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COURT OF APPEALS
DIVISION II

NO. 41353-1-II

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STATE OF WASHINGTON

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

KIM LORD, Personal Representative
of the Estate of Barbara Winde,

Appellant

v.

PIERCE COUNTY,

Respondent

CORRECTED BRIEF OF RESPONDENT PIERCE COUNTY

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the Pierce County Hearing Examiner correctly concluded that the common enemy doctrine does not exempt the appellant, Kim Lord, from Pierce County's flood control permit requirements.

B. STATEMENT OF THE CASE.

1. Procedure

On October 16, 2009, appellant Kim Lord filed an administrative appeal of a Correction Notice/Cease and Desist Order regarding an unpermitted earthen levee on his property. AR 25, 26.¹

On March 4, 2010, a hearing took place before the Pierce County Hearing Examiner. TP 1. On April 20, 2010, the Hearing Examiner issued a decision denying the appeal. AR 1-19.

On May 12, 2010, the appellant filed a LUPA action in Thurston County Superior Court. CP 4-28. On September 29, 2010, Judge Carol Murphy reversed part of the Hearing Examiner's decision regarding code interpretation, but affirmed the Hearing

¹ AR denotes Administrative Record. TP denotes Transcript of Proceedings.

Examiner's finding that the common enemy doctrine does not exempt the appellant from Pierce County's permitting requirements. CP 77-78.

This appeal timely followed.

2. Facts

On September 14, 2009, Pierce County Planning and Land Services (PALS) received a complaint regarding the construction of a levee on the appellant's property located at 7426 Riverside Rd E in unincorporated Pierce County. AR 27.

On September 17, 2009, PALS Development Engineering Inspector Matt Shaw visited the site and observed a newly constructed earthen levee running along the southern property line adjacent to the Puyallup River. AR 47, AR 42 (duplicate copy attached as Appendix A). The earthen levee rose approximately 5 feet high with a length of approximately 160 feet. AR 127. There were no permits issued by Pierce County for this project. AR 47, TP 7. The unpermitted levee had been constructed in a FEMA designated flood hazard area and within an area of deep and/or fast flowing water. TP 9, AR 48, AR 109-112.

On October 5, 2009, PALS Development Engineering section issued a Correction Notice/Cease & Desist order informing

the property owner that the unpermitted levee had been constructed in a regulated floodway which is prohibited by Pierce County Code. AR 47-51. The order required that the levee be removed and the area restored back to its pre-developed condition. AR 48.

On October 16, 2009, Mr. Lord filed an appeal of the Correction Notice/Cease and Desist Order. AR 35. In the written appeal, the appellant claimed that the levee did not violate Pierce County Code because it fell within an exemption for emergency projects. AR 35-36. The written appeal did not mention the common enemy doctrine. AR 35-36

On March 4, 2010, a hearing took place before the Pierce County Hearing Examiner. TP 1. During the hearing, the petitioner testified that this was his second attempt at building an unpermitted levee. TP 120-123. The first unpermitted levee was constructed with ecology blocks and plastic in January of 2009. TP 120-123, TP 152. That levee failed. *Id.* The appellant testified that he has vulnerable tenants living on his property so he constructed another unpermitted levee in an attempt to protect them. TP 127. Those tenants include an elderly woman in her 70's and a child who is mentally disabled. TP 127.

According to Michael Vanassa, the contractor hired by the appellant, the site clearing work for the existing levee began on July 22, 2009 and construction on the levee itself began on August 24, 2009. TP 44-47, 60. Work was stopped on September 13, 2009 when Pierce County sheriffs deputies contacted him about the unpermitted project. TP 44-47, 60. The appellant hired another contractor to complete the levee after the deputies advised Vanassa to stop work. TP 136. The existing levee was built without the benefit of any engineering studies or designs. TP 44, 56, 152.

During the hearing, Dennis Dixon, a Pierce County Engineer and floodplain manager, explained the dangers of unpermitted levees.

Q: Can unpermitted levees sometimes make the flooding situation worse?

A: Yes, they can because you have then an increase in velocity when the wall of water comes through. If the levee is not there at all, you have a slow rise in the floodwaters, giving people time to leave. But if you have a catastrophic failure, you can have a flood wall that could sweep somebody either off their feet or a car off their feet and potentially cause loss of life.

TP 73. Water moving at higher velocities can knock a structure off its foundation. TP 74. Water can also get trapped behind a levee resulting in increased saturation of structures and cause greater

damage. TP 74. Levees can also obstruct the natural flow of water causing flooding upstream. TP 75.

When a property owner applies for a permit to construct a flood control device, the potential impacts to other landowners are considered during the permit review process. TP 25. The appellant testified that he talked to county staff several years ago about obtaining a permit, but decided against it when he learned more about the permit application requirements. TP 127-128.

On April 20, 2010, the Pierce County Hearing Examiner issued a decision denying the appeal, holding that the common enemy doctrine did not exempt the appellant from local permit requirements. AR 1-19 The Hearing Examiner upheld the October 5, 2009 Correction Notice/Cease and Desist Order. AR 19.

A Land Use Petition Act (LUPA) action was filed on May 12, 2010, in Thurston County Superior Court. CP 4-28. Judge Carol Murphy affirmed the Hearing Examiner's finding that the common enemy doctrine did not exempt the appellant from Pierce County's permitting requirements. CP 77-78.

C. ARGUMENT.

1. Standard of Review

When reviewing a case under LUPA, the Court of Appeals

stands in the shoes of the Superior Court and reviews the hearing examiner's land use decision de novo, based on the administrative record. *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).

The court may grant relief to the appellant only if the appellant carries his burden of establishing that one of the standards of relief contained in RCW 36.70C.130(1) has been met. For purposes of this appeal, the relevant standards in RCW 36.70C.130(1) are:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise; and

(d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1).

Appellant Kim Lord bears the burden of proving error. *N. Pac Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003). The court reviews the hearing examiner's findings of fact for substantial evidence. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded person

of the truth or correctness of the order. *City of Medina v. T-Mobile Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). Courts view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Id.* Questions of law are reviewed de novo. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs*, 151 Wn. 2d 279, 290, 87 P.3d 1176 (2004). When the court reviews errors of law, the court grants deference to the construction of the law to the local jurisdiction with expertise so long as the interpretation is not contrary to the law's plain language. RCW 36.70C.130(1)(b); See *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn. 2d 568, 587, 90 P.3d 659 (2004).

2. The Hearing Examiner correctly decided that the common enemy doctrine does not apply to this case.

The Pierce County Hearing Examiner correctly decided in Conclusion No. 10 that "...based upon RCW 86.12 and the adoption of flood control regulations by the Pierce County Council, the Examiner must interpret and enforce said regulations and cannot apply the Common Enemy Doctrine in a manner to amend or negate such regulations." AR 18-19.

The common enemy doctrine is a defense to liability where

one property owner diverts surface water, causing injury to another property owner. *Fitzpatrick v. Okanogan Co.*, 169 Wn.2d 598, 238 P.3d 1129 (2010). The common enemy doctrine is used by defendants as a shield to liability in tort and inverse condemnation cases. See *Fitzpatrick*, supra (county asserted common enemy doctrine as a defense to inverse condemnation claim); *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P. 2d 643 (1999) (common enemy doctrine used as a defense to an inverse condemnation claim); *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953) (private property owner asserted common enemy doctrine as a defense in a negligence action). None of these cases hold that the common enemy doctrine exempts property owners from local permitting requirements.

Pierce County's permit requirements operate independently from tort and taking defenses. Pierce County's flood management regulations are authorized by state law. RCW 86.12.200 authorizes counties to adopt comprehensive flood control management plans. This statute expressly authorizes a regulatory scheme that includes prohibition and/or permitting of structures in areas subject to periodic floods. RCW 86.12.200 provides as follows:

A comprehensive flood control management plan shall include the following elements: [...]

(3) Establishing land use regulations that preclude the location of structures, works, or improvements in critical portions of such areas subject to periodic flooding, including a river's meander belt or floodway, and permitting only flood-compatible land uses in such areas; [...]

RCW 86.12.200(2) authorizes the county legislative authorities to determine the need for, and the desirable location of, flood control improvements as part of a comprehensive flood control scheme.

The legislative findings clearly indicate an intent to authorize a comprehensive management and permitting scheme to protect public and private property:

Findings – Intent – 1991 c 322 "(1) The legislature finds that:

(a) Floods pose threats to public health and safety including loss or endangerment to human life; damage to homes; damage to public roads, highways, bridges, and utilities; interruption of travel, communication, and commerce; damage to private and public property; degradation of water quality; damage to fisheries, fish hatcheries, and fish habitat; harm to livestock; destruction or degradation of environmentally sensitive areas; erosion of soil, stream banks, and beds; and harmful accumulation of soil and debris in the beds of streams or other bodies of water and on public and private lands;

(b) Alleviation of flood damage to property and to public health and safety is a matter of public concern;

(c) Many land uses alter the pattern of runoff by decreasing the ability of upstream lands to store waters, thus increasing the rate of runoff and attendant downstream impacts; and

(d) Prevention of flood damage requires a comprehensive approach incorporating storm water management and basin wide flood damage protection planning.

(2) County legislative authorities are encouraged to use and coordinate all the regulatory, planning, and financing mechanisms available to those jurisdictions to address the problems of flooding in an equitable and comprehensive manner.

(3) It is the intent of the legislature to develop a coordinated and comprehensive state policy to address the problems of flooding and the minimization of flood damage." [1991 c 322 §1.]

RCW 86.12.200. "A flood control management plan shall be subject to the minimum requirements for participation in the National Flood Insurance Program (NFIP)". RCW 86.12.200. Pierce County is a participant in this program which requires local jurisdictions to comply with federal regulations that restrict development activities within flood hazard areas. 44 CFR §60.2. Failure to enforce these standards may result in Pierce County's suspension from the NFIP. 44 CFR §60.13. If suspension occurs, Pierce County residents may become ineligible for flood insurance or federal disaster relief. AR 226-227. Pierce County's flood control regulations which prohibit the construction of unpermitted structures within flood hazard areas are consistent with state and federal laws.

The common enemy doctrine establishes defenses to tort

and taking liability, but does not authorize property owners to erect unpermitted earthen levees or other large flood control structures in violation of state and local laws. The common enemy defense does not override Pierce County's flood control permit requirements. Therefore, the Hearing Examiner correctly decided that the common enemy doctrine has no application to this particular case.

The appellant repeatedly attempts to characterize the water on his property as surface water in his opening brief. During the administrative hearing, Pierce County objected to testimony and evidence regarding the application of the common enemy doctrine. TP 22-23, AR 218-221. The character of the water was not an issue that was fully litigated during the hearing. The Hearing Examiner entered no finding regarding the character of the water. AR 18, 19. The appellant was required to obtain a permit before constructing a large earthen levee within a floodway whether his intention was to deflect surface waters or redirect the flood channel. The character of the water is irrelevant in this appeal.

D. CONCLUSION.

Pierce County's flood control regulations are consistent with state laws which authorize comprehensive flood control management and permitting scheme. Allowing each property

owner to construct their own unpermitted levee undermines this comprehensive approach.

When an individual property owner obtains a permit prior to beginning construction, local governments can inspect the project to ensure that the structure is properly built and does not endanger others.

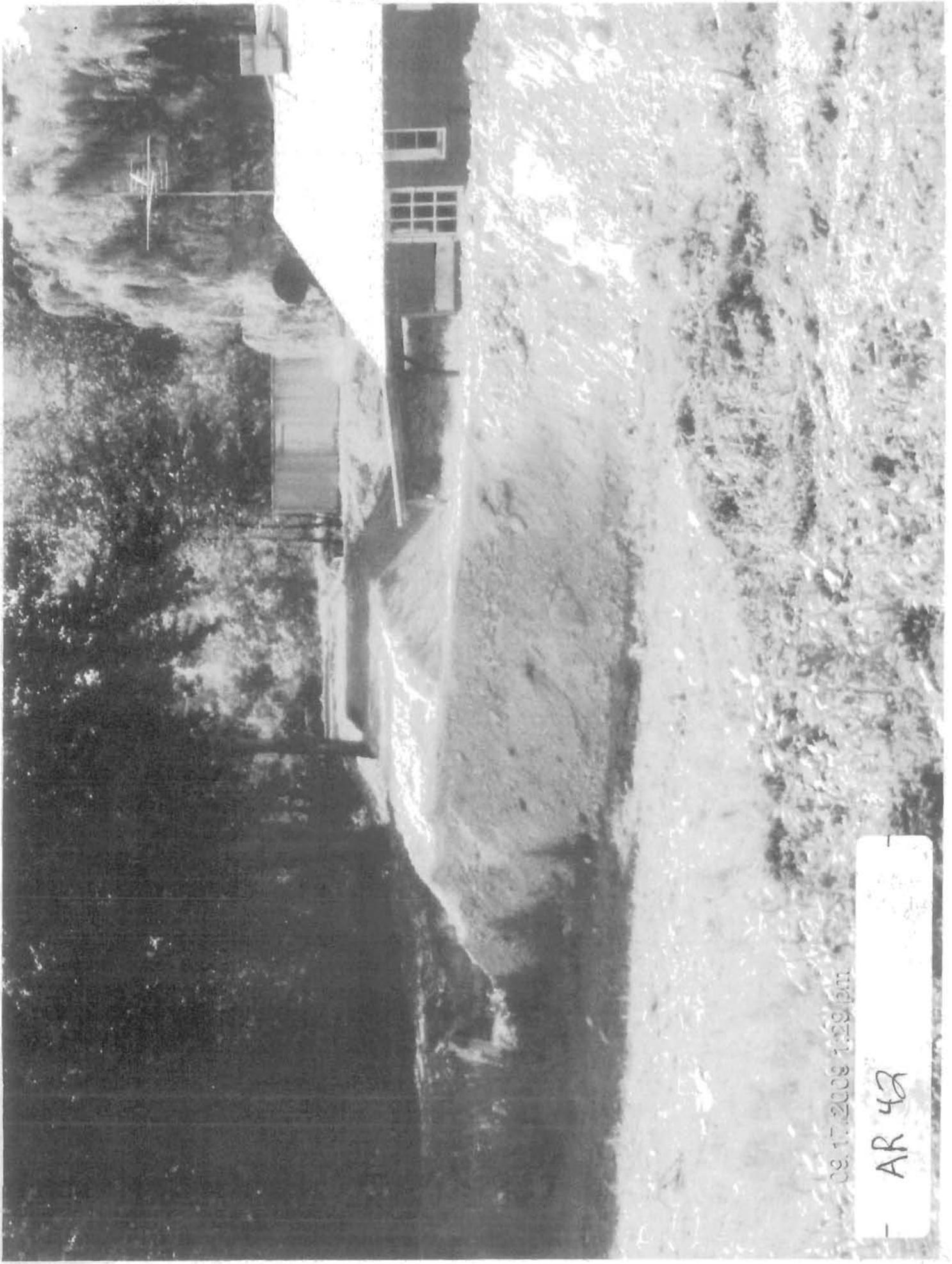
The common enemy doctrine is a recognized defense to liability in tort and takings cases, but does not exempt individual property owners from local permit requirements. Therefore the Hearing Examiner's decision should be affirmed.

DATED: February ²³ 9, 2011.

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APPENDIX A



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DIVISION II

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STATE OF WASHINGTON
BY _____

DEPUTY

NO. 41353-1-II

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

KIM LORD, Personal Representative of the Estate of Barbara
Winde, Appellant

v.

PIERCE COUNTY, Respondent

DECLARATION OF SERVICE

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The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. Corrected Brief of Respondent Pierce County

to be served on the following parties and in the manner indicated below:

Law Office of Thomas J. Westbrook, PLLC
711 Capitol Way, Suite 101
Olympia WA 98501

- by United States First Class Mail, with proper postage affixed thereto
- by Legal Messenger
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- by Personal Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of February, 2011.



Chandra Zimmerman

	FIRM NAME <i>PIERCE COUNTY PROSECUTING ATTORNEY</i>	PHONE <i>253-798-6081</i>	ATTORNEY <i>CORT O'CONNOR</i>
MESSENGER SERVICE LAST DAY	ADDRESS <i>955 Tacoma Avenue South, Suite 301 Tacoma, WA 98402-2160</i>		SECRETARY <i>Chandra Zimmerman</i>
DATE/TIME	CASE NAME <i>Kim Lord v. PC</i>		YOUR ABC ACCT NO. <i>72540</i>
<i>2/11/11</i>	CLIENT MATTER # <i>CHANDRA</i>	CAUSE NO. <i>41353-1-II</i>	DATE <i>February 9, 2011</i>

DOCUMENTS BRIEF OF RESPONDENT PIERCE COUNTY; DECLARATION OF SERVICE

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F I L I N G	COUNTY	SUPERIOR COURT	DISTRICT COURT (INDICATE DIST.)	AUDITOR	APPEALS COURT		FED COURT		SEA	TAC	STATE SUPREME COURT
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