

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

SARA CARTER and, GEORGIA CARRY.	)	
ORG, INC.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION FILE NO.
	)	
v.	)	1:20-CV-01517-SCJ
	)	
	)	
BRIAN KEMP, individually and in his	)	
official capacity as Governor of	)	
The State of Georgia and PINKIE	)	
TOOMER, individually and in her	)	
official capacity as Judge of the	)	
Probate Court of Fulton County,	)	
Georgia,	)	
	)	
Defendants.	)	
_____	)	

**BRIEF IN SUPPORT OF DEFENDANT JUDGE PINKIE TOOMER'S**  
**MOTION TO DISMISS**

COMES NOW, Defendant Judge Pinkie Toomer ("Judge Toomer") by and through her undersigned counsel, Office of the Fulton County Attorney, and hereby files this Brief in Support of her Motion to Dismiss the Plaintiffs Complaint.

**I. INTRODUCTION**

Plaintiffs filed this action against Fulton County Probate Court Judge Pinkie Toomer alleging that due to her inability to cease processing Weapons Carry Licenses ("GWL",) Plaintiff Carter is unable to obtain a GWL and has suffered damages. Plaintiff seeks a writ of mandamus against Judge Toomer to

compel her to process Plaintiff's GWL application. (Doc 1., ¶ 48). Plaintiff also seeks a declaration that Judge Toomer must accept and process GWL applications despite the current health emergency. (Doc 1., ¶ 49). Finally, Plaintiffs seek costs and attorney fees. (Doc 1., ¶¶ 50 and 53).

Governor Kemp declared a public health state of emergency on March 14, 2020 due to the rapid spread of COVID-19 in Georgia. (Doc 1., ¶ 19). The public health state of emergency was based on the continued transmission of COVID-19 throughout the State of Georgia and is an effort to protect the health, safety, and welfare of all Georgia citizens and visitors. (See, Doc. 9, pp. 3-10).

On March 14, 2020, the Chief Justice of the Supreme Court of Georgia issued an order declaring a judicial state of emergency in the State of Georgia due to the COVID-19 outbreak. (See, Doc. 26, pg. 10). In his order, the Chief Justice ordered the courts to remain open for "essential functions" only. Processing GWLs is not listed as an "essential service" in the Chief Justice's order. (See, Doc. 26, pg. 11). In March 2020, the Judicial Qualifications Commission (JQC) issued a statement communicating that any judge who failed to follow the Chief Justice's order could be subject to JQC action. (See, Doc. 26, pg. 14).

The Council of Probate Judges of Georgia issued a memorandum of advisement in which GWLs are expressly listed as a "non-essential function" of the Probate Court. (Doc 26, pg. 17,) As part of the process required in obtaining a GWL, the Probate Court is required to conduct a fingerprint and background check on GWL applicants prior to issuing a GWL. (See, O.C.G.A. § 16-11-129). The Probate Judge is responsible for identifying the entity(ies) that are responsible for the fingerprinting required for GWLs. (See, Doc. 26, pg. 7). State law determines what agencies and entities can provide the required fingerprinting and background check. (See, O.C.G.A. § 16-11-129). The law enforcement agencies that Judge Toomer contracts with to provide these services are not performing them at this time.

In light of the Chief Justice's order, guidance from the JQC, lack of law enforcement agencies under contract with the Probate Court conducting fingerprinting, and for the health and safety of staff and the citizens of Fulton County, Judge Toomer determined that the suspension of processing of applications for GWLs, until further notice, was appropriate and required. (See, Doc. 26, pg. 8).

No GWL is required to carry a loaded weapon inside of one's home, automobile, or place of business. O.C.G.A. § 16-11-126. No GWL is required to carry an unloaded long gun. *Id.* No GWL is

required to carry an unloaded handgun if the handgun is in a box. *Id.*

Plaintiff Carter alleges that she does not have a GWL, but believes she would qualify for one if the probate court were accepting applications.<sup>1</sup> (Doc. 26, p. 5). Plaintiffs allege that without a GWL, Plaintiff Carter could be charged with a misdemeanor pursuant to O.C.G.A. § 16-11-126. (Doc. 1, p. 4). Plaintiffs allege that the state "routinely enforces" O.C.G.A. § 16-11-126, and that they sent a letter to Governor Kemp asking him to suspend enforcement of O.C.G.A. § 16-11-126, but he has failed to do so. (*Id.*, p. 5). Because the Fulton County probate court is not currently accepting applications for GWLs and O.C.G.A. § 16-11-126 prohibits individuals from carrying weapons without a GWL, Plaintiffs contend that they are effectively prevented from bearing arms in violation of the Second and Fourteenth Amendments, as well as state law. (*Id.*, pp. 5-7). In relief, Plaintiffs seek a writ of mandamus and declaration ruling Judge Toomer to accept and process an application for Plaintiff Carter.

## **II. STANDARD OF REVIEW**

A complaint must be dismissed pursuant to Fed. R. Civ. P.

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<sup>1</sup> To date, Plaintiffs have not provided any evidence that the Plaintiff Carter would qualify for a GWL.

12(b)(6) for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 1974(2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957)).

To survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. Although the facts alleged in a complaint are assumed to be true for purposes of a motion to dismiss, conclusory allegations and legal conclusions are entitled to no deference in the court's consideration of such a motion. See, *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 n.10 (11th Cir. 1996) ("conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss") (citation omitted); *Lewis v. Brautigam*, 227 F.2d 124, 127 (5th Cir. 1955) ("In determining the sufficiency of the complaint, the material facts, but not the unsupported conclusions of the pleader, are considered in the light most favorable to the plaintiff").

### III. ARGUMENT AND CITATION OF AUTHORITY

**A. Plaintiff's Claim for Declaratory Judgment against Judge Toomer is Barred by Sovereign Immunity.**

Plaintiffs have brought a declaratory claim against Judge Toomer in her official capacity. Georgia case law has expressly barred declaratory judgment claims brought against persons in their official capacity by sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408 (2017). Specifically, the court holds that "a suit against a state officer in his official capacity amounts to a suit against the State itself...and the doctrine of sovereign immunity bars suits against the State to which the State has not consented." *Lathrop* at 425 (citations omitted).

Plaintiffs have attempted to avoid the holding in *Lathrop* by bringing this claim for declaratory judgment against Judge Toomer in her individual capacity for actions not taken pursuant to state law, specifically O.C.G.A. § 16-11-129. However, the challenged actions of Judge Toomer were not conducted in her personal capacity, but rather were at all times, as the Probate Court Judge. As such, Judge Toomer is being sued in her official capacity. Since Judge Toomer is a state actor acting under the laws of the State of Georgia, any suit brought against her for actions taken in her official capacity, are barred by sovereign immunity.

**B. Plaintiff's Claim for Declaratory Judgment against Judge Toomer are Barred by Official Immunity.**

Under Georgia law, official or qualified immunity is an entitlement not to stand trial rather than a mere defense to liability. See, *Cameron v. Lang*, 274 Ga. 122, 124(1) (2001). The issue of a government employee's official immunity must therefore be resolved as the threshold issue in a suit against the employee in his personal capacity. See, *Roberson v. McIntosh County School Dist.*, 326 Ga. App. 874, 876 (2014). A government/public officer or employee is "immune from individual liability for discretionary acts undertaken in the course of [his or her] duties and without willfulness, malice or corruption." *Hemak v. Houston County School District*, 220 Ga. App. 110 (1996). Thus, the doctrine of official immunity bars Plaintiffs from holding Judge Toomer liable in her individual capacity.

Plaintiffs' claims against Judge Toomer arise solely out of her official duties as Fulton County's Probate Court Judge. As a governmental official, judge Toomer is able to avail herself of this official immunity protection. See, *Ga. Const. of 1983, Art. I, Sec. 2 Par. IX(d)*; *Teston v. Collins*, 217 Ga. App. 829 (1995). Therefore, under Georgia law, public officers are immune from suit absent malice, willfulness or corruption. See,

*Cameron v. Lang*, 274 Ga. 122, 123 (2001). Actual malice requires a deliberate intention to do wrong. *Morrow v. Hawkins*, 266 Ga. 390, 390-391 (1996). Willful or wanton behavior is insufficient to pierce official immunity. *Smith v. Little*, 234 Ga.App. 329 (1998); *Hendon v. DeKalb County*, 203 Ga. App. 750 (1992). The rationale for the constitutional doctrine of official immunity is "to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight." *Standard v. Hobbs*, 263 Ga. App. 873, 876 (2003). "Official immunity is intended to protect public officials in the honest exercise of their judgment, however erroneous or misguided that judgment may be." *Id.* This immunity protects public officials and employees from erroneous or mistaken judgments because, without such protection, it would be difficult to get responsible people to enter public service. *Hemak v. Houston County School District*, 220 Ga. App. 110 (1996).

Here, Plaintiffs challenge Judge Toomer's decision to cease accepting and processing GWLs because of her inability to conduct the investigation that is required. Plaintiffs also question Judge Toomer's adherence to guidance from the Council of Probate Court Judges and the March 10, 2020 declaration of Judicial Emergency filed by Chief Justice Melton. All of these

discretionary actions of Judge Toomer's were while attempting to properly administer the functions of the Probate court during a public health emergency, and all were done without malice, willfulness or corruption. As such, Judge Toomer is protected from declaratory judgement.

**C. Plaintiffs do not Meet the Requirements for the Issuance of Writ of Mandamus.**

Mandamus is an extraordinary equitable form of relief that can only issue against a public officer: (1) when a petitioner has a clear legal right to the relief sought, and (2) when there has been a gross abuse of discretion. *Carnes v. Charlock Mv. (USA). Inc.*, 258 Ga. 771, 373 S.E.2d 742 (1988); *Dougherty County v. Webb*, 256 Ga. 474, 475-76, 350 S.E.2d 457, 458-60 (1986). "The right to the extraordinary aid of mandamus exists only where the applicant has a clear legal right to the relief sought and there is no other adequate remedy. These two conditions must coexist." *Wright v. Forrester*, 192 Ga. 864, 867, 16 S.E.2d 873, 875 (1941) (quoting *Lindsey v. Board of Commissioners of Colquitt County*, 169 Ga. 368, 150 S.E. 261 (1929)). The Plaintiff carries the burden of proving that he has a "clear legal right" to the relief sought. *City of College Park v. Hamilton*, 220 Ga. 629, 631 (1965).

**1. Plaintiffs have no clear legal right to relief sought.**

Here, Plaintiffs have not shown a clear legal right to relief

sought and there are adequate alternative remedies available. First, state statute allows a person to purchase a firearm and possess this firearm within their residence, vehicles and place of business. O.C.G.A. § 16-11-129. Until the emergency declarations are lifted, Plaintiffs can carry their weapons in the places they will be frequenting. Second, any harm to the Plaintiff is only temporary, until the public health and judicial emergencies are lifted. The Plaintiff also does not have a reasonable fear of being prosecuted for carrying a weapon without a GWL. Third, the judge of the probate court (and not the Plaintiffs) has the authority to determine methodology of and, if necessary, cease operations if she cannot perform them in accordance with state and federal regulations. Finally, if Judge Toomer were to continue to try in some way continue to process and issue GWLs, that would put her in violation of the Chief Justice's order and could expose her to possible JQC intervention. For the reasons mentioned above Plaintiffs therefore do not meet the first prong of analysis for a writ of mandamus. Plaintiffs have not proven Judge Toomer's actions amount to a gross abuse of discretion.

Judge Toomer's required investigation when processing a GWL clearly involves the exercise of judgment and discretion. State law requires the probate judge to collect fingerprints and

conduct a background investigation and these activities require under Judge Toomer's discretion and judgement as judge of the probate court. O.C.G.A. § 16-11-129. The Governor's "shelter-in-place" order which requires social distancing has made the ability to obtain the required fingerprints impossible during the public health emergency. (Doc 28-1, Pg. 4) The law enforcement agencies under contract with the Probate Court have temporarily ceased conducting fingerprints due to the public health emergency. (Doc. 28-1, Pg. 4). Additionally, Judge Toomer made this decision to protect her staff and the citizens of Fulton County from unnecessarily being exposed to infected individuals. These actions are reasoned and thoughtful. They may not be in line with Plaintiffs' beliefs and wants, but Plaintiff has not proven these actions rise to the level of gross abuse of discretion. As such, Plaintiffs have failed to meet the second prong for issuance of a writ of mandamus.

2. Plaintiffs cannot be granted a Writ of Mandamus that requires a specific outcome.

Plaintiffs may not agree with Judge Toomer's discretionary determination regarding the processing of GWLs, but Plaintiffs cannot compel Judge Toomer to accept the Plaintiff's GWL application during the public health emergency and they cannot require Judge Toomer to issue Plaintiff Carter a GWL. "Mandamus relief is not available to compel officials to follow a general

course of conduct, perform a discretionary act, or undo a past act." *Schrenko v. DeKalb County School Dist.*, 276 Ga. 786, 794 (2003). "[M]andamus is proper to compel the undertaking of some official action to which the petitioner has a clear legal right, but it is not proper either to prescribe how that action is taken or to preordain its result." See *Bibb County v. Monroe County*, 294 Ga. 730, 736 (2014) (emphasis added); *Peach Hill Props.*, 278 Ga. at 201; *Dougherty County v. Webb*, 256 Ga. 474 (1986); *Citizens & S. Nat'l Bank v. Indep. Bankers Ass'n*, 231 Ga. 421, 425 (1973). As discussed above, Plaintiffs have no clear legal right to compel action by Judge Toomer, but assuming arguendo that they did, they cannot force her to grant a GWL. Moreover, a writ of mandamus for Judge Toomer to accept and process a GWL application during the current public health emergency deprives Judge Toomer the ability to follow the legal requirement that she fully conducts the required investigation and obtain fingerprints of Plaintiff Carter when to do so requires activity in violation of current social distancing guidelines. Further, a writ of mandamus would not guarantee that Plaintiff Carter's background investigation would produce results that would allow her to be issued a GWL. Therefore, mandamus cannot issue to compel Judge Toomer to issue Plaintiff Carter a GWL.

3. Plaintiffs lack standing for a Writ of Mandamus.

Plaintiffs have another remedy at law and therefore lack standing to bring this claim for mandamus. See, O.C.G.A. § 9-6-20. First, in this same lawsuit, Plaintiffs have filed for declaratory judgement as well as injunctive relief. Thus, in drafting their lawsuit, Plaintiffs have advised the Court that they believe that they indeed have another remedy at law. Next, Plaintiffs admit that the Chief Justice of the Supreme Court issued a judicial order that suspended all non-essential acts and the processing and issuance of GWLs is not an essential activity. Additionally, Plaintiffs were aggrieved by the Chief Justice's Order, they had the ability to appeal it. O.C.G.A. § 38-3-64(a) provides that [a]ny person whose rights or interests are adversely affected by an order declaring the existence of a judicial emergency or any modification or extension of such an order shall be entitled to appeal." However, rather than take that action, Plaintiffs filed suit seeking a writ of mandamus against Judge Toomer, among other things. Because Plaintiffs have other remedies at law, they are not entitled to a writ of mandamus.

**D. Plaintiffs do not meet the requirements for a Declaratory Judgment.**

The purpose of the Georgia Declaratory Judgment Act is "to

settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Agan v. State*, 272 Ga. 540, 542 (2000). "A declaratory judgment or decree is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done; its distinctive characteristic being that the declaration stands by itself, and no executory process follows as of course; and the action is therefore distinguished from other actions in that it does not seek execution or performance from the defendant or opposing party." *Clein v. Kaplan*, 201 Ga. 396, 403 (1946).

However, declaratory judgments that are merely advisory are unauthorized. *See, Higdon v. City of Senoia*, 273 Ga. 83, 85 (2000). A declaratory judgment would be considered advisory in four circumstances. First, where the party seeking the declaratory judgment fails to show it is in a position of uncertainty as to an alleged right or, second, where the rights of the parties have already accrued and the party seeking the declaratory judgment does not risk taking future undirected action. *Id.* Third, a declaratory judgment would be advisory if it were rendered based on a possible or probable future contingency. *See Baker v. City of Marietta*, 271 Ga. 210 (1999). Finally, if the claim for declaratory judgment presents a

question of academic interest, then declaratory judgment would be advisory. *Id.* at 214. As stated in *Venable v. Dallas*, 212 Ga. 595 (1956) “[i]t has been said that the declaratory judgment law permits one who is walking in the dark to turn on a light to ascertain where he is and where he is going. (Citations omitted.) However, one walking in full daylight, who knows where he is going and is confident of the course he is pursuing has no need either of artificial light or judicial advice.” *Id.* at 595.

In the instant matter, the Plaintiffs are not in a position of uncertainty, and do not need guidance and protection from the court. During the current state of emergency, GWLs are temporarily not being processed. Plaintiffs are walking in full daylight, and know where they are going. Accordingly, Plaintiffs have no need for judicial advice. Georgia’s law is quite clear, persons without a GWL can carry arms in certain places.

**E. Plaintiff’s Claims Against Judge Toomer Must Be Dismissed For Insufficient Service.**

An action may also be dismissed for insufficient service of process where a defendant has not been served in accordance with Fed. R. Civ. P. 4. *T-12 Entertainment, LLC v. Young Kings Enterprises, Inc.*, 36 F.Supp.3d 1380, 2014 WL 3893022 (N.D.Ga. 2014). “In assessing the validity of service of process, ‘the standards of proof governing motions to dismiss for lack of personal jurisdiction’ are applicable.” *Kammona v. Onteco Corp.*,

587 F. App'x 575 (11th Cir. 2014) *cert. denied*, 14-1099, 2015 WL 2340867 (U.S. May 18, 2015)(citing *Baragona v. Kuwait Gulf Link Transp. Co.*, 594 F.3d 852, 855 (11th Cir. 2010))(per curium)(noting that proper service is one of the components of personal jurisdiction).

Fed. R. Civ. P. 4(e) requires that individuals are served by either (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located; (2) delivering a copy of the summons and complaint to the individual personally; (3) leaving a copy of the summons and the complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (4) delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

The record shows that, as of the time of filing this motion and supporting brief, Judge Toomer has not received service by any of the means of service required by Fed. R. Civ. P. 4(e). Judge Toomer received the copy of the summons and complaint that was left at the office of Probate Court with Barbara Koll, Court Administrator for the Fulton County Probate Court. Therefore,

Plaintiffs have not provided this Court with any proof of proper service for Judge Toomer. In fact, the affidavit submitted by Plaintiffs verifies that service was not effectuated on Judge Toomer as required by Fed. R. Civ. P. 4(e). See, Doc 15.

Judge Toomer is aware of the suit's existence, but this does not remove the requirement on Plaintiffs to comply with procedure. Because Plaintiffs have not actually properly served Judge Toomer in compliance with Fed. R. Civ. P. 4, their claims against Judge Toomer must be dismissed for insufficient service and lack of personal jurisdiction.

**F. Judge Toomer has not violated Plaintiff's Second Amendment Right in violation of 42 U.S.C. Section 1983.**

The allegations of the Complaint do not plausibly state a claim against Judge Toomer for a violation of the Second Amendment. Georgia law does not require a GWL to possess a firearm in one's home, car, or place of business. O.C.G.A. § 16-11-126(a). In addition, unlicensed individuals may also carry in public (1) an unloaded or loaded long gun, provided any loaded long gun is carried openly, or (2) any handgun, provided it is enclosed in a case and unloaded. O.C.G.A. § 16-11-126(b),

(c). Any person with a valid hunting or fishing license on his or her person, who is engaged in legal hunting, fishing, or sport shooting may carry a firearm without a GWL. O.C.G.A. § 16-11-126(f)(1). Lastly, the state of emergency is temporary, and is currently set to expire on May 13, 2020 (Doc. 28-1, pg. 6). There is nothing in the record to suggest that the probate judges will not resume processing GWL applications when the state of emergency is lifted, and it becomes safe to do so.

**G. Plaintiffs are not entitled to attorney's fees.**

1. Plaintiffs are not a prevailing party under 42 U.S.C. Section 1988.

In an action brought under 42 U.S.C. § 1983, the court "in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Unless Plaintiffs fit within this definition, they are subject to the general rule in U.S. courts that requires each party in litigation to bear its own attorneys' fees and expenses. See *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 248, 95 S.Ct. 1612, 1616 (1975); *D'Agunno v. Gallagher*, 50 F.3d 877, 882 (11th Cir. 1995). "To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such

as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgement or settlement." *Walker v. City of Mesquite, TX*, 313 F.3d 246, 249 (5th Cir. 2002). As will be discussed below, Plaintiffs are not prevailing parties against Judge Toomer and therefore is not entitled to fees from her. The only matter upon which this Court has ruled in this case is the Motion for a Temporary Restraining (TRO), and in their TRO Plaintiffs failed to even request relief against Judge Toomer. Therefore, it certainly cannot be said that Plaintiffs are the prevailing party in regards to Judge Toomer. Further, because the court denied Plaintiffs TRO, Plaintiffs have not prevailed at all in this action.

To put it another way, Plaintiffs have failed to state cognizable claims for attorneys' fees and costs. These claims should be dismissed, because they are not independent causes of action under Georgia law, but rather remedies. An award of attorneys' fees, costs and expenses is derivative of whether a plaintiff prevails on his or her substantive claims. See *J. Andrew Lunsford*

*Properties, LLC v. Davis*, 257 Ga. App. 720, 722 (2002). These "claims" also are merely derivatives of the other claims that the Plaintiff asserts. Because the substantive claims fail to state cognizable claims for relief, the derivative claims should also be dismissed.

2. Plaintiff does not meet the parameters for authorization of attorney fees under O.C.G.A. § 16-11-129(j).

Further O.C.G.A. § 16-11-129(j) only authorizes reasonable attorney fees when an eligible applicant prevails in seeking relief under the procedures set forth therein. O.C.G.A. § 16-11-129 specifically provides:

(j) Applicant may seek relief. When an eligible applicant fails to receive a license, temporary renewal license, or renewal license within the time period required by this Code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary renewal license, or renewal license. When an applicant is otherwise denied a license, temporary renewal license, or renewal license and contends that he or she is qualified to be issued a license, temporary renewal license, or renewal license, the applicant may bring an action in mandamus or other legal proceeding in order to obtain such license. Additionally, the applicant may request a hearing before the judge of the probate court relative to the applicant's fitness to be issued such license. Upon the issuance of a denial, the judge of the probate court shall inform the applicant of his or her rights pursuant to this subsection. If such applicant is the prevailing

party, he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees.

Plaintiffs have failed to avail themselves of this statute and therefore are not entitled to attorney's fees.

**CONCLUSION**

For all the foregoing reasons Plaintiffs' Complaint must be dismissed in its entirety as to Judge Toomer.

Respectfully submitted, this 4<sup>th</sup> day of May, 2020.

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