

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA BOUFERGUEN,

Plaintiff,

v.

ANDREW CUOMO, as the Governor of New
York, and the CITY OF NEW YORK,

Defendants.

20-cv-3975

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR A TEMPORARY RESTRAINING ORDER**

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Dated: May 22, 2020
New York, New York

Table of Contents

PRELIMINARY STATEMENT 1
STATEMENT OF FACTS 1
ARGUMENT 7
CONCLUSION..... 11

Table of Authorities

Cases	Page(s)
<i>Bery v. City of New York</i> , 97 F.3d 689 (2d Cir. 1996), <i>cert denied</i> , 520 U.S. 1251 (1997)	10
<i>Carey v. Brown</i> , 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).....	12
<i>Cohen v. California</i> , 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)	13
<i>De Jonge v. Oregon</i> , 299 U.S. 353, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937).....	13
<i>Geller v. de Blasio</i> , 20 Civ. 3566 (DLC), 2020 WL 2520711 (S.D.N.Y. May 18, 2020) (citing <i>Local 1814, Int’l Longshoreman’s Ass’n, AFL-CIO v. N.Y. Shipping Ass’n</i> , 965, F.2d 1224 (2d Cir. 1992)), <i>appeal docketed</i> , No. 20-1592 (2d Cir. May 19, 2020)	10
<i>Latino Officers Assoc. v. City of New York</i> , 196 F.3d 448 (2d Cir. 1999) (quoting <i>New York Magazine v. Metropolitan Transp. Auth.</i> , 136 F.3d 123 (2d Cir. 1998)).....	10
<i>Latino Law Officers Assoc.</i> , 196 F.3d at 448 (2d Cir. 1999) (citing <i>Beal v. Stern</i> , 184 F.3d 117 (2d Cir.1999)).....	10
<i>Million Youth March v. Safir</i> , 63 F.Supp.2d 381 (S.D.N.Y. 1999)	10
<i>NAACP v. Button</i> , 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).....	13
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	13
<i>N.Y. Progress and Prot. PAC v. Walsh</i> , 733 F.3d 483 (2d Cir. 2013).....	10
<i>Police Dept. of Chicago v. Mosley</i> , 408 U.S. 92 (1972).....	11, 12, 13
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)	11
<i>Reed v. Town of Gilbert</i> , 135 S.Ct. 2218 (2015).....	11, 13
<i>Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.</i> , 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)	11
<i>Sorrell v. IMS Health, Inc.</i> , 564 U.S. —, — — —, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011).....	11, 12

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)13

Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)13

Turner Broadcasting Sys. v. Fed. Comm'n's Comm'n, 512 U.S. 622 (1994)11

Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962)13

PRELIMINARY STATEMENT

While COVID-19 presents a grave threat to public health, the pandemic does not provide license to government officials to resort to content discrimination in determining who can exercise First Amendment rights and who cannot. The plaintiff seeks a temporary restraining order enjoining Governor Andrew Cuomo and the City of New York from enforcing an executive order the governor issued last night that would bar the plaintiff from conducting a political protest near City Hall in New York City with ten or fewer people who would observe social-distancing protocols on Saturday, May 23, 2020. While barring the plaintiff's peaceful political protest, the governor's executive order expressly authorizes events commemorating Memorial Day as well as religious services or ceremonies of ten or fewer people observing social-distancing protocols. Whatever the merit of content-neutral bans on public gatherings during the current pandemic, the defendants' actions allowing certain gatherings based on their religious or patriotic content while barring political demonstrations that are indistinguishable on public-health grounds plainly violates the First Amendment. Given this violation and the irreparable harm being inflicted on the plaintiff, this Court should issue the temporary restraining order the plaintiff seeks.

STATEMENT OF FACTS¹

Plaintiff Linda Bouferguen intends to participate in a small, peaceful demonstration in the vicinity of City Hall in Manhattan on Saturday, May 23. *See* Declaration of Linda Bouferguen ¶ 12 (May 22, 2020) ("Bouferguen Decl."). She has been arrested twice for participating in similar demonstrations in recent weeks, and fears she will be arrested again if she moves forward with

¹ The Court may consider hearsay evidence in determining whether to grant a temporary restraining order. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010).

her plan to protest on May 23. *Id.* ¶ 13.

On March 7, 2020, defendant Governor Andrew Cuomo issued Executive Order 202 declaring a state of emergency in response to the threat of COVID-19. Attached as Exhibit 1 to Declaration of Lourdes Chavez (May 22, 2020) (“Chavez Decl.”). On March 23, 2020 the governor issued Executive Order 202.10, which contains numerous restrictions related to COVID-19. Chavez Decl., Ex. 2. Included in that executive order was a restriction barring a wide range of public gatherings: “Non-essential gatherings of individuals of any size for any reason (e.g., parties, celebrations or other social events) are canceled or postponed at this time.” *Id.* Mayor de Blasio subsequently issued an executive order adopting this provision (along with all other provisions of the governor’s COVID-related executive orders). Emergency Executive Order No. 111 (May 4, 2020) (attached as Exhibit 4 to Chavez Decl). In Executive Order 202.18 and Executive Order 202.29, Governor Cuomo continued the ban on “non-essential gatherings.”

The New York City Police Department has played a significant role in enforcing the public-gatherings ban. As the ban applies to protest activities, the NYPD has enforced the ban against some protesters but not others. *See* Complaint ¶¶ 10–13. Most notably on Monday, May 11, New York City Public Advocate Jumaane Williams organized a demonstration in Foley Square to protest the NYPD’s racially-biased enforcement of social-distancing guidelines. According to press reports, at least 50 people participated while wearing masks and observing social distancing. *Id.* After holding a rally, the group marched to nearby police headquarters at One Police Plaza. *Id.* A significant number of police officers were present throughout the event but made no effort to enforce the state or city public-gatherings bans. Todd Maisel, “Williams blames mayor, governor for social distancing enforcement targeting minorities,” *AM New York* (May 11, 2020) (attached as Exhibit 5 to Chavez Decl).. Upon information and belief, high-level

NYPD officials were aware of the protest and made the decision not to enforce the public-gathering bans. *See also* Declaration of Cary Goodman (May 22, 2020) (describing May 17, 2020 protest that NYPD knew of and permitted to take place).

Ever since Governor Cuomo declared a state of emergency, Ms. Bouferguen has been deeply concerned about the state's and the city's response to COVID-19. Bouferguen Decl. ¶ 2. In particular, she has harbored concerns about how defendants' efforts to curb the virus has affected her life and the lives of other New Yorkers. *Id.* ¶ 2. On three occasions, all during May 2020, she has participated in peaceful, public demonstrations as a means of voicing these concerns. *Id.* ¶ 3. During each of these three public demonstrations, Ms. Bouferguen has observed proper social distancing by maintaining at least six feet between herself and other protestors (with the exception of her mother, who is in Ms. Bouferguen's household), and has protested peaceably. *Id.*

During the first of these protests, which took place on May 2, 2020, Ms. Bouferguen joined hundreds of other protestors in Albany to march from the New York State Capitol to the Governor's Mansion. The police were present at the protest and appeared to have cordoned off the street to allow the protestors to march. At all times during the demonstration, Ms. Bouferguen protested peacefully and observed proper social distancing. *Id.* ¶ 4.

Six days later, on Friday, May 8, Ms. Bouferguen participated in another peaceful protest with around seven other people, including her mother, outside City Hall. *Id.* ¶ 5. The protest occurred from approximate 1:00 p.m. to 4:30 p.m. next to a locked gate such that none of the protestors was obstructing access to City Hall or the sidewalk. *Id.* ¶ 6. On information and belief, all of the protestors observed proper social distancing and none behaved violently. *Id.* ¶ 5.

Nonetheless, Ms. Bouferguen's May 8 protest violated the defendants' public-gatherings

ban, as a result of which she was arrested. Within minutes of the protest beginning police officers arrived on the scene and began telling Ms. Bouferguen and other protestors that they were assembled illegally. *Id.* ¶ 6. By 4:00 p.m., approximately 50 police officers had arrived, and the police began playing a prerecorded message on a loudspeaker to the effect that the protestors were gathered illegally and would be subject to arrest if they did not disperse. *Id.* ¶ 7. Although all other protestors dispersed, leaving Ms. Bouferguen as the lone protestor, approximately 24 NYPD officers proceeded to surround Ms Bouferguen and arrest her. *Id.* At no point during her encounter with the NYPD on May 8 did Ms. Bouferguen resist arrest. *Id.* To the contrary, when police officers approached Ms. Bouferguen to arrest her, she turned around with her hands behind her back, signaling that the officers could handcuff her. *Id.* After Ms. Bouferguen's arrest, the police took her to a van and detained her for approximately two hours, after which Ms. Bouferguen was released with a criminal summons. *Id.* ¶ 8. On information and belief, the summons was for violation of the defendants' public-gatherings ban. *Id.*

The following day, on Saturday, May 9, Ms. Bouferguen and her mother again participated in a peaceful demonstration in the vicinity of City Hall that began at around 1 p.m. *Id.* ¶ 9. Ms. Bouferguen's specific purpose for participating in this protest was to speak out concerning her arrest the previous day. *Id.* On information and belief, fewer than twenty protestors were present, all of whom observed proper social distancing. *Id.* None of the protestors behaved violently. *Id.* The May 9 demonstration also violated the defendants' public-gatherings ban, resulting in Ms. Bouferguen being arrested again. *Id.* ¶ 10.

Within approximately 20 minutes of the May 9 protest beginning, the police arrested nine people, including Ms. Bouferguen, who were participating in or located in the immediate vicinity of the protest. *Id.* ¶ 10. After their arrest, Ms. Bouferguen and the other protestors were detained

in a cramped van for approximately 40 minutes without any ability to observe social distancing, and transported to a police precinct, where they remained for approximately two hours thereafter. *Id.* As a result of her May 9 arrest, Ms. Bouferguen was issued two summonses: one for “failure to disperse” and the other for “violating Mayor’s Executive Order.” *Id.* ¶ 11.

Ms. Bouferguen has organized another peaceful protest to occur at noon on Saturday, May 23, outside City Hall in Manhattan. Ms. Bouferguen plans for the protest to occur in such a place and manner as not to obstruct the sidewalk or access to City Hall. The purpose of the May 23 protest is to speak out about the defendants’ response to COVID-19. The protest is not a religious service or ceremony or Memorial Day service or commemoration. Like the other three demonstrations in which Ms. Bouferguen has participated related to COVID-19, Ms. Bouferguen intends to observe proper social distancing and anticipates no violence whatsoever. Ms. Bouferguen is prepared for the protest to have no more than ten people protesting at a time, all engaging in social distancing. *Id.* ¶ 12.

Because of her two recent arrests for participating in public demonstrations in violation of the defendants’ public-gatherings ban, Ms. Bouferguen believes she will be arrested for participating in the May 23 protest. Ms. Bouferguen is concerned not only about the humiliation of being arrested, but also that others will be too fearful of arrest to join her in criticizing the government publicly during the protest. *Id.* ¶ 13.

On Friday, May 15, the NYCLU contacted the New York City Law Department on behalf of Ms. Bouferguen to inform it of her planned event and to request that New York City confirm that the protest could take place without threat of enforcement on the basis of the state or city bans on public gatherings. Declaration of Christopher Dunn (“Dunn Decl.”) ¶ 2 (May 22, 2020). In making this request, the NYCLU pointed to the fact that the NYPD had on at least two

occasions allowed other protests to take place, most notably the May 11 rally and march led by Public Advocate Jumaane Williams. *Id.*; Chavez Decl., Ex. 4.

On Monday, May 18, the NYCLU informed the New York City Law Department of the protest the NYPD had allowed to take place the prior day in midtown Manhattan at the Democratic Party headquarters. Dunn Decl. ¶ 3. On Tuesday, May 19, the New York City Law Department informed the NYCLU that New York City would not grant permission for Ms. Bouferguen's protest to take place in light of the state executive order barring non-essential public gatherings and that it could not make any representations that the NYPD would not take enforcement action if Ms. Bouferguen went forward with her planned protest. *Id.* ¶ 4. Later on May 19, Governor Cuomo announced he would permit gatherings to take place over the Memorial Day weekend involving up to ten people observing social distancing if the gatherings were for the purpose of commemorating veterans. *Id.* ¶ 5. Upon learning of this, the NYCLU contacted the New York State Attorney General's Office to object to granting this exception while continuing the bar on other gathering protected by the First Amendment, including protests like Ms. Bouferguen's. *Id.* The NYCLU also contacted the New York City Law Department to express the same objection and to request that New York City formally consent to Ms. Bouferguen being allowed to conduct her protest. *Id.*

On May 20, Governor Cuomo announced a second exception to the public-gatherings ban, this time for "religious" gatherings of up to ten people observing social distancing. Dunn Decl. ¶ 6. The NYCLU again promptly contacted the Attorney General's Office and the Law Department, further objected to the exceptions being made for certain First Amendment events but not others. *Id.* With respect to New York City, the NYCLU again requested formal recognition that Ms. Bouferguen be allowed to hold her protest without threat of arrest of other

enforcement. *Id.* Late on May 20, the NYCLU communicated to a senior member of Governor’s Cuomo’s office the NYCLU’s concerns about the excepting of events commemorating Memorial Day and of religious events. *Id.* ¶ 7. The NYCLU urged the office to amend the ban on gatherings to allow all First Amendment events of ten or fewer people observing social distancing. *Id.*

On the evening of May 21, Governor Cuomo issued Executive Order 202.32. In relevant part it states, “Executive Order 202.10 (as later extended by Executive Order 202.18 and Executive Order 202.29), which prohibited all non-essential gatherings of any size for any reason, is hereby modified to permit a gathering of ten or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to” Chavez Decl., Ex. 3.

As of the filing of the complaint in this action, New York City has refused to consent to Ms. Bouferguen holding her protest without threat of arrest or other enforcement. Dunn Decl. ¶ 8.

ARGUMENT

The legal standard governing a request for a temporary restraining order is the same as that governing a motion for a preliminary injunction. *See, e.g., Geller v. de Blasio*, 20 Civ. 3566 (DLC), 2020 WL 2520711, at *2 (S.D.N.Y. May 18, 2020) (citing *Local 1814, Int’l Longshoreman’s Ass’n, AFL-CIO v. N.Y. Shipping Ass’n*, 965, F.2d 1224, 1228 (2d Cir. 1992)), *appeal docketed*, No. 20-1592 (2d Cir. May 19, 2020).² “Where, as here, a moving party seeks a

² This case challenged across-the-board enforcement of New York City’s ban on gatherings as applied to protests. In denying the plaintiff’s request there for a temporary restraining order, Judge Cote held that the executive order then in effect was content-neutral. *See id.* at 10–11. It was after this decision that Governor Cuomo issued the executive order at issue in this case, No.

preliminary injunction to stay ‘government action taken in the public interest pursuant to a statutory or regulatory scheme’ that party must show irreparable harm in the absence of an injunction and a likelihood of success on the merits.” *Latino Officers Assoc. v. City of New York*, 196 F.3d 448, 462 (2d Cir. 1999) (quoting *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998) (internal citation and quotation marks omitted).

The Second Circuit has recognized that “[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.” *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996), *cert denied*, 520 U.S. 1251 (1997); *see also Million Youth March v. Safir*, 63 F.Supp.2d 381, 388 (S.D.N.Y. 1999) (granting preliminary injunction against ban on protest), “Accordingly, . . . whether plaintiffs have satisfied the requirements for a preliminary injunction turns on whether they have shown a likelihood of success on the merits of their claim” *Latino Law Officers Assoc.*, 196 F.3d at 462 (citing *Beal v. Stern*, 184 F.3d 117, 123–24 (2d Cir.1999)); *see also N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (“C]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.”).

Turning to the merits, the plaintiff is likely to succeed because she seeks to enjoin the defendants’ public gathering ban, which discriminates against speech in public fora on its face, favoring speech of certain content while singling other speech, like the plaintiff’s political speech here, for punishment. The plaintiff’s claim arises from the defendants’ action barring her from holding a peaceful protest on a public sidewalk, which qualifies as a traditional public forum for purposes of the First Amendment. A central tenant in First Amendment law is that restrictions on expressive activity taking place in traditional public fora are subject to strict scrutiny — and thus

202.32, with its new content-based restrictions. For this reason, *Geller* does not affect the plaintiff’s claim here.

almost always invalid — when they are based on the content of the speech. The United States Supreme Court recently emphasized that content-based restrictions are anathema to the First Amendment:

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

Reed v. Town of Gilbert, 135 S.Ct. 2218, 2226–27 (2015); see also *Turner Broadcasting Sys. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 641 (1994) (explaining that courts impose “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.”).

As for what qualifies as a content-based distinction, the Court explained as follows:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. —, —, —, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra*, at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Sorrell, supra*, at —, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id.

Under these criteria, Executive Order 202.32 plainly is content-based. By its terms it

singles out two forms of expressive activity that may take place expressly in terms of content: those “for the purposes of any Memorial Day service or commemoration” and those that qualify as a “religious service or ceremony.” All other expressive events that lack this specific content, such as the plaintiff’s political protest, are prohibited.

In terms of the First Amendment’s strict prohibition against content-based rules, Executive Order 202.32 is indistinguishable from the rule at issue in *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972), a seminal First Amendment case in which the Supreme Court struck down an ordinance governing expressing activity outside schools. First Amendment case Just as here, the rule in *Mosley* barred all expressive activity in a public forum but then excepted one form of speech. Specifically, the ordinance barred picketing next to a while permitting peaceful labor picketing. *See id.* at 94. Facing the threat of arrest for engaging in other forms of protest in front of a school, Earl Mosley challenged the ordinance. The Supreme Court struck it down, emphasizing that the rule’s content-based exemption violated core First Amendment principles:

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school’s labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269—270, 84 S.Ct. 710, 720—721, 11 L.Ed.2d 686 (1964), and cases cited; *NAACP v. Button*, 371 U.S. 415, 445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); *Wood v. Georgia*, 370 U.S. 375, 388—389, 82 S.Ct. 1364, 1371—1372, 8 L.Ed.2d 569 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government consorship. The essence of this forbidden consorship is content control. Any restriction on expressive activity because of its content would completely undercut the ‘profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ *New York Times Co. v. Sullivan*, supra, 376 U.S., at 270, 84 S.Ct., at 721.

408 U.S. at 95–96. Executive Order 202.32, with its bar on all expressive activity except events commemorating Memorial Day or religious events, presents the very same type of content-based regime.

The express content-based restrictions in Executive Order 202.32 “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S.Ct. at 2226. While it is the defendants’ burden to present to the Court evidence that would satisfy this heavy burden, the plaintiff respectfully submits that the defendants cannot carry that burden. Specifically, the sole justification for the existing bans on public gatherings, including First Amendment events, is to protect public health. But for public-health purposes, the plaintiff’s event is indistinguishable from the events permitted under the executive order since her event also will involve no more than ten people at a time who are observing social distancing.

Having determined that gatherings of up to ten people observing social distancing do not present public-health concerns, the defendants cannot bar protests of up to ten people observing social distancing while allowing similar events because of their religious or patriotic content. This type of content-based distinction is precisely what the First Amendment prohibits.

CONCLUSION

For all the foregoing reasons, the plaintiff respectfully submits she is entitled to the temporary restraining order she seeks.

Respectfully submitted,

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