No. 05-1126

In The Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 15 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

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INTERESTS OF AMICI

The Commonwealth of Virginia and the States of Alabama, Colorado, Idaho, Indiana, Kansas, Michigan, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah ("States") have two distinct interests. First, the States have a critical interest in reducing costs associated with unfounded lawsuits. Businesses in the United States face the highest legal costs in the industrialized world.[1] Antitrust litigation is particularly expensive. A significant reason for the costs associated with antitrust is the expense of conducting discovery. The pleading standard articulated by the Second Circuit essentially eliminates the use of motions to dismiss in cases involving parallel conduct. By guaranteeing discovery in such cases, the standard adopted by the court below will encourage plaintiffs to file first and investigate later. Given the staggering costs associated with discovery in such lawsuits, businesses will be prompted to settle, even at a high cost, to avoid even higher discovery costs. These expenses ultimately will be passed on to consumers. Furthermore, the States are among the chief enforcers of antitrust law. As such, they have a compelling interest in ensuring sound antitrust jurisprudence.

Second, the States have an interest in ensuring that minimal pleading standards are maintained in the federal courts. States and state officials must constantly defend a

[1] According to the Office of Management and Budget, "[t]he costs of litigation per person in the United States are far higher than in any other major industrialized nation in the world. Lawsuit costs have risen substantially over the past several decades, and a significant part of the costs go to paying lawyers' fees and transaction costs – not to compensating the injured parties." Available at http://www.whitehouse.gov/omb/budget/fy2006/promoting.html.

host of complex cases in federal courts. Although the Second Circuit's decision seems to be limited to the narrow area of antitrust law, lower courts will be tempted to extend its rationale to a variety of other areas including civil rights, election law, and environmental matters. If allowed to stand, the Second Circuit's decision, in the long term, risks a weakening of the already low threshold for notice pleading and a corresponding increase in expenditures of limited taxpayer funds defending needless litigation.

By filing this Brief in Support of the Petitioners, the States urge this Court to confirm that the rules of pleading are not an invitation for filing lawsuits that fail to state a legal wrong or for embarking on "fishing expeditions." Overturning the Second Circuit's decision will not hamper the pursuit of meritorious claims that are based upon provable allegations of fact. Reversing the Second Circuit will ensure that the States, businesses, and the federal courts are not burdened with lawsuits based on speculation and innuendo.

SUMMARY OF ARGUMENT

In urging this Court to reverse the Second Circuit, the States make two points.

First, under the plain text of Rule 8 of the Federal Rules of Civil Procedure, the Respondents' allegations cannot survive a motion to dismiss. A complaint that does not allege illegal conduct falls short of the minimum required by the Rule. Therefore, requiring a plaintiff to allege facts that demonstrate a violation of the law, *i.e.*, that the plaintiff is entitled to relief, is fully consistent with the text and spirit of Rule 8. That showing can be made by alleging either facts that establish that the defendants' conduct was contrary to

their own independent self-interest or threshold facts regarding the existence of the conspiracy. Furthermore, a conclusory allegation of a conspiracy does not provide a defendant with "fair notice." A defendant is left to guess which of the thousands of employees conspired, when, and with whom. Without such pleading requirements, there is no incentive to base such lawsuits upon fact. The enormous costs in time and money associated with antitrust discovery will force many defendants to settle these lawsuits, even when they have no merit. Imposing extensive costs on businesses and consumers in these circumstances does not comport with the "substantial justice" that Rule 8 demands from all pleadings.

Second, requiring a minimum level of factual detail in a complaint to show the existence of a conspiracy will not harm state antitrust enforcement. While the States recognize that overly stringent pleading requirements are undesirable, parallel conduct cases require something more than bald assertions that hint at the possibility of illegal behavior. State antitrust enforcement remains effective in those circuits that require something more than mere allegations of illegal conduct coupled with a conclusory allegation of a conspiracy.

ARGUMENT

I. UNDER THE PLAIN TEXT OF RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE PLAINTIFFS' ALLEGATIONS CANNOT SURVIVE A MOTION TO DISMISS.

A. Rule 8 Requires a Showing That the Plaintiff "Is Entitled To Relief" – and Without Factual Allegations that Show Either Behavior Contrary to the Defendants' Independent Self-Interest or Factual Assertions Directly Showing the Existence of a Conspiracy, a Plaintiff Fails to Show He is Entitled to Relief.

Rule 8 of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Obviously, actions that are more complex require more complex pleadings to show the plaintiff is entitled to relief. Indeed, "there is no heightened pleading standard in antitrust cases. On the other hand, the complexity of most antitrust cases inevitably leads to lengthier and more detailed pleadings." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1228 (3d ed. 2004). Thus, in antitrust cases involving allegations of parallel conduct, plaintiffs must allege and prove "plus factors" – circumstances that, in combination with parallel behavior, show illegal conduct.[2] *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2nd Cir. 2001); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3rd Cir.

[2] For a discussion of these "plus factors," *see Antitrust Advisor* § 1:8 (4th ed. Irving Scher, ed. 2005). *See also Corporate Counsel's Antitrust Deskbook* § 1.029-1.050 (2005).

1999); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995). The crux of such a requirement is that the plaintiff must show that the defendant acted in a fashion that is contrary to independent self-interest.

However, the lower court's decision abolishes the need to allege such facts. *Twombly v. Bell Atlantic Corp.,* 425 F.3d 99, 114 (2nd Cir. 2005) (*Twombly II*). Since a plaintiff in an antitrust case could not rest his case without either (1) establishing conduct contrary to a defendant's independent self-interest, which would circumstantially show the existence of a conspiracy, or (2) minimal facts directly showing the existence of a conspiracy, a pleading that proceeds to discovery without such allegations fails to show the pleader is entitled to relief.

By permitting a plaintiff to proceed to discovery with allegations that do not show any illegal conduct, the Second Circuit set a floor well beneath the minimum required by the plain text of Rule 8. *Cf. Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 346 (2005) (plaintiff claiming securities fraud must allege the elements of a viable cause of action to satisfy Rule 8(a)(2)). This is not a heightened pleading standard for antitrust cases. Rather, it is a standard inherent in the nature of a parallel conduct case, which must be premised on something other than legal conduct. The Respondents' allegations do not tend to exclude independent, self-interested conduct as an explanation for the defendants' parallel behavior. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (antitrust plaintiff must provide "evidence that tends to exclude the possibility of independent action by the [defendants]"). The complaint alleges: (1) that the defendants have failed to compete with each other; (2) that they have sought to thwart competing local exchange carriers

(CLECs); (3) that the defendants have had opportunities to communicate with each other; and (4) that various quotes gleaned from Congressmen or from an executive for Qwest Communications indicate conspiratorial behavior. Even accepting the Respondents' *factual* allegations as true, the facts alleged fail to raise any inference of conspiratorial conduct.

Indeed, similar factual assertions could be raised against much permissible economic activity. For example, a complaint might allege that law firms in a given area have opportunities to communicate through bar associations; that the law firms often offer suspiciously comparable pay and benefits packages for an entering class of associates; that their billable hour structure is similar; that the firms have failed to open satellite offices in certain cities, even though they have an arguable interest in doing so; and that their conduct has manifested hostility towards new law firms. Nor would it be especially difficult to locate or generate quotes that arguably hint at anti-competitive conduct. Such assertions, similar to those in the Respondent's complaint, would not show any illegal behavior.

"Antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Furthermore, an inference of conspiracy will not arise from "conduct that is as consistent with permissible competition as with illegal conspiracy." *Id*. Therefore, requiring a plaintiff to allege a viable theory of recovery from the outset does not impose an excessive burden. A court "must assume that the [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the [plaintiff] can prove facts that it

has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983). The district court properly dismissed the amended complaint because the plaintiffs did not allege any facts showing the existence of illegal conduct.

B. The Complaint at Issue Fails to Provide Fair Notice to Petitioners.

While the federal rules of pleading are liberal, they do require a plaintiff to provide a defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Whether in civil or criminal cases, a bedrock principle is the requirement that a complaint or indictment sufficiently inform the defendant of what he must be prepared to meet. *Id. See also Russell v. United States*, 369 U.S. 749, 763-64 (1962).

The Respondents' allegations in this case fail to provide even a minimum foundation of fact to demonstrate the existence of a conspiracy. In their complaint, the Respondents allege that *every* incumbent local exchange carrier (ILEC) has conspired "[b]eginning at least as early as February 6, 1996" to the present day. J.A. at 30, ¶ 64. Such a pleading, which essentially alleges that all defendants conspired all the time, neither provides the defendants with any reasonable notice of the claim, nor does it show that the allegations rest upon any factual ground. As the district court correctly noted, "there is simply no way to defend against such a claim without having some idea of how and why the defendants are

alleged to have conspired." *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003) (*Twombly I*).

"It is not enough to indicate merely that the plaintiff has a grievance but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery." *Davis v. Passman,* 442 U.S. 228, 238 n.15 (1979). Respondents' amended complaint fails this basic test.

C. Allowing Insubstantial Pleadings to Go Forward is Wasteful and Expensive for Both Defendants and the Courts.

The Second Circuit held that a plaintiff need not plead plus factors in parallel conduct cases and that a complaint cannot be dismissed unless "no set of facts [exists] that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Twombly II*, 425 F.3d at 114. If this standard is affirmed, motions to dismiss even the most groundless antitrust cases will be denied. A plaintiff would usually be able to argue that there may be such a set of facts out there that, though not alleged, might be uncovered. Thus, groundless cases ineluctably will be propeled into the discovery phase. Such exercises in futility place an unnecessary burden on already overtaxed district courts to hear the inevitable discovery disputes that arise in cases of this magnitude.

The costs associated with discovery in antitrust cases, as the Second Circuit recognized, are "colossal." *Twombly II*, 425 F.3d at 117. *See also* 6 James W. Moore & Patrick E. Higginbotham, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2006) (describing antitrust discovery as a

"bottomless pit"). *Cf. In re Baby Food Antitrust Litig.*, 166 F.3d at 117 (discovery process lasted three years). Due to the nature of antitrust litigation, countless managers and nearly every document and email in the vast corporate inventory might be relevant or might lead to relevant evidence and thus become a subject of discovery. The Second Circuit acknowledged that its holding would "likely lead defendants and plaintiffs to settle what would ultimately be shown to be meritless claims" and, further, that "the success of such meritless claims encourages others to be brought." *Twombly II*, 425 F.3d at 117. This Court should not adopt a standard that results in staggering costs on business and consumers and imposes unnecessary burdens on the judiciary, all without any corresponding benefit to the marketplace.

The Second Circuit erroneously believed its hands were tied by the Rules of Civil Procedure. However, Federal Rule of Civil Procedure 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Requiring a plaintiff to (1) provide more than conclusory allegations of wrongdoing at the outset and (2) allege a minimum of fact to show a likelihood that the defendants conspired, – that is to say, plead the basic elements of an antitrust case – does not impose an unduly rigorous standard. Moreover, such a standard comports with "substantial justice."

D. This Court's Decisions Have Not Addressed the Allegations Required in "Parallel Conduct" Cases.

Cases addressing pleading requirements are legion. However, an examination of this Court's decisions shows that (1) the pleadings at issue all stated viable causes of

action, rather than the *mere possibility* of a cause of action, and (2) the allegations sufficed to provide notice to a defendant. Moreover, this Court has never addressed the threshold minimum showing that must be made in a "parallel conduct" case.

In the antitrust case *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232 (1980), the plaintiffs alleged that real estate firms and trade associations in Louisiana had conspired to fix commission rates, split fees, and suppress market information. *Id.* at 235. The issue on appeal centered on the allegations necessary to establish a "nexus between the defendants' activity and interstate commerce." *Id.* at 246. The plaintiffs set forth detailed allegations showing the interstate impact of the transactions, including the fact that financing and insurance for the transactions were obtained outside of Louisiana, that the transactions involved persons moving in and out of Louisiana, and the impact of the alleged conspiracy on Veterans' Administration-insured loans. *Id.* at 235-37. The Court concluded that the plaintiffs' allegations established federal jurisdiction. *Id.* at 245. *See also Hospital Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 744 (1976) (allegations in complaint sufficed to establish a substantial effect on interstate commerce for purposes of the Sherman Antitrust Act); *United States v. Employing Plasterers' Ass'n,* 347 U.S. 186, 189 (1954) (same).

In *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 466 (1962), the Court concluded that the case should not have been dismissed at the summary judgment stage. In that case, the plaintiff alleged that in 1954, several specific individuals conspired to drive a television station out of business to protect its VHF format from the threat posed by UHF broadcasting. *Id.* at 465-67. Those allegations contrasted markedly with the allegations in the case

at hand. The plaintiff in *Poller* detailed specific conduct by specific actors within a specified time frame. *Id.* at 466.

In *Radovich v. National Football League,* 352 U.S. 445, 453 (1957), the Court held that the complaint filed by a blacklisted football player sufficed to avoid dismissal. The complaint was premised on the use of a specific standard contract by the National Football League that prevented players from freely transferring to other clubs or leagues. *Id.* at 449. The plaintiff claimed that in 1948, the National Football League communicated with the San Francisco Clippers to prevent him from joining that club. *Id.* at 448-49. These allegations were precise enough to inform the defendant what conduct was being alleged, when and with whom, so as to enable the defendant to mount a defense.

More recently, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993), an action under 42 U.S.C. § 1983, the plaintiffs alleged that law enforcement officers violated their constitutional rights. Specifically, the plaintiffs complained of two discrete searches involving a forcible entry into their homes that occurred after the police detected odors associated with drug manufacturing. *Id.* This Court held it was error to impose a heightened pleading standard in such cases. *Id.* at 168. *Leatherman* offers the Respondents no support for two reasons. First, the allegations in *Leatherman* were sufficient to show that the conduct at stake was illegal and, second, the allegations were specific enough to allow defendants to know when and where the alleged conduct occurred. While there is no heightened pleading standard in parallel conduct cases, the very nature of the underlying wrong requires a plaintiff's allegations to show that there has been something other than simply economically rational behavior.

The lower court also relied upon *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506 (2002). In that case, the plaintiff "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514. This Court found these allegations sufficed to "give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." *Id.* Again, there can be no comparison to the conclusory assertion of a conspiracy in this case.

Although "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley*, 355 U.S. at 45-46, such a rule presupposes that the plaintiff indeed has set forth a valid claim. In the context of an allegation of conspiracy involving parallel conduct, a valid claim must include a showing that the defendant acted contrary to independent self-interest or some modicum of fact directly proving the existence of a conspiracy. In other words, a complaint founded on parallel conduct must clearly and unambiguously allege a wrong, either circumstantially or directly, rather than the mere possibility of a wrong.

This Court has not hesitated, even under the liberal notice pleading standard, to dismiss cases when they failed to state a valid claim. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 412 (2004) (complaint alleging telephone companies' failure to share their network dismissed for failing to state a claim under antitrust law); *Dura Pharms.,* 544 U.S. at 347 (Complaint should have been dismissed because plaintiff failed to plead the elements of a cause of action

and because pleading did not "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.").

II. REQUIRING A MINIMUM OF DETAIL IN A COMPLAINT TO SHOW THE EXISTENCE OF A CONSPIRACY WILL NOT HARM STATE ANTITRUST ENFORCEMENT.

Parallel conduct is a common phenomenon: gas stations raise and lower their prices based on the actions of their nearby competitors; and competing law firms set similar salaries for an entering class of associates, not because they are a part of an elaborate plot but because they have responded independently to obvious economic incentives. Without circumstantial evidence of a conspiracy, or allegations showing direct evidence of a conspiracy, a complaint relying on parallel conduct fails to allege illegal behavior. Requiring that the plaintiff in conscious parallelism cases allege either conduct that is contrary to independent self-interest, or minimal facts demonstrating directly the existence of an actual conspiracy, will not hamper state enforcement of antitrust cases.

First, the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, does not prohibit unilateral conduct.[3] Conscious parallelism is the

[3] In this instance, the defendant telephone companies face competition from new telephone startup companies, from cellular telephones and from cable and internet based alternatives. Given these challenges and the limitations all economic actors face in human and financial capital, the telephone companies rationally chose to address the competition in these areas before straying into traditional telephone service outside of their home market. *See* Dina E. Boghdady, *Verizon Pursues Local Cable Franchises*, *Wash. Post*, July 19, 2005 at D4. Furthermore, telephone companies have an incentive unilaterally to

(Continued on following page)

"process, not itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Conscious parallelism is not unlawful because the Sherman Antitrust Act does not prohibit unilateral behavior. *Id.* (conscious parallelism is "not in itself unlawful."). Rather the Act prohibits "combination[s]" and "conspirac[ies]," 15 U.S.C. § 1, and proscribes "a combination or conspiracy to monopolize." *Id.* at § 2. "Conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962).

Second, States do not file complaints such as the one at issue in the case at bar. As the chief law enforcement officials of their States, State Attorneys General take seriously their obligation to investigate thoroughly suspected violations of antitrust law prior to the filing of a complaint. State Attorneys General fulfill their responsibility to investigate suspected antitrust violations prior to filing suit by issuing pre-complaint investigative subpoenas – commonly referred to as Civil Investigative Demands ("CIDs") in most states – to individuals and companies suspected of engaging in unlawful activity. CIDs allow State Attorneys General to compel the production of

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avoid entering the market of a rival because, obviously, any such entry would likely trigger a retaliatory market entry.

documents and testimony from suspected wrongdoers. State Attorneys General use the evidence obtained through the CID process to support civil actions they file on behalf of their States. There is thus no need for a State to file complaints that lack sufficient detail showing the evidence of a conspiracy.

Nor is there any indication that state enforcement of antitrust has been hampered in those circuits that require allegations of plus factors from the outset. *See DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (requiring plaintiff to allege "plus factors" or other facts in support of antitrust conspiracy claim); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (dismissing complaint for failing to allege any facts that would support an inference of conspiracy). Nor is there any evidence that antitrust enforcement was unduly burdened prior to the holding below when the Second Circuit adhered to a requirement that "a bare bones statement of conspiracy or of injury under the anti-trust laws without any supporting facts permits dismissal" of the complaint. *See Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2nd Cir. 1972).

Third, if this Court endorses the Second Circuit's overly permissive pleading standard, plaintiffs, knowing that they will at least proceed to the discovery phase, will have a powerful incentive to file more antitrust actions of questionable merit. This expansion of private antitrust litigation may have the unintended consequence of undermining well-considered state and federal policies in regulated fields like telecommunications. For example, state and federal regulatory agencies oversee the telecommunications industry and seek, *inter alia*, to facilitate

the transition of local telephone markets to competition. Of course, state and federal agencies provide similar oversight in many other industries. In *Trinko,* this Court specifically highlighted the importance of such regulatory structures in deterring anticompetitive conduct. 540 U.S. at 412.

Private antitrust enforcement operates in inherent tension with these regulatory structures. State and federal agencies have acquired a unique regulatory expertise in highly technical areas, which is not typically found in courts hearing private antitrust actions. Furthermore, regulatory policies and decisions may conflict with court decisions, creating uncertainty in those areas. Finally, regulatory agencies operate in the public interest, whereas private litigants seek to vindicate only their own narrower concerns.

In light of these tensions, the States caution this Court to be mindful of the effect upon regulatory systems that would be triggered by a significant increase in private antitrust enforcement. The consequences of unnecessary and unanticipated changes in the reach of antitrust law are difficult to predict. These uncertainties further counsel against the adoption of the ill-advised decision of the Second Circuit.

Finally, States also have a compelling interest in protecting their citizens, corporate or otherwise, from the prospect of unfounded costly lawsuits without any corresponding gain in marketplace competition.

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Second Circuit should be REVERSED.

Respectfully submitted,

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