

No. 39995-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT EDELMAN,

Appellant,

v.

SECRETARY OF STATE,

Respondent.

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This case reviews whether the Office of the Secretary of State is operating in compliance with the voter registration provisions of the federal Help America Vote Act (HAVA). The key issues are whether the Secretary of State has an obligation under HAVA to prevent the entry of ineligible voter registrations onto the statewide voter list, whether the Secretary of State's practice of "pending" underage registrants violates the duty to process registration information expeditiously, and whether the Secretary of State's voter application form complies with federal standards.

Appellant Robert Edelman has identified flaws in the Secretary of State's practices and procedures which have resulted in the registration of ineligible 16- and 17-year-olds, thereby violating the duty to maintain an accurate statewide voter registration list. Some of these underage registrants have illegally voted. The Secretary disagrees with the severity of the problem, and complains that the procedures necessary to prevent underage registrations are too complicated and could discourage young prospective voters. But the simple reality is that HAVA requires the Secretary of State to maintain an accurate database.

The importance of orderly and accurate voter registration procedures has been confirmed by nationally-recognized election experts

and civic leaders. The Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former U.S. Secretary of State James A. Baker III, studied the electoral process in the United States and in 2005 issued a report on election reform efforts, with recommendations to improve public confidence in the electoral system.¹

Among the recommendations were proposals for ensuring the quality of state voter registration lists based on the understanding of the importance of accurate voter rolls. “A complete, accurate, and current voter roll is essential to ensure that every eligible citizen who wants to vote can do so, that individuals who are ineligible cannot vote, and that citizens cannot vote more than once in the same election.” Carter-Baker Report at 10.

Any ineligible registrant creates the potential for fraud or human error and can throw into question the results of an election. Our democratic society sustains severe damage when confidence in the integrity of the election process is shaken. Accurate voter registration procedures help ensure accurate election outcomes, which is why Congress adopted the Help America Vote Act.

¹ Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” September 19, 2005. *Available at:* <http://www1.american.edu/ia/cfer>.

II. ARGUMENT

A. The Secretary of State is Not Maintaining an Accurate Statewide Voter Registration List

1. The Secretary of State's Practices Have Placed Ineligible Underage Voters on the Voter Registration List

Mr. Edelman argues that the Secretary of State's practice of accepting voter registration applications from ineligible underage voters violates two requirements of HAVA: maintaining an accurate voter list, and processing voter information expeditiously.

A brief overview of the unchallenged facts and the points of disagreement between the parties is helpful here. The Secretary of State's registration practices were established in the unchallenged Findings of Fact entered by the Administrative Law Judge (ALJ) in the Initial Decision (found at AR 0951-59). Washington state established a statewide voter registration list as required by HAVA, though the initial processing of voter registration applications is handled by county auditors. Finding of Fact 3.4; AR 0952. The Secretary of State has allowed counties to accept registration applications from individuals who will not turn 18 before the next election. *Id.* The Secretary did not establish uniform procedures, so counties use different systems to process underage applications—either by placing the applications in a drawer and physically checking to see whether an applicant has reached the required age or by tracking the

applicant's age by computer. Finding of Fact 3.5; AR 0953. When the applicant reaches the appropriate voting age, auditors are expected to either add the registration application into the election system, or if the application has already been entered electronically, convert the registration from "pending" to "active." Finding of Fact 3.6; AR 0953. *See also* AR 0432. The ALJ found that the Secretary is removing underage registrants from the voter list as the office learns of them. Finding of Fact 3.12; AR 0953.

But there are significant disagreements between the parties in this case both as to the facts and the legal conclusions reached by the ALJ and the Reviewing Officer. Factually, Mr. Edelman disagrees with the ALJ and the Secretary over whether the practice of accepting applications from underage applicants results in adding underage individuals to the voter registration list. The parties also disagree over the extent to which underage registrations have occurred.² The parties' legal disputes are over whether there is a duty to reject voter registration applications from underage applicants, whether the Secretary's practice of accepting underage registrations violates the duties of accuracy and expeditious processing, whether the Secretary's remedial practices are sufficient to

² Mr. Edelman agrees that evidence prior to the 2006 implementation of the statewide voter list cannot be relied upon to show a violation of HAVA. However, the information illustrates the long-standing nature of this problem regardless of HAVA's effective date.

satisfy the standards of accuracy set in HAVA, and whether the state's voter registration application was HAVA-compliant.

Addressing the primary factual dispute, the ALJ found (and the Secretary has argued) that underage voter registrations are nothing more than a clerical illusion:

When the applicant is put in active status, the registration date that shows on the [voter registration list] is the date the voter registration is mailed or received. Accordingly, after the voter is of age, it might appear from a review of the database that the voter was registered too early.

Finding of Fact 3.7; AR 0953. This explanation was repeated in Finding of Fact 3.11 and Conclusion of Law 4.3.

The ALJ's finding that underage voter applications are not actually added to the voter registration list is not supported by evidence that is substantial when viewed in light of the whole record, even when reviewing only facts that occurred after the 2006 implementation of the statewide voter database.

In Exhibit 3 Mr. Edelman provided a list of 17 votes cast by underage individuals since January 2006. AR 0930. Of these 17 votes, the ALJ found that 13 individuals voted in 2006 elections before they turned 18, and four underage individuals voted in 2008. Finding of Fact 3.9; AR 0953. Additionally, in Exhibit 9 Mr. Edelman provided a list of 49 underage individuals who were listed as "active" in the voter database

during the months of May, June, and July of 2008. AR 0949-50. Voter Services Manager David Motz stated in his declaration that he had investigated the 49 registrations. AR 0459. Significantly, Mr. Motz did not deny that some underage individuals were listed as active voters in the voter registration list, and he failed to explain why these underage individuals had been listed as active.³

Mr. Motz also stated that as of the date of his declaration, August 8, 2008, his “present practice” was to review the country entries into the voter database for underage voters daily. AR 0459. The Secretary exaggerates the significance of this statement. Brief of Respondent at 18. Under Mr. Edelman’s reading of HAVA, if a county auditor adds an underage individual to the voter registration list a violation of HAVA has already occurred despite any remedial action Mr. Motz may take.

The Secretary dismissively characterizes the problem complained of as “only a handful” of underage registrations and illegal votes. Brief of Respondent at 13. But as stated in the Introduction, any inaccuracy creates the potential for fraud or at least human error, and sloppy registration

³ Mr. Motz stated: “As of August 1, 2008, 24 of those records were no longer active in the statewide database. On the 25 remaining records, seven were held by three counties that have confirmed that their records are pended locally, and the other 18 have been brought to the attention of election officials in four counties that have election management systems that prevent ballots received from underage individuals from being counted.” AR 0459. In other words, 24 individuals were active but eventually deactivated, while 18 individuals remained on the voter list with the hope of preventing any ballots actually cast by these individuals.

procedures can cast a shadow over electoral results. Unlike some voter information errors which are eventually corrected by election officials—such as deceased voters or voters who move—Mr. Edelman has identified an entire category of inaccurate data which is being intentionally added to the state’s election system. These ineligible voters can easily be prevented from being registered in the first place, thereby complying with HAVA and ensuring, at least in part, the accuracy of future elections.

In an effort to explain the theory that underage registrations are a clerical illusion, the Secretary argues that the pre-dating of applications is permitted under state law. “[W]hen a voter registration application is determined to be complete, ‘the applicant is considered to be registered to vote as of the original date of mailing or date of delivery, whichever is applicable.’” Brief of Respondent at 14 (quoting former RCW 29A.08.110).⁴ But the Secretary improperly relies on RCW 29A.08.110 to justify his pending practice—the law merely provides a procedure for handling *incomplete* applications from otherwise eligible voters. See Brief of Appellant at 23-24.

The statute the Secretary cites provides specific time constraints for processing complete applications and for registering the applicant:

⁴ The Legislature revised RCW 29A.08.110 in 2009 (Laws of 2009, ch. 369), and this brief cites the 2008 version of the statute.

Within forty-five days after the receipt of an application but no later than seven days before the next primary, special election, or general election, the auditor shall send to the applicant, by first-class mail, an acknowledgement notice identifying the registrant's precinct and containing such other information as may be required by the secretary of state.

Former RCW 29A.08.110(2). Additionally, if a voter registration application is incomplete the auditor is to send a notice advising the applicant of the deficiency. If the missing information is not provided, the applicant "shall not be placed on the official list of registered voters." Former RCW 29A.08.110(1). The Secretary could receive a complete voter application from a 12-year-old but this statute does not allow him to store the application for six years until the applicant becomes eligible. Yet the Secretary argues he can do so for 16- and 17-year-olds.

This statute does not permit the pending process used by county auditors for ineligible underage applicants. Even if it did, auditors are not processing underage applications in the manner and within the timeline provide in RCW 29A.08.110. The Secretary can cite no authority that permits auditors to hold completed voter applications from ineligible individuals until such time when they become eligible, while both HAVA and state law contemplate the rejection of such applications.

Thus, the ALJ's finding that underage registrations have not occurred is not supported by substantial evidence. The evidence provided

by Mr. Edelman shows that 16- and 17-year old applicants have been placed on the voter registration list and in numerous instances have received ballots and cast votes. If the ALJ's explanation for the appearance of underage registrants were accurate, no underage person would appear as an active voter on the voter list, and no underage person would receive a ballot to cast.

2. The Help America Vote Act Sets a Standard of Accuracy for the Secretary of State

In addition to the factual disputes, the parties disagree on the duty of accuracy required of election officials under HAVA. The Help America Vote Act requires states to create a "single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A). HAVA charges states with the duty to maintain an "accurate" voter list. 42 U.S.C. § 15483(a)(4).

The key legal question in this case is whether the Help America Vote Act requires the Secretary of State to *prevent* ineligible, underage applicants from being added to the statewide voter registration list. Conclusions of Law 4.3 and 4.4, AR 0957. The Secretary admits his obligation to remove ineligible registrants from the voter list, but denies any preventive duty. Brief of Respondent at 30.

That the duty of prevention is incorporated in the standard of maintaining an accurate voter list can be seen in HAVA's plain language, the congressional record when adopting HAVA, and accompanying state statutes.

First, the relevant portion of HAVA states:

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote

42 U.S.C. § 15483(a)(4).

By its plain language, HAVA requires voter registration records to be accurate. The Secretary of State might have an argument if this portion of HAVA were to read:

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, which shall only include the following procedures

The standard of accuracy certainly includes the obligation to remove ineligible registrants, but this obligation is not exclusive. Congress' use of the phrase "including the following" indicates that the enumerated provisions were not all-embracing, but simply illustrative of the general standard of accuracy. Additionally, elsewhere in HAVA,

ineligible voter registrants are advised not to complete the voter application form. 42 U.S.C. § 15483(b)(4)(A)(iii).

During the debate over HAVA, members of Congress repeatedly emphasized the intent to adopt protections against fraudulent voter registration. Brief of Appellant at 17-18. The sponsors of HAVA understood that bloated voter rolls directly contributed to inaccurate election results. *Id.* This understanding was apparently shared by the Washington Legislature. State agencies that accept voter registrations are advised: “If the applicant [is not a U.S. citizen or will not be 18 on or before the next election] the agency shall not provide the applicant with a voter registration form.” RCW 29A.08.330(3). *See also* RCW 46.20.155(1).

Courts have recognized the value of preventive measures in the administration of elections. For example, when reviewing the prohibition on corporations and labor unions from making contributions or expenditures in connection with federal elections, the U.S. Supreme Court stated that courts should not “second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.” *Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 210, 103 S.Ct. 552 (1982). Similarly, reviewing a Washington law addressing minority-party candidate ballot access, the Supreme Court

endorsed actions intended to forestall electoral error. “Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195, 107 S.Ct. 533 (1986).

Despite this ample guidance, the Secretary repeatedly argues that HAVA does not require that data be accurate when it is entered into the voter registration list, but only that there be a reasonable effort to correct errors if they are later discovered. This approach undermines the very purpose of having a statewide registration list. By refusing to implement barriers to bad data and illegal registrations the Secretary is allowing the voter database to be contaminated. HAVA does not say that “the state election system shall ensure that voter registration records will become accurate after officials go through a periodic update.” Yet the Secretary seems to be arguing that voter records, like a good wine, can improve with time.

In addition to setting a standard of accuracy, HAVA advises election officials to process voter information expeditiously. The relevant portion of HAVA states: “All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.” 42 U.S.C. § 15483(a)(1)(A)(vi).

The parties in this matter both agree that the Secretary has allowed county auditors to accept voter registration applications from underage persons. Regardless of whether this process results in the entry of underage registrations on the voter list, which the parties contest, Mr. Edelman also contends that this violates the duty to process information on an expedited basis. Information received from eligible voters is to be processed expeditiously, while applications from ineligible individuals are to be rejected. There is no third option provided for in law that allows auditors to hold ineligible applications until the applicant eventually becomes eligible.

3. Compliance With HAVA's Standard of Accuracy Can be Achieved Without Jeopardizing the Rights of Young Voters

As explained above, Mr. Edelman argues that HAVA requires election officials to reject underage voter registrations in order to prevent the entry of inaccurate information into the voter registration list.⁵ The Secretary argues that this procedure would be overly-complicated and is precluded by practical and policy considerations. Specifically, the Secretary argues that: 1) an underage voter registration applicant may not

⁵ The Secretary of State repeatedly misstates Mr. Edelman's view of HAVA as mandating procedures that "eliminate *any* possibility of an ineligible underage voter being placed into the voter database." Brief of Respondent at 30 (emphasis in original). Mr. Edelman has not argued that the Secretary would be in violation of HAVA if anything short of 100 percent accuracy were achieved. Rather, HAVA provides a standard of accuracy in the registration and maintenance of voter records, and the Secretary's procedures of allowing an identified class of ineligible applicants to submit voter registrations falls short of HAVA's standards.

know when the next election is; 2) election officials themselves might not know when the next election will occur; 3) it would be too expensive and complicated to keep track of underage applicants and subsequently notify them of their eligibility to register; and 4) rejecting underage applications would confuse and discourage individuals and could cause them to miss a future election or not reapply at all. Brief of Respondent at 9-11 and 33-35. These objections ignore the complexity of the Secretary's current practice, exaggerate the difficulty of complying with HAVA, and fail to take into account the interests of properly-registered voters.

Mr. Edelman agrees that 16- and 17-year-olds might not know the date of the next election. This is precisely why the Secretary of State and county auditors should take an active role in advising the ineligible individual when he or she will become eligible.

The Secretary argues that elections officials may be operating in the dark as to the date of the next election given the ability of local jurisdictions to hold special elections in February, March, April, or May. Brief of Respondent at 10-11. The Secretary argues that, given the uncertainty of special elections, it is preferable to have county auditors accept underage applications. Put another way, the Secretary is arguing he is obligated to accept voter applications if he is unable to verify the eligibility of the applicant—an absurd reading of the law.

Despite the uncertainty of special elections in local jurisdictions, there is a practical (and legal) course of action for county auditors. The proper action is for the underage individual to reapply after the resolution date for the first election for which he or she will be eligible. That date is known to the auditor and can be provided to the applicant. Take the example of Karina R. Combs: Ms. Combs was registered to vote on February 18, 2008, yet she would not reach the age of 18 until July 10 of that year. AR 0425. In 2008, special elections could occur on February 19, March 11, April 22, and May 20. Local jurisdiction were required to give county auditors a 54-day notice to intent to hold a special election, so the county auditor would not know for sure if Ms. Combs would be eligible to register until March 29—the resolution date for holding a special election on May 20. The solution that accommodates both the interest in accurate elections and the interest in ease of registration would be to invite Ms. Combs to register after May 20, when all special elections are complete. By following this procedure election officials could avoid accepting underage applicants without risking disenfranchisement of the applicant.

In an effort to illustrate how the Secretary could comply with HAVA, Mr. Edelman has suggested a number of practices that would satisfy HAVA, but the Secretary has rejected these ideas as too “time-consuming, expensive, and . . . complicated”. Brief of Respondent at 34.

Yet the Secretary ignores the complexity of his own practice. Currently, when accepting registrations from underage applicants, every county must maintain its own separate system for storing ineligible applications—whether through an electronic system or by placing the applications in a drawer. AR 0953. The auditors must then periodically check the pending underage applications to ascertain whether any applicants will be 18 by the next election. *Id.* This status check is presumably performed before each regularly-scheduled and special election. Applicants who will be 18 by the next election are then placed in active status. *Id.* This system assumes the pending voter's information is still accurate after weeks or months in pending status. Meanwhile, the Secretary of State's Election Division reviews, on a daily basis, each county's entries into the statewide voter list to ascertain whether any underage voters were added. AR 0459. Any underage persons added to the voter registration list are flagged by the state Election Division, AR 0953, which must communicate back with the county auditors to ensure the voter is removed both from the statewide list and any county records. RCW 29A.84.010 and WAC 434-324-113.

The absurdity of the Secretary's position is that if an underage voter whose registration was cancelled were to immediately re-submit a new registration application, the election official would have no choice but to accept the new application.

This process obviously requires considerable effort and resources and it does not eliminate the possibility of human or system error, which could result in illegal votes being cast. By contrast, declining to accept underage voter registrations poses no cost to the county elections officers, and does not violate any rights of the ineligible applicant.

Regardless, the ease or complexity of a procedure is not the correct standard. HAVA requires procedures to ensure accurate voter registration records and it is the Secretary's responsibility to comply with this standard.

The Secretary also argues that rejecting underage applicants could disenfranchise some young voters by confusing them and discouraging them from reapplying when they become eligible to register. Brief of Respondent at 34-35. Rather than providing any evidence to support this assertion the Secretary asks this Court to take "judicial notice of the behavior of people." *Id.* at 35, n.33. But this Court could just as easily conclude that the Secretary's practices are *more* likely to cause confusion among potential voters, as we have argued. Brief of Appellant at 34.

An arms-open policy with regard to ineligible 16- and 17-year-olds fails to balance the interests of eligible voters. An illegal vote cancels out a legitimate vote from a eligible voter, and the U.S. Supreme Court has equated vote dilution with voter disenfranchisement: "the right of suffrage

can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362 (1964).

The evidence in the record shows that legitimate votes in our state have been diluted as a result of the Secretary's practices. Nevertheless, the Secretary argues: "Encouraging registration and participation by young adults is just as essential to instilling democratic values as is the discouragement of premature voting by those who have not yet attained the age of majority." Brief of Respondent at 35 (quoting the Final Determination). This statement sets up a false dichotomy. Young adults can be encouraged to register and vote *and* do both legally. Democratic values are not instilled by allowing people to break the law.

B. HAVA Requires States to Include a Warning Statement on the Voter Registration Application

Under HAVA, the voter registration form is to ask an applicant if he or she is a citizen of the United States and whether he or she will be 18 on or before election day. The registration form is then to include the statement: "If you checked 'no' in response to either of these questions, do not complete this form." 42 U.S.C. § 15483(b)(4)(A)(iii). The ALJ

determined the statement is not required on the state voter registration form. Conclusion of Law 4.8; AR 0958.⁶

The Secretary argues that the U.S. Election Assistance Commission (EAC) has permitted the omission of the warning statement from the voter registration application. Brief of Respondent at 36-37. But this interpretation ignores the language of HAVA and takes the EAC guidance too far. The EAC guidance addressed the problem of what election officials should do when an applicant fails to select any answer to the citizenship or age questions. The EAC stated:

HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by Election Day. If neither the “yes” box nor the “no” box is checked, the State is required to notify the applicant of the incomplete form with sufficient time to allow completion of the form. This subsection is “subject to state law,” so the state may choose to honor the affirmation of citizenship and age that goes with the signing of the registration form and register a person who did not check the “yes” box. (If a “no” box is checked, the application should be rejected). HAVA does not require states to redesign their state voter registration forms to include check-off boxes.

AR 0455.

The EAC was not advising states to abandon the check-off box requirements, but gave voluntary guidance on how states should handle a

⁶ In the Secretary’s 2003 Washington state plan for implementing HAVA, which is required under 42 U.S.C. § 15404, the Secretary’s proposed voter registration form contained both the check-off boxes and the warning statement. AR 0944. The Secretary subsequently decided to remove the warning statement.

situation where a voter has neglected to check one of the boxes. The Secretary went far beyond the EAC guidance and removed the required warning statement. Doing so renders the check-off boxes superfluous, which cannot have been the intent of HAVA or the EAC. The EAC was advising states only of the flexibility they have in dealing with the processing of problematic forms, not any flexibility they have in designing the forms.

At no point in its guidance did the EAC advise states to omit the warning statement required by 42 U.S.C. § 15483(b)(4)(A)(iii).

C. The Appellant is Entitled to Attorneys Fees

The Secretary of State correctly notes that a qualified party that prevails in a judicial review of an agency action may be awarded fees and other expenses, including attorneys fees, unless the court finds that the agency action was substantially justified. Brief of Respondent at 39. The burden is on the agency to show that its action was substantially justified. *Constr. Indus. Training Coun. v. WA State Apprenticeship and Training Coun.*, 96 Wn.App. 59, 68, 977 P.2d 655 (1999).

The Secretary argues he was substantially justified in this matter, having made a determination that he should err on the side of accepting ineligible voter applications rather than inadvertently rejecting qualified

voters. Brief of Respondent at 40.⁷ The Secretary fails to explain how this policy decision amounts to substantial justification—especially in light of the strong mandates in state and federal law that he maintain accurate voter information. Choosing to permit a weak observance of a federal standard lacks a “reasonable basis in law and fact.” *Silverstreak, Inc. v. Dept. of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007).

The Secretary also argues with respect to the voter registration form that he relied on the advice of counsel and the Election Assistance Commission. *Id.* But as we have argued, the Secretary misconstrued the EAC guidance and omitted the required warning statement when nothing in the guidance permits this omission.

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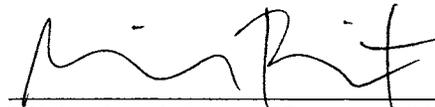
⁷ The Secretary raises the question of whether Robert Edelman or the Evergreen Freedom Foundation is the real party in interest. From the outset of this matter we identified the Appellant’s status as a volunteer researcher for the Foundation in the interest of full disclosure. But we have accurately represented to this and other courts that Mr. Edelman is the real party in interest, and that Foundation attorneys are representing him in his personal capacity.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the superior court's order and remand for the setting aside of the Secretary's order.

RESPECTFULLY SUBMITTED this 3rd day of June, 2010.

EVERGREEN FREEDOM FOUNDATION



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No. 39995-4-II

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**CERTIFICATE OF
SERVICE**

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COURT OF APPEALS

I certify that on June 3, 2010, I caused to be served a copy of the foregoing Appellant Reply Brief via first class mail, postage prepaid, on the following:

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