No. 19-35386(L)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF OREGON, et al.

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, In His Official Capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

Defendants-Appellants.

AMERICAN MEDICAL ASSOCIATION, et al.,

Plaintiffs-Appellees

v.

ALEX M. AZAR II, In His Official Capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), addressing a variety of constitutional law issues, including the Free Speech Clause of the First Amendment.

The ACLJ and nearly 280,000 of its members oppose taxpayer subsidization of the abortion industry and file this brief in defense of the Final Rule, Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019), because they believe it is an important step toward ensuring that the abortion industry is not subsidized either directly or indirectly with federal taxpayer funds.

[1]All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The Appellees' challenges to the Final Rule and the district court's decision mask nothing more than a simple policy disagreement about the degree to which abortion can be facilitated or promoted in Title X projects. Appellee Planned Parenthood has been able for decades to use Title X funds to cross-subsidize its abortion services and funnel Title X patients into its abortion clinics. While it is true that prior HHS regulations permitted this lucrative arrangement, there is no right to federal funds acquired by laches.

Appellee States are free to adopt a policy that is neutral between abortion and childbirth and to use state funds to promote abortion as a method of family planning. But just as States cannot prevent Congress from repealing Title X, they cannot coerce perpetual access to federal funds if they are unwilling to cooperate with federal policy favoring childbirth over abortion.

The Supreme Court has upheld the policy reflected in the Final Rule and that should be the end of the matter. The district court was free to disagree but it was not free to flout binding Supreme Court precedent. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (stating that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

I. The Lower Court Wrongly Held that *Rust v. Sullivan* Did Not Control.

This should have been an easy case. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld regulations substantively indistinguishable from those challenged in this case. The HHS regulations in *Rust* (1) required physical and financial separation between Title X projects and abortion services or activities, and (2) barred Title X projects from providing abortion referrals or otherwise promoting abortion as a method of family planning. *Id*. at 179–81. Rejecting many of the arguments adopted by the district court in this case, the *Rust* Court concluded:

> A doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

Id. at 203. "Both patients and doctors are in no different position than they would be if Title X not been enacted." *Id*. at 202.

Although acknowledging as persuasive the argument that *Rust* should control, *Oregon v. Azar*, No. 6:19-cv-00317-MC, 2019 U.S. Dist. LEXIS 71518, at *28 (D. Or. Apr. 29, 2019), the district court was none too subtle in expressing its disagreement with *Rust*. According to the district court, the challenged provisions of the Final Rule (and thus the provisions upheld in *Rust*):

- Reflect HHS's "arrogant assumption that government is better suited to direct the health care of women than their health care providers." *Id*. at *12.
- Would "create a class of women who are barred from receiving care consistent with accepted and established professional medical standards." *Id*.
- Constitute "a ham-fisted approach to health policy that recklessly disregards the health outcomes of women, families and communities." *Id*.
- Are characteristic "of a Kafka novel."[2] *Id*. at *37.
- Are "madness." *Id*. at *40.
- "Strive[s] to make professional health care providers deaf and dumb when counseling a client who wishes to have a legal abortion or is even considering the possibility." *Id*. at *39–40.
- Are as "silly" and "insulting" as a urologist referring a patient who requested a vasectomy to a fertility clinic. *Id*. at *40 n.5.

[2] Although the district court did not elaborate on this charge, Kafkaesque is defined as "having a nightmarishly complex, bizarre, or illogical quality." *Kafkaesque*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Kafkaesque (last visited May 31, 2019).

- "Dramatically limit medical professionals from discussing abortion options with their patients and completely prohibits them from referring patients seeking an abortion to a qualified provider." *Id*. at *11.
- "Creates one set of rules for abortion and another set of rules for everything else." *Id*. at *35.

In light of the district court's aspersions on the regulations upheld in *Rust*, the court's decision to disregard *Rust* is not surprising. In fact, several of the district court's statements suggest that its quarrel with *Rust* extends to § 1008's requirement that Title X funds not "be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (2018). If § 1008 means anything, it must permit HHS to create "different rules for abortion" and limit discussions between Title X health care providers and their patients about abortion. "It would be wholly anomalous to read [§ 1008] to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.'" *New York v. Sullivan*, 889 F.2d 401, 407 (2d Cir. 1989).

The district court's condemnations would make some sense if either the Final Rule or Title X imposed constraints on all reproductive health care practitioners. But of course neither the statute nor the Final Rule does any such thing. Title X was

enacted for the very narrow purpose of funding preventive, *preconception* family planning services. H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.). Title X was never intended to fund pregnancy treatment of any kind, whether prenatal or abortive. For the very short period that pregnant women are patients in Title X clinics, Congress intended that childbirth be promoted over abortion. 42 U.S.C. § 300a-6; *see also* 116 Cong. Rec. 37,375 (1970) (statement of Rep. Dingell, Sponsor) ("abortion is not to be encouraged or promoted in any way through this legislation"). Title X patients accordingly do not have a right to receive abortion information at taxpayer expense.

One would never know from reading the district court opinion that the Final Rule implements a federal spending program to which "Congress may attach conditions . . . to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("Congress may fix the terms on which it shall disburse federal money to the States."). The Supreme Court has repeatedly upheld the constitutionality of Congress's use of conditions to induce state governments and private parties to cooperate with federal policy. *See, e.g.*, *Rust*, 500 U.S. at 198 (holding that "condition[s] that federal funds will be used only

to further the purposes of a grant [do] not violate constitutional rights"). If state governments and private parties object to a condition on the receipt of federal funding, their "'recourse is to decline the funds.'" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (citation omitted).

Title X joins other federal funding programs which promote childbirth over abortion and provide that abortion cannot be subsidized either directly or indirectly. *See, e.g.*, *Harris v. McCrae*, 448 U.S. 297, 325 (1980) (noting that for Medicaid program patients, "Congress has established incentives that make childbirth a more attractive alternative than abortion. These incentives bear a direct relationship to the legitimate congressional interest in protecting human life."); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds").

The district court disregarded Title X's nature and purpose to encourage state cooperation with federal policy promoting childbirth over abortion. Equally egregious, however, was the court's violation of statutory interpretation principles when it justified its evasion of *Rust* by asserting that Congress "has since spoken" on the meaning of § 1008. *Azar*, 2019 U.S. Dist. LEXIS 71518, at *30.

II. The District Court's Evasion of *Rust* on the Grounds That Congress "Has Since Spoken" On the Meaning of § 1008 Violates at Least Three Canons of Statutory Interpretation.

The lower court's assertion that *Rust* is irrelevant because "Congress has since spoken" on the meaning of § 1008, *id*. at *30, is baseless because neither statutory provision upon which the district court relied even mentions § 1008. Finding clarification of § 1008 in statutes that do not so much as refer to it violates at least three canons of statutory construction: the "omitted-case" canon, the "supremacy of text" canon, and the presumption against implied amendments. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56, 93, 327 (2012). The "omitted case canon" provides that "a matter not covered is to be treated as not covered." *Id*. at 93; *see, e.g.*, *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not--we cannot--add provisions to a federal statute."). The "supremacy of text" principle holds that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *supra*, at 56; *see, e.g.*, *United States v. Mo. Pac. R.R.*, 278 U.S. 269, 278 (1929) (stating that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the

meaning intended"); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935) (noting "[w]e are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used"). The presumption against implied amendments holds that implied amendments of earlier statutes must not be presumed unless the "intention of the legislature to repeal [or amend] [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 663 (2007).

A. The Nondirective Pregnancy Counseling Rider Sheds No Light on § 1008 and Does Not Undermine *Rust*.

The district court held that Congress's first post-*Rust* pronouncement on the meaning of § 1008 occurred in 1996 when Congress passed an appropriations rider providing that all pregnancy counseling shall be nondirective.[3] The

[3] The 2018 Consolidated Appropriations Act rider provides:

> For carrying out the program under title X of the PHS Act to provide for voluntary family planning projects, $286,479,000: Provided, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office.

Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018).

nondirective counseling requirement does not mention § 1008, or abortion referral. It simply imposes a condition on a wholly optional function under Title X – pregnancy counseling. Title X grantees need not provide any pregnancy counseling, 42 C.F.R. § 59.5(a)(5) (2019), because the program's scope is limited to preconception family planning services only. H.R. Rep. No. 91-1667, at 8 (1970) (Conf. Rep.); *Rust*, 500 U.S. at 179. Yet the district court concluded that the Final Rule's ban on abortion referrals violates the nondirective pregnancy counseling requirement. *Azar*, 2019 U.S. Dist. LEXIS 71518, at *57.

The district court erred. Congress did not define "nondirective" or "counseling." Because there is no statutory definition, the court should have determined the ordinary meaning of the individual words "nondirective" and "counseling." *United States v. Havelock*, 664 F.3d 1284, 1293 (9th Cir. 2012); *United States v. Gonzalez*, 492 F.3d 1031, 1041 (9th Cir. 2007). "In order to determine the ordinary meaning of a term, courts routinely rely on dictionary definitions." *Havelock*, 664 F.3d at 1293.

Merriam-Webster's dictionary defines "nondirective" as "of, relating to, or being psychotherapy, counseling, or interviewing in which the counselor refrains from interpretation or explanation but encourages the client (as by repeating phrases) to talk freely." *Nondirective*, MERRIAM-WEBSTER,

https://www.merriam-webster.com/dictionary/nondirective (last visited May 31, 2019). Counseling is defined as "professional guidance of the individual by utilizing psychological methods especially in collecting case history data, using various techniques of the personal interview, and testing interests and aptitudes." *Counseling*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/counseling (last visited May 31, 2019).

Nothing in the dictionary definitions of the individual terms supports the district court's conclusion that nondirective pregnancy counseling must encompass abortion referrals. The matter of abortion referral is simply not covered. The absence of abortion referral language makes sense because if Congress intended to make abortion referrals a part of Title X services, adding the requirement to a service that Title X grantees have no obligation to provide would be an ineffective means of doing so. *See* Scalia & Garner, *supra*, at 63 (describing "presumption against ineffectiveness"); *see also United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring) (describing the "presumption against ineffectiveness" as "the idea that Congress presumably does not enact useless laws").

Undeterred by the text of the statute, however, the district court imported a referral requirement from the Infant Adoption Awareness Act ("IAAA"), H.R.

2511, 106th Cong. (1999), which was incorporated into the Children's Health Act of 2000, 42 U.S.C. §254c-6(a)(1) (2006). *See Azar*, 2019 U.S. Dist. LEXIS 71518, at *32. In the court's words, reading an abortion referral requirement into the nondirective counseling requirement "aligns with Congress's thoughts on referrals" because Congress explicitly provided for referrals on *adoption* in the IAAA. *Id*. (citing 42 U.S.C. §254c-6(a)(1)). It was immaterial to the court that the purpose of the IAAA is to promote adoption. *See* 42 U.S.C. §254c-6(a)(1) (providing that "[t]he Secretary shall make grants to national, regional, or local adoption organizations for the purpose of developing and implementing programs to train the designated staff of eligible health centers in providing adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women."); *see also* 146 Cong. Rec. H2711 (2000) (statement of Rep. Bilirakis) (§ 254c-6(a)(1) was implemented to "promote adoption."); *id*. at H2719 (statement of Rep. Bliley) (program grantees should "be those which promote adoption in a realistic, positive manner as beneficial to the birth parents, child, and adoptive parents.").

If anything, the IAAA contradicts the district court's conclusion that Congress intended nondirective counseling to encompass abortion referrals. First, Congress manifested its intent that referral for adoption be included by actually

including the word "referral" in the text. §254c-6(a)(1). Second, the primary IAAA sponsor expressed the hope that the Act would reduce the incidence of abortion. "[M]ore women will hear about the [adoption] resources available to help them through [their] difficult time and to encourage them to *bring [their] newly-formed life into the world*." 146 Cong. Rec. H2715 (statement of Sponsor Rep. DeMint) (emphasis added).

Section 1008 forbids Title X funds from being used in programs where abortion is a method of family planning. Congress's use of the word "referral" in the IAAA, which explicitly encourages adoption, does not mean that Congress intended to mandate referrals for abortion as well. The district court's reasoning is akin to saying that a program funding hospice services which includes referrals for palliative care must also include referrals for assisted suicide, even if Congress stated in another section of the statute that program funds cannot be used to promote assisted suicide.

The supremacy-of-text and omitted-case canons preclude this Court from discovering an abortion referral mandate in the text of the nondirective pregnancy counseling riders. Because the riders do not mention § 1008, they cannot qualify as a new Congressional pronouncement on the meaning of § 1008; neither do they rescind HHS's authority to bar Title X grantees from giving abortion referrals.

B. Section 1554 of the Patient Protection and Affordable Care Act Sheds No Light on Congress's Understanding of § 1008 and is Irrelevant to HHS's Authority to Promulgate the Final Rule.

In a similar vein, § 1554 of the Patient Protection and Affordable Care Act ("ACA")[4] does nothing to elucidate the meaning of § 1008 or cast doubt on *Rust's* applicability to Appellees' claims. In holding that it does, the district court violated not only the omitted-case and supremacy-of-text canons, but also the presumption against implied amendment. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 663 ("While a later enacted statute can sometimes operate to amend or even repeal an earlier statutory provision, repeals and amendments by

[4] Section 1554 provides:

> Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that: (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services; (3) interferes with communications regarding a full range of treatment options between the patient and the provider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. § 18114 (2010).

'implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'") (citation omitted). The ACA, which expanded health insurance coverage and revamped the health care delivery system, said nothing about Title X, which deals with a narrow, specific government funding program. "A statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 153 (1976).

1. The District Court's Reading of § 1554 Flies in the Face of the Presumption Against Implied Amendments.

The district court's reading of § 1554 is irreconcilable with the Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*. There, the Court held that the presumption against implied amendment applies with equal force when a later enacted statute facially appears to constrain an administrative agency's authority to implement an earlier enacted law. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663. The Court rejected an argument remarkably similar to the district court's ruling. In *National Association of Home Builders*, there was a conflict between a provision of the Endangered Species Act ("ESA") and a provision of Clean Water Act ("CWA"). *Id.* at 661. The ESA had

been passed after the CWA, and the lower court had held that the ESA provision effectively altered the EPA's authority under the CWA to grant National Pollution Discharge Elimination System permits. *Defs. of Wildlife v. EPA*, 420 F.3d 946, 961–62 (9th Cir. 2005).

The Supreme Court reversed, holding that the lower court's ruling was predicated on the erroneous conclusion that the ESA amended the CWA by implication. *Nat'l Ass'n of Home Builders*, 551 U.S. at 662–63. The lower court's reading of the two statutory provisions would "effectively repeal the mandatory and exclusive list of criteria" that the EPA was obligated to consider under the CWA and "replace it with a new, expanded list of criteria [under the ESA]." *Id.* at 662.

National Association of Home Builders requires reversal of the district court's holding. Reading § 1554 of the ACA to impose new limits on HHS's authority to promulgate regulations implementing § 1008 requires the predicate assumption that § 1554 amended either 42 U.S.C. § 300a-6 or 42 U.S.C § 300a-4(a) (stating that "grants and contracts under this chapter shall be made in accordance with such regulations as the secretary may promulgate"). Section 1554 reflects no "clear and manifest" congressional intent to amend either provision. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 663. Because § 1554 did not amend either provision, the district

court was wrong to hold that § 1554 constrained HHS's authority to reinstate the physical separation requirement upheld in *Rust*.

2. When Congress Intended the ACA to Amend Other Federal Laws, It Did So Explicitly.

That Congress did not intend § 1554 to limit HHS's authority to promulgate regulations implementing § 1008 is further demonstrated by ACA provisions that actually do amend other federal health laws. For example, the ACA expanded services provided under another funding program, the State Children's Health Insurance Program ("SCHIP"). 42 U.S.C. § 1397aa(a) (2002). Section 2302 of the ACA amended SCHIP to include hospice care within the definition of "child health assistance." 42 U.S.C. § 1397jj(a)(23) (2006 & Supp. 2011). The ACA's SCHIP amendment demonstrates that when Congress intends to expand the scope of services provided by federal funding programs, it does so expressly.

The ACA amended other federal laws as well. *See, e.g.*, 29 U.S.C. § 1185d (2010) (adding § 715 to the Employee Retirement Income Security Act to incorporate the changes made to the Public Health Service Act); 42 U.S.C. § 1396a(gg) (Supp. 2010) (amending §1902(a) of the Social Security Act to require states with Medicaid programs in place on March 23, 2010 to maintain the same program eligibility standards until the state's insurance Exchange was operable in

2014). The ACA's express amendment of other federal laws discredits the district court's conclusion that § 1554 impliedly amended any provision of Title X and imposed new limitations on HHS's authority to promulgate implementing regulations.

3. The District Court Rewrote the "Notwithstanding Clause" in § 1554 to Buttress the Erroneous Conclusion that the ACA Provision Constrained HHS's Authority to Promulgate the Final Rule.

The district court's unprincipled interpretation of § 1554 is further demonstrated in the court's rewriting of the "notwithstanding" clause. Section 1554 begins, "[n]otwithstanding any other provision of *this Act*," clearly indicating that it affects only HHS's authority under the ACA. *See Preseault v. ICC*, 494 U.S. 1, 13-14 (1990) (holding that "notwithstanding any other provision of this Act" refers to the statute in which it appears and not to the related Tucker Act). But the district court rewrote the notwithstanding clause to say "notwithstanding *any other provision of law*." *Azar*, 2019 U.S. Dist. LEXIS 71518, at *45 (citing *Cisneros v. Alpine Ridge Grp*., 508 U.S. 10, 18 (1993)). The *Cisneros* quotation that the district court relied on was from a D.C. Circuit case involving the phrase "notwithstanding *any other provision of law*." *Cisneros*, 508 U.S. at 18 (quoting *Liberty Maritime*

Corp. v. United States, 928 F.2d 413, 416 (D.C. Cir. 1991) (emphasis added)).[5] In *Cisneros* itself, the clause at issue was "notwithstanding any other provisions of this [government] Contract," and the Court held that it overrode conflicting provisions *within the contract*. *Id*. at 18–19 (emphasis added). *Cisneros* thus supports the conclusion that § 1554 applies only to HHS's authority to promulgate regulations under the ACA.

The district court's holding that Congress intended § 1554 to be a new pronouncement on the meaning of § 1008, without amending or otherwise referring to it is meritless. *Rust* remains binding and requires that the injunction be vacated.

[5] Every case cited in the string citation following *Liberty Maritime* also involved the phrase "notwithstanding any other provision of law." *See Cisneros*, 508 U.S. at 18.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks this Court to vacate the injunction.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE (FORM 8)

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I am the attorney or self-represented party.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I electronically filed a copy of the foregoing *Amicus Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 7, 2018

/s/ Jay A. Sekulow
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