IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	Case No. 1:13-cv-1532 (RMC)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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INTRODUCTION

Plaintiff Competitive Enterprise Institute (CEI) brought this lawsuit based on the alleged unlawful destruction of text messages by certain officials at the Environmental Protection Agency (EPA). Recognizing that CEI sought intrusive oversight of EPA's record-keeping practices, contrary to the administrative enforcement scheme of the Federal Records Act (FRA), this Court dismissed the majority of CEI's claims. *See* Court's Op. of Sept. 4, 2014 (ECF No. 21) at 11-15. The Court permitted, however, two narrow claims to proceed, both challenging the EPA's alleged failure to notify the National Archives and Records Administration (NARA) about the purported unlawful destruction of text messages. Specifically, the Court allowed one claim under the Administrative Procedure Act (APA), and one for mandamus-type relief. *Id.* at 16, 19.

On October 10, 2014, the EPA voluntarily notified NARA about the potential destruction of federal records relating to text messages. Accordingly, CEI's two remaining claims are now moot. The EPA's letter to NARA provides the precise relief CEI seeks through its two remaining claims, and constitutes the full scope of relief that this Court could order even were CEI to prevail on its claims. Thus, CEI no longer has any cognizable interest in this lawsuit. Consistent with black-letter law, CEI's two remaining claims must be dismissed for lack of subject-matter jurisdiction because they are now moot.

BACKGROUND

I. STATUTORY AND REGULATORY FRAMEWORK.

The Federal Records Act is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999); *see* 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24. Not all documents or items

created by a federal agency, however, qualify as federal records. Instead, the FRA defines "records" as follows:

> As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

Id. § 3301; *see also* EPA's Br. on First Mot. to Dismiss (ECF No. 10-1) at 2-4 (providing additional detail on the statutory and regulatory background of the FRA).

The FRA establishes an administrative enforcement scheme to address potential violations of the statute. Pursuant to that scheme, if an agency head learns of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency," then the agency head shall notify the Archivist, who is the head of NARA. 44 U.S.C. § 3106.[1]

Under the FRA, NARA has promulgated regulations governing agency reporting of potential incidents of unlawful actions. *See* 36 C.F.R. § 1230.14 ("The agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration[.]"). NARA's regulation spells out exactly the information that must be reported:

(1) A complete description of the records with volume and dates if known;

(2) The office maintaining the records;

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[1] Agency heads have additional duties when they are aware of the unlawful removal of federal records from their agency—*i.e.*, in cases where a record has been allowed "to leave the custody of a Federal agency without the permission of the Archivist of the United States." 36 C.F.R. § 1230.3. In those situations, the agency head shall request the Attorney General to initiate an action for recovery of the removed records. *See* 44 U.S.C. § 3106.

> (3) A statement of the exact circumstances surrounding the removal, defacing, alteration, or destruction of records;
>
> (4) A statement of the safeguards established to prevent further loss of documentation; and
>
> (5) When appropriate, details of the actions taken to salvage, retrieve, or reconstruct the records.

Id. § 1230.14(a). The report must be submitted or approved by the individual authorized to sign records schedules, *id.* § 1230.14(b), which for the EPA is the Agency Records Officer.

II. FACTUAL AND PROCEDURAL HISTORY.

A. The Amended Complaint and EPA's Motion to Dismiss.

Plaintiff, the Competitive Enterprise Institute, brought this lawsuit alleging that the EPA had unlawfully destroyed certain text messages that constituted federal records. CEI filed its initial Complaint (ECF No. 1) on October 3, 2013, and that Complaint contained four claims. Each of the first three was predicated on the same underlying legal theory—that the EPA had unlawfully destroyed text messages—but each one requested a different type of relief. The first requested "a declaratory judgment that EPA has violated its duty to preserve records under the Federal Records Act and FOIA; has acted arbitrarily, capriciously, and illegally in violation of the APA; and that it has a duty to preserve, and prevent the destruction by EPA employees, of text messages transmitted on EPA devices." Compl. ¶ 50. The second claim requested "injunctive relief forbidding EPA to destroy and/or not preserve text messages." *Id.* ¶ 54. And the third claim requested an unspecified "grant of a writ of mandamus." *Id.* ¶ 60. The fourth claim was simply a request for attorney's fees. *Id.* ¶ 64.

The EPA moved to dismiss the original Complaint, arguing that CEI's claims failed to state a claim upon which relief can be granted, because the FRA precluded judicial oversight of an agency's day-to-day records management program. *See* EPA's Br. (ECF No. 10-1) at 10

("CEI's Complaint seeks to oversee the EPA's compliance both with the FRA and with the EPA's record-keeping guidelines regarding text messages. Pursuant to binding D.C. Circuit precedent, however, this type of claim is precluded under both the FRA and the APA."). That argument was based on Congress's decision to rely on administrative enforcement—rather than judicial enforcement at the behest of private litigants—to ensure compliance with the FRA. *See id.* at 14-15.

While the EPA's motion to dismiss was pending, CEI moved for leave to amend its original Complaint in order to add a fourth substantive claim. Specifically, CEI sought leave "to add a separate claim . . . seeking injunctive relief with regard to EPA's duty to notify the Archivist of the United States about violations of the Federal Records Act." CEI's Mot. for Leave (ECF No. 13) at 1. The EPA opposed that motion on the basis of futility. *See* ECF No. 15. CEI filed a reply memorandum, arguing that its new claim (Count IV in the Amended Complaint) sought only to compel the EPA to invoke the FRA's administrative enforcement mechanism by notifying NARA of the potential destruction of records:

> Defendant essentially argues that plaintiff's amended complaint is futile because the D.C. Circuit made clear that the only recourse for the violations cited by plaintiff is the FRA's administrative enforcement mechanism. But that mechanism is precisely what plaintiff seeks to invoke in the newly added Fourth Claim for Relief in its proposed amended complaint, by merely requiring EPA's administrator to notify the archivist, as expressly dictated by the FRA's enforcement mechanism.

CEI's Reply Br. (ECF No. 16) at 1 (internal quotation marks and citations omitted); *see also id.* at 2 (stating that "all the Fourth Claim seeks" is "a court order directing EPA to notify the Archivist, so that it will be up to the Archivist to take any actions he sees fit to prevent the unlawful removal or destruction of records" (internal quotation marks omitted)).

Based on CEI's representations, the Court granted CEI's motion for leave to amend, noting that CEI's new claim "seeks access to an administrative process rather than a specific

outcome[.]" Court's Order of Mar. 14, 2014 (ECF No. 17) at 3. Accordingly, because the EPA's futility arguments were basically the same arguments presented in its motion to dismiss, the Court granted CEI's motion for leave to amend, but granted the EPA's request that its pending motion to dismiss be applied to the Amended Complaint. *See id.* at 3-4.

The Court thereafter ruled on EPA's motion to dismiss, granting it in part and denying it in part. The Court agreed with the EPA that review under the FRA directly was precluded, and that review under the APA was not available to challenge an agency's actual disposal decisions (as opposed to general records policies governing disposal). *See, e.g.*, Court's Op. (ECF No. 21) at 11 ("This precedent is clear that private litigants cannot state a claim for legal relief under FRA."); *id.* at 14 ("Given the circumscribed nature of judicial review under FRA, private plaintiffs cannot rely on the APA to challenge what they are expressly prohibited from challenging under FRA, *i.e.*, an agency's substantive decisions to destroy or retain records."). Accordingly, the Court dismissed the majority of CEI's claims.

The Court permitted, however, two narrow claims to proceed relating to the EPA's alleged failure to notify the Archivist about the potential destruction of records. Although challenges to an agency's actual disposal decisions are precluded by the FRA's administrative enforcement mechanism, the Court noted that, under D.C. Circuit precedent, a plaintiff may challenge an agency's failure to invoke that mechanism. *See id.* at 15-16 (noting that "claims alleging non-compliance with FRA's enforcement scheme were actionable under the APA" (citing *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991))). The Court concluded that "CEI has adequately alleged that EPA failed to notify the Archivist" here, based on an allegation that EPA had destroyed several thousand text messages sent or received on an EPA-issued device. Court's Op. at 16. Thus, the Court permitted an APA claim to proceed (Count IV of the Amended

Complaint), as well as a mandamus claim based on the same facts (Count III). *See* Court's Op. at 19 ("Despite the stringent limitations on mandamus relief, CEI has adequately alleged an underlying violation of the APA."). Accordingly, the Court dismissed all claims except Counts III and IV of the Amended Complaint. *See id.* (denying the EPA's motion to dismiss "with respect to the APA claim for EPA's alleged failure to comply with FRA's enforcement scheme and CEI's request for mandamus relief"); *see also* Order of Sept. 4, 2014 (ECF No. 22) at 1 n.1 ("The only remaining claims are Count III, Request for Mandamus, and Count IV, CEI's APA claim for failure to notify the Archivist. All remaining Counts are hereby dismissed.").

B. EPA's Letter to NARA.

Recently, EPA voluntarily decided to notify NARA about the potential loss of federal records pertaining to text messages. *See* Joint Status Report (ECF No. 24) ¶ 1 ("Defendant has decided to formally notify the National Archives and Records Administration (NARA) about the potential loss of federal records relating to text messages.").

The EPA provided this formal notification letter to NARA on October 10, 2014. *See* Letter from John B. Ellis, EPA's Records Officer, to Paul M. Wester, Jr., NARA's Chief Records Officer (attached hereto as Exhibit 1) [hereafter "EPA Letter"]. The EPA Letter stated that EPA was notifying NARA "of all relevant facts regarding the Agency's management of text messages under the Federal Records Act" in "an effort to ensure compliance with 44 U.S.C. § 3106, 36 C.F.R. §§ 1230.14 and 1230.16[.]" *Id.* at 1. Specifically, although the EPA "has no reason to believe federal records have been unlawfully destroyed," EPA decided "[o]ut of an abundance of caution . . . to notify NARA of the situation and obtain any guidance, resources, or other insights that NARA may have to offer." *Id.* at 1, 2.

The nine-page letter from EPA specifically invoked the process for reporting FRA violations, *see id.* at 2 (citing 36 C.F.R. § 1230.14), and went on to discuss at length each of the

five requirements set forth in NARA's regulation. *See id.* at 2-8. The EPA Letter addressed both EPA's general policies regarding text messages, *see id.* at 1, 3-6, as well as the specific text messages that appear to have formed the basis for CEI's Amended Complaint here. *See id.* at 3, 6-7. With respect to the text messages CEI alleges were unlawfully destroyed, the EPA Letter explained that "[i]t is correct that none of the requested text messages were produced or preserved," but that "EPA has determined that it is not aware of federal records that were unlawfully destroyed." *Id.* at 1.

In particular, EPA specifically addressed the allegations concerning the approximately 5,000 text messages sent or received during a three year period on a mobile device assigned to EPA Administrator Gina McCarthy, who was at the time the Assistant Administrator for the Office of Air and Radiation. *Id.* at 6-7. To the best of Administrator McCarthy's recollection, those text messages related to her "family and other personal business, not government business." *Id.* at 7. That recollection appears to be consistent with the EPA's review of available billing information:

> Available billing information shows that only about 120 of the text messages sent or received by Ms. McCarthy during this three year period were exchanged between her device and a device assigned to another EPA employee. The remainder of the text messages were exchanged with phone numbers belonging to family members, friends, and non-EPA or personal acquaintances.

Id. And even for the text messages exchanged with other EPA numbers, "[i]t is the Agency's understanding that the messages exchanged with EPA assigned numbers were also personal in nature (*i.e.* arranging to meet socially after work) or nonsubstantive schedule-related." *Id.* Accordingly, the EPA Letter stated that "[t]he Agency has no reason to believe these messages were appropriate for preservation as documentation of Agency business under the Federal Records Act." *Id.*

In addition to discussing each of the five requirements in NARA's regulation at some length, *see id.* at 2-8, the EPA Letter also went on to discuss additional steps that the EPA is taking prospectively regarding text messages. *See id.* at 8-9 (discussing "Continuing Actions & Improvements"). Specifically, EPA stated that it was continually revising its records management training for employees, and that its training will include additional discussion of managing text messages as potential federal records. *Id.* at 8. Once the EPA's training resources are updated, "EPA will highlight them through a mass-mailer or other Agency-wide notice mechanism by January l, 2015 (and will continue to make them available to all employees after that date)." *Id.* EPA will also "include mobile devices in the next round of annual records training, and include the topic as part of an upcoming Quarterly Records Management Day." *Id.*

NARA has now received EPA's letter and is in the process of reviewing it. *Cf.* 36 C.F.R. § 1230.16 (discussing how NARA responds to reports of unlawful or accidental actions pertaining to federal records).

ARGUMENT

I. CEI'S TWO REMAINING CLAIMS ARE MOOT.

A. CEI Has Now Obtained the Only Relief Available on its Claims.

CEI's two remaining claims in this lawsuit are moot. The only relief available on the two claims is a judicial order compelling EPA to notify NARA about the potential destruction of text messages. But EPA has now provided that formal notification to NARA. Accordingly, CEI no longer has a legally cognizable interest in the outcome of this suit. The two remaining claims must therefore be dismissed for lack of subject-matter jurisdiction.

Under Article III of the Constitution, "[f]ederal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983); *see also Church of Scientology v. United*

States, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "There is thus no case or controversy, and a suit becomes moot, when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted).

Here, CEI's two remaining claims are indisputably moot. The sole relief available on those claims is an order compelling a formal notification to NARA regarding the destruction of text messages. *See* 44 U.S.C. § 3106 ("The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention[.]"). The EPA has unquestionably now provided that relief—formally invoking the regulation governing the reporting of potential FRA violations, providing a report signed by the EPA's Agency Records Officer, and discussing all five of the requirements set forth in that regulation. *See* EPA Letter at 2-9 (citing and discussing the requirements of 36 C.F.R. § 1230.14). There is no relief left for the Court to provide—and CEI has no remaining cognizable interest in pursuing this case—and therefore the two remaining claims must be dismissed as moot. *See LaRoque v. Holder*, 679 F.3d 905, 909 (D.C. Cir. 2012) (holding that the case is moot because "appellants have obtained everything that they could recover from this lawsuit" (internal quotation marks and modifications omitted)), *cert. denied*, 133 S. Ct. 610 (U.S. 2012); *see also McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.").

Indeed, CEI itself has previously described its Count IV as seeking precisely the relief that the EPA has now provided—a letter from EPA to NARA regarding the text messages. *See* CEI's Reply Br. in Support of Mot. to Am. (ECF No. 16) at 2 ("But that is all the Fourth Claim seeks: for a court order directing EPA to notify the Archivist, so that it will be up to the Archivist to take any actions he sees fit to prevent the unlawful removal or destruction of records." (internal quotation marks omitted)); *see also* Court's Order of Mar. 14, 2014 (ECF No. 17) at 3 (describing CEI's Count IV as "seek[ing] access to an administrative process rather than a specific outcome"); Court's Op. (ECF No. 21) at 16 ("CEI has adequately alleged that EPA failed to notify the Archivist"). Now that EPA has provided the sole relief available (and the sole relief sought by CEI), the claims are moot. *See Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) (mootness occurs when "the court can provide no effective remedy because a party has already obtained all the relief that it has sought" (internal quotation marks and modifications omitted)).

B. CEI's Request for Mandamus Relief is Likewise Limited to a Judicial Order Compelling Notification to NARA.

In discussions surrounding the parties' Joint Status Report (ECF No. 24), CEI suggested that notification to NARA would not moot the mandamus claim (Count III) because that claim sought broader injunctive relief than just notification to NARA. This argument is incorrect. CEI's mandamus claim is limited to the same potential relief as its APA claim—an order compelling EPA to notify NARA—as confirmed by the Court's resolution of EPA's initial motion to dismiss.

As set forth in the Court's opinion on that motion, the Court permitted CEI's mandamus claim to continue *on the same basis* as CEI's APA claim. *See* Court's Op. at 19 ("Despite the stringent limitations on mandamus relief, CEI has adequately alleged an underlying violation of

the APA."). The Court's logic for permitting the mandamus claim to continue was "[b]ecause mandamus ultimately will be tied to the merits of CEI's allegations," and thus "[t]he clarity of CEI's right to relief and the determination of whether mandamus is justified are questions best reserved for an evaluation on the merits" rather than on a motion to dismiss. *Id.* Of course, the only other claim that the Court permitted to continue was the APA claim seeking notification to NARA. Thus, the Court's rationale for permitting the mandamus claim to continue—to await "an evaluation on the merits"—necessarily requires that the mandamus claim be equal in scope to the only other claim that would have proceeded to the merits (the APA claim).[2]

This limited scope of CEI's potential mandamus claim—as equivalent to the relief offered on the APA claim—is further confirmed by the parties' briefing on the EPA's initial motion to dismiss. In its initial motion to dismiss, EPA argued that "[t]he same reasons why relief is precluded directly under the FRA also explain why CEI cannot invoke mandamus as a substitute," and that "CEI has not met any of the other requirements necessary for the issuance of a writ of mandamus." EPA's MTD Br. (ECF No. 10-1) at 17. CEI's opposition brief entirely failed to discuss mandamus, save for a single sentence asserting that the unavailability of relief under the Freedom of Information Act did not preclude mandamus relief. *See* CEI's MTD Br. (ECF No. 11) at 9 ("Similarly, the fact that EPA correctly notes that FOIA, another statute mentioned in the Complaint, is purely a disclosure statute, in no way affects plaintiff's ability to seek relief for clear-cut violations of other statutes like the FRA, either through the APA or through mandamus."). In other words, CEI did not defend its mandamus claim except by relying on the merits of its other claims. *See* EPA's MTD Reply Br. (ECF No. 14) at 2 (noting that "CEI

[2] The Court's final Order on the motion to dismiss likewise made clear that the two claims were linked together: "the motion is DENIED with respect to Competitive Enterprise Institute's Administrative Procedure Act claim against EPA for failure to notify the Archivist and its request for mandamus relief[.]" ECF No. 22 at 1.

defends only two of its claims, both of which must be brought under the APA"). And the continuation of one of those APA claims (the notification-based claim) is, of course, exactly the reason why the Court allowed the mandamus claim to proceed. *See* Court's Op. at 19. Based on this history, it is clear that the mandamus claim is equivalent in scope to the APA claim—as seeking to compel EPA to notify NARA about the destruction of text messages.[3]

In sum, CEI's two remaining claims are now moot. The only relief available for those claims is an order compelling EPA to formally notify NARA about the destruction of text messages. EPA has now voluntarily provided that formal notification to NARA. CEI thus lacks a cognizable interest in continuing this lawsuit, and the two remaining claims should be dismissed for lack of subject-matter jurisdiction.

II. NO EXCEPTION TO MOOTNESS APPLIES.

To the extent CEI tries to justify this lawsuit's continuation with an exception to the mootness doctrine, neither exception is applicable here. Courts have recognized two potential exceptions: (1) voluntary cessation of the challenged conduct; and (2) claims that are likely to be repeated but are too short in duration so that they will evade judicial review. *See Am. Bar Ass'n v. FTC*, 636 F.3d 641, 647-48 (D.C. Cir. 2011).

The first exception is designed to prevent a defendant from voluntarily ceasing its unlawful conduct, then returning to that practice as soon as the lawsuit is dismissed. But the premise of the exception—a defendant's manipulative purpose—is inapplicable to the Federal Government, as confirmed by the *en banc* D.C. Circuit. *See Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990) (en banc) ("At least in the absence of overwhelming evidence (and

[3] Finally, even if the mandamus claim was not so limited after the Court's resolution of the EPA's motion to dismiss, the mandamus claim still could not offer CEI any relief beyond an order compelling notification to NARA, for the reasons discussed in EPA's initial motion to dismiss. *See* EPA's MTD Br. (ECF No. 10-1) at 17-19.

perhaps not then), it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose."); *cf.* Court's Op. at 14-15 (discussing the presumption "that government officials discharge their duties in good faith").

More fundamentally, that exception has no applicability here, where it is no longer even possible for EPA to "return to [its] old ways." *Clarke*, 915 F.2d at 705. EPA has already notified NARA of the potential destruction of federal records, and it is simply not possible for EPA to un-send its letter. Thus, the "voluntary cessation" exception has no applicability here. *Cf. Bender v. Jordan*, 515 F. Supp. 2d 10, 17 (D.D.C. 2007) (Collyer, J.) (rejecting application of the exception because "[n]o further relief . . . could affect real life").

As for "capable of repetition but evading review," the exception is a narrow one that applies only in "exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). But here, an agency's alleged failure to notify NARA is not the type of challenged conduct that inherently is "always so short as to evade review." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998); *see also Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481 (1990) ("Nor is the State's refusal to issue a bank charter the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to evade review." (internal modifications omitted)). Indeed, because any alleged failure to notify NARA would be an ongoing action by an agency, there is no reason to think that any future failure to notify (which is itself entirely speculative) could not be properly and timely reviewed through a future lawsuit.

Thus, neither of the two exceptions to the mootness doctrines applies here. And because CEI has now obtained the sole relief available in this lawsuit, the two remaining claims must be dismissed as moot.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts III and IV of Plaintiff's Amended Complaint for lack of subject-matter jurisdiction.

Dated: October 23, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2014, a copy of the foregoing Memorandum in Support of Defendant's Motion to Dismiss was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Daniel Schwei
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