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STATE OF WASHINGTON

No. _____

Court of Appeals No. 35883-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner,

Amicus Curiae Memorandum of City of Seattle and Association of
Washington Cities in Support of Petition to Review

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I. INTRODUCTION

The City of Seattle and the Association of Washington Cities submit this brief in support of the Department of Revenue's petition for review of *G-P Gypsum v. State of Washington, Department of Revenue*, ___ Wn. App. ___, 183 P.3d 1109 (2008).

II. IDENTIFICATION AND INTEREST OF AMICUS CURIAE

The City of Seattle is a first class Washington city and the largest city in the state. The Association of Washington Cities ("AWC") is a non-profit corporation representing the cities and towns in the State of Washington before the state legislature, the state executive branch and legislative agencies.¹ AWC consistently maintains 100% membership from the state's 281 cities and towns. The City of Seattle and approximately 45 other cities currently impose the local natural gas use tax at issue in this case.² See SMC 5.68.010. Each of these 46 cities also imposes a local utility tax on natural gas utilities at the same rate as the local natural gas use tax. RCW 82.14.230 (2).

¹ AWC's web page is at www.awcnet.org.

² Washington State Department of Revenue, *Tax Reference Manual, Information on State and Local Taxes in Washington State*, 92-94 (January 2007) (available at http://dor.wa.gov/docs/reports/2007/Tax_Reference_2007/Tax_Reference_2007.pdf).

The court of appeals' decision deprived Tacoma of its ability to collect the local natural gas use tax from Gypsum and will, contrary to the intent of the legislature, effectively deprive other Washington cities of the revenue from the tax.

III. ISSUES ADDRESSED BY AMICUS CURIAE

Can a taxpayer that burns natural gas within Tacoma avoid the local natural gas use tax by claiming that it first uses the gas outside Tacoma because it contracts to purchase the gas outside the city?

IV. ARGUMENT

A. The Decision Below Involves An Issue of Substantial Public Interest That Should Be Determined By The Supreme Court.

The legislature enacted the local natural gas use tax under RCW 82.14.230 to replace the significant utility tax revenues that cities lost as a result of the federal deregulation of the interstate natural gas market. The legislature stated:

Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities and provide equality of taxation between intrastate and interstate transactions.

Laws of 1989, ch. 384, §1. The court of appeals' decision deprived Tacoma of this significant revenue source and will have a similar effect on Seattle and other Washington cities.

As acknowledged by the legislature, the revenues that cities receive from the local natural gas use tax are significant. The City of Seattle expects to receive more than \$2.8 million from this tax in 2008 and, as shown in this table, has received similar amounts in prior years:³

Year	Local Natural Gas Use Tax Revenue
2008 (projected)	\$2,818,000
2007	\$2,787,000
2006	\$2,799,000
2005	\$2,767,000

Thus, from 2005 through 2008, the City of Seattle will have received more than \$10 million from the local natural gas use tax.

The other cities in Washington that impose the local natural gas use tax also receive significant revenue from the tax. As stated by the Department of Revenue, forty-six Washington cities (including Seattle) received over \$10 million from the tax in 2006 and, as shown in the following table, significant amounts in the preceding years:⁴

³See City of Seattle's 2008 Adopted Budget, p. 629, City of Seattle's 2007 Adopted Budget, p. 657, attached as Appendix 1. City of Seattle's 2008 budget available at: <http://www.seattle.gov/financedepartment/08adoptedbudget/default.htm>. City of Seattle's 2007 budget available at: http://www.seattle.gov/financedepartment/0708adoptedbudget/Entire_2007_Adopted_&_2008_Endorsed_Budget.pdf.

⁴ Washington State Department of Revenue, Tax Reference Manual, Information on State and Local Taxes in Washington State, 92-94 (January 2007) (available at http://dor.wa.gov/docs/reports/2007/Tax_Reference_2007/Tax_Reference_2007.pdf).

Year	Local Natural Gas Use Tax Revenue
2006	\$10,845,000
2005	\$8,510,000
2004	\$6,614,000
2003	\$7,370,000
2002	\$4,604,000

Thus, from 2002 through 2006, the Washington cities that impose the local natural gas use tax collected about \$38 million from the tax.

Losing this revenue will affect cities differently, depending on the size of the city and the amount of the tax revenue in relation to the city's other revenue. A list of the cities affected and the lost revenue is attached as Appendix 2.⁵ Several small to mid-sized cities will be especially hard-hit. For example, the city of Othello collected \$795,018 from the local natural gas use tax in 2006 (18.3% of its operating revenue). Similarly, in 2006, the city of Pullman collected \$556,368 (3.6% of its operating revenue); the City of Tukwila collected \$415,652, and the city of Sunnyside collected \$100,719. The court of appeals' decision will result in depriving these cities of much of this revenue in future years. In

⁵ The data is taken from the Office of the Washington State Auditor's Local Government Reporting System; at <http://www.sao.wa.gov/applications/lgrfrs/>.

addition to lost future revenues, these cities will face tens of millions of dollars in refund requests going back to 2004 by other companies that had purchase contracts similar to Gypsum. In fact, the present case arises from a refund request. The refund requests will create severe hardships for dozens of cities because the cities have already spent the tax revenue.

The evidence presented to the trial court showed that natural gas is delivered through an extensive pipeline system with a major hub located outside Sumas, Washington. RP 20, CP 85, ¶ 5. According to the court of appeals' decision, Gypsum was able to avoid paying the tax by entering into an agreement with the seller to assume ownership of the gas near Sumas. Other natural gas purchasers who do not already have the same arrangement as Gypsum will be able to avoid the tax simply by altering their purchase documents. The nature of the natural gas delivery system that uses extensive pipeline systems owned by public utilities and hubs located outside cities will allow purchasers to avoid the tax without changing the manner in which the gas is transported and consumed. The legislature did not intend to create a tax that could be avoided by taxpayers merely agreeing that title transfers outside a city. This case presents a matter of substantial public importance because it will result in tens of millions of dollars of lost revenue and tax refunds requests unless the Supreme Court accepts review and corrects the court of appeals' decision.

B. The Supreme Court Should Accept Review Under RAP 13.4(b)(1) Because The Decision Below Conflicts With Decisions Of The Supreme Court.

The court of appeals failed to follow Supreme Court decisions that require courts to consider legislative intent and a statute's context when determining a statute's plain meaning. In *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002), the Court held that when determining the plain meaning of a statute a court must:

consider legislative purposes or policies appearing on the face of the statute as part of the statute's context. In addition, background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute. Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because the legislators enact legislation in light of existing statutes.

Campbell & Gwinn, 146 Wn.2d at 11 (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809-10 (6th ed.2000)).

In fact, the Court in *Campbell & Gwinn* specifically rejected the *Gypsum* court's holding that a court should consider statutory context or legislative intent only if the statute is ambiguous. *Campbell & Gwinn*, 146 Wn.2d at 10. The court in *Campbell & Gwinn* compared the two approaches and held that a court should consider legislative intent and context to determine the plain meaning of a statute:

Under this second approach, the plain meaning is still derived from what the Legislature has said in its

enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent.

Campbell & Gwinn, 146 Wn.2d at 11-12.

The court of appeals in *Gypsum* failed to follow *Campbell & Gwinn* and mischaracterized the Department of Revenue's arguments as calling for statutory interpretation based on extrinsic sources:

The Department sets out in some detail the legislature's intent in creating the tax—to replace the local utility tax revenue cities collected from local distributors who sold to consumers like Gypsum. But we do not resort to extrinsic sources in interpreting a statute unless we find more than one reasonable interpretation of the statutory language. . . The Department essentially asks us to craft a rule defining "use" to meet the legislature's intent in passing chapter 82.14 RCW. And this we cannot do.

Gypsum, 183 P.3d at 1112.

The court in *Gypsum* erred in failing to consider the legislature's stated intent at Laws of 1989, ch. 384, §1 and the related statutory language, which show that "use" of natural gas occurs when the taxpayer consumes the gas. In *Gypsum*, the court reasons that the definition of "use" is "the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property" because "the statute specifically defines 'use'" as such.

Gypsum, 183 P.3d at 1113. The court failed to recognize that in the very

same provision of RCW 82.12.010 the legislature used the mandatory language “shall” to give “use” its “ordinary meaning.” RCW 82.12.010(5). The ordinary meaning of “use” is “to expend or consume.” Webster’s New Collegiate Dictionary, p. 1299 (9th ed. 1989).

This understanding of the ordinary meaning of “use” as “consume” within the context of a natural gas use tax is consistent with other language in the statute authorizing the tax: RCW 82.12.022 declares that “there shall be a credit against the tax levied under this section . . . by . . . [t]he person consuming the gas upon which a use tax similar to the tax imposed by this section was paid” RCW 82.12.022(6)(b). Thus, in the chapter delineating the provisions of the natural gas use tax the legislature used “consume” interchangeably with “use.”

In addition, the statute further mandates that the “meaning ascribed to words and phrases in . . . 82.12 RCW . . . *insofar as applicable* . . . shall have full force and effect with respect to taxes imposed under authority of this chapter.” RCW 82.14.020(2) (emphasis added). This language indicates that courts must look to the legislative intent to determine whether a particular definition is applicable to the local natural gas use tax. The legislature’s statement of intent and the overall statutory scheme of the local natural gas use tax establishes that the taxable incident is the consumption of natural gas within a city, regardless of where the

purchaser takes title to the gas.

C. The Decision Below Is Not Supported By The Evidence Because Gypsum Did Not Take Dominion And Control Of The Natural Gas Until Gypsum Consumed The Gas In Tacoma.

The evidence presented at trial does not support the trial court's conclusion that Gypsum took dominion and control outside Tacoma.⁶ CP 175, ¶ 15. The parties did not stipulate to this. CP 83-87. Gypsum purchased only the right to receive a certain quantity of gas at the large distribution hub near Sumas and did not purchase specific, identifiable gas particles. RP 20; CP 85, ¶¶ 9-11. The natural gas that Gypsum consumed was a fungible product commingled with other users' gas

Gypsum paid Northwest Pipeline, a gas distribution business under RCW 82.16.010, to transport the gas to Sumner and Puget Sound Energy then transported the gas from Sumner to Gypsum's Tacoma plant. CP 85, ¶¶ 7, 8; CP 86, ¶ 22; RP 32.⁷ The gas was in the possession and control of Northwest Pipeline and Puget Sound Energy while being transported to Tacoma and was commingled with gas to be consumed by other customers. Gypsum never assumed dominion and control over the gas it

⁶ *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (court determines if the trial court's findings of fact were supported by substantial evidence in the record and, if so, whether those findings of fact support the trial court's conclusions of law).

⁷ This is a classic bailment. See *American Tug Boat Co. v. Washington Toll Bridge*, 48 Wn.2d 117, 121, 291 P.2d 668 (1955).

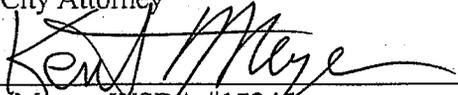
consumed until the gas was removed from Puget Sound Energy's pipeline and burned at Gypsum's Tacoma factory. The lower courts incorrectly concluded that Gypsum took dominion and control outside Tacoma.

V. CONCLUSION

The Court should grant the Department of Revenue's petition for review. This case presents issues of substantial public interest because Washington cities rely on the local natural gas use tax as a significant source of revenue. This Court should accept review to correct the decision below that will deprive Washington cities of the ability to impose tax.

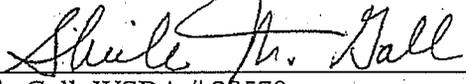
DATED this 18 day of August, 2008.

THOMAS A. CARR
Seattle City Attorney

By: 
Kent C. Meyer, WSBA #17245
Attorneys for City of Seattle

DATED this 18 day of August, 2008.

ASSOCIATION OF WASHINGTON CITIES

By: 
Sheila Gall, WSBA # 28570
General Counsel for AWC

CERTIFICATE OF SERVICE

I, certify that on this date I caused a copy of Amicus Brief of the City of Seattle and the Association of Washington Cities to be filed with the court and served by U.S. Mail on:

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Signed at Seattle, Washington, this 18 day of August, 2008.



Marisa Johnson

Appendix 1

[Excerpts from City of Seattle Budgets, 2007, 2008]

CITY OF
Seattle, Washington

2008 Adopted Budget

Ordinance 122560



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General Subfund

Department Description

The General Subfund of the City's General Fund is the primary operating fund of the City. Appropriations and expenses for many of the services most commonly associated with the City, such as police and fire, are accounted for in the General Subfund. The Subfund is supported primarily by property, sales, business and utility taxes.

The City's financial policies do not require a fund balance to be maintained in the General Subfund. Instead, the City reserves resources for unanticipated expenses or revenue shortfalls associated with general government in the Emergency Subfund of the General Fund and in the Revenue Stabilization Account of the Cumulative Reserve Subfund. As a result of this practice, General Subfund balances usually are spent in their entirety either in the current or next fiscal years.

General Subfund

General Subfund Revenue – In \$1,000s

Summit Code	Revenue	2005 Actuals	2006 Adopted	2006 Revised	2007 Adopted	2008 Endorsed
411100	Property Tax	183,497	187,854	187,883	194,918	199,452
411100	Property Tax-Medic One Levy	20,109	20,545	20,669	21,185	21,856
413100	Retail Sales Tax	131,011	131,461	140,143	147,805	154,558
413600	Use Tax - Brokered Natural Gas	2,767	1,950	3,200	2,944	2,818
413700	Retail Sales Tax - Criminal Justice	12,282	12,664	13,138	13,856	14,490
416100	Business & Occupation Tax (90%)	130,471	133,645	143,886	150,582	158,932
416200	Admission Tax	6,664	6,449	7,214	7,201	7,399
416300	Street Use Franchise Fees	-	125	-	-	-
416430	Utilities Business Tax - Natural Gas (90%)	9,353	9,331	11,096	12,036	11,521
416450	Utilities Business Tax - Solid Waste (90%)	1,129	1,071	1,199	1,229	1,260
416460	Utilities Business Tax - Cable Television (90%)	9,819	10,521	11,622	10,920	11,220
416470	Utilities Business Tax - Telephone (90%)	26,591	26,000	26,856	26,035	25,733
416480	Utilities Business Tax - Steam (90%)	819	940	1,122	1,032	1,011
418200	Leasehold Excise Tax	3,794	3,800	3,900	3,900	3,900
418500	Gambling Tax	21	100	25	25	25
418550	Gambling Tax - Punchboards & Pulltabs	861	1,000	900	900	900
418600	Pleasure Boat Tax	175	170	170	170	170
	Total External Taxes	539,363	547,626	573,023	594,739	615,246
516410	Utilities Business Tax - City Light(90%)	30,340	32,181	31,373	29,617	30,188
516420	Utilities Business Tax - City Water (90%)	12,783	13,383	15,473	15,514	16,346
516440	Utilities Business Tax - Drainage/Waste Water (90%)	18,071	19,492	19,757	21,291	22,031
516450	Utilities Business Tax - City SWU (90%)	7,088	7,422	7,591	8,264	8,813
	Total Interfund Taxes	68,283	72,477	74,194	74,686	77,378
421600	Professional & Occupational Licenses (90%)	1,570	1,550	1,570	810	545
421790	Amusement Licenses (90%)	117	110	110	110	110
421920	Business License Fees (90%)	5,124	4,500	4,500	4,500	4,500
422180	Utility Permit Fees	-	104	-	-	-
422190	Emergency Alarm Fees	3,488	1,836	1,836	2,401	2,365
422300	Animal Licenses (90%)	913	1,045	1,045	910	910
422450	Vehicle Overload Permits	230	122	122	120	124
422490	Street Use Permits	528	288	450	450	464
422920	Fire Permits	3,296	3,074	3,304	3,339	3,339
422940	Meter Hood Service	1,190	993	1,000	1,000	1,030
422990	Gun Permits and Other	14	17	17	18	18
422990	Other Non Business Licenses	25	26	26	26	26
	Total Licenses	16,493	13,664	13,979	13,684	13,430

2007 Adopted and 2008 Endorsed Budget

CITY OF
Seattle, Washington

2007 Adopted and 2008 Endorsed Budget

Ordinance 122298



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General Subfund

Department Description

The General Subfund of the City's General Fund is the primary operating fund of the City. Appropriations and expenses for many of the services most commonly associated with the City, such as police and fire, are accounted for in the General Subfund. The Subfund is supported primarily by property, sales, business and utility taxes.

The City's financial policies do not require a fund balance to be maintained in the General Subfund. Instead, the City reserves resources for unanticipated expenses or revenue shortfalls associated with general government in the Emergency Subfund of the General Fund and in the Revenue Stabilization Account of the Cumulative Reserve Subfund. As a result of this practice, General Subfund balances usually are spent in their entirety either in the current or next fiscal years.

General Subfund

General Subfund Revenue – In \$1,000s

Summit Code	Revenue	2006 Actuals	2007 Adopted	2007 Revised	2008 Endorsed	2008 Adopted
411100	Property Tax	188,884	194,918	196,035	199,452	200,685
411100	Property Tax-Medic One Levy	20,814	21,185	21,508	21,856	33,793
413100	Retail Sales Tax	139,391	147,805	152,196	154,558	157,951
413600	Use Tax - Brokered Natural Gas	2,799	2,944	2,787	2,818	2,818
413700	Retail Sales Tax - Criminal Justice	13,121	13,856	14,347	14,490	14,868
416100	Business & Occupation Tax (90%)	147,593	150,582	156,646	158,932	144,732
416101	Business & Occupation Square Footage Tax (90%)	-	-	-	-	16,738
416200	Admission Tax	7,003	7,201	7,183	7,399	7,097
416430	Utilities Business Tax - Natural Gas (90%)	11,054	12,036	11,961	11,521	11,250
416450	Utilities Business Tax - Solid Waste (90%)	1,162	1,229	900	1,260	900
416460	Utilities Business Tax - Cable Television (90%)	11,700	10,920	11,940	11,220	11,990
416470	Utilities Business Tax - Telephone (90%)	28,746	26,035	29,010	25,733	27,590
416480	Utilities Business Tax - Steam (90%)	1,134	1,032	1,326	1,011	1,194
418200	Leasehold Excise Tax	4,086	3,900	4,300	3,900	4,300
418500	Gambling Tax	15	25	15	25	15
418550	Gambling Tax - Punchboards & Pulltabs	681	900	650	900	650
418600	Pleasure Boat Tax	175	170	183	170	175
	Total External Taxes	578,356	594,739	610,986	615,246	636,747
516410	Utilities Business Tax - City Light (90%)	31,404	29,617	31,203	30,188	30,231
516420	Utilities Business Tax - City Water (90%)	16,117	15,514	17,124	16,346	17,103
516440	Utilities Business Tax - Drainage/Waste Water (90%)	19,727	21,291	21,349	22,031	23,352
516450	Utilities Business Tax - City SWU (90%)	7,535	8,264	8,254	8,813	8,980
	Total Interfund Taxes	74,782	74,686	77,930	77,378	79,666
421600	Professional & Occupational Licenses (90%)	1,497	810	1,495	545	495
421790	Amusement Licenses (90%)	101	110	100	110	100
421920	Business License Fees (90%)	4,455	4,500	4,500	4,500	4,500
422190	Emergency Alarm Fees	1,539	2,401	3,401	2,365	2,365
422300	Animal Licenses (90%)	900	910	910	910	910
422450	Vehicle Overload Permits	227	120	200	124	200
422490	Street Use Permits	546	450	500	464	500
422920	Fire Permits	3,354	3,339	3,339	3,339	3,339
422940	Meter Hood Service	1,275	1,000	1,100	1,030	1,100
422990	Gun Permits and Other	20	18	20	18	20
422990	Other Non Business Licenses	33	26	26	26	26
	Total Licenses	13,946	13,684	15,591	13,430	13,555

2008 Adopted Budget

Appendix 2

[Brokered Natural Gas Use Tax for Washington Cities 2002-2006]¹

¹ Source: Washington State Auditor, Local Government Reporting System; at <http://www.sao.wa.gov/applications/lgrfs/>.

Report Menu Selection Criteria View as Excel Search
By Dollars By % of Total By % Annual Change By % Cumulative Change
Per Capita Population

By Dollars Report

Functional Group/BARS by Entity Revenues for All Cities All Available Fund Types

Brokered Natural Gas Use Tax		2002	2003	2004	2005	2006
Brokered Natural Gas Use Tax	Algona	--	12,772	14,941	10,678	19,981
	Auburn	242,432	158,197	180,902	222,062	380,170
	Bellingham	581,081	507,015	463,929	438,291	596,733
	Burlington	--	--	--	2,141	26,760
	Centralia	--	14,504	3,050	31,176	35,855
	Chehalis	57,175	N/F	15,175	13,488	N/F
	Cheney	49,177	80,980	104,852	187,670	287,111
	College Place	--	--	--	14,677	21,746
	Connell	129,182	205,505	237,711	172,432	177,297
	Edmonds	--	8,936	9,583	9,092	19,121
	Everett	543,916	749,895	857,993	989,826	1,197,394
	Federal Way	1,515	--	--	--	--
	Ferndale	7,316	8,609	10,674	6,671	9,779
	Grandview	70,546	103,138	117,630	118,466	61,840
	Kent	214,656	173,650	210,371	259,574	326,615
	Kirkland	16,385	15,715	1,523	--	--
	Marysville	8,000	10,170	11,833	12,858	4,129
	Medical Lake	39,323	29,176	29,579	45,344	55,542
	Millwood	58,590	65,228	68,531	81,094	87,471
	Mount Vernon	16,139	21,344	24,972	31,750	40,857
	Mukilteo	8,755	3,162	2,463	N/F	N/F
	Olympia	22,257	34,336	38,223	39,662	45,974
	Othello	260,488	186,201	245,130	363,039	795,018
	Pullman	193,783	94,023	299,153	398,068	556,368
	Puyallup	-37,809	3,033	3,991	3,277	19,725
	Redmond	29,684	52,089	49,186	59,012	51,849
	Renton	258,780	158,374	249,561	169,378	365,078
	Seattle	1,086,994	1,687,410	1,834,234	2,767,079	2,799,079
	Selah	1,411	1,411	857	1,411	1,411
	Spokane	134,916	143,545	188,502	231,281	339,654
	Stanwood	5,717	7,350	8,294	9,165	15,074
	Sumner	2,682	24,965	17,378	21,220	29,473
	Sunnyside	122,358	70,553	N/F	--	100,719
	Tacoma	581,017	537,422	510,874	670,800	1,119,635

	Tukwila	--	--	29,667	381,706	415,652
	Tumwater	73,205	74,142	15,195	20,254	18,954
	Union Gap	19,182	16,926	19,524	N/F	25,747
	Vancouver	836,955	812,557	876,208	1,046,961	990,600
	Walla Walla	20,726	39,950	16,923	43,775	56,026
	Warden	13,161	10,995	11,760	35,280	23,520
	Washougal	24,034	19,035	2,104	--	--
	Woodland	8,897	15,925	16,831	21,671	31,386
	Sub-Total	5,702,626	6,158,238	6,799,307	8,930,329	11,149,343
	Grand Total	5,702,626	6,158,238	6,799,307	8,930,329	11,149,343

This report may include partial data. Click [here](#) for more information.
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