F069302

In the Court of Appeal of the State of California
Fifth Appellate District

Stand Up for California and Barbara Leach,

Plaintiffs and Appellants,

v.

State of California, *et al.*

Defendants and Respondents.

Madera County Superior Court
Case No. MCV062850
Honorable Michael J. Jurkovich

Appellants' Supplemental Brief

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Appellants Stand Up for California and Barbara Leach hereby file this supplemental brief as requested by this Court and answer its questions as follows:

(1) Did the failure of the 305-acre parcel to be "Indian lands" prior to the time the Governor negotiated and executed the compact deprive him of the authority to *negotiate and execute the compact* when he did?

Yes. The Governor lacks authority under California law to negotiate and conclude compacts for gaming on non-Indian lands. Accordingly, for the court's questions 2-5 that follow, because the Governor cannot negotiate compacts where a tribe lacks jurisdiction over Indian lands on which such gaming will occur, the Governor has no express or implied authority to concur in the Secretary's two-part determination pursuant to the California Constitution.

Article IV, section 19, subdivision (f), of the California Constitution ("Section 19(f)") authorizes the Governor to "negotiate and conclude compacts" for class III gaming "on Indian lands in California in accordance with federal law." As this court notes, at the time the Governor negotiated the compact with the North Fork Tribe for class III gaming at the Madera site, the Madera site did not qualify as Indian lands. It cannot be disputed that at that time, the Madera site was non-Indian land ineligible for either class II or class III gaming under IGRA.

The Governor attempts to dodge this fact, however, by arguing that the Constitution's use of the phrase "Indian lands in California in accordance with federal law" provides unambiguous authority for the State to compact on any Indian lands created in accordance with federal law. [State Resp. Brief, pp. 18-19.] The Governor continues:

> Moreover, nothing in article IV, section 19, subdivision (f) limits 'Indian lands' to only those tribal lands that existed at the time of Proposition 1A's adoption by the voters. Nor does the constitutional provision's language prohibit new lands from being taken into trust for gaming by the Secretary under IGRA. [State Resp. Brief, p. 19.]

This statement ignores that Section 19(f) does in fact limit its application to Indian lands. But the Governor nonetheless reasons that because IGRA provides exceptions for the creation of new lands eligible for gaming, the phrase "in accordance with federal law" incorporates those exceptions into the Constitution, even before the requirements have been met. Thus the Governor asserts that under Section 19(f) "Indian lands in California" include future or potential lands that may be authorized for gaming under federal law, but where so such authorization has yet occurred.

This assertion ignores the clear language of Section 19(f), the operative verbs of which are "negotiate" and "conclude." These verbs constitute the maximum extent of the Governor's express powers, and these two verbs are limited by the

requirement that they be undertaken "in accordance with federal law." This federal law limitation on negotiating and concluding compacts comprehends only IGRA's definition of Indian land and the provisions related to negotiating compacts.

There is no basis for interpreting the phrase "in accordance with federal law" as expanding the Governor's powers beyond negotiating and concluding compacts for gaming on Indian lands to include provisions of IGRA other than the ones expressly incorporated into Section 19(f) through the terms "negotiate" and "Indian lands"[1] *See Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (stating that under principle of statutory construction *expression unius est exclusion alterius*, "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed"). Contrary to the Governor's assertions, the phrase "in accordance with federal law" cannot authorize negotiating and concluding compacts where a tribe lacks jurisdiction over Indian lands simply because the Secretary is authorized to acquire new land for a tribe and under certain circumstances authorize gaming on newly acquired land.

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[1] As Appellants have already pointed out, the existence of Indian lands eligible for gaming is the *precondition* to the Governor's authority under Section 19(f) and that Section does not purport to give the Governor any authority to create that precondition Cf. *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617, 630 (holding that the "power to construct and operate" an emergency communications system or service was the "precondition," not the result, of the "statutory power to issue bonds for that purpose").

IGRA defines Indian lands as "any lands title to which *is* . . . held in trust for the benefit of any Indian tribe . . ." 25 U.S.C. § 2703(4)(B) (emphasis added). Under the plain meaning of the statute, the Madera site was not Indian land under federal law at the time the Governor negotiated the compact because it was not held in trust at that time. Thus negotiating and concluding a compact for gaming on such lands was not "in accordance with federal law." Indeed, the Ninth Circuit Court of Appeals, construing a similar definition of Indian lands in 25 U.S.C. § 81, held the definition of Indian lands includes only those lands *presently* held in in trust and not future or potential trust lands. *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd*. (9th Cir. 2008) 531 F.3d 767, 775. While in *Guidiville*, the court addressed Section 81, it reached its conclusion by analogizing to IGRA sections 2719(b)(1)(A), 2710(d)(3)(A), and 2710(d)(7), holding specifically that IGRA's compacting provisions require land to be presently held in trust at the time compacts are negotiated.[2] *Id*., at 778.

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[2] The Second Circuit Court of Appeals reached a different conclusion in *Catskill Development, L.L.C. v. Park Place Entertainment Corp*. (2008) 547 F.3d 115. There the Court held that the National Indian Gaming Commission ("NIGC") did not lack the authority to approve a management contract for gaming on Indian lands because the tribe did not have Indian land at the time of the approval. The Court reasoned that NIGC's authority to approve management contracts under IGRA did not "hinge on whether the contract relates to Indian lands." *Id.* at 125. Relying on the Dictionary Act, 1 U.S.C. § 1, the court further stated that the present tense verb in IGRA's Indian lands definition should include "the future as well as the present." *Id.* at 126. The Second

The present requirement of Indian lands is necessary under IGRA because an Indian tribe is not entitled to request compact negotiation until it has obtained jurisdiction over the Indian lands. 25 U.S.C. § 2710(d)(3)(A) ("Any Indian tribe having jurisdiction over the Indian lands upon which class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact . . . *Upon receiving such a request, the State shall negotiate* with the Indian tribe in good faith to enter into such a compact."(emphasis added)). Only when a tribe has jurisdiction over the land is the Governor's authority triggered. Before a tribe has jurisdiction over the land on which it intends to conduct gaming, a state is under no obligation to negotiate. *Match-E-Be-She-Nash-She-Wish Band of Pottawatomi Indians v. Engler* (6th Cir. 2002) 304 F.3d 616, 618. Thus in negotiating a compact prior to the land's becoming Indian land, the Governor is not negotiating in accordance with federal law as the Constitution requires.

Circuit did not, however, address IGRA's compact provisions. In *Guidiville*, by contrast, the Ninth Circuit held that the provisions of IGRA related to compacts for class III gaming did expressly hinge on the land being Indian land at the time and should not include future trust acquisitions. The Ninth Circuit also rejected the application of the Dictionary Act, noting that the "Supreme Court has not once invoked the Dictionary Act in an effort to convert an unambiguous verb tense into a claimed ambiguity, let alone then going on to employ that manufactured ambiguity as a stepping stone to altering the plain sense of a statute." *Guidiville*, *supra*, 531 F.3d at 775.

According to the Sixth Circuit Court of Appeals, "[t]he purposes of the [jurisdiction] requirement appear to be to ensure that the casino will be inside the borders of the State and to give notice of where it will be, and *to require the tribe to have a place for the casino that has been federally approved*." *Engler, supra,* 304 F.3d at 618 (emphasis added). The Sixth Circuit further reasoned, "In the absence of a location, the State would have no way to assess the environmental, safety, traffic, and other problems that such a casino would pose." *Id.*

While IGRA provides protections for the State through the Indian lands requirement, it also gives specific rights to tribes having jurisdiction over such lands. Not only does IGRA limit the permissible subjects of negotiation, 25 U.S.C. §§ 2710(d)(3)(C), 2710(d)(4), but where a state fails to negotiate in good faith upon a qualified tribe's request, IGRA provides the tribe with a right of action against the State. 25 U.S.C. § 2710(d)(7). But to invoke this right of action, the tribe must show it has "Indian lands" as defined by IGRA at the time of filing. *Engler*, *supra*, 304 F.3d at 618. This remedial provision caps three key IGRA compact provisions: the tribe must have Indian land over which it has jurisdiction, the tribe may then request negotiations, and the tribe may file suit if the state does not negotiate or fails to negotiate in good faith.

When the Governor negotiated the compact with North Fork Tribe, none of these provisions applied. The North Fork Tribe was not entitled to compact negotiations and the

negotiations were therefore provided gratuitously. Gratuitous compact negotiations, where the State lacks any obligation to negotiate, for a tribe that may one day acquire land for gaming are simply not "in accordance with federal law."

It defies reason to conclude that Section 19(f)'s incorporation of the term "Indian lands" and its requirement that the Governor negotiate "in accordance with federal law" somehow gives the Governor any authority to negotiate and conclude a compact for class III gaming on land over which the North Tribe lacked jurisdiction and did not qualify as Indian lands under IGRA. Such an interpretation not only ignores IGRA's jurisdiction requirement, but also suggests that the State of California was not cognizant of IGRA's requirements and their purposes when it enacted Section 19(f). *See People v. Kennedy* (2001) 91 Cal.App.4th 288, 296 (holding under principles of statutory construction that the Legislature's revision of Health and Safety Code was to harmonize state and federal drug laws); *see also Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App.4th 109, 118 ("We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules."). It would make little sense for Section 19(f) to operate in a manner that fails to incorporate the jurisdictional protections for the State and the rights of the tribe that flow from its having jurisdiction.

The Governor may argue, however, that his gratuitous compact negotiations did not violate the Constitution because Section 19(f) does not expressly prohibit negotiating compacts before the land becomes Indian land because any compact negotiated is necessarily "for class III gaming on Indian lands." Moreover, because the compact must be ratified by the Legislature and approved by the Secretary before any gaming can occur, no harm or confusion may arise from gratuitous compact negotiations.

But this ignores that under California law, the Governor must have the authority to act. The Governor does not have inherent authority to do all things not prohibited by the Constitution. That is the plenary authority enjoyed by the Legislature. *Howard Jarvis Taxpayers' Assn. v. Fresno Metro. Projects Auth.* (1995) 40 Cal.App.4th 1359, 1374. The Governor's authority, on the other hand, is limited to that expressly given under the Constitution or by delegation from the Legislature. *Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, 1041. Here, the only authority delegated to the Governor under Section 19(f) requires that a tribe having jurisdiction over Indian land on which it intends to conduct class III gaming requests negotiations. Negotiating under any other conditions is not in accordance with federal law.

Finally, even though Appellants contend that Section 19(f)'s plain language prohibits the Governor from negotiating compacts for gaming on lands that are not Indian lands at the

time of negotiations, to the extent the Governor argues otherwise, such that his authority is extended to lands that one day might become Indian lands, Section 19(f) is ambiguous. But any ambiguity cannot be resolved in favor of the Governor's view. As discussed in Appellants' briefs and in further detail below, the legislative history of Section 19(f) demonstrates that its intent was to authorize gaming on existing Indian lands in California and not to expand off-reservation gaming.[3]

(2) Did the failure of the parcel to be "Indian lands" at that time deprive the Governor of any *implied authority to concur in the Secretary of the Interior's determination* the Governor might otherwise have had under article IV, section 19, subdivision (f), of the California Constitution?

Yes. Section 19(f) of the California Constitution does not provide the Governor with any authority, implied or otherwise, to concur in the Secretary of the Interior's determination. However, the failure of the parcel to be "Indian lands" at the time further undermines the Governor's assertion of implied authority.

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[3] Both in the trial court and before this court, the Governor has maintained that Proposition 1A did not limit gaming to Indian lands that existed at the time Proposition 1A was enacted. Appellants have acknowledged that under some exceptions newly acquired Indian lands may be eligible for gaming in California and the Governor may negotiate compacts for such gaming under Section 19(f). But this acknowledgement does nothing to obviate the requirement that a tribe has jurisdiction over those lands before the Governor may negotiate a compact under Section 19(f).

The Governor argues that his authority to concur in the Secretary's determination derives from the "in accordance with federal law" provision in Section 19(f) and is implied by his authority to negotiate and conclude a compact because the "concurrence was necessary to conclude the compact." [State Resp. Brief, p. 12.] Both of these arguments fail.

As discussed above, the Governor argues that because the Secretary has the authority under federal law to approve gaming on newly acquired Indian lands, the Governor necessarily has the same authority. But there is no provision of California law that so authorizes the Governor. The "in accordance with federal law" phrase in Section 19(f) cannot carry that weight because Section 19(f) provides the Governor with the limited and narrow power to negotiate compacts in accordance with federal law. Nothing in IGRA's compact provision related to negotiation speaks to any action on the part of the State to approve gaming on newly acquired lands. See 25 U.S.C. § 2710(d).

There is no reasonable basis to conclude that the Governor has any implied authority to concur because such authority cannot derive from the limited power to negotiate which, as discussed above, requires the Tribe to have Indian land eligible for gaming. Furthermore, the concurrence power cannot be an implied power of the Governor's merely because IGRA authorizes the Secretary to authorize gaming on newly acquired lands. *Confederated Tribes of Siletz Indians of Oregon v. United States*

(9th Cir. 1997) 110 F.3d 688, 697 (stating that the authority to concur is provided by state law).

To circumvent the text of Section 19(f), the Governor argues that the power to concur is implied because it is a necessary first step to negotiating a compact. The trial court agreed, holding that the Governor must have the implied power to concur because he could not otherwise negotiate and conclude compacts. [3 AA Tab 30 at 693.] But, as Appellants have already briefed extensively, the text of Section 19(f) does not comprehend any action by either the Governor or the Legislature related to gaming on non-Indian land. Moreover, to say that the Governor must have the authority to concur because a concurrence "necessary" for the Governor to negotiate a compact is to assume that it is California's policy to allow any and all off-reservation gaming. This result is belied by the history of Section 19(f).

Section 19(f) was added to the Constitution in a ballot initiative – Proposition 1A. Proposition 1A links tribal gaming to tribal land. It says nothing about the creation of new Indian land eligible for gaming. The Legislative Analyst's analysis addresses the impacts of gaming – not the impacts of ceding jurisdiction over land to tribes for tribal gaming.[4] In the "Proposal" section of the Analysis by the Legislative Analyst, wherein the Legislative Analyst describes what is being proposed by Proposition 1A, it describes the effect of Proposition 1A as follows:

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[4] In its Respondent's Brief, the Governor concedes the importance of the Legislative Analyst's analysis in the interpretation of a ballot initiative. [State Resp. Brief, pp. 20-22.]

> This proposition amends the State Constitution to permit Indian tribes to conduct and operate slot machines, lottery games, and banked and percentage card games on Indian land. These gambling activities could only occur if (1) the Governor and an Indian tribe reach agreement on a compact, (2) the Legislature approves the compact, and (3) the federal government approves the compact. [1 AA Tab 6, p. 84]

The Legislative Analyst said nothing about a concurrence or any authority of the Governor to create new Indian land eligible for gaming. There is simply no hint in either the plain language or in the Legislative Analyst's analysis that this initiative authorized the Governor to concur in the decision to create new Indian land eligible for gaming.

The question in this case is whether the electorate, in passing Proposition 1A, intended to authorize the Governor to concur, as is necessary to create new Indian land eligible for gaming. But there is nothing in the plain language of the initiative, nor in the Legislative Analyst's analysis, nor in the voter guide, from which such an intent could conceivably be inferred. The only insight into the issue is provided in the arguments in favor and against the initiative, in which the proponents of the initiative – the victors – described the initiative as authorizing tribes to "keep the gaming we have on our reservations," and in which they assured the electorate that the initiative would not allow the off-reservation phenomenon. [1AA Tab 6, pp. 85-86.]

Moreover, the Governor's authority under Section 19(f) to negotiate and conclude compacts is narrow and limited; whereas the authority to concur in a two-part determination – if he has it – would be entirely discretionary and unlimited. His authority to negotiate and conclude compacts must be: (1) "in accordance with federal law" (Cal. Const. art. IV, § 19(f)); and (2) limited to the topics prescribed by the IGRA in 25 U.S.C. §§ 2710(d)(3)(C), 2710(d)(4); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger* (9th Cir. 2010) 602 F.3d 1019, 1028-1029; (3) ratified by the California Legislature (Cal. Const. art. IV, § 19(f)); and (4) approved by the U.S. Secretary of the Interior (25 U.S.C. § 2710(d)(3)(B)). Thus, the Governor's express authority under Section 19(f) amounts to no more than the authority to negotiate a non-binding agreement that is subject to approval of both the California Legislature and the U.S. Secretary of the Interior.

Considering that the only authority expressly given to the Governor in Section 19(f) – i.e., the authority to negotiate and conclude compacts – is subject to ratification by the Legislature, it would be irrational to imply the power to concur independent of any legislative ratification. It necessarily follows, then, that even if this court disagrees with Appellants' response to question No. 1, and finds the Governor had authority to negotiate a compact,

he did not have any implied authority to concur and bind the state to off-reservation gaming.[5]

In effect, a valid concurrence binds the State to the decision to create new Indian land eligible for gaming. There is no logical, rational basis, nor any legal basis, from which to conclude that authority for such a significant decision is implied within the authority to engage in nonbinding negotiations, especially where to even engage in those non-binding negotiations requires a tribe to have jurisdiction over Indian lands.

(3) If the answer to question No. 2 is yes, would any implied concurrence power be rendered a nullity, since Indian trust land for which gubernatorial concurrence is required cannot, by definition, exist until after the Governor concurs?

Yes. In this question, the Court has put its finger on the flaw in the Governor's argument and the superior court's decision. How can Section 19(f) impliedly authorize the Governor to create new Indian land when its grant of authority to negotiate a compact is expressly limited to Indian lands? Section 19(f) gives the Governor authority to negotiate compacts for gaming on

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[5] If, as the Governor asserts, he has implied authority to concur, then such authority is in his absolute, unlimited discretion. Federal law places no limits on a state's decision whether or not to concur. 25 U.S.C. § 2719(b)(1)(A); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (7th Cir. 2004) 367 F.3d 650, 656; *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 696-97.

Indian lands. It gives him no authority in regard to non-Indian lands.

The Constitution generally proscribes class III casino gaming. See Cal. Const., art. IV, §19(e); *Hotel Employees and Restaurant Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 589. The Governor's authority to negotiate compacts is an exception to that general proscription. Exceptions must be construed narrowly. See., e.g., *Gold v. Superior Court* (1970) 3 Cal.3d 275, 285 ("exception must be narrowly construed and carefully restricted" in order to fulfill legislative purpose); *Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344, 355 (it is appropriate to construe exceptions narrowly when statute is to be liberally construed to effectuate legislative intent). It would defy logic and law to construe a narrow exception expressly allowing the Governor to engage in nonbinding negotiations as an implied grant of authority to bind the State, without legislative ratification, to ceding jurisdiction over land to a sovereign Indian tribe for purposes of gaming including potentially class III gaming under Secretarial procedures.

(4) If the answer to question No. 2 is no, but the answer to question No. 1 is yes, must the question of the concurrence power raised by this appeal still be resolved on some other ground, such as the grounds discussed by the parties in their briefs?

Yes. If the Governor lacked authority to negotiate a compact with the North Fork Tribe because the Madera site was

not Indian land, any implied authority to concur would have to derive from a source other than Section 19(f).

Here, had the Governor acted in accordance with the purposes of IGRA's jurisdictional requirement to first ensure the North Fork Tribe had a federally approved location within the State on which to conduct gaming, the request for concurrence would have preceded any compact negotiations and prevented any bootstrapping of the concurrence power from the negotiation power. Absent compact negotiations, the Governor would have had to locate a source of the concurrence power in some other Constitutional or statutory provisions.

Central to this view is understanding, as Appellants have already discussed, that the concurrence is necessary for either class II or class III gaming. If the Governor is correct that Section 19(f) grants the authority to concur, then class II gaming under a concurrence is not authorized in California, absent some other source. Neither the Governor nor the North Fork Tribe has set forth such an argument. Thus buried within their arguments that the concurrence power can be implied from Section 19(f) is a concession that the concurrence is a separate and distinct power not comprehended at all by Section 19(f).

Accordingly, if the concurrence power exists under California law, it must derived or implied from another Constitutional or statutory provision. Neither the Governor nor the Tribe has offered any. And to the extent they have tried, Appellants have refuted them.

(5) Is your position affected by the voters' defeat of the compact ratification or by the recent approval of substitute procedures by the Department of the Interior?

No. Neither the voters' defeat of the compact ratification nor the recent approval of substitute procedures by the Department of the Interior changes appellants' positions.

As discussed above, and at length in appellants' briefs, proponents of Proposition 1A assured the electorate that Proposition 1A would not lead to reservation shopping or off-reservation gaming. [See 1AA Tab 6 at 85-86 (proponents of Proposition 1A asking for voter approval "so we can keep the gaming we have on our reservations" and stating that "[t]he majority of Indian Tribes are located on remote reservations . . ").] The voters' defeat of the compact ratification in Proposition 48 (2014) confirms that policy.

But the legal issue of whether the Governor of California has authority to concur in the Secretary's two part determination does not depend upon how the electorate voted in Proposition 48, or whether the Secretary issued procedures to permit class III gaming in the absence of a compact. Rather, these events merely illustrate that even in the absence of a compact negotiated and ratified under Section 19(f), the Governor's concurrence paves the

way for class III casino gaming – without any legislative check, and contrary to the will of the People. Neither the plain language of Section 19(f) nor its legislative history comprehends such a situation.

Dated: September 15, 2016

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this reply brief, it contains 4,252, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: September 15, 2016

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On September 15, 2016, I served, in the manner indicated below, the foregoing document described as **Appellants' Supplemental Brief** on the interested parties in this action by placing a true copy thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

See the Attached Service List

- ☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- ☒ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.
- ☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).
- ☐ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 15, 2016, at Costa Mesa, California.

By:/s/ *Wendy J. Merkle*
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