ORIGINAL

In the

Supreme Court of the United States

JAMES TRAINOR, etc., et al.,

Appellants,

v.

JUAN HERNANDEZ, et al., etc.,

Appellees.

No. 75-1407

4.1

Washington, D.C.
January 18, 1977

Pages 1 thru 51

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JAMES TRAINOR, etc., et al., Appellants,	:	
v.	:	No. 75-1407
JUAN HERNANDEZ, et al., etc., Appellees.	:	

Washington, D.C.
Tuesday, January 18, 1977

The above entitled matter came on for argument at 1:45 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN A. DIENNER, III, Assistant State's Attorney, 500 Richard J. Daley Center, Chicago, Illinois 60602; for Appellants Finley and Elrod

PAUL J. BARGIEL, Assistant Attorney General, 160 North LaSalle Street, Suite 800, Chicago, Illinois 60601; for Appellants Trainor and O'Malley.

FRED L. LIEB, Esq., 4753 North Broadway, Suite 1110, Chicago, Illinois 60640; for the Appellees.

CONTENTS

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-1407, Trainor against Hernandez.

Mr. Dienner, I think you may proceed when you are ready.

ORAL ARGUMENT OF JOHN A. DINNER, III, ESQ.,
ON BEHALF OF APPELLANTS FINLEY AND ELROD

MR. DIENNER: Mr. Chief Justice, and may it please the Court:

My name is John A. Dienner, III. I am an Assistant State's Attorney here representing the defendants below, Morgan Finley, the Circuit Court clerk, and Richard J. Elrod, the sheriff of Cook County. Mr. Bargiel, also with me here, is from the Attorney General's Office and will be speaking for defendants Trainor and O'Malley.

This suit originated as a consequence of the Illinois Department of Public Aid having filed an action in the Circuit Court of Cook County wherein the federal plaintiff was the then state defendant, and he was charged with having fraudulently concealed certain monies which he and his wife had in a credit union from the Illinois Department of Public Aid when they, the Hernandezes, applied for public assistance. The amount that the Illinois Department of Public Aid asserted that they received that they were not entitled to

was $720. The complaint in the appendix, starting at page 15, sets forth the facts of this cause of action, and the allegations and facts in support thereof may be found starting at page 15.

Mr. Hernandez, with his counsel, came to the Circuit Court of Cook County and filed his appearance. When he found that the attachment action had been continued for a period of time, pursuant to local Circuit Court of Cook County practice, they immediately came and filed the instant federal action in the United States District Court for the Northern District of Illinois, Eastern Division. Their jurisdiction was based upon 42 USC 1983, and they sought declaratory and injunctive relief from the Illinois Attachment Act.

A three-judge panel was convened, and the defendants filed--all defendants filed motions to dismiss, and the plaintiff filed a motion for summary judgment. The classes were certified, both plaintiff and defendant classes. And the three-judge panel ultimately declared the operative sections of the Illinois Attachment Act to be unconstitutional as violative of Due Process rights.

The defendants whom I represent, defendants Finley and Elrod--the sheriff and court clerk--were enjoined from issuing and attaching pursuant to that act. A motion for a stay was denied. Notices of appeal were filed.

A jurisdictional statement was likewise filed. The case was docketed, and here we shall proceed.

Initially I would like to speak briefly to the proppriety of the class that was certified by District Judge Kirkland. My defendants allege and assert that the plaintiff has failed to plead compliance with Rule 23(a)(3) in establishing the propriety of the plaintiff class. Their allegations in that regard are defective on two counts. First of all, while there is a conclusory allegation of irreparable injury as to all plaintiffs, none is asserted factually in support of the class members. There is no fact upon which the District Court could conclude that the class members, excluding Mr. Hernandez, suffered any irreparable injury.

The second defect is that some potential class members of the plaintiff class are also creditors; in other words, any person, corporation, or business entity could be an attachee as well as a person attempting to attach a debtor's property. And they, therefore, would have no particular interest in the relief sought by the plaintiffs herein.

In fact, their interest would be quite to the contrary.

Q Mr. Dienner, in your questions presented in your jurisdictional statement did you raise any question about the class?

MR. DIENNER: We did mention in our briefs, both our

original brief and our reply brief--

Q In your defects presented in the jurisdictional statement, did you raise these questions? I do not think you did.

MR. DIENNER: I do not believe that the defect of the class was mentioned in the jurisdictional statement, no, Mr. Justice Stevens.

As a consequence, I believe that the class with relief was erroneously granted, and because the entry of that order certifying the class was of course an interlocutory order, it is not made final until the final order that is presently before this Court.

I would like to speak briefly to the issue of abstention as well, this being of particular concern to my clients. My clients believe that the federal courts are undoubtedly the ultimate guarantors of all persons' federal rights. They do, however, assert that the state courts are the primary guarantors, and this must be so for obvious reasons. Otherwise every federal issue conceivably could be raised by any plaintiff or defendant in any typical state action. Tort, contract and the like would have to first come to the federal district court, be decided on the constituional issues, remanded to the Circuit Court of Cook County or any other state court for further trial on the issues. Now, this of course relegates the state courts, in my opinion, to the

role of perhaps masters in chancery to the federal district courts, and this is quite antagonistic to our obviously alleged violations of comity and federalism in this case. As a matter of fact, the Illinois Supreme Court within the last month decided a case--it was a tax injunction suit. And in that case the court made query as to whether or not they were not in fact becoming masters in chancery to the local district court but of course made that observation only in passing.

The two exceptions that will allow a court to override the basic premises of comity and federalism is when there is either a bad faith enforcement of state laws--not at issue here and never alleged--or when the new statute is violative of expressed constitutional provisions in every clause, paragraph, and sentence.

There were no such allegations of bad faith enforcement, and of course the three-judge court did not find the violation in every clause, sentence, and paragraph.

As a consequence, the District Court in its failure to properly take account of comity and federalism as raised and specified more accurately in the Huffman and Younger decisions, the consequence of that action results in 204 State of Illinois officials being enjoined from acting pursuant to a lawfully enacted state statute; 102 of those state officials are county sheriffs, each of whom is charged

with the duty of maintaining the peace. We submit that the creditors, as a result of being denied the opportunity to use the court systems in the Attachment Act, will resort to self-help, available both under common law and the Uniform Commercial Code, and contract provisions also that may permit self-help, thereby establishing a far greater risk of breaches of the peace. To this, of course, the sheriffs have a particular interest.

This federal action by our local District Court was made prior to any state court determinations or interpetations of the law.

Q Mr. Dienner--

MR. DIENNER: Yes, sir.

Q --are the sheriffs of every county in Illinois, in addition to the sheriff of Cook County, bound by this decree of the District Court, or are you just suggesting they will probably obey it as a precedent?

MR. DIENNER: Defendant classes were certified, Mr. Justice Rehnquist, and Sheriff Richard J. Elrod of Cook County was a class representative on behalf of all similarly situated sheriffs throughout the state. So, all 102 of the sheriffs of Cook County were class defendants.

Q If you look at page A2 in the appendix to the jurisdictional statement, it clearly appears that the three-judge District Court thought it was at least ordering the

sheriff of every county in Illinois and every court clerk.

MR. DIENNER: They certainly had that expectation. That amounts, as I said, to over 200 state officials who have been enjoined as a result. This leaves creditors with a lack of full and complete remedies. And of course this Court in the other prejudgment garnishment type actions has recognized the creditors have no fewer rights certainly than debtors, and a balance must be struck between the two. And we assert of course that that balance was struck in the situation and that the action of the federal District Court was totally unwarranted in this regard and has unnecessarily interfered with matters of special state concern.

As to issues of state remedies available and the like, I at this point, if it please the Court, will defer to Mr. Bargiel, who will speak for the Attorney General's Office.

MR. CHIEF JUSTICE BURGER: Mr. Bargiel.

ORAL ARGUMENT OF PAUL J. BARGIEL, ESQ.,

ON BEHALF OF APPELLANTS TRAINOR AND O'MALLEY

MR. BARGIEL: Mr. Chief Justice, may it please the Court:

My name is Paul Bargiel. I am an Assistant Attorney General from the State of Illinois, and I represent the Appellants Trainor and Hernandez in this matter. Appellant Trainor is the Director or Acting Director of the Illinois

Department of Public Aid. And Appellant O'Malley is an employee of the Illinois Department of Public Aid. And it was at the behest of Appellants O'Malley and Trainor that the writ of attachment, which is the subject of this appeal, was sued out in the lower court.

In the brief time allotted to me I would like to take a very simple and straightforward position on behalf of my clients. We suggest or content to the Court that any time a plaintiff comes into a federal court and seeks an injunction intervening in a pending state court proceeding, where the state is bringing the action in the state court and where the state is doing so in aid of a valid and legitimate state purpose, that the federal court ought to refrain from issuing such an injunction in the absence of exceptional circumstances.

Q Where the state or a state agent is plaintiff in the state court?

MR. BARGIEL: That is correct, Your Honor.

Q You are limiting your proposed rule to that.

MR. BARGIEL: Those are the facts which the record presents in this case.

Q Have you got any better reason for limiting it to that, that those just happen to be the facts in this case?

MR. BARGIEL: No, not that they just happen to be the facts in this case,but where the state is bringing the cause of action and doing so in support of a valid and

legitimate state purpose, it seems to me that the principles which underlie comity and federalism are obviously more appropriate than were the plaintiff in the lower court action, a private citizen bringing an action against another private citizen. And I think that that is a fair statement of some of the decisions of this Court in recent times.

The exceptional circumstances under which a plaintiff in a federal District Court can ask for an injunction, this Court has indicated that as being a demonstration or showing that there is some sort of bad faith on behalf of the state in bringing the action. I suppose one example of bad faith is a demonstration that the purpose of bringing the action on behalf of the state is to harass the individual defendant. There has been no allegation in the plaintiff's complaint seeking injunctive relief that there is any bad faith purpose on behalf of the State of Illinois, that its purpose is to harass. There was no finding by the three-judge court in its order or memorandum opinion that the state was acting in bad faith or that its purpose was to harass. And, in fact, no such showing can be made because the purpose which the state was actuated by in this case was to recover welfare funds which were disbursed to the federal court plaintiff pursuant to a request for funds wherein he lied and secreted certain assets which he had.

There are two affidavits in the record, in the

appendix, I should say, I think which demonstrate reasonably clearly that the federal court plaintiff here was in fact in all probability, or the reasonable inference is that he was guilty in fact of welfare fraud. These affidavits appear at, if I am correct, page 15 and 17 of the record--appendix, I am sorry. I apologize. The pages are 52 and 53 of the record. On page 52 there is an affidavit of an employee of the company at which the federal court plaintiff had his credit union wherein he says that the federal court plaintiff, Mr. Hernandez here, has accumulated a certain amount of money in the credit union, and he has an account which has been open from January 3, 1972, and that he had a balance on hand of $1,193 on November 30, 1974. This is in paragraph three of the affidavit at page 52. There is an affidavit at page 53 of an employee of the Illinois Department of Public Aid wherein the employee of the department indicates that Mr. Hernandez received public assistance for the same period and in fact said in his application that he was unemployed and had no assets.

So, it appears to me quite clear that the state was actuated by a valid and legitimate state purpose in this particular case, which is that of combatting welfare fraud.

The other circumstance, exceptional circumstance, under which a plaintiff might be entitled to injunctive relief to restrain a pending state court proceeding from going

forward is, as Mr. Dienner pointed out, then a situation where the plaintiff can show that the statute in question is patently and flagrantly violative of constitutional prohibitions in every clause, sentence, phrase, and against whomever it may possibly be applied.

I would suggest first that the statute here, the Illinois Attachment Act, has never--at least its validity has never been construed by the Illinois State Supreme Court. And we would submit to this Court that there are saving constructions and applications which would result in its validity. One suggested application of this statute, which we submit would result in a finding that it would be constitutional, involves on page 29 of the appendix the application of Section 2, which talks about an affidavit and a statement. It says in all actions sounding in tort where the underlying obligation sounds in tort that before an attachment shall issue upon the affidavit of the attachment creditor, that the attachment creditor has to appear before a judge. I am reading from page 30 of the appendix. It says: "Before the writ of attachment shall be issued, the plaintiff, his agent or attorney shall apply to a judge of the circuit of the county in which the suit is to be brought or is pending and be examined under oath by such judge concerning the cause of action." So, it is clear that even though there is no notice before the attachment takes place where the

underlying action sounds in tort that the attachment creditor would have to appear before a judge and be examined concerning the cause of action.

Q That did not happen in this case, did it?

MR. BARGIEL: In this particular case, no, Your Honor, because the department apparently took a position when they filed that--they did not take the position that the underlying action sounded in tort. That may have been a mistake.

Q But this goes to your argument that the statute is not unconstitutional in every letter, comma, and so forth?

MR. BARGIEL: That is correct, Your Honor.

Q That is, there may be one or two parts that are constitutional; that is what your argument is?

MR. BARGIEL: I am suggesting with regard to the question of abstention--

Q Yes, I see.

MR. BARGIEL: --that that at the very least is one easy example of how the statute might be constitutionally applied. I am not saying that it is limited to that. But for that purpose, I am suggesting that.

Q Do you not get some suggestion from the District Court's opinion, however, and is it not also true generally that the state distinctions between contract attachments and

tort attachments, that the reason for requiring a hearing in a tort attachment is to fix the probable amount of recovery, whereas in a contract claim like yours you really do not have that.

MR. BARGIEL: I frankly do not get that impression. I know that the three-judge District Court in its opinion apparently construed that provision of the statute as limiting it to a determination of the amount of damages in a tort action. However, the literal language of the statute itself, which has not been construed by the Illinois Supreme Court, indicates that the attachment creditor shall appear before a judge and be examined concerning the cause of action. And I would submit to Your Honor that that is a very limiting construction which was indulged by the federal District Court and not one which would necessarily be indulged by the Illinois Supreme Court, and that the Illinois Supreme Court ought to have an opportunity or at least the courts of Illinois ought to have an opportunity to construe that section. That would be my position with regard to that. I think that the language itself is broad enough to incorporate--

Q But how could they construe it in this case?

MR. BARGIEL: Pardon?

Q How could they construe it in this case?

MR. BARGIEL: I do not say that they could.

Q So, the federal court should abstain until

somebody else files some other lawsuit raising this issue?

MR. BARGIEL: No.

Q This procedure is very seldom used, is it not?

MR. BARGIEL: That is not my position at all. Again with regard to this one particular provision, what I am saying is that this is an application of the statute which will result in a finding of its constitutionality. What I think is, with regard to these plaintiffs and the facts which were presented here, I think that these plaintiffs had an opportunity--and I must say too, before I leave that point, I would like to say that the federal District Court never did make a finding that the statute was patently and flagrantly violative of the Constitution in every clause, phrase, and so on. While they make some reference to that in their memorandum--

Q They said it was patently and flagrantly violative of the Constitution. They did find that.

MR. BARGIEL: They said it was unconstitutional on its face, and it appears to me that there is some question as to whether or not--

Q They also use the words "patently and flagrantly" on page B5 of the jurisdictional statement.

MR. BARGIEL: That is true too. I believe it says patently and flagrantly violative on its face.

Q They are taking about two or three pages to analyze decisions of this Court to make up their mind.

Q They may have been wrong, but at least they said it, is all I am saying.

MR. BARGIEL: Yes, I will agree to that. It is not exactly clear to me which standard they were applying at that particular time.

I would like to, if I may, in the very few minutes that I have left address myself to the other aspect of this, the question of abstention, whenever a plaintiff comes into a federal court and requests an injunction to stop a state court proceeding. The second prerequisite--and I submit that the first was not met here, that is, that there was no demonstration of clear and immediate irreparable injury as required by this Court's decisions--the second prerequisite is that the plaintiff has to demonstrate to the federal court that he has no opportunity to timely raise and have adjudicated by competent state tribunal with federal questions or issues which are presented.

Our position here today, that the plaintiffs in this particular case had an opportunity to raise all these questions in a timely fashion before a competent state tribunal and conceivably could have had their action and the relief that they requested before the 13 months that it took for the federal District Court to enter its injunction.

Q So, is it your point that quite apart from Younger v. Harris or anything else, just as a matter of the

issuance of an injunction, that there as an adequate remedy at law?

MR. BARGIEL: I would certainly take the position that they had a remedy available to them, yes.

Q Because quite apart from dual jurisdictions or federalism or anything else, equity chancellor should not ever issue an injunction under ordinary equitable principles if there is an adequate remedy at law.

MR. BARGIEL: Yes, I think that that is true; I would agree with Your Honor.

Q I am asking you what you are saying, not whether--is that your point?

MR. BARGIEL: My point is that Younger and Huffman v. Pursue reflect the idea that, in my reading, as an indispensable prerequisite to obtaining relief in a federal court by way of an injunction, plaintiff has to show that he has no opportunity to raise these questions and have them timely decided in a state court.

I am saying yes, he has an adequate remedy, but I am also saying that Huffman and Younger reflect that kind of philosophy, and I think preclude this kind of relief here. Our position is that the plaintiff could at any time after the writ of attachment was issued have come into state court, filed a motion to quash the writ; he could have contested the facts upon which the writ was issued. He could have tested

the legal sufficiency of the writ. He could have raised the constitutional objection that he wanted to or that he ultimately raised in the federal court; and he could have motioned this up for hearing at a time convenient to him, upon proper notice, in this case to the Illinois Department of Public Aid.

Q Can you give me a citation or some rule or some statutory provision that contemplates this kind of motion?

MR. BARGIEL: On page 43 of the appendix, Section 26 of the Illinois Attachment Act indicates that the provisions of the Civil Practice Act--

Q Forty-three?

MR. BARGIEL: Page 43, Your Honor, yes.

Q What paragraph?

MR. BARGIEL: Section 26, I am sorry, at the bottom of the page. It talks about Civil Practice Act application. It says that provisions of the Civil Practice Act which govern--

Q Now where do we go from there?

MR. BARGIEL: It says including provisions for appeal and all existing and future amendments, and the rules now and hereinafter adapted shall apply to all the proceedings hereunder, except as otherwise provided.

And Section 70 of the Civil Practice Act--

Q What page is that on?

MR. BARGIEL: I am sorry, that is not in the appendix. I happen to have it here.

Q Just give me the citation.

MR. BARGIEL: Section 70 of the Illinois Civil Practice Act.

Q What does that permit a person to do?

MR. BARGIEL: A Section 70 motion is a motion to quash. It says: "A party intervening to move to set aside or quash any execution, bond, or other proceeding may apply to the quarter to adjudge it as chamber for certificate that there is probable cause for staying further proceedings until the order of the court on the motion."

I am saying that he could have filed a motion to quash the writ of attachment with the judge of the Circuit Court of Cook County, contesting the legal facts upon which the writ was issued--

Q Just contesting his right to an attachment or the facts underlying the basis--

MR. BARGIEL: No, I am saying I think he could have raised anything in that writ. That is my position.

Q Have you got some basis for that? Have you got some Illinois cases illustrating a fellow whose bank account has been attached, coming in and putting the--

MR. BARGIEL: No, I do not have an Illinois case to cite to you now, Your Honor. However, in garnishment cases, which operate under somewhat the same procedure, our office has been served with writs of garnishment for state

employees, and the Attorney General has regularly gone into state courts and moved to quash the writs of garnishment.

Q On what grounds?

MR. BARGIEL: For a variety of reasons. Initially we took--we said the state was not subject to--

Q On a motion like that will the court listen to an argument that the debt is not owed?

MR. BARGIEL: Yes, I think that such a matter could be raised.

Q You do not have any Illinois authority for that?

MR. BARGIEL: I do not have a case to cite to you now, no.

Q The best we have is what you think?

MR. BARGIEL: Yes, at this particular point, that is true. Section 27, which is on the following page of the Illinois Attachment Act, says that the defendant can answer traversing the facts stated in the affidavit upon which the attachment is issued and that the answer has to be verified. It says he can file a counterclaim.

It seems to me that the plaintiff can file because the Civil Practice Act applies to this procedure, that the plaintiff can file any motion which he could file in any civil proceeding, and he could call that motion up for a hearing on proper notice to the other parties--in this particular case

the Illinois Department of Public Aid, and I think that he could raise all of the questions which he has raised in the federal District Court.

I see that my time has long since expired.

MR. CHIEF JUSTICE BURGER: No, you have some rebuttal. That is the signal for your rebuttal.

MR. BARGIEL: Oh, I see. At any rate, if it has not expired, I think I have at least attempted to make my point, which is that the federal District Court in this case should have abstained because there was no showing of clear and immediate irreparable injury, and I think that there was an adequate remedy in the state court available to the plaintiff for adjudication of his federal claims.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lieb.

ORAL ARGUMENT OF FRED L. LIEB, ESQ.,

ON BEHALF OF THE APPELLEES

MR. LIEB: Mr. Chief Justice, and may it please the Court:

At the outset I would like to emphasize that the propriety of the injunction against Appellees Finley and Elrod and the class of county court clerks and sheriffs that they represent has not properly been presented to this Court for review. Appellees Finley and Elrod did not file any

jurisdictional statement raising any questions for review. The jurisdictional statement of the appellants did not challenge the class, nor did it challenge the propriety of the injunction against defendant classes of clerks and sheriffs. It merely raised the question of the propriety of the injunction against the appellees, the appellants proceeding against the appellees in the state court.

Appellees submit that in light of this, the injunction against the class of county court clerks and sheriffs cannot be vacated on the appeal of the appellant since that issue has not been properly presented to this Court for review.

Q You are not saying that Elrod was not himself an appellant. You are just saying he did not preserve this issue; is that right?

MR. LIEB: Under the rules of this Court he is not an appellant. In fact, their brief is submitted as appellees in support of appellants' position.

Q The jurisdictional statement, on the face of it, lists Elrod as an appellant, does it not?

MR. LIEB: Yes, but I believe that was mistaken. It says, "Jurisdictional Statement for Appellants Trainor and O'Malley," and this Court was docketed as the case of Trainor v. Hernandez.

Q Trainor was the only named appellant on the

docket?

MR. LIEB: Trainor and O'Malley.

Q Does not our rule ten cover it? I may be wrong as to number.

MR. LIEB: Ten-one states--I believe it is ten-one--that all parties in the proceeding below shall be parties in the Supreme Court.

Q But it also permits them to adopt the co-appellants' position, and I thought they had done that here.

MR. LIEB: Precisely. However, the jurisdictional statement of the appellant does not raise the propriety of the injunction against the appellees, the clerks and the sheriffs throughout Illinois. Therefore, this injunction cannot be challenged on appeal, and that injunction must remain in full force and effect regardless of how the Court rules on the appeal of appellants Trainor and O'Malley.

Q You are not suggesting that we say that the District Court should have abstained in the case brought against Elrod. Nonetheless, its injunctive decree as to other people who are just named as a class of defendants would remain in effect.

Q So, he is suggesting that. Are you not?

MR. LIEB: Yes, Your Honor. I believe that Younger and Huffman--under those cases you have to look at the facts of each case. And there may also be particular circumstances

regarding each party. Now, in this particular case, even though I submit that it is not really before the Court, there are different circumstances. Finley and Elrod were not parties to the state court proceedings.

Q Were they members of the class?

MR. LIEB: That is right, Your Honor.

Q And are they class representatives here?

MR. LIEB: They are representatives of the class.

Q So, if it were held that the court should have abstained, the injunction against the entire class would be set aside. Is that right or not?

MR. LIEB: I do not believe that the court could--

Q You are the one that wanted the class, are you not?

MR. LIEB: We asked for the class.

Q And you do not like it now.

MR. LIEB: Your Honor, we like it very much.

Q Are the representatives here or not?

MR. LIEB: Yes, appellees Finley and Elrod.

Q Are the representatives of the class here as appellants?

MR. LIEB: As appellants, no. As appellees only.

Q Who are the appellants?

MR. LIEB: The appellants are Trainor and O'Malley, who were the attachment creditors in the state court

proceeding.

Q I see. And so the representatives of the defendants--

MR. LIEB: Are not here as appellants.

Q Who appealed?

MR. LIEB: Appellants Trainor and O'Malley.

Q I see.

MR. LIEB: The attachment creditors.

Q Everybody else is an appellee, every other party to this case?

MR. LIEB: That is right. All the other named parties and the class parties.

In light of this fact alone, we submit that either the appellants' appeal must be dismissed or the judgment affirmed since there is absolutely no effective relief that the Court can give the appellants. If the injunction remains in effect, no creditors, including the appellants, can obtain prejudgment attachments in Illinois.

The appellants have emphasized the fact--

Q What are we here for?

MR. LIEB: We are here because the appellants filed a jurisdictional statement, and this Court noted its probable jurisdiction. However, I submit that the issues raised in their appeal do not allow the Court to vacate the injunction against appellees, class representatives who have not appealed.

Q And where did you raise that point?

MR. LIEB: We raised that point--first of all, we raised it in our motion to dismiss and, secondly, we raised it as point one in our brief.

Q I remember that. I did not remember in the motion to dismiss.

MR. LIEB: Yes, we initially moved to dismiss this entire appeal.

Q Can you point that page out to me?

MR. LIEB: That would be in our motion to dismiss the appellants--

Q He says 85--right? I do not have it.

MR. LIEB: There are two places where that would be found. One would be in our motion to dismiss the appeal. And the other point would be in our brief, argument one of our brief at page 15.

The appellants have claimed that they are state officials and that they were carrying out a specific state function here, and therefore the injunction against them was improper, and they point to the case of Huffman v. Pursue. That case, however, is totally inapposite to the present case. In that case state officials were bringing a quasicriminal action pursuant to a specific statute which gave those officials the exclusive right to bring that action. In the instant case, the appellants utilized a general creditor's remedy which can be

utilized by any creditor in the State of Illinois. And, as the District Court noted, it was mere happenstance that the creditor in this case happened to be the state.

Furthermore, the District Court did not enjoin appellants from proceeding against appellees in the state court on their claim against the appellees.

In spite of the District Court's injunction against the prejudgment seizure of property under the Illinois Attachment Act, the appellants were always free to proceed against the appelles in the state court on their money claim. However, it should be pointed out that the appellants voluntarily chose to dismiss those proceedings. They stayed those proceedings and ultimately dismissed those proceedings although nothing in the federal court injunction required them to do so.

Thus any claim of interference with their attempts to sue the appellees simply cannot be taken seriously.

Q Might they not have felt that in the absence of some sort of garnishment or attachment the judgment would just be worthless?

MR. LIEB: Your Honor, there is no evidence in the record of that. As a matter of fact--

Q But you are speculating though as to why they dismiss. Whose burden is it in this case?

MR. LIEB: I believe it is their burden. They are

the appellants.

Q But it was your burden to make out the claim in the District Court and to show the thing was unconstitutional.

MR. LIEB: I believe we sustained that burden in the District Court. While the District Court proceedings were pending, the appellants stayed the state court proceedings. Once the federal District Court enjoined the attachment, enjoined the appellees from proceeding to utilize the Attachment Act any further, the appellants dismissed their case on the merits against the appellees. Therefore, any claim that they make that the federal District Court interfered with their attempts to sue the appellees in the state court or to interfere with the litigation at all in the state court simply does not have any merit because they just dismissed that suit sua sponte.

Q But they dismissed it after they were told they could not attach in connection with it, did they not?

MR. LIEB: That is correct, Your Honor. However, the appellees were working. They could have possibly obtained a judgment here. I do not think that the record shows that they could have. But had they obtained in a judgment, they could have utilized a whole variety of postjudgment procedures to execute upon that judgment.

Q Why did you go to the federal court? Why did

you not take your constitutional challenges to the state court in the attachment proceeding or in the--

MR. LIEB: There are a number of reasons, Mr. Justice White, why we went to the federal court. First of all, we were raising a constitutional claim--

Q Are the state courts in Illinois incapable of dealing with constitutional claims anymore?

MR. LIEB: Yes, Your Honor. However, this was a federal claim under 1983 for an injunction against state officials charged with the execution of the act.

Q Could you have gone to the state in this proceeding--in the very proceeding that is pending--could you have presented your claim in a timely manner?

MR. LIEB: Not in a timely manner.

Q That is what I want to know. What could you have done in this pending state action and when?

MR. LIEB: First of all, it has to be emphasized that whenever the issue is raised in the state court, it is always after the injury has occurred. The property is seized without, as we allege, due process of law.

Q I understand that. Could you at the moment you heard about it have gone into the court with a motion and challenged not only the grounds for the attachment but ask that probable cause on the underlying debt be established?

MR. LIEB: We could have tried, Your Honor.

Q Is there a procedure available for that?

MR. LIEB: There is no express provision in the act. That is not quite what I am asking you. Could you or not?

MR. LIEB: We could have attempted to do so. There is no precedent which would have allowed us to have done that.

Q You mean no one that has ever been attached has ever gone into court trying to get it released? Is the only way you can release it by putting up a bond?

MR. LIEB: No, there is a number of ways. One is putting up a bond. The other is by answering the affidavit on the merits, that is, denying the grounds.

Q That is Section 27.

MR. LIEB: That is right.

And then ultimately there will be a trial in that issue.

Q But that does not release the attachment.

MR. LIEB: If you win on the merits of the attachment--

Q At the end of the lawsuit.

Q No, at the end of the hearing on the attachment.

MR. LIEB: That is right, the hearing on the attachment. The creditor files an affidavit. The act provides that the debtor may file a counter affidavit.

Q It is all spelled out on the top of page 44 of the appendix.

Q Yes, I have read it.

MR. LIEB: And that there will be a hearing on the factual issue as to whether or not an attachment was justified. There is no provision in the act for moving for any other type of hearing.

Q Could you have filed an action for an injunction against the enforcement of the act on the ground that it was a violation of the United States Constitution?

MR. LIEB: We could have filed a separate suit in state court.

Q This one is a separate suit.

MR. LIEB: We could have filed a separate suit in state court.

Q Just like the one in the federal court?

MR. LIEB: Exactly.

Q Under 1983.

MR. LIEB: Exactly. However, I do not believe that Younger v. Harris requires an exhaustion of all state remedies.

Q My question was, You could have?

MR. LIEB: Yes, Your Honor.

Q And theoretically you could have gotten full relief.

MR. LIEB: The law in Illinois is unsettled on that, on the question as to whether you can get plaintiff class and

defendant class relief. We might have gotten an injunction in this instant case.

Q Is there anything in the law that says you could not?

MR. LIEB: The answer is no, Your Honor.

Q So, there is a possibility you could have?

MR. LIEB: That is right. We could have gone into state court in a separate proceeding and filed a 1983 act.

Appellees submit that three decisions of this Court are clear authority for affirming the District Court's decision to proceed to the merits of this case. Those decisions are Lynch v. Household Finance, Fuentes v. Shevin, and Gerstein v. Pugh. Lynch and Fuentes concern summary creditor remedies almost identical to the Illinois Attachment Act under review. The Lynch case concerned prejudgment garnishment, and in effect this case is a garnishment since the property was held in the hands of a third party. And I might add that Lynch was also a garnishment of a credit union account.

In Lynch and in Fuentes the Court found the proceeding, the prejudgment seizure, not to be a proceeding in state court. In Lynch the Court considered the question of the applicability of the Ante Injunction Act. And in Fuentes the Court directly considered the question as to whether Younger was a bar to this proceeding. And I would like to

quote from Fuentes because I believe that this quote is directly--

Q In Fuentes was there an available and immediate hearing on the attachment?

MR. LIEB: In Fuentes there would have been an eventual hearing.

Q Eventual. You seem to indicate that under these proceedings you could have gone right into court and challenged the attachment, including any allegations about the underlying debt.

MR. LIEB: Yes, under Section 26 we could have. Yes, under Section 26 we could have.

However, the statute does not provide for an immediate postseizure hearing. You can answer the affidavit by filing a counter-affidavit, and there shall be a trial thereon.

Q That is separate though from the main trial?

MR. LIEB: The trial on the merits. But, you see, an attachment is different from a replevin. In a replevin the question of possession pendente lite is almost identical to the question of ultimate right to possession.

Q What sort of calendar delay are you talking about in the Circuit Court of Cook County with that kind of mini-trial? Do you know or do you not know?

MR. LIEB: The way the procedure works is this. The

writ of attachment which is served upon the debtor indicates at the bottom that the hearings on attachment will be disposed on the return date.

Q That is from 10 to 60 days.

MR. LIEB: After the date of the writ. In this instant case we did appear on the return date, and we asked for a hearing. We were denied a hearing, and we were told that these cases are routinely heard 30 days later. So, there could be a 90-day period before you have the opportunity for that hearing.

Q Does that not suggest that perhaps the class of sheriffs of 102 counties in Illinois may not have been a little broad because you would not suggest that there is that same delay in every one of the 101 counties besides Cook County?

MR. LIEB: The delay is possible under the statute. There is no right to move for an earlier hearing, so that the statute is unconstitutional on its face since there is possibility for a delay of that long or greater. The act does not even say you have to have the hearing on the return date. The act just says, "There shall be a trial thereon."

Q Are you saying a statute is unconstitutional on its face if an unconstitutional delay is possible under its terms?

MR. LIEB: This has to be seen in terms of the

Mitchell decision where the Court found that one of the saving aspects of the Louisiana prejudgment sequestration statute was that there was an express provision for an immediate post-seizure hearing. And what we are saying is that the Illinois Attachment Act does not have an express provision for an immediate postseizure hearing.

Q You mean it just does not have the word "immediate" in it. It has got a provision for a hearing.

MR. LIEB: Eventually as in Fuentes.

Q It does not say eventually. It says he can file the motion. And you are just saying that it might be later, but it might be sooner too.

MR. LIEB: No. A motion to quash would be for a defect in the writ, if it was not properly pleaded under the act. And the creditor can amend the writ and continue the attachment. The hearing is provided for only in Section 26, which says you are entitled to a trial on the attachment issue. It does not say when.

Q That is Section 27?

MR. LIEB: Section 27. I am sorry.

Q At least the District Court said that the statute makes it, puts it within the power of the creditor to defer the hearing for at least 60 days.

MR. LIEB: That is right.

Q Because under the statute the return day he must

make no less than ten and no more than 60 days. So, the hearing is not going to be before the return day, and he can defer that--

MR. LIEB: That is correct.

Q --for 60 days.

MR. LIEB: It is up to the discretion of the court. And, I would add, any time that the debtor comes in and asks for an earlier hearing, the creditor could object to that on the grounds that he is not prepared, and he would ordinarily have the right to that later hearing.

Q On what date did you begin the action in federal court approximately?

MR. LIEB: I believe that was December 3, 1974.

Q 1974.

MR. LIEB: That is right.

Q And you could not have gotten this state proceeding moved along before the lapse of two years and now almost two months?

MR. LIEB: First of all, we got the District Court decision a year later. We are talking now about an appeal to this Court, which has taken further time.

Q It is now 25 months approximately--

MR. LIEB: Yes. First of all--

Q --since you could have sought some relief within 60 days.

MR. LIEB: We got relief in the District Court. We moved for a temporary restraining order. And that was not decided, but it was settled so that we did get half of the funds. The Due Process issue was briefed, and we would have gotten a decision in June. But during this time the Huffman decision came down, and we were asked to rebrief that issue. That is only something that would happen once. If this Court would resolve that issue in our favor, that issue would not come up again.

Q You think that if the District Court had abstained in this case, not necessarily under any command of the doctrine of Younger v. Harris but had just abstained to allow the Illinois courts to construe their statute, do you think that it is at least arguably possible that the Illinois courts, having read the Mitchell v. Grant case, would have said that Section 27 requires a prompt hearing, at least as prompt as was accorded in Mitchell?

MR. LIEB: I think that would be rewriting the statute, Your Honor. I think that--

Q That is not contrary to the statute.

MR. LIEB: That has to be read in pari materia with the return date provision, that the return date can be set anywhere from 10 to 60 days, and the common understanding of the return date is when--

Q The hearing cannot be before the return date.

MR. LIEB: That is right. And I would like to add too on this point that these procedural protections have to be seen working together, not separately. A major defect in this case, as we have pointed out, is the lack of the requirement to plead facts in the affidavit which would support the grounds for the attachment, and the requirement of having to appear before a judge to establish with these factual grounds the need. So, even if there were an eventual hearing, even with the right to move for a hearing, the initial seizure does not have adequate safeguards to protect the debtor from unconstitutional deprivation of his property.

On that point on the possibility of a wrongful deprivation, I would like to turn to a point raised by the appellants, that is, that they had a meritorious claim here and that they were justified in the attachment. While it is not the role of this Court to determine that issue, I think that an examination of what really happened points up the great possibility in this case of a wrongful attachment.

The papers filed by the appellants in the federal District Court--

Q Mr. Lieb, before you get too far in this, you could litigate that in the state courts, could you not?

MR. LIEB: The merits of the state court claim?

Q Yes.

MR. LIEB: Certainly. And we were well prepared to

litigate that in the state courts, and nothing in the federal court injunction prevented any of the parties from litigating that in the state courts.

The affidavits that the appellants have referred to actually establish that there was no grounds for fraud. Unfortunately in their printing of the appendix, the affidavit which appears on page 52, there is an insert, an attachment regarding how much money was in the account at the time the alleged fraud took place. That does appear in the record at item five. Their affidavit indicates that Mr. Hernandez applied for public assistance March 24, 1972. The itemized statement of his account indicates that on that date he had $55 in his credit union account. Now, under Illinois law, fraud cannot be alleged in a conclusory fashion except in the Illinois Attachment Act. When you file a complaint for fraud, you have to allege specifically factual allegations. You have to allege misrepresentation of a specific fact, intent to deceive, materiality of the allegation, reliance, and damages. If the attachment creditor had been required to allege those specific facts and to present that to a judge or any other officer who knows what the law is in Illinois, this attachment would never have been issued because a person who applies for public aid can have more than $55 in assets at the time he applies; so that if they had alleged the specific allegation that he said he did not have anything and he really has $55,

they could not allege materiality because he would have gotten the money anyway. The record also shows that Mrs. Hernandez did not even have a credit union account at the time and, furthermore, that she was not the person who applied to public aid. Therefore, she made no misrepresentations. So, therefore, if the specific facts would have had to have been pled in the state court to a judge, based on their own evidence in the record, there would not have been an attachment.

Yet, because of the fact that you can get an attachment by filing an affidavit with conclusory allegation of fraud, presented to a court clerk who merely stamps that affidavit and sends it summarily on to the sheriff, they were able to deprive these persons and all other creditors are able to deprive all other persons similarly situated of their property without due process of law.

Q Is that in the record, that this was done ministerially by some official in the court?

MR. LIEB: Yes, Your Honor, it is.

Q Who knows that? Who testified to that?

MR. LIEB: The statements were made in our allegations in the complaint which were not denied.

Q Is there anything else in the record; is there positive testimony by a live witness?

MR. LIEB: There was no testimony. This was all

handled on affidavits.

Q Is there an affidavit that says that?

MR. LIEB: No.

Q Why are you making the statement as a fact?

MR. LIEB: I do not think there is any dispute as to that fact. I believe that all attorneys who practice in Illinois--

Q Is it admitted by the state?

MR. LIEB: We alleged it in our complaint and it was not denied.

Q I thought the state said that you appeared before a judge and presented an affidavit. Is that not what the state argued here?

MR. LIEB: Only in tort cases.

Q Did they not argue that?

MR. LIEB: Yes, only in tort cases.

Q And you say that is not true?

MR. LIEB: In contract cases it is presented to a court clerk.

Q Who do we believe, you or the state?

MR. LIEB: I believe we are both making the same allegation.

Q Oh, I see.

MR. LIEB: We agree on this.

Q This was decided on a motion to dismiss by the

defendants and on your motion for summary judgment.

MR. LIEB: Summary judgment, that is right.

Q A motion to dismiss admits all pleaded allegations in the complaint, does it not?

MR. LIEB: That is right.

Q Mr. Lieb, I understand from what you said that you think there was no probable cause for the filing of this attachment.

MR. LIEB: That is correct, Your Honor.

Q Do you agree with the Attorney General of Illinois that a tort action lies against an attachment creditor who files an attachment without probable cause?

MR. LIEB: That is correct, under the statute.

Q And is he entitled also to punitive damages?

MR. LIEB: That is true.

Q Have you filed any such suit?

MR. LIEB: No, we have not. First of all, this is the state, and in order to sue the state, you would have to go into the Court of Claims, and it is a very difficult procedure with no right of appeal. The initial problem we confronted was the constitutional problem for the appellees and the members of the class. So, therefore we tried to get that resolved first. There is a damage claim pending in the federal courts right now, though under this 1983 action, and that will be reconsidered and we intend to pursue that.

Q That is before Judge Kirkland?

MR. LIEB: That is right.

Q I am having some difficulty in keeping the various state and federal forums straight. In response to a question from Justice Stewart a moment ago, you answere that something was disposed of on a motion to dismiss. Which piece of litigation is that?

MR. LIEB: The federal court suit, this case.

Q You mean it granted your injunction on a motion to dismiss?

MR. LIEB: Cross-motion, motion to dismiss.

Q And your cross-motion for summary judgment.

MR. LIEB: And cross-motion for summary judgment.

Q So, it resolved all disputed facts in favor of the appellants?

MR. LIEB: That is correct.

I would like to go back to the Huffman issue and poit out that the Gerstein v. Pugh case I believe disposes of this issue in our favor. In that case a unanimous court concluded that Younger v. Harris was not a bar to a federal injunction against pretrial detention of arrestees, charged by a prosecutor on information without a preliminary hearing. And I would like to quote briefly from that statute because it bears directly on this case. The Court noted: The injunction was not directed at the state prosecution as such but only at the legality of

pre-trial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. In this case the District Court injunction was not directed at the state court proceedings as such--that is, at the merits of the underlying claim--but only at the legality of pre-trial detention of property which had been carried out without due process of law. That issue could not be raised as a defense to the main claim of the creditor. And finally and most importantly, I believe, for purposes of Younger, the resolution of the constitutional issue in the federal court did not prejudice in any way the litigation of the conduct of the merits in the state court.

I believe in light of the Gerstein case and the Fuentes and Lynch case, which I mentioned previously, that the District Court's decision to proceed to the merits of the constitutional claim and to enjoin the county officials from carrying out the provisions of the Illinois Attachment Act was clearly correct.

Therefore, we respectably as this Court to affirm the judgment below.

Q Before you sit down, Mr. Lieb, I want to be sure I understand the points you made at the outset of your argument. In this case every clerk of every judicial circuit court in Illinois in every county in Illinois has been enjoined ever in

the future, under a permanent injunction, from ever issuing a writ of attachment under this law. And every sheriff in every county of Illinois has been similarly permanently enjoined from ever executing any such writ. It is your point, as I get it, that that is the way it is and that is the way it is going to be from now on and that no court has any power to correct that, even if it is terribly wrong in the judgment of some court or another; is that it?

MR. LIEB: Yes, Your Honor, that is correct.

Q That is what I thought it was.

MR. LIEB: Parties must properly appeal.

Q A notice of appeal was filed here, but it was never followed through on.

MR. LIEB: That is correct.

Q Do you think these appellants are qualified or have standing to raise the abstention point?

MR. LIEB: Against them but not against the other parties.

Q I know, but the court cannot both abstain and not abstain. What if it were held that the court should have abstained, as these appellants say it should?

MR. LIEB: I believe the only decision the court could reach is that the District Court should not have reached the question of the injunction against the appellants. There may have been other considerations and I submit there were--

Q If the court should have abstained, it means it should not have proceeded with judgment.

Q You have a bifurcated abstention.

Q It should not have considered the merits of your lawsuit, if it should have abstained.

MR. LIEB: I believe that under Younger one could consider the various circumstances concerning each one of the appellants or each one of the defendants in federal court. And since the sheriffs and clerks were not parties to the state court proceedings, there would be different considerations going to whether or not the injunction against them was proper.

Q But if you enjoin the sheriff and the clerk--but you say that you should never have gotten into the case of the plaintiff--in effect, the plaintiff does not get any benefit from the abstention because what he is trying to utilize is a state court procedure that you are allowing to be used against somebody else.

MR. LIEB: I believe that the appellant could have rectified that problem by, number one, appealing the class so that the issue would have been limited to--had they succeeded in overturning the class, then the sole question would be the injunction against them in favor of this particular plaintiff. And I believe that they could have presented to this Court the precise issue of whether or not the injunction was proper against the other parties.

Q I assume you would object to having it remanded so this could be straightened out. I assume you would object to that.

MR. LIEB: Absolutely, Your Honor. It is not a matter that needs to be straightened out by the District Court. It is a matter that the parties should have straightened out before they appealed.

Q Mr. Lieb, did any defendant ever file an appearance or a pleading on behalf of the defendant class as a group and purport to represent the defendant class?

MR. LIEB: Finley and Elrod filed an appearance when they were first served.

Q For themselves or for the class?

MR. LIEB: This was before the class was certified.

Q Before it was certified.

MR. LIEB: Right. We then moved for certification of the classes. The appellants Trainor and O'Malley filed a memorandum in opposition to the certification of the plaintiff class. They never even raised the question of the defendant class.

Q Does the record show any notice having gone out to the non-appearing members of the defendant class, giving them an opportunity to opt in or out or anything like that?

MR. LIEB: No. This is a 23(b)(2) class. So, I believe under the federal rules there is no necessity.

Q Does the record show whether the members of the class who are not individually before the court ever received actual notice of any of the proceedings?

MR. LIEB: The record does not show that. However, it is my understanding that after the judgment was issued, notices were sent out to the various sheriffs and clerks informing them--

Q Was it pursuant to court order, or was this something informal?

MR. LIEB: This was an agreement between the parties.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dienner, do you have anything further? You have about two minutes.

REBUTTAL ARGUMENT OF JOHN A. DIENNER, III, ESQ.,
ON BEHALF OF APPELLEES FINLEY AND ELROD
IN SUPPORT OF APPELLANTS

MR. DIENNER: Yes, if it please the Court, Mr. Chief Justice:

Two quick points. First as to our appeal as representatives of the defendant classes, defendants Finley and Elrod, we filed our notice of appeal. That is the manner in which an appeal is taken pursuant to Supreme Court rule ten-one. Pursuant to ten-four, all parties below are parties before this Court. Rule fifteen-three: Related cases from

the same court can file a single jurisdictional statement. In this case all issues as to all defendants, state defendants, county defendants, and class defendants were raised in a single jurisdictional statement.

Rule 46 of the Supreme Court also permits of course joint appeals where parties who are jointly or severally interested may join in an appeal. In the court below we filed a motion to adopt all pleadings that have been filed by the state defendants and that will be filed by the state defendants. As I pointed out, all issues as to all defendants were properly preserved in the jurisdictional statement. We designated ourselves as appellants in the designation of portions of the record and also in the jurisdictional statement. We filed a notice of appeal, we filed briefs, and we filed appearance in this Supreme Court. We assert that under the Court's own rules there is no question of the fact that the representatives of the class and the class themselves are before this Court and have properly preserved all issues raised below.

Q Do you think the other people on your side should have filed a brief as appellants?

MR. DIENNER: We filed a brief. We entitled it and designated it as a brief of appellees in support of the position of the appellants. I think that was an erroneous caption, but it is by no means jurisdictional. We are

appellants. We assert--

Q So, you would like to change that designation?

MR. DIENNER: We would indeed. We assert that we are unequivocally appellants in this position. We were misled initially by an interpretation of Supreme Court rule ten-four as requiring that result. Further thought and reflection on the matter convinced us it is otherwise.

One other thing--

MR. CHIEF JUSTICE BURGER: Make it very brief.

MR. DIENNER: --that is of ultimate importance in this case, under the Civil Practice Act attachment debtors have an unequivocal right under the Civil Practice Act of Illinois on two days notice to motion up a motion to quash, dismiss, file a counterclaim for summary judgment--

Q You are speaking of rule 27 then?

MR. DIENNER: Under rule 26, adopting the Civil Practice Act into the Attachment Act. They had possibility of filing motion to dismiss, summary judgment, declaratory relief, third party action. I could cite you the sections if Your Honors were interested.

One last matter, and that is that you will recall that the plaintiffs are in forma pauperis before this Court, thereby rendering nugatory much benefit of proceeding with the attachment action in the state court when they in fact are apparently judgment proof, thereby giving explanation for

the dismissal of that case once we were enjoined from attaching their assets. I assert that they had various remedies under the Civil Practice Act and under the Illinois Supreme Court rules. On two days notice they could have been in court presenting and preserving all of their constitutional issues.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:50 o'clock p.m., the case was submitted.]

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