

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

BRIAN KIRK,)	
)	
Plaintiff,)	
)	
v.)	Case No.:
)	
CITY OF ST. JOSEPH,)	
MISSOURI, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF’S PETITION FOR DAMAGES AND EQUITABLE RELIEF**

COME NOW Defendants City of St. Joseph, Mayor John Josendale, and City Council Members Marty Novak, Taylor Crouse, Andy Trout, Michael Grimm, Madison Davis, Kenton Randolph, Jeff Schomberg, and Randy Schulz, all sued in their official capacities (hereinafter collectively referred to as “City Defendants”), by and through undersigned counsel, and, for their Answer and Affirmative Defenses to Plaintiff’s Petition for Damages and Equitable Relief, state and allege as follows:

Summary of Action

1. City Defendants admit that Brian Kirk previously served as a member of the Library Board of Trustees (“Library Board”), and this is an unpaid position. City Defendants state that the duties of the Library Board are generally set out at Missouri Statute section 182.140 *et. seq.* City Defendants further state that Plaintiff Kirk’s nomination was never placed on the agenda for the City Council and, accordingly, there was not a vote in opposition to the Plaintiff serving another term on the Library Board. To the extent any further response is required, City Defendants deny the allegations of paragraph 1 of the Petition.

2. City Defendants deny the allegations contained in paragraph 2 of the Petition.

Parties

3. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Petition and, therefore, deny them.

4. City Defendants admit that John Josendale is a citizen of the City of St. Joseph and is currently serving as the Mayor of St. Joseph and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 4 of the Petition.

5. City Defendants admit that Marty Novak is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 5 of the Petition.

6. City Defendants admit that Taylor Crouse is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 6 of the Petition.

7. City Defendants admit that Andy Trout is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 7 of the Petition.

8. City Defendants admit that Michael Grimm is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official

capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 8 of the Petition.

9. City Defendants admit that Madison Davis is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 9 of the Petition.

10. City Defendants admit that Kenton Randolph is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 10 of the Petition.

11. City Defendants admit that Jeff Schomburg is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 11 of the Petition.

12. City Defendants admit that Randy Schulz is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 12 of the Petition.

13. City Defendants admit that Marty Novak is a citizen of the City of St. Joseph and is currently serving on the St. Joseph City Council and that he has been sued in his official capacity. To the extent any further response is required, City Defendants deny the remaining allegations of paragraph 13 of the Petition.

14. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 of the Petition and therefore deny them.

15. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the Petition and therefore deny them.

16. City Defendants state that paragraph 16 does not make any substantive allegations but acknowledge that Plaintiff is referring to the St. Joseph City Council as “City Council.”

Jurisdiction and Venue

17. The allegations contained in paragraph 17 of the Petition constitute legal conclusions that do not require a response from City Defendants. To the extent a response is required, City Defendants deny the allegations of paragraph 17 of the Petition.

18. The allegations contained in paragraph 18 of the Petition constitute legal conclusions that do not require a response from City Defendants. To the extent a response is required, City Defendants deny the allegations of paragraph 18 of the Petition.

19. The allegations contained in paragraph 19 of the Petition constitute legal conclusions that do not require a response from City Defendants. But to the extent a response is required of City Defendants, City Defendants admit that the events describe in Plaintiff’s Petition occurred in Buchanan County, Missouri.

Background Facts Common to All Counts

20. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the Petition and therefore deny them.

21. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the Petition and therefore deny them.

22. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22 of the Petition and therefore deny them and also deny any allegation contained in the displayed images.

23. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 23 of the Petition and therefore deny them.

24. City Defendants admit that Plaintiff Kirk previously served on the Library Board. City Defendants deny the remaining allegations of paragraph 24 of the Petition.

25. City Defendants admit that one of the duties of a member of the Library Board is to oversee the financial health of the library. City Defendants deny that this is the only duty and additional duties are generally set forth at Missouri Statute section 182.140 *et. seq.*

26. City Defendants deny the allegations contained in paragraph 26 of the Petition.

27. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the Petition and therefore deny them and also deny any allegations contained in Exhibit A to the Petition.

28. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28 of the Petition and therefore deny them.

29. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 of the Petition and therefore deny them, including its sub-part.

30. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30 of the Petition and therefore deny them.

31. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of the Petition and therefore deny them, including its sub-part.

32. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32 of the Petition and therefore deny them.

33. City Defendants deny the allegations contained in paragraph 33 of the Petition.

34. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of the Petition and therefore deny them and also deny any allegations contained in the displayed images.

35. City Defendants deny the allegations contained in paragraph 35 of Plaintiff's Petition.

36. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 36 of the Petition and therefore deny them.

37. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37 of the Petition and therefore deny them, including each of its sub-parts.

38. City Defendants deny the allegations contained in paragraph 38 of the Petition.

39. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 39 of the Petition and therefore deny them.

40. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of the Petition and therefore deny them.

41. City Defendants deny the allegations contained in paragraph 41 of the Petition.

42. City Defendants admit that the City Council had a meeting on June 26, 2023, where there was public comment by individuals regarding appointments to the Library Board. To the extent any further response is required, City Defendants deny the allegations of paragraph 42 of the Petition.

43. City Defendants deny the allegations contained in paragraph 43 of the Petition.

Count I

Violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment Under 42 U.S.C § 1983 (All Defendants)

44. City Defendants incorporate by reference all of their responses to paragraphs 1–43 of Plaintiff’s Petition as if fully set forth herein.

45. The allegations contained in paragraph 45 of the Petition constitute legal conclusions that do not require a response from City Defendants. To the extent a response is required, City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45 and therefore deny them.

46. City Defendants deny the allegations contained in paragraph 46 of the Petition.

47. City Defendants deny the allegations contained in paragraph 47 of the Petition.

48. City Defendants deny the allegations contained in paragraph 48 of the Petition.

49. City Defendants deny the allegations contained in paragraph 49 of the Petition.

50. City Defendants deny the allegations contained in paragraph 50 of the Petition.

51. City Defendants deny the allegations contained in paragraph 51 of the Petition.

Count II

**First and Fourteenth Amendment Retaliation Under 42 U.S.C § 1983
(All Defendants)**

52. City Defendants incorporate by reference all of their responses to paragraphs 1–51 of Plaintiff’s Petition as if fully set forth herein.

53. City Defendants deny the allegations contained in paragraph 53 of the Petition, including each of its sub-parts.

54. City Defendants deny the allegations contained in paragraph 54 of the Petition.

55. City Defendants deny the allegations contained in paragraph 55 of the Petition.

56. City Defendants deny the allegations contained in paragraph 56 of the Petition.

57. City Defendants deny the allegations contained in paragraph 57 of the Petition.

58. City Defendants deny the allegations contained in paragraph 58 of the Petition.

59. City Defendants deny the allegations contained in paragraph 59 of the Petition.

60. City Defendants deny the allegations contained in paragraph 60 of the Petition.

61. City Defendants deny the allegations contained in paragraph 61 of the Petition.

62. City Defendants deny the allegations contained in paragraph 62 of the Petition.

63. City Defendants deny the allegations contained in paragraph 63 of the Petition.

Count III

**Conspiracy to Violate Constitutional Rights Under 42 U.S.C §§ 1983 and 1985
(All Defendants)**

64. City Defendants incorporate by reference all of their responses to paragraphs 1–63 of Plaintiff’s Petition as if fully set forth herein.

65. City Defendants deny the allegations contained in paragraph 65 of the Petition.

66. City Defendants deny the allegations contained in paragraph 66 of the Petition.

67. City Defendants deny the allegations contained in paragraph 67 of the Petition.
68. City Defendants deny the allegations contained in paragraph 68 of the Petition.

Count IV

Equal Protection (Against Defendants City of St. Joseph, Mayor Josendale, and City Council Members)

69. City Defendants incorporate by reference all of their responses to paragraphs 1–68 of Plaintiff’s Petition as if fully set forth herein.

70. City Defendants admit that they were acting in their official capacities as Mayor and City Council members. To the extent any further response is required, City Defendants deny the allegations of paragraph 70 the Petition.

71. City Defendants deny the allegations contained in paragraph 71 of the Petition.
72. City Defendants deny the allegations contained in paragraph 72 of the Petition.
73. City Defendants deny the allegations contained in paragraph 73 of the Petition.
74. City Defendants deny the allegations contained in paragraph 74 of the Petition.
75. City Defendants deny the allegations contained in paragraph 75 of the Petition.

Count V

Grounds for Injunctive Relief

76. City Defendants incorporate by reference all of their responses to paragraphs 1–75 of Plaintiff’s Petition as if fully set forth herein.

77. City Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 77 of the Petition and therefore deny them.

78. City Defendants deny the allegations contained in paragraph 78 of the Petition.

Relief Requested

City Defendants deny that Plaintiff is entitled to any of the requested relief. Plaintiff is not entitled to punitive damages as a matter of law and Plaintiff has no economic losses of any kind. Further, the City Council cannot be mandated to adopt a formal written policy based upon the allegations of Plaintiff Kirk and the prayer for the rescission of Grace Calvary's tax exempt status is inappropriate in that Grace Calvary Church is not a party to this action and this Court lacks the jurisdiction to rule regarding its tax exempt status.

GENERAL DENIAL

City Defendants deny each and every allegation of Plaintiff's Petition which is not specifically admitted herein. City Defendants also deny any allegations contained in any heading or unnumbered paragraph.

WHEREFORE, having fully answered Plaintiff's Petition, City Defendants pray that Plaintiff's Petition, including each and every count thereof, be dismissed with prejudice, that judgment be entered in favor of the City Defendants, that City Defendants be awarded their cost and expenses incurred herein, and that they be awarded a reasonable attorney fee and that this Court grant such other and further relief as it deems just and proper.

AFFIRMATIVE DEFENSES AND AVERMENTS

1. City Defendants state that Plaintiff has failed to state a claim.
2. City Defendants affirmatively state that if Plaintiff sustained any damage or loss, which City Defendants deny, the same was negligible in degree and amount and, thereby, *de minimus*. Therefore, this Court should give no cognizance thereto.

3. City Defendant state that Plaintiff's claim(s) are barred, in whole or in part, and/or Plaintiff is not otherwise entitled to any relief because of the doctrines of bad faith and unclean hands.

4. City Defendants state that they cannot be jointly or severally liable for any damages caused to Plaintiff, and any law which allows joint and several liability is unconstitutional and violates public policy and the right of due process and equal protection guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

5. If Plaintiff were damaged as alleged in his Petition, which City Defendants specifically deny, Plaintiff failed to mitigate his damages and, therefore, any recovery by Plaintiff should not include any loss which Plaintiff could have prevented by reasonable care and diligence.

6. City Defendants assert that any decisions regarding Plaintiff were made for legitimate and non-retaliatory reasons and would have been the same regardless of his alleged protected category or alleged protected speech.

7. City Defendants state that if Plaintiff has suffered any damages, then such damages should be apportioned to other causes or stressors in Plaintiff's life other than any action or inaction by City Defendants.

8. Plaintiff's Petition seeks to hold City Defendants liable on a theory of *respondeat superior*, which cannot operate to impose liability on City Defendants under 42 U.S.C. § 1983.

9. City Defendants state that they did not violate any constitutional or federally protected right, clearly established or otherwise, and that any "speech" or expressive conduct Plaintiff engaged in was not as a private citizen on a matter of public concern, and that the application of the *Pickering-Connick* balancing test weighs in City Defendants' favor.

10. Defendants affirmatively plead that according to *Mt. Health City School Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274 (1977), the same decision with respect to Plaintiff would have been made for lawful reasons regardless of whether Plaintiff engaged in protected speech, activity, or affiliation and Plaintiff has failed to allege any protective activity was the but-for causation of the alleged adverse action.

11. If Plaintiff offers evidence or testimony at trial of emotional distress, humiliation, and/or indignation allegedly aroused by City Defendants, any compensatory damages verdict awarded will already contain elements of both compensatory and punitive damages, and Plaintiff should not be permitted to receive a punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (citing Restatement (Second) of Torts § 908, Comment c, p. 466 (1977)).

12. Punitive and/or exemplary damages are barred and/or limited by section 510.261 RSMo, *et seq.* Punitive and/or exemplary damages shall not be awarded unless the claimant proves by clear and convincing evidence that the City Defendants intentionally harmed the Plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others. Defendants affirmatively plead that punitive damages are not available against Defendants in their official capacity, under 42 U.S.C. § 1983 or § 512.261.1 RSMo. Punitive and/or exemplary damages may only be recovered if the trier of fact awards more than nominal damages or if the claim(s) for which nominal damages are solely awarded, invoke privacy rights, property rights, or other rights protected by the Constitution of the United States or the Constitution of the State of Missouri. Punitive damages cannot be awarded against an employer or principal because of an act by an agent unless (1) the principal or a managerial agent of the principal authorized the doing and the manner of the act, (2) the agent was unfit and the principal or a managerial agent of the principal

was reckless in employing or retaining the agent, (3) the agent was employed in a managerial capacity and was acting in the scope of employment, or (4) the principal or a managerial agent of the principal ratified or approved the act. Punitive and/or exemplary damages may not be awarded because Plaintiff's Petition violates section 510.261.5 in that Plaintiff cannot state a claim for punitive damages or exemplary damages without obtaining leave of court after filing a written motion. § 510.261 RSMo. No judgment that includes a punitive or exemplary damages award shall be entered unless the requirements of sections 510.261, 510.263, and 537.675 have all been met. § 510.261.7 RSMo. Punitive or exemplary damages shall not be based, in whole or in part, on harm to nonparties.

13. City Defendants state that Plaintiff is not entitled to any punitive damages for any or all of the following reasons:

- a. The standards by which City Defendant's conduct is to be determined as alleged by Plaintiff are vague and wholly arbitrary, and as such deny due process in violation of the Fifth and Fourteenth Amendments of the United State Constitution and the Missouri Constitution;
- b. The standards for determining the amount and/or subsequent imposition of punitive damages are vague, supply no notice to City Defendant of the potential repercussions of its alleged conduct, and are subject to the unbridled discretion of the fact finder, thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution and Missouri Constitution;
- c. Plaintiff's request for punitive damages is criminal in nature and the rights given to defendants in criminal proceedings are applicable under the Fifth, Sixth, Eighth,

and Fourteenth Amendments to the United States Constitution and the Missouri Constitution;

- d. Plaintiff's request for punitive damages constitutes a request for, and/or imposition of, excessive fines in violation of the Eighth Amendment to the United States Constitution and the Missouri Constitution;
- e. Plaintiff's request for punitive damages constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and the Missouri Constitution;
- f. Plaintiff's request for punitive damages constitutes a denial of equal protection of the law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the Missouri Constitution in that City Defendants' wealth or net worth may be considered by a fact-finder in determining the award of damages in a punitive damages award;
- g. Plaintiff's request for punitive damages cannot protect City Defendants against multiple punishments for the same alleged wrong, thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution and the Missouri Constitution;
- h. An award of punitive damages would violate City Defendants' due process under the United States Constitution as well as be in violation of the United States Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991);
- i. An award of punitive damages would violate provisions of the Constitution of the United States, including Article I, Section 8;

- j. An award of punitive damages would violate provisions of the Constitution of the United States, including Article I, Section 9;
- k. An award of punitive damages would violate provisions of the Constitution of the United States, including Article I, Section 10;
- l. An award of punitive damages would violate provisions of the Constitution of the United States, including Article III, Section 2;
- m. An award of punitive damages would violate provisions of the 1945 Constitution of Missouri, including, but not limited to, Article I, Bill of Rights, Sections 2, 10, 13, 19, 21, and 22;
- n. To the extent City Defendants are being sued in their representative and/or official capacities, Plaintiff is not entitled to any punitive damage against them.

14. City Defendants state that punitive damages are not available against City Defendants in their official capacities under 42 U.S.C. § 1983. Defendant City of St. Joseph has sovereign immunity from punitive damages, as do all of City Defendants sued in their official capacities.

15. City Defendants state that they have been sued in their official capacities and are immune from punitive damages. To the extent any allegation against the City Defendants is deemed to have been made against them in their individual capacities, then the City Defendants would have qualified immunity from such claims. In any event, City Defendants did not violate Plaintiff's constitutional or federally protected rights, clearly established or otherwise, and are immune from suit under 42 U.S.C. § 1983.

16. City Defendants state that they acted reasonably under the circumstances then existing and their conduct was justified and/or privileged.

17. City Defendants state that Plaintiff has failed to exhaust his administrative remedies.

18. Any harm that Plaintiff may have suffered has been the result of an intervening act or superseding event caused by some person or entity other than City Defendants and City Defendants cannot be held responsible for such intervening acts or superseding events.

19. City Defendants state that all actions taken as it relates to Plaintiff are objectively reasonable under the circumstances.

20. City Defendants state that if Plaintiff sustained any damage or loss, which City Defendants at all times deny, the same was caused or contributed to by Plaintiff's own acts or omissions and any liability to Plaintiff should be proportionally reduced or eliminated.

21. City Defendants affirmatively state that Plaintiff lacks standing.

22. City Defendants state that to the extent Plaintiff's Petition attempts to seek or obtain injunctive or equitable relief, such relief is not available on the grounds that Plaintiff lacks standing and failed to present a justiciable claim. Further, Plaintiff has adequate remedies at law available to him.

23. City Defendants state that they have no liability under 42 U.S.C. § 1983 pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L. ED. 2d 611 (1978) and its progeny in that Plaintiff has not pleaded and cannot prove the facts sufficient to impose municipal liability.

24. City Defendants state that punitive damages are not available against a public entity under 42 U.S.C. § 1983.

25. City Defendants affirmatively plead that Plaintiff's claims are barred in whole or in part and cannot result in liability because of the business judgment rule.

26. City Defendants state that any speech or expressive conduct Plaintiff engaged in was made in the course of and pursuant to his duties as an employee of the Library Board.

27. Any actions taken by City Defendants toward Plaintiff were in furtherance of a compelling government interest and were narrowly tailored to achieve that compelling government interest.

28. Any actions taken by City Defendants toward Plaintiff were neither intentionally discriminatory nor irrational.

29. City Defendants states that none of the actions for which Plaintiff seeks to hold City Defendants liable were actions attributable to City Defendants.

30. City Defendants state that Plaintiff has not and cannot plead facts establishing that City Defendants treated other non-protected individuals who were similarly situated differently than Plaintiff as required to support Plaintiff's equal protection claim.

31. City Defendants affirmatively state that Plaintiff was not part of a suspect class that would invoke intermediate or strict scrutiny.

32. City Defendants affirmatively state that some or all of Plaintiff's claims are barred by the doctrines of legislative immunity, absolute immunity, sovereign immunity, and the public duty doctrine.

33. City Defendants state that the powers inherent in the Library Board position require political loyalty and allow adverse actions for otherwise protected First Amendment speech under the *Elrod-Branti* test.

34. City Defendants state that Plaintiff is not a member of a protected class and Plaintiff's sexual preference or identity cannot make him a member of a protected class.

35. City Defendants adopt the affirmative defenses of any other Defendant in this matter as if set forth in full herein.

36. City Defendants expressly reserve the right to raise, assert, and plead additional affirmative defenses which may become known and available through investigation and/or discovery and City Defendants reserve the right to amend their answer and affirmative defenses.

WHEREFORE, having fully answered Plaintiff's Petition, City Defendants pray that Plaintiff's Petition, including each and every count thereof, be dismissed with prejudice, that judgment be entered in favor of the City Defendants, that City Defendants be awarded their cost and expenses incurred herein, and that they be awarded a reasonable attorney fee and that this Court grant such other and further relief as it deems just and proper.

Respectfully submitted,

ENSZ & JESTER, P.C.



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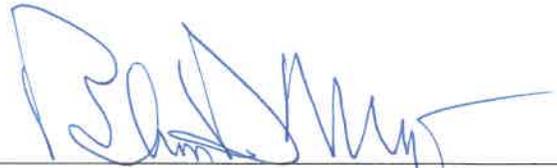
CERTIFICATE OF SERVICE

I hereby certify that, on February 15, 2023, the above and foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

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ATTORNEYS FOR DEFENDANTS
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