No. 07-88

IN THE

Supreme Court of the United States

CITY OF MODESTO, et al.,

Petitioners,

v.

ENRIQUE SANCHEZ, EMMA PINEDO, and SALVADOR VERA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review when 1) the state court, interpreting state law, determined that Petitioners' facial challenge to the California Voting Rights Act relied upon an erroneous interpretation of the Act, 2) no court has applied the Act or determined the elements of liability and available remedies, 3) the state court remanded the case to the trial court for a determination of the precise scope of the Act, and 4) an impending vote on a ballot measure could moot this action.

CORPORATE DISCLOSURE STATEMENT

No Respondent is a corporation. There are no corporate relationships to disclose under Supreme Court Rule 29.6.

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INTRODUCTION

The California Voting Rights Act (CVRA) seeks to protect California voters from the improper dilution of their vote. This state law offers a remedy when racially-polarized voting impairs the ability of a group—whether white, African-American, or any other race—to select a candidate of choice in at-large election systems used to elect local officials. The California Legislature concluded that racially-polarized voting in at-large election systems is one specific way in which voters' right to select a candidate of their choice can be improperly impaired.

There is no cause for review of this matter. This is the first case in which the recently enacted CVRA has been invoked. California courts have yet to articulate either the elements of a CVRA cause of action or the remedies available in the event that there is a violation. These issues are presently pending before the trial court with appellate instructions to formulate both the elements and the available remedies. The court of appeal did not need to reach these issues as it rejected Petitioners' facial challenge as a misinterpretation of the CVRA.

Thus, there is no conflict in the law. No other California court has reviewed the statute. No other state has enacted or interpreted a statute similar to the CVRA.

Nor is this a matter of such substantive importance that it warrants review. While Petitioners claim that the CVRA is facially unconstitutional because it creates a "racial classification," this Court has recognized that racially-polarized voting that dilutes one's vote is an injury that may be remedied. Without more, the mere fact that the state Legislature seeks to provide a remedy for racially-polarized voting is not grounds for declaring the CVRA facially unconstitution-

al when its application to specific facts and circumstances is not at issue.

Petitioners' claim that the CVRA threatens thousands of at-large election systems is also not a ground for review. The CVRA regulates local elections that California is constitutionally entitled to regulate. That the California Legislature might decide to curtail, or even eliminate, at-large elections is not of federal constitutional moment. In any case, it is clear from the decision of the court of appeal that the CVRA will be construed in a manner consistent with constitutional precepts. Should the courts stray, there will be sufficient time and basis for review based upon an actual evidentiary record, and not hypothetical facts.

Perhaps the most compelling reason for the Court to deny this petition for *certiorari* is the fact that the voters of the City of Modesto will vote on a ballot measure in November 2007 that, if passed, could result in this case being rendered moot. Petitioners make no mention of the measure that asks voters to decide on what form of election system they prefer. This advisory vote would be followed by a binding vote in February 2008 that, if passed, would result in a district election system. It makes little sense for this Court to grant review of a case that could so easily and quickly be rendered moot.

In short, there is no reason to grant the petition.

STATEMENT OF THE CASE

California Provides Protection Against Voter Impairment in Context of At-large Elections

In 2001, the California Legislature enacted the California Voting Rights Act. It allows at-large election systems to be challenged when they "impair" a protected classes' ability to elect candidates of their choice or the ability of a protected class to influence the outcome of an election. *See* Cal. Elec. Code § 14027.[1]

Upon proof of racially-polarized voting that results in vote dilution, the CVRA requires a court to consider whether invalidation of the challenged at-large election scheme is appropriate. The court then must assess whether the plaintiff has shown that the proposed remedy would be effective—that the remedy would enable the protected class to elect candidates or meaningfully influence the outcome of elections. *See* § 14028(c); App. at 120a-121a.

The specific elements that must be proven to establish liability, the remedies that are available, and the showings that must be made to obtain relief under the CVRA have not yet been decided by California courts. Those issues were not presented by Petitioners' facial challenge. After rejecting Petitioners' facial challenge, the court of appeal remanded for consideration of those issues. App. at 38a-39a.

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[1] Unless otherwise specified all statutory references are to the California Elections Code.

Respondents Rely Upon CVRA Protections in Challenge to City's Election Scheme

In a complaint filed on June 3, 2004, Respondents challenged the at-large election scheme of the City of Modesto pursuant to the CVRA. App. at 60a. They alleged that the City of Modesto's at-large election scheme deprived Respondents and Latinos of their ability to elect candidates of their choice due to the dilutive effect of racially-polarized voting. App. at 60a.

Petitioners Bring a Facial Challenge to the CVRA

Petitioners answered the complaint with a general denial and then sought a dismissal of the action. Petitioners claimed that the CVRA was facially unconstitutional. App. at 25a-28a, 34a-35a.

Petitioners claimed that the CVRA was subject to strict scrutiny because it was a "race-conscious" statute. They alleged that it allowed a race-based remedy without proof or a finding of intentional discrimination. App. at 25a-28a, 34a-35a.

Petitioners also raised a now-abandoned argument that the CVRA violated the Equal Protection Clause because only certain groups had standing to sue for a violation of the CVRA. In fact, the CVRA allows those in any protected class to sue. App. at 28a-31a.

Finally, Petitioner raised other arguments. They claimed that the CVRA burdened the right to vote, that it violated the First Amendment rights of voters, and that it violated California's Constitution because its attorneys' fee provision authorized the gift of public funds. App. at 32a-33a, 35a-38a.

The Court of Appeal Rejects the Facial Challenge and Remands for Consideration of the Elements of Liability and the Available Remedies

The court of appeal rejected Petitioners' facial challenge. App. at 1a. The court found that Petitioners failed to show that the CVRA was unconstitutional in all applications. Consistent with the facial challenge standard, the court concluded that the CVRA could not be invalidated merely because Petitioners could imagine some unconstitutional applications. App. at 22a-23a, 35a-36a.

In reaching this conclusion, the court held that Petitioners were incorrect when they claimed that the CVRA allowed only certain persons to sue. It found that all persons could sue under the CVRA regardless of race. In so holding, it also noted that courts had an obligation to construe a statute so as to avoid a constitutional violation. App. at 28a-31a.

The court also rejected the argument that the CVRA was subject to strict scrutiny because it was "race-conscious." The court found that the CVRA was intended to redress a harm inflicted or imposed due to a person's race or national origin. App. at 24a-28a, 34a.[2]

Finally, the court concluded that the CVRA was not unconstitutional merely because there might be remedies that, if imposed, could be unconstitutional. The Court held that any remedy imposed would be "subject to analysis" under this Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Bush v. Vera*, 517 U.S. 952 (1996). Therefore,

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[2] The Court also rejected those arguments not addressed here by Petitioners, including the arguments that the CVRA burdened voting rights, the First Amendment, and allowed for a gift of public funds. App. at 32a-33a, 35a-38a.

"[w]hether one potential remedy under a statute would be subject to strict scrutiny . . . is not the test for facial invalidity of the statute." App. at 38a.

Having rejected Petitioners' claims, the court remanded the case, noting that there were four questions to be answered in the first instance by the trial court:

- What elements must be proven to establish liability?
- Are there specific remedies that are precluded?
- Is the court precluded from employing an alternative at-large system as a remedy?
- Must any contemplated remedy conform to the United State Supreme Court's vote dilution remedy cases?

The answer to these questions, the court noted, would determine whether the CVRA provided persons "only the same relief that they would have obtained under the [Federal Voting Rights Act]" or whether there was some other remedy that "does not result in unconstitutionally drawn districts under the Supreme Court's rulings." App. at 38a.

The California Supreme Court Declines to Review the Decision of the Court of Appeal

Petitioners sought review by the California Supreme Court. Without comment, the California Supreme Court rejected Petitioners' petition for review.

REASONS TO DENY THE WRIT

1. California courts have not determined the elements of a CVRA violation. Nor have the courts decided what remedies might be available to a plaintiff who establishes a violation of the CVRA.

There is therefore no reason to take the precipitous step of granting review. The effect and scope of the statute have not been determined. The statute involves a matter uniquely of state concern—the manner in which officials for local offices will be elected. This Court has consistently deferred to a state court's interpretation of a state statute. *See infra* Parts I, II.

2. There is no conflict in authority, and Petitioners do not purport to articulate one. There is no conflict in the California courts as to the meaning or application of the CVRA. There is no other state that has promulgated a statute similar to the CVRA. Therefore, there can be no actual, or even brewing, conflict in authority between California and any other state.

There cannot even be a conflict between the CVRA and any federal law as the CVRA has not yet been construed. One of the pending questions to be resolved by the trial court is the proper scope of any relief or remedy under the CVRA. *See infra* Part I.

3. As for the national importance of the issue, the CVRA is an effort by the State of California to regulate local elections. Elections for federal office are not implicated because the CVRA only applies to elections of local officials, such as city council members, and school board members. As such, it addresses uniquely local interests.

Even were the CVRA to gain national interest at some later stage, those concerns are not ripe at this juncture. There is no reason for this Court to interrupt California's regulation of its local elections based upon some unfounded fear that a constitutional violation will result. If such issues arise, they may be addressed in due course. *See infra* Part II.

4. This case might be rendered moot long before a briefing on the merits. The City of Modesto has placed on the ballot a proposal to eliminate the challenged at-large election system. *See infra* Part III.

5. The Petitioner's contention that the CVRA is a potential threat to at-large election schemes creates no basis for review. States are given the authority to govern and regulate the manner of their elections, particularly for local offices. Therefore, California's decision to impose conditions on its at-large election systems—even if it means the elimination of such systems—does not justify the grant of the petition.

Further, should the CVRA result in at-large election systems being set aside, those instances are subject to review by the California courts of appeal and the California Supreme Court. If, following review by both these courts, there remains an issue of constitutional import, this Court can then review any such issue. At that time, the federal constitutional issues, if any, would fairly present themselves for adjudication. *See infra* Parts II, IV.

6. The CVRA is not facially unconstitutional. This Court has acknowledged that at-large election systems that impair the rights of protected classes to vote meaningfully are subject to remedial measures. What those measures are, and the extent of the remedy, may be subject to constitutional review; however, that such measures are available on adequate proof is without question.

Petitioners' claim that the CVRA is of remarkable constitutional importance because it represents an attempt to allow the smallest of groups the opportunity to upset an election and imposes liability before there is some determination that a majority-minority district can be created also does not compel review. The CVRA does not require a court to set aside an at-large system merely upon a finding of liability, as Petitioners suggest. A court must still determine whether there is proof that the ability to elect or to influence the outcome of an election is "impaired." Small groups that cannot show this are unable to obtain a remedy. As for the specific remedy, it must still address the harm within a constitutionally prescribed fashion. *See infra* Part IV.

7. Finally, that race is considered somehow in the CVRA statutory scheme does not render it constitutionally infirm. A statute that seeks to remedy racial discrimination, like Title VII, is not one that is constitutionally suspect. The CVRA is an attempt to remedy a form of discrimination that has been recognized in courts and legislatures across the country: in some circumstances, racially-polarized voting in at-large elections improperly impairs the rights of members of a protected class to vote. The mere mention of race, i.e., that there is some level of "race-consciousness" in the CVRA, also does not render it constitutionally suspect. First, contrary to Petitioners' arguments, the CVRA has nothing in common with laws, that deprive people of the right to marry, that segregate people by race, or that are intended to benefit one group over another. Second, a statutory scheme is not subject to strict scrutiny merely because it is somehow "race-conscious." Legislatures are entitled to enact statutes that, for example, seek to prohibit racial discrimination, without having to satisfy strict scrutiny. Such a

statute neither places a burden nor distributes a benefit based on race. *See infra* Part IV.

For these reasons, Petitioners' petition should be denied.

I. THERE IS NO CONFLICT

Petitioners do not argue that there is a conflict between the CVRA and any other state statute or a conflict among California courts as to the meaning of the CVRA. This stands to reason. The present case represents the first opportunity any court has had to construe the CVRA or a statute like it. Even now, questions remain as to the CVRA's scope and meaning. The case has been remanded to the trial court for consideration of just these issues.

Petitioners assert the CVRA is suspect because Petitioners believe that it allows a court to set-aside an at-large election scheme without proof of a "majority district" as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). Pet. at 14-19. Even when cast as a conflict issue, this argument does not merit attention.

First, the court of appeal remanded the case expressly so that the trial court could determine whether there must be proof of a "majority district" before relief from an at-large election system may be granted. No conflict exists because on remand the trial court must answer the question:

> Is the court precluded from employing crossover or coalition districts (*i.e.*, districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?

App. at 38a.

Second, neither *Thornburg* nor any other decision of this Court has held that proof of a "majority district" such as that discussed in *Thornburg* is a constitutional requirement that precludes consideration of remedies such as the creation of coalition and crossover districts. *Cf. Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs.*, 906 F.2d 524, 526-27 (11th Cir. 1990) ("Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."); *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992) (plaintiffs permitted to show coalition of African-Americans and Hispanics although failed to show cohesion).

As there is no conflict, there is no reason to grant Petitioners' petition.

II. DEFERENCE IS DUE TO A STATE'S REGULATION OF ITS ELECTIONS AND A STATE COURT'S CONSTRUCTION OF ITS STATUTES

A. California's Governance And Regulation Of Its Elections Are Matters Of State, Not Federal, Interest

As the CVRA has yet to be construed in a concrete factual context, review by this Court of what is essentially an interlocutory appeal, is premature at best. Petitioners' argument that at-large election systems are threatened is not a basis for review. *See, e.g.*, Pet. at 6 (claiming the CVRA will "invalidate literally thousands of at-large systems").

Even were California's at-large election systems threatened with imminent demise, the regulation of local elections is a constitutional power entrusted to the states. *See, e.g.*,

Oregon v. Mitchell, 400 U.S. 112, 124-25 (1970) ("[T]he Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections."); *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.").

The state's expansive power is indisputable:

> Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But this does not mean that the State's powers are similarly limited. Quite the opposite is true.

Voinovich v. Quilter, 507 U.S. 146, 156 (1993).

The CVRA concerns a matter of state and local interest. Its impacts—if any—affect the manner by which city council members, school board members, and community college district representatives are elected.

In fact, the CVRA has no importance beyond the state line of California. The CVRA does not presently, or foreseeably, affect the voting process by which national officeholders are elected to office. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning state law placing term limits on Congressional offices).

Given this, the deference owed to a states' authority to regulate its elections dictate that this Court not intervene. App. at 39a.

B. California Courts Should Be Given The Opportunity To Interpret State Statutes

Allowing the California courts to arrive at an interpretation of the CVRA is consistent with this Court's doctrine that a state's interpretation of its statutes is binding on this Court. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339 (1986) ("[W]e must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of Puerto Rico."); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (noting that the Court is bound by the construction given to a statute by the state courts). Therefore, if this Court should decide that review of this matter is appropriate, it should do so only after it has had the benefit of the state courts' interpretation.

III. A BALLOT MEASURE, IF PASSED, WOULD MOOT THIS ACTION

The City of Modesto has placed on the November 2007 ballot a measure that would modify the challenged system by which city council members are elected.[3] If the measure is approved and finalized in a binding vote scheduled for February 2008, it is likely that this case will be rendered moot.

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[3] City of Modesto Council Agenda Report (June 29, 2007), http://www.ci.modesto.ca.us/ccl/agenda/ar/2007/07/ar070710-16.pdf.; Minutes of City Council meeting, City of Modesto, Item 22, Unfinished Business (June 26, 2007), http://centreplaza.com/ccl/minutes/2007/cc070626.asp; Minutes of City Council meeting, City of Modesto, Item 16, Unfinished Business (July 10, 2007), http://www.ci.modesto.ca.us/ccl/minutes/2007/cc070710.asp. These items were last viewed on August 27, 2007.

For this reason, as well, Petitioners' petition should be denied.

IV. THE CVRA IS NOT FACIALLY UNCONSTITUTIONAL

A. At-Large Election Systems That Impair The Ability To Elect May Be Remedied

Petitioners' racial classification argument and their facial challenge ignores the fact that this Court has determined that valid and proper remedies are available for at-large election systems that impair the ability of a protected class to elect a candidate of choice. *See, e.g., Thornburg*, 478 U.S. 30. Racially-polarized voting in at-large elections has consistently been recognized as depriving minorities of their right to vote meaningfully both in California and elsewhere. *Id.* at 47-48 (citing cases and studies); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (finding racially-polarized voting in a California at-large election system).

There may be issues with the remedies that are imposed under the CVRA and, the elements of a CVRA violation. Nonetheless, a statute that seeks to remedy racially-polarized voting that dilutes one's vote in an at-large election system is not subject to constitutional attack based on an argument that it creates a "racial classification" or is somehow "race conscious." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . ."); *see also Parents Involved In Comty. Schools v. Seattle School Dist.*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring) ("race-conscious" statutes are not subject to strict scrutiny when they "do not lead to different treatment based on a classification").

Petitioners' argument is wrong; it depends on the acceptance of the idea that any statute that considers race—even one that seeks to eliminate or prohibit a recognized form of discrimination—is subject to strict scrutiny. Pet. at 6-9 & n. 2. Moreover, in the 42 years since the enactment of the FVRA, no court has ever suggested that a challenge to at-large election systems, when there is proof of racially-polarized voting that dilutes the right to vote, raises the constitutional concerns expressed by Petitioners.

Petitioners' facial challenge fails.

B. The CVRA Does Not Create "Racial Classifications"

Petitioners' argument that the CVRA creates a constitutionally suspect racial classification because "the Act operates *entirely* and *only* on the basis of racial classifications," Pet. at 9 (emphasis in original), *see also* Pet. at 13, ignores the distinction between rules that penalize or benefit a certain race and those that prohibit discrimination.

Whatever else may be said about the CVRA, it does not create or replicate the statutory schemes at work in those cases on which Petitioners rely for their argument: *Loving v. Virginia*, 388 U.S. 1 (1967), *McLaughlin v. Florida*, 379 U.S. 184 (1964), and *Johnson v. California*, 543 U.S. 499 (2005).[4] These cases concern statutes and regulations that

[4] Petitioners take the court of appeal to task because, as Petitioners represent it, the court concluded that strict scrutiny is not appropriate because "all racial groups purportedly may sue under the Act [and therefore the Act] treats all races equally . . . ." Pet. at 9. In fairness, this mischaracterizes the court's holding. The court was forced to address two issues raised by Petitioners, only one of which Petitioners now urge. Petitioners made a standing argument, now abandoned before this

reflect the grossest forms of our segregated past, when persons were deprived of the right to marry and were segregated solely on the basis of race. Neither in operation nor intent does the CVRA come close to mirroring the statutes at issue in those cases.

The CVRA is also not like those statutes at issue in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Grutter v. Bollinger*, 539 U.S. 309 (2003), or *Parents Involved in Comty. Schools*, 127 S. Ct. 2738 (2007). It does not seek to distribute a benefit to one class to the detriment of another, whether that is a government contract, *Adarand Constructors,* a spot in a law school class, *Grutter*, or a seat in a local school. *Parents Involved in Comty. Schools*. This is not an instance "when the government distributes burdens or benefits on the basis of individual racial classifications . . . ." *Id.* at 2751-52 (citing *Adarand Constructors, Inc.*, *Grutter*, and *Johnson*).

Instead, this is an instance in which the California Legislature is seeking to remedy a recognized harm in a manner that does not benefit or burden any race or class. *See supra* Part IV, A; *see also* App. at 25a-26a, 35a.

Court, claiming that the CVRA was subject to strict scrutiny because not all were entitled to sue. The court rejected this argument, holding—as Petitioners presently note—that since all can sue there was no basis for strict scrutiny. App. at 28a. Separately, Petitioners raised the claim that any race-based statute was subject to strict scrutiny. As to *this* argument, the court concluded the CVRA seeks to redress "a race-based harm, vote dilution." App. at 26a.

C. The Remedies That Petitioner Speculates Might Be Imposed Do Not Justify Review

Petitioners suggest that the aim and result of the CVRA will be "racial balancing." *See, e.g.*, Pet. at 21. Petitioners claim that this is inevitable because the CVRA does not require proof of a majority district for liability to be established. Pet. at 13-19. Thus, according to Petitioners, it is possible for a single Hispanic to upset an at-large system "notwithstanding the obvious inability to create any remedy or a winnable district with only one Hispanic voter." Pet. at 19.

Speculation that the California courts will adopt Petitioners' extreme view on how the statute should be construed does not justify this Court's intervention. Whether the CVRA will allow such a remedy has not yet been determined, or even hinted at, except that the court of appeal has affirmatively stated that any remedy must conform to constitutional precepts. *See supra* Parts I, II.

There is, however, more reason than this to reject Petitioners' extreme claim. The CVRA dispenses with the necessity of showing the existence of geographical compactness for the purposes of liability. But it does not render irrelevant considerations of the ability of a protected class to elect or influence an election. Such considerations are part of the inquiry because a CVRA violation is only established when the ability to elect or influence the outcome of an election is impaired. § 14027; *see also* § 14029 (authorizing courts "to implement the appropriate remedies . . . that are tailored to remedy the violation").

To be sure, the CVRA appears to allow for remedies such as crossover or coalition districts, which is one of

the reasons it does not require proof of a majority-minority district as an element of liability. App. at 10a. Whether such remedies are actually available and whether they will pass constitutional scrutiny as a remedy in a specific case has not been, and cannot be, decided on the record before this Court. This is one of the issues that the court of appeal asked the trial court to grapple with on remand. App. at 38a-39a. Any constitutional challenge that may arise from such remedies should await their application.

V. THE FACT THAT PETITIONERS CAN HYPOTHESIZE A CONSTITUTIONAL CONCERN DOES NOT WARRANT GRANTING THEIR PETITION

Petitioners end their petition by claiming that the court of appeal erred when it concluded that their facial challenge fails because "the statute can be saved facially by narrower judicial application ...." Pet. at 23. According to Petitioners, there is no "escape from the presumption of facial unconstitutionality ... where there is no nexus between justification and classification." Pet. at 23.

This argument does not merit review. First, Petitioners do not dispute that, as found by the state court of appeal, a facial challenge under *United States v. Salerno*, 481 U.S. 739 (1987), is only successful when there is no imaginable set of circumstances under which a statute would be constitutional. App. at 22a-23a.

Second, Petitioners' real argument is that the CVRA is only capable of the extreme interpretation they proffer. The court of appeal found otherwise and its interpretation is binding. *See supra* Part II, B. Moreover, as the CVRA is still

wants interpretation and is sitting in the trial court awaiting that interpretation, Petitioners' assertion lacks merit.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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