**IN THE COURT OF APPEALS**
**OF MARYLAND**

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September Term, 2008

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No. 88

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**INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1715 CUMBERLAND FIREFIGHTERS, *et al.*,**

*Appellants,*

**v.**

**MAYOR & CITY COUNCIL OF CUMBERLAND, *et al.*,**

*Appellees.*

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On Appeal from the Circuit Court for Allegany County
(W. Timothy Finan, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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# BRIEF OF APPELLEE STATE BOARD OF ELECTIONS

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September 12, 2008

## STATEMENT OF THE CASE

The Circuit Court for Allegany County properly dismissed the complaint for a writ mandamus filed by Appellants, the International Association of Fire Fighters, Local 1715 Cumberland Firefighters ("Local 1715"), because Local 1715 did not submit an adequately supported petition for referendum in time for inclusion on the State ballot. Local 1715's complaint seeks to compel placement of a referendum on the November 4, 2008 ballot administered by the State Board of Elections ("State Board"). The referendum would amend the Charter of the City of Cumberland and compel binding arbitration to resolve disputes between the Mayor & City Council of Cumberland (the "City") and Local 1715. The City maintains that requiring binding arbitration is not a proper subject for charter amendment, a fact of which Local 1715 has been aware since at least March 19, 2008. (Docket number 10/1, Answer, filed by City of Cumberland, ¶ 3.)

In its attempt to amend the Charter, on July 25, 2008, Local 1715 submitted a petition for referendum containing 3,550 signatures to the City, which had 60 days to count the signatures, pursuant to Md. Code Ann. Art. 23A, § 14. Although the City had already concluded that the matter could not be put to referendum as a charter amendment, it nonetheless proceeded to count the signatures, and informed Local 1715 on August 15, 2008, that the petition contained only 2,172 valid signatures, while the City determined that 2,582 signatures were needed to meet the 20% threshold under Art. 23A, § 14.

On August 18, 2008, the same date by which local boards of election were required to submit ballot information regarding any referendum to the State Board, Local 1715 submitted 472 additional signatures to the City, intending to achieve the requisite

number by supplementing the July 25 submission. The City, however, did not begin counting the new submission, because the City concluded that the July 25 and August 18 submissions were separate petitions, and standing alone, 472 signatures could not meet the threshold.

On August 22, 2008, Local 1715 and three individual firefighters filed suit in the Circuit Court for Allegany County, seeking injunctive relief and a writ of mandamus, compelling the City to: verify the additional signatures; treat the July 25 and August 18 submissions as one petition; and compare the combined total to a threshold of 2,381, which Local 1715 asserts is the required 20% of voters in Cumberland. If the total number of signatures meets the threshold, Local 1715 seeks to have the court compel the Allegany County Board of Elections to submit the referendum to the State Board and to compel the State Board to repeat its completed ballot preparations so that this municipal measure may be added to the ballot administered by the State and County Boards of Elections on November 4, 2008.

On September 9, 2008, the Circuit Court for Allegany County held a hearing at which evidence was admitted, brief testimony was taken, and arguments were presented to supplement the parties' papers already on file. On September 10, 2008, the circuit court entered a Memorandum Opinion and Order (Docket Number 21), dismissing Local 1715's complaint, because the court concluded that the July 25 and August 18 submissions were separate petitions, neither of which presented an adequate number of signatures. The court concluded that the number of signatures was insufficient, even

though the court agreed with Local 1715 that the 20% threshold should be calculated based on the number of qualified voters, excluding "inactive" voters, producing a lower threshold for the required number of signatures. Local 1715 timely noted an appeal to the Court of Special Appeals and simultaneously filed a petition to this Court for a writ of certiorari. The City filed a cross-appeal on September 12, 2008.

## QUESTION PRESENTED

Did the circuit court correctly determine that the municipal charter amendment referendum should not be placed on the November 4, 2008 general election ballot?

## STATEMENT OF FACTS

On July 25, 2008, Local 1715 submitted a petition containing 3,550 signatures, seeking to have its referendum placed on the Cumberland municipal ballot. (Docket Number 21, Circuit Court for Allegany County Memorandum Opinion and Order, dated September 10, 2008 (the "Order") at 2.) Twenty-one days into the 60 days the City was permitted by law to count the signatures, the City finished reviewing the petition. (*Id.* at 2.) On August 15, 2008, the City informed Local 1715 that 2,172 of the signatures were valid, and that the petition therefore failed to meet the threshold set by Article 23A, § 14(a). (Order at 2-3.) Article 23A requires a petition be supported by the signatures of "Twenty per centum or more of the persons who are qualified to vote in municipal general elections in the particular municipal corporation."

The City calculated the 20% requirement to be 2,582 signatures, because it contends that "persons qualified to vote" includes both "active" and all "inactive" registered voters. (Order at 3.) Although Local 1715 disagreed with the City's inclusion

of inactive voters in the baseline from which to calculate the 20%, on August 18, 2008, it submitted 472 additional signatures in an attempt to reach the required number. (Order at 2.) The City declined to count the additional signatures "contending that the second set of signatures constitute[s] a separate petition and that 472 signatures are not enough to support the call for a referendum." (Order at 2-3.)

Also on August 18, the Allegany County Board of Elections submitted its ballot information to the State Board for inclusion in the State-administered ballot process. (Docket number 2, Complaint, attached exhibit 5.) Local 1715 was aware of this deadline for submission. (*Id.*)

Elections preparations by the State Board and the Allegany County Board of Elections have, of necessity, continued apace so that the State Board could certify the content and arrangement of the ballots to be used in each election district, as required by statute, on September 10, 2008. On August 29, 2008, the audio recordings of the ballot used to assist visually impaired voters using the touch-screen voting system, including the Cumberland portion, were completed, with the exception of the nominees for Vice President of the United States. (Docket number 14, State Board of Elections Motion to Dismiss, exhibit 2.) In addition, the computer specialist under contract to program the ballots for the electronic voting system, who also performs this task for a number of jurisdictions other than Maryland, completed her scheduled work on September 5, 2008. (*Id.*) Accomplishing each of these tasks required a multiplicity of detailed checks for errors, which must be done for each and every ballot variant throughout the State. (*Id.*)

Within 48 hours after the ballot was certified, the State Board delivered to each local board of elections a copy of the certified ballot content and arrangement for that county, as is required. *See* EL § 9-207(c). The requirements of prompt ballot certification and delivery by the State Board allows the local boards to comply with their statutory responsibilities in a timely fashion, including posting the ballot. *See* EL § 9-207(d)(1). The printing of ballots may begin three days after the posting of the ballots by the local boards. EL § 9-207(e).

Absentee ballots present an additional hurdle. EL § 9-213 requires the content of an absentee ballot to be identical to the ballot used in the absentee voter's polling place. Thousands of Maryland troops are stationed overseas, many deployed in combat areas. The Federal Voting Assistance Program of the United States Department of Defense has advised that a reasonable benchmark for overseas and military ballot mailings is 45 days. Implementing the Uniformed and Overseas Citizens Absentee Voting Act and avoiding the disenfranchisement of Marylanders stationed overseas thus requires close adherence to the timeframes prescribed by statute.

Further, to ensure the proper functioning of the voting equipment, each electronic voting unit undergoes "preelection logic and accuracy" testing. *See* COMAR 33.10.02.14 - .15. This testing must be completed at least 10 days before an election, *see* COMAR 33.10.02.14, and county boards of elections must complete this testing and the requisite public demonstration of the tests, *see* COMAR 33.10.02.16. Following the test and demonstration, the votes recorded during the test are cleared from the system, and the

unit is sealed. This process has already been scheduled, and any change in the ballot, and the resulting repetition of programming, audio recording, certification, posting, and other tasks could force it to be rescheduled.

## ARGUMENT

### I. THE STATE AND COUNTY BOARDS OF ELECTIONS SHOULD NOT BE COMPELLED TO REDO THEIR WORK IN SUPPORT OF THE NOVEMBER 4, 2008 GENERAL ELECTION, IN ORDER TO ACCOMMODATE APPELLANTS' BELATED DEMAND.

Since at least March 19, 2008, well before Local 1715's submission of its July 25, 2008 petition for referendum, it knew that the City would not place the subject on the ballot for referendum. (City's Answer, ¶ 3.) In addition, when the City rejected Local 1715's petition on August 15, 2008, Local 1715 knew that many of the State Board's statutorily-imposed milestone dates were swiftly approaching or had already passed, including, importantly, the August 18, 2008 deadline for Allegany County Board of Elections to provide its ballot information to the SBE. (Complaint, Exhibit 5.) Nonetheless, Local 1715 elected to wait until August 22, 2008, a week after its petition was rejected, to file suit, interfering with statutory deadlines that has passed or were fast approaching.

Having received Allegany County Board of Election's ballot information, as well as that from other local boards, after August 18, the State Board moved forward with ballot preparation. At that point, any delay for the City to verify the new signatures would hinder the ballot preparation and election administration process at both the State

and county level. Particularly, if the City took the 60 days permitted by statute under Article 23A, § 14 to verify and count the signatures, the State Board would receive the referendum, if it were found adequately supported, well beyond the point when it might have been possible to include the measure on the November 4, 2008 ballot.

Regardless of the reasons for Local 1715's delay in seeking to compel placement of the referendum question on the ballot, the demand must at this point be rejected. This Court has recognized the special considerations that apply in the elections context when a claimant comes before a court seeking injunctive relief. *See Ross v. State Bd. of Elections*, 387 Md. 649, 671-72 (2005). As the elections timeline discussed above demonstrates, the timing of a lawsuit challenging an aspect of the election process is crucial. Thus, for instance, the Supreme Court has made clear on several occasions that injunctive relief may be inappropriate in an elections case even where a constitutional violation affecting the fundamental rights of voters has been shown, if the election is too close for the State to realistically be able to implement the necessary changes before the election. In *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), the Court said:

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief. . . . *In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.*

(Emphasis added.) The Court elaborated on the equitable considerations that bear on the timeliness of an election challenge:

> With respect to the timing of relief a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

*Id.* Following this rationale, courts have denied or dismissed claims for injunctive relief on equitable principles based on the nearness of the elections and the harm to the State, candidates and citizens from the disruption of the electoral process. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967); *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991).

This Court, too, has recognized the force of this rationale, observing – most recently in last year's decision in *Liddy v. Lamone* – that any claim against a state electoral procedure must be expressed expeditiously." (quoting *Ross v. State Bd. of Elections*, 387 Md. 649, 671 (2005)). This is particularly so when the challenge, as here, presents a number of legal issues that would have to be resolved before the court could fashion appropriate relief. "Unreasonable delay can . . . prejudice the administration of justice by compelling the court to steamroll through . . . delicate legal issues in order to meet the ballot printing deadlines." *Liddy,* 398 Md. at 255 (internal quotation marks omitted).

Moreover, the SBE should not be compelled to place Local 1715's referendum question on the ballot, because it is entitled to the protection of the limitations period imposed by EL § 12-202(b)(1). That provision requires that an action such as the present one must be brought within "10 days after the act or omission or the date the act or

omission became known to the petitioner." Local 1715 was on notice as early as March 19 that the City viewed the petition issue as an improper subject for a charter amendment. Indeed, Local 1715 itself asserted in its complaint that it objected to the City's position in communications with the City's counsel in July 2008. (Complaint ¶ 3.) The August 22 filing of Local 1715's complaint thus fell outside the limitations period. *See Abrams v. Lamone*, 398 Md. 146, 159 n.18 (2007) ("A voter may not simply bury his or her head in the sand and thereby avoid the triggering of the 10-day statutory time period, prescribed by § 12-202."); *Roskelly v. Lamone*, 396 Md. 27, 41 (2006) (enforcing 10-day statute of limitations imposed in EL § 6-210(e)).

Even setting aside the limitations bar, the unique equitable considerations that apply in the election-law context discussed above would require that Local 1715's belated demand for injunctive relief be denied. In *Ross*, this Court held that laches may apply to bar a claim even before a statutorily imposed limitations period has run, based on considerations of delay, prejudice to the defendants, and, notably, prejudice to the electorate. *See* 387 Md. at 671-72. An alteration to the ballot after the additional signatures have been verified and the other legal objections raised by the City have been resolved would create prejudice to the election preparations that the State and local boards of elections must undertake to protect the interest of voters in ensuring an orderly election. To grant the relief requested would lead to unnecessary disruption.

By contrast, the harm suffered by Local 1715 is abstract and speculative. The circuit court did not address the City's contention that the question is not a proper subject

for a charter amendment, and the supplemental signatures submitted on August 18 have not been counted and verified to determine whether the two sets of signatures would meet the requisite threshold. Furthermore, under Article 23A, § 14, Local 1715 has the alternative of pursuing a special election (an option it has asserted) or of pursuing inclusion on the 2010 state-administered general election ballot – an acceptable time frame given that Local 1715's counsel told the circuit court that the union's contract extends until 2010. Even if Local 1715's claim that it has accomplished what is necessary to petition its cause to referendum is ultimately accepted, the City can administer a special election at a time and a place appropriate under the law and can do so without interfering with the November 4, 2008 statewide election.

## II. INCLUSION OF INACTIVE VOTERS IN SETTING THE THRESHOLD FOR PETITION SIGNATURES RISKS DILUTING VOTERS' ABILITY TO OBTAIN BALLOT ACCESS FOR AN ISSUE OR CANDIDATE.

The circuit court agreed with Local 1715 that the 20% threshold under Article 23A, § 14 should be calculated based on the total number of "active" registered voters, and should not include "inactive voters" in this calculation. The State Board recognizes that the Court has before it a similar issue in *Doe v. Montgomery County Bd. of Elections,* Sept. Term 2008, No. 61, involving construction of Article I, § 114 of the Montgomery County Charter, which uses a similar formula to calculate the threshold for a referendum petition. The Court's September 9 order reversing the circuit court in that case suggests that the Court has concluded that inactive voters should be counted among the registered voters in calculating the threshold under that provision. If so, and if the same

interpretation is given to Article 23A, § 14 in this case, then the Circuit Court for Allegany County erred in its contrary determination. This would have the effect of increasing the threshold by 410 signatures, and it becomes much more doubtful that the unverified 472 signatures submitted on August 18 would be sufficient to make up the difference. If the Court does reach this conclusion in *Doe* or in this case, there may be implications for similar provisions in Article XI-A, §§ 1 and 5, and EL § 5-703(e). The proper application of the latter provision, in particular, is of concern to the State Board, which is responsible for coordinating the counting and verification of signatures for petitions to place a candidate not affiliated with the two principal political parties on the ballot for statewide offices.

Each of the provisions that employ a formula in which "registered voters" is used in the denominator to calculate the threshold requirement for petition signatures presents the question of whether inactive voters should be counted as part of that number. A conclusion that EL 5-703(e) does indeed require the inclusion of this category of voters in the denominator has the virtue of mathematical consistency, since such voters are included in the numerator. As a matter of statutory construction, such a conclusion would arguably be a natural extension of this Court's previous holding in *Maryland Green Party v. State Board of Elections*, 377 Md. 127, 150 (2003), and *Gisriel v. Ocean City Elections Board*, 354 Md. 477, 504 (1997). However, the reasons that registered voters may be placed in the inactive voter registry vary, producing differing policy implications when one considers inclusion of inactive voters who have signed a petition

in the numerator of the formula (as in *Green Party*) than when one considers inclusion of inactive voters who have not signed a petition or otherwise exercised an attribute of their right to vote in the denominator of the formula. These differing policy implications in turn affect the constitutional analysis, because a statute that permitted inactive voters to be excluded from the denominator in the threshold calculation does not hinder an eligible voter in exercising an attribute of his or her right to vote.

"Inactive" voters are defined by federal and State law as voters who previously registered, but who have failed to respond to two mailings at the address on file with the board of elections. *See* National Voter Registration Act of 1993, 42 U.S.C. § 1973gg ("NVRA"); Md. Code Election Law 3-503. Inactive voters may simply have missed their mail, but they also may no longer live in the relevant jurisdiction or be otherwise ineligible to vote. They may in fact have moved out of the jurisdiction and then died, because the registration rolls are updated using vital statistics reports only for deaths in Maryland, and there is no system for jurisdictions to share such information. Two federal election cycles after a voter has been identified as "inactive," if there is not further qualified contact with the board of elections, such as voting, submitting a change of address, or signing a petition, the voter is removed from the rolls of those who are registered to vote. *Id*.

Inactive voters who sign a petition to place a matter on the ballot demonstrate their continued eligibility and thereby remove themselves from the inactive list. Accordingly, their signatures properly count towards placing a matter on the ballot. However,

including the number of inactive voters in the calculation of how many signatures a petitioner must obtain has potential counter-franchise implications. It raises the bar to gain ballot access by counting not just eligible but inactive voters, but also by forcing the petitioner to cross a threshold set based upon voters who are no longer eligible to vote, but who have not yet been removed from the roles.

### A. Background of the "inactive" voter concept

The "inactive voter" concept is a key part of a legislatively-established process for removing ineligible voters from registration rolls, balanced with a series of checks against abusive voter purging practices. Historically, many states or localities "purged" registered voters who failed to vote but did not provide any notice or opportunity to explain. S. Rep. No. 103-6, at 17 (1993). Accordingly, the NVRA seeks, in part, "to ensure that once a citizen is registered to vote, he or she should remain on the list so long as he or she remains eligible to vote in that jurisdiction." *Id.* However, the Congress was also concerned that federal legislation should "maintain the current level of fraud prevention." H.R. Rep. No. 103-9, at 5 (1993). The balance Congress established is that NVRA *requires* states to "conduct a program to maintain the integrity of the rolls[,]" but states "may not remove the name of a voter from the list of eligible voters by reason of a person's failure to vote." S. Rep. No. 103-6, at 18.

States are permitted to remove the names of voters from the rolls for a limited number of reasons. These include the request of the voter or, as provided by state law, by

reason of mental incapacity or criminal conviction. 42 U.S.C. § 1973gg-6(a)(3); EL § 3-501.

In addition, states are *required* to make reasonable effort to remove the names of voters from the official lists who become *ineligible* "by reason of death or change of residence." S. Rep. No. 103-6, at 18. To protect against list maintenance practices that could be abusive, NVRA requires that any such program be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965…." 42 USC 1973gg-6 (NVRA Section 8(b)(1)).

The process of identifying voters who are ineligible because of a change of address is called the "confirmation process." *Id.* In Maryland, the confirmation process is initiated most commonly by the mailing to each registered voter of a specimen ballot before a general election. COMAR 33.05.07.01. Specimen ballot mailings are marked not to be forwarded. When a local board of elections receives a specimen ballot back as "undeliverable," the local board sends the voter a follow-up confirmation notice by forwardable mail, together with a return card on which the voter may report the voter's current address. *See* EL § 3-502. If the voter returns the notice confirming an address outside of Maryland, the voter can be removed from the voter registration list.

However, if the voter fails to respond to the confirmation notice, under both federal and State law, the voter is designated as an "inactive voter." An inactive voter may be ineligible, or may simply have failed to respond. In either case, this process serves to set the date under both federal and State law which determines whether the

voter meets the second requirement for removal under the NVRA: having not voted or appeared to vote "in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice." 42 U.S.C. § 1973gg-6 (NVRA Section 8(d)(1)(B)); EL § 3-503. Without having the "inactive voter" infrastructure in the voter registration system, there would be no way of tracking voters who have moved without notifying the board of elections and there would be no method to comply with the NVRA criteria for allowable removal of ineligible voters who do not respond to board of elections contacts.

The House Report expressly states that, "within the official list of eligible voters, notations (such as an asterisk or 'I' or inactive status) may be made of those eligible voters who have failed to respond to a notice under Section 8(d)(2)." This permits:

> the State to decline to use these names in performing the type of routine, administrative responsibilities that do not impair the right of such voters to vote as set forth in the Act, and as protected by the Voting Rights Act. For example, *those who have failed to respond to a Section 8(d)(2) notice need not be included for administrative purposes in determining the number of signatures that may be required under State law for ballot access,* the number of precincts that may be needed to service voters, or the number of ballots or voting machines that may be required in the administration of the voting process.

H.R. Rep. No. 103-9, at 16-17 (emphasis added).

To ensure that persons who are placed in "inactive" status are not disenfranchised by bureaucratic or legal technicalities, the NVRA contains specific "fail-safe" voting procedures. 42 USC 1973gg-6 (NVRA Sections 8(d)(1)(B), 8(d)(2)(A), and 8(e)). These provisions are codified in Maryland law at EL § 3-503. Thus, under both federal and

State law, if a person appears at a polling place on election day and completes a "written affirmation of residence," the person is entitled to vote and the inactive designation is removed in the voter registration system.

Following this affirmation, the relevant local board of elections sends a "voter notification card" to the formerly inactive voter, informing the person that he or she is qualified to be registered. The voter notification card is another trigger for the NVRA confirmation process. If the voter notification card is returned as undeliverable, the local board sends a second notice by forwardable mail with a return card. If the voter fails to respond to this mailing, the voter is again designated as "inactive" and the time period for removal for failure to vote in two federal general elections begins again.

**B. Including the number of inactive voters in the calculation of a petition signature threshold makes ballot access more difficult partly based upon ineligible voters.**

If the number of voters who are identified as inactive is added to the baseline for calculating how many signatures a petition must have to place an item on the ballot, it increases the required minimum not only by including eligible voters who are out of contact with the board of elections (and who are desirable to count) but also based upon voters who have moved out of state or who have otherwise become ineligible to vote. Unlike formerly inactive voters who sign a petition and thereby become "active," the category of inactive voters who would be included in calculating the minimum number of signatures needed to support a petition are, by definition, not in contact with the board of elections and their status remains, at best, uncertain.

This "silent" category undoubtedly includes both out of touch voters as well as ineligible voters and the category's inclusion in or exclusion from the needed-signatures calculus both present risks. Add the number in, and ballot access becomes more difficult due to ineligible voters. Omit the number, and some eligible voters who may or may not support a petition do not count as part of the threshold.

In *Green Party,* this Court addressed whether "inactive" voters who sign a petition must be counted in verifying their eligibility. The Court held that not counting such voters in the numerator portion of the formula "creates a group of 'second-class citizens' . . . who are . . . not eligible to sign petitions." 377 Md. at 150. That ruling recognizes that refusing to count "inactive" voters who sign a petition individually disenfranchises them by denying them a voter-participation opportunity they personally seek.

However, the omission of silent "inactive" voters, who are unfortunately but unavoidably indistinguishable from ineligible voters, from the calculation of required signatures to support a petition does not directly refuse them anything. They may or may not support the petition. They may or may not ultimately vote for or against it on the ballot. They are not, however, refused an affirmative voting opportunity that a voter in contact with the board of elections would have. Given that a petition serves only to place an item on the ballot, allowing all eligible voters to register their support or opposition to the measure or candidate at the ballot box, the Constitution should not prevent the legislature from deciding to lower the threshold necessary to obtain ballot access. Thus, the State Board submits that the question presented in this case and in *Doe* is more

appropriately resolved as a matter of statutory interpretation, rather than on constitutional grounds.

## CONCLUSION

The decision of the Circuit Court for Allegany County should be affirmed.

Respectfully submitted,

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September 12, 2008

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