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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL RICHARDSON, Plaintiff, **v.** **JEFFERSON SESSIONS, in his official capacities; XAVIER BECERRA, in his official capacities,** Defendants.	2:17-cv-1838 JAM AC PS **DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** Date: February 14, 2018 Time: 10:00 a.m. Dept: 26 Judge: The Hon. Allison Claire Trial Date: None set Action Filed: 9/5/2017

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INTRODUCTION

Plaintiff has now clarified that his sixth through ninth claims challenge only California's Sex Offenders Registration Act (SORA) and Megan's Law. Under controlling Supreme Court and Ninth Circuit authority, this Court should dismiss those claims without leave to amend.

ARGUMENT

I. PLAINTIFF CONCEDES THAT HIS COMPLAINT DOES NOT CHALLENGE JESSICA'S LAW

As a threshold matter, Plaintiff concedes in the Opposition that Jessica's Law does not apply to him because he is no longer on parole. Opposition at 15; Cal. Penal Code § 3003.5(b). Thus, the only state laws at issue in the Complaint are: (1) SORA, which requires Plaintiff to register with local law enforcement (Penal Code 290, *et seq.*), and; (2) Megan's Law, which requires the Department of Justice to post some of Plaintiff's registration information on the Megan's Law Internet website (Penal Code § 290.46). See Motion at 3.

II. THE SIXTH CLAIM FOR VIOLATION OF EX POST FACTO CLAUSE FAILS TO STATE A CLAIM

Plaintiff clarifies in the Opposition that his sixth claim challenges Megan's Law, but not SORA.[1] Opposition at 14.

The application of Megan's Law to Plaintiff does not violate the Ex Post Facto Clause because the law is non-punitive under the purpose/effects test outlined in *Smith v. Doe*, 538 U.S. 84 (2003). Nothing distinguishes this case from *Smith v. Doe* to justify a different outcome. Supreme Court and Ninth Circuit precedent show that, as a matter of law: (1) the California legislature enacted Megan's Law for a civil regulatory purpose, not to impose punishment, and (2) the effect of Megan's Law is not so punitive in effect as to negate its intended regulatory purpose. The passage of time since *Smith* has not changed either of these conclusions.

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[1] Plaintiff also argues that the sixth claim challenges other international, federal, and local laws for which Defendant Becerra is not liable. Opposition at 14-15; *see* Argument section VI, *infra*. Plaintiff further claims to be challenging California's state "residency statutes"; however, he has identified no such statutes in the Complaint except for Jessica's Law, which he concedes is inapplicable to him.

A. Regulatory Purpose: The California Legislature's Purpose in Enacting Megan's Law Was Regulatory

First, as detailed in Defendant Becerra's moving papers, the text, legislative history, and other factors show that the intent of Megan's Law was "to ensure that members of the public have adequate information about the identities and locations of sex offenders who may put them and their families at risk...." 2004 Cal. Legis. Serv. Ch. 745 § 5 (A.B. 488) (West); *see also* Motion at 10-13. Plaintiff's only argument to the contrary relies on apparent quotations of elected officials for the City of Adelanto (who are not even state legislators).[2] Opposition at 14. Their purported comments do not relate to the legislative intent behind AB 488. The first prong of the purpose/effects analysis is therefore satisfied.

B. Regulatory Effects: Under *Smith* and *Elk Shoulder,* the Effects of Megan's Law Are Not So Punitive as to Negate its Regulatory Purpose

"[O]nly the clearest proof will suffice to override [the legislature's stated] intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92. Under *Smith* and *Elk Shoulder*, Plaintiff's allegations in the Complaint are insufficient to override the regulatory intent of Megan's Law.

1. Factor 1: Internet publication of sex offender registry information has not been historically regarded as punishment

Smith concluded that Internet publication of sex offender registry information has not been historically regarded as punishment. *Smith*, 538 U.S. at 98-100. This ruling squarely governs here. Factor one therefore indicates that Megan's Law is not punitive.

2. Factor 2: Just as in *Smith* and *Elk Shoulder*, Megan's Law does not impose a cognizable affirmative disability or restraint

Internet publication of sex offender registry information does not impose an affirmative disability or restraint on the offender. *Smith*, 538 U.S. at 100-102; *U.S. v. Elk Shoulder*, 738 F.3d

[2] Defendant has been unable to access the website cited in Plaintiff's brief. Moreover, not even statements from an authoring legislator are legislative history subject to judicial notice in California when there is no reliable indication that the Legislature as a whole was aware of the stated objective and believed the legislation at issue would accomplish it. *People v. Garcia*, 28 Cal.4th 1166, 1176 n.5 (2002).

948, 953-54 (2013); *U.S. v. Morgan*, 255 F.Supp.3d 221, 230 (D.D.C. 2017). *Smith* reasoned that that the Internet notification provision in Alaska's SORA was limited to providing information to the public, and that any further consequences flow from the fact of the conviction, which is a public record. *Smith*, 538 U.S. at 101. This law and reasoning apply to Megan's Law here.

Plaintiff appears to argue that *Smith* is outdated because the reach of the Internet has expanded since 2003. However, that change does not undermine the Supreme Court's reasoning that the law *itself* does not affirmatively disable or restrain. *See Smith*, 538 U.S. at 98. That ruling is binding on this Court. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."), *accord Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (2011).

Even if changes to the Internet were relevant and Plaintiff's allegations in the Complaint were all true, they would be insufficient to carry "the heavy burden of showing substantial changes in society that would require us to revisit the Supreme Court's conclusion [in *Smith* in 2003]." *Elk Shoulder*, 738 F.3d at 954. They do not show a substantial societal change since *Elk Shoulder*, in which plaintiffs alleged:

> [T]oday SORNA's registration requirement imposes significant hardships on offenders, who are "held to public ridicule by community members," and face difficulty finding and maintaining both employment and housing. He notes that local newspapers frequently maintain interactive maps of the registered residences of sex offenders, and cites "reports of incidents of citizens standing on street corners bearing signs with the names and addresses of offenders blaz[o]ned across the front."

Id. They also do not show a substantial societal change since *Smith*, which held that the law did not impose an affirmative disability or restraint despite the followings statements in that case by the 9th Circuit:

> By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

Doe I v. Otte, 259 F.3d 979, 987-988 (9th Cir. 2001), *overruled by Smith*, 538 U.S. 84; *Smith*, 538 U.S. at 99-102 (acknowledging that "publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.") The Plaintiff's allegations of hardship are not markedly different than the facts in these previous cases.

Plaintiff points to the District of Colorado case of *Millard v. Rankin* to support his argument of societal change since *Smith*. *See Millard v. Rankin*, 265 F.Supp.3d 1211 (D. Colo. 2017). Currently on appeal in the 10th Circuit, this decision is directly contrary to *Smith* and *Elk Shoulder*. Perhaps notably, *Millard* was not decided under the binding authority of *Elk Shoulder*, in which the 9th Circuit confirmed as recently as 2013 that *Smith* analysis was still binding law. *See Elk Shoulder*, 738 F.3d at 953-954. Moreover, in finding affirmative disabilities and restraints, *Millard* relied heavily on *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016) as persuasive authority. *See Millard*, 265 F.Supp.3d at 1224, 1225 n. 7, 1227, 1228, 1229. *Snyder*, which examined Michigan's SORA, is distinguishable because the "most significant burden imposed by the Michigan statute was its regulation of where registrants may live, work, and loiter." *Morgan*, 255 F.Supp.3d 221, 231 n. 2 (distinguishing *Snyder* and holding that, consistent with *Smith*, SORNA's registration and Internet publication provisions do not impose an affirmative disability or restraint.) SORA and Megan's Law do not impose these types of constraints.

Plaintiff's remaining arguments also fail to show that Megan's Law imposes an affirmative disability or restraint because they mistake the law's scope. Megan's Law does not restrict where Plaintiff can live or to travel, including for work. Megan's Law does not require any so-called "compliance checks." Megan's Law does not restrict his ability to be with his children or other relatives. [3] The proposed "International Megan's Law" is not a provision of California's Megan's Law, nor is it a statute enforced by Defendant against Plaintiff. And, any "ostracism" which Plaintiff could potentially experience in college from his fellow students has apparently not happened and, if it did, would not necessarily impede his ability to receive an education.

[3] The claims in the Complaint do not purport to challenge the as-applied constitutionality of Family Code section 3030. Even if an Ex Post Facto violation were alleged as to section 3030, Plaintiff has not and could not allege the elements of such claim, including that of retroactivity.

For these reasons, the second factor also indicates that Megan's Law is regulatory and not punitive.

3. Factor 3: Megan's Law does not promote traditional aims for punishment

For factor 3, Plaintiff does not argue that Megan's Law promotes traditional aims for punishment. Therefore, this factor is also met. *See Smith*, 538 U.S. at 102.

4. Factors 4 and 5: Just as in *Smith* and *Elk Shoulder*, Megan's Law is justified by the rational basis of public safety and is not excessive

As a matter of law, California's Megan's Law website is supported by the rational basis of public safety; specifically, by increasing the accessibility of sex offender information that is already in the public record. *See Smith*, 538 U.S. at 102-103; *Elk Shoulder*, 738 F.3d at 954; *see also Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (Alaska's SORA does not violate substantive due process and serves the legitimate state interest in public safety); *U.S. v. Juvenile Male*, 670 F.3d 999, 1009–1010 (9th Cir. 2012) (SORNA does not violate substantive equal protection and serves the legitimate state interest in public safety). The Supreme Court recently reaffirmed this in *U.S. v. Kebodeaux*, stating, "sex offender registration has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." 570 U.S. 387, 133 S.Ct. 2496, 2503 (2013) (quoting *Smith*, 538 U.S. at 102-103).

Plaintiff appears to argue that Megan's Law is irrational or excessive because the recidivism rate of sex offenders is allegedly overblown. However, as recently as *Kebodeaux*, the Supreme Court confirmed that "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals." *Id.* (citing Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994, p. 1 (Nov. 2003) (reporting that compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex)); *see also id.* at 2504 (citing H.R. Rep. No. 109–218, pt. 1, pp. 22, 23 (2005) (House Report) (citing statistics compiled by the Justice Department as

support for SORNA's sex offender registration regime); *see also Smith*, 538 U.S. at 103 (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997).)

The *Kebodeaux* Court explained that despite the fact that conflicting evidence on the recidivism rate exists, it is within the legislative purview to weigh the evidence and make a rational policy decision.[4] *Kebodeaux*, 133 S.Ct. at 2303. Thus, for the purposes of this motion, it does not matter whether recidivism rates may actually be lower than previously thought – that debate does not create a triable issue of fact. It is enough that *some* reasonably relied-upon evidence indicates that the recidivism rate is a public safety concern. *Id.* at 2303-2404.

III. THE SEVENTH CLAIM FOR SEPARATION OF POWERS DOCTRINE AND BILL OF ATTAINDER FAILS TO STATE A CLAIM

Plaintiff's seventh claim for violation of separation of powers and bill of attainder also fails as to SORA and Megan's Law. "The Bill of Attainder Clause implements the doctrine of separation of powers." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002). Plaintiff's Complaint fails to allege two of the three essential elements of the claim: (1) punishment and (2) lack of a judicial trial. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984).

With respect to the first factor, as discussed in Defendant's moving papers and above, SORA and Megan's Law do not constitute punishment. *See id* at 852.

With respect to the second factor, Plaintiff argues that the trial related to his sex offense did not include a determination of his proclivity to reoffend. Opposition at 18. However, he cites no legal authority suggesting that that finding was necessary. Case law demonstrates, to the contrary, that when a "statute applies evenhandedly to all persons convicted of certain enumerated offenses" the trial need only have determined guilt as to that offense. *Phillips v.*

[4] Defendant objects to Plaintiff's request for judicial notice on page 3, footnote 3 of the Opposition. The contents of the referenced article are not the proper subject of judicial notice, because they are not "generally known" and cannot be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b).

Iowa, 185 F.Supp.2d 992, 1005 (Dist. Iowa 2002) (statute mandating service of full prison sentence for certain offenses ruled was not a bill of attainder); *Schafer v. Moore*, 46 F.3d 43, 45 (8th Cir. 1995) (amendment to statute governing parole program for sex offenders was not a bill of attainder because it applied only to convicted sex offenders); *cf. Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (Alaska's SORA did not violate procedural due process where it based registration and Internet notification provisions solely on fact of plaintiff's conviction).

Because Plaintiff can show neither of these two essential elements of a bill of attainder, the seventh claim should be dismissed.

IV. THE EIGHTH CLAIM FOR CRUEL AND UNUSUAL PUNISHMENT FAILS TO STATE A CLAIM

Because SORA and Megan's Law are not punitive under the Ex Post Facto Clause analysis, they also do not constitute punishment under the Eighth Amendment. *See U.S. v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013) (applying *Smith* test to determine whether law was punitive under Eight Amendment); *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999).

Defendant cites dicta in the 1910 case of *Weems v. U.S.*, 217 U.S. 349 (1910) for the proposition that burdens identified as "civil disabilities" may still violate the Eighth Amendment. In *Weems*, there was no question of whether the burden was punitive; it was part of a criminal sentence and intended as part of the punishment, regardless of the label. *Weems v. U.S.*, 217 U.S. 349, 364 (1910) ("There are, besides, certain accessory *penalties* imposed…" (emphasis added).) And, even if *Weems* had ever been applicable, it was superseded by the Supreme Court's specific determination in *Smith* that sex offender registration laws such as SORA and Megan's Law are not punitive.

Plaintiff also argues that the frequency with which he must register in-person with law enforcement renders SORA punitive. The Ninth Circuit foreclosed this argument in *U.S. v. Elkins*, 683 F.3d 1039, 1049 (9th Cir. 2012). There, the court held that SORNA's requirement that the plaintiff register in-person every three months did not make the law punitive. *Id.* Here, SORA's requirements are less severe for Plaintiff. Plaintiff must register only once a year and if he moves residences. Cal. Pen. Code §§ 209, 290.012. He must also register when he enrolls or

ceases to be enrolled in college (Cal. Pen. Code § 209.01(a)(1)), a requirement that applies only so long as Plaintiff remains in college. Thus, the is also rationally related to protecting the student bodies of academic institutions. *See* Assemb. Comm. On Public Safety, Analysis of AB 4 (2001-2002 Reg. Sess) April 3, 2001 ("AB 4 would assist campus police in preventing sexual assaults by providing our campuses with the same information about these criminals that is provided to city and county law enforcement agencies.").

Because SORA and Megan's Law are not punitive, they cannot constitute cruel and unusual punishment.

V. THE NINTH CLAIM FOR INVOLUNTARY SERVITUDE FAILS TO STATE A CLAIM

Plaintiff's Ninth Claim for Involuntary Servitude fails because, as a matter of law, the duty to occasionally register with local law enforcement is not compulsory labor "akin to African slavery." *See United States v. Kozminski*, 487 U.S. 931, 942 (1988).

Plaintiff argues that sex offenders' duty to register differs from the other "civic duties" that courts have held not to constitute involuntary servitude because it is not imposed on all citizens. Opposition, Dkt. No 16, at 21. However, the test for involuntary servitude under *Kozminksi* relates to the substance of the burden, not the breadth of its application. *See Kozminski*, 487 U.S. at 942. If only sex offenders were forced to pay taxes, that would not make the preparation and submission of tax forms "akin to slavery" and violative of the Thirteenth Amendment. The fact remains that the act of registering with local law enforcement is far more similar to the administrative acts held not to constitute involuntary servitude than to African slavery. *See id.* at 944; *see also Kasey v. C. I. R.*, 457 F.2d 369, 370 (9th Cir. 1972); *Abney v. Campbell*, 206 F.2d 836, 841 (5th Cir. 1953).

Plaintiff next argues that the Thirteenth Amendment applies to conditions beyond just slavery, citing *Slaughter-House Cases*, 83 U.S. 36 (1872) and *U.S. v. Reynolds*, 235 U.S. 133 (1914). Neither of those cases are similar to the situation here. In the 1872 decision of *Slaughter-House*, the Supreme Court defined "involuntary servitude" to extend only to the other historical types of forced labor: peonage, serfdom and feudalism. *Slaughter-House Cases*, 83

U.S. at 49-50. *Reynolds* merely held that peonage is involuntary servitude. *Reynolds*, 235 U.S. at 144-145.

The "obvious purpose" of the Thirteenth Amendment "was to forbid all shades and conditions of African slavery." *Slaughter-House Cases*, 83 U.S. at 69. The registration requirements of SORA are clearly not a shade or condition of African slavery similar to peonage, serfdom or feudalism.

Finally, Plaintiff details the various burdens that are allegedly imposed on him under the law in addition to registration. However, the only state laws challenged in his complaint are SORA and Megan's Law. Since Megan's Law does not impose any affirmative duties on him, only the registration requirements in SORA are at issue.

Because SORA's registration requirements do not constitute involuntary servitude under the Thirteenth Amendment, the ninth claim should be dismissed.

VI. TO THE EXTENT THE SIXTH THROUGH NINTH CLAIMS CHALLENGE THE ENFORCEMENT OF FEDERAL OR LOCAL LAW, THEY FAIL DUE TO THE ATTORNEY GENERAL'S ELEVENTH AMENDMENT IMMUNITY

A public official has Eleventh Amendment immunity from a constitutional challenge to a law that he or she does not directly enforce and has not threatened to enforce. *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). Because Defendant Becerra does not enforce and has not threatened to enforce the federal SORNA or any local ordinances against Plaintiff, he is immune from suit to the extent those laws are challenged.

SORNA is a federal statute governing states' sex offender registries. Plaintiff initially named U.S. Attorney General Jefferson Sessions as a defendant in this action but then, without explanation, voluntary dismissed him. Dkt. No. 17. Although the California Attorney General may play a role in *complying* with SORNA, as a state official, Defendant Becerra does not enforce SORNA. And, he has not threatened to enforce SORNA (as distinct from California's state statutes in SORA and Megan's Law) against Plaintiff. The "general supervisory powers of the California Attorney General" do not establish the direct connection with law enforcement required by *Ex parte Young*. *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Long*, 961 F.2d at 152; *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998).

Even if this Court found that Defendant Becerra is a proper defendant as to SORNA, it still must dismiss those claims. As the U.S. Attorney General pointed out in his motion to dismiss (Dkt. No. 15, Attach. 1 at 14-15), the Ninth Circuit held in both *Elkins* and *Elk Shoulder* that SORNA, specifically, does not constitute punishment for the purpose of the Ex Post Facto Clause. *Elkins*, *supra*, 683 F.3d at 1043-1045; *Elk Shoulder*, *supra*, 738 U.S. at 953-954. And, the other reasons for dismissing the sixth through ninth claims apply equally well to SORNA as they do to California's SORA and Megan's Law. *See* Defendant Jefferson B. Sessions' Motion to Dismiss, Dkt. No. 17.

Defendant Becerra is also immune from constitutional challenges to the application of local city ordinances to Plaintiff. Plaintiff argues that Defendant Becerra enforces these laws by virtue of his general duties as the Attorney General, as stated in Article V, section 13 of the California Constitution. However, that section only provides Defendant with a "generalized duty to enforce state law" and "general supervisory power over the persons responsible for enforcing the challenged provision," which are insufficient. *L.A. County Bar Ass'n*, 979 F.2d at 704. Moreover, Article V, section 13 of the California Constitution existed in its current form at the time the Ninth Circuit held in *Long* that the Attorney General did not directly enforce a Vehicle Code statute. Article V, section 13 therefore does not make the Attorney General automatically liable for constitutional challenges to all laws in California.

Defendant Becerra does not directly enforce and has not threatened to enforce SORNA or any local ordinances against Plaintiff. This court therefore lacks subject matter jurisdiction to entertain any claims against Defendant Becerra challenging those laws.

CONCLUSION

For the reasons above, this Court should dismiss Plaintiff's sixth through ninth claims against Defendant Attorney General Xavier Becerra for failure to state a claim and lack of subject matter jurisdiction.

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Dated: February 7, 2018

Respectfully Submitted,

XAVIER BECERRA
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Attorneys for Defendant Attorney General Xavier Becerra

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CERTIFICATE OF SERVICE

Case Name: **Richards, Michael v. Jefferson Sessions, et al.** No. **2:17-cv-1838 JAM AC PS**

I hereby certify that on February 7, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On February 7, 2018, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael Richardson
4624 Ashdale Court, #4
Sacramento, CA 95841

Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 7, 2018, at Sacramento, California.

Janice Titgen
Declarant

s/Janice Titgen
Signature

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