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In the Matter of:

UNITED STATES CATHOLIC CONFERENCE, ET AL.,

Petitioner,

v.

ABORTION RIGHTS MOBILIZATION, INC., ET AL.

No. 87-416

Pages: 1 through 52

Place: Washington, D.C.

Date: April 18, 1988

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ABORTION RIGHTS MOBILIZATION, INC., ET AL.

Washington, D.C.

Monday, April 18, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

KEVIN T. BAINE, ESQ., Washington, D.C.,; on behalf of the Petitioners.

ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as federal respondents supporting Petitioners.

MARSHALL BEIL, ESQ., New York, New York; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 87-416, the United States Catholic Conference Et Al., versus the Abortion Rights Mobilization, Inc., Et Al.

Mr. Baine, you may proceed whenever you're ready.

ORAL ARGUMENT OF KEVIN T. BAINE, ESQ.

ON BEHALF OF THE PETITIONERS

MR. BAINE: Mr. Chief Justice, and may it please the Court:

This case is before the Court for review of a final judgment of civil contempt against the two National Organizations of Catholic Bishops. It is the Bishops' contention that the contempt judgment against them is void because that judgment, and the underlying orders, were beyond the constitutional power of the District Court.

The facts can be stated simply. The Respondents brought suit seeking an order directing the Commissioner of Internal Revenue to revoke the tax-exemption of the Catholic Church in the United States on the ground that the Church had allegedly engaged in impermissible political activities in the area of abortion.

The Respondents served subpoena duces tecum upon the Bishops, and the Bishops moved to quash those subpoenas on the

ground, among others, that the Court was without power to issue them. Without power because the Plaintiffs lacking standing to bring a lawsuit challenging the tax-exemption of the Church. Without power, in other words, because there was no case or controversy before the Court.

The District Court denied the motion and later held the Bishops in contempt when they declined to comply with the subpoenas. In the District Court's view, the Respondents -- the Plaintiffs had standing to bring the suit.

The Court of Appeals affirmed the contempt judgment without deciding the issue of standing. It held that a non-party witness may not challenge the power or jurisdiction of a court; he may only raise a limited challenge that there is no colorable claim of jurisdiction.

In its present posture then, this case presents two questions. Whether a witness and an alleged contemnor may challenge the Article III Power of the Court to Act, and, if so, whether the District Court in this case was without power because the Plaintiffs lacking standing to bring the suit.

Now, there is a very simple and straightforward answer to the first question. A witness who is subpoenaed and held in contempt may challenge the Article III Power of the Court because that power is being invoked against him.

The subpoena and contempt powers that are at issue in this case are themselves elements of the Article III Power of

the Court., They don't exist independently. They are part of the judicial power that is conferred by Article III, and as this Court said in United States v. Morton Salt, the subpoena power is therefore subject to the limitations of Article III.

What that means --

QUESTION: Mr. Baine, certainly there's language in Blair v. United States, as you know, that it certainly cuts against your position.

MR. BAINE: Blair v. United States is a case that concerns the subpoena power of the Grand Jury, and what the Court held in that case is that one who is subpoenaed to appear before a grand jury cannot object on the ground that the criminal statute that he believes is the subject of the investigation is unconstitutional. That kind of a challenge is speculative and premature.

A grand jury's subpoena power, unlike the subpoena power of a court in a civil case, does not depend upon the existence of a case or controversy, and, in fact, in a case of the grand jury, as the Court said in Blair, the grand jury and the court don't even know whether there's a matter within the jurisdiction of the federal courts until the end of the investigation.

In a civil case, on the other hand, the complaint is at the beginning of the case. One can determine at the beginning of the case whether there is jurisdiction, whether

there is a case in controversy.

So, it's our contention that Blair simply has no relevance to this case, and, in fact, when Blair says that the witness may not challenge the jurisdiction, it is referring to the jurisdiction of the grand jury and the court to investigate, and to bring a case within the jurisdiction of the court if it finds that a violation has occurred.

QUESTION: Mr. Baine, if the case were one in which the burden on the witness was minimal rather than the greater burden that you allege in this case for these witnesses, do you think that any witness should be able to make the same jurisdictional challenge, regardless of the burden on the witness?

MR. BAINE: There's no question that the burden in this case was substantial and we certainly rely upon that fact. However, the contention is that the Court has no power to act at all if there is no case or controversy, and if there's no case or controversy, it has no power to do anything relating to the merits of the case.

QUESTION: Well, so, is your answer to me yes, regardless of the extent of the burden any witness in any circumstance should be able to make this kind of a challenge?

MR. BAINE: Yes, that is my answer. I would add, of course, that in our view, the subpoena here was not only unlawful because it was without judicial power, but it was also

unduly burdensome, and if you wanted to look at it as a matter of whether the subpoena is unduly burdensome, certainly you could consider the burden that is placed upon the witness.

The basic problem --

QUESTION: Well, the Court's got the power to decide its own jurisdiction and do something until somebody reverses it, doesn't it?

MR. BAINE: There's no question the Court has power to decide its own jurisdiction. I think that that's where the Court of Appeals went wrong. As a general matter, a court must have power to decide its own jurisdiction and, therefore, it must have power to enter those orders that are necessary to enable it to decide the question of jurisdiction.

QUESTION: And to go forward with the case until it's reversed, isn't it?

MR. BAINE: Go forward with the case until it's reversed in the sense that a party may not question jurisdiction, but the critical point here is that as far as the Bishops were concerned, there was a final judgment entered as to them, and this Court has held over and over that a judgment against -- of contempt against a non-party witness is a final judgment and the witness is entitled to appeal it immediately before undertaking any burden of compliance.

The Court has also held that a non-party contemnor may, on review, have a full review of his claims, and if the

Court -- if a non-party contemnor is entitled to a full review of his claims, certainly he must be entitled to review of the very basic contention that there was no power at all to subpoena him.

QUESTION: Well, do you -- what are you attacking? What did the Court of Appeals do?

MR. BAINE: The Court of Appeals said that the non-party witness may not challenge the Article III Power of the District Court, and that is where we say the Court of Appeals committed error.

QUESTION: Well, they said something about jurisdiction.

MR. BAINE: What they said is that the witness may raise the limited challenge that there is no colorable jurisdiction.

QUESTION: Why did they say that?

MR. BAINE: Well, I don't know why they said it, but I think I know where the error occurred.

QUESTION: If they said that, they would have to -- it would be proper for them to redecide the merits of the jurisdictional question.

MR. BAINE: I think there's no question, once you start looking at jurisdiction, there's no reason not to decide the question outright.

I think what the Court of Appeals did is it took

limited exception to the principle that a court must have power to act. That exception being the court necessarily has power to decide its power, and if it can't make a decision on jurisdiction right away, it can issue an order as in United Mine Workers to preserve the status quo, pending a decision on jurisdiction.

QUESTION: What would the Court of Appeals have done if it had found there's no colorable jurisdiction?

MR. BAINE: It would have reversed and found that the contempt judgment was invalid.

QUESTION: Were there any efforts to define what colorable was?

MR. BAINE: Well, I don't think the Court of Appeals defined it at all. The Court just said in one paragraph that we think there's a colorable claim here.

QUESTION: What do you think they meant by colorable?

MR. BAINE: I'm not sure what they meant. I think that the concept has some meaning if the Court doesn't have all the information before it to enable it to decide the question. When you have all the information before you, I don't know what colorable jurisdiction means.

This subpoena, these subpoenas, were not issued to secure evidence relating to the question of jurisdiction. In fact, the District Court had already decided that it had jurisdiction, and, so, we say that the issue on appeal wasn't

whether the District Court had colorable jurisdiction to decide its actual jurisdiction. The issue is whether the District Court was correct in deciding that it had actual jurisdiction.

QUESTION: What if we agree with you that the Court of Appeals should have decided the jurisdictional issue straight out, would we just remand and let them decide jurisdiction?

MR. BAINE: That would be an option before the Court. I would suggest, however, that the jurisdictional issue in this case is not a novel one, and that the Court really doesn't need the guidance of the Court of Appeals on it.

The Court has addressed the question in several cases.

QUESTION: But it would save us a lot of work.

MR. BAINE: It would, indeed. It would, indeed.

QUESTION: Ordinarily, if we disagree with their standards, say they have another one to apply, don't we usually let them apply it first?

MR. BAINE: I think, quite frankly, the Court has done it both ways, and certainly the Court could either remand for a full decision by the Court of Appeals on the question of jurisdiction or it could go ahead and decide the question itself.

Now, the Respondents' main argument in this Court on the question -- on the first issue, is that a non-party witness

can't raise a jurisdictional challenge on appeals. Somehow it's interlocutory. This, I think, is simply wrong.

This Court has held for at least eighty years now that a final judgment of civil contempt against a non-party witness is immediately appealable and that the contemnor is entitled to a full review of his claims.

What the Respondents say is that the Bishops could have argued on appeal that the contempt judgment was invalid because the subpoenas were unduly burdensome, that it cost too much to xerox the documents, or that it would take too many man hours to search for the documents, but they say that we can't raise on appeal the more fundamental question whether or not the subpoenas were invalid all together because they were beyond the power of a District Court.

What that overlooks is that the first issue on any appeal is the question of jurisdiction or power, not just of the Court of Appeals, but of the District Court.

The appeal in this case is really no different from any other appeal in that respect. The Court of Appeals had an obligation to satisfy itself that the District Court had power to act and that the District Court was correct when it found that it did have power to act.

QUESTION: Well, is lack of standing as quintessentially jurisdictional as, say, the absence of subject matter jurisdiction?

MR. BAINE: Certainly, the absence of Article III standing is. There are also elements of standing that are prudential in nature, but this Court has held over and over again that in the absence of Article III standing, there is no case or controversy, and that, indeed, there is no more fundamental element of Article III power than the existence of standing.

And, so, we say that this is a quintessential Article III issue that the Court must satisfy itself on.

QUESTION: What case of ours comes closest to supporting that particular proposition, that lack of Article III standing is just like lack of, say, subject matter jurisdiction?

MR. BAINE: Well, I think in Valley Forge, what the Court in Americans United v. Valley Forge was the Court said is that Article III standing -- that without Article III standing, a plaintiff may not litigate in the federal courts, that it is an essential ingredient of the Court's Article III Power, that in the absence of Article III standing, there simply is no case or controversy.

One final point on the first question. If the Bishops can't raise their jurisdictional challenge in the Court of Appeals, then they can never raise it at all because they are not parties. There will never be another final judgment against the Bishops that they can appeal.

QUESTION: Couldn't they raise it by mandamus in the Court of Appeals? You can get review of some extreme discovery orders that way.

MR. BAINE: Well, I suppose that they could, but I think that it's an elementary doctrine that is implicit in all of the Court's cases, that at some point, one must be able to have a right of appeal from the final judgment against you.

QUESTION: Well, we could say that they can appeal when the merits, if the issue that they're appealing that pertains to the sanction that they've suffered, relates to the merits of the case, they simply have to wait until the merits of that case have been disposed of or are appealed.

MR. BAINE: Well, the --

QUESTION: Now, that might be a problem where the sanction hasn't been suspended in the interim or where it can't be returned, but where the sanction is just the payment of money, surely you could say, well, wait until the merits of the appeal either come up or are finally decided, and at that point, we'll let you challenge the sanction.

MR. BAINE: Well, you could say that because you are construing a statute, but if you were to say that, you would be denying the party of any meaningful opportunity for review because there is no judgment against the Bishops at the end of the case. There's going to be a judgment in favor of the Plaintiff or the Defendant.

QUESTION: I understand, but at that point, I'm saying, you let the Bishops come up and say we shouldn't have been socked with this fine, and if it's been paid, we want it returned, if it's been suspended in the interim, as it has here, we don't have to pay it.

Why wouldn't that give them full relief?

MR. BAINE: If the Court were to hold that, the Court would be, in a sense, overruling Nelson v. United States in 1906, Alexander v. The United States in the same year, United States v. Ryan a number of years later.

In all of these cases, the Court has held that a non-party contemnor is entitled to an immediate appeal of the final judgment of contempt entered against him.

Now, the rule is different for party contemnors. The rule is quite clear in a number of the Court's decisions. That a non-party who is held in contempt has an immediate right of appeal whereas a party does not because a party will be involved in other judgments that he can then appeal.

But the non-party's only opportunity is now.

QUESTION: Mr. Baine, how does that problem differ than the problem that confronted Blair in Blair v. United States? He also could never make the argument if he couldn't make it in that particular proceeding.

MR. BAINE: The issue in Blair was a little different. The problem of Blair wasn't that the witness

wouldn't have had another chance to get review of his claim. The problem in Blair was that the witness didn't have a claim. The witness can't say --

QUESTION: He claimed that the grand jury had no power to act because they were investigating a crime that was not authorized by federal law. The basic federal law was unconstitutional, but I don't think your argument about Blair would be any different if the witness had said the grand jury is improperly constituted or something like that.

MR. BAINE: Of course, the holding in Blair wasn't that the witness had no right to review. The holding in Blair was that he was in contempt and he had no defense to the contempt charge, that there was no comparable argument.

QUESTION: Well, his defense was the grand jury -- his defense was very similar to the one here. The grand jury had no power to ask the questions that it wanted to ask.

MR. BAINE: And in the context of the grand jury, that simply isn't a defense because one cannot say ---

QUESTION: But once you say that, you're saying you can never make this argument, and I'm just saying to the extent you're relying on the fact that this issue is never reviewable, that argument could also have been made in Blair. That's kind of a practical argument rather than a legal argument.

MR. BAINE: Yes. The argument could have been made in Blair, but, of course, Blair did get review of the contempt

judgment and the decision was the contempt judgment was valid because the jurisdictional objection that he raised was without merit, and what we're saying is that this is an entirely different case, that we have a jurisdictional challenge to the existence of a case or controversy, and we have a civil court that has purported to issue a subpoena without any case before it.

If the District Court just decided one day to subpoena the Bishops' documents, clearly, that would have been beyond the jurisdiction of the District Court, and what we're saying is that's what happened. There was no case or controversy authorizing the District Court to issue a subpoena to the Bishops and to hold them in contempt.

The simple fact is that if there was no case or controversy before the Court, then there was no judicial power at all, no power to subpoena the Bishops, and if there was no power to subpoena them, they didn't have to obey the subpoena, and if they didn't have to obey it, they couldn't be held in contempt for disobeying.

I would like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baine.

We'll hear now from you, Mr. Horowitz.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

FEDERAL RESPONDENTS SUPPORTING PETITIONERS

MR. HOROWITZ: Mr. Chief Justice, and may it please

the Court:

I plan to devote my time to the issue that is of most concern to the Federal Government, the underlying question of whether the Plaintiffs have standing to bring this suit against the Internal Revenue Service, seeking to compel us to revoke the tax-exemption of a third party.

That standing issue raises a general problem that the Court has confronted on several occasions in recent years. Namely, the circumstances under which the federal courts may be asked to review the workings of the Executive Branch by a party who is not directly affected by government actions.

The basic principle in these cases is that the Plaintiffs have standing to challenge executive action only when they have suffered a concrete injury thereby, and one principle that the Court has made clear time and time again is that the courts will not entertain challenges brought by citizens whose interest is no more than a generalized interest in having the Government obey or enforce the law.

In the words of this Court, the federal judiciary is not an ombudsman of the general welfare. It is not designed to act as a continuing monitor of the wisdom and soundness of executive actions.

In our view, the injury that is claimed here is so theoretical and abstract that acceptance of it would almost completely obliterate this principle that limits judicial

monitoring of the Executive Branch. It would expose the Government to untold numbers of suits by interested but not affected persons who seek to challenge its day-to-day execution of the laws.

Specifically, we think the claim of injury here is considerably weaker than the claims of injury that have been asserted to underlie standing in recent cases that the Court has rejected standing.

QUESTION: Mr. Horowitz, what precisely is the claimed injury here?

MR. HOROWITZ: Well, the claimed injury in this case, basically the gist of it, is that there has been government favoritism, that the government -- that the Catholic Church has violated the prerequisites for having a Section 501(c)(3) tax-exemption and, yet, the government has failed to take away that tax-exemption.

Therefore, this failure to enforce the law by the government as somehow favoritism towards an entity with whom the Plaintiffs disagree and that favoritism necessarily injures them.

QUESTION: Mr. Horowitz, can I give you a hypothetical that keeps running through my mind as I read this case?

Supposing either Congress passed a statute or the Executive through regulation decided that contributions to the

Democratic Party should be tax-deductible, would a member of the -- a Republican candidate have standing to challenge such a ruling?

MR. HOROWITZ: Congress passed a law that contributions --

QUESTION: Either the Congress or Internal Revenue took that position by regulation. It seems to me your arguments would compel me to answer that question in the negative, as I read your brief, and I just want you to tell me whether that's right or not.

MR. HOROWITZ: Well, one thing that is distinguishing or that is different about this case is that the Plaintiffs have not -- are not claiming any right of their own, and in the case of --

QUESTION: Well, I would like an answer to my question, if you're able to give me one.

MR. HOROWITZ: I think in that --

QUESTION: What would your position be to that?

MR. HOROWITZ: I think the Republican Party would then claim a tax-exemption of its own.

QUESTION: No. What I'm saying is that they have decided the Executive Branch of the government is enforcing a policy that says no tax-exemption for contributions to Republicans but a tax-exemption for contributions to Democrats.

Would a member of the Republican Party or a

Republican candidate have standing to challenge that? That's my question.

MR. HOROWITZ: Well, I think at a minimum, a member of the Republican Party would have standing to claim the denial of the tax-exemption to himself -- to the Republican Party, and they could raise such a defense or as the basic claim that there was an --

QUESTION: My question is whether they would have standing to challenge the granting of an exemption to the Democrats because they clearly would not be eligible. There's no statute, no regulation that entitles them to one.

MR. HOROWITZ: They could bring a separate action challenging. I'm not sure. Possibly not.

QUESTION: Possibly not.

MR. HOROWITZ: Possibly not.

QUESTION: Well, I guess that question comes down to whether equal protection challenges lie where what you're suing for is not to get treated -- not to have yourself treated as favorably as the other person, but to have the other person treated as unfavorably as you.

Are there any equal protection cases where the plaintiff sues not to get something for himself, but to get something taken away from another person? I'm not aware of any offhand. Usually, the equal protection plaintiff wants to get the advantage of what the other side has.

MR. HOROWITZ: Well, they usually come up in the context of the plaintiff's own entitlement to a certain benefit. Yes.

I think, Justice Stevens, that it's essential here, this is where the idea that there is a separation of powers component that underlies Article III. I mean, it is not contemplated that the government will be passing clearly on constitutional laws and that the Executive will enforce them, but there is --

QUESTION: Yes, but we're assuming here we have a clearly unconstitutional discrimination granting one group a preference that is illegal under the allegations. I'm not saying it really happened, --

MR. HOROWITZ: Yeah.

QUESTION: -- but don't we have to make that assumption? The question is, does anybody have standing to challenge it. Your answer is no, I think.

MR. HOROWITZ: Well, first, --

QUESTION: And I don't understand why that's different to the Democrat-Republican example, and maybe you're right.

MR. HOROWITZ: The reason why this case is different?

QUESTION: Yeah.

MR. HOROWITZ: Well, first, you're not allowing the Republicans to bring a suit challenging their own tax status.

QUESTION: No, there is no statutory basis for granting either of them an exemption, but they either administratively or they do pass a statute saying Democrats shall get it, but they don't say anything about Republicans. There's no basis for the Republicans to claim it.

Do they have standing to challenge the benefit for the Democrats? I think your arguments about causation and all would say that's just too bad, and that may be right, but I think we should face the --

MR. HOROWITZ: Well, I would say this case is different in a lot of ways. I guess I'm not entirely sure myself what the answer is to your question, but this case is different in a lot of ways because there is not the same element of causation here that there is in that case.

I mean, there, there is a direct relationship. I mean, you have a suit that is brought by the Republican Party, which is a direct competitor, shall we say, of the Democratic Party.

Here, you have a suit that is just brought by citizens who claim that there is some abstract injury out there in the arena of public debate because one of the other manifold --

QUESTION: Were any of the Plaintiffs here people who had had their tax-exemptions revoked because of political activity?

MR. HOROWITZ: No, no. They make no claim that they're entitled to any. Never sought such a tax-exemption, and they make no real claim of injury to themselves in any bottom line sense.

All they claim is that conferring some advantage and there's no real attempt to claim a significant advantage there either, but any advantage that is granted to a competitor in the area of political debate automatically confers a disadvantage on them that gives them the right to sue.

That is just too open-ended of a claim because it basically opens the courts up to any claim to any government action. Almost any company, any organization is in some sense a participant in a political debate, and to say that any government action that increases the amount of money that one participant in the debate will have, that that is automatically disadvantaged to the other party, just leaves this an area with no bounds on it whatsoever.

Now, the Court has repeatedly said that these kind of cases are not appropriate for federal court adjudication. This is a challenge first to an executive enforcement program. The Court in Allen said that's rarely, if ever, appropriate for federal court adjudication.

In addition, it's a suit that challenged the tax-exemption of a third party.

QUESTION: Is there any challenge to the statute

itself here as opposed to the way it's administered?

MR. HOROWITZ: No. Absolutely not. The Plaintiffs are relying on the statute. They're simply claiming that in this particular instant, the IRS is not enforcing it, and they don't even claim -- they certainly don't point to any action taken by the IRS. What they're arguing for is inaction, and in Heckler v. Chaney, a case where the Court -- where there was an actual affirmative statutory right to review, the Court pointed out how unusual it is to have review of inaction, and this is even a weaker case than Chaney because it's not -- in Chaney, at least, there was a government decision not to take enforcement action.

You don't even have anything like that here. All you have is the allegation that the IRS has not as yet taken any action against the Church. We don't know what they're likely to do in the future.

QUESTION: Is there an Establishment Clause challenge being made?

MR. HOROWITZ: Well, there is something that the District Court called Establishment Clause standing, and that just falls back on the basic claim of favoritism. What the Court said was that if one entity is favored and that entity favored by the fact that there's a failure to enforce the law against it, and if that entity is a religious entity, then that is automatically an Establishment Clause violation.

I would say two things to that. First of all, it's not automatically an Establishment Clause violation. It's just an enforcement decision by the government. And, second, even if it is, it doesn't enter the plane in any specific way any more than there was an injury in the Valley Forge case. That's just a claim by a citizen that any Establishment Clause violation gives a right to any citizen to sue the Federal Government.

QUESTION: Do you think the Court of Appeals was right in saying there was a colorable jurisdiction?

MR. HOROWITZ: No, we don't think so, although as Mr. Baine said, it's hard to know what they meant. That phrase is taken out of the cases that involve the inquiry by the Court into whether it has jurisdiction, and --

QUESTION: I suppose the Government made all these arguments? Did you participate in the Court of Appeals?

MR. HOROWITZ: We participated in the Court of Appeals, but that issue -- I don't know what we said on that issue.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Horowitz. We'll hear now from you, Mr. Beil.

ORAL ARGUMENT OF MARSHALL BEIL, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. BEIL: Mr. Chief Justice, and may it please the Court:

Threshold question for determination by this Court is

what issues are properly raised on this appeal.

Petitioners here seek an unprecedented exemption from the rule against interlocutory appeals, which is the fundamental principle of federal appellate jurisdiction. To raise issues that no contemnor has ever been permitted to raise on appeal.

It is to be remembered that the Petitions are appealing from a contempt order, not a final judgment on the merits. Yet, the Petitioners, who are non-party witnesses, legally strangers to the lawsuit, do not raise any issues related to the subpoena or to the contempt order themselves.

QUESTION: Yet, it is a final judgment as to them, isn't it, Mr. Beil? Adjudicating them in contempt?

MR. BEIL: Yes, it is, and, but it's -- in order to determine what issues can be raised from that "final judgment", one should look at the cases that allow appeals from this determination.

The fact that it's a final determination does not mean -- doesn't flow from that fact that the Petitioners can raise any issue that would lead to the dismissal of the lawsuit, which would, therefore, obviate the need for any testimony.

QUESTION: Mr. Beil, in theory, they don't care about the dismissal of the lawsuit. They may be strangers to the lawsuit, but they're not strangers to the contempt citation.

That has come down upon them.

Would you be making the same argument if the Court had imposed criminal contempt instead of civil contempt? Suppose the Court had said, you know, you don't give us the document, off to jail?

MR. BEIL: Well, --

QUESTION: Now, you know, we do have a thing called habeas corpus. Are you saying that even though the Court has no authority, no jurisdiction, there's no case of controversy, there is no way for that person to get out of jail until the lawsuit is completed?

MR. BEIL: No. First of all, it's not true that the Court has no jurisdiction here.

QUESTION: Well, but that's the basis that they want to -- on which they want to challenge it.

MR. BEIL: The Court makes a determination. District Court makes a determination of jurisdiction. That determination is binding on all parties who, or anybody that comes into the lawsuit, until reversed on a proper appeal.

This appeal is not the kind of appeal that raises jurisdictional issues. It raises -- it's allowed as an appeal because it raises issues that are independent from the main action but are personal to the contemnors, which would be lost if you had to --

QUESTION: So, even though you are perfectly correct

that the Court has no jurisdiction and that is ultimately determined to be the case on appeal, there is no way that you can make that vindication until the case is decided, so you have to spend however many years it is in jail until the other lawsuit finally concludes? That's the result.

MR. BEIL: I think that -- well, this Court has made a distinction between civil contempt and criminal contempt. The criminal contempt condition stands apart from the main action and is treated like any other criminal action.

So, I think if there are criminal contempt for a non-party witness, they could probably raise the jurisdictional issues. But civil contempt is within the action and it raises -- the issues that can be raised on appeal from civil contempt order are different and much more limited than those that can be raised from, I think, an appeal from a criminal contempt case.

QUESTION: Well, now, what is your authority for that proposition? Because it doesn't strike me as self-evidence at all.

MR. BEIL: Well, I think --

QUESTION: What cases do you say support that?

MR. BEIL: United Mine Workers, which discusses at some length the distinction between criminal and civil contempt, the Court does draw a distinction between criminal contempt standing apart as a separate action, and civil

contempt is much more related to the action.

QUESTION: But I thought the distinction was that the criminal contempt citation could stand and the civil could not, which seems to me to cut against you in this case.

QUESTION: There is a fine here, is there, that's been imposed as part of the contempt?

MR. BEIL: Yes.

QUESTION: And where does the fine -- where is the fine payable? To the Court?

MR. BEIL: The District Court has ruled the fine is payable to the Government.

QUESTION: To the Government.

MR. BEIL: To the Treasury.

QUESTION: Do you think that might make it criminal?

MR. BEIL: No, no.

QUESTION: Why not?

MR. BEIL: It is ruled as a civil contempt, part of the civil contempt. The Court ruled it was civil contempt. It is -- there has been no separate criminal proceeding. Civil contempt can either be contempt --

QUESTION: Don't we need to know what the nature of the sanction imposed to determine whether it's civil or criminal and if the fine is payable to the Court? Does that make it criminal?

MR. BEIL: Well, no, because civil contempt can

either be coercive, to essentially you pay -- either you produce the documents or you pay the fine. If you produce the documents, you don't have to pay the fine. Or it can be compensatory, which is to say you pay the Plaintiffs for damages caused by non-compliance.

Criminal contempt is essentially punishment for past non-compliance, and that's not the case here. This is -- what the District Court said is that for each day that you do not produce documents, that the fine has to be paid. That's a coercive fine, yes, but it is traditionally civil contempt.

But if you look at what appeals are allowed from civil contempt, which is the issue here, not criminal contempt, the Court, in ruling that civil contempt orders are appealable, has limited the issues that can be raised to those issues that are important to the witness but independent of the main action, because to rule otherwise is essentially to create a new class of appealable order involving jurisdictional issues.

QUESTION: What case do you rely on for the proposition that an appeal in a civil contempt action cannot raise an issue unless it's independent of the main action?

MR. BEIL: Well, the cases that have all come up have all been -- well, in the cases that allow civil contempt appeals, Alexander, Ryan, Cobbledick, all the issues were issues that relate specifically to the witness. There were questions. Was there undue burden. Was there First Amendment

privilege. Was there a Fifth Amendment privilege. In personam jurisdiction.

There is no case that says a witness can raise issues that are intimately connected to the main action, such as subject matter jurisdiction, but there are cases that say witnesses can do that and that's in the Blair line of cases, and Blair says that a witness cannot raise issues going to the --

QUESTION: So, Blair is your closest case to support that proposition?

MR. BEIL: Yes.

QUESTION: Mr. Beil, do you think it's open -- it was open to the Court of Appeals sua sponte to determine that there was no Article III standing and to dismiss?

MR. BEIL: I think the Court has to be very careful. I think the Court --

QUESTION: Was it open to the Court to do that?

MR. BEIL: Yes. I think the Court of Appeals --

QUESTION: Is it open to this Court to do that as well?

MR. BEIL: Yes. This Court has the power to do that, but it's a power that should not be exercised, and the reason for it is this. At this point, there is no special rule for appeals of jurisdictional determinations. When a District Court denies a motion to dismiss for subject matter

jurisdiction, that order is not appealable.

If that is challenged on a mandamus petition, the regular rules for mandamus apply. There are no special rules for mandamus for jurisdictional issues.

To exercise supervisory power over the lower courts in this context would essentially throw out all of that case law, which is now 200 years old, and create a special rule for jurisdictional issues which this Court has so far declined to create, and I think it's a good one because, otherwise, you will wind up having repeated appeals of jurisdictional issues in any case where jurisdiction is a close case.

Look at, for example, the history of this case. This case is now nearly eight years old. The District Court has made two determinations on jurisdictional issues. The Court of Appeals has been asked to review jurisdictional issues two times, and this Court has been asked to review the jurisdictional issues two times.

If non-party witnesses held in contempt are allowed to raise jurisdictional issues on their appeal, then this case, which is now unusual, is going to become the norm in any case in which jurisdictional --

QUESTION: Why should we start off regarding the matter as somehow the primary focus should be the case out of which this order from the court issued? As far as the person who receives an order from the court that says you do this or

you'll go to jail or you do this or you'll be fined so much a week as concerned, as far as that person is concerned, there's only one case. That is the order from the Court.

Does the Court have authority to issue that order? What difference does it make what litigation it comes out of it?

MR. BEIL: But what is the injury that that party is being asked to suffer?

QUESTION: He's going to be fined or he's going to go to jail.

MR. BEIL: Well, I think actually the focus is not on the fine because that's one that's created by his refusal to produce documents. The focus should be on the injury created by compliance, and that's not, in fact, an injury at all. That's a duty.

This Court has held several times, all citizens have the obligation to come forward and produce evidence in a case if they have relevant evidence. That's a duty that I don't think would raise an injury.

Certainly, if the Court is going to hold otherwise, and hold that the injury of producing documents creates the right to appeal a jurisdictional determination that is made in an underlying case, then it would have to hold by logic that the burden placed on a defendant, which is much greater, he's going to defend the case, discovery and trial and judgment and

then appeal, that that burden is so much greater that he should have an immediate right to appeal an adverse jurisdictional determination, and this Court has never held that.

The Court, in fact, has held just the opposite.

QUESTION: Well, that person has a right -- has the power to get an immediate appeal, can't he? He can say I'm not going to turn over the documents. The court says you don't turn over the documents, judgment against you, he goes up immediately.

MR. BEIL: That's right.

QUESTION: Now, you tell me how the third party can get a judgment immediately when he's not in control of the lawsuit.

MR. BEIL: I'm not sure I understand the question.

QUESTION: I'm saying when there is a subpoena issued to the party in the lawsuit, he can, at great expense, but he can get a determination. He can take a default judgment and appeal the jurisdiction of the court in the default judgment. Correct?

MR. BEIL: Yes.

QUESTION: But the third party, you're telling us there is no way that third party can ever stand on his rights and say I will not turn over these documents. You're not just saying there's no appeal, you're saying there's no right. If you get an order from the court, that's it.

MR. BEIL: That is right. We're saying, essentially, that as a third party witness, the issue of jurisdiction -- he takes the court as he finds it, the determination by the District Court of its jurisdiction is a determination that the District Court has the right to make and that simply is not reversible.

The injury that the non-party witness has been called forth to produce that evidence suffers, which is compliance with a public duty to produce documents, doesn't give rise to an appealable injury on the jurisdictional issue because, if it does, it would mean that any denial of a motion to dismiss on jurisdictional issues would have to be automatically appealable.

I don't think this Court -- this Court has certainly never held that.

Also, if you hold that, however, the possibility of not only repeated appeals, because, after all, each witness that comes forward and is subpoenaed and doesn't produce documents can raise the issue again because he's not -- there's been no res judicata, you also have the possibility of inconsistent rulings by different District Courts and different circuits around the country, because a witness can only be subpoenaed in his home state, in his home district, in fact, and can raise any challenges to that subpoena in his home district.

So, if you had a case, as this is like the case may involve, you have witnesses here in Washington, maybe witnesses elsewhere in the country, it could raise a jurisdictional issue in another District Court and a second circuit, another circuit, would be looking at it, and you would have inconsistent -- conceivably have inconsistent rulings by different courts on the same issue in the same case that could not be resolved by this Court.

QUESTION: I assume if the appeals are frivolous, there could be sanctions against the witness?

MR. BEIL: Yes, but may not necessarily be frivolous appeals, and certainly a decision by one district or one circuit is not binding on a determination by another circuit. So that the issue can be raised in a different circuit without being frivolous or somehow improper.

I would like to turn now to the other issue in the case, which is the question of standing. Respondents do not believe this Court should reach the issue of standing because the -- actually, let me step back and say something further about response to Justice White's questions about what colorable means.

What the Court of Appeals recognized is that there is essentially a safety valve that exists in the federal system for determinations by District Courts that are totally bereft of any rational argument.

QUESTION: This contempt judgment was appealable?

MR. BEIL: Yes. In --

QUESTION: It's appealable and in the process of appealing it, you may consider jurisdiction.

MR. BEIL: In the way you would consider jurisdiction on a mandamus petition. It is --

QUESTION: But you agree if the Court of Appeals had decided no colorable jurisdiction, they would have reversed -- they would have set aside the discovery orders?

MR. BEIL: Yes. It was essentially treating the jurisdictional issue as a mandamus petition.

QUESTION: Just as a matter of judicial administration, that's sort of a halfway house, it seems to me, that has a good deal to be criticized and not much to commend itself.

If you're going to talk about jurisdiction at all, why create kind of a twilight zone?

MR. BEIL: Well, I think -- I don't think the Court of Appeals was doing that. I think what the Court of Appeals was recognizing is that jurisdictional determinations are not appealable, but you can bring a mandamus petition to challenge a usurpation of power, and that this was the jurisdictional challenge here was the equivalent of a mandamus petition raising a question of whether there was a usurpation of power.

In fact, the District Court -- the Court of Appeals

in stating why it found that there was colorable jurisdiction used the term "usurpation of power", which indicates to me that it was, in fact, applying a mandamus standard here.

QUESTION: How do you define colorable?

MR. BEIL: I think the way the Court of Appeals did it was mandamus. The Court said the District Court cannot be said to be usurping power in determining the subject matter jurisdiction exists.

That's the standard used in a mandamus petition.

QUESTION: What does that mean?

MR. BEIL: Well, usurpation of power means essentially that's there no rational argument in support of a District Court's determination. It is not that the District Court is right or that the District Court is wrong, but that there is essentially a total absence of any power here. It's the standard that this case has always applied to mandamus petitions challenging jurisdictional determinations.

QUESTION: But if you decide there was no Article III standard, the District Court was totally without power.

MR. BEIL: I guess it comes back to the question of the District Court has jurisdiction to determine jurisdiction, and that determination, Respondents suggest, remains unassailable until appeal of a final judgment.

If the District Court has usurped power, has done -- gone so far that this Court or the Court of Appeals would grant

a mandamus petition, which, in fact, was filed here, in the Court of Appeals and in this Court and by the Government and rejected both by the Court of Appeals and the District Court, that usurpation of power is challengeable.

Blair recognizes that. Blair recognizes beyond --

QUESTION: But then this doctrine really gives the Petitioners nothing that a writ of mandamus or the application for writ of mandamus might not give it.

MR. BEIL: On the jurisdictional issue, I think that's the case. The Petitioners have plenary appeal on issues personal to the witness. Issues that are not raised here. Privilege, burden, confidentiality. Notions like that are raised here.

QUESTION: When you say personal to the witness, you mean by that that they affect the witness and no one else in the case?

MR. BEIL: Yes.

QUESTION: Because certainly it's kind of personal to go to jail.

MR. BEIL: Yes, but we're not dealing, as I say, we're not dealing with a criminal contempt here. He is not being punished for past non-compliance.

QUESTION: And you say it would be different if we were dealing with a criminal contempt?

MR. BEIL: Well, Justice Kennedy is correct in that.

I don't think --

QUESTION: You think it's the same.

MR. BEIL: I think it would have to be the same under Mine Workers, it would have to be the same.

QUESTION: Now, if the Second Circuit here had decided that there was no standing and no Article III jurisdiction, would that have been reversible error?

MR. BEIL: Yes.

QUESTION: Even though sua sponte could have made that decision?

MR. BEIL: If it had decided that there was no jurisdiction,, yes, I think that decision would have been wrong for two reasons. One, because I don't think they should have reached it, and, two, because I think it would have been wrong on the merits.

I'd like to turn, in fact, to the merits on that. On the standing question, and to suggest that this case differs from Allen v. Wright and prior determinations of this Court, by particularly looking at the claim that's made by the Clergy Respondents here.

The Clergy Respondents claim is under the Establishment Clause. In fact, it's a claim that goes to the core of the Establishment Clause. It's a claim of preference, of one religion over another, which this Court has held is the clearest command of the Establishment Clause, that kind of

governmental preference is forbidden.

But when a challenge is made to governmental preference, one religion over another, the most logical plaintiffs to challenge that determination would be clergy members of the disfavored group.

To take Justice Stevens' hypothetical and put it into the Establishment Clause context, suppose the government announced that it was subsidizing only, say, Quaker School education, that the government would give cash grants to schools that taught Quaker theology, I don't think this Court would have any question, any hesitation in allowing clergy members who ran schools that didn't teach Quaker theology from challenging that determination.

QUESTION: Well, but the Court has allowed any citizen standing to challenge taxing and spending decisions by legislative bodies.

MR. BEIL: Yes, but if this were an administrative --

QUESTION: This is an enforcement agency challenge.

MR. BEIL: Well, except that the difference here, though, is that the enforcement -- the failure to enforce is the equivalent of a subsidy. So, while we are challenging --

QUESTION: Well, that could have been said in Valley Forge, couldn't it?

MR. BEIL: But in Valley Forge, the plaintiffs there had -- were not people who ran other hospitals or other

colleges. They were not people who were seeking the surplus governmental property that was at issue there.

Here, we have clergy members who are directly affected, personally affected by the same laws that their Catholic counterparts are affected by, but the preference is given to the Catholic clergy but not to the Clergy Respondents.

QUESTION: It seems to me that the true counterpart, the counterpart for Justice Stevens' hypothetical, would be an organization in which it had its tax-exemption revoked, because it had been lobbying or it had been active politically, and they say you revoke my tax-exemption but you didn't revoke the Catholic Church's, which was doing the same thing.

MR. BEIL: Well, I think that those people would certainly have standing, but certainly under the Establishment Clause, you don't -- coercion is absent.

QUESTION: Establishment Clause standing is to attack spending of money.

MR. BEIL: That's what we're arguing here.

QUESTION: Well, but it's a long way around to say that you're attacking a spending of money. None of our cases have gone that far.

MR. BEIL: Well, I think that the Court has held that the tax-exemption or tax deduction is the equivalent of a cash grant. The government, in effect, pays for certain activities by making it cheaper to do those activities. You don't have to

pay taxes on those activities, and when that power is exercised in a discriminatory fashion, to prefer one religion, I think, in fact, that is the equivalent of an endorsement of that religion.

QUESTION: That gives the taxing and spending clause considerable scope. You're saying taxing includes not taxing. Is there anything else that exists besides taxing and not taxing? I mean, --

MR. BEIL: Death is the only other thing I can think of.

But this case is not really brought under taxpayers standing. We are seeking -- because we are seeking -- we are challenging the enforcement action. The Respondents are challenging the enforcement action, not an action by Congress.

So that what you have here is a situation in which essentially the disfavored clergy are seeking to remove the preferential treatment to the favored group, and I think, Mr. Chief Justice, that you don't need to show that there's been coercion on the Respondents themselves in the Establishment Clause.

QUESTION: What case of ours do you think comes closest to supporting that?

MR. BEIL: Well, I think Abington, in fact, says that, and Engel both say that coercion is not an element.

QUESTION: And, there, the challenge was to prayer in

public schools.

MR. BEIL: What the nature of a claim under an Establishment Clause is the preference -- the nature of the injury is the preference. The fact that one group is being preferred, as Justice O'Connor said, that that is a message of endorsement, that is sent to the world, that one group is the favored included insider group and the other group is the excluded the outsider group, and the outsiders should be able to challenge the preference.

They don't need -- they don't have to ask for that preference themselves because under the Establishment Clause, in fact, they don't want that benefit. The Respondents here do not seek to be able to use tax-exempt money in political campaigns, but I don't think that they have to -- that that makes a difference because when the question is unequal treatment, the Court has two alternatives to remedy that.

One is to extend the remedy to the disfavored group or the other is to withdraw it from the favored group, and this Court has held in various cases that deal with how to remedy under-inclusive statutes and unequal treatment cases that the availability of either remedy gives standing to those who, for example, seek to have the preference removed.

QUESTION: Let's assume a group has a complaint about the Chaplain Corps in the services, saying that they aren't chaplains for some religious groups, although there should be.

It seems to me wouldn't that claim have to be brought in such a fashion as give my group a chaplain, not take chaplains away from the other groups.

Would it be conceivable to bring the case saying since I don't have any, nobody should have any, take them away from everybody else, which is what the claim here is?

MR. BEIL: Well, I think that could -- I think a challenge could be made that way. I think the challenge would lose because I think this Court has held that chaplains are permissible.

QUESTION: But on an equal basis.

MR. BEIL: Yes.

QUESTION: Your problem here is an equal basis. You wouldn't mind if everybody had an exemption or everybody didn't. It's really an equal protection problem, favoritism, that you're complaining about, right?

MR. BEIL: Yes. Favoritism is what we're complaining about.

QUESTION: So, you think a chaplain suit would lie if what you brought suit for is not to get a chaplain for your group, but to take it away from everybody else's.

MR. BEIL: Because if one would argue that that's the -- the giving of the chaplain to one group is an Establishment and that the Court -- the government has to be neutral, therefore can't have any chaplains, I think that's a remedy.

QUESTION: Do you know any case like that where your complaint is other people are favored over you and what you get is not equal treatment in the sense of you being favored, but, rather, will disfavor them?

MR. BEIL: Well, in Heckler v. Mathews and Orr v. Orr, which are -- one is a gender discrimination case and I guess they both, in fact, are gender discrimination cases, the Court has held that the mandate of equal treatment, which could be done either way, either by extending or by removing, and that you don't -- because a plaintiff is seeking only one, but both remedies are available, doesn't mean that that plaintiff doesn't have standing, because otherwise no one would have standing because you'd always say, well, he's seeking this, but the remedy is that. He's seeking that, the remedy is here, and no one would have standing, and this Court, in Orr and Heckler, has said just the opposite.

And I think since this is an Establishment Clause claim, I think we should take a look at some of the prudential concerns that this Court has raised, and realize that in an Establishment Clause claim, it's very important to provide a judicial remedy because if the Plaintiffs can't bring this lawsuit, then what it means is that they have to go into the political process to try to remedy the problem they're complaining about.

Yet, that would bring the religious divisions that

the Plaintiffs are complaining about into the political process, which is exactly what the First Amendment has sought to avoid, sought to take to avoid political division along religious lines, to avoid political divisiveness.

And that is also true of the claim made by the voter respondents, political participant respondents. They are claiming the challenge -- their injury is a skewing of the political process by the government.

You cannot expect the political process to correct that problem. This Court is the place where the independent branch, which can create a remedy, to create to fix the problem, to cure the problem of the skewing of the political process or political divisions along religious lines.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Beil.

Mr. Baine, you have four minutes remaining.

ORAL ARGUMENT OF KEVIN T. BAINE, ESQ.

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BAINE: Thank you.

The issue of standing in this case is simply this. Do those who disagree with the Catholic Church's teaching on abortion have standing to challenge the Church's tax-exemption on the ground that the Church has allegedly crossed the line between permissible and impermissible political activities in the area of abortion.

This case concerns the Catholic Church and abortion, but you can substitute any church for the Catholic Church, indeed, you can substitute any exempt organization for the Catholic Church, and you can substitute any controversial issue to the abortion issue.

Because if these Respondents have standing to challenge the Catholic Church's tax-exemption, then any citizen has standing to enforce -- to bring a suit to enforce Section 501(c)(3) against any organization he disagrees with.

Those who agree with the Catholic Church on abortion would have standing to challenge the exemption of the Presbyterian Church or of the American Jewish Congress, who have joined an amicus brief, pointing out that they take a different view.

Those who agree with the Catholic Church or disagree with the Catholic Church or any church on any of the issues the churches speak out on, including arms control, civil rights, the economy, capital punishment, to name just a few, would have standing to challenge the tax-exemption of that group on the ground that the group's activities had crossed the line.

And what the Respondents say is that a citizen would have standing to bring that suit, and this is the critical point, regardless of whether that citizen himself has been subjected to any unequal or any unfair treatment by the Internal Revenue Service.

The complaint in this case does not allege that the Internal Revenue Service has taken any enforcement action against any of the Respondents. They haven't had any tax-exemption revoked or denied. They haven't even been threatened with enforcement action.

The District Court said --

QUESTION: Mr. Baine, would that make any difference? Supposing they had been -- had some exemption denied, would they then have standing to challenge the exemption for the Catholic Church?

MR. BAINE: If they had had an exemption denied, they could bring a lawsuit challenging the denial of that exemption. They could argue -- I'm sorry?

QUESTION: Would they have standing in that lawsuit to make the challenge they're making here? I don't think so, if you're right.

MR. BAINE: They could make the substantive argument that they had been denied equal protection.

QUESTION: I understand, but that's not my question.

MR. BAINE: And once they had standing to get into court, they could make the argument of unequal treatment. They could make the argument of Establishment Clause violation.

QUESTION: What is your answer to my question?

MR. BAINE: And they could say that you can remedy this in one of two ways. You can take their exemption away or

you can give us one.

QUESTION: Would they have standing to make precisely the same claim made here? They can say we don't care what you do to us, we want you to take away the exemption for the Catholic Church.

MR. BAINE: If they're saying we don't care what you do to us, I don't think they have an injury that they're complaining about. The injury is what was done to them.

QUESTION: Well, the same injury, unequal treatment. They're saying you've taken our -- what I'm really asking you is, does it really make any difference to your argument whether they have had their own tax-exemption challenged or not. I don't think it does.

MR. BAINE: Well, I think it does. I think that if their tax-exemption had been revoked, --

QUESTION: They could then bring a lawsuit.

MR. BAINE: -- they could then bring a lawsuit saying that was unlawful and they could say it was unlawful because by revoking mine and not revoking anybody else's, that's an equal protection claim. It would be like a selective prosecution claim in a criminal context.

The point here, though, is that there has been no unequal treatment at all.

QUESTION: What happens in the selective prosecution case is that you get off just as everybody else has gotten off.

You don't mandate that the Attorney General go off and prosecute everybody else. Right?

MR. BAINE: That's true.

QUESTION: You always get the more favored treatment.

MR. BAINE: That's true.

The point is, there is no dissimilar treatment here. The Respondents aren't similarly situated. They would be similarly situated.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Baine.

MR. BAINE: I'm sorry.

CHIEF JUSTICE REHNQUIST: The case is submitted.

MR. BAINE: Thank you.

(Whereupon, at 11:02 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 87 -416

CASE TITLE: U.S. Catholic Conference v. Abortion Rights Mobilization Inc.

HEARING DATE: April 18, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States,

and that this is a true and accurate transcript of the case.

Date: April 18, 1988

Margaret Daly

Official Reporter

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