

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,
ELECTRONIC PRIVACY INFORMATION
CENTER, AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION, and
FREEDOM TO READ FOUNDATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action
No. 03-CV-2522 (ESH)

**REPLY IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs, the American Civil Liberties Union (ACLU), the Electronic Privacy Information Center (EPIC), the American Booksellers Foundation for Free Expression (ABFFE), and the Freedom to Read Foundation (FTRF), submit this reply in support of their cross-motion for summary judgment. Only two matters are in issue. The first is whether the government is entitled to rely on Exemption 1 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to withhold aggregate statistical information in a document (“Section 215 List”) that the Federal Bureau of Investigation (FBI) earlier released in redacted form. The second is whether plaintiffs are entitled to expedited processing on the remainder of their FOIA request.

In their earlier pleading, Pls. Br. at 11-13,¹ plaintiffs noted that the declaration initially submitted by the government in support of its reliance on Exemption 1 is virtually identical to the declaration that this Court rejected as insufficient in earlier litigation, *see American Civil Liberties Union v. Department of Justice*, 265 F.Supp.2d 20, 29 (D.D.C., 2003) (“*Patriot FOIA I*”). The government has now submitted a supplemental declaration in support of its reliance on Exemption 1. The supplemental declaration is addressed almost entirely, however, to information that plaintiffs do not seek. As plaintiffs have emphasized, Pls. Br. at 7, plaintiffs do not seek records

¹ Throughout, plaintiffs refer to the government’s “Memorandum of Points and Authorities in Support of Defendant’s Motion for Partial Summary Judgment” as “Govt. Br.”; to plaintiffs’ “Memorandum in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment and Opposition to Defendant’s Motion for Partial Summary Judgment” as “Pls. Br.”; and to the government’s “Memorandum of Points and Authorities in Opposition to Plaintiffs’ Cross-Motion for Partial Summary Judgment and in Reply to Plaintiffs’ Opposition to Defendant’s Motion for Partial Summary Judgment” as “Govt. Reply.”

pertaining to particular intelligence investigations, whether completed or ongoing. Nor do plaintiffs seek information relating to the activities of individual field offices. With respect to the Section 215 List, plaintiffs seek only one statistic – a statistic indicating the *total* number of times FBI field offices lodged applications for Section 215 orders with FBI headquarters. The government has supplied no argument to justify the continued withholding of this information. Indeed, the disconnect between the government’s declarations and the information actually sought by plaintiffs is near total.

Nor has the government supplied any legitimate justification for its refusal to provide expedited processing in this case. Plaintiffs’ request seeks information that is urgently needed to inform the public about a matter of pressing concern. Further, the request pertains to one of the most controversial public policy issues in recent memory. As the government knows, a denial of expedited processing in this case will deprive the public of vital information about government activity at precisely the time the public most needs the information. The expedited processing provisions of the FOIA were enacted specifically to prevent such a result.

ARGUMENT

- I. PLAINTIFFS ARE ENTITLED TO THE AGGREGATE STATISTICAL INFORMATION CONTAINED IN THE SECTION 215 LIST
 - a. Plaintiffs’ claim with respect to the Section 215 List is not precluded by *res judicata*

The government persists in its argument that plaintiffs’ claim with respect to the Section 215 List is precluded by *res judicata*. The government appears to acknowledge, Govt. Reply at 4-6, that *res judicata* does not preclude claims based on facts that were not yet in existence at the time of the original action, *see Page v. United States*, 729 F.2d 818,

820 (D.C. Cir. 1984); *Drake v. Federal Aviation Administration*, 291 F.3d 59, 66-67 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003); *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 78 (D.C. Cir. 1997). It also acknowledges that the Attorney General issued his declassification decision four months *after* this Court's decision in *Patriot FOIA I*. Govt. Br. at 10 n.5. The government nonetheless advances two arguments for the application of *res judicata* in this case.

The government argues, first, that “there is no ‘new’ information in the Business Record document.” Govt. Reply at 5. The argument is misguided. Whether *res judicata* applies does not turn on whether there is new information in any particular document but on whether the “nucleus of facts” on which plaintiffs’ current claim is founded differs from the “nucleus of facts” on which their previous claim was founded. *See Drake v. Federal Aviation Administration*, 291 F.3d at 66; *Page v. United States*, 729 F.2d at 820 & n.12. In this case, the nucleus of facts on which plaintiffs’ claim is founded includes the fact of the Attorney General’s September 2003 declassification order. The nucleus of facts on which plaintiffs’ *earlier* claim was founded did *not* include this fact; indeed, it could not have included this fact because the declassification order was issued in September 2003 – four months after this Court’s decision in *Patriot FOIA I*.

The government’s second argument is that the Attorney General’s declassification decision cannot give rise to a new claim because the information that the Attorney General declassified was not “at issue” in the earlier litigation. Govt. Reply at 4-5; *id.* at 6 (“[P]laintiffs’ reliance on the Attorney General’s declassification of information which was not at issue or being withheld in the prior lawsuit as grounds for establishing post-judgment events that give rise to a new claim is unfounded.”). But the information that

the Attorney General declassified *was* at issue in the original lawsuit. For one thing, OIPR withheld documents containing precisely the information that the Attorney General later declassified. *See Patriot FOIA I*, at 28 (noting that documents withheld by OIPR “describe[d] the frequency or manner of use of specific techniques authorized under FISA” (internal quotation marks omitted)); *id.* (noting OIPR’s stated justification for refusing to disclose, *inter alia*, “the number of FISA applications made for the production of tangible things”). Further, and perhaps more relevant to the present case, this Court ultimately affirmed the FBI’s decision to withhold the Section 215 List only because disclosing that document could have revealed something about the number of times that the FBI had relied on Section 215. *See Patriot FOIA I*, at 31 (affirming government’s decision to withhold statistical information because disclosure could reveal “the relative frequency with which particular surveillance tools have been deployed”). It cannot seriously be argued that the information that the Attorney General subsequently declassified was not at issue in *Patriot FOIA I*. This Court allowed the FBI to withhold the statistical information in the Section 215 List only because disclosing that statistic would have shed light on the total number of Section 215 orders actually sought by FBI headquarters and issued by the FISA Court.

b. The government improperly relies on Exemption 1

The government has now submitted two declarations in support of its continued refusal to disclose the aggregate statistical information contained in the Section 215 List. As plaintiffs noted in their earlier pleading, Pls. Br. at 11-13, the first of these declarations is substantively identical to the declaration that the FBI submitted in *Patriot FOIA I*. This Court has already found that declaration to be inadequate. *See Patriot*

FOIA I, at 29 (rejecting FBI declaration because it had “in no way been tailored to the particular surveillance tools about which plaintiffs seek information, and does not address the specific harm likely to flow from the release merely of aggregate statistical information about those tools”). The government has now submitted a second declaration, providing novel explanations for the withholding of the Section 215 List. These new explanations, however, do not stand up to even the most cursory scrutiny. The supplemental declaration identifies five “specific harms” that would result from the disclosure of the single statistic sought by plaintiffs. Suppl. Hardy Decln., ¶ 8. Plaintiffs address each of these purported harms in turn.

First: the government states that disclosing the statistic would “disclose the very fact that the FBI is engaged in certain investigations which contemplate the use of this particular FISA technique – a technique authorized under the Patriot Act.” Suppl. Hardy Decln., ¶ 8. Plaintiffs submit that this statement does not identify a harm that would result from disclosing the statistic. Rather, it simply restates (in more abstract terms) what the government has already acknowledged: that the information in question indicates the number of times that FBI field offices applied to FBI headquarters for authority to seek Section 215 orders. In other words, the specific harm identified by the government is nothing more than the disclosure of the information itself. Plaintiffs agree with the government that disclosing the statistic would disclose the number of times that FBI field offices applied to FBI headquarters for authority to seek Section 215 orders. That the public would learn something from the disclosure of the Section 215 List, however, is not in itself a legitimate rationale for withholding it. On the contrary, informing the public about government activity is the very purpose of the FOIA. *See*,

e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (central purpose of the FOIA is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”).

Second: the government states that disclosing the statistic would “disclose the frequency of use of this specific technique during a specified time period.” Suppl. Hardy Decln., ¶ 8. As the government knows, the frequency with which Section 215 was used during this time period is already a matter of public record.

Third: the government states that disclosing the statistic would “disclose the concentration of . . . investigations by specific Patriot Act technique – proposed section 215 FISAs, and by geographic location – specific FBI field offices, thereby disclosing the concentration of FBI resources allocated to certain types of investigations which are relying on this particular technique.” Suppl. Hardy Decln., ¶ 8. Again, the frequency with which Section 215 was used within the relevant time period is already a matter of public record. With respect to the fear that disclosing the statistic sought by plaintiffs would disclose information related to individual field offices, plaintiffs emphasize once more that they do not seek field office-specific information.

Fourth: the government states that disclosing the statistic “would signal to targets of investigations that it is comparatively safe to conduct certain operations and activities based on the FBI’s allocation and direction of resources.” Suppl. Hardy Decln., ¶ 8. Plaintiffs fail to understand how the statistic at issue here – the number of times FBI field offices applied to FBI headquarters for authority to seek Section 215 orders – could send this kind of signal. Applications submitted by FBI field offices have no bearing

whatsoever on actual surveillance unless the applications are ultimately approved by FBI headquarters (and by the FISA court). The government has already disclosed that, during the relevant time period, no such applications were approved.

Fifth: the government states that disclosing the statistic “would, against the overall numbers of FISA applications publicly disclosed, enable our adversaries to discern whether or to what extent business records and other such ‘tangible things’ in the hands of third parties were or were not a safe harbor from the FBI.” Suppl. Hardy Decln., ¶ 8. Here again, the government apparently neglects to consider that the number of times the FBI used Section 215 within the relevant time period is already a matter of public record. Accordingly, our adversaries already know “to what extent business records . . . were a safe harbor from the FBI.”²

This Court noted in *Patriot FOIA I* that the government’s “predictions about the security implications of releasing particular information to the public” are entitled to deference only “where those predictions are sufficiently detailed and do not bear any indicia of unreliability.” *Patriot FOIA I*, at 28. Plaintiffs submit that deference is wholly inappropriate in this case because (i) the FBI initially submitted a boilerplate declaration substantively identical to a declaration that this Court rejected as insufficiently detailed in the earlier litigation; and (ii) the second declaration submitted by the FBI is addressed almost entirely to the necessity of withholding categories of information that plaintiffs do

² The government’s brief adds one further argument: that disclosing the statistic sought by plaintiffs will “provide our adversaries with an official measure of whether and how much safer their operations would be if they recruit and use U.S. persons as their agents.” Govt. Reply. at 9. This argument may have made sense in the previous litigation, where plaintiffs sought, among other things, statistics indicating to what extent the FBI had used Section 215 against U.S. persons in particular. As they have repeatedly emphasized, however, plaintiffs do not seek information of that nature here.

not seek. The FBI's submissions suggest that it has not seriously considered plaintiffs' FOIA request, much less reconsidered the sensitivity of the information sought by plaintiffs in light of the Attorney General's declassification order. Plaintiffs do not dispute that the FBI has national security expertise that the general public does not possess. It would make little sense, however, to defer to the FBI's expertise where all the evidence suggests that it has not troubled to bring that expertise to bear.

The government, perhaps recognizing that it has not identified any specific harm that would flow from the disclosure of the statistic sought by plaintiffs, raises one additional argument. It argues that the statistic sought by plaintiffs, while innocuous in itself, might, in the context of all the other information that is and that may become publicly available, provide "a very significant and meaningful picture of the FBI's investigative efforts in the post-September 11, 2001 war on terror." Suppl. Hardy Decln. ¶¶ 9-11 (outlining "mosaic" argument). The Court should reject this argument. As plaintiffs have noted, the very purpose of the FOIA is to provide the public with meaningful information about government activity. The government should not be permitted to withhold information from the public on the grounds that the information might be meaningful.

Plaintiffs note, moreover, that the government's "mosaic" argument could be advanced in support of *any* withholding. If information could be withheld merely because it might contribute in some unspecified way to a more complete picture of government activity, the government could *never* be compelled to release information, and the courts would have no role to play in policing the government's reliance on FOIA exemptions. This is not the law. The FOIA drafters "stressed the need for an objective,

independent judicial determination” even in Exemption 1 cases, and the D.C. Circuit has held that the government’s decision to invoke Exemption 1 is subject to *de novo* review, *see Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978). While the government’s burden in Exemption 1 cases is not onerous, even in Exemption 1 cases the government may not withhold information without identifying a *specific* harm that would flow from the disclosure of the *specific* information at issue. *See King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987) (agency must “describe . . . the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed”); *id.* at 219 (agency must “provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply” (internal quotation marks omitted)); *see also Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (“agency must provide “a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption”), *cert. denied*, 505 U.S. 1212 (1992).³ The government has not sustained this burden here.

³ The government states, without citation, that Congress has “rejected . . . proposals to make the statistical information that plaintiffs seek here publicly available.” Govt. Reply at 11. Plaintiffs do not know of any such proposal. Certainly, Congress has never considered the implications of the Attorney General’s declassification decision on the sensitivity of the information contained in the Section 215 List.

II. PLAINTIFFS ARE ENTITLED TO EXPEDITED PROCESSING

- a. Plaintiffs are entitled to expedited processing under the “urgency to inform” standard
 - i. This Court has jurisdiction to grant the requested relief

The government contends that both *Al-Fayed v. CIA*, No. 00-2092 (CKK), 2000 U.S. Dist. LEXIS 21476 (D.D.C., Sept. 20, 2000), and *Electronic Privacy Information Center v. DOJ*, No. 03-2078 (JR) (D.D.C., filed 2003), were wrongly decided insofar as they held that a FOIA requester can seek immediate judicial review of an agency’s denial of expedited processing. The government has offered no compelling reason, however, to reject the reasoning of Judges Kollar-Kotelly and Robertson in those cases.

As plaintiffs noted in their earlier pleading, Pls. Br. at 17-18, the plain language of the FOIA leaves no doubt that a requester can seek immediate judicial review of an agency’s denial of expedited processing, *see* 5 U.S.C. § 552(a)(6)(E)(iii) (“Agency action to deny or affirm denial of a request for expedited processing . . . shall be subject to judicial review . . . except that the judicial review shall be based on the record before the agency at the time of the determination.”). In *Al-Fayed*, Judge Kollar-Kotelly found that “[t]his language of alternatives clearly indicates that judicial review is appropriate at either of two moments: when the agency has denied a request for expedited processing, or when the agency has, upon administrative appeal, affirmed the denial of such a request.” *Al-Fayed*, 2000 U.S. Dist. LEXIS 21476, at *7.

That the FOIA requires requesters to exhaust administrative remedies before seeking judicial review of an agency’s refusal to release records is not determinative. As Judge Robertson noted in *EPIC v. DOJ*, the exhaustion requirement

has been applied in cases like *Oglesby v. United States Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990), and *Hidalgo v. FBI*, 344 F.3d 1256 (D.C. Cir. 2003), only because of specific provisions in FOIA that are inapplicable in the expedited processing context: under the 1996 Amendments, there is no requirement that agencies notify a requestor of the right to appeal any adverse determination or of the provisions for judicial review, and the provision for administrative appeals does not have the twenty day time limit provided for ordinary FOIA requests, § 552(a)(6)(A)(ii), but requires only “expeditious consideration” of administrative appeals, § 552(a)(6)(E)(ii).

EPIC v. DOJ, No. 03-2078, at 4-5.

The government’s reliance on fee waiver cases is also misplaced. The FOIA does *not* expressly provide that a requester can seek immediate judicial review of an agency’s refusal to grant a fee waiver. *See* 5 U.S.C. § 552(a)(4)(vii) (“In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter *de novo*: Provided, that the court’s review of the matter shall be limited to the record before the agency.”). By contrast, the statute *expressly* provides that a requester can seek immediate judicial review of an agency’s refusal to provide expedited processing.

The government cites, finally, *Judicial Watch, Inc. v. United States Naval Observatory*, 160 F.Supp.2d 111 (D.D.C. 2001), and *Edmonds v. FBI*, 2002 U.S. Dist. LEXIS 26578 (D.D.C., Dec. 3, 2002). In the government’s view, these cases “appear, at least implicitly, to accept the notion of exhaustion in the expedited processing context.” Govt. Reply at 15. In fact, neither case addressed the issue. In *Judicial Watch*, this Court held that it lost jurisdiction over a requester’s claim that an agency had failed timely to respond to a request for expedited processing when the agency provided a complete response to the underlying FOIA request. *See Judicial Watch v. U.S. Naval Observatory*, 160 F.Supp.2d at 112. The question whether a requester must exhaust administrative remedies before seeking judicial review of a denial of expedited processing was not at

issue in the case and was not addressed by the Court. *Edmonds v. FBI* is also inapposite. In that case, the requester filed suit after the FBI failed to respond to a request for expedited processing. *Edmonds v. FBI*, 2002 U.S. Dist. LEXIS 26578, at 2. This Court noted, in an aside, that the requester had exhausted her administrative remedies. *See id.* The Court simply did not address, explicitly or implicitly, the question whether a requester must exhaust administrative remedies before seeking judicial review of a denial of expedited processing.

ii. Plaintiffs are primarily engaged in disseminating information

The FBI rejected plaintiffs' request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) on the grounds that EPIC is not primarily engaged in disseminating information. *See* Letter from FBI to ACLU (Oct. 30, 2003) (Govt. Br., Ex. C) (opining that "the primary activity of [EPIC] is not information dissemination, which is required for a requester to qualify for expedited processing under this standard"). Plaintiffs initially understood this to mean that the FBI had failed to consider whether plaintiffs other than EPIC are "primarily engaged in disseminating information." Pls. Br. at 19. The government now appears to concede that EPIC is primarily engaged in disseminating information. Govt. Reply at 13 n.3. It appears that there is no longer any dispute, then, that plaintiffs satisfy this aspect of the expedited processing test.⁴

⁴ Unfortunately, the government's footnote is somewhat opaque and plaintiffs are not entirely certain that they understand it. To the extent the government continues to dispute that plaintiffs satisfy the "primarily engaged in disseminating information" standard, plaintiffs rely on their earlier pleading. Pls. Br. at 18-20. To the extent the government advances the novel proposition that a group of requesters seeking expedited processing under section 16.5(d)(1)(ii) is not entitled to expedited processing unless *all* of the requesters are "primarily engaged in disseminating information," plaintiffs submit that the government's position is nonsensical. A requester who would otherwise be entitled to expedited processing under section 16.5(d)(1)(ii) should not forfeit his entitlement to

iii. Plaintiffs have demonstrated an “urgency to inform the public about an actual or alleged federal government activity”

In their earlier pleading, plaintiffs discussed at length their entitlement to expedited processing under the “urgency to inform standard.” Pls. Br. at 20-23. However, the government has now raised two new arguments on this point. First, it argues that “the fact that a statute has a sunset provision or that certain unnamed legislation is being considered by Congress is not sufficient to establish urgency.” Govt. Reply at 16. Second, it argues that plaintiffs’ Complaint failed to convey the urgency of their request. Govt. Reply at 17. Neither of these arguments has any merit.

First, plaintiffs’ claim of urgency does not rely solely on the sunset provision or on proposed legislation to amend the Patriot. As plaintiffs have explained, Pls. Br. at 20-23, their argument for expedited processing rests on, among other things, (i) the widespread public controversy surrounding about the Patriot Act; (ii) the national debate about whether the Act’s surveillance provisions should be renewed before they sunset in December 2005; (iii) recent legislative proposals to amend the Act in various ways; (iv) the ongoing nature of the government surveillance activity at issue; (v) the extremely limited information currently available to the public concerning the Patriot Act and how it is being used; and (vi) the government’s acknowledgement that ordinary (non-expedited) processing would deny the public further information about the Patriot Act until at least 15 months from now. Plaintiffs believe that these factors, taken together,

expedited processing because she has submitted her FOIA request jointly with another individual or entity. Such a requirement would serve no purpose for the agencies, the courts, or the public. In the end, the agencies would receive exactly the same requests; the only difference would be that there would be fewer requesters. The government points to nothing in the statute, the regulations, or the case law that would require such a rule.

warrant the provision of expedited processing in this case. The Court need not reach the question whether any subset of these factors would satisfy the relevant standard.

As to the government's contention that plaintiffs' Complaint did not convey the urgency of their FOIA request, Govt. Reply at 17, plaintiffs note that the Complaint was not part of the record when the government rejected plaintiffs' request for expedited processing. As the government has acknowledged, Govt. Reply at 13, this Court's review must be based on the record that was before the agency at the time it denied plaintiffs' request for expedited processing, *see* 5 U.S.C. § 552(a)(6)(E)(iii). In any event, plaintiffs' Complaint made repeated reference to their request for expedited processing. Complaint, ¶¶ 1, 35, 36, 37, 38, 40, 42 & 43. The request for expedited processing referred not only to the sunset provision and to proposed legislation to amend the Patriot Act but also to the other factors supporting plaintiffs' entitlement to expedited processing here.

b. Plaintiffs are entitled to expedited processing under the "media interest" standard

The government argues that plaintiffs have not established an entitlement to expedited processing under the "media interest" standard because (i) their request for expedited processing did not cite a sufficient number of news articles; and (ii) the cited articles do not suggest that government integrity is at issue. Govt. Reply at 18-20.

Plaintiffs addressed these arguments at length in their earlier pleading, Pls. Br. at 23-26, and do not think it necessary to repeat these points here.⁵

⁵ Plaintiffs' earlier pleading explained, among other things, why a requester's entitlement to expedited processing should not be measured simply by counting the number of news articles to which the request for expedited processing refers. Pls. Br. at 23-26. If the number of articles cited is relevant, however, plaintiffs point out that their request for

It bears emphasis, however, that the government has offered no justification whatsoever for its decision effectively to reverse its earlier determination about the applicability of 28 C.F.R. § 16.5(d)(1)(iv). When plaintiffs submitted their first FOIA request concerning the Patriot Act, the government granted expedited processing, acknowledging that the request “pertain[ed] to a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” *See* Letter from DOJ to ACLU (Sept. 3, 2002) (Pls. Br., Ex. A, Att. 2). Since plaintiffs submitted that FOIA request, the Patriot Act has become even more controversial and questions about government integrity have become even more acute. As plaintiffs noted in their previous pleading, Pls. Br. at 24, approximately 250 governing bodies in the United States have now passed resolutions urging that Congress narrow some provisions of the Patriot Act, including Section 215; the Attorney General embarked on a cross-country tour to defend the Act; and the President made a prominent reference to the Patriot Act in his State of the Union address. The government has offered no reason, nor could it, for its determination that the Patriot Act is no longer a subject of widespread and exceptional interest and controversy.

expedited processing referred to and incorporated plaintiffs’ *earlier* FOIA request, which cited over a dozen *additional* news articles about the controversy surrounding the Patriot Act.

CONCLUSION

For the foregoing reasons, plaintiffs' cross-motion for partial summary judgment should be granted.

Respectfully submitted,

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