No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN RESERVATION,

Petitioner,

v.

THE WENDAT BAND OF HURON INDIANS.

Respondent.

On Writ of Certiorari to

the United States Court of Appeals

for the Thirteenth Circuit

BRIEF IN SUPPORT OF RESPONDENT

T102

JANUARY 4, 2021

SUMMARY OF THE CASE

The Court should uphold the Thirteenth Circuit Court's decision in *Wendat Band of Huron Indians v. Maumee Indian Reservation*, as the court accurately applied the ruling from *McGirt v. Oklahoma* in finding the Wendat Reservation remained intact and that New Dakota was prohibited from levying its tax on Wendat tribal entities. The Wendat and Maumee have historically maintained inter-tribal relations in a peaceful manner regarding the Topanga Cession territory, however, the Maumee capitalized on the Wendat's purchase of land in fee from non-Indian owners for commercial development, disrupting that peace for an expectation to pay State of New Dakota tax which would then benefit their tribe.

The Maumee decision at the district court fails to fully consider and apply the content and context of the treaty with the Wendat of 1859. The Thirteenth Circuit Court of Appeals correctly reversed the district court's decision as the Maumee's claim to the Topanga Cession has been abrogated, and the Wendat Reservation remains undiminished when applied to the Wendat Allotment Act, P.L. 52-8222, of 1892.

Respondent respectfully requests 30 minutes of oral argument to establish the ruling of the Thirteenth Circuit Court, regarding the claims stated above, and establishing the Petitioner's claim errs in establishing Wendat land diminishment and Cession land ownership, supporting of the court's decision.

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QUESTIONS PRESENTED

1. Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?
2. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

STATEMENT OF ISSUES

After purchasing land (in-fee from non-Indian owners) located within the Topanga Cession area on December 7, 2013, the Wendat planned a shopping complex that would include Wendat restaurants, a grocery store, a salon and spa, a bookstore, and a pharmacy, under the Wendat Commercial Development Corporation ("WCDC"). The Wendat soon found themselves approached by representatives from the Petitioner. Funds would stay within the Wendat and support public housing and nursing care facility costs, those of which would otherwise impose a financial hardship to the Wendat if the WCDC center would not be constructed.

Petitioner's representatives stated that they considered the area purchased to be the Petitioner's land, diminished by the 1892 Allotment Act, and the proposed commercial complex would be required to pay the State of New Dakota the 3.0% TPT. Rather than acknowledge the falsity associated with the reservation diminishment under the 1892 Allotment Act, the District Court erred in concluding the Petitioner had shown

reservation diminishment and incorrectly applied the test in *Solem*. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). On appeal with the Thirteenth Circuit, only then was the court correct in finding that applied to the Treaty with the Wendat of 1859, was the Maumee Nation's claim to the Topanga Cession abrogated.

Additionally, the court correctly found that the imposition of state tax on tribal land businesses infringes on tribal sovereignty (citing to *Williams v. Lee*, 358 U.S. 217 (1959) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Under the information as plead, did the Thirteenth Circuit Court err in reversing the ruling of the District Court, accepting the well plead facts as true, that there was no Wendat land diminishment and the tribe was not subject to State of New Dakota taxation? (Suggested Answer: *No*).

List of Apposite Cases: *McGirt v. Oklahoma, Williams v. Lee, White Mountain Apache Tribe v. Bracker, Nebraska v. Parker, Solem v. Bartlett, Montana v. Blackfeet Tribe, Worchester v. Georgia*

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The Opinion (Op.) issued from the District Court of New Dakota, in response to the filing by Petitioner, alleges that the Wendat reservation had been diminished through the Treaty of Wauseon, and that the land purchased in fee in the Topanga Cession was subject to the statutory tax code under 4 N.D.C. §212[1], which would be paid back in part to Petitioner. Op. ¶2. The Petitioner supported the New Dakota state tax and argued the WCDC development is within Petitioner's reservation area and should be remitted 3% of the gross development proceeds. Op. ¶2. The Court's opinion found for the Petitioner, and the Wendat appealed the ruling.

The Wendat Band of Huron Indians, on September 20, 2018, appealed to the United States Court of Appeals for the Thirteenth Circuit, seeking a review of the U.S. District Court for the District of New Dakota's opinion regarding the diminishment of the Topanga Cession and the ability for the State of New Dakota to levy the TPT. The case was filed on September 11, 2020, following the Supreme Court's ruling in *McGirt v. Oklahoma*.[2] F. 13d. ¶1. Here, the court concluded the Petitioner's claims to the Topanga Cession were abrogated, and through the Wendat Allotment Act, the Wendat Reservation was not diminished. Further, the court ruled that any levy of a state tax that would be collected and remitted through the State back to the band would be an infringement on tribal sovereignty. F. 13d. ¶1. The Circuit

[1] State of New Dakota Transaction Privilege Tax Code, 4 N.D.C. § 212.

[2] *McGirt v. Oklahoma,* 591 U.S. __, 140 S. Ct. 2452 (2020).

Court reversed and remanded back to the District Court with instructions to withdraw and reissue its Declaration in the manner consistent with this opinion. F. 13d. ¶4.

The Petitioner filed a Petition for Writ of Certiorari with the Supreme Court, which was granted on Friday, November 6, 2020. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018), cert. granted, 933 F.3d 1088 (13th Cir. 2020).

II. STATEMENT OF FACTS

The Maumee Indian Tribe and the Wendat Band of Huron Indians are culturally distinct, federally recognized tribes of Indians numbering between 1,500 and 2,000 members in the United States on traditional lands in what has now become the State of New Dakota. Op. ¶1. The traditional land claims overlap, and their present reservations share a border. Op. ¶1. Each tribe has a treaty with the United States that reserves a set of lands…the Maumee Indian Nation dates its rights to the Treaty of Wauseon in 1802, and the Wendat to the Treaty with the Wendat in 1859. Op. ¶4. Maumee Indian Nation treaty language describes their lands to the west of the Wapakoneta River, and the Wendat Band of Huron Indians to the east of the Wapakoneta River. Op. ¶4. The Wapakoneta River moved approximately three miles to the west sometime during the 1830's, created a sizeable and now disputed tract of land known as the Topanga Cession. Op. ¶5.

On December 7, 2013, the Wendat successfully purchased land in fee from non-Indians located in the area of the Topanga Cession. Purchased through the WCDC, the planned commercial development would support Wendat owned restaurants, grocers, salons, and other businesses that would help fund needed public housing and nursing care facility costs

for the tribe. Op. ¶19. Shortly after purchasing the land, on November 4, 2015, the Wendat were approached by the Petitioner's representatives making statements regarding the reservation diminishment of the Wendat and that the newly purchased land was on the Petitioner's reservation and the Wendat would be required to pay the TNT which would then be remitted back to the Petitioner pursuant to 4 N.D.C. § 212(5). Op. ¶20.

As a result of Petitioner's statements to the Wendat regarding the need for TPT to be paid on the WCDC development due to the treaty rights from the 1802 treaty, the Wendat Tribal Council and WCDC replied that the Topanga Cession was part of the Wendat Reservation since their treaty of 1859. Op. ¶22. On November 18, 2015, the Maumee Nation filed the complaint against the Wendat Band of Huron Indians in the federal court, seeking a Declaration that any development by the WCDC in the Topanga Cession would require the TPT license and payment of the tax because it is on the Petitioner's reservation. Op. ¶23.

The Petitioner filed a complaint against the Wendat in federal court on November 18, 2015. Op. ¶24. In the complaint, the Petitioner sought a Declaration that any development by the WCDC in the Topanga Cession would require the procurement of a TPT license and payment of the tax because the land-in-question is on Petitioner's reservation. Op. ¶24. Petitioner further sought the court's ruling that the Topanga Cession should not be considered Indian Country at all, allowing the TPT to be remitted to the Maumee under 4 N.D.C. §212(6). Op. ¶24.

The District Court applied the four-part test in *Solem v. Bartlett*,[3] in conjunction with the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908), to make the decision in favor

[3] *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

of the Petitioner that the Topanga Cession was clearly part of the lands reserved by the Maumee Indian Reservation in the Treaty of Wauseon. Op. ¶25. Further, on the issue on the TPT, the court applied *Williams v. Lee*[4] and *White Mountain Apache Tribe v. Bracker*,[5] and stated the State of New Dakota could levy the TPT tax on the Topanga Cession, finding that nothing in either case justifies denying the right of New Dakota to impose the TPT to any commercial enterprise proposed by WCDC on the land located in the Topanga Cession. Op. ¶26.

The case was held pending the Supreme Court's ruling in *McGirt v. Oklahoma*,[6] and filed on September 11, 2020. On appeal, the Thirteenth Circuit Court correctly reversed the decision of the District Court. The Thirteenth Circuit Court applied the claim of abrogation as incorrect by Petitioner based on the information within the Treaty with the Wendat of 1859, making clear that the Maumee Nation's claim to the Topanga Cession has been abrogated, and the court further failed to see any cession language sufficient to diminish the Wendat Reservation. Cir. ¶2.

On the issue of New Dakota TPT, while the Topanga Cession is within the Wendat Reservation, the funds from the tax would be remitted through the state back to the Wendat and infringes on the tribal sovereignty established in *Williams v. Lee*. Cir. ¶3. Further, the TPT and should be subject to Indian preemption under Supreme Court precedent in *White Mountain Apache Tribe v. Bracker*. Cir. ¶3.

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[4] *Williams v. Lee,* 358 U.S. 217 (1959).

[5] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

[6] *McGirt v. Oklahoma,* 591 U.S. ___, 140 S. Ct. 2452 (2020).

SUMMARY OF ARGUMENT

There is no question interpretation of federal Indian law differs from that of other fields of law. As this Court has proclaimed, "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Further, it is precedent that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians. *See e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit"); *Choate v. Trapp,* 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians [the] construction [of treaties] is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor" of the Indians.) This liberal construction means all ambiguities must be resolved in the Indians favor (*see County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' ") (quoting *Montana v. Blackfeet Tribe, 471 U.S. at 767–68*).

ARGUMENT

I. The Treaty With The Wendat Includes The Area Known As The "Topanga Cession."

Chief Justice Marshall first penned the Indian cannons of treaty construction in this Court's 1832 opinion in *Worcester v. Georgia*.[7] Since then, this Court has held these canons of construction as fundamental Indian law precedent.[8]

These cannons of construction call on this Court to examine the treaty language under three principles. First, they seek to ensure the treaty language is applied as the Indians would have understood them.[9] Second, the court must construe them liberally in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Third, the court must resolve all ambiguities in the Indians' favor. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). Here, at the time of the Treaty with the Wendat, the Wendat would have understood the boundary of their reservation to be "those lands East of the Wapakoneta River." Treaty with the Wendat, Art. I, March 26, 1859, 35 Stat. 7749 (1859 Treaty). Because the Wendat would have seen the river, known its location, and understand the river to act as an eastern boundary, the 1859 Treaty must be interpreted as the Wendat Reservation bound along the Wapakoneta River.

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[7] *Worchester v. Georgia,* 31 U.S. 515 (1832).

[8] *See e.g*. *Jones v. Meehan*, 175 U.S. I, II (1899); *Chocktaw Nation v. United States*, 119 U.S. I, 27-28 (1886); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985); *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200 (1999).

[9] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ; *Jones v. Meehan*, 175 U.S. 1, 10-12 (1866); *United States v. Shoshone Tribe*, 304 U.S. 5 111, 116 (1938)

II. Congress Did Not Diminish The Wendat Reservation In The Surplus Land Act.

This Court has articulated the test for determining whether an Indian reservation has been diminished.[10] Under this "well settled" precedent, "'only Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. at 1078-79 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). In determining congressional intent, statutory language is "of course" the "most probative evidence." *Id.* at 1079 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Applied, this probative evidence will not be inferred lightly by the Court. *McGirt v. Oklahoma*, 140 S. Ct. at 2461. As this Court aptly pointed out in *McGirt*, Congress knows how to change a reservation via statutory language.[11] This Court has noted phrases that indicate diminishment by Congress have, "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Nebraska* v. *Parker,* 136 S. Ct. at 1079 (quoting *Solem,* 465 U.S. at 470). Likewise, phrases stating reservation land is to be returned to the "public domain" will indicate diminishment. *Id.* at 1079.

Whereby beginning with the statutory text, *Parker* "conclu[ded] that Congress did not intend to diminish." *Id.* at 1080. The statutory language at question in *Parker* commissioned the Secretary to survey and appraise the land, which could then subsequently be purchased

[10] *E.g., McGirt, v. Oklahoma, 140 S. Ct. 2452 (2020); Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

[11] Examples of express termination include: Act of July 27, 1868, 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); Act of April 21, 1904, 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished"

by white settlers. Further, because the Tribe's profits were entirely dependent upon the number of tracts sold, versus a fixed sum, the Court concluded the surplus land act in *Parker* "merely opened the reservation land to settlement and that the proceeds should be applied to the Indian's benefit." *Id.* at 1079. This type of act simply allows for "non-Indian settlers to own land on the reservation." *Id.* at 1080.Therefore the *Parker* Court found no diminishment.

Likewise, this Court in *McGirt* ruled the Creek reservation survived allotment because the Creek surplus land act did not include language like "present and total surrender of all tribal interests." *McGirt v. Oklahoma*, 140 S. Ct. at 2464. Here, the Wendat Allotment Act, P.L. 52-8222 did not diminish the Wendat Reservation. Like the allotment act in *Parker*, the Wendat Allotment Act included language for a government agent to "survey[]...the western half of the lands reserved by the Wendat Band in the 1859 Treaty." Wendat Allotment Act, P.L. 52-8222 ¶1 (1892). Further, just like the allotment act in *Parker* had profits based on the number of tracts sold, the Wendat Allotment act provided money to the tribe based on every acre deemed surplus. *Id.* ¶2. Based on these two factors, the Wendat allotment act did as other allotment acts at the time did, which was to allow for non-Indians to own land within Indian Reservations.

Essentially, Congress acted more like a real estate agent, by advertising the sale, brokering the purchase, and ultimately transferring money from the non-Indian purchasers to the Wendat. Moreover, the Wendat Allotment Act has none of the phrases noted by this Court as indicating diminishment by an "explicit reference to cession" or "unconditional commitment" to pay for the land subject to surplus.

Indeed, the Court has never found diminishment without a "clear textual signal," and has stated that documentation must "' *unequivocally* reveal[] a widely held, contemporaneous

understanding that the reservation would shrink'" absent clear phrases indicating diminishment. *Nebraska v. Parker,* 136 S. Ct. at 1080. In examining contemporaneous understanding, this Court has often referred to legislative history, and to a lesser degree, the subsequent treatment of the area by tribal, state, and federal governments. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). However, as this Court duly noted in *McGirt*, it will not favor legislative history or subsequent treatment "*instead of"* the statutory language. *McGirt*, 140 S. Ct. at 2468 [emphasis original].

Parker appropriately examined "statements [from] legislators" suggesting that the reservation had disappeared, and "subsequent demographic history" showing the "Tribe was almost entirely absent ... for more than 120 years." *Nebraska v. Parker*, 136 S. Ct. at 1080-81. But, the Court noted that "our precedents" only consider "unequivocal evidence." The Court in *Parker* ultimately found no diminishment, and was unwilling to let "mixed historical evidence ... overcome the lack of clear text[]." *Id.* at 1079-80 (quoting *Solem*, 465 U.S. at 471) (emphasis in original). While the Congressional record from the Wendat allotment act includes language such as "reduction" and "by opening of [the Wendat Reservation] more than 2,000,000 acres of land will be added to the public domain," such language, as cited in *Parker*, is not dispositive of diminishment. *Congressional Record* 23 (January 14, 1892) p. 1777.

As noted previously, Congress knows how to diminish a reservation. Had Congress had the intention to return the Wendat allotments to public domain Congress could have easily put that language within the act itself similar to the Maumee Allotment Act. The Maumee allotment act of 1908 specifically states, "[surplus lands] may be returned to the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29,

1908) §1. While the issue of public domain lands was discussed by legislatures, the final language of the Wendat allotment act includes no such reference to "public domain," "reduction," or "ceded." Therefore, because the explicit language of the Wendat allotment act does not include unmistakable evidence of diminishment, it must be presumed the Wendat reservation remains fully intact.

III. New Dakota's Transaction Privilege Tax is Invalid Because It Is Not Authorized By Congress.

As this Court announced in *Okla. Tax Comm'n v. Chickasaw Nation*:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,'… a State is without power to tax reservation lands and reservation Indians." 515 U.S. 450, 458 (1995) (quoting *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992)).

In making the determination that the tax is imposed directly on an Indian tribe, this court will examine the legal incidence of the tax. This examination "is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be explicitly stated." *Cal. State Bd. Of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1986). In other words, this Court must ask the "who" and the "where" of a tax statue by looking at "*who* bears the legal incidence of [the] tax." *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 101 (2005) (quoting *Okla. Tax Comm'n* 515 U.S. at 458) (emphasis in original).

There is no doubt that the legal incidence of 4 N.D.C. § 212 is imposed upon the Wendat Indian Tribe via the WCDC. The statute purports that Indian Tribes will not have to pay the tax only if the sales operation is operated on land within its reservation *and* is held in trust by the United States. 4 N.D.C. § 212(4) (emphasis added). In other words, sales

operations by the Wendat Tribe within the reservation will be subject to the tax, unless the Tribe can show the land is held in trust by the United States. Here, the land in question was purchased in fee by the Tribe, therefore will be subject to the tax, as the exemption listed in subsection four does not apply, because the land is not held in a trust status. Op. ¶4. The instant case at hand is analogous to the tax in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976), which was found to be invalid because the activity occurred within the Flathead reservation boundaries, regardless of land status, and whereby the tax was paid by Indians and non-Indians, alike. Like the *Moe* case, the tax imposed upon the Wedant is based on activity within the Wedant reservation and will be paid by the Wedant Indians.

A. New Dakota's Transaction Privilege Tax Infringes On The Wendat Reservation Indians

The standard for tribal autonomy is not a new revelation. Tribal autonomy was at the center of the landmark case affirming Tribal autonomy in *Worcester v. Georgia*, whereby this Court invalidated Geogia state laws regarding missionaries on the Cherokee reservation.[12] This standard of tribal autonomy continued in this Court's holding in *Williams v. Lee,*[13] stating actions that impact a tribe or tribal members will be assessed as to "whether the state action infringed on the right of reservation Indians to make thier own laws and to be ruled by them." In *Williams*, a non-Indian filed suit in state court against an Indian couple in attempt to collect on an unpaid debt. The debt was incurred via purchases at a store within the reservation. In its reasoning, this Court found that "the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would

[12] *Worchester v. Georgia*, 31 U.S. 515 (1832).
[13] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

infringe on the right of the Indians to govern themselves. *Id.* at 223. In *White Mountain Apache Tribe v. Bracker*, this court laid out its preemption analysis as "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." 448 U.S. 136, 144-45 (1980). In *Bracker*, Arizona assessed a tax on a non-Indian business doing business within an Indian Reservation. The Court, upon reviewing statutes and other regulatory language, invalidated the tax by noting the "state taxes would obstruct federal policies." *Id.* at 148-49. Here, New Dakota's Transaction Privilege Tax (TPT) infringes on the Wendat Tribe, and all tribes within New Dakota to self-govern. The statutory language of the TPT even acknowledges the ability of each tribe to self-govern itself with the language," [w]hile the Department of Revenue recognizes that each Tribe could collect this tax itself...." 4 N.D.C. § 212(4). Simply put, absent a thorough historical record, this Court must find in favor of the Wendat Indian Tribe, and find the tax infringes on the Wendat tribal autonomy.

CONCLUSION

For the foregoing reasons, the ruling of the Circuit Court of Appeals should be upheld, as no reservation diminishment occurred, and the levying of a State tax on documented Indian land violates inherent tribal sovereign immunity.

Respectfully submitted,

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