No. 09-343

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL., PETITIONERS

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 16 U.S.C. 824p(b)(1)(C)(i), which gives the Federal Energy Regulatory Commission authority to issue a permit for the construction of a transmission facility in a national interest electric transmission corridor when a State has "withheld approval for more than 1 year after the filing of an application," allows the Commission to act after a State has denied an application.

2. Whether the court of appeals had jurisdiction to consider respondents' challenge to the Commission's interpretation of 16 U.S.C. 824p(b)(1)(C)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 558 F.3d 304. The orders of the Federal Energy Regulatory Commission (Pet. App. 52a-245a, 246a-292a) are reported at 71 Fed. Reg. 69,440 and 119 F.E.R.C. ¶ 61,154, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. Petitions for rehearing were denied on April 20, 2009 (Pet. App. 50a-51a). On July 13, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 18, 2009. On August 7, 2009, the Chief Justice further

extended the time to September 17, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce" by public utilities. 16 U.S.C. 824(b)(1). Traditionally, the States have "assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities," and, "[a]s a result, the nation's transmission grid is an interconnected patchwork of state-authorized facilities." Pet. App. 11a. Because of that fragmentation, "increasing concerns have been expressed about the capacity and reliability of the grid." *Ibid.*

In response to those concerns, Congress included in the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221(a), 119 Stat. 946 (16 U.S.C. 824p), authorization for the Secretary of Energy to designate certain areas with electricity-transmission constraints as "national interest electric transmission corridor[s]." 16 U.S.C. 824p(a)(2). In such corridors, FERC has the authority to issue "permits for the construction or modification of electric transmission facilities" if certain conditions are met. 16 U.S.C. 824p(b). As relevant here, the Commission must first find that the State in which the facilities are to be sited lacks adequate authority to approve transmission siting or to consider the interstate benefits of a proposed facility, 16 U.S.C. 824p(b)(1)(A); that the

applicant does not qualify to apply for siting approval in the State, 16 U.S.C. 824p(b)(1)(B); or that:

> (C) a State commission or other entity that has authority to approve the siting of the facilities has—
>
> > (i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or
> >
> > (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

16 U.S.C. 824p(b)(1)(C).

If one of those requirements is met, the Commission may exercise jurisdiction and issue a permit only upon making the additional findings that the proposed project (1) will be used to transmit electric energy in interstate commerce; (2) is consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) is consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing facilities. 16 U.S.C. 824p(b)(2)-(6).

2. a. Section 824p directs FERC to issue regulations specifying the form of, and the information to be contained in, an application for the construction or modification of electricity-transmission facilities in a national interest corridor. 16 U.S.C. 824p(c)(2). In a notice-and-

comment rulemaking, the Commission adopted such regulations. Pet. App. 52a-245a. In doing so, FERC interpreted the statutory phrase "withheld approval for more than 1 year" to govern cases in which States have denied permits. *Ibid.*

The Commission observed that the statute "does not explicitly define the full range of state actions that are deemed to be withholding approval," and it determined that "a reasonable interpretation of the language in the context of the legislation supports a finding that withholding approval includes denial of an application." Pet. App. 70a. In reaching that conclusion, the Commission observed that "the term 'withhold' in this context means to refrain from granting approval, and, conversely, the term 'deny' is synonymous with 'withhold.'" *Id.* at 73a. FERC also pointed out that Section 824p(b)(1)(C)(ii) "provide[s] the Commission with the authority to intervene in circumstances where a State has issued an authorization which will essentially prevent a project from going forward," concluding that "it would not be reasonable to interpret the statute in such a manner that would leave the Commission without authority to intervene in instances where a State has expressly denied an application." *Id.* at 71a-72a. And the Commission cited a House Committee report stating that the statute permits FERC to issue a permit "if, after one year, a State is unable or refuses to site the line." *Id.* at 72a (quoting H.R. Rep. No. 65, 108th Cong., 1st Sess. 170 (2003)).

b. On rehearing, the Commission reiterated that "the most common sense reading of 'withheld approval for more than 1 year' encompasses any action—whether it is a failure to act or an outright denial—that results in an applicant not having received state approval at the end of one year." Pet. App. 252a. The Commission em-

phasized that the purpose of Section 824p is "to facilitate the process of siting critical regional transmission lines and facilities," thereby "ensuring adequate capacity and increased reliability on the electric transmission grid"—a purpose that the Commission's interpretation furthered. *Id.* at 257a.

3. A divided panel of the court of appeals granted petitions for review in relevant part and set aside FERC's interpretation of Section 824p. Pet. App. 1a-49a.

a. The court of appeals held that "[t]he continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline." Pet. App. 17a. Instead, the court reasoned, "[t]he denial of an application is a final act that stops the running of time during which approval was withheld on a pending application." *Ibid.* The court concluded that the statute confers jurisdiction on FERC "only when a state commission is unable to act on a permit application in a national interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions," but not when a state commission denies an application outright. *Id.* at 22a-23a. The court therefore reversed FERC's interpretation of 16 U.S.C. 824p(b)(1)(C)(i). Pet. App. 23a, 33a.

b. Judge Traxler dissented in relevant part. Pet. App. 34a-49a. In his view, "[u]nder the common meaning of the words 'withhold' and 'approval,' approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered)." *Id.* at 42a. He noted that the Commission's interpretation "is also but-

tressed by the applicable legislative history," which indicates that Congress "primarily had in mind situations in which a state denied a permit that was necessary to ensure reliability of the national transmission grid, not simply situations where a state had not ruled on an application for a certain period of time." *Id.* at 46a-47a. Finally, Judge Traxler stated that "even assuming *arguendo* that the statute's meaning were not plain, [he] would conclude that FERC's interpretation was reasonable at the very least, and therefore entitled to deference under" *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Pet. App. 49a.

4. The court of appeals denied petitions for rehearing en banc. Pet. App. 50a-51a.

ARGUMENT

Under 16 U.S.C. 824p(b)(1)(C)(i), FERC has the authority to issue permits for the construction of electric transmission lines in designated national interest transmission corridors if a State has "withheld approval for more than 1 year after the filing of an application." The court of appeals erred in setting aside FERC's reasonable interpretation of Section 824p and holding that the statute allows the Commission to issue a permit only if a State has failed to act on an application, but not if has denied an application. The court's interpretation could have serious consequences, and the question presented therefore could warrant this Court's review in an appropriate case.

This case, however, is not an appropriate vehicle for resolving the question presented. The court below is the first court of appeals to consider the interpretation of Section 824p. Moreover, there is a substantial question whether the court of appeals had jurisdiction to review

FERC's interpretation of the statute in this case. The petition for a writ of certiorari should therefore be denied.

1. Petitioners are correct in arguing (Pet. 14-21) that the court of appeals erred in setting aside FERC's interpretation of Section 824p. The Commission's interpretation represents the most natural reading of the statutory text, best harmonizes all the provisions of the statute, and most effectively promotes the congressional purpose. And because it represents FERC's authoritative construction of a statute the agency is charged with administering, it is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Since the Commission's reading is, at a minimum, permissible, the court erred in failing to uphold it.

a. The Commission's interpretation of Section 824p is consistent with the ordinary meaning of the statutory terms. As the court of appeals acknowledged, the word "withhold" means "to desist or refrain from granting, giving, or allowing." Pet. App. 17a (quoting *Webster's Third New International Dictionary* 2627 (1993)). It follows, as the Commission reasoned, that a State has "withheld approval" of a permit application whenever it has refused to grant a permit, including when it has denied the application. Indeed, this Court has used the word "withheld" in a similar way, noting that, when an agency refused a request that it produce documents under the Freedom of Information Act, "it undoubtedly 'withheld' [the documents] in any reasonable sense of that term." *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 150 (1989).

The court of appeals emphasized that the phrase "withheld approval" is accompanied by the phrase "for more than 1 year." Pet. App. 17a. In its view, "withheld

approval" can only refer to approval that has been held back "*continuously* over a period of time (more than one year)," which would exclude the "finite act" of denying an application. *Ibid.* But as Judge Traxler explained, applying the common meaning of the word "withhold"—"[t]o keep back; decline to grant"—"yields a straightforward rule that a state has 'withheld approval for more than 1 year' when one year after approval has been sought, the state still has not granted it, regardless of the reason." *Id.* at 41a (dissenting opinion). "Under the common meaning of the words 'withhold' and 'approval,' approval is withheld, *i.e.*, not granted, every day that no decision is issued granting approval, and it continues to be withheld on the day an application is denied (as well as every day that such a denial is not reconsidered)." *Id.* at 42a.

The analysis of the court of appeals is also flawed in that it fails to give effect to the word "approval." If the operative language were "withheld action" or "withheld decision," then it would make sense to say that the statute does not apply when an application is denied. But the statute refers to "approval," and denial is the opposite of approval. If, 366 days after the filing of an application with a state siting authority, the application has been denied, then the State has withheld approval for more than one year.

b. The court of appeals believed that, because the other circumstances under which FERC may exercise siting authority are what it described as "limited grants of jurisdiction," the "withheld approval" clause should be given a similarly limited construction. Pet. App. 20a. As the court put it, "if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national

interest corridor, it would surely have said so directly." *Id.* at 20a-21a. The court of appeals misunderstood the statutory scheme. Section 824p does not broadly preempt state jurisdiction. All States have initial authority to make a siting determination under state law, even in national interest corridors. If a State has withheld approval in a national interest corridor, FERC may issue a permit only if it makes a series of specific determinations under federal law that might not have been the focus of state proceedings, including that the proposed authorization or modification of transmission facilities "will significantly reduce transmission congestion in interstate commerce" and is "consistent with sound national energy policy and will enhance energy independence." 16 U.S.C. 824p(b)(4) and (5). Accordingly, FERC may override a State's denial of siting approval only in certain specified circumstances.

Once the operation of Section 824p(b)(1)(C)(i) is thus properly understood, then as Judge Traxler explained, "only FERC's interpretation makes sense in the context in which the language is used and in the context of the statute as a whole." Pet. App. 48a (dissenting opinion). The subsection granting FERC siting authority when a state has "withheld approval for more than 1 year" (16 U.S.C. 824p(b)(1)(C)(i)) is immediately followed by 16 U.S.C. 824p(b)(1)(C)(ii), which gives FERC siting authority when a state has granted approval but "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." It would have made little sense for Congress to have given FERC the authority to override a State decision approving a permit but imposing onerous conditions, while leaving FERC powerless to

act when a State denies a permit application altogether. See Pet. App. 44a (Traxler, J., dissenting).

In addition, the decision below fails to take account of 16 U.S.C. 824p(i), which creates a mechanism for States to defeat federal control over siting decisions. Section 824p(i) grants Congress's consent for three or more States to enter into an interstate compact governing the siting of transmission facilities. When States have entered into such a compact, "[t]he Commission shall have no authority to issue a permit for the construction * * * of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement." 16 U.S.C. 824p(i). The express provision that FERC may not override the denial of a permit when compacting States are in agreement, but may do so when they are not, supports the conclusion that FERC may override a denial by an individual State outside a compact. See Pet. App. 258a-259a; *id.* at 45a (Traxler, J., dissenting).

c. FERC's interpretation also promotes the statutory purpose of assuring that critical transmission facilities are sited in designated national interest corridors. By contrast, the court of appeals' interpretation would permit an individual State to thwart the goal of reducing capacity constraints and congestion in national interest corridors merely by denying a siting permit. In other words, a State could deny a critical piece of transmission infrastructure for purely local reasons, with no opportunity for federal review of whether the project is in the national interest.

The legislative history confirms that Congress intended Section 824p to allow FERC to issue permits in national interest corridors "if, after one year, a state, or other approval authority, is unable *or refuses* to site the

line." H.R. Rep. No. 215, 109th Cong., 1st Sess. Pt. 1, at 261 (2005) (emphasis added). Indeed, even Members of Congress who opposed Section 824p understood it to have that effect; the dissenting members of the House Committee objected that the bill "includes transmission-siting provisions that preempt * * * state decisions about whether new or expanded lines should be built." *Id.* at 494; see Pet. App. 46a-47a (Traxler, J., dissenting).

FERC's interpretation of "withheld approval" does not, as the court of appeals believed, render state review of siting applications "futile." Pet. App. 20a. In enacting 16 U.S.C. 824p, Congress recognized States' traditional siting authority by providing States a full year to site critical facilities under their own laws. Under Section 824p, States may impose conditions on any siting permit as long as the conditions are economically feasible and would not prevent significant reduction of congestion. 16 U.S.C. 824p(b)(1)(C)(ii). That preserves the state's ability to condition and control the circumstances of the siting.

Significantly, the Commission may not exercise siting authority over national interest corridor projects simply based upon a finding that a State has "withheld approval." Instead, several additional findings are required before the Commission may do so. See 16 U.S.C. 824p(b)(2)-(6). And the filing of an application with the Commission does not mean that valid state concerns are no longer considered. See Pet. App. 74a. Instead, the Commission takes state determinations into consideration in making its own permitting decisions. The state decision and state-compiled record become part of the FERC record and are considered "to the maximum extent possible." *Id.* at 120a-121a; see *id.* at 79a-80a, 268a-

269a. The statute also requires that the Commission offer States an opportunity to comment on "the need for and impact of a facility covered by the permit." 16 U.S.C. 824p(d). As parties to the FERC proceeding, States may file requests for rehearing following a permitting decision, and, if they remain aggrieved, they may petition for review in the court of appeals. Pet. App. 104a; 16 U.S.C. 825*l*.

2. The court of appeals' interpretation of Section 824p(b)(1)(C)(i) is not only erroneous but also could have serious consequences. Congress recognized that difficulty in siting new transmission facilities—and, in particular, difficulty in obtaining state regulatory approval for such siting—is a significant factor contributing to inadequate investment in transmission infrastructure. See S. Rep. No. 78, 109th Cong., 1st. Sess. 8 (2005) ("Siting challenges, including a lack of coordination among States, impede the improvement of the electric system."). The interpretation adopted by the court below permits any State, simply by denying a permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in national interest corridors, regardless of how important those projects may be to the national interest and to relieving congestion on the interstate grid. See *Transmission Infrastructure: Hearing Before the Senate Comm. on Energy and Natural Resources*, 111th Cong., 1st Sess. 11 (2009) (Wellinghoff Senate Testimony) (testimony of Jon Wellinghoff, FERC Chairman). Thus, the decision "is a significant constraint on the Commission's already-limited ability to approve appropriate projects to transmit energy in interstate commerce." *Ibid.*; see *The Future of the Grid: Proposals for Reforming National Transmission*

Policy: Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Energy and Commerce, 111th Cong., 1st Sess. 5 (2009) (same) (Wellinghoff House Testimony).[1]

The need for regionally- and nationally-based oversight is significant. The electric grid was built by utilities over the last 100 years primarily to serve local customers. But a doubling of electricity demand and generation over the past three decades, and the emergence of competitive wholesale electricity markets, has significantly increased the need to transfer large amounts of electricity regionally across the grid. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors*, *Notice of Proposed Rulemaking*, 71 Fed. Reg. 36,258 (2006). While there has been some expansion of regional and inter-regional transmission facilities over the last 15 years, that expansion is not nearly sufficient to address the need for transmission infrastructure to meet state and national goals. Wellinghoff House Testimony 4. Without adequate siting authority, the Commission's ability to address these challenges is limited. *Ibid.*

In designating the two national interest electric transmission corridors identified to date under Section 824p—the Mid-Atlantic Area corridor and the Southwest Area corridor (consisting of parts of California and Arizona)—the Department of Energy determined that congestion in those areas causes consumers to face consistently higher electricity prices, poses threats to the reliability of electricity supply, limits supply diversity and energy independence, and raises national-security

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[1] http://energycommerce.house.gov/Press_111/20090612/testimony_wellinghoff.pdf.

concerns. 72 Fed. Reg. 56,992, 57,005, 57,014, 57,016, 57,021 (2007). Given the increasingly interconnected nature of the transmission grid and wholesale power markets, the siting of necessary electric facilities poses increasingly complex issues of balancing competing interests, particularly as "[t]ensions can exist between what is perceived to be best for a region as a whole versus what is perceived to be best for an individual State or a portion of one State." *Id.* at 57,014; see *id.* at 57,021.

Transmission infrastructure development, moreover, is necessary not only to eliminate capacity constraints and congestion on the transmission grid but also to permit the delivery of renewable power, such as solar and wind power, to bring the power from the remote areas in which it is most efficiently produced to the metropolitan areas where it is most needed. Wellinghoff Senate Testimony 2; Wellinghoff House Testimony 2. Renewable energy sources, such as wind and solar, typically are located in rural areas. While they may only take a year or two to construct, the time needed for siting and construction of transmission lines may average five years, presenting significant barriers to the development of such projects. See Aaron S. Lax, *A High-Wire Balancing Act: Federal Energy Transmission Corridors*, 23 ABA Sec. Nat. Resources & Env't 18, 54 (2008).

3. Although the question presented is important, review is not warranted at this time. The Fourth Circuit did not review a decision by FERC concerning an actual application for a permit to construct a transmission line. It considered FERC's statutory interpretation in the abstract. Moreover, the Fourth Circuit is the only court of appeals to have considered the Commission's interpretation of Section 824p. Contrary to petitioners' sug-

gestion (Pet. 22), there will be opportunities for other courts to examine the issue. If a party seeking to build a transmission facility in a national interest corridor outside the Fourth Circuit were to seek a permit from FERC after having been denied a permit by a State, FERC's decision—whether or not it was consistent with the decision in this case—would be subject to review in another court of appeals. See 16 U.S.C. 825*l*(b).

In addition, there is a substantial question whether the court of appeals properly considered respondents' challenge to FERC's interpretation of Section 824p(b)(1)(C)(i) in this case. The Commission's interpretation of that statutory provision was not set forth in a Commission regulation but only in the preamble issued as part of a rulemaking. And although that interpretation makes it more likely that FERC will ultimately issue a permit if it should be presented with an application following a denial by a State, the interpretation does not have any immediate, concrete effect on respondents. Rather, it will affect them in the future only if and when FERC issues a permit to build a transmission line—which would occur only if FERC first determined that all of the other criteria necessary for issuance of a permit were satisfied. These circumstances of respondents' challenge raise issues of both standing and ripeness. Although those issues were not raised below, they could prevent the Court from reaching the question presented if it were to grant review.

In the court of appeals, Piedmont Environmental Council, the Minnesota Public Utilities Commission, and the New York Public Service Commission filed a joint brief in which they made no effort to demonstrate that the requirements of standing were satisfied for their challenge to FERC's statutory interpretation. The

other respondent is Communities Against Regional Interconnect (CARI), an association of seven New York counties and four community organizations. CARI filed a brief noting that an application to build a transmission line had been filed with the New York Public Service Commission, and asserting that FERC's "expansive interpretation of its authority and jurisdiction * * * [is] the source of cognizable injury to CARI and its members, including decreased land values, the taking of land by condemnation, increased utility rates and numerous potential and threatened environmental impacts." CARI C.A. Br. 12. But there would be no injury fairly traceable to action by FERC—rather than to measures taken in connection with the application filed with the New York Public Service Commission—unless the New York Public Service Commission denied the application, the sponsor of the project then filed an application with FERC, and FERC granted that application. The brief said nothing to establish that any of those intermediate events was likely.[2]

Thus, respondents did not carry their burden of establishing that they faced an injury that was "actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citation omitted). This case there-

[2] In fact, in April 2009, the New York Regional Interconnect (NYRI) withdrew its petition with the New York Department of Public Service for a certificate of approval of the proposed facility, and the New York Department of Public Service granted the request for withdrawal, with prejudice. See Letter to Leonard H. Singer from Jaclyn A. Brilling, Secretary, New York Department of Public Service (Apr. 21, 2009). Thus, even if the pendency of the application with the New York Department of Public Service might once have given rise to a live, ripe controversy concerning a possible siting in New York, there is no such controversy now.

fore is similar to *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142 (2009). In *Summers*, the Court held that a group of environmental organizations lacked standing to challenge a Forest Service regulation exempting certain projects from notice-and-comment procedures. *Id.* at 1147-1148. In reaching that conclusion, the Court emphasized that the organizations had identified no actual "application of the * * * regulations that threatens imminent and concrete harm to the interests of their members." *Id.* at 1150. Much the same is true here, since FERC's interpretation of Section 824p will have no concrete effect on respondents unless and until a party seeking to build a transmission line applies for a state permit, the State denies a permit, the party applies to FERC for a permit, and FERC decides to grant a permit to construct a transmission facility in a location and manner that adversely affects the interests of one or more respondents. For similar reasons, respondents did not establish that they were "aggrieved" by the order that contained FERC's statutory interpretation, which is a requirement for invoking the jurisdiction of the court of appeals under 16 U.S.C. 825*l*(b).

Alternatively, the problem raised by the nature of respondents' challenge in this case may be conceptualized as one of ripeness. The statements in FERC's order concerning the interpretation of Section 824p(b)(1)(C)(i) "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). None of those consequences would occur unless and until FERC issued a permit (following a

state denial of approval) for a transmission facility in a location that would have a concrete impact on respondents' legally cognizable interests. FERC's interpretation therefore was not ripe for judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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