

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, OLIVE OSHIRO,
DOMINADOR AURE, CHRISTINA
PEATO, and ELIZABETH OSHIRO,

Plaintiffs,

v.

ROBERT KELLY, JR., RICK D. GEORGE,
AGRIPINA SMITH, BOB SOLOMON,
LONA JOHNSON, KATHERINE CANETE,
RAYMOND DODGE, ELIZABETH KING
GEORGE, KATRICE ROMERO, DONIA
EDWARDS, and RICKIE ARMSTRONG,

Defendants.

Case No. 2:17-cv-00088-JCC

JOINT STATUS REPORT

Pursuant to the Court's October 25, 2017, Order (Dkt. 130), the parties provide this Joint Status Report "detail[ing] the results of the Nooksack Tribal Council special election and any subsequent action taken by the DOI in accordance with the MOA."

The parties cooperated in the preparation of this Joint Status Report, but were unable to come to agreement on a single, unified statement. Thus, this document contains the limited statements in which all parties have joined, as well as Plaintiffs' separate statements and Defendants' response.

JOINT STATUS REPORT:
CASE NO. 2:17-CV-00088-JCC - 1

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1 **A. The Parties' Joint Statements.**

2 1. The Nooksack Tribe's General Election was held on December 2, 2017, and
3 the Election Board certified the election results on December 8, 2017. A copy of the
4 Election Board-issued Certified Election Results is appended hereto.

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6 2. On December 9, 2017, Defendant Richard "Rick" D. George, Defendant
7 Agripina "Abbie" Smith, Defendant Katherine Rose Romero (formerly known as "Katherine
8 Canete"), and Roy Bailey were sworn in and executed the Oath of Office.

9 3. On December 11, 2017, Election Superintendent Katrice Rodriguez mailed, e-
10 mailed, and faxed a copy of the Board's Submission of Certified Election Result and
11 Swearing In to the Bureau of Indian Affairs, Puget Sound Agency Superintendent Marcela
12 Teters and the Bureau of Indian Affairs, Northwest Regional Director. MOA ¶ B. Ms.
13 Rodriguez also provided to the Bureau of Indian Affairs, Northwest Regional Director a
14 report demonstrating that the conditions of the special election contained in the MOA had
15 been satisfied. MOA ¶ B.

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17 4. By letter dated January 11, 2018, the BIA's Acting Northwest Regional
18 Director, Bodie Shaw, acknowledged receipt of the Ms. Rodriguez's report and advised that
19 the Northwest Regional Office was currently reviewing the materials and preparing its
20 recommendation to the Assistant Secretary – Indian Affairs. A copy of the letter is appended
21 hereto.
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B. Plaintiffs' Statements.

1. On August 30, 2017, Defendant Kelly appointed Defendant Katrice Romero Rodriguez as the Election Superintendent for the Special Election.¹ Defendant Rodriguez, who once proclaimed that Principal Deputy Assistant Secretary-Indian Affairs Lawrence Roberts' signature was "forged," previously served as Election Superintendent in the 2017 election that Interior did "not view . . . as legitimate." Dkt. # 117-18 (Appendix G); *Nooksack Indian Tribe v. Zinke*, No. 17-0219 (W.D. Wash. Feb. 13, 2017), Dkt. # 43 at 6.

2. Defendant Kelly's appointment of Defendant Romero Rodriguez violates Nooksack Tribal Code § 62.03.010, which prohibits "an employee of the Tribe or its entities" from serving as Election Superintendent. Dkt. # 74-3 at 4; *see also* Dkt. # 64 at 5, ¶ 19 ("KATRICE ROMERO is . . . the Director of the NIHA. The NIHA is a subordinate body of the NITC."). It also violated the MOA, which required that the Nooksack Indian Tribal Council Election be conducted "in accordance with the NOOKSACK CONSTITUTION, BYLAWS, AND TRIBAL LAWS and ORDINANCES." MOA ¶ B.

3. On October 2, 2017, the Election Board correctly wrote: "all ballots *postmarked by the U.S. Postal Department* no later than the close of polls on Election Day will be counted." Declaration of Gabriel Galanda ("Galanda Decl."), Ex. B at 1 (emphasis in original). But then, on November 2, 2017, the Election Board—headed by Defendant Katrice Romero Rodriguez—announced a new "rule," proclaiming: "voter ballots must be

¹ Defendant Katrice Romero Rodriguez is the twin sister of Holdover Councilperson and Special Election candidate, Defendant Katherine Canete Romero.

1 received by the Election Board by the end of business on Election Day.” Galanda Decl., Ex.
 2 A at 1 (emphasis added).

3 4. The Election Board’s mid-election announcement proved pivotal because it
 4 ensured that the election would *not* be conducted “in accordance with the NOOKSACK
 5 CONSTITUTION, BYLAWS, AND TRIBAL LAWS and ORDINANCES,” as required by
 6 the MOA. MOA ¶ B. Nooksack law mandates that “[v]oting shall be conducted **entirely**
 7 through the United States Postal Service [(“USPS”)].” Dkt. # 74-3 at 10 (N.T.C.
 8 62.06.020(A)) (emphasis added); Galanda Decl., Ex. B at 3 (“The Election Ordinance also
 9 makes clear that voting will be conducted **exclusively** through the U.S. mail.”) (emphasis
 10 added). More specifically, ballots must be “**postmarked** at or before the close of the polls
 11 on Election Day” Dkt. # 74-3 at 11 (N.T.C. § 62.06.020(B)(7)(b)) (emphasis added);
 12 *see also id.* (N.T.C. § 62.06.020(B)(7)(c)) (“Any ballot **postmarked** after the close of the
 13 polls shall not be counted.”) (emphasis added). The postmark on the front of the outer
 14 envelope containing a ballot, and the voter’s signed declaration/certification on the back,
 15 “determines the validity” of the ballot. *Id.* (N.T.C. § 62.06.020(B)(7)(c)).

16 5. Federal Bureau of Indian Affairs (“BIA”) observers were present for only
 17 parts of three days during the General Election: (1) on November 10, 2017, when ballots
 18 were mailed to eligible voters; (2) on the evening November 21, 2017, during a “Ballot
 19 Party” where at least sixteen ballots were cast and “received” in person; and (3) after 3:30
 20 p.m. on the evening of December 2, 2017, when the Election Board processed ballots—
 21 which were previously placed into the ballot box—from behind closed doors for the first
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1 time in Nooksack history. BIA observers were not present for any of the other days or times
 2 when the Election Board received and handled the ballots.

3 6. On December 2, 2017, Defendant Romero Rodriguez testified to retrieving a
 4 last round of “Ballot Packages” from the Deming Post Office by 2:00 p.m.; connecting with
 5 the two BIA observers, Richard Ferguson and Agency Superintendent Marcella Teters, by
 6 3:30 p.m.; “secur[ing]” and “transport[ing]” the ballot box; “record[ing] (audio and visual)
 7 the processing of the incoming ballots; “tabulat[ing] the ballots **received**”; and then
 8 “post[ing] the unofficial results of the General Election in accordance with Title 62.06.040.”
 9 Galanda Decl., Ex. C at 2-3 (emphasis added). Tellingly absent is *any* testimony, *any* audio
 10 or video recording, or *any* other evidence of Election Board review or BIA observation of
 11 “Ballot Packages” for postmarks or voter signatures in accordance with N.T.C. §
 12 62.06.020(B)(7)(c), or even of opening those outer envelopes. *Id.*

13 7. Pivotaly, because the Election Board placed the ballots into the ballot box
 14 before 3:30 p.m. on December 2, 2017—when BIA observers were not present—the BIA
 15 cannot rule out fraudulent ballots. In addition, absent 812 postmarked and signed outer
 16 envelopes corresponding to the 812 ballots cast and counted,² the voting results cannot
 17 otherwise be validated in accordance with Nooksack law, as required by the MOA. Dkt. #
 18 74-3 at 11 (N.T.C. § 62.06.020(B)(7)(c)); MOA ¶ B.

19 8. On December 11, 2017, candidates Robert Doucette, Saturnino Javier,
 20 Bernadine Roberts, and Tresea Doucette—as well as Plaintiffs and approximately 325 other
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 25 ² At a minimum, at least 756 non-replacement ballots should correspond to postmarked and signed outer envelopes,
 26 for ballot validation purposes. Dkt. # 74-3 at 11 (N.T.C. § 62.06.020(B)(7)(c)). Defendants have admitted that 56
 so-called “replacement ballots” were cast in person with the Board, in violation of Nooksack law.

1 Nooksack tribal members—challenged the General Election results before the BIA. *See* Dkt.
 2 # 117-1 at ¶ C (allowing “challenges to said election”); Dkt. # 131 at 2. In addition to
 3 challenging the election on the grounds set forth immediately above, these candidates
 4 explained to the BIA how Holdover Councilperson Defendants Smith, Canete, and George—
 5 either directly or through surrogates such as Rikkole Edwards (Holdover Councilperson
 6 Defendant Johnson’s sister) and Leandra Smith (Defendant Smith’s daughter)—procured
 7 votes by promising Nooksack voters a \$1,000 reward that would be paid after those
 8 Defendants won “reelection.” *Cf.* Dkt. # 74-3 at 13 (N.T.C. § 62.07.010A(2)) (forbidding
 9 “any bribe or reward for the purpose of procuring the election”); *see also* Declaration of
 10 Michelle Roberts (“Roberts Decl.”), Exs. A, B.³ \$750 of the reward is federal dollars from
 11 the Tribe’s \$2.3 million *Ramah Navajo Chapter, et al., v. Jewell* settlement against the U.S.
 12 Department of Interior (“DOI”).⁴

15 9. Beginning on December 20, 2017, the BIA notified Plaintiffs’ counsel that it
 16 and Interior had taken the General Election challenge under advisement and would not
 17 decide it until sometime in 2018. Yesterday, in addition to confirming the BIA’s review of
 18 Defendant Rodriguez’s December 12, 2017, Special Election report “and other associated
 19 materials”—which Plaintiffs presume includes their December 11, 2017, election
 20 challenge—Acting Northwest Regional Director Shaw called into question 125 General
 21 Election ballots corresponding to “gaps in the numbering sequence.” According to the BIA,
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24 ³ Social media postings are evidentiary weight under applicable Nooksack law. Dkt. No. 74-2 at 25; *see also*
 25 *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (per curiam).

26 ⁴ *See* Final Settlement Agreement, *Ramah Navajo Chapter, et al., v. Jewell*, No. 90-0957 (D.N.M. Sept. 16, 2015),
 ECF No. 1306-1; UPDATED ESTIMATED DOLLAR SHARES FOR EACH CLASS MEMBER, RAMAH NAVAJO CHAPTER
 CLASS ACTION SETTLEMENT (Jan., 2016).

1 125 of those ballots “do not appear to have been mailed out or used as replacement ballots.”
2 A 126th “unusual” ballot is also in question by the BIA.

3 10. Also yesterday, Plaintiffs’ counsel received a call from a Counselor for Indian
4 Affairs at the U.S. Department of Interior in Washington, DC, on behalf of ASIA Tahsuda,
5 advising that another letter was in the final process of being issued from ASIA Tahsuda to
6 Defendant Kelly. Galanda Decl., ¶ 6. That letter apparently addresses the status of the MOA
7 after December 23, 2017, given the need for Defendant Kelly to commence a second, regular
8 election for his and three other Tribal Council seats according to the Nooksack Constitution.
9 *Id.* That latest election began on December 7, 2017, and is supposed to conclude by March
10 2018. *See* Dkt. # 74-3 at 11 (N.T.C. § 62.03.010(A)); Dkt. # 74-2 at 5 (“Election season
11 begins every other year with the Tribal Council Chairman's appointment of an Election
12 Superintendent by the first Thursday in December in the year preceding the election.”).
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15 11. As Acting Northwest Regional Director Shaw’s letter, in particular, confirms,
16 DOI has neither endorsed the election results, nor recognized the Nooksack Indian Tribal
17 Council. MOA ¶ D. DOI has already rejected at least three farce elections conducted by
18 Kelly Defendants since March of 2016. Dkt. # 74-16 at 1 n.1 (rejecting April 2016 recall
19 election of Councilwoman Carmen Tageant); Dkt. # 74-5 at 1 (rejecting both November
20 2016 disenrollment “referendum election” and January 2017 Tribal Council election).
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22 12. On December 22, 2017, Kelly Defendants misrepresented to this Court that
23 because “the Assistant Secretary – Indian Affairs has never notified the Tribe that it is in
24 non-compliance with the MOA, DOI is obliged to recognize the Tribal Council as the
25 governing body of the Tribe.” Dkt. # 131 at 2-3. The MOA includes no such provision. *Cf.*
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MOA ¶¶ C, D. Acting Northwest Regional Director Shaw’s letter of yesterday proves as much, at least according to DOI and BIA.

13. Notwithstanding, without any DOI endorsement of the Special Election or recognition of the Council, the Kelly Defendants immediately—and illegally⁵—attempted to disenroll 275 Nooksack tribal members, including Plaintiffs. By Christmas Eve, December 24, 2017, the Kelly Defendants generated a “December 2017” list of enrolled Nooksack members and circulated it to health care providers in Bellingham. Declaration of Saturnino Joseph Javier RE: Nooksack Health Care Denial (“Javier Decl.”); Roberts Decl. The 275 Nooksack members the Kelly Defendants have slated for disenrollment, including Plaintiffs, do not appear on that list. *Id.* Beyond the multiple tribal and federal injunctions and stays of

⁵ Disenrollment is enjoined by operation of multiple legitimate Nooksack Tribal Court and Appeals Court orders and stayed pending an appeal to Interior’s Board of Indian Appeals. See *Belmont, et al. v. Kelly, et al.*, No. 2014-CI-CL-007, (Nooksack Tribal Ct. Feb. 26, 2015) (“[T]he Parties shall maintain the status quo . . . until a decision approving Title 63 becomes final for the Department of the Interior pursuant to 25 C.F.R. § 2.6.”); 43 C.F.R. § 4.314(a) (2004) (“No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final”); 25 C.F.R. § 2.6(a) (1989) (“No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final”); 25 C.F.R. § 2.6(b) (1989) (“Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.”); *St. Germain v. Acting N.W. Reg’l Dir.*, 17 IBIA No.16-022 (Jan. 27, 2016) (appealing whether the Superintendent and Regional Director approved the Tribe’s proposed amend to Title 63 in accordance with the administrative rules, procedures, and laws that direct BIA decision making); *Michelle Roberts, et al., v. Robert Kelly, et al.*, No. 2013-CI-CL-003 (Nooksack Tribal App. Ct. Mar. 18, 2014) (“[T]hese procedures were not properly adopted in accordance with the strict requirements of the Nooksack Constitution, and any procedural rules governing disenrollment proceedings must be adopted by ordinance and the ordinance approved by the Secretary of the Interior as provided for in the Nooksack Constitution.”); *Belmont et al. v. Kelly, et al.*, No. 214-CI-CL-007 (Nooksack Tribal Ct. Jun. 12, 2014) (granting Plaintiff’s motion for preliminary injunction holding “[t]his approach appears to be an attempt to circumvent the very clear holdings of the Court of Appeals that disenrollment procedures . . . must be approved by the Secretary of the Interior”); *Michelle Roberts, et al., v. Robert Kelly, et al.*, No. 2013-CI-CL-003 (Nooksack Tribal Ct. Mar. 31, 2014) (Court issuing “a permanent injunction against the Defendants enjoining them from undertaking disenrollment proceedings”); *Belmont, et al. v. Kelly, et al.*, No. 2014-CI-CL-007 (Nooksack Tribal App. Ct. Sept. 28, 2016) (order granting injunctions to 127 more plaintiffs); *Belmont, et al. v. Kelly, et al.*, No. 2014-CI-CL-007 (Nooksack Tribal App. Ct. Sept. 21, 2016) (same, in regard to 17 additional plaintiffs).

1 disenrollment, Holdover Council Defendants still lack a quorum with which to delist or
2 disenroll Plaintiffs. In addition, to do so would violate Nooksack law.⁶

3 14. By December 26, 2017, the Kelly Defendants had again denied Plaintiffs and
4 their families federally funded healthcare, in violation of Indian Health Services' interim
5 contract with Chairman Kelly "to resume federally-operated health care services." Dkt. #
6 117-7. Plaintiffs have grieved their latest health care discrimination to Health and Human
7 Services authorities.
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9 15. The Special Election, and related interim federal funding, was predicated on
10 the DOI's hope that Kelly Defendants could change their ways, including by promising that
11 "[u]nless they are disenrolled via a Tribal mechanism that accords due process and is
12 otherwise in accordance with Nooksack Tribal law," Plaintiffs would "receive the benefits of
13 Tribal membership equally with all other Tribal members." MOA ¶ E. With federal cash
14 again in hand, Kelly Defendants have violated the promises they made DOI in the MOA,
15 violated the law, and continue to defraud Plaintiffs.
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17 16. To that end, on December 22, 2017, Defendant Kelly tapped Defendant
18 Romero Rodriguez to once again serve as Election Superintendent for the next, regular
19 election that commenced on December 7, 2017. The upcoming regular Primary Election also
20 explains Holdover Council Defendants' very latest illegal mass disenrollment move.⁷
21 Pending the forthcoming letter from ASIA Tahsuda to Defendant Kelly, it is questionable
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23 ⁶ See generally *id.*

24 ⁷ Nina Shapiro, *Nooksack Chairman Vows to Continue Disenrollments in the Wake of Contested Election*, SEATTLE
25 TIMES (Dec. 5, 2017, 1:18 PM), available at [https://www.seattletimes.com/seattle-news/politics/nooksack-](https://www.seattletimes.com/seattle-news/politics/nooksack-chairman-vows-to-continue-disenrollments-in-wake-of-contested-election)
26 chairman-vows-to-continue-disenrollments-in-wake-of-contested-election ("Nooksack tribal chairman Bob Kelly
said he plans to start a new round of disenrollment . . . after an election that seemed to favor incumbents but was
clouded by allegations of fraud. . . . Even with results of this election in contention, the tribe this week is supposed
to start the next election process. Kelly is up for re-election.").

whether Plaintiffs and the over 275 Nooksack members that have purportedly been “disenrolled” will be allowed to run for office or vote in that election. *See generally* Roberts Decl.; Javier Decl.; Galanda Decl., Ex. D.

17. On December 26, 2017, the Ninth Circuit Court of Appeals scheduled oral argument on Kelly Defendants’ appeal for March 9, 2018.⁸

18. Plaintiffs ask this Court to extend the current stay for at least 90 days, especially given: (a) Acting Northwest Regional Director Shaw’s request to “schedule a visit [to Nooksack] within the next two weeks to review the 125 ballots and to discuss ballot number 3196”; (b) the forthcoming letter from ASIA Tahsuda to Defendant Kelly that will impact the state of affairs at Nooksack until at least March 2018, pending the next election; and (c) Kelly Defendants’ pending Ninth Circuit appeal.⁹ Alternatively, if this Court permitted the current stay to expire, Plaintiffs would seek leave to amend their complaint to add new allegations and defendants regarding Defendants’ evolving scheme to defraud Plaintiffs, most recently via the Special Election and now the next general election for Defendant Kelly’s seat. Plaintiffs would otherwise relish the chance to obtain discovery of Kelly Defendants’ latest election fraud.

⁸ *Rabang v. Kelly*, No. 17-35427 (9th Cir. Dec. 26, 2017), ECF No. 24.

⁹ Kelly Defendants’ appeal divests this Court of jurisdiction of any matter that is subject of the appeal. *Griggs v. Provident Consumer Discount Co.*, 495 U.S. 56, 58-61 (1982); *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). Thus, as the Ninth Circuit is currently considering whether Kelly Defendants are entitled to the Nooksack Tribe’s sovereign immunity, it would be improper for this Court to consider, or make any determinations as to, the legitimacy of Kelly Defendants’ status as representatives of the Nooksack Tribe. *See Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (district court can only issue orders that “preserve[] the status quo and [do] not materially alter the status of the case on appeal.”). Defendants’ argument immediately below that “this Court lacks jurisdiction,” in other words, is improperly made to this Court; this is an issue that must be determined by the Ninth Circuit, and the Ninth Circuit only.

1 **C. Response of Kelly Defendants.**

2 1. The Kelly Defendants dispute each of Plaintiffs' statements. Nonetheless, the
3 statements further illustrate the fact that this lawsuit is an inter-tribal dispute that affects
4 matters of self-government and sovereignty, over which this Court lacks jurisdiction. *See*
5 Doc. Nos. 34 (03/02/17) and 53 (03/24/17). Judge Dodge joins in this statement.
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7 2. The Special Election conducted by the Tribe was consistent with the terms of
8 the MOA and in accordance with the Nooksack Constitution, Bylaws, and Tribal laws and
9 ordinances. MOA ¶ B.

10 3. Under the terms of the MOA, upon request from any party, the Assistant
11 Secretary could have an observer present at any time ballots are being handled, processed or
12 counted. "The observer shall immediately report in writing any irregularities observed to
13 both parties to this memorandum and to the BIA Regional Director." MOA ¶B. The Tribe
14 requested that the Assistant Secretary provide one or more observers at any time such
15 observers were available, at the very least any time ballots were handled, processed, or
16 counted. The BIA Puget Sound Agency Office provided two observers, Richard Ferguson
17 and Agency Superintendent Marcella Teters.
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19 4. The DOI did not, at any time, notify the Tribe that it was out of compliance
20 with the MOA (MOA ¶ H), nor did the DOI notify the Tribe that any irregularities were
21 observed by Mr. Ferguson or Superintendent Teters during the election process, which the
22 MOA required be done immediately, in writing (MOA ¶ B). The DOI did not terminate the
23 MOA for cause (MOA ¶¶ C, H).
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5. The Tribe has cooperated with the DOI and BIA in its review of the Special Election, and will continue to do so, although it was hopeful the process would be completed in December as the Court indicated it believed was required under the MOA. *See* Dkt. No 130, at 6. Ms. Rodriguez delivered her election certification on December 11, one day after the results were finalized. The following week, Ms. Teters asked for color copies of some of the reports, which the Tribe immediately provided, but heard nothing further until receiving the letter from Mr. Shaw on January 11, 2018.

Dated this 12th day of January, 2018.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 12th day of January, 2018, I electronically filed the foregoing JOINT STATUS REPORT with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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