IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EDUARDO HOLGUIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	**EP-21-CV-00067-DB**
	§	
YSLETA DEL SUR PUEBLO, *et al.*	§	
	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE JUDGE BRIONES:

COMES NOW, Plaintiff Eduardo Holguin ("Mr. Holguin") to file his Response to Defendants' Motion to Dismiss (ECF 4) and respectfully shows the Court as follows:

I.
INTRODUCTION

1. Like a Speaking Rock slot machine, the Defendants have played fast and loose with the Rules of Civil Procedure to hoodwink this Court into improperly disposing of Plaintiff's claims (i.e., removing a case stating this Court has subject matter jurisdiction and subsequently representing that this Court lacks subject matter jurisdiction). Within each of their filings, the Defendants have taken no issue with grossly misrepresenting applicable law and the facts of this case. Plaintiff files his Response to their Motion to Dismiss against this backdrop of the Defendants' filings rife with logical inconsistencies, demonstrably false factual representations never contained in Plaintiff's petition, conveniently clipped excerpts from applicable caselaw coupled with gross misrepresentations of their facts and holdings. Unlike the Defendants, Plaintiff's position throughout this proceeding has been consistent and the Defendants should not be permitted to rewrite Plaintiff's t legal or factual allegations to suit their tenuous legal position.

II.
SUMMARY OF THE ARGUMENT

The Defendants' Motion to Dismiss must be denied for the following reasons:

2. **First**, the Defendant's assertion that this Court lacks subject-matter jurisdiction, directly conflicts with its basis for Removal and this case must be remanded. The Defendant attempts to improperly shift the burden it failed to meet onto the Plaintiff. The law is unambiguous with respect to this improper legal maneuvering. The case must be remanded. *See* 28 U.S.C. § 1447(c)

3. **Secondly**, In the unlikely event that the Court does not remand this case, the factual allegations as plead by the Plaintiff (without the Defendants' gross mischaracterizations) easily exceed the plausibility standard and give rise to a claim for relief. It is well-known that the Court must assume that the facts plead by the Plaintiff (not the Defendant) are true. Despite the Defendants' attempts to rewrite his petition, the Plaintiff's case is about the deprivation of his constitutional rights and illegal seizure of his person and property by Defendants operating outside their well-established territorial boundaries. Consequently, Plaintiff's petition (even applying the more stringent federal standard) is more than plausible on its face and the case should not be dismissed for failure to state a claim.

4. **Finally**, the Defendants statute of limitations defense fail as a matter of law and directly conflicts with the plain language of the statute they cite. The limitations date relied on by the Defendants was Saturday, January 30, 2021 and Plaintiff's filing was accepted on Monday, February 1, 2021. It is almost universally known that any deadlines falling on a weekend extend to the Monday immediately following that weekend. Furthermore, even improperly counting the statute of limitations from the earliest date provided by the Defendants', November 28, 2018, the Plaintiff's lawsuit was timely because, in accordance with the Texas Supreme Court and El Paso

County Court's Emergency COVID Orders, all statutes of limitation falling during the declared disaster were tolled through February 1, 2021.

III.
FACTUAL BACKGROUND

5. Defendant Ysleta del Sur Pueblo operates "without organic or written constitution" and exclusively "governs itself by oral tradition." *See* Ysleta del Sur Pueblo Tribal Resolution TC-99-99. According to the same constitution-*less* Defendant, "neither the Texas nor the U.S. Constitutions apply to the tribe." ECF 4 pp. 7 ¶ 15. Therefore, as argued by the Defendant, the Congressional act from which they derive their "sovereign immunity" waived both the Texas and United States Constitutions for non-tribal citizens travelling outside the Defendant's territorial jurisdiction. In doing so, the Defendant asks this Court to create a constitutional vacuum and grant them free reign to trample on well-established protections afforded to Mr. Holguin and other non-tribal citizens.

6. Mr. Holguin never entered the Ysleta del Sur Reservation. Pl.'s Orig. Pet. p. 3. Mr. Holguin was stopped on an off-reservation Texas roadway by the Tigua Tribal Police Department exercising state police authority outside the their territorial jurisdiction. *Id.* at 4

7. The TTPD officers who stopped Mr. Holguin were both subjectively and objectively aware that the stop was improper and that they were exercising state police power outside their territorial jurisdiction. *Id.*

8. Mr. Holguin challenged the legality of the stop because he was, at all relevant times, driving on a Texas roadway and never entered their territorial jurisdiction. *Id.*

9. The TTPD officer who stopped him became upset that her authority to perform traffic stops, outside their territorial jurisdiction, on a Texas roadway was challenged by the Plaintiff. Without a

legitimate law enforcement purpose, TTPD officers used the NCIS database to obtain personal information of the Plaintiff. *Id.*

10. Several TTPD officers showed up at Plaintiff's El Paso county residence, outside the Defendants' territorial jurisdiction, following the initial stop on a Texas roadway. *Id.*

11. Plaintiff was summoned to appear before the Ysleta del Sur Pueblo tribal court. The Ysleta del Sur Pueblo is governed by "oral tradition," does not abide by any "organic or written constitution," and therefore used an improperly constituted tribunal with no authority to adjudicate claims with nonmembers outside its territorial jurisdiction. *Id.* at 6.

12. Plaintiff did not submit to the tribal court's authority because it was improperly constituted and he never entered its territorial jurisdiction. *Id.*

13. Unsurprisingly, the tribal court operating within a constitutional vacuum lacked any semblance of due process and the judge entered a default judgment against the Plaintiff. *Id.*

14. The default judgment entered against the Plaintiff requires him to pay a "civil assessment" and indefinitely banned him from reservation territory (despite being outside the Defendants' territorial jurisdiction at all relevant times). *Id.*

15. The tribal court also ordered the Defendants' police force to detain Plaintiff and seize any vehicle he was operating (whether belonging to him or not). *Id.*

16. The tribal court further ordered Plaintiff pay the assessment, appeal to the Tribal Council (the tribe's appellate body) or perform community service for the tribe in order to avoid being detained and having his property seized by TTPD officers. The initial pretextual stop on a Texas roadway, outside Defendant's territorial jurisdiction and subsequent taking constitute the constitution violations which are part of a pattern and practice of the Defendants. *Id.*

17. The Defendants' conduct, which the Plaintiff witnessed and was subjected to on numerous occasions, forms a larger scheme or artifice to deprive non-tribal El Paso residents, like the Plaintiff, of their rights to equal protection under the laws and to be from improper government intrusion by a police force, who at all relevant times (except when testifying in tribal court) operated outside the territorial boundaries of the reservation. *Id.*

IV.
ARGUMENTS AND AUTHORITIES

A. SUBJECT MATTER JURISDICTION

18. Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir. 2001). At the time of Removal, as the party invoking federal jurisdiction, the Defendant's had to establish that all elements of jurisdiction—**including Article III standing**—existed at the time of removal. *See Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing" Article III standing) (emphasis added).

19. A Court must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Howery* at 916 (emphasis added). The removing party must establish "that federal jurisdiction exists and that removal was proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). A party may remove an action to federal court if the action is one over which the federal court has subject matter jurisdiction. 28 U.S.C. § 1441(a). "A motion to remand [a] case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." 28 U.S.C. § 1447(c). Any doubts as to the propriety of removal should be construed in favor of remand. *Holguin v. Albertson's LLC*, 530 F. Supp. 2d 874, 876 (W.D. Tex. 2008).

B. PLEADING STANDARD

20. A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008); *Guidry v. American Pub. Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007). The "[f]actual allegations of [a complaint] must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (quotation marks, citations, and footnote omitted).

21. In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mutual Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007); *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

22. In ruling on such a motion, the court cannot look beyond the pleadings. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Likewise, "'[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims.'" *Id.* (quoting Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)).

23. In this regard, a document that is part of the record but not referred to in a plaintiff's complaint and not attached to a motion to dismiss may not be considered by the court in ruling on a 12(b)(6) motion. *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 820 & n.9 (5th Cir. 2012) (citation omitted). Further, it is well-established and "'clearly proper in deciding a 12(b)(6) motion [that a

court may] take judicial notice of matters of public record." ' Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011) (quoting Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir.2007)) (citing Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)).

24. The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002). While well-pleaded facts of a complaint are to be accepted as true, legal conclusions are not "entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679 (citation omitted).

25. The court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* 355 F.3d 370, 376 (5th Cir. 2004). Stated another way, when a court deals with a Rule 12(b)(6) motion, its task is to test the sufficiency of the allegations contained in the pleadings to determine whether they are adequate enough to state a claim upon which relief can be granted. *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977); *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996), rev'd on other grounds, 113 F.3d 1412 (5th Cir. 1997) (en banc).

THE DEFENDANTS' JURISDICTIONAL CHALLENGE TO THIS COURT'S SUBJECT-MATTER JURISDICTION AMOUNTS TO NOTHING MORE THAN AN IMPROPER ATTEMPT TO BURDEN SHIFT. AS THE REMOVING PARTY, ABSENT AN AFFIRMATIVE SHOWING BY THE DEFENDANTS THAT SUBJECT-MATTER JURISDICTION EXISTS, THIS CASE MUST BE REMANDED.

26. Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir. 2001). At the time of Removal, as the party invoking federal jurisdiction, the Defendant's had to establish that all elements of jurisdiction—**including Article III standing**—existed at the time of removal. *See Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing" Article III standing) (emphasis

added). A Court must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Howery* at 916 (emphasis added).

27. The removing party must establish "that federal jurisdiction exists and that removal was proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). A party may remove an action to federal court if the action is one over which the federal court has subject matter jurisdiction. 28 U.S.C. § 1441(a). "A motion to remand [a] case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." 28 U.S.C. § 1447(c). Any doubts as to the propriety of removal should be construed in favor of remand. *Holguin v. Albertson's LLC*, 530 F. Supp. 2d 874, 876 (W.D. Tex. 2008).

28. Under 28 U.S.C. § 1441 a defendant may remove over which federal courts would have had "original jurisdiction" and 28 U.S.C. § 1331 grants district courts "original jurisdiction" over claims "arising under" a federal statute. Simple reliance on the phrase "original jurisdiction" is not enough, because federal courts have subject-matter jurisdiction only if constitutional standing requirements also are satisfied. See *Spokeo, Inc. v. Robins*, 136 S.Ct. at 1547–48 (plaintiff lacks standing, and court lacks jurisdiction, without "concrete and particularized" invasion of legally protected interest that is "actual or imminent").

29. Pursuant to 28 U.S.C. § 1447(c) this Court is required to remand this case to state court, because, as argued by the Defendants, this Court lacks subject matter jurisdiction. To properly remove the case in the first instance, the Defendants were required to establish federal subject-matter jurisdiction The Defendants' argument that this Court lacks subject-matter jurisdiction, serves as an admission that that their Removal was defective and they have failed to satisfy Article

III's requirements. The Defendants suggestion that once removal based on a federal question gets a defendant's foot in the door of a federal court, the slate is wiped clean, and the defendant can challenge jurisdiction is meritless. The Defendants were required to show that the Plaintiff has Article III standing. They did not do so.

30. Section 1447(c) makes it clear that the district court **must remand the case to state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction."** 28 U.S.C. § 1447(c) (Emphasis added). Presumably this explains why the Defendants do not specify whether they are factually or facially challenging subject matter jurisdiction. In fact, aside from blanket assertions of immunity and gross mischaracterizations of the facts plead, the Defendants failed to file any supporting affidavits or other evidence factually attacking jurisdiction with regard the claims asserted against them, nor have they requested an evidentiary hearing. The Defendants' attempt to improperly shift their burden onto the Plaintiff, while accusing the Plaintiff of frivolity, belies the Defendants' already tenuous legal position.

THE PLAINTIFF'S FACTUAL ALLEGATIONS CLEARLY ESTABLISH CONSTITUTIONAL VIOLATIONS.

31. The Plaintiff's allegations establish clear constitutional violations involving the Defendants' misuse of a police force to perform off-reservation pretextual stops of nonmember citizens and the subsequent misuse of a court system operating outside its clearly established jurisdictional boundaries. The pattern and practice of an extraterritorial police force was ratified by the an extraterritorial judicial system to seize the Plaintiff's property through the open-ended threat of immediate arrest and impoundment of his vehicle. The Defendants' disregard for its clearly established jurisdictional boundaries forms the basis of the Plaintiffs' lawsuit and certainly rises to a level beyond mere plausibility.

DESPITE DEFENDANTS' MISREPRESENTATIONS TO THIS COURT, THE TRIBE'S AUTHORITY CANNOT BE ARTIFICIALLY EXTENDED TO INCLUDE OPERATING A POLICE FORCE OUTSIDE ITS JURISDICTIONAL BOUNDARIES.

32. Here, the threshold question of whether the tribal court has exceeded its jurisdictional limits, is the first of many critical determinations required for any further analysis of this instant case. As alleged in Plaintiff's petition, the pretextual stop occurred to a non-tribal Plaintiff operating his vehicle off-reservation. Furthermore, these Defendants can point to no statute or treaty permitting them to govern the "conduct of nonmembers on the highway." *Srate* at 442. The facts as alleged clearly establish that the Plaintiff never entered the reservation, and it is undisputed that he is a non-member. Except for testifying in tribal court, the TTPD Defendants were operating outside their territorial jurisdiction and it follows that their extraterritorial conduct could not artificially extend the tribal court's jurisdiction. Therefore, the tribal court would not have civil authority over this dispute. Consequently, it is unnecessary for this Court to consider whether Plaintiff exhausted remedies of the tribal court system.

TRIBAL EXHAUSTION CANNOT BE REQUIRED FOR THE DEFENDANTS' OPERATION OF A POLICE FORCE OUTSIDE ITS CLEARLY ESTABLISHED JURISDICTIONAL BOUNDARIES.

33. The case would not be subject to dismissal under the tribal exhaustion rule. Exhaustion is not required where a tribal court, did not have jurisdiction, and the requirement would serve no other purpose than delay. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14, (1997) (exhaustion requirement must give way where tribal court does not have jurisdiction over civil action against nonmember); See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) (requiring exhaustion of tribal remedies before federal court entertained action under federal question jurisdiction). "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8, (1987). Typically, a federal court should stay its hand until the tribal court has had a full opportunity to determine its own

jurisdiction. *National Farmers*, 471 U.S. at 857. As a general rule, absent a different congressional directive, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: nonmembers who enter consensual relationships with the tribe or its members; and **on-reservation activity of nonmembers** which directly affects the tribe's political integrity, economic security, health or welfare. *Montana v. United States*, 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258-59, 67 L.Ed.2d 493 (1981) (emphasis added).

34. In *Strate*, the Court, applying the *Montana* rule, held that tribal courts could not entertain a civil action against a non-tribal driver and the driver's employer arising from an accident occurring on a public highway, maintained by the state under a federally granted right of way over Indian reservation land, **absent a statute or treaty authorizing the tribe to regulate or govern the conduct of nonmembers on the highway**. *Id.* at 442 (emphasis added). Such cases fall within state or federal regulatory and adjudicatory governance and expressed no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. *Id.* The ownership status of land is only one factor to consider, however, in determining whether tribal regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). A tribe's inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance "on the character of the individual over whom jurisdiction is claimed, not the title to the soil on which he acted." *Id.* at 381 (Souter, J., concurring). Thus, it is the membership status of the unconsenting party, not the status of the real property, that counts as the primary jurisdictional fact. *Id.* at 382. In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985), the Supreme Court held that "whether an Indian tribe retains

the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is [. . .] a 'federal question.'" The *National Farmers* Court further ruled that federal jurisdiction was properly invoked to determine "whether a tribal court has exceeded the lawful limits of its jurisdiction." *Id.* at 853.

EXHAUSTION OF TRIBAL REMEDIES WOULD REQUIRE PLAINTIFF TO SUBMIT TO AN IMPROPERLY CONSTITUTED COURT'S JURISDICTION DESPITE NEVER ENTERING THE TRIBE'S JURISDICTIONAL BOUNDARIES.

35. Finally, even if exhaustion were required (which it is not), the tribal court is not properly constituted because the Defendants operate "without organic or written Constitution," and according to these Defendants, neither the Texas nor the United States Constitutions apply. Ruling otherwise and forcing the nonmember Plaintiff to exhaust tribal remedies for off-reservation conduct would effectively strip him and similarly situated citizens of any constitutional protections afforded by the Texas and United States Constitutions.

THE LAWSUIT WAS FILED PRIOR TO THE APPLICABLE ANY APPLICABLE STATUTE OF LIMITATIONS BECAUSE JANUARY 30, 2021 WAS A SATURDAY AND THE FILING WAS ACCEPTED ON MONDAY FEBRUARY 1, 2021. THE LAWSUIT WAS ALSO TIMELY FILED BECAUSE STATUTES OF LIMITATIONS WERE TOLLED THROUGH FEBRUARY 1, 2021 DUE TO THE COVID-19 PANDEMIC.

36. "Section 1983 does not prescribe a statute of limitations." *Heilman v. City of Beaumont*, 638 F. App'x 363, 366 (5th Cir. 2016). Instead, "[t]he statute of limitations for a suit brought under [section] 1983 is determined by the general statute of limitations governing personal injuries in the forum state." *Piotrowski v. City of Hous.*, 237 F.3d 567, 576 (5th Cir. 2001); *see also Price v. City of San Antonio, Tex.*, 431 F.3d 890, 892, 894 (5th Cir. 2005) ("The limitations period for a claim brought under section 1983 is determined by the general statute of limitations governing personal injuries in the forum state.").

37. As the forum state, Texas has a two year statute of limitations for personal injury claims. TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Piotrowski*, 237 F.3d at 576. For these claims, the

limitations period begins to run when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989) (citations omitted); *see also Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992). The plaintiff must know of the injury and the causal connection between the defendant and the injury. *Piotrowski*, 237 F.3d at 576. If the last day of a limitations period under any statute of limitations falls on a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that the county offices are open for business. TEX. CIV. PRAC. & REM. CODE § 16.072. In accordance with the Texas Supreme Court's Orders pertaining to the COVID-19 State of Emergency, all statutes of limitation falling within the disaster period were extended through February 1, 2021.

38. Here, even assuming the Defendants' improperly calendared dates applied, all relevant statutes of limitations were tolled through February 1, 2021 due to the COVID-19 state of emergency in the State of Texas. In addition, the Defendants' argument that Plaintiffs' claims expired on January 30, 2021 also fails. That is because January 30, 2021 was a Saturday. Despite being filed on the weekend, the lawsuit was accepted by the district clerk on Monday, February 1, 2021. Pursuant to Section 16.072 of the Texas Civil Practices and Remedies Code, Plaintiff's filing was timely. Therefore, Defendants' assertion of statute of limitations defenses, like their other defenses, are meritless.

V.
REQUEST FOR RELIEF

Accordingly, for these reasons, Plaintiff respectfully requests that the Court remand the case back to state court because the Defendants have failed to meet their burden. Consequently, pursuant to 28 U.S.C. § 1447, this case must be remanded. In the unlikely event this case is not remanded, Plaintiff respectfully requests that the Defendants' Motion to Dismiss should be DENIED and for such other relief to which the Plaintiff may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing on this 7th day of May, 2021:

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