IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ATHENS DIVISION

SKYLER MUSGROVE, Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*, Defendants.	Civil Action No. 3:18-cv-00080-CDL JURY TRIAL DEMANDED

PLAINTIFF'S OPPOSITION TO THE PARTIAL MOTION TO DISMISS ON BEHALF OF DEFENDANTS BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT

Plaintiff Skyler Musgrove ("Mr. Musgrove" or "Plaintiff"), by and through the undersigned counsel, hereby files his response in opposition to the Partial Motion to Dismiss on Behalf of Defendants Board of Regents of the University System of Georgia, James Hull, Jere Morehead, and Karin Elliott, each in their official capacities. In support Plaintiff states as follows:

STATEMENT OF FACTS

Plaintiff Skyler Musgrove, a University of Georgia employee, was unlawfully denied coverage under his employer-based health plan for surgery to treat his medical condition, gender dysphoria. Defendants barred coverge not due

to a lack of medical necessity, but rather pursuant to an animus-based treatment exclusion. Mr. Musgrove receives employment compensation from his employer, the Georgia Board of Regents ("BOR") in the form of health care coverage under the Consumer Choice HSA Healthcare Plan ("Plan"). (Doc. 1 ¶ 1.) Mr. Musgrove underwent provider-recommended surgical treatment for gender dysphoria. (Doc. 1 ¶ 50.) His surgeon's preauthorization request was denied not due to lack of medical necessity, but solely on the basis of a plan exclusion for all treatments of gender dysphoira. (Doc. 1-4 at 2.)

Mr. Musgrove timely filed a charge of sex and disability discrimination with the Equal Employment Opportunity Commission, (Doc. 1 ¶ 23), which issued him a right-to-sue letter. (Doc. 1 ¶ 24) Mr. Musgrove filed within the ninety days of receipt of the right-to-sue letter. (Doc. 1 ¶ 25). Mr. Musgrove thus met Title VII's technical and administrative requirements.

LEGAL STANDARD

In ruling on a 12(b)(6) motion to dismiss, the court must accept the allegations of the complaint as true and construe the facts alleged in the complaint in the light most favorable to the plaintiff. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994). The relevant inquiry is whether the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The motion "tests the

sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citation omitted). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *ICA Const. Corp. v. Reich*, 60 F.3d 1495, 1497 (11th Cir. 1995) (citations omitted).

ARGUMENT AND CITATION OF AUTHORITY

I. Eleventh Amendment immunity is inapplicable to Mr. Musgrove's claims for monetary damages brought pursuant to Title I and Title II of the ADA.

Defendants do not dispute that, in enacting the ADA, Congress intended to abrogate Eleventh Amendment immunity.[1] Rather, Defendants argue that Congress did not do so validly; the Eleventh Amendment, they argue, entitles them to sovereign immunity from Plaintiff's claims for monetary damages under Titles I and II of the ADA. This argument should be rejected.

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[1] *See U.S. v. Georgia*, 546 U.S. 151, 154 (2006) ("In enacting the ADA, Congress 'invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment.' 42 U.S.C. § 12101(b)(4). Moreover, the Act provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." § 12202. We have accepted this latter statement as an unequivocal expression of Congress's intent to abrogate state sovereign immunity.").

The Eleventh Amendment provides states with immunity from suit for damages, but the Supreme Court has recognized that Congress can abrogate this immunity in two ways. *Compare Georgia*, 546 U.S. at 158, *with City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *see also Alaska v. EEOC*, 564 F.3d 1062, 1067–68 (9th Cir. 2009) (discussing two ways in which Congress abrogates sovereign immunity). In their Motion to Dismiss, Defendants do not discuss the first theory of abrogation, which the Supreme Court recognized in an ADA case out of the Eleventh Circuit: Congress can validly abrogate Eleventh Amendment immunity by creating a private right of action for money damages against the State for "conduct that *independently* violate[s] the provisions of § 1 of the Fourteenth Amendment." *Georgia*, 546 U.S. at 154-55 (emphasis added); *id.* at 159 (holding that Eleventh Circuit erred in dismissing ADA claims that were based on conduct that "also violated the Fourteenth Amendment").

Second, "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause. . . . Section 5 legislation is valid if it exhibits 'a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end.'" *Association for Disabled Americans, Inc. v. Fla. Intern.*

University, 405 F.3d 954, 957 (11th Cir. 2005) (emphasis added) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997)); *see also Georgia*, 546 U.S. at 157-58 (distinguishing abrogation for state conduct that "independently violates" § 1 of the Fourteenth Amendment, from abrogation pursuant to § 5 of the Fourteenth Amendment for "prophylactic" legislation).

Both theories of abrogation—namely, (1) *Georgia*'s theory of abrogation regarding state conduct that "actually violates" the Fourteenth Amendment, and (2) *Boerne*'s "congruence and proportionality" theory—support Plaintiff's claims for monetary damages against the Defendants under Titles I and II of the ADA.

A. A plaintiff may maintain a suit for damages under Titles I and II of the ADA for conduct that "actually violates" § 1 of the Fourteenth Amendment.

Eleventh Amendment immunity does not bar the Plaintiff's claim for monetary damages under Titles I or II of the ADA because the Plaintiff has alleged an independent violation of the Fourteenth Amendment. *See* Compl. ¶¶ 156-173 (Counts Seven, Eight, and Nine). The key case is *United States v. Georgia*, which held that Title II of the ADA validly abrogated state sovereign immunity to create a private right of action for monetary damages against the State for conduct that "actually violates" § 1 of the Fourteenth Amendment in addition to the ADA. 546 U.S. at 158 (recognizing Congress's power "to enforce . . . the provisions of the [Fourteenth] Amendment by creating private remedies against the States

for *actual* violations of those provisions") (emphasis in original). In that case, an inmate with paraplegia brought a suit for damages under Title II of the ADA against the State of Georgia, the Department of Corrections, and several individual prison officials alleging that he was confined to his cell for 23-24 hours per day and had been denied access to prison programs and services on account of his disability. *See id.* at 154-55. He also claimed a violation of the Eighth Amendment based on these conditions of confinement. *Id.* at 156.

The Supreme Court reversed the Eleventh Circuit's decision dismissing the Title II ADA claim as barred by sovereign immunity, holding that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at 159 (emphasis in original). On remand, the Eleventh Circuit was instructed to determine "(1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct *also* violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* (emphasis added).

Here, the Plaintiff has adequately alleged that Defendants' conduct violated not only Titles I and II of the ADA, but also his right to equal protection under the

Fourteenth Amendment. *See* Compl. ¶¶ 156-173 (Counts Seven, Eight, and Nine). Accordingly, under *Georgia*, the Plaintiff may maintain a damages action for violations of Title I and II of the ADA. Importantly, none of the cases cited by Defendants suggest otherwise. *See* Defs.' Mot. Dismiss at 4-7. Specifically, none of the Title I cases cited by Defendants involved an independent constitutional claim and, therefore, none addressed *Georgia*'s theory of abrogation regarding state conduct that "actually violates" the Fourteenth Amendment. *See, e.g.*, *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Congress did not validly abrogate sovereign immunity under Title I of the ADA pursuant to its § 5 powers because legislation was not "congruent and proportional"); *see also Georgia*, 546 U.S. at 157-58 (distinguishing *Garrett*).[2]

The Title II cases cited by Defendants are likewise unavailing: with one exception,[3] none of the cases involved an independent constitutional claim and

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[2] The Supreme Court's decision in Garrett preceded its decision in *Georgia* and involved only a violation of the ADA—not an independent violation of § 1 of the Fourteenth Amendment. See *Garrett*, 531 U.S. at 362. Accordingly, the Court in *Garrett* had no occasion to address *Georgia's* theory of abrogation based on "conduct that independently violated the provisions of § 1 of the Fourteenth Amendment." *Georgia*, 546 U.S. at 157.

[3] In a report and recommendation issued in *Kessler v. Fla. Dep't of Revenue*, the Plaintiff, proceeding *pro se*, appears to have raised a constitutional liberty claim in addition to the ADA claim. 2009 U.S. Dist. LEXIS 139060, at *4 (S.D. Fla. 2009) (report and recommendation). Because the magistrate did not cite—let alone analyze—*Georgia*, this report and recommendation should be accorded no weight.

therefore did not reach the *Georgia* theory of abrogation. *See, e.g.*, *Clifton v. Ga. Merit System,* 478 F. Supp. 2d 1356, 1367 n.9 (N.D. Ga. 2007) (distinguishing *Georgia* on grounds that "[n]o . . . independent violation of a stated constitutional protection is clearly implicated in the matter at hand."); *accord. Lucas v. Ala. Dep't of Pub. Health*, 2016 U.S. Dist. LEXIS 9420, at *11 n.9 (M.D. Ala. 2016).

B. A plaintiff may maintain a suit for damages under Title II of the ADA provided that there is "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to that end.

Even if this Court were to determine that the Plaintiff has not adequately alleged an equal protection violation pursuant to the *Georgia* theory of abrogation, it should still find that Eleventh Amendment immunity does not bar the Plaintiff's claim for monetary damages under Title II of the ADA[4] because Title II is congruent and proportional legislation under *Boerne*.

In *Georgia*, the Court instructed the Eleventh Circuit on remand to determine "insofar as [the State's] misconduct violated Title II *but did not violate the Fourteenth Amendment*, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is *nevertheless* valid." *Georgia*, 546 U.S. at

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[4] As discussed above, in *Garrett*, the Supreme Court held that Eleventh Amendment immunity barred the Plaintiff's claim for monetary damages under *Title I* (but not Title II) of the ADA because Title I was not congruent and proportional legislation under *Boerne*. *See Garrett*, 531 U.S. at 374. As further discussed above, *Garrett* did not reach the *Georgia* theory of abrogation.

159 (emphasis added). Under *Georgia*, this Court should reach this question only if it concludes that the Plaintiff has not adequately alleged a constitutional violation. *See id.*; *see also Alaska*, 564 F.3d at 1068 ("[W]hen legislation provides a direct remedy for unconstitutional conduct [i.e., under *Georgia*'s theory of abrogation], the *Boerne* [congruence and proportionality] inquiry is superfluous.").

According to the Eleventh Circuit, the congruence and proportionality inquiry set forth in *Boerne* requires a determination of: "(1) the constitutional right or rights that Congress sought to enforce when it enacted the ADA, (2) whether there was a history of unconstitutional discrimination to support Congress's determination that prophylactic legislation was necessary; and (3) whether Title II is an appropriate response to this history and pattern of unequal treatment." *Association for Disabled Americans, Inc. v. Fla. Intern. University*, 405 F.3d 954, 957 (2005).

Regarding the first question, the Supreme Court in *Tennessee v. Lane* concluded that "Title II seeks to enforce the Fourteenth Amendment's 'prohibition on irrational disability discrimination.' . . . Additionally, the Court noted that Title II seeks to enforce the constitutional guarantees under the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment in the context of access to the courts." *Id.* at 957 (quoting *Tennessee v. Lane*, 541 U.S. 509 (2004)). Importantly, the Supreme Court "did not specify the

need for a fundamental right to be at stake in order to satisfy this prong of the inquiry." *Disabled Americans, Inc.*, 405 F.3d at 957 n.2. In enacting the ADA, Congress sought to enforce a range of constitutional rights at issue in this case including, *inter alia*, equal access to healthcare services under the Equal Protection Clause. *See City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (holding that a city ordinance that irrationally required a special permit for the operation of a group home for people with disabilities violated equal protection).

Regarding the second question—history of unconstitutional discrimination—the *Lane* Court noted that Congress had documented "a pattern of unequal treatment in the administration of a wide range of public services, programs and activities," and the Court concluded that this history of unconstitutional disability discrimination justified Congress's enactment under § 5 of a prophylactic remedy. *Disabled Americans, Inc.*, 405 F.3d at 1992 (citing *Lane*). Here, Congress identified, in the ADA, a pattern of unconstitutional discrimination by the States against people with disabilities regarding the delivery of healthcare services. *See, e.g.*, 42 U.S.C. § 12101(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as . . . health services"); *id.* § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion,

. . . failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities").

As to the third question—whether Title II an appropriate response—the *Lane* Court explained that the congruence and proportionality of remedies must be judged based on the constitutional rights at stake in the particular class of cases at issue. *Disabled Americans, Inc.*, 405 F.3d at 958 ("[C]ongruence and proportionality of the remedies in Title II should be judged on an individual or 'as-applied' basis in light of the particular constitutional rights at stake in the relevant category of public services.") (citing *Lane*, which involved "the class of cases implicating the accessibility of judicial services"). Here, Title II is congruent and proportional legislation as applied to the class of cases implicating equal access to healthcare services. Given the history of state discrimination against people with disabilities in the delivery of healthcare services, "Congress reasonably concluded that there was a substantial risk for future discrimination" and enacted Title II as a prophylactic remedy to prevent it. *Id.* at 959. Importantly,

> Congress chose a limited remedy. Title II only prohibits discrimination by reason of disability. Therefore, States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability. . . . Furthermore, Title II requires only "reasonable modifications that would not fundamentally alter the nature of the service provided."

Id. (citation omitted). As the Supreme Court stated in *Lane*, the validity of § 5 legislation turns not only on the pervasiveness of discrimination, but also on the "gravity of the harm [the law] seeks to prevent." *See Lane*, 541 U.S. at 523. Here, the consequences are grave: the denial of life-saving, medically necessary health services. *See* Compl. ¶ 37 ("When left untreated, gender dysphoria can result in serious psychological debilitation, including depression, anxiety, suicidality, and other mental health issues."). Accordingly, if this Court reaches the question, the Court should conclude that Title II validly abrogated sovereign immunity with respect to discrimination in the delivery of healthcare services.

Defendants nowhere argue that Title II is not "congruent and proportional" legislation under *Boerne*. In fact, they do not explicitly discuss *Boerne* at all. Instead, they advance a different argument premised on several district court decisions: because *Garrett* bars monetary damages claims against employers under Title I, they argue, *Garrett* must also bar such claims against employers under Title II. *See* Mot. Dismiss at 6-7. This logic is flawed, and the argument therefore fails, for several reasons.

First, as discussed above, *Garrett* does not bar *all* Title I claims for monetary damages; because *Garrett* was decided before *Georgia*, *Garrett* never addressed *Georgia*'s theory of abrogation regarding state conduct that "actually violates" the Fourteenth Amendment. *See Georgia*, 546 U.S. at 157 (distinguishing *Garrett*).

The district court decisions upon which Defendants rely, *see, e.g.*, *Clifton*, 478 F. Supp. 2d at 1367 n.9, similarly do not reach *Georgia*'s theory of abrogation regarding state conduct that "actually violates" the Fourteenth Amendment. Second, *Garrett* explicitly refused to reach whether the Eleventh Amendment bars Title II claims for monetary damages, 531 U.S. at 360 n.1, and *Georgia* subsequently determined that such claims are *not* categorically barred, 546 U.S. at 157. Third, the Eleventh Circuit's decision in *Bledsoe v. Palm Beach County Soil and Water Conservation Dist.*, which first held that "Title II of the ADA encompasses employment discrimination," does not address—and certainly does not foreclose—monetary damages claims against public employers under Title II. 133 F.3d 816, 818 (11th Cir. 1998); *see also Winokur v. Office of Court Admin.*, 190 F. Supp. 2d 444, 449 (E.D.N.Y. 2002) (concluding that Eleventh Amendment barred state employee's claim for monetary damages against state employer under Title I *but not* Title II of ADA). In sum, neither the Supreme Court nor the Eleventh Circuit has ever held—nor even suggested—that Eleventh Amendment immunity bars monetary damages claims against public employers under Title II, and district court decisions, while mixed, have suggested the opposite.

II. Title VII's concurrent applicability does not bar Mr. Musgrove's private cause of action for discrimination under Title IX.

Allowing Mr. Musgrove's Title VII and Title IX claims to proceed simultaneously does not unfairly prejudice Defendants. To the extent that the

rationale for preemption of Title IX claims is to prevent bypassing of the EEOC process, such concerns are not present in this case. Mr. Musgrove is not attempting an end-run around Title VII's techical and administrative requirements, which he met. (Doc. 1 ¶ 23-25)

Neither the Supreme Court nor the Eleventh Circuit have addressed the question of whether Title VII preempts a Title IX action for damages. *Drisin v. Fla. Int'l Univ. Bd. of Trs.*, 2017 U.S. Dist. LEXIS 100247 (S.D. Fla. June 27, 2017). The majority of Circuit Courts (1st, 3rd, 4th, 6th, and 8th) that have examined this question have found that plaintiffs may pursue a lawsuit under Title IX for employment discrimination notwithstanding the availability of Title VII remedies. *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1988), *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3rd Cir. 2017) (rejecting Title VII preemption even where Title VII claims were not brought nor the EEOC exhaustion requirements met); *Preston v. Virginia*, 31 F.3d 203, 205-206 (4th Cir. 1994); *Ivan v. Kent State University*, 92 F.3d 1185, at 2 n.10 (6th Cir. 1996); *Brine v. Univ. of Iowa*, 90 F.3d 271 (8th Cir. 1996). The Second Circuit has not decided the issue, but in *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013), the court noted that the U.S. Department of Justice recognizes such a cause of action. U.S. Dep't of Justice, Title IX Legal Manual IV.B.2., *available at* https://www.justice.gov/crt/title-ix ("The Department takes the position that Title IX and Title VII are separate enforcement

mechanisms. Individuals can use both statutes to attack the same violations. This view is consistent with the Supreme Court's decisions on Title IX's coverage of employment discrimination, as well as the different constitutional bases for Title IX and Title VII."). The Manual in turn cites *Henschke v. N.Y. Hosp.-Cornell Med. Ctr.*, 821 F.Supp. 166, 172-73 (S.D.N.Y. 1993), which explains that following *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), "it is undisputed that a private right of action exists under Title IX." 821 F.Supp. at 172. And that in *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512 (1982), "the Supreme Court undertook an extensive analysis of the legislative history of Title IX and determined that Congress intended Title IX to serve as a bar to employment discrimination by educational programs receiving federal funding." 821 F.Supp. at 172. *Henschke* rejected *Storey v. Bd. of Regents of Univ. of Wis. Sys.*, 604 F. Supp. 1200 (W.D. Wis. 1985). Only the 5th and 7th Circuits have found preemption of Title IX. *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861–62 (7th Cir. 1996), abrogated in part on other grounds by *Fitzgerald*, 555 U.S. 246 (2009).

Title IX is a remedial statute that courts should accord "a sweep as broad as its language." *North Haven* 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)). In light of the circuit split on this issue, it is premature to dismiss Mr. Musgrove's claims, especially given that there is no unfair prejudice to

Defendants by retaining them. Should the Court find that Mr. Musgrove prevails on both the Title VII and Title IX claims, the result will be the same for Defendants. To the extent that there are any differences between the scope of protections under Title VII and Title IX, Mr. Musgrove is entitled to the benefit of development of the factual record that may provide evidence of discrimination under Title IX alone. Title IX's protections are more broadly-worded 20 U.S.C. § 1681 (2017). and there are implementing regulations to rely on, unlike with Title VII. 34 C.F.R. § 106.56(b) (2018) ("A recipient shall not: (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees."); 34 C.F.R. § 106.51(a)(3) (2018) ("A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with … organizations providing or administering fringe benefits to employees of the recipient."); 34 C.F.R. § 106.51(b)(7) (applying employment discrimination protections to "[f]ringe benefits available by virtue of employment, whether or not administered by the recipient"). There is also a robust body of case law under Title IX specifically protects transgender individuals. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1046-47 (7th Cir. 2017) (distinguishing a Title VII case, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and holding that Title IX prohibits treating transgender

students differently from non-transgender students), *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (denying motion to stay preliminary injunction that prevented school district from singling out a transgender girl for disparate treatment). Mr. Musgrove's Title IX claims should be allowed to proceed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court deny Defendants' Partial Motion to Dismiss Plaintiff's Complaint. If the Court is nonetheless inclined to grant any portion of Defendants motion, Mr. Musgrove respectfully requests leave to amend his complaint.

Respectfully submitted this 9th day of November, 2018.

/s/ Noah E. Lewis

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed using the CM/ECF system, which will send electronic notification to all attorneys of record.

Respectfully submitted this 9th day of November, 2018.

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