

NOTES

UNLACHED: THE CASE AGAINST LACHES IN ACTIONS BROUGHT IN REPLEVIN BY FOREIGN SOVEREIGNS FOR OBJECTS OF CULTURAL HERITAGE

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INTRODUCTION

The American judicial system sanctions the theft of objects of immense cultural value from source nations—countries whose modern borders encompass territory previously inhabited by culturally rich civilizations—by allowing the allegedly equitable doctrine of laches¹ to serve as an affirmative defense to actions brought by foreign sovereigns in replevin.² While laches may have some utility in quieting the title of cultural artifacts,³ its acceptability as a tool turns on the identity of the plaintiff. When the aggrieved plaintiff is a private party, laches serves to effectively balance the equities between two competing claims.⁴ American courts have seen this defense asserted time and again against Holocaust victims and their descendants seeking the recovery of ancestral property looted by the Nazis, most commonly in the form of valuable artwork.⁵ While perhaps allowing for some seemingly immoral results, laches in those cases serves the purpose of adjudicating between two relatively comparable claims, insofar as they both involve private parties seeking title over a cultural object for their own individual purposes.⁶

However, the story is flipped on its head when the plaintiff is a foreign sovereign. Courts have treated laches as a valid affirmative defense in foreign-sovereign-plaintiff replevin actions, treating the

1. Laches is defined as “[u]nreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought.” *Laches*, BLACK’S LAW DICTIONARY (12th ed. 2024).

2. See *Republic of Turkey v. Christie’s Inc.*, 62 F.4th 64, 71-74 (2d Cir. 2023). Replevin is “[a] lawsuit to repossess personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.” *Replevin*, BLACK’S LAW DICTIONARY (12th ed. 2024). However, in *Christie’s Inc.*, the auction house retained possession of the artifact during the lawsuit. *Republic of Turkey v. Christie’s Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *3 (S.D.N.Y. Sep. 7, 2021), *aff’d*, 62 F.4th 64 (2d Cir. 2023).

3. See Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 676-89 (2011).

4. See *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011) (quoting Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc., No. 98 Civ. 7664, 1999 WL 673347, at *7 (S.D.N.Y. Aug. 30, 1999)), *aff’d*, 500 F. App’x 6 (2d Cir. 2012); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196 (2d Cir. 2019); 27A AM. JUR. 2D *Equity* § 108 (2019).

5. See Demarsin, *supra* note 3, at 621, 627.

6. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011).

foreign sovereigns no differently than they would a private citizen bringing suit for a piece of artwork.⁷ While the value of the artwork may be the same in the two instances—both in terms of cultural and monetary value—the identity of the plaintiff changes from that of an individual to a quasi-class action brought under the banner of a single foreign sovereign. While in the former instance, balancing the equities between similarly situated parties and judicial interests in quieting title are acceptable grounds on which to justify a laches defense, the latter invokes compelling public interest arguments that justify taking laches off the table.⁸

A nation's patrimony laws provide for state ownership of cultural objects excavated within its borders after the laws' passage dates.⁹ American courts are deferential to foreign patrimony laws;¹⁰ however, most nations passed these laws relatively recently.¹¹ Turkey, the plaintiff in the suit that serves as the case study for this Note, passed its patrimony legislation in 1906.¹² As a result, any antiquities excavated within Turkey's borders since 1906 are deemed to be the public property of the Republic of Turkey.¹³ Artifacts found prior to 1906, however, are not subject to such protections.¹⁴ Patrimony laws serve a clear objective: to preserve the cultural heritage of a people by ensuring that its remains are properly protected, with the modern state acting as the ideal custodian.¹⁵ Through their state

7. See *Christie's Inc.*, 62 F.4th at 71 (discussing nation's claim with individualized language, like "claimant" and "persons").

8. See *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 703 (R.I. 1993) (disfavoring laches in cases that vindicate the public interest).

9. See, e.g., *United States v. Schultz*, 333 F.3d 393, 398-99 (2d Cir. 2003) (describing an example of a patrimony law).

10. See *United States v. McClain*, 545 F.2d 988, 996-97 (5th Cir. 1977).

11. See *UNESCO Database of National Cultural Heritage Laws*, UNESCO, <https://www.unesco.org/en/cultnatlaws> [<https://perma.cc/AZ65-V4VM>].

12. While the 1906 Decree was issued by the Ottoman Empire, the court simply treated it as a "Turkish decree." *Christie's Inc.*, 62 F.4th at 69; Sibel Özel, *Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey*, 38 INT'L J. LEGAL INFO. 177, 179 (2010). To view the current iteration of Turkey's patrimony law, see Türkiye, *Law on the Conservation of Cultural and National Property*, UNESCO CULTURAL HERITAGE LAWS DATABASE, art. 5 (2024), https://media.unesco.org/sites/default/files/webform/mhm001/turkey_lawconservationculturalnaturalproperty_1_entof [<https://perma.cc/4A6W-W8WF>].

13. See *Republic of Turkey v. Christie's Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *5 (S.D.N.Y. Sep. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

14. See *id.* at *6-7.

15. See *United States v. Schultz*, 333 F.3d 393, 398 (2d Cir. 2003).

museums, countries are able to present this history to the public and protect it from the whimsical desires of individual collectors.¹⁶ The two-pronged preservation and presentation aim of state ownership of cultural property firmly aligns with familiar topics in public interest. For example, cultural heritage is often approached through the lens of natural resources law.¹⁷ Just as the environment is a focal point of public interest,¹⁸ so too is cultural heritage. It transcends the ordinary bounds of conventional property law,¹⁹ giving occasion to disregard the compelling interests of quieting title in the name of a public interest in history and cultural identity.

This Note argues that laches should not apply in suits of replevin brought by foreign sovereigns seeking to recover objects of cultural heritage.²⁰ Part I provides background on cultural heritage and laches and summarizes this Note's illustrative case, *Republic of Turkey v. Christie's Inc.*²¹ Part II argues for the conceptualization of the true plaintiffs in these suits as the individual citizens of the plaintiff nation—both living and yet to be born—who all have a vested interest in protecting and preserving the cultural heritage found within their nation's borders. Part III explores American legislative intent with regard to cultural heritage by examining the Native American Graves Protection and Repatriation Act (NAGPRA)²² and the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer

16. See, e.g., *Masterpieces*, THE EGYPTIAN MUSEUM, <https://egyptianmuseumcairo.org/the-collection/> [<https://perma.cc/N7QF-ERGN>]; *Collections*, NATIONAL ARCHAEOLOGICAL MUSEUM, <https://www.namuseum.gr/en/collections/> [<https://perma.cc/5PBX-772X>]; *İstanbul Archaeological Museums*, T.R. MÜZE İSTANBUL, <https://muze.gen.tr/muze-detay/arkeoloji> [<https://perma.cc/4DA8-BNRY>].

17. See Andrea Russell, *Warhorse: The Ongoing Conflict Between Cultural Heritage Protection and International Trade*, 25 CURRENTS: J. INT'L ECON. L. 92, 97 (2022).

18. See *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 703 (R.I. 1993).

19. See Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641, 667 (2011).

20. To be clear, this is not a call to overhaul any meaningful aspect of American property law; rather, it is a mere assertion that the preservation of cultural heritage is a strong enough public interest to tip the scales of equity in favor of barring what would otherwise be an equitable defense.

21. 62 F.4th 64 (2d Cir. 2023).

22. 25 U.S.C. §§ 3001-3013.

of Ownership of Cultural Property (UNESCO Convention),²³ finding that the United States has a clearly articulated interest in the protection of cultural heritage and the return of that heritage to its descendants. Part IV examines the equitable defense of laches and finds that its three-pronged test cannot be satisfied under the proper conceptualization of the plaintiffs' identity. This Note concludes with the hope that courts will begin to view cultural heritage as a strong public interest that renders laches inapplicable in lawsuits brought by foreign sovereigns for objects of cultural heritage.

I. BACKGROUND

A. *Cultural Heritage and Laches*

While modern nations may not be fully representative of the cultures that previously inhabited their lands, they are the natural choice to serve as the custodians of the previous culture's heritage.²⁴ First, those nations control the land where the artifacts were found. Any claim on those objects by another sovereign would be blatant exploitation and looting, just as it would be if oil or diamonds were discovered rather than pottery. Additionally, cultural property should remain in the region where it was found. Related cultural property needs to remain together because its synthesis paints a clearer contextual picture of the society from which it originated.²⁵ This picture-painting function is most at risk when cultural heritage objects are disseminated throughout the world in private collections. The cultures and societies that produced them are often gone, leaving only a few scattered relics to tell the entire story of a people.²⁶ Thus, ripping those objects out of their context is

23. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, T.I.A.S. No. 83-1202, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

24. See KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 120 (2006).

25. *What Is Archaeological Context?*, NAT'L PARK SERV., <https://www.nps.gov/articles/000/what-is-archeological-context.htm> [<https://perma.cc/85W7-9YZW>]; see, e.g., *Explore the Collections*, ACROPOLIS MUSEUM, <https://www.theacropolismuseum.gr/en/explore-collections> [<https://perma.cc/82EB-TWFQ>].

26. See, e.g., A. Bernard Knapp & Sturt W. Manning, *Crisis in Context: The End of the Late Bronze Age in the Eastern Mediterranean*, 120 AM. J. ARCHAEOLOGY 99, 99 (2016).

essentially a genocide on the culture from which those artifacts originated, removing any trace of its existence. There is perhaps no greater public interest than the preservation of the very history of humanity. To that end, laches should be disfavored as an affirmative defense in lawsuits involving these concerns.

Laches is traditionally unavailable as an equitable defense when the plaintiff is an American sovereign whose motivation behind a lawsuit is a compelling public interest.²⁷ Likewise, laches is occasionally precluded against individual, private party plaintiffs whose legal actions are aimed at serving a public good.²⁸ The argument for this exception is simple: The equitable interests of the parties that laches hopes to balance are of a fundamentally different weight when a public interest is involved.²⁹ As the Supreme Court of Rhode Island explained:

Many courts faced with the application of laches have disfavored this equitable defense in situations wherein the plaintiff's lawsuit seeks to vindicate rights of the general public. These Courts have found that laches does not operate as a defense in cases of public interest for two basic reasons: (1) the importance of rights at stake when the interests of the public are asserted and (2) the determination that those rights cannot be compromised or forfeited by the negligent or illegal acts of public officials who fail to carry out their government obligations.³⁰

For example, in cases concerning environmental pollution, any number of potential plaintiffs could be affected by the subject of the litigation. The failure of some of those individuals to bring timely suit ordinarily will not bar the claims of others.³¹ The same logic should apply to the sovereigns most interested in protecting cultural heritage in American courts: those seeking the return of artifacts removed from their borders after the passage of their patrimony laws. While technically the foreign sovereign is the only party claiming rights in the object, their cause is one of sound public policy and

27. 27A AM. JUR. 2D *Equity* § 122 (2019).

28. See *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 703 (R.I. 1993).

29. See *id.*

30. *Id.* (citations omitted).

31. See *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990).

is in the name of a compelling public interest.³² By treating cultural property as a special kind of property and foreign sovereigns as a special kind of plaintiff in these replevin actions, American courts could act in an equitable manner consistent with policy already in place for related causes, such as cases involving environmental exploitation.³³ To do so, courts must take a wider view of who constitutes the “public” in “public interest” by refusing to limit the classification to American citizens. In doing so, America would be implementing ideals espoused by UNESCO member states committed to protecting and preserving cultural heritage around the globe.³⁴

B. Republic of Turkey v. Christie’s Inc.

The case study for this Note is *Republic of Turkey v. Christie’s Inc.*, a 2023 Second Circuit decision affirming the trial court’s ruling that laches effectively barred Turkey’s claims of conversion and replevin for the Guennol Stargazer (Stargazer).³⁵ Stargazer is a fifth millennium B.C.E. marble figurine.³⁶ It is of the Kiliya-type³⁷ and was made in ancient Anatolia, within the borders of modern-day Turkey.³⁸ It first appeared on the art market in New York City in 1961 when J.J. Klejman,³⁹ an art dealer best known for his role

32. See UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 6, 823 U.N.T.S. at 236.

33. See *Daingerfield Island Protective Soc.*, 920 F.2d at 37.

34. See UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 6, 823 U.N.T.S. at 236.

35. 62 F.4th 64, 67 (2d Cir. 2023).

36. *Id.* at 68.

37. *Id.*; *Neolithic Idols*, LOYOLA UNIV. MUSEUM OF ART, <https://www.luc.edu/luma/collections/lumacollection/neolithicidols/> [<https://perma.cc/788M-CKJW>] (“The marble fragments of Kiliya-type sculpture are commonly called ‘stargazers’ because the heads of the figures are tilted upward to the sky. Complete stargazer figures are extraordinarily rare, with reports of only 15 intact pieces worldwide.”).

38. *Christie’s Inc.*, 62 F.4th at 68.

39. See Grace Glueck, *Art People*, N.Y. TIMES, Oct. 22, 1976, at C16 (“Already one dealer, J.J. Klejman (who sold the ‘Lydian hoard’ to the Met), has retired, reportedly in frustration over the situation, and others are fading away. Matters will not be helped, the trade believes, by United States participation in the 1970 UNESCO treaty, which provides for worldwide controls over traffic in cultural properties.”).

in smuggling the Lydian Hoard into the United States,⁴⁰ sold it to Alastair⁴¹ and Edith Martin.⁴²

Klejman sold Stargazer to the Martins in 1961, who owned it until 1983, when they sold it to the Buttercup Beta Corporation, which was owned by Alastair's son.⁴³ In 1993, the Buttercup Beta Corporation sold the figurine to the Merrin Gallery,⁴⁴ which flipped it to one of the defendants, Michael Steinhardt,⁴⁵ and his wife, Judy, that same year.⁴⁶ In 2017, the Steinhardts consigned Stargazer to an auction house, Christie's, to sell.⁴⁷ Upon news of the impending auction, Turkey put Christie's on notice of its claims.⁴⁸ Christie's then auctioned off the figurine, with the caveat that the buyer would have a right of cancellation.⁴⁹ Stargazer fetched \$12.7 million at auction, but the buyer never took possession, leaving Steinhardt as the owner and Christie's as the possessor.⁵⁰

The trial court held that the statue belonged to the Steinhardts because Turkey could not prove its ownership claim.⁵¹ Turkey

40. In 1993, after a five-year legal battle, the United States repatriated the Lydian Hoard from the New York Metropolitan Museum of Art to Turkey. *See* Sharon Waxman, *Chasing the Lydian Hoard*, SMITHSONIAN MAG. (Nov. 14, 2008) <https://www.smithsonianmag.com/history/chasing-the-lydian-hoard-93685665/> [<https://perma.cc/8XS8-NL59>].

41. For background on Alastair Martin's collection, see *Martin, Alastair Bradley*, THE FRICK COLLECTION, <https://research.frick.org/directory/detail/986> [<https://perma.cc/WW6H-YW3U>].

42. *Republic of Turkey v. Christie's, Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *2, *7 (S.D.N.Y. Sep. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

43. *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 68 (2d Cir. 2023).

44. *Id.*; *see also* Torey Akers, *US Authorities Return Antiquities Linked with Notorious Smuggling Ring to Egypt*, THE ART NEWSPAPER (May 3, 2024), <https://www.theartnewspaper.com/2024/05/03/egyptian-antiquities-repatriated-manhattan-district-attorney-dib-simonian> [<https://perma.cc/P2FK-6U6G>] (discussing the repatriation of illicit artifacts seized from the Merrin Gallery).

45. *See* Tom Mashberg, *Michael Steinhardt, Billionaire, Surrenders \$70 Million in Stolen Relics*, N.Y. TIMES (Dec. 6, 2021) <https://www.nytimes.com/2021/12/06/arts/design/steinhardt-billionaire-stolen-antiquities.html> [<https://perma.cc/P67B-VMY5>] ("Michael H. Steinhardt, the billionaire hedge fund pioneer and one of New York's most prolific antiquities collectors, has surrendered 180 stolen objects valued at \$70 million and been barred for life from acquiring any other relics, the Manhattan district attorney's office said in a statement.").

46. *Christie's Inc.*, 62 F.4th at 68.

47. *Id.*

48. *See id.*

49. *Republic of Turkey v. Christie's Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *3 (S.D.N.Y. Sep. 7, 2021).

50. *See id.*

51. *See id.* at *12.

passed its patrimony laws in 1906;⁵² Stargazer first appeared publicly in 1961, meaning that it could have been removed from Turkey either before or after 1906.⁵³ The trial court looked favorably upon the defense's argument that, due to some Greek tools found at Stargazer's place of origin and similar statues being found elsewhere, Stargazer could have moved along a trade route when it was first made, eventually being lost in a land other than Turkey.⁵⁴ Accordingly, the trial court found that Turkey failed to prove its ownership claim.⁵⁵ The Second Circuit highlighted that the trial court employed the wrong burden of proof in this regard: It mistakenly held Turkey to a preponderance of the evidence standard in showing that Stargazer came from Turkey after 1906, when the correct standard would have only demanded that Turkey make a threshold showing that it had an arguable claim.⁵⁶ Then the burden would shift to the defendants to prove that the statue came from elsewhere or from Turkey prior to 1906.⁵⁷ Seemingly not comfortable with such a thin ruling, the trial court had also concluded that, alternatively, laches barred Turkey from recovery.⁵⁸ The Second Circuit erroneously affirmed this second holding.⁵⁹

For the defense of laches to succeed, a defendant needs to show that (1) the plaintiff knew of the misconduct; (2) the plaintiff inexcusably delayed in bringing the action; and (3) the defendant suffered prejudice as a result of the delay.⁶⁰ Here, the district court found that Turkey should have known about Stargazer's presence in New York since at least the early 1990s.⁶¹ The figurine was exhibited at The Metropolitan Museum of Art (Met) from 1968 through 1993 and again from 1999 through 2007.⁶² While at the

52. See Özel, *supra* note 12, at 179.

53. See *Christie's Inc.*, 2021 WL 4060357, at *7. Steinhardt's history of purchasing unprovenanced antiquities was deemed inadmissible character evidence. *Christie's Inc.*, 62 F.4th at 73.

54. See *Christie's Inc.*, 2021 WL 4060357, at *6-7.

55. See *id.* at *12.

56. See *Christie's Inc.*, 62 F.4th at 71.

57. See *id.*

58. See *Christie's Inc.*, 2021 WL 4060357, at *12.

59. See *Christie's Inc.*, 62 F.4th at 74.

60. *Id.* at 71.

61. See *id.*

62. *Id.* at 68.

Met, Stargazer was always labeled as coming from Anatolia.⁶³ Furthermore, the statue was referenced in multiple publications, including some written by Turkish scholars associated with the Turkish Ministry of Culture and Tourism and disseminated by the same Ministry.⁶⁴ As a result, the court held that Turkey should have had knowledge of the statue's whereabouts, the statue's Anatolian roots, and its own potential claim on it.⁶⁵ To satisfy the third prong—prejudice to the defendant—the court found that the deaths of Klejman and the Martins weakened Steinhardt's ability to prove good title, as he could not call them as witnesses.⁶⁶ Steinhardt asserted that he made efforts to ensure that Stargazer was not stolen, although he admitted to previously buying potentially-illicit antiquities.⁶⁷ Whether or not Klejman would have produced Stargazer's provenance is unknown,⁶⁸ although it bears noting that if it had a strong chain of title, it probably would not have escaped mention to the wealthy collectors or a major museum.⁶⁹ Nonetheless, Steinhardt was under no obligation to adhere to the loftier investigatory standards typically reserved for the likes of commercial actors, and he insisted that, as far as he could determine, Stargazer was not stolen.⁷⁰

Given the Second Circuit's apprehension as to the strength of the trial court's ruling on the issue of proof of ownership, laches was determinative in the outcome of this case.⁷¹ The Second Circuit concluded its analysis by stating, "[e]quity favors the vigilant.... Turkey has slept on its rights."⁷² At first glance, the use of an

63. *See id.*

64. *See id.* at 68-69.

65. *See id.* at 72.

66. *See id.* at 73.

67. Republic of Turkey v. Christie's, Inc., No. 17-CV-3086, 2021 WL 4060357, at *11 (S.D.N.Y. Sep. 7, 2021).

68. *Christie's Inc.*, 62 F.4th at 73.

69. *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 179 (2007) ("[Market participants] believe that lack of complete provenance information does not *necessarily* mean that an artifact is looted." (emphasis added)).

70. *See Christie's, Inc.*, 2021 WL 4060357, at *11; Gerstenblith, *supra* note 69, at 178-79 ("[M]arket participants convince themselves that many of the market's undocumented antiquities are chance finds and that this excuses sales that may be illegal.... [M]arket participants indulge in a significant amount of denial about what they do.").

71. *See Christie's Inc.*, 62 F.4th at 71, 74.

72. *Id.* at 74.

equitable defense here seems odd. Normally, the statute of limitations is favored over laches.⁷³ However, Stargazer was in New York, and New York law applied, meaning that a demand and refusal rule was in place: Turkey would have had to demand the statue back and Steinhardt refuse before the statute of limitations could begin running.⁷⁴ As a result, Steinhardt had to resort to an equitable defense, laches, that the court likely felt comfortable in applying because it had been used in a number of high-profile art cases.⁷⁵ The critical difference here was that Turkey, a foreign sovereign, was the plaintiff.

II. IDENTIFYING THE PLAINTIFF

The characterization of the plaintiff in a lawsuit can determine the affirmative defenses available to the defendant. For example, it is a longstanding tenet of American jurisprudence that laches is a disfavored affirmative defense in environmental lawsuits.⁷⁶ As then-Judge Ginsburg wrote in *Daingerfield Island Protective Society v. Lujan*, “[n]early every circuit ... and numerous district courts have recognized the salutary principle that ‘[l]aches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress’s environmental policy.’”⁷⁷ Because the plaintiff in such actions will not ordinarily be the only aggrieved party, equity demands that other, unascertained plaintiffs should not lose their right to assert a claim because of the delay of another.⁷⁸ In the realm of equity, where the law is designed to “promote and achieve justice [and to do so] with some degree of flexibility,”⁷⁹ this exception is especially

73. See *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 233 (6th Cir. 2007).

74. See *Christie’s Inc.*, 62 F.4th at 68, 70; see *Grosz v. Museum of Mod. Art*, 772 F. Supp. 2d 473, 481-82 (S.D.N.Y. 2010), *aff’d*, 403 F. App’x 575 (2d Cir. 2010).

75. See, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196-97 (2d Cir. 2019); *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306-07 (S.D.N.Y. 2011), *aff’d*, 500 F. App’x 6 (2d Cir. 2012); *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621-23 (App. Div. 1990), *aff’d*, 569 N.E.2d 426 (N.Y. 1991); see also *Demarsin*, *supra* note 3, at 627-30, 646-49.

76. See *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990).

77. *Id.* (alterations in original) (quoting *Park Cnty. Res. Council, Inc. v. U.S. Dep’t of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987)).

78. *Id.*

79. *Garrett v. Arrowhead Improvement Ass’n*, 826 P.2d 850, 855 (Colo. 1992).

persuasive. Environmental suits are akin to suits regarding cultural heritage in that they involve large numbers of unascertained plaintiffs. How to think of those plaintiffs, however, is a complicated matter.

One way to conceptualize large numbers of unascertained plaintiffs in a cultural heritage suit is to think of it as a pseudo-class action, in which the damages owed to the citizens of an aggrieved nation could be aggregated under the banner of a class representative, the foreign sovereign itself. This view falls neatly in line with the prerequisite that “the class [be] so numerous that joinder of all members is impracticable.”⁸⁰ It is worth noting that this conception is simply meant to aid courts in visualization, however, as the barriers and complexities surrounding class actions would render this approach unworkable in practice. For example, Federal Rule of Civil Procedure 23(a)(3) requires, as a prerequisite to class certification, that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”⁸¹ The foreign sovereign would be serving as the representative party and would, for all literal purposes, be the only class member asserting an ownership interest, therefore violating Rule 23(a)(3). Nevertheless, class actions provide a blueprint for the logic, if not the law, with which actions brought in replevin by foreign sovereigns for objects of cultural heritage should be approached.

Another approach is to claim that cultural artifacts belong to humanity as a whole.⁸² While appealing on its surface, this approach represents a mutilation of international law originally designed to restrict the looting of cultural heritage.⁸³ As Professor Gerstenblith explains:

This aspect of internationalism was not intended as a *carte blanche* for the looting of sites that goes on today, or for any derogation of national legal principles intended for the same goal—the preservation of artistic and cultural objects. Rather,

80. FED. R. CIV. P. 23(a)(1).

81. FED. R. CIV. P. 23(a)(3).

82. See APPIAH, *supra* note 24, at 118-21.

83. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 201 (2001).

this internationalist approach imposes obligations on nations to prevent destruction and plunder, both within their own borders and in territory occupied during time of war.⁸⁴

Employing the internationalist approach in a courtroom would be, in effect, judicially condoning looting, voiding the foreign plaintiff's ownership claim established by its own patrimony laws. The United States has thus far been unwilling to take such a drastic step.⁸⁵

Another option, the approach favored by the Second Circuit in *Christie's Inc.*, is to view the modern state party as the sole possible plaintiff.⁸⁶ This view finds support in UNESCO's Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), which asserts:

The States Parties to this Convention recognize that ... property which belongs to the following categories [including cultural property found within a State's territorial boundaries] forms part of the cultural heritage of *each State* ... [t]o ensure the protection of *their cultural property* against illicit import, export, and transfer of ownership.⁸⁷

This approach is also flawed. First, modern states, especially those that have inherited culturally rich traditions and histories, are often not in a position to press their claims.⁸⁸ For example, Turkey was wracked by corruption, violence, and political uncertainty throughout the 1990s,⁸⁹ the period in which the court

84. *Id.* For an example of this internationalist approach in action, see generally MATTHEW BOGDANOS WITH WILLIAM PATRICK, *THIEVES OF BAGHDAD* (William Patrick ed., 2005) (chronicling U.S. efforts to assist Iraq in the recovery of artifacts looted from the Iraqi Museum during the instability created by the 2003 Invasion of Iraq).

85. See *United States v. McClain*, 545 F.2d 988, 996-97 (5th Cir. 1977).

86. *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 72 (2d Cir. 2023) (treating Turkey's knowledge as that of a single entity).

87. UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 6, 8, 823 U.N.T.S. at 237-38 (emphasis added).

88. See Gerstenblith, *supra* note 69, at 179-80. *But see, e.g.*, Jane Arraf, *Iraq Reclaims 17,000 Looted Artifacts, Its Biggest-Ever Repatriation*, N.Y. TIMES (June 23, 2023), <https://www.nytimes.com/2021/08/03/world/middleeast/iraq-looted-artifacts-return.html> [<https://perma.cc/9XYJ-FDK4>].

89. Aykan Erdemir, *Turkey Risks Relapse into '90s Violence*, POLITICO (Aug. 17, 2015, at 05:30 CET), <https://www.politico.eu/article/turkey-relapse-90-violence-kurds-gezi-protest-pkk/>

held it should have become aware of Stargazer.⁹⁰ Second, countries cannot be expected to investigate, locate, and pursue a claim on every object that was illegally removed from their territories.⁹¹ In light of these two concerns—that countries do not possess an omniscient knowledge of the location of all of the culturally significant objects in which they should be vested sole ownership and the instability of modern regimes often unrepresentative of the nation's populace—treating a nation as the sole plaintiff that should be diligently pursuing any and all claims is, at best, an ineffective legal fiction.

The best way to view the possible plaintiffs in a suit of replevin for an object of cultural value is to deem all of the citizens of the aggrieved state, including future generations, as plaintiffs.⁹² Similar to environmental litigation, which can concern environmental damage that has a lasting effect on the population of a given area for generations,⁹³ cultural heritage suits are imbued with a gravity that extends their verdicts infinitely into the future.⁹⁴ To allow laches in such cases would be to deny an equitable outcome to countless individual plaintiffs on the basis of an ineffective or apathetic contemporary regime. Such an outcome is directly contrary to the aims of international agreements such as the UNESCO Convention, which “recognize[s] that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property.”⁹⁵ To claim that this impoverishment affects a bureaucratic governmental machine rather than the individuals that constitute a nation is a disingenuous and dangerous shortcut that facilitates cultural theft.

[<https://perma.cc/LH7S-DEZ4>].

90. See *Christie's Inc.*, 62 F.4th at 71-72.

91. See Gerstenblith, *supra* note 69, at 178 (“It is estimated that approximately 80 to 90 percent of the antiquities on the market lack sufficient provenience to establish that they were discovered long enough ago that their acquisition would not raise legal problems.”).

92. See John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORN. L. REV. 1179, 1195-96 (1989) (arguing for “group rights” in objects of cultural heritage central to a cultural group's identity).

93. See *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990) (quoting *Park Cnty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987)).

94. See Moustakas, *supra* note 92, at 1195-96.

95. UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 6, 823 U.N.T.S. art. 2.

III. LEGISLATIVE INTENT: VALUING CULTURAL HERITAGE

Congress has a history of recognizing the inherent value of cultural heritage. The Native American Graves Protection and Repatriation Act (NAGPRA) is a statutory provision that reflects the value of cultural items.⁹⁶ While American Indian tribes have a unique status under American law, they “generally retain their inherent sovereignty.”⁹⁷ Although their status differs from foreign states in a number of ways, they nonetheless provide a blueprint for what American repatriation legislation could look like.⁹⁸ NAGPRA defines cultural patrimony as:

[A]n object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.⁹⁹

This understanding of cultural patrimony reflects the view of rightful ownership expressed in Part II of this Note, under which all members of a group benefit from the cultural value of an object. NAGPRA compels the expeditious return of cultural patrimony in the possession of federal agencies and museums upon request by the tribe when the tribe can show that the object was owned or controlled by the tribe.¹⁰⁰ Notably, NAGPRA makes no mention of the effects of the tribe’s delay in asserting a claim—it simply compels the return of the objects.¹⁰¹

96. See 25 U.S.C. §§ 3001-3013.

97. 41 AM. JUR. 2D *Indians* § 9; see *Worcester v. Georgia*, 31 U.S. 515, 581 (1832).

98. See 41 AM. JUR. 2D *Indians* § 9.

99. 25 U.S.C. § 3001(3)(D).

100. See 25 U.S.C. § 3005(a)(5)(B).

101. See 25 U.S.C. § 3005.

While statutory provisions directed at federal agencies and museums are different than property law as applied to private parties,¹⁰² the spirit of NAGPRA undoubtedly reflects legislative intent to rectify cultural theft where possible. The principles underlying that intent should remain when the affected sovereign is foreign, rather than an American Indian tribe.

The UNESCO Convention, together with its 147 state parties,¹⁰³ recognizes that “cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”¹⁰⁴ The United States clearly agrees with this principle, demonstrated both by its joining of the UNESCO Convention and in the passage of legislation such as NAGPRA. The UNESCO Convention represents a commitment to protecting the cultural heritage of other nations in much the same way that NAGPRA provides for American Indian tribes.¹⁰⁵ While chiefly concerned with restricting the import and export of cultural property as opposed to repatriation, the UNESCO Convention shows American legislative respect for foreign cultural property.

IV. THE INAPPLICABILITY OF LACHES

While suits in replevin must necessarily follow the well-worn contours of established property law, the path to recovery remains

102. See, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 195 (2d Cir. 2019); *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 298 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

103. For a complete list of signatories, see *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural> [<https://perma.cc/JS67-NP2L>].

104. UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 2, 823 U.N.T.S. at 232.

105. See *id.* at 12 (“Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.”).

open for plaintiffs in many cases.¹⁰⁶ For example, in *Christie's, Inc.*, Stargazer's path to New York City in 1961 was unclear.¹⁰⁷ However, the district court held Turkey to the wrong standard, demanding that it show by a preponderance of the evidence that it had an ownership claim.¹⁰⁸ As the Second Circuit explained, "the claimant must only make a 'threshold showing' of an 'arguable claim' to the pilfered artwork before the possessor must carry the rest."¹⁰⁹ In cases like that one, in which there was no record of provenance until after the artifact was found outside the nation's borders after the passage of the nation's patrimony laws, laches is an extremely powerful defense for a wrongful possessor.¹¹⁰

As laches is an equitable defense, it may be employed in an attempt to balance the interests of both parties.¹¹¹ To prevail on a laches defense, the defendant must establish "(1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay."¹¹² Under the approach to plaintiff identification taken in *Christie's Inc.*, a nation must be said to know of the possessor's illegitimate possession of the cultural object.¹¹³ How a nation can know something is a philosophical question the court sidesteps, arguing that because the Turkish Ministry of Culture and Tourism and scholars connected with it published papers referencing Stargazer, the nation of Turkey should have been aware of its claim.¹¹⁴ Disregarding the dubious logic that assumes when one cog in a bureaucratic governmental agency publishes materials, knowledge of the materials may be credited to the entire agency and, by extension, the national government,¹¹⁵ the court's analysis

106. UNESCO, *supra* note 103 ("The United States understands Article 3 not to modify property interests in cultural property under the laws of the States parties.").

107. See *Republic of Turkey v. Christie's, Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *2 (S.D.N.Y. Sep. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

108. See *id.* at *7.

109. *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 71 (2d Cir. 2023) (quoting *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010)).

110. See *id.* at 67.

111. See 27A AM. JUR. 2D *Equity* § 2.

112. *Ikeliowu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998) (citing *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994)).

113. See *Christie's Inc.*, 62 F.4th at 72.

114. *Id.*

115. See *id.*

would fail under the conception of the true plaintiffs proposed in Part II of this Note. Under the understanding of plaintiffs as the entire citizenry of the affected nation, the first laches prong could never be satisfied. Using a knowledge standard with large numbers of potential plaintiffs is impossible when some are unascertained. Likewise, any number of plaintiffs could not be said to have unreasonably delayed, as this approach contemplates that future generations have a keen interest in their cultural heritage that takes the form of prevailing public policy, in line with the view of cultural heritage to which the United States ascribes via the UNESCO Convention.¹¹⁶

However, the third prong of the laches test, that of prejudice to the defendant, is not affected by the proposed change in plaintiff. In *Christie's Inc.*, the court held that the defendants were prejudiced by the deaths of three potential witnesses, J.J. Klejman and Alastair and Edith Martin, the art dealer and buyers involved in the first known transaction involving Stargazer.¹¹⁷ It is well established that the deaths of potential witnesses for the defendant that occurred during the plaintiff's unreasonable delay is a form of prejudice strong enough to satisfy the third prong of the laches framework.¹¹⁸ However, a strong policy rationale supports departing from this standard in cultural heritage suits. By holding that the deaths of potential witnesses who may have been able to speak to an artifact's provenance prejudices the defendant, courts encourage poor, if not entirely disingenuous, record keeping. Individual collectors like Michael Steinhardt, one of the defendants in *Christie's Inc.*, are not held to the same standards of diligence required of museums and commercial actors involved in the antiquities trade.¹¹⁹ Nevertheless, the failure of multiple owners of Stargazer to secure the provenance of the multi-million dollar

116. See UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 2, 823 U.N.T.S. at 232.

117. See *Christie's Inc.*, 62 F.4th at 73.

118. *Id.* (quoting *Stone v. Williams*, 873 F.2d 620, 625 (2d Cir. 1989) ("One form of prejudice is the decreased ability of the defendants to vindicate themselves that results from the death of witnesses."), *opinion vacated on reh'g on other grounds*, 891 F.2d 401 (2d Cir. 1989)).

119. See *id.* at 74.

antiquity¹²⁰ implies that at some point in the chain of title, Stargazer was subject to illicit trafficking.¹²¹

The importance of an artifact's provenance cannot be overstated, both for collecting purposes¹²² and for the broader and loftier aim of situating an artifact within its relevant historical context.¹²³ There is a middle ground between holding private collectors to the same diligence standards of commercial actors and allowing them to show prejudice by the death of witnesses, on the off chance that one of those witnesses would have been able to prove good title. Importers, art dealers, and collectors are incentivized by the market¹²⁴ and the law¹²⁵ to maintain a chain of title. While the absence of one does not establish that the artifact in question is illicit, courts should dispose of the assumption that the deaths of previous owners prejudiced the current possessor-defendant.

In *Christie's Inc.*, the Second Circuit clarified that the trial court should have required Turkey to make a "threshold showing that [it] ha[d] an arguable claim," rather than meet a more exacting preponderance of the evidence standard.¹²⁶ Following a threshold showing of an arguable claim, the burden of proving ownership then shifts to the possessor.¹²⁷ The effect of this strong protection¹²⁸ for

120. See *Republic of Turkey v. Christie's Inc.*, No. 17-CV-3086, 2021 WL 4060357, at *10-11 (S.D.N.Y. Sep. 7, 2021), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

121. See Gerstenblith, *supra* note 69, at 178-80.

122. See Luke Kelly, *What Is Provenance—and Why Does It Matter?*, UTAH MUSEUM OF FINEARTS, <https://umfa.utah.edu/what-is-provenanceand-why-does-it-matter/> [<https://perma.cc/M78B-8NCA>].

123. See UNESCO Convention, *supra* note 23, T.I.A.S. No. 83-1202 at 2, 823 U.N.T.S. at 232 ("[Cultural heritage's] true value can be appreciated only in relation to the *fullest possible information* regarding its origin, history and traditional setting" (emphasis added)); NAT'L PARK SERV., *supra* note 25 ("Context imbues archeological resources with significance and meaning. Without context, the meaning and significance of an archeological resource is lost.").

124. See Alessandro Levato, *What is the Importance of Provenance in Artwork?*, ARTWORK ARCHIVE (July 7, 2023) <https://www.artworkarchive.com/blog/what-is-the-importance-of-provenance-in-artwork> [<https://perma.cc/43DN-NUXM>].

125. See, e.g., *Reif v. Nagy*, 106 N.Y.S.3d 5, 15-20 (App. Div. 2019).

126. *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 70 (2d Cir. 2023) (quoting *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010)).

127. *Id.* (quoting *Bakalar*, 619 F.3d at 147).

128. See *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 624 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991) ("We recognize this burden to be an onerous one, but it well serves to give effect to the principle that '[p]ersons deal with the property in chattels or exercise acts of ownership over them at their peril.'") (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON, ON L. TORTS*, § 15, at 93).

the true owners of stolen artifacts and artwork is negated if the death of possible defense witnesses swings the presumption in the opposite direction.¹²⁹ Placing the burden of proving ownership on the defendant after the plaintiff merely makes a threshold showing of an arguable claim clearly incentivizes possessors to do their due diligence, lest a colorable claim arise. Rejecting that claim because the possible exculpatory proof is there one day and lost the next with the death of a witness is inconsistent with the policy aims served by the burden shifting mechanism.

If courts continue to allow the death of witnesses to serve as evidence of prejudice to a defendant collector in suits in replevin for objects of cultural heritage, possessors of illicit antiquities need only wait out those witness to the theft. Under the current approach to the first two laches prongs, time persists as the great launderer of title. While laches should and does allow this whitewashing of ownership in some limited circumstances,¹³⁰ application of the principle here results in a fundamentally inequitable outcome. In these cases, the flexibility afforded by equity¹³¹ should work against wrongful possessors, not for them.

CONCLUSION

Laches should be inapplicable in lawsuits brought in replevin for objects of cultural heritage by foreign sovereigns, such as *Republic of Turkey v. Christie's Inc.*¹³² Holding otherwise is to allow the continuation of the status quo, that of the widespread theft and unmooring of cultural heritage. Although a foreign sovereign is technically the plaintiff, courts should conceptualize the true identity of that party as a class, comprised of all of the citizens of the plaintiff nation who bear the brunt of the cultural impoverishment.¹³³ This approach finds grounding in courts' traditional reluctance to apply laches in environmental lawsuits, where overwhelming public policy interests, as well as the practical application

(5th ed. 1984).

129. See, e.g., *id.* at 621.

130. See 27A AM. JUR. 2D *Equity* § 108.

131. See 27A AM. JUR. 2D *Equity* § 2.

132. 62 F.4th 64, 67 (2d Cir. 2023).

133. See Moustakas, *supra* note 92, at 1195-96.

of the laches analysis, prohibit widespread use of the equitable defense.¹³⁴ Furthermore, barring laches in these situations facilitates the legislative intent of the Senate, which demonstrated its commitment to protecting international cultural heritage through its consent to ratification of the UNESCO Convention.¹³⁵ NAGPRA further shows Congress's commitment to cultural heritage by creating a cause of action for American Indian tribes, as sovereigns, to recover cultural patrimony possessed by federal agencies and museums.¹³⁶ The noticeable lack of a laches-like provision in NAGPRA further suggests that Congress takes the long view on cultural heritage, with a particular respect for the rights of future generations.¹³⁷

The scope of the carve-out described in this Note is relatively narrow—it would be limited to actions brought by sovereigns, not private parties. In the case of private plaintiffs, the public policy considerations evaporate, as artifacts confined to dining rooms and private galleries are of little present use to a nation's citizenry at large. Nations would still be limited to artifacts on which they actually have a claim of ownership and, given the cost of litigation, a country is unlikely to aggressively pursue the recovery of any and all artifacts it may have a claim to.¹³⁸ In practice, this limitation cabins the proposed exception to artifacts of particularly significant cultural value, providing all the more reason to repatriate them as a matter of public policy. As a general matter, nations are unlikely to pursue actions for objects that are not deemed historically significant, due to both the constraints alluded to above and the desire to commit finite government resources to targeting the most noteworthy objects. Thus, given the limited application of this proposal and the gravity of the subject matter to which it applies, U.S. courts should consider its adoption with haste. The current system is outdated and reflective of a pre-UNESCO Convention

134. See *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 40 (D.C. Cir. 1990).

135. See S. TREATY DOC. NO. 42-14; UNESCO Convention, *supra* note 23, T.I.A.S. 83-1202, 823 U.N.T.S. at 232.

136. 25 U.S.C. §§ 3001-3013 (1994).

137. See *id.*

138. See Michael H. Traison, Andrew P. Nitkewicz & Amanda A. Tersigni, *The Cost of Pursuing Justice: Litigation Financing Agreements*, CULLEN AND DYKMAN LLP (Jan. 13, 2022), <https://www.cullenllp.com/blog/the-cost-of-pursuing-justice-litigation-financing-agreements/> [<https://perma.cc/K94J-RCZ2>].

world, where the cultural heritage of source nations served as mere objects of curiosity for generations of illicit collectors. A continued adherence to it would serve not the interests of equity, but the interests of a select few who hold the world's cultural heritage on dining room shelves.

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