No. 18-1538

In The Supreme Court of the United States

DARTMOND CHERK, ET AL.,

Petitioners,

v.

MARIN COUNTY, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Marin County imposed a $39,960 "affordable housing" fee as a condition of approving a permit to divide a residential lot, absent any finding that the fee was needed to mitigate adverse impacts of the proposed development. Alternatively, the property owner might have dedicated various non-possessory interests in the property, other land, or low-cost housing units off-site to satisfy the condition. The court below held that neither the fee nor its alternatives were subject to the unconstitutional-conditions doctrine, which requires land-use permit conditions to bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

The questions presented are:

1. Whether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits?

2. Whether the unconstitutional-conditions doctrine applies to such permit conditions when imposed legislatively, as the high courts of Texas, Ohio, Maine, Illinois, New York, and Washington and the First Circuit Court

QUESTIONS PRESENTED – Continued

of Appeals hold; or whether that scrutiny is limited to administratively imposed conditions, as the high courts of Alabama, Alaska, Arizona, California, Colorado, and Maryland and the Tenth Circuit Court of Appeals hold?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court. For over 40 years, SLF has advocated for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs in support of property owners. *See, e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of

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[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amici* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

The Beacon Center of Tennessee is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals. The Beacon Center frequently represents private property owners challenging unconstitutional conditions such as affordable housing mandates. *See, e.g.*, *Home Builders Ass'n of Middle Tenn. v. Metro. Gov't*, 2019 Tenn. App. LEXIS 54 (Jan. 30, 2019)

Amici's direct interest here stems from their profound commitment to protecting America's legal heritage,

including private property rights. Unconstitutional conditions that lack a nexus and rough proportionality are unconstitutional regardless of whether the government imposed the condition through legislation or through an ad hoc administrative process. This case is another example of lower courts misapplying the unconstitutional conditions doctrine and serves to further deepen the divide among the lower courts. Unless and until this Court resolves the split and provides much needed clarity, local governments will be able to continue evading constitutional review.

SUMMARY OF ARGUMENT

A government may not require a person to give up a constitutional right as a condition to receiving a discretionary government benefit. In the context of property rights, the "unconstitutional conditions doctrine" protects private property owners from being forced to surrender their Fifth Amendment right to just compensation to obtain a building permit, a variance, or other government benefit related to their property. Or, in the words of this Court, a "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013); *see also Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

As Petitioners explain, the conditions found unconstitutional in *Nollan*, *Dolan*, and *Koontz*, all followed from legislation rather than ad hoc administrative decisions. Pet. at 25-30; *see also Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 377-78; *Koontz*, 570 U.S. at 599-603. Ignoring the facts of those precedent-setting cases, a growing number of lower courts refuse to apply the heightened scrutiny mandated by *Nollan* and *Dolan* to legislatively imposed conditions, recognizing exaction claims only when the government imposes the condition in an ad hoc administrative setting. This not only defies the unconstitutional conditions doctrine and *Nollan*, *Dolan*, and *Koontz*, but it also results in a deep and now established split among the lower courts (state and federal alike). This deepening split of authority allows the government to evade proper constitutional review, casts a cloud on governmental actions, and even worse, leads to the unconstitutional taking of property without just compensation.

Amici write separately because the division among the lower courts "shows no signs of abating." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). Only this Court can resolve the split and provide the resolution needed to protect and preserve those property rights guaranteed by the Fifth Amendment. And until it does, private property owners and courts are left struggling to determine the level of scrutiny applicable to legislatively imposed conditions, and state and

local governments are handed a roadmap to evade the Constitution.

ARGUMENT

Although the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference," *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari), many lower courts dispense with *Nollan* and *Dolan* scrutiny simply because the government imposed the unconstitutional condition by a legislative act rather than through a discretionary administrative process. This rejection of *Nollan* and *Dolan*'s heightened scrutiny creates several conflicts[2] that warrant this Court's attention. The first and most obvious is the direct conflict with this Court's precedent set forth in

[2] This Court has consistently applied the unconstitutional conditions doctrine to both legislatively and administratively imposed conditions without regard to the condition's origin. *See, e.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (applying doctrine to a legislatively imposed condition without regard to its origin); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (same); *Perry v. Sindermann*, 408 U.S. 593 (1972) (applying doctrine to administratively imposed condition without regard to its origin). As Petitioners explain, lower courts' refusal to apply heightened scrutiny to legislatively imposed conditions, conflicts with this Court's precedent as it relates to the unconstitutional conditions doctrine generally, and the lack of support for distinguishing between legislative and adjudicative acts. Pet. at 16.

Nollan and *Dolan*, and recently reaffirmed in *Koontz*: cases which all involved conditions imposed through a legislative act. And the second is the growing conflict among the lower courts, both state and federal.

I. Allowing a government to evade the Constitution simply by imposing an unconstitutional condition through legislation rather than through an ad hoc administrative process conflicts with this Court's precedent.

The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. Const. amend. V. There are three primary taking doctrines: physical takings, regulatory takings, and takings based on the unconstitutional conditions doctrine. Thus, a taking occurs when the government (1) directly appropriates or physically invades private property (a physical taking), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982); (2) enacts or applies a regulation "so onerous that its effect is tantamount to a direct appropriation or ouster" (a regulatory taking), *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005); or (3) places conditions on a property owner's right to use or build on her property that lack any reasonable relationship to the development (an unconstitutional condition, or an exaction), *Koontz*, 570 U.S. at 599; *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

In its most basic formulation, the unconstitutional conditions doctrine provides that a government may not require a person to give up a constitutional right in exchange for a discretionary government benefit. In the seminal unconstitutional conditions case, the Court held that a government may not do indirectly what it could not accomplish directly:

> [T]he power of the state [. . .] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. R.R. Comm'n, 271 U.S. 583, 594 (1926) (striking down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways). The "doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights." Richard A. Epstein, Bargaining with the State 5 (1993). And courts have invoked the unconstitutional conditions doctrine in many cases when the government sought to trade a discretionary benefit for a person's right to free speech, right to freedom of religion, right to equal protection,

and right to due process of law. *Id*. at 9-10 (discussing and citing unconstitutional condition doctrine cases).

Through *Nollan, Dolan,* and *Koontz*, this Court made clear that the unconstitutional conditions doctrine also applies to protect property rights against coerced waivers. *Lingle*, 544 U.S. at 547 (explaining, in a unanimous opinion, that the tests set forth in *Nollan* and *Dolan* constitute a "special application" of the unconstitutional conditions doctrine). Under the *Nollan* and *Dolan* tests, a government cannot condition the grant or denial of a land-use permit on the relinquishment of another right unless it can show that there is both a "nexus" and "rough proportionality" between its demand and the effects of the proposed land use. *Koontz*, 570 U.S. at 599.

"Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Id*. at 607. As this Court explained, the unconstitutional conditions doctrine recognizes a constitutional injury where a government forces a property owner to choose "between (a) foregoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development." Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management, 27 Geo. Int'l Envtl. L. Rev. 539, 569 (2015). A finding that such a condition is unconstitutional is the equivalent of finding that such a demand "amount[s]

to a *per se* taking[.]" *Koontz*, 570 U.S. at 615 (citing *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831).

Here, as in *Nollan*, *Dolan*, and *Koontz*, the "condition" imposed by the government comes in the form of a required dedication of private property for a public use. And, as in *Nollan*, *Dolan*, and *Koontz*, the government imposed its "condition" in accordance with a legislative enactment. *See Nollan*, 483 U.S. at 828-30 (*state law* requiring dedication of beachfront property for a public access point as a condition to obtain a development permit); *Dolan*, 512 U.S. at 377-78 (*city land-use planning ordinance* requiring dedication of property for a bike path and greenway as a condition to obtain a permit); *Koontz*, 570 U.S. at 599-603 (*state law* requiring an in-lieu fee as a condition to obtain a development permit for land designated as wetlands).

A property owner's constitutional right should not hinge on whether the government violates that right through a legislative act versus an administrative one. *See Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702 (2012) (emphasizing that the Takings Clause is unconcerned with which "particular state actor is" burdening property rights).[3] To be sure, the Court has always applied the unconstitutional conditions doctrine just the same when

[3] The Takings Clause applies equally to all coordinate branches of state government under the Fourteenth Amendment. For that reason, it cannot be that the Takings Clause imposes a different standard of review for actions violating property rights when carried out by a legislative body where that same action would constitute a taking where carried out by an administrative agency.

reviewing conditions imposed by statute. *See, e.g.*, *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (conditioning receipt of government funds on waiver of rights). Indeed, in the seminal unconstitutional conditions case, this Court struck down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways. *See Frost & Frost Trucking Co.*, 271 U.S. at 594

That said, the lower court here refused to apply *Nollan* and *Dolan* scrutiny simply because the County of Marin imposed the condition legislatively, rather than administratively. The California Court of Appeal is not the first to make this improper distinction and to ignore this Court's unconstitutional conditions doctrine jurisprudence. Instead, this is one more decision contributing to an ever-deepening split of authority on this issue.

II. Only this Court can provide the clarity needed to protect the constitutional right to just compensation and to resolve the deep split of authority over the standard for reviewing legislatively-imposed exactions.

In 1995, just one year after this Court's opinion in *Dolan*, in a dissent from a denial of certiorari, Justice Thomas acknowledged that the lower courts were already "in conflict over whether [*Dolan*'s] test for

property regulation should be applied in cases where the alleged taking occurs through an act of the legislature." *Parking Ass'n of Ga.*, 515 U.S. at 1117. Just a few months after *Dolan*, at least four lower courts disagreed about its application, with two applying the nexus and rough proportionality test to legislative takings and two refusing to do so. *Compare Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (denying motion for reconsideration) (declining to apply *Dolan* because case involved legislative regulatory taking rather than an adjudicative one), *and Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994) (same), *with Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* even though challenged ordinance was a legislative enactment), *and Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994).

In *Trimen Development*, a developer challenged a local ordinance requiring developers to dedicate land for open space or pay a fee in lieu of the dedication as a condition to obtaining subdivision plat approval. 877 P.2d at 188. Less than one month after *Dolan*, the Supreme Court of Washington applied this Court's rule to the ordinance and found a rough proportionality between the dedication or in-lieu fee and the impact of the proposed development. *Id*. at 194.

One month later in *Manocherian*, the Court of Appeals of New York reviewed a property owner's challenge of a city ordinance that required property owners to offer renewal leases to not-for-profit hospitals. 643 N.E.2d at 479-80. In doing so, the court applied *Nollan*

and *Dolan*, explaining that through them, this Court "establish[ed] a constitutional minimum floor of protection which [it] lacks authority to diminish under the Supremacy Clause." *Id*. at 482. It continued, noting there is no evidence "for concluding that the Supreme Court decided to apply different takings tests" and that this Court's takings jurisprudence "suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases." *Id*. at 483.

Despite the "uniform, clear and reasonably definitive standard," a few months later, the District Court of Kansas declined to apply *Dolan* because the condition at issue was imposed legislatively rather than applied on an ad hoc administrative basis. *Harris*, 862 F. Supp. at 294. Soon after, the Supreme Court of Georgia followed suit and refused to apply the nexus and rough proportionality tests to a group's challenge of a city ordinance requiring owners of surface parking lots to dedicate portions of their property to create barrier curbs and landscaping areas. *Parking Ass'n of Ga.*, 450 S.E.2d at 201-02. The court rejected the plaintiff's reliance on *Dolan*, opting instead to apply a test of its own creation, the significant detriment test. *Id*. at 203 n.3. Yet Justice Sears, joined by Chief Justice Hunt and Justice Carley, wrote a strong dissent contending that the court erred in failing to follow this Court's takings jurisprudence under *Nollan* and *Dolan*. *Id*. at 203-04 (Sears, J., dissenting).

This almost immediate split of authority following *Dolan* provided state and local governments with a roadmap to evade constitutional scrutiny – impose

land-use conditions through legislative enactments rather than through administrative procedures and avoid meaningful constitutional review. When property owners challenged legislatively imposed exactions, governmental defendants could, from the beginning, persuade the court to side with the District Court of Kansas and the Supreme Court of Georgia and apply a lower level of scrutiny.

Over the last two decades, the split has deepened and local and state governments continue to evade the Constitution. For example, the lower courts have found the following conditions valid, under Maryland's approach:[4]

- Ordinances requiring dedication of affordable housing units. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 459 n.11 (2015); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010);
- A county ordinance imposing an agricultural and open space easement on subdivision applicants. *See San Mateo Cty. Coastal Landowners' Ass'n v. Cty. of San Mateo*, 38 Cal. App. 4th 523, 546-49 (1995);

[4] When *Nollan*, *Dolan*, and *Koontz* are held inapplicable, courts typically apply the much more deferential balancing test set forth in *Penn Cent. Transp. v. New York City*, 438 U.S. 104 (1978).

- An ordinance imposing landscaping and street maintenance requirements as a condition to obtain a permit or certificate of occupancy. *Spinell Homes, Inc. v. Mun. of Anchorage*, 78 P.3d 692, 702 (Alaska 2003);

- A city ordinance conditioning permit approvals on requirements to pay impact fees. *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010);

- An ordinance requiring developers to pay a sanitation permit fee as a condition for development approval. *See Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-96 (Colo. 2001);

- A city ordinance imposing a water resources development fee on all new realty developments. *See Home Builders Ass'n of Cent. Ariz. v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997);

- A city ordinance requiring mobile home park owners who close their parks to pay displaced tenants. *See Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996);

- A city ordinance imposing a fee on hotel owners as a condition for a permit to reconfigure business to no longer provide rooms to long-term renters. *See San Remo Hotel L.P. v. City and Cty. of San Francisco*, 41 P.3d 87, 105 (Cal. 2002); and

- An ordinance requiring property owners to dedicate much of their property as a conservation area as a condition for a permit. *Common*

> *Sense All. v. Growth Mgmt. Hearings Bd.*, 2015 Wash. App. LEXIS 1908, *17-19 (Aug. 10, 2015).

Had those conditions been administratively-imposed, those courts would have applied *Nollan* and *Dolan* scrutiny and many of those conditions would have, perhaps, been invalidated.

The severity of the split of authority is readily apparent when one compares these cases and conditions with those that follow. Despite the similarities between the laws listed above, the courts evaluating the following legislatively imposed conditions all applied *Nollan* and *Dolan* scrutiny:

- A city ordinance requiring dedication of affordable housing units. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991);[5]
- Ordinances conditioning permit approvals on requirements to pay impact fees. *See City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Home Builders Ass'n of Dayton and Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000);

[5] The Ninth Circuit applied only *Nollan* to the affordable housing ordinance at issue in *Commercial Builders* because it decided the case several years before *Dolan*.

- A town ordinance imposing road improvement requirements as a condition to obtain a development permit. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004);

- A town ordinance imposing an easement for fire prevention purposes as a condition for subdivision approval. *See Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998);

- State statutes and local ordinances imposing transportation impact fees on new developments. *See N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995);

- A city ordinance requiring property owners to pay a lump sum to displaced tenants as a condition for withdrawing rent-controlled property from the rental market. *Levin v. City and Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1089 (N.D. Cal. 2014); and

- An ordinance requiring a cash proffer in exchange for a favorable action on rezoning applications. *Nat'l Ass'n of Home Builders v. Chesterfield Cty.*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995).

Not only has the split deepened, but as Justice Thomas noted in his concurring opinion in support of the Court's denial of certiorari, the "division shows no signs of abating." *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928. For over two decades, "lower courts have divided over whether the *Nollan/Dolan* test applies in cases

where the alleged taking arises from a legislatively imposed condition rather than an administrative one." *Id*. And, while this Court has recognized that there is no "precise mathematical calculation," *Dolan*, 512 U.S. at 395, for determining when an adjustment of rights has reached the point when "fairness and justice," *id*. at 384, requires compensation, until this Court "decide[s] this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 929. As Justice Kagan explained in *Koontz*, the split of authority "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting).

CONCLUSION

For all these reasons, and those stated by the Petitioners in the Petition for a Writ of Certiorari, *amici curiae* request that this Court grant writ of certiorari, and on review, reverse the decision of the California Court of Appeal.

Respectfully submitted,

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