

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, and VERONICA DEGRAFFENREID, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania,

Respondents,

TIMOTHY BONNER, et al.,

Petitioners,

v.

DEGRAFFENREID, et al.,

Respondents,

and

BUTLER COUNTY REPUBLICAN COMMITTEE; YORK COUNTY REPUBLICAN COMMITTEE; and WASHINGTON COUNTY REPUBLICAN COMMITTEE.

Intervenors-Petitioners.

**Nos.: 244 M.D. 2021
293 M.D. 2021 (Consolidated)**

INTERVENORS-PETITIONERS', BUTLER COUNTY REPUBLICAN COMMITTEE, YORK COUNTY REPUBLICAN COMMITTEE, and WASHINGTON COUNTY REPUBLICAN COMMITTEE, BRIEF IN SUPPORT OF PETITIONERS' APPLICATIONS FOR SUMMARY RELIEF

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**INTERVENORS-PETITIONERS' BUTLER COUNTY REPUBLICAN
COMMITTEE, YORK COUNTY REPUBLICAN COMMITTEE, AND
WASHINGTON COUNTY REPUBLICAN COMMITTEES' BRIEF IN
SUPPORT OF PETITIONERS' APPLICATIONS FOR SUMMARY RELIEF**

I. PERTINENT PROCEDURAL HISTORY.

On July 26, 2021, Doug McLinko ("**McLinko**") filed a Petition for Review at docket number 244 M.D. 2021. On August 31, 2021, Timothy R. Bonner ("**Bonner**") filed a Petition for Review at docket number 293 M.D. 2021. On September 1, 2021, Bonner filed an Application for Consolidation seeking consolidation of the two actions. On September 24, 2021, this Court issued an Order consolidating the two cases at docket number 244 M.D. 2021.

On October 18, 2021, Intervenors-Petitioners, Butler County Republican Committee, York County Republican Committee, and Washington County Republican Committees (collectively referred to as the "**County Republican Intervenors**")¹ filed an Application to Intervene. On October 25, 2021 a hearing was held related to the County Republican Intervenors' Application. On October 26, 2021, the Honorable Mary Hannah Leavitt, President Judge Emerita, entered an Order granting the County

¹ The County Republican Intervenors incorporate their Application to Intervene, Petition for Review, Brief in Support of Application to Intervene, and all exhibits, as if fully set forth at length herein.

Republican Intervenors Application and Ordering them to file a brief “in support of or opposition to the pending applications for summary relief on or before November 2, 2021.” See October 26, 2021 Order. Accordingly, the County Republican Intervenors file the within brief in support of both McLinko’s and Bonner’s Application for Summary Relief, and further state as follows below.

II. PERTINENT FACTUAL BACKGROUND.

Pursuant to Paragraph 4 of Judge Leavitt’s October 26, 2021 Order, the County Republican Intervenors incorporate by reference the material facts in the McLinko pleadings as if fully set forth at length herein. They also incorporate by reference the material facts in the Bonner pleadings as if fully set forth at length herein.

The County Republican Intervenors are the Republican Party Committees of Butler County, York County, and Washington County, Pennsylvania, formed pursuant to Sections 2831 and 2837 of the Election Code. See 25 P.S. § 2831 and 25 P.S. § 2837. Specifically, Section 2837 states:

[t]here may be in each county a county committee for each political party within such county, the members of which shall be elected at the spring primary, or appointed, as the rules of the respective parties within the county may provide. The county committee of each party may make such rules for the government of the party in the county, not inconsistent with law

or with the State rules of the party, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such State rules, any present or future county rules of such party.

Pa. Stat. Ann. tit. 25, § 2837 (West).

Pursuant to the By-laws of the County Republican Intervenors, the Committees have a duty to register Republican voters and encourage them to vote; assist Republican voters by providing information, absentee ballot applications, and other voter services; advance Republican principles in their respective counties, including locating, nominating, and electing diverse and well qualified Republican candidates; and assist Republican candidates who affirm the Committees' traditional Republican values in election campaigns.

As the Republican Party Committees of their respective counties, the County Republican Intervenors are responsible for leading efforts for voter registration within their respective counties; assisting Republican voters with questions regarding proper voting practices; advancing the policies and principles of the Republican Party within their Counties; assisting candidates in their election campaigns; and "getting out the Republican vote" in their respective counties. See County Republican Intervenors' Petition for Review, ¶¶ 17-20; 45. Stated summarily, the County Republican Intervenors are charged with advising their constituency of the proper, legal, and constitutional methods of voting in the Commonwealth of Pennsylvania. *Id.*

As will be further explained below, the County Republican Intervenors have both representational and organizational standing to challenge Act 77 as political committees representing the interests of Republican electors within their respective Counties. They also have individual standing. See County Republican Intervenors Petition for Review, Ex. 2, ¶ 13.

III. SUMMARY OF THE ARGUMENT.

The County Republican Intervenors support the arguments raised by both McLinko and Bonner as to the unconstitutionality of mail-in balloting in Act 77; however, they will not repeat those arguments here. Rather, the County Republican Intervenors focus on two central issues articulated in the consolidated litigation: 1) standing and 2) laches.

First, McLinko, Bonner, and the County Republican Intervenors all have standing to advance their respective Petitions for Review for similar, yet distinct, “substantial, direct and immediate” reasons. *Robinson Tp., Washington County v. Com.*, 83 A.3d 901, 917 (Pa. 2013).

Second, Petitioners’ challenge of Act 77 is timely and is not barred by the doctrine of laches as the doctrine of laches “can never be permitted to amend the Constitution.” See *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988). Laches will not operate so as to bar an attack upon the constitutionality of a statute as to its future operation, particularly statutes involving matters of

elections. See e.g. *Wilson, et ux. v. Philadelphia School District, et al.*, 195 A. 90, 99 (1937).

IV. ARGUMENT.

1. STANDING.

a. Standing Generally.

“Generally, the doctrine of standing is an inquiry into whether the petitioner filing suit has demonstrated aggrievement, by establishing ‘a substantial, direct and immediate interest in the outcome of the litigation.’” *Robinson Twp., Washington County v. Com.*, 83 A.3d 901, 917 (Pa. 2013) (citation omitted). “Pure questions of law, including those in the present cross-appeals, do not suffer generally from development defects and are particularly well suited for pre-enforcement review.” *Id.*

McLinko, Bonner, and the County Republican Intervenors have a “substantial, direct, and immediate interest in the outcome of the litigation.” *Id.*; See also McLinko’s Reply Brief, p. 2. Additionally, the consolidated cases before the Court contain “pure questions of law” and are “well-suited for pre-enforcement review.” *Id.*²

² The Pennsylvania Supreme Court in *Robinson Twp.* did not address whether Petitioners had a separate interest as local elected officials sufficient to confer standing. *Robinson Twp.*, 83 A.3d 901, 918.

Each party's standing, including the County Republican Intervenors, will be addressed briefly in turn below.

b. McLinko Has Standing.³

Standing is an inquiry into whether the petitioner filing suit has demonstrated aggrievement, by establishing “a substantial, direct, and immediate interest in the outcome of the litigation.” *Fumo v. City of Philadelphia*, 972 A.2d 487, 500 n.5 (Pa. 2009). In setting forth the test for standing in Pennsylvania, the Pennsylvania Supreme Court stated,

[a] ‘substantial’ interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A ‘direct’ interest requires a showing that the matter complained of caused harm to the party’s interest. An ‘immediate’ interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question[.]

S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 795 (Pa. 1989).

McLinko has traditional standing to challenge Act 77. As an election official, McLinko is charged with determining the proper and legal ways in which electors in the Commonwealth of Pennsylvania may cast their vote.

³ The standing issues before the Court have been thoroughly briefed by Petitioners and Respondents. The County Republican Intervenors seek not to repeat those arguments here, but only to supplement them with a focused analysis.

Moreover, Petitioner McLinko must determine which ballots were legally cast and thus should be counted.

McLinko also has taxpayer standing. With regard to taxpayer standing, the Pennsylvania Supreme Court has stated,

[t]he ultimate basis for granting standing to taxpayers must be sought outside the normal language of the courts. Taxpayers' litigation seems designed to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.... Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

Sprague v. Casey, 550 A.2d 184, 187 (Pa. 1988); *citing Application of Biester*, 409 A.2d 848 (Pa. 1979). The Court further noted, "that 'consideration must be given to other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or the existence of other persons better situated to assert the claim.'" *Id.*

In his Petition for Review, McLinko asserted that he "believes ballots from qualified mail-in electors, other than from voters qualified as absentee...are illegal votes and should not be counted." See McLinko Petition for Review, ¶ 42. McLinko further stated if he "certifie[d] the results

of the 2021 general election...he would be violating the Pennsylvania Constitution.” *Id.* at ¶ 43.

Respondents countered that McLinko’s duties are “ministerial” and that he is “given no discretion.” See August 26, 2021 Memorandum in Opposition to Petitioner’s Application for Summary Relief and in Support of Respondents’ Cross-Application for Summary Relief pp. 13-17. However, as Respondents rightly conceded, “boards of elections may exercise ‘quasi-judicial functions.’” *Id.* at p. 18. Indeed, “[t]he Election Code makes the County Board of Election more than a mere ministerial body.” *App. of McCracken*, 88 A.2d 787, 788 (Pa. 1952). “The Board is not a multiple comptometer, making up as many lists as there are different spellings for what common sense and the obvious facts dictate are the same person. It is because the Board is charged with discretionary responsibilities that it has been armed with authority and power to issue subpoenas, summon witnesses and take testimony.” *App. of McCracken*, 88 A.2d 787, 788 (Pa. 1952); See *also* McLinko’s Reply Brief, pp. 6-7. Further, McLinko has sworn an oath to uphold the Pennsylvania Constitution. See Pa. Const. art. VI, § 3 (“I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity.”).

Act 77's expansion of mail-in voting also unquestionably expanded the quasi-judicial functions of the county boards of election. As was stated during the hearing regarding the County Republican Intervenors' Application to Intervene, they receive regular calls with questions related to mail-in ballots. These questions also extended to the county boards of election and McLinko. Indeed, Act 77 effectively turned county bureaus, subject to election board control, into polling places where mail-in ballots could be returned and effectively cast.⁴ Additionally, county bureaus had to determine if mail-in ballots contained all the right information or if they needed to be cured or were defective.⁵ They also had to determine whether "naked ballots" were returned.⁶ These are but a few examples; however, "the determination of the validity of ballots is *not* [a ministerial] act." See McLinko's Reply Brief, p. 8 (emphasis added).

Indeed, county boards of elections, and McLinko, have become hotlines and help desks. As a result, McLinko has been placed in a position where he must determine whether he is in compliance with Act 77, or not.

⁴ <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> ("As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your county election board or other officially designated site.").

⁵ <https://www.inquirer.com/politics/election/pennsylvania-flawed-mail-ballots-cure-20201029.html>.

⁶ <https://www.vox.com/21452393/naked-ballots-pennsylvania-secrecy-envelope>.

Having sworn an oath to uphold the Pennsylvania Constitution, is a “substantial, direct, and immediate interest in the outcome of the litigation.”

c. Bonner Has Standing.⁷

Bonner also has a “substantial, direct, and immediate interest in the outcome of the litigation.” As individual voters and past and likely future candidates for office, Bonner satisfies all of the elements required of standing as set forth in *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 555 A.2d 793 (Pa. 1989). Bonner asserted a substantial interest in the constitutionality of Act 77 that surpasses the common interest of all citizens, because Bonner, as future candidates for office, are directly impacted by the conduct of elections in the Commonwealth of Pennsylvania and possess a substantial interest in ensuring that any such election is conducted properly, legally, and pursuant to the Constitution of the Commonwealth of Pennsylvania.

In their Petition for Review, Bonner asserted that, “[o]ver time, exceptions to in-person voting have been added to the Pennsylvania Constitution only through valid constitutional amendments.” See Bonner Petition for Review, ¶ 24. Bonner also asserted that, “the people of Pennsylvania have the right to vote on any amendment to the Pennsylvania

⁷ For purposes of this brief, the County Republican Intervenors refer to “Bonner” collectively as to all Petitioners.

Constitution, and the final say on whether any such amendment is permitted.” *Id.* at ¶ 25.

Respondents countered that Bonner’s suit is a “tag along” suit. See Memorandum in Support of Respondents’ Application for Summary Relief Regarding the *Bonner* Petition, p. 1. They also countered that “Petitioners challenge the validity of certain rules prescribing *how* the votes of qualified electors may be received, rules that apply to every voter in the same way.” *Id.* at p. 16. They further state that, “[p]ut differently, Petitioners do not claim a right to prevent any particular person from casting a vote; their interest, properly understood, is ensuring that the statutorily prescribed *methods* of voting are within the scope of the legislature’s constitutional authority.” *Id.* They conclude that, “[s]uch an interest is, of course, a generalized interest in obedience to the law.” *Id.*

However, as Bonner rightly points out, their “case is not about whether no excuse mail-in voting is a good idea or about whether no excuse mail-in balloting should be legally permissible in Pennsylvania.” See Bonner Brief in Response to Respondents’ Application for Summary Relief and Preliminary Objections, p. 1. Further, Bonner made “no challenge to the procedural mechanisms through which Act 77 was passed – e.g., bicameralism and

presentment – but rather, what is substantively contained within the legislative vehicle that became Act 77.” *Id.* p. 11.

Bonner’s interests are not generalized interests in obedience to the law. To the contrary, Bonner’s interests are distinguishable from the interests shared by all other citizens. Here, if Bonner’s Petition is dismissed based upon standing, Act 77 would otherwise go unchallenged. Additionally, redress through other channels is unavailable because the parties directly and immediately affected are actually opposed to those adversely affected. As stated in *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988), Bonner’s Petition allows the courts, within the framework of traditional notions of ‘standing,’ to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.

d. The County Republican Intervenors have Organizational, Representative, and Individual Standing.

The County Republican Intervenors were formed pursuant to the Bylaws of the Republican Party of the Commonwealth of Pennsylvania and Sections 2831 and 2837 of the Election Code. See 25 P.S. §§ 2831 and 2837. Section 2831 provides that, “[s]tate committee members, and also such party officers, including members of the National committee, as its rules provide, shall be elected by a vote of the party electors, in accordance with

the provisions of this act and party rules.” Pa. Stat. Ann. tit. 25, § 2831 (West). Section 2837 provides that, “[t]he county committee of each party may make such rules for the government of the party in the county, not inconsistent with law or with the State rules of the party, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such State rules, any present or future county rules of such party. No such rules shall be effective until a certified copy thereof has been filed in the office of the county board of elections.” Pa. Stat. Ann. tit. 25, § 2837 (West).

First, the County Republican Intervenors have representational and organizational standing. See County Republican Intervenors’ Petition for Review, ¶ 15. Pursuant to Pennsylvania law, “an association has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or threatened injury as result of the action challenged.” *Robinson Twp., Washington County v. Com.*, 83 A.3d 901, 922 (Pa. 2013); *Pennsylvania Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012).

Similarly, Pennsylvania Courts have allowed organizations to sue on behalf of their members. See *e.g. Applewhite v. Commonwealth*, 2014 Pa.

Commw. Unpub. LEXIS 756, at *21 (Pa. Commw. 2014) (recognizing an organization, “has standing to sue on behalf of its members or on its own behalf, particularly in lawsuits brought to challenge state laws affecting voters” and in litigation that, “implicates the violation of the right to voted protected in the Pennsylvania Constitution.”); see also *N. Central Pa. Trial Lawyers Ass’n v. Weaver*, 827 A.2d 550, 554 (Pa. Commw. 2003) (an organization has standing when its members suffer “immediate or threatened injury as a result of the challenged action.”).

Here, the County Republican Intervenors have standing because they must determine the allocation of financial resources, the efforts of volunteers, prioritizing get-out-the-vote efforts and communications. See County Republican Intervenors’ Petition for Review, ¶¶ 17-20; 45. The County Republican Intervenors, as those with the responsibility of leading Republican voter education efforts within their respective counties, must determine how to advise voters of the legal and proper method of voting and how to allocate financial resources for voter education efforts. *Id.*

The County Republican Intervenors’ standing is similar to that of the petitioners who challenged Pennsylvania’s Voter ID laws in the case of *Applewhite v. Com.*, 2014 WL 184988 (Pa. Commw. 2014). The *Applewhite* case concerned challenges to the Act of March 14, 2012, P.L. 195, No. 18

(Act 18 or “Voter ID Law,”) by numerous petitioners including various individual petitioners, the Homeless Advocacy Project, the NAACP, and the League of Women Voters (“organizational petitioners,”). *Id.* at *6. The Respondents in *Applewhite* challenged the organizational petitioners standing to bring their claim. In responding to this challenge, the Court held that the organizational petitioners have standing to challenge Act 18. *Id.* at *7. In so holding, the Court stated,

This litigation implicates the violation of the right to vote protected in the Pennsylvania Constitution. Both the LWV and the NAACP are organizations concerned with protecting the right to vote of Pennsylvanians and maximize their opportunities to exercise that right. *HAP also educated its clients as to voting criteria and has an interest in assisting its low-income clients to obtain compliant photo ID...Organizational Petitioners diverted valuable resources as a consequence of Respondents’ inconsistent evolving unchecked decisions expanding and contracting the criteria for compliant photo IDs under the Voter ID Law. F.F. Nos. 19–24. This loss of resources is a direct harm sufficient for standing.*

Applewhite, 2014 WL at *7.

In the present matter, the County Republican Intervenors allege interests almost identical to the organizational petitioners in *Applewhite*. The County Republican Intervenors, just as the organizational petitioners in *Applewhite*, have alleged direct harm in the form of increased education efforts being impacted by an unconstitutional statute and the spending of valuable resources as a consequence of the inconsistent, evolving

expansion of Pennsylvania’s laws governing mail-in voting. As such, the County Republican Intervenors have associational and organizational standing to challenge Act 77 as political committees representing the interests of Republican electors within their respective Counties.

Finally, the County Republican Intervenors also averred individual standing. Indeed, Jeffrey Piccola, Chair of the York County Republican Committee, averred that “[a]s a voter, [he was] harmed” because he was “not eligible for an absentee ballot.” See County Republican Intervenors Petition for Review, Ex. 2, ¶ 13. As a result, Mr. Piccola had to decide whether to use a no-fault mail-in ballot and “take the risk that [his] mail-in ballot and Republican vote may not be counted if Act 77 is unconstitutional and/or that [his] in-person vote at [his] polling place may be diluted or diminished by votes cast by virtue of an unconstitutional process.” *Id.*

2. LACHES.

In addition to the arguments surrounding standing, Respondents alleged that Petitioners’ claims challenging the constitutionality of Act 77 are barred by the purported time limitations contained in Act 77 as well as by the equitable doctrine of laches. These arguments are without merit.

Respondents argued that several elections have passed since the enactment of Act 77 in the Commonwealth of Pennsylvania and that as such,

the equitable doctrine of laches will bar Petitioners' relief due to their delay in challenging the Act. However, as an equitable doctrine, laches cannot be applied in any way that would burden the constitutionally guaranteed voting process. The Pennsylvania Supreme Court has ruled that a six-month delay in bringing an action challenging an election did not constitute laches such as would prevent the Court from hearing constitutional claims. See *e.g.* *Sprague v. Casey*, 550 A.2d 184 (1988). The Sprague Court held that, "laches and prejudice can never be permitted to amend the Constitution." *Id.* In so holding, the Court cited to an earlier Pennsylvania Supreme Court case, *Wilson, et ux. v. Philadelphia School District, et al.*, 195 A. 90 (1937), stating:

We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental questions going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations.

Wilson, 195 A. at 99.

Accordingly, the doctrine of laches is inapplicable to the present case, as the constitutionality of Act 77 is an issue that should be determined by this Court.

Respondent additionally alleges that Section 13 of Act 77 operates as a statute of limitations, barring claims not brought within 180 days of Act 77's

effective date. This argument is also in error. Section 13 of Act 77 states, “[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1) of Section 13. Section 13 additionally provides, “[a]n action under paragraph (2) must be commenced within 180 days of the effective date of this section.” Act of Oct. 31, 2019, P.L. 552, No. 77, § 13. However, the above cited provision of Act 77 does not operate as a statute of limitations, but rather grants exclusive jurisdiction to the Pennsylvania Supreme Court for the first 180 days that the Act is signed into law. Act 77’s exclusive jurisdiction mechanism has been reviewed by the Pennsylvania Supreme Court, in which case the Court ruled that, “[t]he petition for review was filed outside of the 180-day time period from the date of enactment of Act No. 2019-77 during which this Court had exclusive jurisdiction to decide specified challenges to Act No. 2019-77. . . . *the case is immediately transferred to the Commonwealth Court.*” See *Delisle v. Boockvar*, 95 MM 2020 (Pa. 2020) (emphasis added).

As such, Petitioners’ action challenging the constitutionality of Act 77 is timely filed. Additionally, as a challenge to the constitutionality of a sweeping statutory change of the Commonwealth of Pennsylvania’s election laws, the doctrine of laches is inapplicable to the present matter.

V. CONCLUSION.

The pleadings associated with the present cross-applications for summary relief have narrowed the issues of the case to two concise issues: (1) whether the Petitioners and County Republican Intervenors have standing to challenge the constitutionality of Act 77; and (2) whether the actions challenging the constitutionality of Act 77 were timely filed.

As set forth fully herein, McLinko, the Bonner Petitioners, and the County Republican Intervenors possess a “substantial, direct, and immediate interest,” in the present litigation. Moreover, the Petitioners’ actions were timely filed as the equitable doctrine of laches is inapplicable to constitutional claims and the purported 180-day limitation contained in Act 77 is a provision granting exclusive jurisdiction to the Pennsylvania Supreme Court.

As such, for the reasons set forth herein, the County Republican Intervenors respectfully request that this Honorable Court grant the Petitioners’ Applications for Summary Relief; deny Respondent’s Application for Summary Relief; and enter judgment in favor of Petitioners, together with such other relief that this Court deems just.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Thomas W. King, III
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