08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo*, 424 U.S. 1 (1976), where we represented our New York affiliate, to *McConnell v. FEC*, 540 U.S. 93 (2003), where the ACLU was both co-counsel and plaintiff, to *Randall v. Sorrell*, 548 U.S. 230 (2006), where we were lead counsel. In addition, the ACLU has appeared as *amicus curiae* in many of this Court's campaign finance cases, including *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449 (2007).

As framed by the Court's reargument order, 2009 WL 1841614 (2009), this case presents fundamental questions concerning the constitutionally permissible scope of campaign finance regulation that this Court first confronted in *Buckley* and subsequently revisited in *McConnell* and *WRTL*. The proper resolution of that delicate balance remains an issue

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

of substantial importance to the ACLU and its members.

SUMMARY OF ARGUMENT

The broad prohibition on "electioneering communications" set forth in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b(b)(2), violates the First Amendment, and the limiting construction adopted by this Court in *WRTL* is insufficient to save it. Accordingly, the Court should strike down § 203 as facially unconstitutional and overrule that portion of *McConnell* that holds otherwise.

This brief addresses only that question. It does not address the additional question raised by this Court's reargument order: namely, whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled. However, if *Austin* is overruled and the ban on express advocacy by corporations and unions is struck down, then the ban on "electioneering communications" in § 203 would necessarily fall as a consequence.

Even if *Austin* is not overruled, § 203 is unconstitutional precisely because it extends beyond the express advocacy at issue in *Austin*. The history of the *McConnell* litigation, as well as campaign finance litigation before and after *McConnell*, demonstrates that there is no precise or predictable way to determine whether or not political speech is the "functional equivalent" of express advocacy.

The decision in *WRTL* correctly recognized that the BCRA's prophylactic ban on "electioneering

communications" threatened speech that lies at the heart of the First Amendment, including genuine issue ads by nonpartisan organizations like the ACLU. But the reformulated ban crafted by this Court in *WRTL* continues to threaten core First Amendment speech. Its reliance on the hypothetical response of a reasonable listener still leaves speakers guessing about what speech is lawful and what speech is not. That uncertainty invites arbitrary and discriminatory enforcement. It will also lead many speakers to self-censor rather than risk sanctions or undertake the expense of suing the FEC prior to speaking, especially since most suits will not be resolved until long after the speech is timely and relevant.

In short, § 203 was a poorly conceived effort to restrict political speech and should be struck down.

ARGUMENT

SECTION 203 OF BCRA VIOLATES THE FIRST AMENDMENT AND SHOULD BE DECLARED FACIALLY UNCONSTITUTIONAL.

1. In *McConnell*, *supra,* this Court upheld the facial validity of § 203. Section 203 bans corporations and unions from using general treasury funds to pay for "electioneering communications," which are defined by BCRA as any "broadcast, cable, or satellite communication" that refers to "a clearly identified candidate for federal office" and that is made either 60 days before a general election or 30 days before a primary election. *See* 2 U.S.C. § 434(f)(3).

That ban applies to both for-profit and non-profit corporations, like the ACLU.[2] For that reason, the ACLU joined the challenge to BCRA in *McConnell*. As we noted at the time, Congress frequently votes on important bills affecting civil liberties in the period preceding an election. To choose two recent examples, the FISA Amendments Act, Pub.L. 110-261, 122 Stat. 2436, was adopted in July 2008 (shortly before the blackout period), and the Military Commissions Act, Pub.L. 109-366, 120 Stat. 2600, was adopted in October 2006 (during the blackout period).

Like many other advocacy organizations, the ACLU has found that broadcast ads can be an important tool for promoting our ideological goals. Although the ACLU has never supported or opposed a candidate for partisan office, its broadcast issue ads were nonetheless banned by BCRA if they met the definition of an "electioneering communication." The government did not dispute the impact of BCRA on the ACLU's advocacy efforts in *McConnell*, and this Court did not directly address it. Instead, the *McConnell* Court held that § 203 was facially valid because it was not substantially overbroad. 540 U.S. at 206-07.

2. Four years later, this Court significantly limited that holding in the context of an as-applied challenge to § 203. Specifically, in *WRTL*, the Court

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[2] The only exception is for non-profit corporations that meet the criteria set forth by this Court in *FEC v. Massachusetts Citizens for Life, Inc ("MCFL")*, 479 U.S. 238 (1986). The relevance of *MCFL* to this case is discussed *infra*, at pp.18-19.

construed BCRA's ban on "electioneering communications" to reach only communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 470.

Several aspects of *WRTL* are worth emphasizing. First, the Court properly described § 203 as a content-based restriction on political speech that triggers strict scrutiny under the First Amendment. *Id.* at 464-65. Second, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Court reiterated our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 467. Third, the Court ruled that those wishing to express their views on core political issues are entitled to a constitutional "safe harbor" that does not turn on the subjective evaluation of agency regulators. *Id.* Fourth, the Court recognized that the line between campaign advocacy and issue advocacy is often difficult to draw in the real world, *id.* at 474, and that the "[d]iscussion of issues cannot be suppressed merely because the issues may also be pertinent to an election." *Id.* Fifth, the Court made clear that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* (footnote omitted). In other words, a test that purports to distinguish between political ads that can be proscribed under the First Amendment and those that cannot "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 469.

3. To say that "the tie goes to the speaker, not the censor," presumes a generally understood method

for determining the First Amendment score that can be fairly and consistently applied. The rules of baseball tolerate judgment calls but "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Even as construed in *WRTL*, § 203 lacks the precision that the First Amendment requires.

Congress, to its credit, understood the constitutional problems it faced when it decided to abandon the "express advocacy" test that had marked the outer boundary of government regulation in this sensitive area since *Buckley*. It therefore took the unusual step of providing alternative definitions of the "electioneering communications" it sought to prohibit in § 203.

By describing an "electioneering communication" as any broadcast, cable or satellite ad that mentions a clearly identified candidate for federal office within a specified blackout period, the primary definition has the benefit of clarity. For First Amendment purposes, however, clarity and precision are not the same. A law that prohibits newspapers from publishing endorsements on Election Day is perfectly clear. It is also unconstitutional as this Court held more than forty years ago in *Mills v. Alabama*, 384 U.S. 214 (1966), because it is not narrowly tailored to advance a compelling state interest.

Had this Court struck down the primary definition of an "electioneering communication" in *WRTL*, it would have been required to consider the fallback definition that Congress provided in anticipation of the possibility that its primary

definition might be declared unconstitutional. Unlike the primary definition, the fallback definition is not limited to the period preceding an election. Rather, its prohibition applies to any broadcast, satellite or cable communication that: (a) "promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)"; and (b) is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

The Court's holding in *WRTL* borrowed heavily from this fallback definition, which has neither clarity nor precision, but did so in the guise of construing the primary definition. To be sure, there are differences. By construing the primary definition rather than adopting the fallback definition, the *WRTL* Court maintained the temporal limitations of the primary definition, which continues to apply only during the congressionally specified blackout periods. Also, the *WRTL* Court did not incorporate the language of "promote," "support," "attack," or "oppose" that Congress included in the fallback definition. But the operative language in the fallback definition, as Congress wrote it, is nearly identical to the operative effect of the primary definition, as this Court construed it in *WRTL*. Under the former, corporate and union funds cannot be used for an "electioneering communication" that is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Under the latter, corporate and union

funds cannot be used for any "electioneering communication" that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

4. The ACLU's position in *McConnell* was that both the primary definition and the fallback definition of "electioneering communications" in § 203 are unconstitutional, and that remains our position. Because the language adopted by this Court in *WRTL* is indistinguishable in critical respects from the fallback definition, we believe it is constitutionally insufficient to solve the constitutional problems created by § 203.

Those problems are amply illustrated by the record in *McConnell*. As Justice Kennedy correctly noted in *McConnell*, "even defendants' own experts disagree among themselves about whether specific ads fall within the prohibition" against "sham" issue ads. 540 U.S. at 338. Given the current debate about health care reform, one illustration from the *McConnell* record is particularly revealing. A group called the "Alliance for Quality Nursing Home Care" broadcast the following ad prior to the 2000 presidential election.

> [Announcer]: There's a nursing home crisis in America. Despite record budget surpluses Medicare has been cut by billions. Seniors' access to quality nursing care threatened.
>
> [Woman]: Caring for the elderly: it becomes your life. But with Medicare cuts my job is much harder.

> [Announcer]: Call. Tell Al Gore to fight to restore the Medicare cuts. Keep the promise.
>
> [Woman]: Help me help those who need it most.

This ad was shown to the principal congressional sponsors of BCRA during discovery in *McConnell*. Senator Feingold testified at his deposition that "[the ad] is certainly not helpful to Al Gore because what it suggests is that he was somehow responsible for the Medicare cuts and it, in my view, it's sort of a sneaky way of trying to blame him without directly saying that he should be thrown out of office or not elected." Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." Representatives Meehan and Shays, on the other hand, thought that the ad was "probably" intended to promote Senator Gore's presidential candidacy.[3]

It is possible, we realize, to dismiss the significance of those inconsistent responses by arguing that they focused on the intent of the ad's sponsor, which is no longer a relevant consideration under this Court's decision in *WRTL*.[4] But, we think it is even more important to acknowledge that the

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[3] *See* Consolidated Brief for Plaintiffs in Support of Motion for Judgment, *McConnell v. FEC*, No. 02-0582 (D.D.C.), at 72-73.

[4] "Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect the election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *WRTL*, 551 U.S. at 468.

question of whether an ad is the "functional equivalent" of express advocacy necessarily calls for a subjective response on the part of the listener despite this Court's characterization of the *WRTL* test as an objective standard. Furthermore, those responses are likely to differ even among reasonable listeners. As Judge Kollar-Kotelly observed after reviewing the voluminous evidence presented to the three-judge district court in *McConnell*: "The expert testimony in this case . . . illustrates how one person's genuine issue advertisement can be another's electioneering commercial." *McConnell v. FEC*, 251 F.Supp.2d 176, 586 (D.D.C. 2003)(concurring opinion).

The history of campaign finance regulation demonstrates the need to erect sturdy safeguards for free speech. The modern era of campaign finance regulation began when Congress passed the Federal Election Campaign Act ("FECA") of 1971, Pub.L. 92-225, 86 Stat. 3. That law was applied for the first time against the National Committee Against Impeachment, a nonprofit organization that purchased a two-page ad in *The New York Times* in May 1972 calling for the impeachment of President Nixon and listing an "honor roll" consisting of Members of Congress supporting impeachment. The government's theory was that the ad was intended to "influence" the outcome of the 1972 presidential and congressional elections and that, under FECA, the National Committee Against Impeachment was therefore barred from accepting contributions and spending additional funds unless it first registered as a "political committee." Reversing a preliminary

injunction in the government's favor, the Second Ciruit ruled that it would be "abhorrent" and "intolerable" to permit FECA to "regulat[e] the expression of opinion of fundamental issues of the day." *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972).

The ACLU found itself in a similar position when it sought to purchase an ad shortly before the 1972 elections criticizing President Nixon's busing policies and praising Members of Congress who shared the organization's support for court-ordered busing as a remedy for school segregation in appropriate circumstances. Based on its understanding of FECA, *The New York Times* treated the ad as one "on behalf" of the reelection of the congressional members listed in the ad, and "in derogation" of President Nixon's reelection campaign. It refused, accordingly, to print the ad unless the ACLU provided the newspaper with a statutorily required certification. A three-judge court held that the proposed interpretation of FECA "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041, 1051 (D.D.C. 1973), *vacated as moot,* 422 U.S. 1030 (1975).

It is certainly true that a legislative scheme that permits the regulation of political speech "on behalf" of a candidate, *Jennings*, or speech that is intended to "influence" an election, *National Committee,* is more constitutionally pernicious than the narrowing

interpretation of § 203 adopted in *WRTL*. But, that ought not to be the measuring stick.

The *WRTL* Court implicitly recognized that a determination of whether or not a particular ad (or in this case a movie) is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" will necessarily depend on the totality of circumstances. The Court then tried to limit the reach of that judicially-crafted language by noting that the particular ad at issue in *WRTL* did not mention an election or candidacy, and did not take a position on a candidate's character, qualifications, or fitness for office. 551 U.S. at 470. However, none of those criteria were described as dispositive, which is hardly surprising since the underlying statute was consciously designed as an alternative to *Buckley's* express advocacy test. By definition, any test that depends on a reasonable interpretation of the totality of circumstances has considerable play in the joints.

5. Despite this Court's effort to narrow the scope of § 203 in *WRTL*, the statute should be declared facially unconstitutional for at least three independently sufficient reasons.[5]

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[5] Under these circumstances, *stare decisis* does not justify preserving the contrary holding in *McConnell*. *McConnell* is only six years old, its rationale on this point was substantially undermined by *WRTL* just two years ago, *stare decisis* has less force for constitutional rulings that cannot be corrected by Congress, and this is not a situation where there are any significant reliance issues. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991)(and collected cases).

First, § 203 remains unconstitutionally vague. Vague laws chill speech and the vagueness doctrine therefore applies with special force in First Amendment cases. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

For that reason, First Amendment tests do not typically rely on the reaction of a "reasonable listener." There are, of course, exceptions. The *Miller* test for obscenity rests, in part, on the response of the "average person" to the material at issue. *Miller v. California*, 415 U.S. 15, 24 (1973). This Court has also referred to the "reaction of the listeners" in determining whether speech qualifies as a "true threat" that can be proscribed. *See Watts v. United States*, 394 U.S. 705, 708 (1969). But, both those cases were dealing with speech that has historically been deemed outside the First Amendment.

This case, by contrast, deals with political speech at the First Amendment's core.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to public processes.

Mills v. Alabama, 384 U.S. at 218-219. To facilitate these discussions, the First Amendment demands a

bright line between protected speech and unlawful advocacy because political campaigns in the real world so rarely provide one. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42.

As an abstract matter, a hypothetically reasonable speaker should perhaps be able to predict with a reasonable degree of certainty how a hypothetically reasonable listener will interpret an ad. But piling hypotheticals together is no more consistent with strict scrutiny under the First Amendment than the "prophylaxis-upon-prophylaxis approach to regulating expression" that this Court rejected in *WRTL*. 551 U.S. at 479.[6]

Second, vague laws invite discriminatory enforcement on the basis of viewpoint and that risk is particularly acute when what is at stake is political speech that may be harshly critical of those in power. FECA seeks to minimize that risk by providing that each major party is entitled to equal representation on the Federal Elections Commission. 2 U.S.C. §437c(2)(A). But the bipartisan composition of the

[6] Citing *Buckley,* the *WRTL* Court explained that a test based on the "actual effect" that speech will have on the target audiences "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." 551 U.S. at 469. Although the majority rejected Justice Scalia's critique that its own test suffered from the same vagueness problems, *id*. at 474 n.7, it is hard to see how a test based on the hypothetical impact of speech on a reasonable listener or listeners (who may have different responses that could be described as reasonable) provides greater clarity.

FEC does not protect minor parties; it does not protect groups that operate independently of any political party; and it does not extend to state and local laws that may not even attempt to insulate campaign finance enforcement from partisan political influence.

Third, BCRA's ban on "electioneering communications" currently extends only to broadcast, cable and satellite. That selective focus presents its own constitutional problems. The government concedes that *Hillary: The Movie* is not subject to BCRA if it is purchased as a DVD and watched at home, yet contends that it is subject to BCRA if ordered for home viewing as a pay-per-view movie. It is difficult to justify that distinction in any rational First Amendment world.[7]

More seriously, the limitations on covered media included in BCRA could be changed at any time. As the government made perfectly clear during oral argument in March, its constitutional theory would permit Congress to ban a book as well as a 30-second TV spot if the book satisfied the operative definition of an "electioneering communication" and the book's corporate publisher paid for the book with general treasury funds (as it almost certainly would). Tr. at 26-30. The breadth of that concession is staggering. It has become commonplace to publish

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[7] *Cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)(holding that a special tax targeting a handful of newspapers "presents such a potential for abuse that no interest suggested by [the state] can justify the scheme.").

books about candidates during campaign season. Such books almost always take a position on a candidate's character, either explicitly or implicitly, which is one of the indicia of prohibited advocacy that this Court identified in *WRTL*. The fact that such books could be banned under the government's theory unless funded by a PAC vividly illustrates why those criteria are insufficient to safeguard the important First Amendment interests at stake.[8]

6. The government devotes a scant four pages of its supplemental brief to defending *McConnell's* holding on the facial validity of § 203. Its defense is not only short, but unpersuasive. Initially, the government repeats its mantra that § 203 – as drafted by Congress and, *a fortiori*, as construed in *WRTL* – only reaches political speech that is the "functional equivalent" of express advocacy. Supp.Br. at 21-22. That cannot mean that § 203 only bans speech that would previously have been covered by the express advocacy rules since § 203 would then be pointless. Yet, the government never even attempts to define the daylight between *Buckley* and BCRA by explaining what speech is permitted by the former and prohibited by the latter.

If the government cannot state the difference clearly and succinctly, speakers covered by § 203 will necessarily be guessing when they venture beyond

[8] "Debate on the qualifications of candidates is integral to the system of government established by our Constitution," *Buckley*, 424 U.S. at 14, and thus "at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

express advocacy. Rather than risk sanctions, many speakers will "steer far wider of the unlawful zone," *Speiser v. Randall,* 357 U.S. 513, 526 (1958). If so, the resulting constitutional injury is not limited to those who are silenced. "[S]peech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In fashioning the express advocacy doctrine, the *Buckley* Court was not naive. It understood that groups could devise "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 46. But, contrary to the government's position, the Court chose to accept that possibility rather than permit the suppression of constitutionally protected speech.

The government next contends that the chilling effect of § 203 is overstated because the FEC has provided "a simple mechanism" for corporations and unions to claim that their speech is permissible under *WRTL.* Supp.Br. at 22. But that "simple mechanism"—a regulatory form—only works if the FEC agrees with the speaker's contention about *WRTL*'s impact on particular speech. The administrative review mechanism becomes less simple if the speaker must take the FEC to court.

In fact, the government's suggested solution only compounds the constitutional problem. This Court has repeatedly held that the government may not impose a content-based restriction on speech and then place the burden on the speaker to establish the constitutionality of the proposed speech.

> [W]here particular speech falls close to the line separating lawful and the unlawful, the possibility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterance will be penalized . . . This is especially to be feared when the when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position."

Speiser v. Randall, 357 U.S. at 526 (citations omitted). *See also Freedman v. Maryland,* 380 U.S. 51, 58 (1965).

Finally, the government argues that free speech interests are adequately protected because Congress provided for expedited review of constitutional challenges to BCRA. Supp.Br. at 23. This Court took a more realistic view in WRTL, agreeing with the district court's assessment that "it would be 'entirely unreasonable . . . to expect that [the speaker] could have obtained complete judicial review of its claims in time for its ads' during the BCRA blackout periods." 551 U.S. at 462 (citations omitted).

7. As noted at the outset, this brief does not address the question of whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled. At the very least, however, the ACLU strongly believes that this Court should hold that the *MCFL* exception for nonprofit, ideological corporations that do not accept corporate funding, *see* n.2, *supra*, should extend to organizations like the ACLU that only accept *de minimis* funding from

sources other than individual donors. Contrary to the position it has taken for years, s*ee* 11 C.F.R. § 114.10(c)(4)(ii), the government now apparently concedes, or at least acknowledges, that *MCFL* applies to nonprofit, ideological corporations that are financed "overwhelmingly" by individual donations. Supp.Br. at 3 n.3. The ACLU urges the Court to adopt that interpretation of *MCFL*, if it does not overrule *Austin* entirely.

CONCLUSION

For the reasons stated herein, this Court should declare § 203 of BCRA facially unconstitutional under the First Amendment, and overrule the contrary holding in *McConnell*.

Respectfully submitted,

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