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ORAL ARGUMENT SCHEDULED FOR APRIL 27, 2018

No. 18-5110 (consolidated with No. 18-5032)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE,

Petitioner–Appellee,

v.

JAMES MATTIS, in his official capacity as SECRETARY OF DEFENSE,

Respondent–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC SUPPLEMENTAL BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

(A) Parties and Amici

John Doe was petitioner in district court and is appellee in this Court. James N. Mattis, in his official capacity as Secretary of Defense, was respondent in district court and is appellant in this Court. No amici participated in the district court, and none are currently anticipated in this appeal.

(B) Ruling Under Review

The ruling under review is the order of the district court (Chutkan, J.) dated April 19, granting Petitioner–Appellee's motion for a preliminary injunction. The district court's order was entered as ECF 88. The district court's accompanying memorandum opinion was issued under seal as ECF 87; the public, redacted version was issued as ECF 91-1. The district court's ruling has not been reported.

(C) Related Cases

Other than the briefing and argument in the consolidated case, this case has not previously been before this Court or any other court. Counsel for Petitioner–Appellee are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: April 24, 2018

Respectfully submitted,

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GLOSSARY

AUMF: Authorization of Use of Military Force

FARRA: Foreign Affairs Reform and Restructuring Act of 1998

[redacted]

MNF: Multinational Force–Iraq

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PROCEDURAL BACKGROUND

On April 5, 2018, this Court heard argument on the government's appeal of the district court's January 23 order requiring the government to give 72 hours' notice before forcibly transferring Petitioner to a third country, JA 50.[1] In its reply brief, the government narrowed its appeal to challenge the notice requirement only as to two specific countries, [redacted]. *See* Reply Br. 1–2.

On April 16, the government filed a notice informing the district court of its intent to "relinquish custody" of Petitioner to the custody of [redacted] "no sooner than 72 hours hence." ECF 77 at 1. An attached declaration of a State Department official stated that [redacted] "agreed to accept the transfer" of Petitioner despite the fact that Petitioner does not consent, and that if transferred he would be [redacted]. Decl. ¶ 2, ECF 77.[2] As the district court later explained, the declaration's language "indicat[ed] that the transfer was not initiated by the receiving country, but by the United States." *See* ECF 87 ("Op.") at 4.

On April 18, Petitioner sought a temporary restraining order or preliminary injunction enjoining his forcible transfer without positive legal authority. ECF 82.

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[1] All "JA" references herein are made to the Joint Appendix filed in the consolidated appeal pending before this Court. *See* No. 18-5032 (D.C. Cir.).

[2] For simplicity, all citations to ECF numbers in this brief are to the documents so numbered in the district court's electronic docket.

On April 19, the district court held a hearing and granted Petitioner's motion for a preliminary injunction. ECF 88.

The court held that all four *Winter* factors weighed in Petitioner's favor. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). First, the court concluded that Petitioner had shown a likelihood of success on the merits because the government had "failed to provide" legal authority for the transfer. Op. 3; *see* Op. 4 (explaining that "[w]hile the United States' relations with foreign allies is undoubtedly important, the government's bilateral relations and continued engagement in 'diplomatic discussions' with the receiving country does not rise to the level of 'positive legal authority' required to justify Petitioner's transfer"). Next, the court held that Petitioner would suffer irreparable harm if an injunction did not issue. *See* Op. 5 (explaining that "[r]elease from custody and involuntary transfer to the authorities of another country are not interchangeable concepts" and rejecting the government's "disingenuous" argument to the contrary). Finally, the court concluded that both the balance of equities and the public interest weighed in Petitioner's favor. *See* Op. 5–6 (finding "unavailing" the government's argument that "a ruling in Petitioner's favor would damage the government's international relations" and observing that the "receiving country agreed to accept the transfer" even while "well aware" that it could be "delayed or prohibited").

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The government appealed, ECF 89, and upon the government's unopposed motion, this Court consolidated the appeal with the government's pending appeal of the district court's January 23 order.

ARGUMENT

I. The district court properly enjoined Petitioner's transfer.

A. Petitioner established a likelihood of success on the merits.

The district court correctly held that Petitioner demonstrated a likelihood of success on the merits of his claim that the government may not transfer him to [redacted] without positive legal authority for the transfer. Op. 3–4. No court in U.S. history has permitted a U.S. citizen's forced transfer to another government without affirmative authorization by statute or treaty, whether in time of war or peace, or whether within or across a country's borders. Like the district court, this Court should reject the government's argument that it can transfer Petitioner to [redacted] based on the executive's determination that this country has a "legitimate sovereign interest" in him.

The requirement of positive legal authority and opportunity for judicial review of that authority is rooted in the Due Process Clause, the Suspension Clause, the federal habeas statute, and the separation of powers. It ensures that the executive cannot by itself dispose of a citizen's liberty. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011).

As the Supreme Court has stated, "[t]he Constitution creates no executive prerogative to dispose of the liberty" of a citizen, and the authority to transfer a citizen to a foreign government must be "given by act of Congress or by the terms of treaty," and must be subject to judicial review. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936); *accord Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir. 1972) ("It is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty." (citing *Valentine*, 299 U.S. at 7–9)); *see* Appellee Br. 18–22.[3]

The government argues that *Valentine* should not apply "to the wartime transfer of a detainee held in military custody abroad," Reply Br. 12, but it has offered no persuasive reason why that should be so. For example, the government claims that "[i]ndividuals captured by opposing forces on a foreign battlefield during an armed conflict are not 'fugitive criminals'" like the U.S. citizens sought by France in *Valentine*; instead, the government argues, "[t]hey are battlefield detainees, properly detainable and lawfully transferrable under the laws of war." Reply Br. 11. But the government has unambiguously conceded that its determination that Petitioner is lawfully detainable "*is not the basis* for the U.S. military's authority to transfer petitioner." Reply Br. 8. Moreover, at the April 5

[3] All references herein to Appellant's and Appellee's briefs are made to the briefs filed in the pending consolidated appeal. *See* No. 18-5032 (D.C. Cir.).

oral argument in this Court, government counsel suggested that if Petitioner were physically detained inside the United States, the government's position concerning the application of *Valentine* here would be different. But if the circumstances of Petitioner's capture remained the same, there is no reason why the government's decision to hold him in military custody inside the United States (as opposed to in Iraq) would trigger additional due process rights under *Valentine* against the very same "wartime transfer" the government has proposed here.

The government also claims that the principles in *Valentine* are inapplicable here because Petitioner "has not unearthed any decision from any court applying *Valentine* to the wartime transfer of a detainee held in military custody abroad." Reply Br. 12. More importantly, it is the *government* that lacks any precedent for the proposition that it may transfer a U.S. citizen to the custody of a foreign sovereign without positive legal authority—in *any* context. Courts have always complied with *Valentine*'s irreducible core requirement, rooted in the Due Process Clause and separation of powers: that the executive branch demonstrate positive legal authority before forcibly transferring a U.S. citizen. For example, in *Wilson v. Girard*, 354 U.S. 524 (1957), the Court upheld the transfer to Japan of an American servicemember accused of committing crimes in Japan based on a treaty. *Id.* at 526–29. Below, the government reduced *Wilson* to a case holding simply that there was no "'constitutional or statutory barrier' . . . to the application and

implementation by the Executive of a treaty provision permitting it to hand over a member of [the] military stationed in Japan to that country for criminal prosecution." ECF 84 at 15 n.2 (quoting *Wilson*, 354 U.S. at 530). But that is the point: *because* a treaty satisfied the requirement of positive legal authority for the transfer, there was no *additional* statutory or constitutional barrier to the transfer. *See Wilson*, 354 U.S. at 530; *accord Holmes*, 459 F.2d at 1219 (transfer of U.S. servicemembers to the Federal Republic of Germany for crimes committed there pursuant to agreement authorized by treaty).[4]

The government's suggestion that the positive legal authority required under *Valentine* applies solely when a citizen is "present in the United States," Reply Br. 17, is contradicted not only by decisions requiring that authority for transfers abroad, including by the military, but also by *Reid v. Covert*, 354 U.S. 1 (1954), *Hamdi*, and *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). In *Reid*, the Supreme Court made clear that a citizen does not "surrender" his constitutional rights when abroad (as the government argues, Reply Br. 17), but remains shielded by the Bill

[4] Below, the government claimed that *Wilson* "did not address the application of *Valentine* to individuals outside U.S. territory, nor did it otherwise undermine the authority of the Executive to relinquish custody of a wartime detainee held overseas to another country [redacted]." Both are arguments Petitioner has already addressed. *See* Appellee Br. 21–22 (discussing *Valentine*); *id.* at 30–31 & n.7 (explaining why [redacted] does not alter requirement of positive legal authority).

of Rights at all times and in all places. 354 U.S. at 5–6.[5] And the Supreme Court has repeatedly explained that the locus of an individual's detention does not alter his statutory or constitutional rights to challenge that detention. *See, e.g.*, *Hamdi*, 542 U.S. at 524 (physical location of a citizen's detention does not make "a determinative constitutional difference"); *see Boumediene*, 553 U.S. at 765 (political branches lack "the power to switch the Constitution on or off at will"). The same must be true of transfer—and any conclusion otherwise would invite governmental mischief. *Cf. Hamdi*, 542 U.S. at 524 (if locus of detention determined constitutional rights, it would create "a perverse incentive . . . . [to] simply keep citizen-detainees abroad").

The D.C. Circuit has recognized that *Valentine*'s requirement of positive legal authority is not limited to the extradition context, applying it equally to transfers of citizens to foreign custody by the U.S. military. *See Holmes*, 459 F.2d

[5] The government's assertion that habeas corpus does not protect Petitioner's right to regain his liberty "as against all sovereigns at all times wherever petitioner goes," Reply Br. 20, counters an argument Petitioner does not make. Petitioner makes no claim vis-à-vis any foreign sovereign; his claim is solely against *the United States*. Habeas corpus—and the Bill of Rights—protect American citizens against unlawful detention or unlawful transfer *by the U.S. government*. And, if those treasured safeguards mean anything, they must provide a citizen the opportunity to seek a remedy where a remedy is possible, as it is here, whether by safe release in Iraq *or*, if necessary, release in the United States or transfer elsewhere by mutual agreement of the parties. *See infra* Point I.B. Were that not that case, the government could unilaterally render to foreign custody a citizen journalist or aid worker unlawfully detained abroad—unless, perhaps, the citizen was Anderson Cooper, as the government appeared to suggest at argument.

at 1219 & n.59. *See* Appellee Br. 21–22. Even in *Munaf v. Geren*, 553 U.S. 674 (2008), a case implicating a sovereign's absolute right to punish crimes committed within its borders, the United States required positive legal authority for the citizens' transfer. *See Omar*, 646 F.3d at 24 (Supreme Court determined in *Munaf* that executive "had the affirmative authority to transfer" the citizens to Iraqi custody). In *Munaf*, the positive legal authority for transfer was a 2002 AUMF provision authorizing the United States, as part of the Multinational Force–Iraq ("MNF"), to "enforce all relevant Security Council resolutions regarding Iraq," 2002 AUMF § 3(a)(2), and therefore to detain individuals "pending investigation and prosecution in Iraqi courts under Iraqi law." *Munaf*, 553 U.S. at 679; *see id.* at 698 (U.S. authorized to function "in essence, as [Iraq's] jailor"); *Munaf v. Geren*, 482 F.3d 582, 586 (D.C. Cir. 2007) (Randolph, J., concurring) (necessary positive legal authority provided by 2002 AUMF, "in conjunction with" U.N. Security Council Resolutions 1546 and 1637), *aff'd*, 553 U.S. 674 (2008); *see also* Br. for the Federal Parties 25, *Munaf*, 553 U.S. 674 (Nos. 07-394 & 06-1666), 2008 WL 205089 (same).[6] To be sure, the *Munaf* Court distinguished the transfer at issue

[6] With respect to the United States' detention-as-jailor in *Munaf*, U.N. Security Council Resolution 1546 made clear that the multinational force operating in Iraq had "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed" thereto—including a letter from U.S. Secretary of State Colin L. Powell that explained that the "MNF stands ready to continue to undertake a broad range of tasks" such as

there from an extradition. *See* 553 U.S. at 704. But an extradition treaty is merely one type of positive legal authority, and the government had another type in that case. *See* Appellee Br. 28–32; *see also Omar*, 646 F.3d at 24; *id.* at 26 (Griffith, J., concurring in the judgment); *Munaf*, 482 F.3d at 586 (Randolph, J., concurring). The government has not presented any such positive legal authority here.[7]

Additionally, the government wrongly asserts that Petitioner's "capture[ ] on a battlefield during an armed conflict . . . is dispositive under *Munaf*." Reply Br. 13. First, *Munaf* turned not on a government assertion of "battlefield capture," but on the government's demonstrated positive legal authority to transfer the petitioners to Iraq—where they had voluntarily traveled (and were not forcibly brought) and that was prosecuting them for crimes committed on its territory. *Munaf*, 553 U.S. at 689, 694. And second, *Hamdi* rejected that a mere allegation of "battlefield capture" was sufficient to strip a citizen of his right to seek release

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"internment where . . . necessary for imperative reasons of security." UNSCR 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

[7] The government may later argue that it possesses positive legal authority to transfer Petitioner to [redacted] based on the 2001 or 2002 AUMFs. *Cf. In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) (authorizing transfer of American citizen properly detained as prisoner of war pursuant to affirmative transfer authority under Geneva Conventions). But the government has not relied on the AUMFs to transfer Petitioner now, and as Petitioner has already explained, any such reliance would require the courts' legal conclusion that Petitioner is an "enemy combatant" under the statute. *See* Appellee Br. 23–26; ECF 83-1 at 13–14. The government cannot now transfer Petitioner based on a legal conclusion or alleged facts that, even if made in good faith, remain untested.

through habeas, whether because the government lacked legal authority or a factual basis to detain him. 542 U.S. at 524. The government's argument would render *Hamdi* a dead letter for any citizen journalist or aid worker whom the government captured in a war zone and sought to forcibly transfer to another country.

Finally, Petitioner does not suggest, as the government misleadingly asserts, that "U.S. courts must essentially adjudicate petitioner's habeas petition before the U.S. military has authority to transfer him." Reply Br. 14. U.S. courts must adjudicate his habeas petition *if* the government lacks independent positive legal authority to transfer him, such as an extradition treaty, or if the government's asserted detention authority is the same as its positive legal authority to transfer.

B. Petitioner will suffer irreparable harm if he is transferred.

The district court properly found that Petitioner will suffer irreparable harm if transferred to [redacted]. Op. 5. As the court explained, "[r]elease from custody and involuntary transfer to the authorities of another country are not interchangeable concepts." Op. 5. If Petitioner is forcibly transferred to [redacted]. Decl. ¶¶ 2–4, ECF 77.[8]

[8] The district court properly distinguished *Gul v. Obama*, 652 F.3d 12 (2011), which the government cited below in support of its argument that "collateral consequences, such as [redacted]—both of which stem from a foreign government's independent decisions—are beyond this Court's power to control or

Moreover, such a transfer will cause Petitioner to lose his constitutional and statutory right to demonstrate that his detention is unlawful and to obtain his unconditional release. *See* Op. 5; Appellee Br. 41–44.

Below (and at the previous oral argument in this Court), the government speculated that Petitioner *might* suffer harm if he were simply released in Iraq, because [redacted] *might* seek to detain him. ECF 84 at 17–18. But they also might *not* seek Petitioner's detention if he is released to a safe location in Iraq. And the district court also might order his release in the United States if it finds that he is not lawfully detained as an enemy combatant and that release elsewhere is not safe or practicable. To be sure, it is not clear what will happen to Petitioner once he regains his freedom. But the government's argument that because Petitioner "would have no legal entitlement to U.S. protection post-release from detention by either [redacted]," he cannot be harmed as a matter of law is not only wrong, but wildly offensive to constitutional values. *See supra* note 5. Even if, upon his release, Petitioner merely crosses the street and is taken into foreign custody, the loss of the

redress." ECF 84 at 18. But *Gul* involved petitioners who had already been transferred to the custody of a foreign sovereign and were no longer within the court's habeas jurisdiction. *See* Op. 5 (citing *Gul*, 652 F.3d at 13). Thus, while *Gul* may stand for the proposition that collateral consequences cannot support an independent habeas *claim*, it does not by any means stand for the proposition that collateral consequences are not cognizable habeas *harms*.

ability to cross the street as a free man is, in itself, an irreparable harm. *See* Appellant Br. 42–43.[9] To hold otherwise would be to cynically accept that Petitioner's fate is in no way his own, and that the actions of foreign sovereigns—even if made for fundamentally illegitimate reasons—can trump habeas's most fundamental promise. This Court should reject the government's argument.

C. The equities weigh in Petitioner's favor.

The district court did not abuse its discretion in balancing the equities and concluding that they "weigh in Petitioner's favor." Op. 5. The court found "unavailing" the government's argument that an injunction would "undermine" the credibility of the United States with an "important foreign partner" and negatively impact future negotiations regarding detainee transfers. Op. 5–6. As the court noted, the government "was aware of the possibility that Petitioner's transfer could be delayed or prohibited when it entered into negotiations for the transfer with the receiving country, and it informed the receiving country of that possibility before the receiving country agreed to accept Petitioner." Op. 6. The receiving country

[9] As previously explained, this case thus differs from *Munaf* and *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009), where there was no possible habeas remedy. In *Munaf*, release in either Iraq or the United States would necessarily have "shield[ed]" the petitioners from prosecution by a foreign sovereign that had already commenced criminal proceedings to punish them for crimes committed on its territory, 553 U.S. at 699. In *Kiyemba II*, the only possible remedy was transfer to a foreign country since the court held a federal judge could not order the release of "alien wartime detainees" in this country through habeas, 561 F.3d at 519 (Kavanaugh, J., concurring) ("inadmissible aliens . . . have no constitutional right to enter the United States").

thus "agreed to accept the transfer" knowing full well that ongoing litigation might delay or prevent the transfer. Op. 6.

Further, the government cannot have a legitimate interest in transferring a U.S. citizen to another country by entering into an agreement it had no legal authority to enter into in the first place. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (A party cannot be "harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional." (citation omitted)).

D. The preliminary injunction serves the public interest.

The district court properly found that the public interest favors ensuring that U.S. citizens are not rendered to foreign governments without positive legal authority and that citizens retain their right to seek their "freedom from arbitrary and unlawful restraint" through habeas corpus. Op. 6 (quoting *Boumediene*, 553 U.S. at 797); *see also* Appellee Br. 51–52.

II. The district court's ruling shows the need for individualized, country-specific notice prior to transfer.

In its appeal of the district court's 72-hour notice order, the government effectively sought judicial pre-clearance to transfer Petitioner to any country. While that appeal was pending, the government provided notice of its intention to transfer Petitioner to [redacted], accompanied by a declaration explaining the transfer's circumstances. ECF 77. This notice provided information essential to the district

court's determination of whether the transfer was lawful, making clear: that the government has no positive legal authority for the transfer, Decl. ¶¶ 3–4, ECF 77; that Petitioner will be [redacted], *id*. ¶ 5; that the government will suffer no commensurate harm to bilateral relations, *id*. ¶¶ 5–6; and that [redacted] has not charged Petitioner criminally, has not requested his transfer, and "agreed" to Petitioner's transfer at the United States' request, *id*. ¶ 4.

The district court's ruling thus shows why this Court should affirm not only the preliminary injunction as to [redacted], but also the 72-hour notice requirement as to both [redacted]. Rejecting that requirement would mean that this Court had necessarily deemed *any* potential transfer to [redacted] lawful no matter the circumstances, depriving the district court the opportunity to assess not only the asserted legal authority, but also the concrete terms of that transfer, the respective harms to the parties, and the nature of the receiving country's specific interest. Notice would additionally enable the court to assess whether a proposed transfer should be prohibited based on the risk of torture, whether as an "extreme case" under *Munaf*, 553 U.S. at 702, or under the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681–761 (1998) ("FARRA"), which implements the U.N. Convention Against Torture, and prohibits transfer to a country where there are substantial grounds for believing the person would be in danger of being subjected

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to torture. *See, e.g.,* ECF [redacted].[10] The concreteness of the dispute in this appeal make plain that it would be unwise to "pre-clear" Petitioner's [redacted]—particularly after the government first offered justifications for it in its reply brief in the previous appeal.

CONCLUSION

This Court should affirm the district court's ruling enjoining Petitioner's transfer to [redacted], and affirm the 72-hour advance notice requirement as to [redacted]. Should the Court decide to vacate either injunction, Petitioner respectfully requests that issuance of the mandate be stayed for a sufficient time to allow him to seek review by the Court en banc, or to seek a stay from this Court or the Supreme Court pending the filing of a petition for certiorari.

[10] In *Omar*, this Court held that the petitioner could not seek judicial review under FARRA of his claim that he faced torture if transferred to Iraq. 646 F.3d at 145. Judge Griffith disagreed with this conclusion, explaining that, absent a suspension of the writ, courts must consider a FARRA claim, but concluding that petitioner's FARRA claim should be rejected on the merits. *Id.* at 29 (Griffith, J., concurring). Should any [redacted] carry a substantial risk of torture, Petitioner would press a FARRA claim through en banc or Supreme Court review.

Dated: April 24, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order dated April 20, 2018, because it contains fifteen pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Jonathan Hafetz
Jonathan Hafetz
Counsel for Petitioner–Appellee

Dated: April 24, 2018

CERTIFICATE OF SERVICE

On April 24, 2018, I filed the foregoing PUBLIC SUPPLEMENTAL BRIEF FOR PETITIONER–APPELLEE with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the Court's electronic docketing system.

Dated: April 24, 2018

Respectfully submitted,

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