UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

PUBLIC INTEREST LEGAL FOUNDATION, *Plaintiff*, *v.* JOCELYN BENSON, in her official capacity as Michigan Secretary of State, *Defendant*.	Civ. No. 1:21-cv-929

PLAINTIFF PUBLIC INTEREST LEGAL FOUNDATION'S
RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

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Plaintiff Public Interest Legal Foundation ("Foundation") responds to the motion to intervene filed by the Detroit/Downriver Chapter of the A. Philip Randolph Institute, the Michigan Alliance for Retired Americans, and Rise, Inc. (ECF No. 18 PageID 190-216).

INTRODUCTION

Movants seek to disrupt this litigation based on a flawed premise, namely a mischaracterization of what the Foundation seeks. While Movants and their supporter may ideologically oppose the Foundation, mere ideological opposition does not merit intervention. Movants' arguments suggest they did not carefully read the Foundation's complaint. Movants claim that the Foundation seeks to "weaponize the NVRA to improperly force the purge of Michigan's voter rolls and to impose new hurdles on those who seek to register to vote…" (ECF No. 18 PageID.202.) Flat wrong. The Complaint contemplates no adverse act to a living soul and suggests no claim or prayer for relief that would affect a single registrant on the sunny side of the grass. The entire basis for intervention is based on a fable.

The Complaint alleges Defendant Benson is not complying with her federal law obligation to remove registered voters **who are deceased**, based on verifiable records of death. Many of these registrants have been deceased for years and even decades. Additionally, the Complaint explains that a series of specific interactions between the Foundation and the Defendant, going back to 2020, preceded the filing of the Complaint. (ECF No. 1 PageID.9-12.) Movants were not involved then in the acts or communications that necessitated this lawsuit, nor are they involved now. Movants' interest in this case similarly lacks any nexus to the issues presented and relief sought.

The motion to intervene should be denied for at least five reasons. **First**, Movants have no "significantly protectable interest" in the subject matter of this case. Movants claim they have an interest in making sure "their members and constituents who are already registered to vote are not

needlessly purged from the voter rolls." (ECF No. 18 PageID.206.) The only registrants who might be impacted by this suit are *ineligible*, *dead registrants*—and only after their deaths have been confirmed by election officials.

Second, Movants have not demonstrated that their stated interest will be impaired by this litigation. Movants claim no relationship with *any* of the 25,975 registrants the Foundation has matched against a verifiable death record or offer even the faintest suggestion that a single member or constituent faces the risk of "needless" removal.

Third, Movants have not demonstrated that the Defendant will not adequately protect their interests. Defendant is legally bound to safeguard the voting rights of *all* eligible registrants. There is no indication that she is not vigorously defending this case. (*See* Defendant's Partial Motion to Dismiss, ECF No. 10, PageID.91-92.) Furthermore, Movants and their affiliated entities routinely oppose intervention in *their* cases, invoking—when convenient—the presumption that the government will adequately represent the interest of the movant and a difference in litigation strategy is not sufficient grounds for intervention. *See*, *e.g.*, Plaintiffs' Response in Opposition to the Michigan Legislature's Motion to Intervene at 10, *Priorities USA, Rise, Inc., and the Detroit/Downriver Chapter of the A. Philip Randolph Institute, v. Nessel*, Case No. 4:19-cv-13341 (E.D. Mich., filed March 12, 2020 PageID.897) ("The [Movant] may not like Defendant's litigation strategy (although it is difficult to imagine what more the Attorney General could do), but that is not a justification for intervention…otherwise, anyone with an interest aligned with any defendant could intervene in virtually any matter in a misguided attempt to simply litigate the case differently.") While inconsistency is not a bar to intervention, in equity, it merits consideration.

Fourth, the motion is, at best, premature. Even assuming Movants have *any* interest in this case, it could only be at the remedial stage, not the liability stage. Movants' remote interest in

guarding against the speculative removal of living registrants could ripen *only* if the Court first finds that Defendant's programs to remove ineligible, dead registrants are unreasonable *and* orders relief beyond what the Foundation seeks. Because neither event has occurred, Movants' purported interest cannot justify intervention at this time.

Fifth, allowing Movants to intervene is not in the interest of justice. Movants seek to more than double the current number of parties (and at least double—perhaps quadruple based on past behavior—the attorneys), greatly complicating this matter with no corresponding benefit. Movants have not shown their participation as *parties*, throughout *all phases* of this action, is necessary or even helpful to the Court's disposition of the Foundation's Complaint. Movants' Proposed Answer confirms this as they state they "lack knowledge and information" as to dozens of paragraphs in the Foundation's Complaint. (ECF No. 20 PageID.219-255.) Movants are free to file *amici curiae* briefs to offer their concerns without causing the delay, complication, and prejudice to the parties that will inevitably arise from the addition of politically motivated intervenors. *See Geier v. Sundquist*, No. 95-5844, 1996 U.S. App. LEXIS 22376, at *4 (6th Cir. Aug. 14, 1996) (denying intervention but allowing *amicus curiae* briefs).

ARGUMENT

I. The Court Should Deny Intervention as of Right.

The Sixth Circuit has articulated that intervention as of right requires the establishment of four factors:

> (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest.

Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775, 779 (6th Cir. 2007). If Movants fail to establish any single element, their motion must be denied. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

Here, Movants fail to establish any of the four elements and the motion must fail.

A. Movants Have No "Significantly Protectable Interest" in the Subject Matter of this Litigation.

To intervene as of right, the movant must demonstrate a sufficient interest in the subject matter of the action. Fed. R. Civ. P. 24(a)(2). Not just any interest will do. Rule 24(a)(2) requires "a direct and substantial interest in the litigation" that "must be significantly protectable." *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989). While the Sixth Circuit has an "expansive notion" of the interest prong, "this does not mean that any articulated interest will do." *Granholm*, 501 F.3d at 780 (citations omitted).

Here, Movants claim that "if their motion is denied, the litigation will proceed without any litigant focused *specifically* on easing barriers to registration and voting…." (ECF No. 18 PageID.203) (emphasis in original). Even if this were factually true, which it is not,[1] wishing to *promote* a specific, organizational priority that has nothing to do with the relief sought in the

[1] On the contrary, Defendant highlights the NVRA's goals as to voting and registration in her motion to dismiss. (ECF No. 11, PageID.98-101.) Furthermore, Defendant has emphasized her intention to remove barriers to voting, including for students. "I'm committed to removing barriers and also encouraging college-age voter participation with several additional initiatives…." News Center, Secretary of State Jocelyn Benson, *Secretary Benson announces steps to promote college-age voter participation, initiatives to resolve lawsuit*, June 5, 2019, https://www.michigan.gov/sos/0,4670,7-127-1640_61055-499139--,00.html (last accessed Feb. 8, 2022); *see also* News Center, Secretary of State Jocelyn Benson, *Secretary Benson and advocates discuss voter accessibility*, October 9, 2020, https://www.michigan.gov/sos/0,4670,7-127--541967--rss,00.html ("my office is working with clerks across the state to remove any barriers and ensure voting is an easy, enjoyable experience for everyone.").

Complaint does not merit intervention. The question is whether Movants have a *direct and substantial interest* in *this* matter. They do not.

Movants articulate their interests as ensuring that (1) their "members and constituents who are already registered to vote are not needlessly purged" and (2) "their voter registration efforts are not undermined." (ECF No. 18 PageID.206.) Both "interests" are no different from the general public's interest in ensuring that election laws are followed. Further, the Foundation shares the Movants' interest in ensuring that no *eligible* registrants are removed from the rolls. The Foundation is already adequately representing that position, and so is Defendant. Movants' interests have nothing to do with the merits of this case, that is, whether Defendant's efforts to remove deceased registrants are reasonable.

Movants' "concerns" are generalized, speculative, and do not rise to the level of a legally protected interest in the outcome of this case. Indeed, the Sixth Circuit has found that a generalized interest in the enforcement of existing law is not a substantial legal interest, even when it is asserted by a public interest group. *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345-46 (6th Cir. 2007).

Not only is Movants' injury speculative when looking at it in isolation, the predicate for the injury (*i.e.*, that the Foundation is advocating for the removal of living *and* eligible voters) is non-existent. No one, and certainly not the Foundation, is seeking to remove eligible registrants from the registration list. Nor would any remedy agreed-to by the parties or imposed by this Court brook such a ham-handed outcome. No party is seeking to remove any *living* registrants, whether they are eligible or not. Movants' assertions to the contrary are conspiratorial at best. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest

when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely *prefers* one outcome to the other.")[2]

Granting intervention based on general and indefinite interests poses real risks to party and judicial resources. In *Bullock*, the District of Montana found that the movant's interest in protecting its members' voting rights was "not dissimilar to the interests of any number of politically involved organizations in Montana." *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 U.S. Dist. LEXIS 167715, at *5 (D. Mont. Sep. 14, 2020). Similarly, Movants assert a general interest in voting rights that is shared by "any number of politically involved organizations" in Michigan. *Id*. Permitting them to participate *as a party* on that basis alone would risk opening the floodgates to waves of politically motivated interest groups (or activists) that would drain resources without any corresponding benefit.

Movants do not claim a relationship with any of the 25,975 deceased registrants identified by the Foundation. Nor do Movants claim that a single member faces any threat of unlawful removal. Movants' interests are no different from the general public's interest in ensuring that election laws are followed, which is insufficient to support intervention. *See United States v. Alabama*, No. 2:06-cv-392-WKW, 2006 U.S. Dist. LEXIS 55305, at *13-15 (M.D. Ala. Aug. 8, 2006) (where "the alleged interest could be claimed by any voter, the interest is only of a general—not a direct and substantial—concern").

[2] That this motion has been filed solely for ideological reasons is further evidenced by the fact that non-movant Priorities USA is boasting about funding the motion. *See* "Priorities USA Supports Legal Intervention in Michigan Voter Rolls Purge Case," (January 25, 2022), *available at* https://priorities.org/press/priorities-usa-supports-legal-intervention-in-michigan-voter-rolls-purge-case/ (last accessed Feb. 8, 2022).

B. Movants' Stated Interest Will Not Be Impaired by the Disposition of this Action.

Movants must also show that "impairment of its substantial legal interest is possible if intervention is denied." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). Even assuming Movants have a substantial interest, they have failed to show how this case will impair that interest. Movants assert that they *might* have to re-register people to vote if they are somehow removed from the registration list in accordance with the NVRA. (ECF No. 18 PageID.208.) This is not sufficient and, even if it were, is best suited for the remedial stage. A speculative, future injury does not meet the requirements of Rule 24. *See United States v. Metro. St. Louis Sewer Dist*., 569 F.3d 829 (8th Cir. 2009). That is especially true here because even this speculative injury bears no relationship to the relief sought.

Movants posit that this case puts eligible registrants at risk of being removed and that "those eligible voters are likely to include members of [Movants'] organizations or individuals [they] serve." (ECF No. 18 PageID.207.) They go on to claim that "[s]tudents and minority voters are among the individuals most likely to be erroneously removed from voter rolls." (ECF No. 18 PageID.207.) Even if that were true, it has no relevance here because it concerns a completely unrelated reason for voter removal—change of address. Indeed, Movants' cited source refers to a data-sharing program called "Crosscheck" and its impact on "frequent movers," a category of registrants wholly irrelevant to a case involving dead registrants. (*See* ECF No. 18 PageID.207 at note 2.)

The court's denial of intervention in *Judicial Watch, Inc. v. Logan*, No. 2:17-cv-08948 (E.D. Cal., filed Dec. 13, 2017) ("*Judicial Watch*") is highly instructive.[3] (Attached as Exhibit A.)

[3] The order denying intervention was ultimately vacated on appeal after the parties settled the case and movants' appeal became moot. *Judicial Watch, Inc. v. Padilla*, Nos. 18-56102 & 18-

There, like here, an organization claimed that election officials had not used reasonable efforts to remove *ineligible* registrants from the voter rolls. Exhibit A at 1. A coalition of interest groups moved to intervene as defendants. *Id*. The court acknowledged that the movants' goals included "improv[ing] voter registration efforts" and "involve more citizens in the political process by assisting and mobilizing voters." Exhibit A at 2.

> [Movants] have a legally protected interest to ensure that eligible voters maintain their right to vote and remain on the voter rolls. However, there is no relationship between this interest and the claims at issue. Plaintiffs request that Defendants reasonably attempt to remove *ineligible* voters from the voter rolls. Removing ineligible voters from the voter rolls will not affect eligible voters' rights.

Exhibit A at 2 (emphasis in original).

Intervention was denied even though the plaintiffs there sought relief that could have affected living—although ineligible—registrants. Here, the Foundation seeks no relief concerning living *or* eligible registrants. Movants' interest in registration of *eligible, living* people has "no relationship," Exhibit A at 2, to the actual relief requested in the Complaint—*i.e.*, implementation of reasonable efforts to identify and remove *deceased* registrants. (ECF No. 1 PageID.19-20.)

As in *Logan*, "[Movants] speculate that eligible voters risk wrongful removal from voter rolls. Should that occur, [M]ovants] may bring a separate, private cause of action to vindicate these voters' rights. [Movants'] rights will not be harmed if ineligible voters are removed from the voter rolls." Exhibit A at 3.

The Sixth Circuit has denied intervention where proposed intervenors were "more concerned about what will transpire *in the future*" and where proposed intervenors sought to "inject … issues that are not yet before the court." *United States v. Michigan*, 424 F.3d 438, 444 (6th Cir.

56105, 2019 U.S. App. LEXIS 8347 (9th Cir. Mar. 20, 2019). The reasoning of the district court, however, remains equally relevant and persuasive.

2005). "An interest that is . . . contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule" governing intervention as of right. *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990); *see also Ungar v. Arafat*, 634 F.3d 46, 51-52 (1st Cir. 2011) ("An interest that is too contingent or speculative — let alone an interest that is wholly nonexistent — cannot furnish a basis for intervention as of right.")).

Movants' interest is entirely contingent on at least *three* future events: (1) the Court rules for the Foundation on liability; (2) the Foundation seeks "needless" removal of eligible registrants as a remedy, and (3) this Court orders a remedy that violates federal law. The first of these events will occur only after motions practice, discovery, and potentially a trial. This contingency alone makes the request "premature." *League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148, 2018 U.S. Dist. LEXIS 136965, at *3-4 (E.D. Mich. Aug. 14, 2018) (denying intervention where applicant merely "speculate[d] about the 'possibility'" that an event would occur and where "Applicants' argument presuppose[d] events that have not yet come to pass[.]").

The occurrence of the second event is premised entirely on a false characterization of the prayer for relief and a lack of understanding how election officials ascertain the status of dead registrants. Movants do not identify a single demand in the Foundation's Complaint or a piece of record evidence to support their claim that the Foundation has or will ask for relief that is unlawfully overbroad. The Foundation does not seek the removal of a single *eligible, living* registrant. Instead, the Foundation's prayer for relief specifies it seeks for Michigan to "remove *confirmed deceased* registrants" and to "implement and follow a reasonable and effective registration list maintenance programs to cure the violations" of the NVRA. (ECF No. 1, PageID.19) (emphasis added.)

Lastly, the third contingency— that this Court will order relief that violates federal law— would need to occur before Movants' interest could ripen. Simply put, Movants cannot support intervention simply by fantasizing about events that have not yet occurred and are unlikely to occur.

C. Movants Have Not Overcome the Presumption of Adequate Representation.

Even if Movants' interest is found to be sufficient, Defendant protects that interest far beyond the standard for intervention, namely inadequacy. Instead, Defendant is zealously, competently, and fully protecting that interest. "'[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance.'" *Nat'l Inst. for Strategic Tech. Acquisition & Commercialization v. Nissan of N. Am.*, No. 11-11039, 2012 WL 3679316, at *3 (E.D. Mich. Aug. 22, 2012) (citation omitted.)

> An applicant for intervention fails to meet his burden of demonstrating inadequate representation 'when no collusion is shown between the representatives and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty.'

Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987) (citations omitted).

Movants claim they do not have the same ultimate objective as any party, (ECF No. 18 PageID.209-210), while also admitting that they seek the same outcome in the case as Defendant (ECF No. 18 PageID.211). Movants speculate that they "*may* find themselves at odds throughout this case on issues ranging from the best basis on which to defend the law to how to appropriately craft a remedy." (ECF No. 18 PageID.210) (emphasis added.) Like in *Logan*, "Defendants are government officials charged with enforcing state election laws and promoting voter registration

to eligible voters. They share the same interest as [movants] in protecting eligible voters' right to vote….." Exhibit A at 3.

Movants have not even attempted to demonstrate adversity of interest, collusion, or nonfeasance. Indeed, there is none. Therefore, the presumption remains that any interests are adequately represented.

D. The Motion Is Not Timely.

Additionally, the motion was not timely. "No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (citations omitted.) Taking into account the circumstances of this case, including the highly publicized nature of this litigation, the motion was not timely.

Movants claim that their "motion is timely as this suit is in its infancy." (ECF No. 18, PageID.204.) But this case is already well underway. Defendant's motion to dismiss is fully briefed. More importantly, the interactions between the parties started years ago. The parties will be conferring shortly after the filing of this response for the requisite joint report to be filed prior to the upcoming scheduling conference. The parties have already had discussions regarding Count II, which the Defendant is not seeking to dismiss in her pending motion.

Also, Movants do not claim they did not know about this litigation prior to their filing. That is unlikely as this case has been highly publicized. "An entity that is aware that its interests may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene." *United States v. Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001). Movants did not do so.

For these reasons, Movants' request for intervention as of right should be denied. [4]

II. The Court Should Deny Permissive Intervention.

This Court "may permit" a timely motion to intervene[5] where the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). However, the Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).[6]

A. Movants Do Not Have a Separate Claim or Defense.

"[T]he words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 76 (1986) (O'Connor, J., concurring). So, while Rule 24 does not require a "direct personal or pecuniary interest in the subject of the litigation," the Rule "plainly *does* require an interest sufficient to support a legal claim or defense which is 'founded upon [that] interest.'" *Id*. at 77 (emphasis in original) (citation omitted).

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[4] Should the Court find that the other intervention elements are met, **the Foundation requests that it be permitted to conduct discovery related to Movants' alleged interests and whether they even have standing to intervene in this matter.** The Foundation requests that the Court hold an evidentiary hearing on the same. *See Michael v. Futhey,* No. 08-3932, 2009 U.S. App. LEXIS 23589, at *9 (6th Cir. Oct. 23, 2009) (noting that "[t]he district court held an evidentiary hearing on the motion to intervene.") Movants filed no affidavits or exhibits in support of their motion. The motion rests on bare assertions as to the Movants' alleged interests in this matter.

[5] For the reasons above, the motion is not timely.

[6] Movants rely heavily on the granting of permissive intervention in a matter before the Eastern District of Michigan. *Pub. Interest Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795 (E.D. Mich. 2020). Movants claim that case was "almost exactly like this one." (ECF No. 18 PageID.212.) But that case involved different legal claims, including list maintenance claims regarding living registrants. This case does not. As is stated above, the only people who might be impacted by **this** suit are ineligible, dead registrants—and only after their deaths have been confirmed by election officials. Also, the defendants in *Winfrey* were local election officials not the State of Michigan with the full weight of the Attorney General's office behind her defense.

Movants have no such claim or defense. As the *Logan* court found under nearly identical circumstances,

> [Movants] do not meet the threshold requirements because they do not share a common question of law or fact with the underlying action. Here, Plaintiffs are suing Defendants to enforce the NVRA and remove ineligible voters from the voter rolls. By contrast, [movants] are concerned with *eligible* voters being wrongfully removed from the list. There is no reason that eligible voters would be removed from voter rolls if Plaintiffs are successful. In fact, it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA.

Exhibit A at 4 (emphasis in original). The same is true here.

B. Movants Will Duplicate Efforts, Add to the Parties' Burdens, and Cause Undue Delay and Expense if Permitted to Intervene.

Movants do not explain, and it is difficult to imagine, what they will add to the Defendant's substantive defenses and thus Movants' contributions will be superfluous and a drain on the resources of the parties and the Court. *See Bullock*, No. CV 20-66-H-DLC, 2020 U.S. Dist. LEXIS 167715, at *7 (denying permissive intervention as "intervention would simply be piling onto the arguments advanced by the other parties to this litigation"). In fact, Movants already made unnecessary and contentious work for the parties when they filed their motion before hearing back from the Defendant on her position. (*See* ECF No. 19 PageID.217.) That is a preview of the consumption of court and party resources to come if intervention is permitted.

Movants seek to more than double the number of parties and attorneys in this matter. Movants' participation would thus undoubtedly raise the cost of this litigation. *See Kitzmiller v. Dover Area Sch. Dist.*, No. 04-cv-2688, 2005 U.S. Dist. LEXIS 3693, at *23 (M.D. Pa. Mar. 10, 2005). The Court should not permit Movants to participate as defendants where they possess no protectable interest, no specialized knowledge of the Defendant's programs, and would merely increase legal fees and expenses—fees and expenses that the Foundation will seek to recover from the Defendant if successful in proving its case. *See* 52 U.S.C. § 20510(c).

On the other hand, Movants are free to provide their perspective through *amici curiae* briefs without the injury to justice that would occur by allowing intervention. *See Moore v. Johnson*, No. 14-11903, 2014 U.S. Dist. LEXIS 70798, at *9 (E.D. Mich. May 23, 2014) ("Allowing their participation as *amici*…strikes the proper balance between maintaining efficiency and allowing them to be heard when appropriate.").

CONCLUSION

For the foregoing reasons, this Court should deny the motion to intervene.

Dated: February 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to each ECF participant.

Dated: February 8, 2022

/s/ Kaylan Phillips
Kaylan Phillips
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