International Municipal Lawyers Association



e-News: Issue 22 December 13, 2018

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In This Issue: 7 Cases

Employment: Termination of Public Employee with High-Level Budgetary Responsibilities is Justified under Elrod-Branti

Qualified Immunity: Municipality had Sufficient Probable Cause to Bring Arson Charges

Qualified Immunity: "Objective Reasonableness" Standard Applied to Deny Deliberate Indifference Claim

Sanctuary Cities: Colorado Court Permanently Enjoins 48-Hour ICE Holds Where Detainees Have Served Time or Posted Bond

Taxation: Driving Across State Line to Make Motor Vehicle Sale is Merely to Avoid Taxes and has no Legitimate Business Purpose

Trials: Belated Claim for Attorney's Fees Fails due to Claim Preclusion

Trials: Relation Back to Prior Pleading not Available Where Earlier Case was Dismissed

Quick Links

IMLA Website

Webinar Calendar

Municipal Jobs Board

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IMLA Podcasts

Employment: Termination of Public Employee with High-Level Budgetary Responsibilities is Justified under *Elrod-Branti*

Bogart v. Vermillion County, No. 18-1719 (7th Cir. Nov. 26, 2018).

A state employee with high-level responsibility for budget preparation and similarly significant matters could be fired based other political affiliation under the *Elrod-Branti* exception.

Nicole Bogart (Bogart) the Financial Resources Director of Vermilion County, Illinois (County) performed tasks such as ensuring that information about the County finances is available to the County Board, developing long and short-range financial plans, projecting revenue and expenditure, preparing the budget as well as review and control thereof. When several Republican candidates won seats on the County Board in 2012 her job appeared threatened - she is a Democrat - but she was not fired. In 2014, however, she was fired within a month after a new Republican Chairman of the Board took over. She filed suit alleging her firing constituted political retaliation and discrimination in violation of the First Amendment and Equal Protection Clause. The lower court disagreed, and she appealed.

The standard in this public employee arena derives from two Supreme Court cases - *Elrod* and *Branti* - comprising the now-familiar *Elrod-Branti* exception. While the general rule is that public employers cannot condition employment on an individual's political affiliation, this exception provides that employees can be dismissed from *positions where political loyalty* is a valid job qualification. The inquiry in this case is thus whether the public employer can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved, which could be because the job involves policymaking, providing political advice to an elected superior, or gives the employee access to political superiors' confidential, politically sensitive thoughts." The Court found Bogart's case relatively straight-forward: she reported directly to the County Chairman, kept the Board informed about County finances, developed long- and short-range financial plans, and prepared the County's annual budget and, in turn this meant she "held a senior position requiring the trust and confidence of the elected Board members . . . and entailing substantial policymaking authority." The court characterized municipal budgeting as the equivalent of "matters of foreign policy are at the national level" and found as the holder of a "cabinet-level position within Vermillion County" she fit well-within the *Elrod-Branti* exception. It affirmed the lower court holding that she could indeed be fired under the circumstances.

LINK

Qualified Immunity: Municipality had Sufficient Probable Cause to Bring Arson Charges

Muth v. Woodring, No. 17-3038 (3d Cir. Nov. 15, 2018).

The Third Circuit has upheld a lower court's finding that a county had sufficient probable cause to bring arson charges, even though the case was ultimately dismissed.

There was a fire at the property of Ronald Muth (Muth) in 2009 in Harrisburg, Pennsylvania (City). A detective from Dauphin County (County), Dennis Woodring (Woodring), and one from the City, Jeffery Schriver, investigated the fire - its potential ignition, foul play, and witnesses that may have seen something. They concluded arson was at play, and that a couch in the house was deliberately set alight. Muth was charged and ultimately the case was dismissed, prompting him to file suit alleging malicious prosecution by the officers and municipal liability against the County and City. The case was dismissed by the lower court, which granted qualified immunity to the investigators.

Muth's primary charge was that the officers arrested him without probable cause, but the interesting issue in the case is that Muth hinged that claim on the officers' "reliance on the negative corpus methodology for determining the cause of a fire because it does not identify who set the fire." The first consequence of this was that the court defined the clearly established right at issue as "the right not to be arrested for arson where probable cause to believe the individual committed the arson is based on the negative corpus methodology." It created quite a narrow right, to put it mildly. Second, it required the Circuit to dig into the validity of the fire investigation method used at the time in 2009, which had been *invalidated* by the National Fire Protection Association in 2011. Only after determining the legitimacy of using the technical fire investigation tool did the Court look at the facts supporting probable cause for arresting Muth - the specific individual involved - for the arson. It found there was probable cause because the elements of the crime required "(1) that there was a fire; (2) that it was of incendiary origin; and (3) that [the defendant] set the fire," and the officers' affidavit of arrest stated "(1) there was a fire deliberately set on a couch in the house Muth owned, (2) a neighbor saw a white man in a green t-shirt who drove a red truck at the house just before the fire, which matched the description of Muth's car

and the clothing he was wearing the night of the fire, (3) Muth stated that he was at the property to do maintenance and claimed he did not enter the house, and (4) Muth had difficulty selling the house and had since filed an insurance claim." The lower court was ultimately affirmed and the County and City were cleared of municipal liability.

LINK

Qualified Immunity: "Objective Reasonableness" Standard Applied to Deny Deliberate Indifference Claim

McCann v. Ogle County, No. 17-3139 (7th Cir. Nov. 30, 2018).

The Seventh Circuit applied its newly-derived "objective reasonableness" standard in upholding a lower court's denial of liability by a county and county officials in a methadone over-prescription case.

Patrick McCann (McCann) was detained and awaiting trial at the Ogle County (County) Correctional Center when he died from a doctor's over-prescription of methadone. His estate - via Valerie McCann- filed suit under § 1983 alleging deliberate indifference to Patrick's medical needs. The district court denied the claim, granting summary judgment to the County (and various county officials) because it found none of the individual defendants exhibited deliberate indifference to his medical needs.

The Seventh Circuit affirmed the lower court. What is noteworthy about the case, however, is that following the district court's decision, the Seventh Circuit decided *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. Aug, 10, 2018), in which it *replaced deliberate indifference with a standard requiring a showing of objective reasonableness for a claim challenging the medical care provided to a pretrial detainee.* The Seventh Circuit's ruling in *Miranda* - i.e. its decision to alter the long-standing deliberate indifference standard for pretrial detainees - was a direct result of the Supreme Court's *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which held that the due process standard for assessing a pretrial detainee's claim of excessive force should be "objective not subjective."

After *Miranda* was decided, Seventh Circuit analysts have predicted those practicing in the Circuit would not see a profound effect on litigation, and this test case seems to indicate just that. The Circuit in the current case (McCann's) summarized *Miranda* as requiring "a pretrial detainee . . . show that the defendant's conduct was objectively unreasonable, without any accompanying requirement to demonstrate, as would be the case in a claim brought under the Eighth Amendment's Cruel and Unusual Punishment Clause by an inmate serving a sentence, that the defendant was subjectively aware that the amount of force being used was unreasonable." It broke the new standard into a two-part test: 1) focusing on the intentionality of the individual defendant's conduct, "asks whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case," and 2) aligning with *Kingsley*, "ask[s] whether the challenged conduct was objectively reasonable."

Using this new framework, the Court was able to easily affirm the lower court's holding, which was of course reached under the customary Eighth Amendment framework, that the nurse was not purposeful or knowing or reckless in administering too much methadone to McCann since she followed the doctor's order. Similarly, her conduct was objectively reasonable--again, she relied on the doctor's order in carrying out her dosage - an order upon which she was rightly able to rely on as the administering nurse. The lower court was affirmed.

LINK

Sanctuary Cities: Colorado Court Permanently Enjoins 48-Hour ICE Holds Where Detainees Have Served Time or Posted Bond

Cisneros v. Elder, no. 2018 CV 30549 (Dist. Ct. El Paso Cty. Dec. 6, 2018).

In a case of first impression in Colorado, a state court has permanently enjoined a sheriff from holding persons who have already served their sentences and/or posted bond for an additional 48 hours pursuant to immigration detainers.

IMLA members will be familiar with the basic parameters of this litigation. In carrying out their mandate to remove persons in our country illegally, federal immigration authorities rely heavily on local law enforcement. A major part of this assistance is provided by local sheriffs, who routinely exchange information with immigration authorities about the identity of individuals in local jails--and may then be asked by Immigration and Customs Enforcement (ICE) authorities to detain such individuals beyond their release dates so they can be picked up held pending deportation proceedings. These "immigration detainers," or "ICE holds" are central to our national strategy on immigration enforcement-- while also raising civil liberties concerns.

This case addresses, specifically, whether a Colorado sheriff has authority under Colorado and/or federal law to continue to detain inmates at the county jail, at the request of federal immigration authorities but without the participation of a judge, for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases, so they can be picked up by immigration authorities.

The need for legal clarity is evident. Virtually every sheriff's office in Colorado has ceased honoring immigration detainers after receiving cease-and-desist letters from the ACLU. El Paso County, Sheriff Bill Elder's (Sheriff Elder's) jurisdiction, is one of only two counties that still honor ICE detainer requests. In the other, Teller County-where a case similar to this one is pending, the court ruled preliminarily in favor of the sheriff. (*Salinas v. Mikesell*, case no. 2018CV30057 (trial set for June 2019).) As the judge puts it "Clearly, the issues are ones on which reasonable minds may differ. Resolution of one of these cases by a higher court is needed in order to provide certainty in this area to Colorado's sheriffs and the immigrant population. "

The case was brought in February 2018 by two Plaintiffs, Saul Cisneros and Rut Noemi Chavez Rodriguez, who were pretrial detainees held in the El Paso County Sheriff's Office (EPSO). Both had been arrested in November 2017 on misdemeanor charges. Relatives and friends attempted to post bonds within days, but were informed that Plaintiffs would not be released due to an ICE hold. They were then detained for three months, finally being discharged after obtaining a preliminary injunction on March 19, 2018 restraining EPSO's practice until trial on the merits. On March 15, 2018, shortly before the preliminary injunction hearing, EPSO issued Directive Number 18-02, titled "Change in ICE Procedures" which belatedly modified existing EPSO policy to conform to a 2017 ICE directive. That new policy, which was effective nationwide, requires an ICE official to appear in person to serve ICE forms on detainees before they can be transferred to federal custody, and limits the "ICE hold" period (which had previously been indefinite) to a maximum of 48 hours after conclusion of state-law authority. Although Sheriff Elder ceased his practice of honoring ICE detainers pending resolution of this case, he publicly expressed his intention to resume the ICE hold practice in the event he prevails in court.

On May 1, 2018, the court granted Plaintiffs' motion to certify two classes of inmates: (1) all current and future prisoners held by EPSO and (2) pretrial detainees for whom bond has been set, who are or will be subject to ICE holds. (The court rejected Sheriff Elder's contention that

Plaintiffs' claims had become moot as a result of the preliminary injunction), and denied Sheriff Elder's motion seeking to compel joinder of ICE as a party-which filed an amicus brief but declined to join.

The forms involved are relevant:

-The Immigration Detainer (ICE Hold) form (ICE Form I-247A) identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. It asks the jail to continue to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to allow time for ICE to take the prisoner into federal custody.

-The Administrative Warrant (ICE Form I-200) names a particular prisoner, asserts that ICE has grounds to believe he/she is deportable, and ICE officers to arrest the person. Although referred to as a "warrant," it is not reviewed, approved, or signed by a judicial officer, as a warrant normally would be.

-Tracking Form (ICE Form I-203) is used to track detainees housed in local jails; it accompanies ICE detainees when ICE officers place them in, or remove them from, a detention facility. Although it bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved or signed by a judicial officer, and it confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody.

-The Intergovernmental Services Agreement (IGSA) is a contract that authorizes the EPSO to house ICE detainees in its jail, in ICE's custody and at ICE's expense. It applies only to persons who are already in the physical custody of ICE officers when they arrive at the jail; Plaintiffs were therefore not being held pursuant to an IGSA.

It was EPSO's policy, whenever it received an immigration detainer form and an administrative warrant from ICE, to refuse releasing prisoners who had posted bond, completed their sentence, or resolved their criminal case. Sheriff Elder's written policies required deputies to delay the processing of bond paperwork when the prisoner was a "foreign born national."

The issue before the court not only related to the legality of EPSO's actions, whether under Colorado or federal law, in holding Plaintiffs under the above-referenced documents for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases.

Sheriff Elder asserted that EPSO's practice was lawful for at least three reasons: (1) the 48-hour hold is not an arrest, but is rather a short-term detention akin to a *Terry* stop; (2) EPSO has authority to hold inmates for 48 hours under Colorado law, including his inherent authority as a Colorado sheriff; and (3) EPSO has authority to cooperate with immigration agents under the federal Immigration and Nationality Act (INA), section 287(g)(10).

The court concluded that EPSO's hold practice was not authorized by either Colorado or federal law:

ICE Immigration Detainers are Requests, not Commands. the ICE forms at issue constitute requests from ICE, not commands; and thus Sheriff Elder is under no compulsion to comply with them. Whereas ICE administrative warrants "command" federal immigration officers to arrest suspected illegal immigrants and take them into custody, ICE detainers are directed to local law enforcement agencies and simply "request" their assistance in detaining a non-citizen. This is a change from previous versions of the detainer form, which used to "require" such assistance. (The reason ICE administrative warrants only "request," and do not "command," the cooperation of local officials, is that to issue commands to state or local officials would be unconstitutional. See *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3rd Cir. 2014). As the *Galarza* court explained, if detainers were regarded as commands from the federal government to state or local officials, they would violate the Tenth Amendment's anti-commandeering principle).

Continued Detention After a Prisoner is Eligible for Release is the Equivalent of a New Arrest: Although Sheriff Elder contended that the 48-hour hold was not a new arrest, but more akin to a Terry stop, he was unable to cite any legal authority supporting his position. There are numerous federal court holdings to the contrary: courts have held that, when an inmate is entitled to release but is instead held in custody for a new reason, the continued detention constitutes a new seizure under the Fourth Amendment, and the few courts that have addressed the issue under the laws of other states have concluded that continued detention under an ICE detainer constitutes a new arrest.

Continued detention is not comparable to a *Terry* stop: Sheriff Elder contended that the 48-hour ICE holds at issue involved a limited intrusion on the inmate's liberty that is reasonable, limited in time, and appropriate in light of the interests at stake. But a warrantless seizure is unreasonable unless it falls within an "established and clearly articulated exception[] to the warrant requirement." *People v. Rodriguez*, 945 P.2d 1351, 1359 (Colo. 1997). A *Terry* stop, which is recognized as one such exception, "is a brief investigatory stop supported by a reasonable suspicion of criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968).

Colorado Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner after his or her Release Date: Sheriff Elder contended that EPSO had authority to hold inmates for 48 hours under Colorado law, based on (a) his inherent authority as a sheriff and (b) a statute that authorizes him to house federal prisoners in the EPSO jail. No part of the Colorado law cited allowed for detention in the absence of a warrant supported by probable cause; any other arrest would be presumptively unconstitutional. Deportation proceedings are civil, not criminal proceedings, and the federal administrative process for removing someone from the United States "is a civil, not criminal matter." The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime").

Sheriff Elder has no "Inherent Authority:" Sheriff Elder contended that he had the inherent authority, as the county's chief law enforcement officer, to hold inmates for 48 hours beyond their release date at ICE's request; this authority inhered in his power to protect the citizens of his county, and particularly those lawfully present, from illegal activity by non-citizens; and he furthered contended that the practice was an appropriate way of reducing the risk to the community that could occur if arrests had to be carried out in public. The court noted that Colorado sheriffs are limited to the express powers granted them by the Legislature and the implied powers "reasonably necessary to execute those express powers;" powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." Here, no Colorado statute currently authorizes sheriffs to enforce civil immigration law or even to cooperate with its enforcement. (Notably, the state previously had a statute, enacted in 2006, that authorized--and indeed required--local law enforcement to assist the immigration authorities in detaining suspected illegal immigrants, but that law was repealed in 2013, with the Legislature declaring that "[t]he requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust."

Federal Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner After his or her Release Date: Although federal authorities can affirmatively delegate the power to arrest and detain suspected non-citizens pending deportation (via a so-called "287(g) agreement"), the EPSO's 287(g) agreement had terminated in 2015. Although a portion of that same statutory provision (section 287(g)(10) allowed for continued cooperation by state and local authorities with federal immigration authorities, "to the extent they are authorized to do so by their State law and choose to do so," Colorado law provided no such authorization, as indicated above

"Cooperation" or "Operational Support:" As the court noted, "notwithstanding the above, there is no question that section 287(g) contemplates communication and cooperation between federal and state officials in immigration enforcement, even in the absence of a written 287(g) agreement." Sheriff Elder contended that the statute's reference to cooperation provided implicit

authorization for cooperative actions such as honoring ICE detainer requests. The leading case on such cooperation in immigration enforcement is *Arizona v. United States*, 567 U.S. 387 (2012), which addressed, and largely overturned on preemption grounds, an Arizona statute that enlisted state and local law enforcement to the front lines of immigration enforcement. The case left open the possibility of other, less robust 'cooperation;" and Sheriff Elder contended that the 48-hour ICE holds were permissible within the scope of "cooperation" or "operational support" approved in *Arizona*. However, the court again found that, even if *Arizona* did not preempt the type of "cooperation" Sheriff Elder envisioned, he would still need a basis in Colorado law to grant him that authority-which did not exist.

The court concluded that EPSO's continued detention of Plaintiffs would violate the Colorado Constitution, first, by depriving the Plaintiffs of liberty without legal authority; second, by failing to release the Plaintiffs after they posted or offered to post bond; and third, by depriving them of their due process rights. It permanently enjoined Sheriff Elder from imposing 48-hour ICE holds based solely on the aforementioned documents.

LINK

Taxation: Driving Across State Line to Make Motor Vehicle Sale is Merely to Avoid Taxes and has no Legitimate Business Purpose

***Richardson's RV, Inc. v. Indiana Department of Revenue*, No. 18S-TA-22 (Ind. Dec. 5, 2018).**

Reversing the Indiana Tax Court, the state's Supreme Court has found that a scheme whereby an Indiana state auto dealer drove vehicles across the border to Michigan where keys would be handed to Indiana purchasers in an attempt to avoid Indiana sales tax was a sham designed to circumvent the literal wording of the state's tax law.

Richardson's RV, Inc. (Richardson's) thought it had come up with a plan to avoid paying sales tax in Indiana for customers from states without a reciprocal sales tax exemption agreement with Indiana: the dealership arranged for sales of RV's in Indiana at its lot, including filling out insurance paperwork, inspecting and fixing defects, and signing all documents necessary to obtain title, but it actually *handed over the keys and thus possession* in the non-reciprocal state of Michigan by having the purchaser follow a staff person while s/he drove the RV over the state line to "complete the transaction" at a Speedway gas station. The Indiana Department of Revenue took issue with this, saying Richardson's owed tax on these sales. Seemingly surprisingly, the Indiana Tax Court sided with Richardson's, prompting the Department of Revenue to appeal and the Indiana Supreme Court to reverse.

The issue hinged on the Indiana state law stating that "[s]ales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax." 45 Ind. Admin. Code § 2.2-5-54(b). But these specific words of the law were not *really* what was at issue, as Indiana's Supreme Court has previously noted, "[a] transaction structured solely for the purpose of avoiding taxes with no other legitimate business purpose will be considered a sham for taxation purposes, and thus what matters for purposes of determining tax consequences is the substance, rather than the form, of [a] transaction." Richardson's argued it had three legitimate business purposes for its transaction: (1) ensuring that customers paid taxes in the proper jurisdiction, (2) avoiding double taxation, and (3) maintaining competitive pricing. But the Court rejected these flat out, first pointing out that these reasons "tellingly" were in themselves for all about tax purposes and *not* a business purpose. From there it easily saw that the delivery of the RVs in this case was solely for

the purpose of sales tax avoidance, and thus reversed the Tax Court.

LINK

Trials: Belated Claim for Attorney's Fees Fails due to Claim Preclusion

DeCoster v. Waushara County Highway Department, No. 18-2387 (7th Cir. Nov.15, 2018).

A Wisconsin landowner who succeeded in obtaining payment from a county when he sued for appropriation of his land could not thereafter file in federal court for $110,000 in attorney's fees which he had not sought previously.

Waushara County, Wisconsin (County) set out to improve a highway, leading a local landowner, Ronald DeCoster (DeCoster), to contend that he owned a tract of land relevant to the project. Ultimately the litigation was settled for a $7,900 payment from the County to DeCoster. After the settlement, DeCoster sought $110,000 in attorneys' fees under Wisconsin state law. The state law judge awarded just $31,000, finding his request "unreasonable." DeCoster followed up this ruling with a suit in federal court seeking attorneys' fees be awarded under 42 U.S.C. §§ 4651-55, which is part of the Uniform Relocation Assistance and Real Property Acquisition Act (Act). Under the Act, federal grants to states for highway improvements are contingent on the state providing assurance that landowners will be compensated for fees - including reasonable attorneys' fees. The district court held that Act did not provide a private right of action under which DeCoster could recover. He appealed.

The Seventh Circuit took the appeal, but unfortunately did not decide the merits of the novel claim. Rather, it found DeCoster's claim was unsustainable because it had not been presented in his initial suit. Wisconsin follows claim preclusion, under which a plaintiff cannot seek a recovery with one legal theory in one suit, then present a different legal theory in a second suit to obtain the same recovery. This was the first, and insurmountable, bar to DeCoster's recovery the Circuit identified. However, it also identified a second hurdle for DeCoster: on one hand, the Act allows reimbursement only of "reasonable attorneys' fees," but the state court deemed DeCoster's request "unreasonable." The lower court was affirmed.

LINK

Trials: Relation Back to Prior Pleading not Available Where Earlier Case was Dismissed

Titus v. Miami Dade County, No. 17-14843 (11th Cir. Dec. 7, 2018).

"Relation back" via amendment to a prior pleading under Fed. R. Civ. P. 15 is not possible where the earlier action has been dismissed; the subsequent filing constitutes a new action.

Selwyn Don Titus (Titus) worked as a heavy equipment operator in the Miami Dade County (County) Water and Sewer Department starting in 2001 and applied for supervisor positions in 2011 and 2012. He was denied the supervisor jobs and alleged - first in 2015 - that he was not hired due to unlawful discrimination under Title VII, the ADEA, and Florida's Whistleblower Act.

The case was dismissed and Titus did not appeal. He filed a *new suit* in 2016 under the same theories and adding a few others. The district court dismissed that case, holding the claims were time-barred. Titus appealed.

On appeal Titus argued the lower court improperly dismissed his case because, under FRCP 15, his claims "related back" to his 2015 suit. Under FRCP 15 an "amendment to a pleading," in some circumstances, may relate back to an original pleading, thus surviving a statute-of-limitations that would otherwise bar the claims. The problem for Titus stemmed from his attempt to "relate back" his 2016 complaint to the 2015 case. The Circuit found the 2016 complaint was not an "amendment to [the 2015] pleading" to which he could hinge his current claim; rather the 2015 case was *dismissed,* making the 2016 complaint *the pleading to the actual, current civil action*. FRCP 15 was thus inapplicable. The Circuit affirmed the lower court and the County succeeded.

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