No. _____

In the

Supreme Court of the United States

MICHAEL DAVID OMONDI, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

In *United States v. Apel*, 571 U.S. 359, 373 (2014), this Court held that the term "military installation" in 18 U.S.C. § 1382 includes all areas under the commanding officer's area of responsibility. Thus, as applied to Vandenberg Air Force Base, the boundary of the military installation is not defined by a green line demarcating public and exclusive jurisdiction.

This case presents a sequel to *Apel*.

> Does Section 1382 codify the common law of trespass, such that Petitioner could be convicted for unlawfully entering a military installation when he crossed the green line, even though his initial entry onto Vandenberg for protest purposes was, in fact, authorized?

Statement of Related Proceedings

- *United States v. Michael David Omondi*,
  - Case No. 2:17-cr-00315-FMO-1 (C.D. Cal., Central Violations Bureau, Feb. 16, 2017)

- *United States v. Michael David Omondi*,
  - Case No. 2:17-cr-00315-FMO-1 (C.D. Cal. Apr. 8, 2019)

- *United States v. Michael David Omondi*,
  - Case No. 19-50119 (9th Cir. June 11, 2020)

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MICHAEL DAVID OMONDI, Petitioner

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Petition for Writ of Certiorari

Michael David Omondi petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the court of appeals is unreported. App. 1a-6a. The rulings of the district court and magistrate judge are also unreported. App. 7a-22a.

Jurisdiction

The judgment of the court of appeals was entered on June 11, 2020. App. 1a. A timely petition for rehearing en banc was denied on September 2, 2020. App. 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal Statute Involved

18 U.S.C. § 1382. Entering military, naval, or Coast Guard property

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined under this title or imprisoned not more than six months, or both.

Statement of the Case

1. On August 6, 2016, Mr. Omondi was cited for a violation of 18 U.S.C. § 1382 during a scheduled peaceful protest marking Hiroshima and Nagasaki Day on Vandenberg Air Force Base ("Vandenberg" or "the Base"). (ER 21-22.) The approved protest area is located within the Vandenberg installation but is outside Vandenberg's exclusive jurisdiction. (ER 73.) Eventually Mr. Omondi left the protest area by crossing a green line, painted on the pavement, which marks the boundary between public and exclusive jurisdiction. (ER 73-74.) He approached a "confrontation line" of officers stationed in front of a gate and thanked them for their service before being taken into custody. (ER 73; Ex. 1 at 15:06-15:46.)

2. Mr. Omondi was cited for a violation of 18 U.S.C. § 1382 ("Entering military, naval, or Coast Guard property"), convicted at a bench trial, and sentenced to six months of imprisonment. (App 19a-22a; ER 7.) The charged offense conduct was "walk[ing] across the jurisdiction line and illegally enter[ing] onto the installation." (ER 22.)

3. This Court has already addressed the status of Vandenberg's protest area and green line for purposes of a Section 1382 prosecution. In *United States v. Apel*, 571 U.S. 359 (2014),[1] this Court clarified "whether a portion of an Air Force base that contains a designated protest area and an easement for a public road qualifies as part of a 'military installation.'" *Id.* at 361. In *Apel*, the defendant had been convicted of violating Section 1382's second paragraph, which pertains to persons who had previously been removed or barred, by "reenter[ing]" or being "found within," the protest area at Vandenberg. *Id.* at 365-66. Apel argued that "the fence enclosing Vandenberg's operational facilities marks the *real* boundary of the Base and that Vandenberg's commander lacks authority to control the rest, or at least the designated protest area." *Id.* at 366-67.

4. This Court rejected Apel's argument, holding that "a much better reading of § 1382 is that it reaches all property within the defined boundaries

1 The respondent in *Apel*, John Apel, testified as a defense witness in this case, and the map from Apel was an exhibit at trial. (ER 131, 137, 272-273, 302.)

of a military place that is under the command of a military officer." *Id.* at 372. That is, this Court ruled that the presence of "a fence, a checkpoint, or a painted green line" does not matter for purposes of Section 1382's scope. *Id.* at 370 (emphasis added). Rather, "the *entire* Vandenberg property" qualifies as a "military installation" under Section 1382 — protest area, easements, and all. *Id.* at 369-70 (emphasis in original). Therefore, Apel reentered Vandenberg when he stepped into the protest area; the green line and fence deeper within Base property were irrelevant to his guilt. *Id.*

5. Despite *Apel*'s holding, Vandenberg's green line lay at the center of this case. Mr. Omondi filed a motion to dismiss the citation, arguing that he lacked notice that his entry was unlawful and that his arrest reflected arbitrary and capricious enforcement by the Base commander. (ER 23-61.) The government opposed the motion, on the ground that Mr. Omondi had received actual notice through a trespass warning read over a loudspeaker, the painted green line demarcating the prohibited area at Vandenberg, his observation of two other protestors' arrests, and his three prior convictions for violating Section 1382 at Vandenberg. (ER 62-72.)

3. Proceeding in pro per, Mr. Omondi went to trial before a magistrate judge on the Section 1382 charge, where the following evidence was presented. (ER 116.)

Vandenberg's written rules for peaceful protest activity, included in the Base Commander's Closed Base Order, are posted on its website. (ER 150.) The Closed Base Order states that while Vandenberg is generally a "closed" installation, the Commander has granted permission for scheduled peaceful protests in a designated area. (ER 79-80.) It also provides that "[a]nyone failing to vacate installation property upon advisement from Security Forces . . . may be removed from United States (VAFB) property and may be cited for applicable criminal violations which may include a violation of 18 U.S.C. Section 1382." (ER 80.)

Before Mr. Omondi crossed the green line, two other protestors left the protest area and walked down California Boulevard toward the confrontation line. (Ex. 1 at 1:58-4:08; ER 169.) They were given a two-minute warning, over a loudspeaker, to return to the designated protest area or face citation. (ER 169-170, 177; Ex. 1 at 3:19-3:42.) When they did not return, they were arrested. (ER 169.)

It was unclear whether the two-minute warning was audible in the protest area, due to the distance and traffic noise, and there was no evidence that Mr. Omondi was in the protest area when the warning was delivered. (ER 187-188, 194-195, 201-206, 223-225.)

Approximately twelve minutes later, Mr. Omondi left the protest area and took a similar route down California Boulevard. (Ex. 1 at 14:21.) In doing so, Mr. Omondi passed Vandenberg's visitor center. (Ex. 1 at 14:21-15:14; ER 171, 179-181.) A sign near the visitor center, angled toward the street, states: "It is unlawful to enter this area without permission of the Installation Commander," citing "Sec. 21, Internal Security Act of 1950; 50 U.S.C. 797." (ER 166-167, 268-271.) The two protestors who were arrested prior to Mr. Omondi did not see this sign as they walked down California Boulevard. (ER 225-226.) A third protestor who remained in the designated protest area also did not see the sign. (ER 225.)

Mr. Omondi was not given a loudspeaker warning as he walked toward the confrontation line. (ER 187.) He approached the officers, thanked them for their service, and was swiftly arrested. (Ex. 1 at 15:06-15:46.) One officer testified that he informed Mr. Omondi that he was trespassing, and Mr. Omondi stated that he understood that. (ER 214-215.)

John Dennis Apel, the respondent in this Court's 2014 case, testified regarding his many arrests at Vandenberg. (ER 229.) Apel testified that, despite changes in Vandenberg's policies and procedures over the years, an opportunity to leave the area "seems to be standard," and that he did not

know of anyone, aside from Mr. Omondi, who had not been given the opportunity to leave. (ER 234-235.)

The magistrate judge ruled that evidence of Mr. Omondi's prior citations and convictions for violating Section 1382 at Vandenberg was admissible on the issue of notice. (ER 221-222.) The record did not include details regarding the circumstances of those prior citations. (ER 264-267.)

At the conclusion of trial, the magistrate judge denied Mr. Omondi's motion to dismiss, stating, "You did have notice of the way things had gone in the past. You knew that going over the green line at least made you run the risk that you would be arrested." (App. 21a.)

The magistrate judge also found Mr. Omondi guilty of violating Section 1382, which she referred to as "trespass." (App. 22a.) Again, the magistrate judge stated, "Everybody knew what the green line meant. And as I've said before, you knew the risk that you were running." (App. 21a.) The magistrate judge later sentenced Mr. Omondi to six months of imprisonment, the statutory maximum. (ER 7.)

4. Mr. Omondi appealed his misdemeanor conviction to the district court, raising a sufficiency challenge and a due process challenge to the lack of notice and opportunity to leave. (ER 274-285.) The district court affirmed the conviction in a written decision. (App. 8a-17a.)

5. Mr. Omondi then appealed to the Ninth Circuit. He argued that the evidence was insufficient for conviction because Section 1382's "goes upon" language criminalizes unlawful initial entries onto military property, and his initial entry onto Vandenberg's protest area was permitted and lawful. (AOB 19-26.) After *Apel*, he contended, the magistrate judge's focus on his crossing of the green line misconstrued Section 1382's requirements. (AOB 33-35.) Mr. Omondi also reasserted his due process vagueness challenge to Section 1382 and the Closed Base Order as applied to his conduct. (AOB 27-33.)

The Ninth Circuit affirmed Mr. Omondi's conviction in a memorandum disposition. (App. 1a-6a.) First, the panel concluded that the evidence was sufficient to support Mr. Omondi's conviction under Section 1382, an offense it characterized as "unlawful entry onto Vandenberg Air Force Base." (App. 1a-2a.) Specifically, it reasoned that Mr. Omondi's conduct was covered by Section 1382 because his "'entry [was] with knowledge that the facility has been closed to the public by properly promulgated regulations of the military commander.'" (App. 3a). But the panel was not referring to Mr. Omondi's initial entry onto Vandenberg, which was concededly for the lawful and permitted purpose of protest. Rather, by "entry," the panel referred to Mr. Omondi's crossing of the green line that demarcates the public protest area

from restricted areas of the base. (App. 4a.) That is, it concluded that this further entry into a restricted portion of the base violated Section 1382. (App. 4a.) For the same reason, it concluded that the magistrate judge had not misconstrued the elements of the offense. (App. 4a n.2.)

The panel explained that it was not persuaded by Mr. Omondi's interpretation of the statute because it would require "this court to hold that § 1382 loses all applicability once a defendant steps onto a military installation with authorization." (App. 4a.) It continued: "If Omondi is correct, § 1382 would afford him free rei[]n to access the most sensitive portions of Vandenberg because the Commander permitted him to protest in a designated portion of the base." (App 4a.) In the panel's view, this construction of Section 1382 "lacks support in its plain language and 'would frustrate its more general purpose of protecting the property of the Government so far as it relates to the national defense.'" (App. 4a).

The panel also rejected Mr. Omondi's vagueness argument. (App. 5a.) It concluded that a right to a warning was not an element of a Section 1382 offense. (App 6a.) Because Mr. Omondi had actual notice that his crossing the green line was prohibited, the panel explained, the statute and order were not unconstitutionally vague as applied to him. (App 6a)

6. Mr. Omondi filed a timely petition for rehearing en banc, which the court of appeals denied. App. 7a.

Reasons for Granting the Petition

This Court should grant certiorari because the Ninth Circuit's interpretation of Section 1382 conflicts with *Apel*'s holding regarding the contours of a "military installation" — indeed, the very same military installation, Vandenberg Air Force Base. The Ninth Circuit also interpreted the statute to codify common-law trespass, contrary to the plain language of the term "goes upon" and the government's position in *Apel*. These important questions of federal law merit this Court's intervention.

A. The Ninth Circuit's Focus on Mr. Omondi's Crossing of the Green Line Conflicts with This Court's Holding, in *Apel*, That the Green Line Is Irrelevant to Section 1382 Culpability.

1. Section 1382's first paragraph criminalizes "go[ing] upon" a military installation "for any purpose prohibited by law or lawful regulation." 18 U.S.C. § 1382. While the statute covers entries for such prohibited purposes as vandalism, burglary, or espionage, the prohibited purpose element may also be satisfied by "the unauthorized entry itself." *United States v. Hall*, 742 F.2d 1153, 1154 (9th Cir. 1984) (per curiam). But "[w]here entry alone is the basis of the violation, knowledge that the entry is

unauthorized is an essential element of a section 1382 offense." *United States v. Cottier*, 759 F.2d 760, 762 (9th Cir. 1985).

Further, where "entry alone" constitutes the prohibited purpose, the requisite mens rea must exist at the time the defendant enters the military installation. *See United States v. Parrilla Bonilla*, 648 F.2d 1373, 1378 (1st Cir. 1981) ("When the proscribed 'purpose' consists of no more than the entry itself, we think the clear implication is that, at a minimum, the defendant had notice of prohibition of entry upon the military reservation, yet entered anyway."); *United States v. Patz*, 584 F.2d 927, 929 (9th Cir. 1978) ("The usual situation in which 18 U.S.C. § 1382 is applicable is that in which the entry is with knowledge that the facility has been closed to the public by properly promulgated regulations of the military commander. Such an entry is for a 'purpose prohibited by regulation.'") Therefore, for purposes of Section 1382 culpability, identifying the moment of entry onto a military installation is crucial.

2. In *Apel*, this Court resolved the issue of where Vandenberg's boundaries as a military installation begin and end. *Apel*, 571 U.S. at 367-72. It did so in a prosecution under Section 1382's second paragraph, which criminalizes the somewhat different conduct of "reenter[ing]" or being "found within" a military installation. *Id.* at 365. But its definition of "military

installation" applies equally to Section 1382's first paragraph. *Id.* at 366-72. Apel, an antiwar activist, had reentered Vandenberg's designated protest area after being barred by the Base commander. *Id.* at 365. He argued that he was not "found within" Vandenberg because the protest area was subject to a roadway easement that deprived the government of exclusive possession over the area, and was located outside the fence enclosing the Base's operational facilities. *Id.* at 366-67.

This Court rejected Apel's plea to limit the scope of a "military installation" under Section 1382. Instead, it held: "Where a place with a defined boundary is under the administration of a military department, the limits of the 'military installation' for purposes of § 1382 are coterminous with the commanding officer's area of responsibility." *Id.* at 373. Because the entire Base constitutes the "military installation," it did not matter if areas within the commanding officer's area of responsibility were subdivided or opened to the public for particular purposes. *See id.* ("Those limits do not change when the commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area . . . ."); *id.* at 370 ("The fact that the Air Force chooses to secure a portion of the Base more closely—be it with a fence, a checkpoint, or a painted green line—does not alter the

boundaries of the Base . . . ."). *Apel* clearly holds that Vandenberg's protest area qualifies as part of a "military installation" under Section 1382.

3. Under *Apel*, Mr. Omondi entered Vandenberg when he stepped into the protest area. It was undisputed that this entry onto the Base was authorized for the purpose of peaceful protest. He was found guilty, however, of crossing the green line that marks the boundary between public and exclusive jurisdiction *within* the Base. (App. 21a.) And the Ninth Circuit affirmed his conviction on this theory. (App. 3a-5a.) Because Mr. Omondi's conviction cannot be squared with *Apel*, this Court should grant certiorari and reverse.

B. This Court Should Grant Review to Clarify That Section 1382 Does Not Codify the Common Law of Trespass.

Given the definition of "military installation" in *Apel*, the Ninth Circuit could have upheld Mr. Omondi's conviction only if concluded that Section 1382 is a trespass statute, such that "goes upon" should be interpreted to cover not only initial unlawful entries onto a Base but also further entries that exceed the scope of the initial authorization to enter. Neither precedent nor the statute's plain language supports this result.

1. The Ninth Circuit's decision appears to endorse the government's argument that Section 1382 codifies the common law of trespass, thereby permitting conviction if a person goes onto land with the landowner's consent

but subsequently exceeds that consent. (GAB at 23-25.) It did so based on this Court's passing description of one of Apel's prior Section 1382 convictions as involving "trespass[ing] beyond the designated protest area and thr[owing] blood on a sign for the Base," *Apel*, 571 U.S. at 364. (App. at 5a.) This language in *Apel*'s factual recitation was "not even dictum, and therefore precise language was not essential," *Gelder v. Coxcom Inc.*, 696 F.3d 966, 968 (10th Cir. 2012) (per curiam order); *see also Cottier*, 759 F.2d at 762 ("[T]his type of passing, narrative language neither literally nor contextually lays down a solid rule . . . .").

Further, prior to this case, the Ninth Circuit had rejected attempts to reduce Section 1382 to a trespass statute. It has reasoned that Section 1382's use of the terms "goes upon" (in the statutory text) and "entering" (in the title), as opposed to the word "trespass," suggests that "Congress sought to divorce this statute from the requirements of common law trespass." *United States v. Mowat*, 582 F.2d 1194, 1203 (9th Cir. 1978). And it specifically noted that, "[u]nlike common law trespass, the statute requires that the initial entry be made for a prohibited purpose." *Hall*, 742 F.2d at 1154 (emphasis added). Similarly, in *Patz*, the Ninth Circuit declined to incorporate Washington state's trespass statute into the first paragraph of Section 1382 as the requisite "purpose prohibited by law." *Patz*, 584 F.2d at

929-30. It was unwilling to turn Section 1382 into "a general trespass statute," because Congress did not intend to criminalize mere "entry without permission." *Id.* at 929.

Significantly, in *Apel*, the government took the position that "Section 1382 does not codify the common law of trespass." Brief for Petitioner at 19, *United States v. Apel*, 571 U.S. 359 (2014) (No. 12-1038), 2013 WL 4404599, at *19; *see also id.* at *8 ("law of trespass . . . is not codified in Section 1382"). Citing the Ninth Circuit's decision in *Mowat*, the government argued that "Congress's use of common verbs" ("reenters" and "is found within") in the second paragraph of Section 1382 "suggests a deliberate effort to avoid the restrictive connotations that other verbs (such as 'trespasses') might have conveyed." *Id.* at *12 (quoting *Mowat*, 582 F.2d at 1203). In its merits reply brief, the government noted that Apel "agrees with the government that '[t]he common law of civil trespass is not relevant in interpreting [Section] 1382.'" Reply Brief for Petitioner at 4, *United States v. Apel*, 571 U.S. 359 (2014) (No. 12-1038), 2013 WL 6114792, at *4 (citation omitted).

This Court should grant certiorari to make clear that its passing references to "trespassing" in *Apel*'s factual recitation did not turn Section 1382 into a general trespass law, especially where the government — the prevailing party in *Apel* — argued against this interpretation of the statute.

2. The Ninth Circuit's interpretation of Section 1382 as a trespass statute finds no support in the plain language. "Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). But the Ninth Circuit did not use the statutory text as a starting point in determining whether Section 1382 criminalizes Mr. Omondi's passage from a public to restricted area of Vandenberg. The decision hardly addresses the statutory text at all.

The key statutory text for determining Section 1382's scope is "goes upon." The statute, titled "Entering military, naval, or Coast Guard property," provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation;
>
> . . . .
>
> Shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 1382. The parties' disagreement centered on the meaning of the phrase "goes upon," which Congress used to delineate the core conduct at issue. Mr. Omondi argued that "goes upon" is a phrasal or prepositional verb that meant "enters" in 1909, when Section 1382's predecessor statute was enacted. (AOB at 24-26, ARB at 1-7.) The government, on the other hand, maintained that "goes upon" — split into its constitutive verb "goes" and preposition "upon"— means "the continuous act of moving while on or in

contact with a military installation." (GAB at 20-23.) While stating that Omondi's "proposed reading of the statute lacks support in its plain language" (App. at 4a), the panel did not address these dueling interpretations of the statute.

This Court has already recognized that "goes upon" means "enters," in the context of reviewing Section 1382's legislative history. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court quoted from congressional Reports explaining that the statute

> is designed to punish persons who, having been ejected from a fort, reservation, etc., return for the purpose of obtaining information respecting the strength, etc., of the fort, etc., or for the purpose of inducing the men to visit saloons, dives, and similar places. Such persons may now go upon forts and reservations repeatedly for such purposes and there is no law to punish them.

S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1, p. 16 (1908); H.R. Rep. No. 2, 60th Cong., 1st Sess., pt. 1, p. 16 (1908), *quoted in Albertini*, 472 U.S. at 681. This Court concluded that "the primary purpose of § 1382 was to punish spies and panderers for repeated *entry* into military installations." *Albertini*, 472 U.S. at 681 (emphasis added). Thus the most natural reading of "go upon," as demonstrated by this Court's paraphrase of the legislative history, is synonymous with "enter."

Instead of grappling with Section 1382's plain language, the Ninth Circuit fell back on the statute's "'general purpose of protecting the property

of the Government so far as it relates to the national defense'" to support its construction of the statute. (App. at 4a-5a.) But this reasoning turns statutory construction on its head: one cannot know Congress's specific purpose in enacting Section 1382 until one analyzes the plain meaning of the statutory language it actually used. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

Rather than focusing on the statute's plain language, the panel fast-forwarded to what it viewed as the absurd results of adopting Mr. Omondi's construction. But the Ninth Circuit's concern that Mr. Omondi could gain unfettered access to sensitive portions of Vandenberg, without fear of prosecution, is misplaced. (App. at 4a.) Section 1382 broadly applies to entries "for any purpose prohibited by law or lawful regulation." 18 U.S.C. § 1382. Here, unlawful entry itself was the only prohibited purpose the government sought to prove. (ER 105, 237.) But Mr. Omondi's reading of Section 1382 would not prevent prosecution of individuals who enter military bases with permission but have other, more nefarious prohibited purposes in mind — such as vandalism, burglary, or espionage. Repeat offenders can also be prosecuted under Section 1382's second paragraph, which prohibits

the reentry of people who have previously been removed or barred. 18 U.S.C. § 1382.

Further, Section 1382 is not the only, or even the primary, tool for deterring and punishing unauthorized access within military installations. As Vandenberg's warning sign makes clear, a separate misdemeanor statute, 50 U.S.C. § 797 ("Penalty for violation of security regulations and orders"), criminalizes willful violations of "any defense property security regulation," such as entering into unauthorized areas. 50 U.S.C. § 797(a)(1). Section 797 is specifically referenced both on the warning sign marking Vandenberg's restricted area (ER 269), and in the Commander's Order (ER 79). It also carries a higher potential penalty (one year) than Section 1382 (six months). 50 U.S.C. § 797; 18 U.S.C. § 1382.

C. Mr. Omondi's Case Is a Good Vehicle for Resolving the Question Presented.

This case squarely presents the issue of Section 1382's applicability to further forays onto military property, following an initial entry that was undisputedly lawful. The case arose at the same Vandenberg protest area at issue in *Apel*, and even utilized the same map included as an appendix to the *Apel* opinion. This identical factual setting provides an ideal vehicle for clarifying the elements of a Section 1382 "goes upon" offense, against the

backdrop of *Apel*'s holding regarding the definition of a "military installation."

Conclusion

For the foregoing reasons, Mr. Omondi respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: January 28, 2021

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