Inc. (“FAIR”) is a membership corporation organized under the laws of the State of New Jersey. It is an association of law schools and law faculties. Membership is open only to law schools or other academic institutions or their faculties that vote by a majority (and follow any other necessary procedures) to join FAIR. FAIR’s mission is to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education. FAIR members recognize and agree that the non-discrimination policies of each of its members is central to their mission, for those policies contribute to a setting in which all participants in the dialogue are assured that they will be judged on the quality of their ideas rather than characteristics bearing no relation to merit.

8. Plaintiff The Society of American Law Teachers (“SALT”) is a New York corporation with almost 900 members, it is the largest membership organization of law faculty in the United States. It is committed to making the legal profession more

inclusive and to extending the power of the law to underserved individuals and communities. Its members are law faculty who are ultimately responsible for the stewardship of the law school, and especially for advancing its mission to nurture future leaders and foster an environment conducive to respectful, open dialogue on fundamental issues of law and justice. Its members hail from 159 law schools in 44 states, including New Jersey, the District of Columbia, Puerto Rico and four foreign nations. SALT members, too, consider the non-discrimination policies of their schools to be central to that mission and to their members' roles as law professors.

9. Plaintiff The Coalition of Equality is an association of students at Boston College Law School. Plaintiff Rutgers Gay and Lesbian Caucus is an association of students at Rutgers University School of Law. They both are committed to furthering the rights and interests of all groups including gays and lesbians. Members of both associations are beneficiaries of law school policies directed at increasing diversity and inculcating values and fostering an environment in which respectful debate unfolds.

10. Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D. and Michael Blauschild are students at Rutgers University School of Law. Pam Nickisher and Michael Blauschild are residents of New Jersey. Leslie Fischer is a resident of Pennsylvania. As students, they are the beneficiaries of law school policies increasing diversity and directed at inculcating values and fostering an environment in which respectful debate unfolds.

### **Defendants**

11. Defendant Donald Rumsfeld, the United States Secretary of Defense, heads the DOD, which oversees the United States Armed Forces. The Secretary of Defense is

responsible for the formulation and execution of defense policy. DOD is the nation's largest employer, with 1.4 million men and women on active duty, another 1.2 million serving the Reserve and Guard components, and more than 650,000 civilians. DOD also makes available an estimated \$1 billion in grants plus billions more in federal contracts every year to institutions of higher education.

12. DOD is responsible for the implementation of the Solomon Amendment. Specifically, DOD makes the ultimate determination whether an institution of higher education is in compliance with the Solomon Amendment. When DOD determines that a school is in violation, it first threatens to cut off grants and contracts to that school. Then, if not satisfied with an institution's compliance, it cuts off those grants and contracts and notifies other agencies that are, in turn, obliged to do the same.

13. Defendant Rod Paige is the United States Secretary of Education. Under his direction, the Department of Education makes available an estimated \$3 billion in grants plus millions more in federal contracts every year to institutions of higher education covered by the Solomon Amendment.

14. Defendant Elaine Chao is the United States Secretary of Labor. Under her direction, the Department of Labor ("DOL") makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

15. Defendant Tommy Thompson is the United States Secretary of Health and Human Services. Under his direction, the Department of Health and Human Services ("HHS") makes available an estimated \$12 billion in grants plus millions more in federal

contracts every year to institutions of higher education covered by the Solomon Amendment.

16. Defendant Norman Mineta is the United States Secretary of Transportation. Under his direction, the Department of Transportation (“DOT”) makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

17. Defendant Tom Ridge is the United States Secretary of Homeland Security. Under his direction, the Department of Homeland Security makes available monies in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment.

## **FACTS**

### **Law School Mission**

18. Law schools are not merely vocational schools that churn out lawyers so that they can pass bar exams, draft briefs and close deals. Law schools aspire to train the next generation of leaders to pursue justice, respect the rule of law, and stand by principle.

19. Law schools have determined that diversity in their faculty and students is an essential precondition to this mission, both because the society these future lawyers will enter, and hopefully lead, is not monochromatic, and because discourse is richer in communities full of varied backgrounds, perspectives, and experiences.

20. Diversity serves no purpose if students and faculty feel inhibited from engaging in discourse. Thus, law schools have promoted, demanded, and strictly



enforced, not merely diversity, but also tolerance and respect. Law schools nurture environments in which students are welcome to present their views, their ideas, and beliefs. Key to this environment, and key to their mission, therefore, is an uncompromising adherence to the principle that all who engage in discourse within the law school community are fully equal. Judgments based solely on race, creed, color, religion, gender, national origin, or sexual orientation have no place in the law school environment. They have no place because they undermine the law school's mission.

### **Non-Discrimination Policies**

21. The message of diversity and tolerance is communicated by law schools through their faculty, their curriculum, and their policies. Every accredited American law school has adopted a non-discrimination policy. The words may vary but the content and the message communicated is the same:

[The] Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, or sexual orientation.

22. Law schools admit students, grant scholarships, grade exams, recruit and promote faculty, and hire staff in light of these principles. In furtherance of the policies, law schools also follow recruiting policies: They refuse to assist any recruiter who discriminates on the basis of characteristics unrelated to merit. Some have refused even to allow such recruiters on campus to recruit.

23. In so doing, the school conveys a message that law school personnel will not abet the discriminating employer's recruiting efforts. To do otherwise is antithetical

to both the law schools' message and mission. This policy has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures, values that law faculty hope students will internalize, and the policy reifies those values, modeling behavior that it hopes its students will follow in their law practices and lives as community leaders.

24. In the law school's judgment, this policy also helps nurture the sort of environment for free and open discourse that is the hallmark of the academy.

25. Law schools apply this policy even-handedly to all employers. Any employer that discriminates forfeits law school assistance in recruiting and might even be excluded from recruiting on campus. Students are free to seek jobs with employers that discriminate. However, they must do so without the law school's active support of that employer, and at times must do so off campus.

26. Because law schools applied their non-discrimination policies even-handedly, no exception was made for the military and its discriminatory policy regarding sexual orientation. Their motive has been neither to punish the military nor to undermine military recruitment. Their motivation has been to adhere to a principle that has long motivated the academy and to maintain the open, respectful academic environment they aspire to nurture.

### **The Solomon Amendment**

27. In 1995, Congress responded to the non-discrimination policies of educational institutions by passing the Solomon Amendment, named for its sponsor, Representative Gerald Solomon of New York. Among the purposes of the amendment,

according to a congressional supporter of the legislation, was to “send a message over the wall of the ivory tower of higher education.” 140 Cong. Rec. 11,441 (1994). The amendment, which has become increasingly strict over the years in language and interpretation, currently covers funds allocated in two broad appropriations measures — one for the Departments of Defense and Transportation, and the other embracing the Departments of Labor, Health and Human Services, and Education, and related agencies. In its current incarnation, the Solomon Amendment provides that none of the funds in those two appropriations measures:

may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

- (1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or
- (2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution) . . .

10 U.S.C. § 983(b). The Solomon Amendment also now applies to funds from the Department of Homeland Security. Pub. L. No. 107-296, Title XVII, § 1704(b)(1),(g), Nov. 25, 2002, 116 Stat. 2314, 2316.

28. The statute and implementing regulations effectively make the funding restriction provisions of the Solomon Amendment applicable only to those law schools that ban or restrict the military from recruiting as an expression of protest of the

military's discriminatory hiring practices. Schools that ban the military from recruiting for other reasons are not subject to the provisions of the Solomon Amendment.

29. Under the terms of the Solomon Amendment, the funding prohibition is triggered only when an institution has a policy or practice that "prohibits, or in effect prevents" military recruiters from "gaining entry to campuses or access to students . . . on campuses" or access to "information pertaining to students." 10 U.S.C. § 983(b). DOD regulations promulgated under the statute exempt some schools that do not "provid[e] requested access" — so long as they can demonstrate "that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." 32 C.F.R. § 216.4(c)(3).

30. The Solomon Amendment authorizes the Secretary of Defense to issue regulations prescribing procedures for determining whether an educational institution has a policy of denying or preventing access to students on campus or to information. According to DOD, once it determines that an institution has violated the Solomon Amendment, the institution is no longer eligible for most funds administered by the Departments of Defense, Transportation, Labor, Health and Human Services, Education, Homeland Security, and related agencies. 10 U.S.C. § 983(d)(2).

31. In implementing the regulations, the DOD has taken inconsistent positions, and its current position is internally contradictory, particularly in regard to the statutory language about "subelements." DOD initially read the language to mean that only the subelement of a school that violated the Solomon Amendment would be punished. 63 Fed. Reg. 56,819 (Mar. 29, 1997). Without notice or comment, however, DOD amended

its regulations to eliminate the subelement limitation from regulations governing its own funds, 65 Fed. Reg. 2056 (Jan. 13, 2000), but kept it in place as applied to the funds of other agencies, *see* 32 C.F.R. § 216.

32. Under DOD's current reading of the law, upon its determination that any subelement of an institution of higher education is in violation of the Solomon Amendment, the Defendants are all required to stop payment on virtually all of their grants and contracts to the entire school and to award them no further grants or contracts.

### **Efforts to Comply With the Solomon Amendment**

33. Virtually none of the law schools in the nation have barred military recruiters from campus although a handful have. What many did, however, was to develop devices to adhere to their non-discrimination policies even while also ensuring full military access to interested students. Some did not let law school personnel arrange student interviews, but relegated the task to career services professionals from somewhere else at the university. Others would allow military recruiters on campus by invitation of any student or student group — and would make facilities available to them — but would not match students to recruiters or post military literature.

34. The military was still inundated with many more highly talented lawyers than it could accommodate. As one recruiter remarked, "Competition has been very keen in the past few years for both our intern and JAG attorney positions. Unfortunately, that means some very qualified applicants will not be selected for a position."

35. Lately, however, DOD, or officers of various branches of the military, has begun threatening law schools with a cutoff of federal funds for alleged violations of the

Solomon Amendment. And the military has demanded more than just access. It has demanded the law schools' active participation in military recruiting. Typically, the military has communicated the demand not by specifying what the law school has done wrong. Rather, the military merely has declared that the law school is in default and that all federal funds will be cut off if the law school does not come into compliance.

36. Some law schools responded by requesting from DOD a clear statement of what it believes the law requires. DOD has consistently refused to offer concrete guidance, replying only that the inquiring school remains in default.

37. When law schools asked the complaining military officials how they could obtain review of their recruiting policies without risking suspension of federal monies, the typical response was that there was no review. In other words, the military officials claimed that the law school had to risk losing all of its federal monies before it could obtain DOD review. Review could be had only once the military determined that the law school was out of compliance, DOD recommended the suspension of funds, and funds were suspended.

38. The recruiting policies of law schools have no discernable impact on the military's ability to recruit, as the military was more than able to meet its JAG Corps recruiting needs before law schools began to suspend their non-discrimination policies. A law school's decision not to volunteer law school staff to help the military recruit is therefore entirely expressive in purpose and effect.

39. After nearly 18 months of exchanges between the military and various law schools, and in direct response to the threats of the military, as of the 2003 fall recruiting

season, every law school in the nation that receives federal funds has permanently suspended the application of its non-discrimination recruiting policy to the military. As a result, law schools' statements of dissent and protest are being suppressed, and law schools are being forced to endorse, or appear to endorse, the military's discriminatory hiring policy — a message that is repugnant to them.

## **CAUSES OF ACTION**

### Count I: Statutory Construction

40. The allegations of ¶¶1-39 of this Complaint are incorporated and re-pled.

41. The Defendants have misread and misapplied the plain terms of the Solomon Amendment and the regulations promulgated thereunder: (A) by demanding that law schools do more than permit “entry to campuses, or access to students ... on campuses, for the purposes of military recruiting;” (B) by incorrectly interpreting the statute and the regulations to require that a law school offer military recruiters every service and accommodation given to employers who satisfy the law school's non-discrimination policy; and (C) by interpreting the Solomon Amendment to permit a university-wide funding freeze just because of a law school's purported non-compliance.

42. As a result of the military's misreading and misapplication of the Solomon Amendment and its implementing regulations, the Plaintiffs have been and continue to be irreparably harmed.

### Count II: Unconstitutional Conditions

43. The allegations of ¶¶ 1-42 of this Complaint are incorporated and re-pled.

44. The Solomon Amendment and regulations promulgated thereunder violate the Plaintiffs' rights under the First Amendment to the Constitution of the United States, by imposing an unconstitutional condition on the receipt of federal funding, thereby impinging on their academic freedom, freedom of speech, and freedom to associate with one another in pursuit of common objectives.

Count III: Viewpoint Discrimination

45. The allegations of ¶¶ 1-44 of this Complaint are incorporated and re-pled.

46. The Solomon Amendment, as written and implemented, constitutes impermissible viewpoint discrimination in violation of the First Amendment to the Constitution of the United States in that its funding restrictions apply only to law schools and other institutions that ban or restrict military recruiters in protest. Law schools and other institutions that exclude military recruiters for other reasons are not affected by the Solomon Amendment's funding restriction provisions.

47. Because the Solomon Amendment is viewpoint-based, it is presumptively unconstitutional and the military cannot rebut this presumption. The Plaintiffs' constitutional rights therefore have been, and continue to be, irreparably harmed.

Count IV: Compelled Speech/Suppressed Dissent

48. The allegations of ¶¶ 1-47 of this Complaint are incorporated and re-pled.

49. The Solomon Amendment impermissibly prohibits the Plaintiffs from expressing dissent by cutting off critical federal funding to law schools that express their protest of and objection to the military's discriminatory hiring and personnel policies and by exposing allegedly non-compliant schools to public censure by identifying them in the



Federal Register. The Solomon Amendment forces the Plaintiffs to express and subsidize a message of support for the military, even though they abhor the military's discriminatory hiring decisions.

50. The Plaintiffs' constitutional rights to express dissent and to be free from compelled endorsement of messages repugnant to them therefore have been, and continue to be, irreparably harmed.

#### Count V: Void for Vagueness

51. The allegations of ¶¶ 1-50 of this Complaint are incorporated and re-pled.

52. The Solomon Amendment is unconstitutionally vague and thus void under the First Amendment and the Due Process Clause of the Fifth Amendment of the Constitution of the United States, in that it restricts a wide range of speech and associational activities protected under the First Amendment, lacks sufficient definitions or guidance regarding its application, grants unfettered discretion to DOD, and low-level military officers, to decide what constitutes compliance, and impermissibly chills the Plaintiffs' speech.

53. The operative language of the statute and its implementing regulations are so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application. Moreover, the DOD, as the enforcing agency, has not only refused to clarify its interpretation of the statute or the regulations, but, through various recruiters and officers, also has given numerous conflicting interpretations to the statute and regulations. As a result, the Plaintiffs' constitutional rights have been, and continue to be, irreparably harmed.

Count VI: Due Process

54. The allegations of ¶¶ 1-53 of this Complaint are incorporated and re-pled.

55. The Defendants, by refusing to provide the university or the law school with the reason or reasons that the university is in violation of the Solomon Amendment, and by finding the university in violation without giving the university an opportunity to be heard, have violated the Plaintiffs' right to due process under the Fifth Amendment to the United States Constitution.

Count VII: Violations of the Administrative Procedure Act

56. The allegations of ¶¶ 1-55 of this Complaint are incorporated and re-pled.

57. The DOD's elimination of the subelement limitation from the regulations governing its own funds without notice or comment period violated the provisions of the Administrative Procedure Act. 5 U.S.C. § 551, *et seq.*

58. The DOD's failure to provide law schools with reasoned and supported explanations of how the law schools allegedly had failed to comply with the Solomon Amendment violated the Administrative Procedure Act. 5 U.S.C. § 551, *et seq.*

59. The DOD's violations of the Administrative Procedure Act have caused and continue to cause irreparable harm to the Plaintiffs.

\* \* \*

60. The Plaintiffs have no adequate remedy at law for any of these violations.

\* \* \*

WHEREFORE, Plaintiffs respectfully request the Court to:

(1) Declare pursuant to 28 U.S.C. § 2201 that, as a matter of statutory construction, law schools have no obligation under the Solomon Amendment to do anything other than allow military recruiters to enter the campus in order to recruit, without expecting any support or other involvement from the law school;

(2) Declare pursuant to 28 U.S.C. § 2201 that the Solomon Amendment — even when limited to a directive to allow the military on campus to recruit — violates the First and Fifth Amendments to the Constitution of the United States;

(3) Declare pursuant to 28 U.S.C. § 2201 that the Defendants have violated the provisions of the Administrative Procedures Act in their interpretation and implementation of the Solomon Amendment;

(4) Grant appropriate preliminary, and final, equitable relief enjoining the Defendants from enforcing the Solomon Amendment, including but not limited to, declaring law schools ineligible for federal grants or contracts, recommending ineligibility to the Principal Deputy Under Secretary of Defense for Personnel Readiness or any other DOD official, listing schools in the Federal Register as institutions that are not in compliance with the Solomon Amendment, or notifying any of the other Defendants or any related federal agency of such ineligibility for the purposes of terminating grants or contracts under the Solomon Amendment;

(5) Award reasonable attorneys fees and costs pursuant to 28 U.S.C. § 2412; and

(6) Grant such other and further relief as the Court deems proper.

Respectfully submitted,

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