In re: Miscellaneous and General Requirements

FLRA Docket No. 0–MC–33

Via email to: FedRegComments@flra.gov

January 20, 2023

Americans for Fair Treatment ("AFFT") submits this comment in response to the Federal Labor Relations Authority's ("FLRA") Notice of Proposed Rulemaking ("NPRM") proposing recission of or changes to its governmentwide regulation at 5 C.F.R. § 2429.19. 87 Fed. Reg. 78014–17. AFFT, on behalf of itself and its members, opposes FLRA's proposed changes because they would substantially curtail federal employees' rights—for whose primary benefit and convenience the Federal Service Labor Relations Management Statute ("FSLRMS") was crafted by Congress[1]—and in the process violate the United States Constitution and the FSLRMS. In the alternative, if FLRA is going to require an annual window period for revocation of dues deduction authorizations, it should honor employee free choice as much as possible and prescribe by regulation that the window be uniform across the federal government, coterminous with "Open Season" for health insurance and other benefits, and affirmatively and clearly put to employees in the same way (*i.e.*, asking them whether they wish to have union dues continue to be deducted from their pay for the year ahead and disclosing the cost).

I. AFFT's and Its Members' Interest in FLRA's Proposed Rulemaking

AFFT is a national non-profit organization that offers a free membership program to public employees and helps them to understand and exercise their constitutional rights (including under the First and Fifth Amendments) in the context of a unionized workplace. AFFT serves federal employees nationwide, a significant

[1] *Am. Fed'n Gov. Emps., Council 214 v. FLRA*, 835 F.2d 1458, 1460 (D.C. Cir. 1987) ("The Statute clearly was designed for the primary benefit and convenience of the employee."); 5 U.S.C. § 7101(a)(2) ("[T]he public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government. Therefore, labor organizations and collective bargaining in the civil service are in the public interest.").

number of whom are AFFT members. AFFT's members would be harmed if FLRA completed its rulemaking as proposed.

II. FLRA's Proposed Rulemaking Violates AFFT's and its Members' Due Process and Administrative Procedure Act Rights

FLRA's NPRM is expressly in response to and wholly predicated on a petition it received from the National Treasury Employees Union ("NTEU"). 87 Fed. Reg. 78014. NTEU's petition was docketed by FLRA at 0–MC–33, the same docket where this comment was required to be submitted. *Id.* However, that docket is not public, and FLRA did not otherwise publish NTEU's petition. Neither has NTEU published its petition. But FLRA's NPRM briefly summarizes NTEU's positions set forth in its petition and seeks comments on "these proposals." *Id.* at 78015. Even as summarized, "these proposals" are based on complex assertions of law and fact—including alleged Congressional intent. *Id.* It is totally unfair, and violates AFFT's and its members' due process and Administrative Procedure Act ("APA") rights, to require comment on detailed "proposals" that they cannot review—AFFT and its members lack a fair opportunity to comment.

"The most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation." *Owner–Operator Indep. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (cleaned up); *see also, e.g.*, *Time Warner Ent. Co., L.P. v. FCC*, 240 F.3d 1126, 1140 (D.C. Cir. 2001) (cleaned up) ("An agency cannot rest a rule on data that, in critical degree, is known only to the agency.") (cleaned up); *Am. Coke & Coal Chemicals Inst. v. EPA*, 452 F.3d 930, 938 (D.C. Cir. 2006) ("Under the APA, notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."); *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1265 (D.C. Cir. 2020) ("A procedural due process violation under the Fifth Amendment occurs when a government official deprives a person of property without appropriate procedural protections—protections that include, at minimum, the basic requirements of notice and an opportunity to be heard.").

Further compounding its threshold substantive failure, FLRA has provided only 30 days for the public to comment on its NPRM proposing changes to a governmentwide rule affecting millions of federal employees—and not explained the exigency. 87 Fed. Reg. 78014. The comment period began on December 21, 2022, and

overlapped with ***three*** federal holidays (Christmas Day, New Year's Day, and Birthday of Martin Luther King, Jr.). *See Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 819 (N.D. Cal. 2020) ("First, thirty days for a rule of this magnitude, both in terms of the changes proposed and the importance of the subject matter, is already short. That the comment period spanned the year-end holidays shortened the period further still and undercut the purpose of the notice process to invite broad public comment."). FLRA's comment period is just one-third of the "usual 90 days" allowed for public comment. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) ("The APA requires that the public have a meaningful opportunity to submit data and written analysis regarding a proposed rulemaking. 5 U.S.C. § 553(c). Yet, commenters did not have sufficient time to do so after the Op–Ed/Press Release. The Chairman gave only 28 days for response, not the usual 90 days.").

Based on this, it appears FLRA has designed the comment period expressly to prevent the receipt of substantive public comment—and has done so despite that it lacks a third board member and so as a practical matter ***cannot*** finalize a rule until one is nominated and confirmed by the Senate (many months from now, at least).[2] 87 Fed. Reg. 78016 (former Chairman Kiko, dissenting). It therefore appears that FLRA has prejudged the outcome of this rulemaking process. "Allowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether. Indeed, if the public perceives that the agency will disregard its comments, there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter." *Nehemiah Corp. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008); *see also Ass'n Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) ("Accordingly, a Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.").

III. NTEU's Proffered Justifications for Rescinding FLRA's Governmentwide Rule Are Divorced from Reality

FLRA's summary of NTEU's position says it would be "more efficient" if federal employees were permitted to revoke their dues deduction authorizations (and in practice resign their union memberships) only once per year instead of "one by [*sic*] throughout the year." 87 Fed. Reg. 78015. This position is puzzling because the processing of agency dues deduction authorizations happens with OPM Standard

[2] Erich Wagner, *The Federal Labor Relations Authority Is Now Ideologically Deadlocked After Its Chairman's Term Expired*, GOV'T EXEC. (Jan. 4, 2023), https://www.govexec.com/workforce/2023/01/flra-now-ideologically-deadlocked-after-chairmans-term-expired/381439/ [https://perma.cc/G2G4-NA3X].

Form 1188 and requires employee and agency, but not union, action. *Cf. AFGE,* 835 F.2d at 1461 ("The union has no role in negotiating the checkoffs, and the withholding employer acts solely as the employee's agent.").

To the extent unions have negotiated with agencies to permit union officials to exercise control over the SF-1188 by not allowing it to be processed until a union official signs it (typically after requiring the resigning employee to have an unwanted and First Amendment offending conversation with a union official[3]), this is unnecessary red tape, not contemplated by the face of the SF-1188 (which does not contain a box for a union official signature, unlike its counterpart SF-1187, which does), and violates the First Amendment and the FSLRMS (5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity . . . ."). FLRA should not countenance this conduct and should appreciate that the SF-1188 allows an employee to engage in free exercise to dissociate from a union at the time of his or her choosing, and that it is an agency-employee only transaction. *Cf. AFGE,* 835 F.2d at 1460 ("The employee has the right to decide whether to opt for withholding and to control the disposition of the funds so withheld. The employer acts as the agent of the employee with respect to the withheld funds.").

Further, the FSLRMS expressly requires agencies to process union dues deauthorizations throughout the year: 1) whenever an employee leaves the applicable bargaining unit; and 2) whenever an employee is suspended or expelled from union membership. 5 U.S.C. § 7115(b). Congress thus has already decided that an efficiency argument in this context is a non-starter. Moreover, the argument is being made by a wrong (and conflicted) party—if anyone wants to complain about the efficiency aspects of FLRA's current regulation, it should be agencies.

FLRA's summary of NTEU's position next says that rescinding its current rule to allow employees to revoke dues deduction authorization "only at one-year intervals" would "restore unions' bargaining posture." 87 Fed. Reg. 78015. The apparent thinking is that unions previously negotiated with agencies to severely restrict when employees could stop financially subsidizing union speech (and in effect

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[3] *See, e.g.*, *National Collective Bargaining Agreement Between U.S. Customs and Border Protection and NTEU*, https://www.opm.gov/cba/api/documents/47ff2115-7d9c-e911-915b-005056a577c8/attachments/3556_DHS%20CBP%20&%20NTEU_CBA_09302023-%20redacted.pdf [https://perma.cc/9SF6-8V6X], art. 25, sec. 9.B ("Revocations may only be effected by submission of a completed Standard Form 1188 that has been initialed or signed by the Chapter president of [*sic*] his designee so that the Chapter can discuss with the employee the reason for the revocation.").

resign union membership), FLRA's current regulation removes the discretion to bargain over that issue, and so that leaves unions with little to do. *Id.* ("[F]ederal sector unions 'have little to bargain over in the first place.'"). FLRA's purpose is not to expand unions' "bargaining posture" to the detriment of the members they represent so they can trench on their statutory and constitutional rights to refrain from union activity. FLRA, *Mission*, https://www.flra.gov/about/mission#:~:text=Mission%3A%20Protecting%20rights%20and%20facilitating,Service%20Labor%2DManagement%20Relations%20Statute. [https://perma.cc/5RFR-CMKV] (last visited Jan. 20, 2023) ("Mission: ***Protecting rights*** and facilitating stable relationships among federal agencies, labor organizations, and employees . . . .") (emphasis added). And no doubt the FSLRMS gives unions plenty to do (indeed, requires them to do) if they are so inclined. *E.g.*, 5 U.S.C. § 7116(b)(5) (unfair labor practice for union to fail negotiate in good faith about changes to working conditions).

Next, FLRA's summary says that NTEU believes restricting an employee from resigning from and deauthorizing union dues deductions to brief one-year intervals would "honor employee choice." 87 Fed. Reg. 78015. This is doublethink. Substantially restricting an employee from exercising his or her free choice to disassociate from a union "at any time that the employee chooses" (language from FLRA's current regulation) is the opposite of honoring his or her free choice.[4] And although the SF-1187 says in tiny print that completing it is "voluntary," it nowhere discloses that it is irrevocable for at least one year, and its language about when and how to complete an SF-1188 is about as clear as mud ("Such cancellation will not be effective, however, until the first full pay period which begins on or after the next established cancellation date of the calendar year after the cancellation is received in the payroll office."). In practice, federal employees are often held to unwanted union membership and involuntary dues deductions for years in violation of their rights.

[4] FLRA describes NTEU's position that SF-1187 is a "contract" and discusses its related reliance on *Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020). 87 Fed. Reg. 78015. This is a red herring. The court there found, on a summary judgment record, the existence of an enforceable, private contract between a union and union members with respect to dues deduction and noted the significant fact that the public employer "had no say in shaping the terms of that agreement." *Belgau*, 975 F.3d at 947. The SF-1187, on the other hand, is drafted by OPM—not a union—is supposed to be standard across the government and is in no sense a contract between a union and a federal employee. *AFGE*, 835 F.2d at 1460 ("The employee has the right to decide whether to opt for withholding and to control the disposition of the funds so withheld. The employer acts as the agent of the employee with respect to the withheld funds.").

FLRA's current regulation as written does much to help mitigate this.[5] 87 Fed. Reg. 78016 (the current regulation "assures employees the fullest freedom in the exercise of their rights.").

Finally, FLRA summarizes NTEU's position that there has been "little reliance" on FLRA's current regulation for various reasons, so it would be a "virtually seamless transition" back to the old days of restricting employee freedom. 87 Fed. Reg. 78015. As former Chairman Kiko pointed out in her dissent, this argument is disingenuous at best because NTEU simultaneously claims that the current regulation is causing unions significant harm but is hardly in use. 87 Fed. Reg. 78016. To be sure, in AFFT's experience there has been significant resistance to implementing FLRA's current regulation because unions appear to be able sidestep at will most new governmentwide regulations for even decades by failing to negotiate new collective bargaining agreements, *see* 5 U.S.C. § 7116(a)(7). A better future course for FLRA is to maintain its current regulation and require that it be implemented governmentwide immediately because it is not only enforcing federal employees' mandatory constitutional and statutory rights but is stopping the coercion of their political activities (which means it is applicable to pre-existing collective bargaining agreements). 5 U.S.C. § 2302(b)(3).

IV. FLRA's Reasoning Is at Odds with the FSLRMS and Its Legislative History

5 U.S.C. § 7115(a) says that dues deduction authorizations "may not be revoked for a period of 1 year." FLRA previously understood this to mean that dues deduction authorizations "may be revoked only at intervals of 1 year"—even after the first year. *U.S. Army Materiel Dev. & Readiness Command, Warren, Mich.*, 7 FLRA 194, 199 (1981); *but see Off. Pers. Mgmt.*, 71 FLRA 571 (2020) ("Except for the limiting conditions in § 7115(b), which § 7115(a) explicitly acknowledges, nothing in the text of § 7115(a) expressly addresses the revocation of dues assignments after the first year."). Neither the plain language of the statute nor the legislative history supported FLRA's interpretation to which it proposes to revert.

Prior to Congress passing the Civil Service Reform Act of 1978, Executive Order 11491 governed the procedures for dues deduction authorizations. Exec. Order No. 11,491, 34 Fed. Reg. 17605 (1969); *see also* Exec. Order No. 11,616, 36 Fed. Reg.

[5] To be sure, AFFT objects to the language in the current regulation indicating that union members may not deauthorize dues deductions for one year after authorizing them but understands that it is required by statute. 5 C.F.R. § 2429.19 (citing 5 U.S.C. § 7115(a)). AFFT believes that 5 U.S.C. § 7115(a) is unconstitutional in violation of the First Amendment and Fifth Amendment.

17319 (1971) (amending Executive Order No. 11,491). It explicitly permitted employees to revoke their dues deduction authorizations only at "six-month intervals." *Id.* sec. 21. Use of the term "intervals" there unambiguously indicated that employees could stop their dues deductions only at certain, recurring periods. Similarly, the legislative history of the early stages of crafting the relevant section of the Civil Service Reform Act of 1978, 5 U.S.C. § 7115, shows that the Senate bill mirrored the Executive Order's language and provided that dues deduction authorizations "shall be revocable at stated intervals of not more than 6 months." Civil Service Reform Act of 1978, S. 2640, 95th Cong. § 7231(a) (1978).

But Congress chose ***not*** to include this language—specifically the term "interval" or anything like it—in the final statute. 5 U.S.C. § 7115(a); H.R. REP. NO. 95-1717, at 155 (1978) (Conf. Rep.). Instead, 5 U.S.C. § 7115(a) provides for a one-time period of a year during which dues deduction authorizations are irrevocable. There is no use of the term "interval" and otherwise no mention of recurring periods after one year. *OPM*, 71 FLRA at 572. Thus, FLRA may not interpret that one-year initial period of irrevocability to be, to include, or to authorize annual window of revocability; it is plainly contrary to the statute, and there is no ambiguity. The legislative history shows that if Congress meant to restrict employees' deauthorizations to yearly intervals (or some other period), it would have explicitly done so by using the term "intervals," as it has done in the past. *See* A. Scalia & B. Garner, Reading Law 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."); 124 CONG. REC. H9617–9703, at H9625 (daily ed. Sept. 13, 1978), *reprinted in* COMM. ON POST OFF. & CIV. SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1033 (1 vol. 1979) ("Under the voluntary dues withholding system, allotments are revokable at 6-month intervals. Both of these provisions are identical to our current program. The committee bill and the Udall substitute, on the other hand, depart from our current program by requiring an agency to deduct dues at the request of an exclusive union. Allotments would be irrevocable for 1 year . . . .").

Moreover, it is undisputed that 5 U.S.C. § 7115 "clearly was designed for the primary benefit and convenience of the employee," *AFGE*, 835 F.2d at 1460—"not the union." 85 Fed. Reg. 41170 (2020). Its focus is on employees' "right to decide whether to opt for withholding and to control the disposition of the funds so withheld," *AFGE*, 835 F.2d at 1460, so it is proper to "weigh the employees' interests more heavily" than unions' interests "in having revocation procedures with minimal administrative burdens." 85 Fed. Reg. 41170 (2020). The legislative history shows that 5 U.S.C.

§ 7115 has always been aimed at supporting employees' freedoms. H.R. REP. NO. 95-1403, at 48, *reprinted in* COMM. ON POST OFF. & CIV. SERV., 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 685 (1 vol. 1979) ("The decision to pay or not to pay is solely the employee's."). NTEU's argument that the NPRM would "restore financial security and predictability" for unions subordinates employee interests to union interests and is thus at odds with Congressional intent.

V. A Return to Annual Window Periods Would Violate the Constitution and the FSLRMS

Leaving aside that FLRA lacks authorization to interpret the FSLMRS to permit one-year window periods after federal employees' first year of dues deductions, these window periods violate employees' rights under the United States Constitution and the FSLMRS.

First, public employees have a First Amendment right to choose whether (or not) to associate with and to financially support a union. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."). That right includes the ability to change one's mind and to dissociate from a union. *See id.* at 2463; *see also Debont v. City of Poway*, No. 98CV0502-K, 1998 WL 415844, at *6 (S.D. Cal. April 14, 1998) ("[A]t the heart of the First Amendment . . . is the freedom to associate, the freedom not to associate, and ***all of which inherently also involve the freedom to change one's mind***.") (emphasis added).

FLRA's NPRM seeks to prohibit a union member from ceasing his financial support of the union (and in practice resigning his membership) except after one year of union membership and then during only a brief period once a year.[6] It clearly would

[6] To add insult to injury, it can be exceedingly difficult to ascertain these window periods because they often are made relative to the date on which the employee initially became a union member, a fact typically opaque to them, and by reference to a voluminous collective bargaining agreement. *See, e.g.*, *Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees*, http://afgenvac.org/wp-content/uploads/2021/10/Master_Agreement.pdf [https://perma.cc/S6KH-AND8] (last visited Jan. 20, 2023), art. 45, sec. 6(A) ("An employee may revoke dues withholding only once a year, by submitting a timely SF-1188 to the local union representative . . . . during the 10 calendar days ending on the anniversary date of his/her original allotment."); *see also* 87 Fed. Reg. 78016 ("When the Authority very recently solicited public comment on this regulation, we heard from employees who were frustrated with narrow form-submission windows occurring on indecipherable anniversary date."). To comply with these window

violate the First Amendment. As Member Abbott explained in detail in *OPM*, FLRA's current regulation is required by Supreme Court precedent: "The Court's decision in *Janus* leads me to one conclusion – once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be 'freely given' and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding – for whatever reason – to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights." *OPM*, 71 FLRA at 575*; see also Janus*, 138 S. Ct. at 2486 ("[B]y agreeing to pay [union dues], [employees] are waiving their First Amendment rights, and such a waiver cannot be presumed . . . [and] must be freely given."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

Second, the FSLRMS guarantees employees the right to refrain from labor union activity. 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."). Similar to how they violate employees' First Amendment right to choose whether to associate with and support a union, annual window periods violate employees' right to refrain from union activity by compelling them to financially support a union for months or years (and in practice to remain union members).

Third, the Takings Clause of the Fifth Amendment prevents the government from acquiring private property for a public use without providing just compensation to the property owner. *Cedar Point Nursey v. Hassid*, 141 S. Ct. 2063, 2071 (2021). This prohibited conduct is precisely what federal employers are doing by continuing to withdraw funds from employees' paychecks, at the behest of the union, even after those employees have explicitly withdrawn their dues deduction authorizations. *Brown v. Legal Found.*, 538 U.S. 216, 240 (2003) (seizure of money from lawyers' trust accounts constitutes a taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 448 U.S. 155, 164–65 (1980) (seizure of money from funds held by the Florida courts in an interpleader account constitutes a taking). And it is made possible by annual window periods alone.

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periods, employees must be able track when they initially became union members, decipher a collective bargaining agreement, and submit their resignation requests consonantly. And missing the "window" by just one day—perhaps by being out sick—means having to wait another almost twelve months to resign and thus being forced to associate with and financially support the union until then.

VI. If FLRA Is Going to Require Annual Window Periods, It Should Honor Employee Choice by Making Them Uniform Across the Government, Clearly Messaged, and User Friendly

FLRA's summary of NTEU's proposal says that NTEU believes that "temporarily irrevocable payment authorizations are common and enforceable in other contexts." 87 Fed. Reg. 78015. FLRA says NTEU cited to a case about health insurance premium payroll deductions and a case about "consumer contracts" to support the point. Whatever the merits of those cases, if FLRA decides that it is going to permit window periods for federal employees to dissociate from unions, it should adopt NTEU's analogy about health insurance and make those window periods as best conform with honoring employee choice as they possibly can be. The best, most transparent, and user-friendly way to do so would be to include these window periods within the well-tread apparatus of "Open Season" that already exists for federal employees to make annual elections about benefits.

1. OPM should include information about joining and resigning from union membership in its Open Season website: https://www.opm.gov/healthcare-insurance/open-season/. It should also include related information in its annual Federal Benefits Open Season handbook (*e.g.*, 2022 handbook: https://www.opm.gov/healthcare-insurance/healthcare/reference-materials/federalbenefitsopenseasonhighlights.pdf).

2. When Open Season becomes available to federal employees each year, the mechanism by which they can select changes to or refuse other benefits (particularly health benefits such as via SF-2809) should include questions about union membership and dues deduction.

    a. The questions put to every employee should be: (1a) whether they want to join the relevant union if a nonmember, (1b) whether they want to leave the union if they are currently a member; and (2a) whether they want to authorize payroll deductions for union dues if not currently being deducted, (2b) whether they want to de-authorize payroll deduction for union dues if currently being deducted.

3. Just like with health insurance, the Open Season documents should clearly disclose to employees the cost of union dues deductions, including what would be deducted from their paychecks for union dues during the year ahead if they choose that option (both on a bi-weekly and annual basis). Accordingly for example if bi-weekly dues would be $25, the form should say so and explain that the annual cost is $650.

4. The form should also include an express, clearly worded disclosure that union membership is completely voluntary and is not a condition of federal employment.

5. The annual time to complete the union Open Season form should be coterminous with the time to complete health insurance and other benefit elections (for example, the last open season was November 14–December 12, 2022).

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Respectfully submitted,

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