NO. 92688-3

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIAN DIRKS, CHRISTINE DIRKS,
MARESSA DIRKS and CA-WA CORP,
a California corporation doing business as
HOLLYWOOD EROTIQUE BOUTIQUE,

Petitioners,

v.

CITY OF SPOKANE VALLEY, a
Washington municipal corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Direct review by this Court was requested by CAWA and was unanimously denied in an order dated February 4, 2015. CAWA's petition for review scarcely addresses the criteria of RAP 13.4(b). CAWA's petition for review should also be denied.

This case relates to only one aspect of the operations of a single business under a particular municipal code. Disposition by unpublished decision was proper. This case would have little or no precedential effect even if published. No unsettled or new question of law was determined. There is no split in authority on any point decided. Virtually the same arguments raised by CAWA in this case were addressed in *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 103 P.3d 1265 (2005), *review denied*, 155 Wn.2d 1014 (2005).

CAWA rehashes the factual record and re-argues its brief on the merits. The Court of Appeals decision is consistent with precedent from both Washington and the federal courts. Supreme Court review is unnecessary.

II. IDENTITY OF ANSWERING PARTY

The City of Spokane Valley (the "City") answers the petition for review filed by appellants (collectively "CAWA").

III. COURT OF APPEALS DECISION

The Court of Appeals decision is *City of Spokane Valley v. Brian Dirks, Christine Dirks, Maressa Dirks, and CA-WA Corp*, No. 33140-7-III (October 22, 2015).

IV. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The City restates CAWA's issues for review as follows:

1. The Court of Appeals found that CAWA's business is not a lawful nonconforming use. The petition for review does not contain any argument explaining why this conclusion is in error.

In the absence of supporting argument, CAWA has abandoned this claim. The Court need not consider the matter further. *Detention of A.S.*, 138 Wn.2d 898, 922 n. 10, 982 P.2d 1156 (1999).

2. Regulations that govern the time, place, and manner of adult entertainment business operations, including the configuration of viewing areas, are content neutral, are not prior restraints, and are not subject to strict scrutiny. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (valid if supported by substantial government interest); *Adult Ent. Ctr. v. Pierce County*, 57 Wn. App. 435, 438-39, 788 P.2d 1102 (1990), *review denied*, 115 Wn.2d 1006 (1990) (regulations pertaining to arrangement of viewing areas involve no subject matter restraint).

Where a certain type of adult entertainment business may not be commercially viable because of time, place, and manner regulations, and

where there is no issue of pure speech in a traditional public forum, was it error for the Court of Appeals to follow existing Washington and federal precedent to find the absence of a prior restraint?

3. Washington's constitution does not provide greater protection for adult entertainment businesses than the federal constitution under *Renton*. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 122, 937 P.2d 154 (1997). The Court of Appeals followed settled federal precedent to determine whether there were reasonable alternative avenues of communication in the City under *Renton*'s intermediate scrutiny standard. *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

Should this Court now create a new standard for the "alternative avenues of communication" prong of *Renton*'s intermediate scrutiny test?

V. STATEMENT OF THE CASE

The Court of Appeals decision provides a recitation of the facts, which the City hereby incorporates by reference. Decision at 1-6. Because CAWA abandons its claim regarding whether or not it is a lawful nonconforming use under earlier municipal codes, it is unnecessary to describe the series of enactments of Spokane County and, upon incorporation, the City. CAWA has never disputed the factual

characteristics of its business operations. CAWA has never disputed that its operations began only after the adoption of Spokane County's ordinances.

CAWA has never disputed that it lacked both zoning authorization and adult entertainment licensing authorization (first from Spokane County and, later, the City).

VI. ARGUMENT

A. The petition for review ignores the requirements of RAP 13.4(b).

CAWA's petition fails to identify any subsection of RAP 13.4(b) to which its arguments respond. Merely invoking constitutional arguments is not the equivalent of identifying a specific "significant question of law under the Constitution of the State of Washington or of the United States" that merits further review by this Court. RAP 13.4(b)(3).

As an unpublished decision relating to one aspect of the operations of CAWA's idiosyncratic business, under the particular local codes of one municipality, the decision is not of substantial public interest. Both the trial court and the Court of Appeals fully considered CAWA's arguments. There is no fundamental issue of statewide jurisprudence in this matter that warrants an additional determination by this Court. RAP 13.4(b)(4).

B. The decision is consistent with longstanding federal precedent on the "reasonable alternative avenues of communication" prong of intermediate scrutiny.

CAWA states that "[t]his Court is free to adopt its own reasonable interpretation of *Renton* and *Alameda Books* and is not obligated to follow in lock step with the lower federal courts." Petition at 18.

Below, CAWA conceded that federal precedents were "satisfied so long as it is theoretically possible for an adult entertainment business to find a location in the City." Br. at 68. Now, CAWA urges this Court to adopt a new rule. CAWA does not articulate how this settled area of law should be modified nor why such a step is needed, except to change the result in this case. CAWA's petition is silent on these details, but these are the details that must be explained to justify this Court's review.

CAWA's argument is nothing more than an invitation for this Court to guess at a new standard. The federal courts have reviewed this subject in many prior cases. CAWA does not differentiate its inchoate new standard from existing caselaw.

1. CAWA advances no argument on what, if any, different analysis on intermediate scrutiny should be performed.

CAWA's argument suggests that the law on reasonable alternative avenues of communication is somehow unsettled. CAWA gives no explanation, though, for how or why this Court should break from federal appellate cases on which the United States Supreme Court has consistently denied certiorari. *See, e.g., Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1132-1143 (C.D. Cal. 2005), *rev'd on other grounds*

sub nom. Tollis, Inc. v. County of San Diego, 505 F.3d 935 (2007), *cert. denied*, 553 U.S. 1066 (2008) (summary judgment affirmed on adequacy of relocation sites); *Diamond v. City of Taft*, 215 F.3d 1052, 1056 (9th Cir. 2000), *cert denied*, 531 U.S. 1072 (2001) (no constitutionally defined requisite number of relocation sites); *Topanga Press*, 989 F.2d at 1531, *cert. denied*, 511 U.S. 1030 (1994) (all relocation sites that could ever become available to "any commercial enterprise" are appropriate for consideration).

As pointedly expressed in one case, the federal courts have held "time and again" that actual commercial viability of relocation sites is irrelevant. *Woodall v. City of El Paso*, 49 F.3d 1120, 1124 (5th Cir. 1995), *cert. denied*, 516 U.S. 988 (1995). This line of authority has continued without disruption to the very recent cases of *Lund v. City of Fall River*, 714 F.3d 65 (1st Cir. 2013), and *McKibben v. Snohomish County*, 72 F. Supp. 3d 1190 (W.D. Wash. 2014).

2. The Washington Constitution does not require any different analysis on intermediate scrutiny.

In order to show the presence of a significant question of law under the Washington or federal constitutions, CAWA must demonstrate that some aspect of this topic is, in the first place, open to question. RAP 13.4(b)(3). As shown above, this is not true under federal precedent.

Lacking in CAWA's petition is any explanation of why the Washington Constitution requires any different test. Washington has

consistently affirmed *Renton*, which is the origin of the federal alternative avenues inquiry. *Renton*, 475 U.S. at 47; *Ino Ino*, 132 Wn.2d at 118 (citing *Renton* on intermediate scrutiny); *see also World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991) (citing *Renton* on alternative avenues of communication).

CAWA can hardly claim that there is a significant question as to whether the Washington Constitution's heightened protection of free speech has any applicability in the context of adult entertainment business regulations. The *Gunwall* analysis conducted in *World Wide Video of Washington*, 125 Wn. App. at 303-305, *review denied*, 155 Wn.2d 1014 (2005), is dispositive. In *World Wide Video of Washington*, the court drew heavily from *Ino Ino,* which, as noted above, is a faithful implementation of *Renton*. *World Wide Video of Washington*, 155 Wn. App. at 301-304 (citing *Ino Ino*, 132 Wn.2d at 114-115, for proposition that Washington follows federal standard for sexually oriented business regulations).

While it is true that the issue in *World Wide Video of Washington* related to retail sales of sexually explicit materials, CAWA's viewing rooms are no more a traditional public forum than an adult bookstore. In any event, adult entertainment does not require a different result. "In the context of adult entertainment, however, the court has declined to afford the full protection of art. 1, § 5, observing that nude dancing "'clings to the

edge of protected expression.'" *Ino Ino*, 132 Wn.2d at 117 (quoting *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 9, 891 P.2d 720 (1995)).

CAWA cannot seriously claim that adult entertainment businesses have traditionally been held in trust for the use of the public because of their historic role as sites for discussion and debate. *See McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014).

CAWA cannot apparently identify a *specific* significant question of law on this issue. Prior federal decisions under the United States Constitution, which have been followed by the Washington courts in applying the Washington Constitution, have closely examined the issue of reasonable alternative avenues of communication. There is no reason to grant review.

C. The Court of Appeals correctly found that the City's adult entertainment licensing regulations impose time, place, and manner restrictions, which are not a prior restraint.

CAWA has never disputed that the City's licensing regulations are content neutral. The Court of Appeals found that the "City engaged in a careful review" of materials documenting the existence of adverse secondary effects of adult businesses. Decision at 11. CAWA conceded that the legislative record extended to "secondary effects attributable to adult theaters." *Id.* at 19. CAWA had no evidence "to cast doubt on the City's rationale for the regulations." *Id.* at 12.

The Court of Appeals followed familiar precedent in holding that time, place, and manner restrictions "on adult entertainment are not prior restraints and do not merit the more rigorous analysis afforded under the Washington Constitution for pure speech in a traditional public forum." Decision at 18 (citing *Ino Ino*, 132 Wn.2d at 121).

In *Renton*, the Supreme Court began by noting that the challenged zoning ordinance was designed to generally protect and preserve the quality of urban life, "not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48. The Court deemed the restriction "content neutral." *Id.* at 49. Content neutral regulations are subject to intermediate scrutiny. *Id.* And, as shown above, the only part of intermediate scrutiny analysis that CAWA challenges is its discredited attack on the alternative avenues of communication prong. CAWA fails to show how its prior restraint argument raises a significant question of law for this Court's review.

1. The federal courts have integrated Justice Kennedy's concurrence in *Alameda Books* within the same jurisprudence that existed prior to his concurrence and which was correctly applied by the Court of Appeals.

CAWA implies the existence of an offshoot branch of first amendment law that extends the concept of prior restraints to any impairment, rather than the banning, of certain types of speech. Petition at 9-11. In support of this theory, CAWA refers to the concurring opinion of

Justice Kennedy in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 445 (2002). Petition at 12.

CAWA exaggerates the salience of Justice Kennedy's concurrence. CAWA implies that the concurrence supports a viable mode of analysis within prior restraint law. Later decisions have repudiated this idea. In this way, CAWA invites this Court to adopt a doctrine that may seem alluring to adult entertainment advocates but that is not otherwise open to serious debate. CAWA takes liberties with this Court by not explaining the subsequent history of Justice Kennedy's remarks.

In his concurrence in *Alameda Books*, Justice Kennedy wrote that "the central holding of *Renton* is sound: a zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Alameda Books*, 535 U.S. at 448. Justice Kennedy held this view because the "zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional." *Id.* at 449.

CAWA creates a straw argument out of Justice Kennedy's concurrence by claiming that the City's licensing code, which imposes configuration requirements on adult entertainment viewing areas, amounts to a prior restraint because it reduces the economic viability of certain kinds of adult entertainment establishments. Petition at 12. It is true that the

City's licensing code requires adult arcade stations to be limited to one occupant and open to view by management. SVMC §§ 5.10.080(C)(6) and (D)(3). And, to this extent, adult entertainment businesses that wish to locate in the City contrary to these requirements would be prohibited. But to claim, as CAWA does, that Justice Kennedy's concurrence therefore makes a prior restraint out of viewing room configuration requirements is misleading and wrong. Petition at 12.

To the contrary, the *Alameda Books* plurality explained that it considered Justice Kennedy's remarks as "simply a reformulation of the requirement that an ordinance ordinarily warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." *Alameda Books*, 535 U.S. at 443. Subsequent cases have confirmed that Justice Kennedy's concurrence relates to the evidentiary burden to show that the "primary motivation" behind the regulation was concerned with secondary effects of adult entertainment businesses, and not the speech value of the communication itself. *See, e.g., Tollis, Inc. v. County of San Diego*, 505 F.3d 935, 940 (9th Cir. 2007), *cert. denied*, 553 U.S. 1066 (2008) (Justice Kennedy's concurrence relates to predominate concern of regulation and did not require inquiry into "how speech would fare"); *Fantasyland Video*, 373 F. Supp. 2d at 1105, 1106 (concurrence addressed level of evidence to

support content-neutral regulations, and burden to "cast direct doubt" on government's rationale remained "very high").

The Ninth Circuit has expressly held that Justice Kennedy's comment on the "quantity of speech," and the proportional reduction of speech commensurate with a regulation's effects, was never intended as a "sea change in this particular corner of First Amendment law" and is inconsistent with "the weight of authority in the wake of that decision." *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1162-1163 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004).

Even more definitive, and flatly rebutting CAWA's suggestion that this is an unsettled area of the law, is the holding in *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007): "We now hold that Justice Kennedy's concurrence is also inapplicable to an open-booth requirement." In *Fantasyland Video*, the Ninth Circuit acknowledged the argument that such configuration requirements would make the "forum for the speech less attractive" and that the "overall quantity of the protected expression must be reduced" but responded that Justice Kennedy's "proportionality language was not designed for situations where the protected speech and the unprotected conduct merge in the same forum." *Fantasyland Video*, 505 F.3d at 1005.

CAWA cannot dispute the presence of unprotected and unlawful conduct, both as a matter of the legislative record and as a matter of the City's practical experience with the Hollywood Erotic Boutique. Decision at 1, 11. CAWA conceded that the City possessed suitable evidence of that conduct in its legislative record as to arcades, mini-theaters, and adult theaters. Decision at 12, 19. In a startling passage from the briefing below, given this state of the law, CAWA argued that "[t]his Court can and should adopt Justice Kennedy's position in *Alameda Books*." Reply Br. at 18. CAWA's reliance on Justice Kennedy's concurrence is misplaced, both as to the merits and as a basis for its petition for review.

2. The economic effect of adult entertainment business regulations does not convert a content neutral regulation into a prior restraint.

CAWA's argument that the City's licensing code is an effective ban on a form of expression is a veiled attempt to resurrect Justice Kennedy's concurrence -- which is now marginalized in federal decisions -- and graft it onto Washington law.

This Court may deny the petition without even the need to re-trace the steps of the federal courts. This Court has already considered and rejected the initial premise of CAWA. Viewing area configuration requirements are certainly constitutional. *World Wide Video v. City of Tukwila*, 117 Wn.2d at 392. This has been Washington's position for

decades. *Bitts, Inc. v. City of Seattle*, 86 Wn.2d 395, 399, 544 P.2d 1242 (1976) (configuration ordinances "do not attempt to regulate what is shown" and are not "any form of restraint"). The Court of Appeals correctly relied upon *World Wide Video v. Tukwila.* Decision at 10.

CAWA's ban argument claims that the regulations may have the effect of making certain venues unprofitable, perhaps including CAWA's viewing rooms. CAWA insists that the resulting closure of businesses that cannot meet the City's configuration requirements is tantamount to a ban on a form of expression and a prior restraint. This argument was foreclosed as far back as *Renton.* "The inquiry for First Amendment purposes is not concerned with economic impact." *Renton*, 475 U.S. at 54.

The challenged configuration regulations do not literally prevent adult mini-theaters and adult theaters from operating in the City. Instead, the configurations necessitated by the regulations may affect the viability of some forms of adult entertainment businesses. This is not the same as prohibiting the right to disseminate and receive protected speech contrary to the First Amendment. Economic impact is not a constitutionally relevant test for viewing area configuration regulations. Such regulations do "not limit what movies can be shown" and are not an "absolute bar to the market" even if they may "prove to be commercially unfeasible for an adult business." *Fantasyland Video*, 373 F. Supp. 2d at 1113-1114 (even though

most customers may disfavor viewing sexually oriented films in an open setting, this is not relevant where reduction of speech is not the premise for the regulation); *see also Ino Ino*, 132 Wn.2d at 139 (inquiry is not concerned with economic impact).

3. The City's licensing regulations are not directed at any erotic message conveyed by the speech associated with adult entertainment.

Another subtle way in which CAWA conflates a constitutionally-prohibited complete ban with the City's time, place, and manner regulations is to imply that a particular configuration of an adult entertainment business is itself the free speech at issue. Petition at 12. But on this core premise -- CAWA's assertion that adult movie theaters constitute a unique form of speech -- CAWA has no supporting citation to authority.

In reality, the *medium* of expression is film and/or digital images, and the *content* is non-obscene pornography. This medium of expression and this content are available within the City. They are only subject to appropriate time, place, and manner restrictions.

Sexually oriented film outlets are not only available to those who would produce and disseminate them but are also available to those who would view them – except not in a manner that violates the time, place, and manner restrictions justified by the City's legitimate motive to suppress adverse secondary effects.

CAWA's claim arises from arguments raised in previous cases and exposed as fallacious. Under this theory a so-called First Amendment "right" to protected expressive activity is artificially defined to include the contested restriction itself. *See Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005), *cert. denied*, 546 U.S. 871 (2005) (noting that "virtually no ordinance would survive this analysis"). For example, the expressive activity of adult erotic dancing does not suffer any unconstitutional invasion simply because a distance limitation restricts "proximate [table] dancing" even if the latter is "completely banned." *Gammoh*, 395 F.3d at 1123. This is true even though "if the dancers' expressive activity is considered 'erotic dance within two feet of patrons' and not merely 'erotic dance,' this activity is completely banned." *Id.* The main point is that a limitation on the manner of conveying the protected expression is not a ban on the ability to engage in the expression and, particularly, to convey its erotic message or content. *Id.* Similarly, there is no constitutional infirmity with limiting pornography viewing to open booths because the producer may still show any film he or she wishes and the patron may still view the films. *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1247 (9th Cir. 1982).

The key is that a viewer has no "'right' to unobserved masturbation in a public theater," which may be properly addressed by time, place, and manner restrictions. *Ellwest Stereo Theatres*, 681 F.2d at 1248.

Here, both the distributors and the audience for adult-oriented films are unaffected by any content restrictions whatsoever. As the Court of Appeals repeatedly noted, CAWA has never cast doubt on the City's motivation in adopting the configuration regulations. *See* Decision at 11 ("CA-WA presents no evidence that would call [the City's] motivation into doubt"); and at 12 ("CA-WA has not presented evidence to cast doubt on the City's rationale for the regulations."). Under orthodox First Amendment law of adult entertainment businesses, this is the pivotal issue. *See World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1196 (9th Cir. 2004) ("failure to cast doubt on Spokane's justification...dooms World Wide's challenge.").

The City's regulations are not a complete ban on any form of expression. The Court of Appeals correctly found that the City's regulations do not interfere "with the communication of the erotic message." Decision at 17.

D. There is no issue of substantial public interest that should be determined by this Court.

The jurisprudence of secondary effects and adult entertainment regulations has long been treated as a special category of First Amendment

content-neutrality law. The caselaw is a thicket of confusing holdings that must be applied to evolving forms of media and consumer preferences for erotic speech content. But the key cases have remained remarkably stable since *Renton.*

The present case addresses the manner in which the City used its lawful zoning and licensing authority based on its concern with tangible non-speech consequences of adult entertainment businesses, such as criminal conduct, litter, and public health. This is the basic premise of the secondary effects doctrine. As Justice Kennedy put it, these considerations -- if they indeed are the focus of the regulation, as the Court of Appeals found here -- operate independently of any suppression of expression. *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).

The Court of Appeals found that the City's regulations were time, place, and manner restrictions in the form of "reasonable safeguards...to prevent lewd conduct from occurring within the viewing area." Decision at 17.

The decision's effect is intrinsically limited to this case. The regulations at issue are local. The City's jurisdiction is local. CAWA claims, rightly, that its combination of erotic merchandise sales and mini-theaters is the only such business in the City. Petition at 5. The legislative record of the City drew from local experience. The inventory of suitable

land for CAWA's effort to relocate its business in compliance with the City's zoning code is unique to the City. No other adult retail or adult entertainment business in the City is affected by the Court of Appeals decision. The information and ideas that CAWA wishes to convey will still be provided a constitutionally sufficient outlet.

The Court of Appeals' unpublished decision literally has no precedential effect. RAP 10.4(h). And even if it did, it would have little impact on Washington law because it simply restates existing Washington law. All the issues decided by the Court of Appeals are founded on established First Amendment doctrine.

With no developed explanation CAWA claims that "Cities and Counties throughout the State will consider the Court of Appeals decision and possibly follow it." Petition at 19. This speculative assertion is not good reason for this Court to revisit the free speech doctrines meticulously briefed, argued, and resolved by the Court of Appeals.

Grounds for review under RAP 13.4(b)(4) are absent.

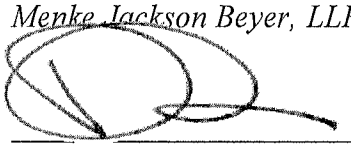
VII. CONCLUSION

The Court of Appeals, like the trial court before it, applied complex but longstanding legal principles to an undisputed factual record. This Court declined to accept direct review initially and CAWA has not shown how any of the standards of RAP 13.4(b) are met now. CAWA has

repeatedly but unsuccessfully probed every nook in free speech law in its attempt to find the City's regulations unconstitutional. Further review is not warranted.

RESPECTFULLY SUBMITTED this 18th day of February, 2016.

Menke Jackson Beyer, LLP

By: 

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COMES NOW Kathy S. Lyczewski, being first duly sworn on oath, and deposes and says:

That she is employed as a legal assistant by Menke Jackson Beyer, LLP, and makes this affidavit in that capacity.

I hereby certify that on the 18TH day of February, 2016, a copy of the foregoing was delivered to the following in the manner indicated:

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DATED THIS 19TH day of February, 2016.

Kathy S Lyczewski
KATHY S. LYCZEWSKI

Signed and sworn to before me this 18TH day of February, 2016.

Julie K Linn
Notary public in and for the State of Washington, residing at YAKIMA.
My appointment expires: 09/15/2018.

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Subject: Supreme Court Case No. 92688-3 - City of Spokane Valley v. Brian Dirks, et ux., et al.

Dear Clerk of the Court: Attached for filing is Answer to Petition for Review in the above-entitled matter.

Please contact the undersigned if you have questions about this email or its attachment.

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