No. 22-174

In The
Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN POSTAL WORKERS UNION, AFL-CIO IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

American Postal Workers Union, AFL-CIO (APWU) is the second largest union of U.S. postal workers with approximately 200,000 members nationwide. The APWU represents employees at the U.S. Postal Service who work throughout postal operations in areas such as retail, mail processing and sorting, maintenance, transportation, accounting and payroll services, human resources, systems administration and maintenance, data entry, and customer service. APWU-represented employees include employees who are categorized as non-career like the Rural Carrier Assistants. APWU bargaining unit members have always had to work on Sundays, and the Union has negotiated fair and objective scheduling rules, premium pay, and required days off to fairly allocate the burden of work schedules among its bargaining unit members. The APWU continues to press the Postal Service to be fully staffed to further minimize any negative impact on employees' work schedules and personal lives. These contractual rights would be impaired by the relief Petitioner seeks as to involuntary Sunday scheduling.

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY

In Part I of this brief, *amicus* APWU explains that Petitioner's criticism of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), insofar as it relates to dress codes and personal workplace expression, is very different from mandatory religious preferences in workplace benefits like assignment of unwanted work. The *amicus* supports Congress' effort in Title VII to protect worker autonomy over their own bodies, dress, and personal lives against arbitrary management suppression. Clearly, the possibility that personal expression by religious minorities might offend intolerant co-workers should not be given any legal weight as a "heckler's veto." The *amicus* APWU takes no position on how the *Hardison* accommodation standard should be revised as to matters of personal self-expression that do not affect the legitimate rights of co-workers.

In Part II, however, we show why Petitioner's argument for a religious preference in scheduling is entirely different. *Amicus* APWU opposes Petitioner's demand for a special, religious preference to avoid weekend work to the disadvantage of his co-workers who observe a different or no faith. That is not merely an act of self-expression. It is a claim of *preferential entitlement* based on a religious test. Other workers who simply want and have earned time to spend with their families or to have a day of rest on Sundays are not "hecklers" intolerant of their co-worker's religion. They are citizens equally entitled to a day of rest, and equally protected against Government-mandated sacrifice to facilitate others' religious exercise.

Eight years after *Hardison*, this Court held that a Sunday work-preference statute was unconstitutional in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-710 (1985), a case that the Third Circuit majority cited, Pet. App. 24a, but that the dissenting Judge and Petitioner's *certiorari* petition both fail to acknowledge. Unlike *Hardison*, *Caldor* did not rely on second-guessing the Legislature's statutory intent. This Court struck down Connecticut's mandatory preference in Sunday scheduling for religious employees, not as a statutory matter, but as a violation of the Constitutional rights of non-religious co-workers forced to cover Sabbatarians' weekend shifts. This Court held in *Caldor* that the burden on co-workers' weekends is *not* incidental collateral damage, but substantial enough to invalidate the preference as a penalty on non-observant workers' own choice not to subscribe to an organized religion. As Justice O'Connor explained in her concurring opinion: "All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. . . . The message conveyed is one of endorsement of [] religious belief, to the detriment of those who do not share it." *Caldor*, 472 U.S. at 711-712 (O'Connor, J., concurring).

Petitioner's claim for a religious test for avoiding weekend work cannot be granted without overruling

Caldor as well. Indeed, Petitioner's theory would require overruling a long line of this Court's decisions holding that religious non-exercise (whether based on agnosticism, secular humanism, or anti-clerical dissent) is equally protected by the Free Exercise Clause against Government-mandated penalty. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

A day off is not the special privilege of the religious. Days off, especially on the weekend, are when parents can spend the day with children who are otherwise in school, when people can spend time on the other necessities of life, when the community enjoys a common day of rest for churchgoers and the non-religious alike. Petitioner is wrong to claim he has a special legal right to a regular day off that the Buddhist and the agnostic and the Catholic do not. Petitioner has a right to wear a religious pin, symbol, or garment, but no right to require his co-workers to give up their weekends to facilitate his practice of his faith. The Free Exercise Clause does not countenance such a discriminatory preference for workers whose religious practice prohibits them from working on their Sabbath.

ARGUMENT

I. *Amicus* APWU Takes No Position on the Standard for Accommodating Workers' Right of Free Religious Expression, Which Is Distinct From a Right to Preferential Treatment in Work Assignment.

The *amicus* APWU believes that a worker's right of personal religious expression should never be restricted based on intolerance or bigotry. Supervisors, co-workers, and customers who object solely because they despise a religious worker's faith should never be given a "heckler's veto" over such worker's personal expression. *Amicus* APWU leaves the debate over how to define the limits of accommodation of religious dress and speech in the workplace (the "'favored treatment' for religious practices" that Petitioner references, Pet. Br. 23 (quoting *EEOC v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768, 775 (2015))) to the parties and the other *amici*. *Amicus* APWU agrees that a high standard is warranted to protect workers' expression of their faith.

This is not such a case. Unlike the right of personal religious expression, Petitioner's demand to have Sundays off irrespective of an equal-rotation system for sharing unwanted weekend work implicates the legitimate rights of all of his co-workers. A non-religious co-worker who resists being forced to work Sundays to facilitate Petitioner's religious practice is not a bigot exercising a "heckler's veto" just because she wants to spend Sunday as a day of rest, too.

II. The Right of All Workers to a Non-Discriminatory System for Assigning Weekend Work May Not Be Subjected to a Religious Test: *Estate of Thornton v. Caldor*.

While *amicus* takes no position on the general question posed by Question 1 of the *certiorari* petition, *amicus* APWU opposes Petitioner's position as to Question 2. By demanding a preferential exemption from weekend work based on a religious test, Petitioner is not simply defending his own free religious expression or challenging the appropriateness of the Postal Service's accommodations. Unlike his right to wear a religious pin or symbol, Mr. Groff's demand for preferential scheduling rights insists that all other co-workers give up their weekends to facilitate his religious practices, solely because he belongs to a particular church and they do not. That is patently unconstitutional under *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 710 (1985).

A. If the Court reconsiders *Hardison*'s statutory focus on employer rights, the Court must consider the independent Constitutional rights of non-religious workers or workers of other faiths passed over in *Hardison*.

Petitioner and his *amici* treat this as a purely statutory question, limited to the employer's managerial interest. They fixate on the language of Title VII, which speaks only of the burden to the *employer*. *See* 42 U.S.C. § 2000e(j). They argue that there is no such burden

here, assuming that the Postal Service has enough non-believers who do not ascribe to Mr. Groff's faith available to conscript for involuntary weekend work. *See* Pet. Br. 44-45. Petitioner and his *amici* reason that the Postal Service suffers no harm to its own business from exempting Mr. Groff. Because Congress did not mention harm to other employees in Title VII, they say, any non-believer or an employee of a different faith forced to work weekends has no countervailing rights to assert. *See* Pet. Br. 38-43.

The *Hardison* Court distorted the consideration of this issue by treating the problem as a purely *statutory* question of how much managerial authority should give way to religious exercise under Title VII. This is the result of the *Hardison* Court's improvident decision to focus only on the employer Trans World Airline's *certiorari* petition (arguing for a pro-employer standard of minimal burden under Title VII), while relegating the Machinists Union's parallel *certiorari* petition (defending union workers' Constitutional right against a religious test for scheduling) to a footnote.

In *Hardison*, the Court acknowledged that it had also granted *certiorari* to the Machinists Union's separate petition "because the rationale of the Court of Appeals' opinion, as the union underst[ood] it, 'necessarily and explicitly assume[d] that petitioner Unions [we]re legally obligated to waive or vary provisions of their collective bargaining agreement in order to accommodate respondent Hardison's beliefs, if called upon by TWA to do so.' " *Hardison*, 432 U.S. at 70 & n.5. The Court recognized that this appeared "to

be the position of Hardison and the EEOC in this Court." *Id.*

The Machinists Union's petition in *Hardison* did not rely on the employer TWA's managerial prerogative or the burden on the *employer*. It strenuously defended the Union members' *own* rights under the collective bargaining agreement and the Free Exercise Clause to be free of Government-mandated religious tests for choosing their schedule. *See* Brief for Petitioner Int'l Ass'n of Machinists in *Hardison*, 1977 WL 189767 (filed Jan. 15, 1977). Because the *Hardison* Court reversed based only on the employer TWA's statutory argument, however, it did not reach the Machinists Union's Constitutional defense of its members' Free Exercise rights. The *Hardison* Court merely buried a reference to the Union's Constitutional theory, which the Court never reached, in a footnote. 432 U.S. at 70 n.5. Now that the Court has granted *certiorari* to reconsider *Hardison*, the Court must be even-handed. It must therefore consider the independent union arguments acknowledged but not reached in *Hardison*.

Now, however, Petitioner and his *amici* claim that the Postal Service lacks standing under Title VII to assert "undue hardship on the conduct of the employer's business under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself." Petition, Question 2. The *amicus* APWU agrees with Petitioner that employers generally lack standing to assert the rights their employees won against them in collective bargaining. The restrictions in the Rural Carriers'

MOU requiring an equal rotation in the assignment of involuntary Sunday work[2] were not given by the grace of the Postal Service—they were won by the union in bargaining. But for the union's demands, employers like the Postal Service might well prefer to be free of any restrictions on their managerial prerogative to assign mandatory work to any employee they choose. Those individual rights to a fair process for mandatory weekend work exist only because the workers and their unions fought for them in collective bargaining. For this reason, this Court has properly been unmoved by employers who champion rights that their own employees won against them in collective bargaining. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 51 n.16 (1987) (citing *Brooks v. NLRB*, 348 U.S. 96 (1954)).

That does not mean that those workers have no rights to assert. If the Court is now granting *certiorari* to reconsider *Hardison* on the ground that employers may not invoke the burden to other workers against preferential religious accommodation, the Court then must allow employees and their representative unions to defend their rights independently.

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[2] The MOU in this case is not a seniority provision, but it is a fair equal-rotation requirement. Pet. App. 57a. The District Court explained that it makes no difference whether the method of distributing unwanted Sunday work was based on seniority (as in *Hardison*) or equal rotation, as in this case. *Id*. These are both collectively bargained restrictions that impose objective fairness in the assignment of unwanted Sunday work. *Id*.

B. Non-religious workers have free exercise rights against forced subsidy of others' exercise of religious observance.

1. The issue presented in Question 2 of the *certiorari* petition has already been answered in *Estate of Thornton v. Caldor*.

Eight years after *Hardison*, this Court reached the Constitutional issue it had avoided in *Hardison*. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), the Court struck down a Connecticut statute that provided Sabbath observers with a statutory right not to work on their Sabbath. The Court held that this statute violated the rights of the non-religious workers who would have to cover the shift: "[o]ther employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off" would be "'significant[ly] burden[ed]' if Sabbath observers were granted an absolute right not to work on their Sabbath." 472 U.S. at 710 & n.9. Justice O'Connor's concurrence elaborated:

> All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes,

> absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.

Id., 472 U.S. at 711 (O'Connor, J., concurring).

The Court ruled 8-1 (per Chief Justice Burger, with only Justice Rehnquist dissenting) that "this unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: 'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' As such, the statute goes beyond having an incidental or remote effect of advancing religion." 472 U.S. at 710 (quoting *Otten v. Baltimore & Ohio R. Co*., 205 F.2d 58, 61 (2d Cir. 1953)).[3]

While the *Caldor* Court framed its decision as an enforcement of the Establishment Clause, its analysis more precisely highlights a Free Exercise problem with preference for certain religious believers in weekend scheduling. The burden of working on weekends is,

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[3] The AFL-CIO filed an amicus brief in *Caldor* successfully pressing the Free Exercise arguments that the Court adopted. *See* Brief of Amicus Curiae AFL-CIO, 1984 WL 566042 (filed August 3, 1984).

by government mandate, confined to non-religious workers solely because of their choice not to be religious. That amounts to a government-mandated penalty, a forced subsidy by the non-religious to support the religious workers' own observance. That is the kind of discrimination the Free Exercise Clause is framed to prevent. *See Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("Neither [states nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."); *Everson v. Board of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (Free Exercise Clause prevents states from excluding individuals "because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

Caldor forecloses Petitioner's position as to Question 2. Remarkably, although the Third Circuit majority cited *Caldor*, Pet. App. 24a, neither Judge Hardiman's dissent nor the Petitioner's *certiorari* petition acknowledged that decision.

2. Petitioner's position on Question 2 would abolish the core tenet that the Free Exercise Clause protects non-believers and believers alike from religious tests.

Petitioner's theory, if accepted, would not only require the overruling of *Caldor* and *Hardison*. It would

require the Court to overrule core tenets of the Free Exercise Clause—that the First Amendment protects the non-religious from Government-mandated preferences every bit as much it does religious believers and that the government should not value certain religions over others.

Petitioner's and his *amici*'s argument assumes that people who share his particular faith are the only people with rights under the Free Exercise Clause. They assume that other workers who do not wish to work on Sundays have no Constitutional protection, because their day of rest is not mandated by their faith. Anti-clerical dissenters, agnostics, and Buddhists, even Catholics, Baptists, and Evangelicals who want their Sundays off do not count, according to this theory, because they are not, by their absence from work, religiously celebrating a Sabbath, and so they have no interests that the Free Exercise Clause is required to honor. If a worker wants Sunday off because he wants to walk in the park, spend time with children he does not see on school days, or go to morning church services for a faith not requiring Sabbath observance, then the Petitioner and his *amici* say that he should be required to work Sundays to bear the burden of his co-workers' faith.

This violates every principle of the First Amendment. The First Amendment does not simply protect one sect against another—belief systems that eschew organized worship like atheism, anti-clerical non-conformism, Thoreauian transcendentalism, Deism, Buddhism, agnosticism, and secular humanism are equally

protected against religious discrimination, even though (and indeed *because*) they do not join in the majority's organized worship. *Torcaso*, 367 U.S. at 495 ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally [] pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."). Similarly, religions that do not mandate non-work on the Sabbath are no less legitimate than those that do. *Everson*, 330 U.S. at 15 ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). But under Petitioner's view of Title VII, only those with "religious practices" that direct non-work on a Sabbath may benefit from the rule. Others are forced to submit to mandatory weekend work. Thus, the rule discriminates against those who do not declare their profession for organized worship or for a particular religion, as though the freedom to enjoy a day of rest is outside the First Amendment's protection.

This is also clear as a statutory matter. If a union enforced a contract provision that workers may choose their day off according to seniority, but made an exception for more junior Catholics to jump the line over more senior Protestants to take Sundays off, this would plainly be religious discrimination in violation of Title VII. *See* 42 U.S.C. §§ 2000e-2(a)(1), (c)(3). The

union could not justify the exception by arguing that Catholic Mass is more traditionally held in the daytime than Protestant services. But here Mr. Groff is asking for the very same rule, simply substituting "adherents of the Worldwide Church of God" instead of "Catholics" and "employees of any other or no faith" instead of "Protestants." An employer (particularly a government employer like the Postal Service) should never be permitted to say "you may have Sundays off, but only if you certify that you believe in God and your God directs you not to work on the Sabbath. If not, your contractual rights to earn your day off based on your seniority have been canceled." That is a Government-mandated disability imposed on non-believers, no different than the 18th Century preferences for members of the Church of England that the Framers intended to abolish.

3. Weekends are not an exclusive privilege for the religious.

Petitioner also argues that non-religious people do not have the same right to Sundays off, because they do not subscribe to the doctrine of the religious Sabbath. This is the equivalent of a union bargaining to make Labor Day a paid holiday only for dues-paying members. The fact that union members believe in the ideological origin of the holiday cannot justify forcing non-members to forgo their own cookouts to work on Labor Day, despite the fact that their non-membership indicates that they do not subscribe to the doctrinal tenets of the "labor sabbath."

This is not the way the Court regards weekends. Although the designation of Saturdays and Sundays is historically rooted in the Judeo-Christian tradition, this Court holds that the modern weekend is *not* a religious establishment. State laws may properly require Sunday closings without running afoul of the Establishment Clause because a Sunday off is as valuable to the non-religious as to the religious. "People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. 'Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. * * * '" *McGowan v. Maryland*, 366 U.S. 420, 451-52 (1961) (quoting 308 Parliamentary Debates, Commons 2159). Sunday is, accordingly, the "day of rest . . . which most persons would select of their own accord." *Id*. at 452.

Unions like the APWU strenuously fight for legislation and contract provisions to afford days off, advance scheduling, family leave, and other worker rights against management intrusion into the work/life balance. But Congress may not legislate protections like the Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq*., as a special privilege reserved to religious observers. Nor may a union award special superseniority rights to Catholics for days off in preference to co-workers who do not celebrate Mass.

Yet here Petitioner proposes a religious test where "a time for family activity, for visiting friends and

relatives, for late sleeping, for passive and active entertainments, for dining out," *cf. McGowan*, 366 U.S. at 451-452, may be preserved only if it aligns with a declared religious belief—all others have no similar right to a weekend, and must submit to an increased weekend workload to facilitate those who truly believe in the original Sabbath purpose. That is indefensible under the Free Exercise Clause. A non-religious co-worker or a co-worker who is not compelled by her faith not to work on the Sabbath is not exercising a "heckler's veto" against Mr. Groff's religious observance—she is defending her *own* right to have a Sunday off without having to certify her *own* religion's practice of faith.

4. Petitioner is not urging an anti-discrimination law; he is arguing for Title VII as a program of preferential rights for religious believers.

Until now, this Court has stressed that religious people and organizations may not be excluded from secular benefits because they are religious. For example, if a State awards financial scholarships or tuition assistance to private schools, it may not disqualify a parochial school simply because its private education is also religious. *Carson as next friend of O.C. v. Makin*, ___ U.S. ___, 142 S. Ct. 1987, 1997 (2022); *Espinoza v. Montana Department of Revenue*, ___ U.S. ___, 140 S. Ct. 2246, 2254 (2020). "By condition[ing] the availability of benefits in that manner," a State would

"effectively penalize[] the free exercise of religion." *Carson*, 142 S. Ct. at 1997.

But this doctrine must work both ways. Just as a generally available secular benefit like tuition assistance cannot be conditioned on the recipient *renouncing* a religious mission, so that benefit cannot be conditioned on the recipient *adopting* one. In *Carson*, the State of Maine could not have been allowed to give tuition assistance only to religious schools to foster vocational training for religious young people. 142 S. Ct. at 1997; *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989) (Texas' tax exemption for religious periodicals violated Establishment clause, distinguishing past cases forbidding exclusion of religious groups from secular benefits—"In all of these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect." (citing *Caldor*, 472 U.S. 703)).

But here, Petitioner demands that Title VII go even further—not merely to put observant and non-observant employees on the same footing as to the right to Sundays off, but to explicitly legislate preferential rights for certain religious practices and therefore certain religions.

5. Congress' intent in Title VII is irrelevant if it legislated a religious test for preferential employment rights.

Petitioner and his *amici* treat this case as a purely statutory matter—did Congress intend Title VII to require preferential treatment for religious objectors, even if it requires other employees of different or no religious beliefs to bear the burden? This statutory question is interesting, but it ignores the elephant in the room—the glaring Constitutional issue.

Regardless of whether Congress intended Title VII in the way Petitioner claims, Congress lacks the power to legislate preferences for certain religious practices, just as the Connecticut Legislature lacked the power to legislate mandatory days off for only Sabbatarians in *Caldor*.

If Congress did intend Title VII to nullify other employees' contractual rights against unwanted Sunday work because of their abstention from religion or their exercise of a faith that reconciles religious practice with weekend work, then Congress violated the Free Exercise Clause. Where an otherwise acceptable construction of a statute would raise serious Constitutional problems, the Court will construe the statute to avoid it. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979). If Congress did intend an unconstitutional religious preference in Title VII, this Court may not uphold the legislation no matter what

Congress' intent was. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

CONCLUSION

Mr. Groff is entitled to belong to the Worldwide Church of God or no church at all. The *amicus* APWU defends Mr. Groff's right to wear a religious pin or other symbols of religious self-expression at work. We leave the revision of the standard for accommodating religious personal expression in the workplace to other parties. The *amicus* takes no position on Question 1.

But Mr. Groff's right to avoid his fair share of work on his Sabbath, and to force other workers to take those tours of duty, cannot become stronger because of his particular religious practices which his co-workers do not share. His co-workers who choose not to spend their Sundays in church or observing a Sabbath do not have any lesser right against religious discrimination for their non-attendance or non-observance. Nor is a worker's right to a Sunday as a day of rest any less protected from a religious test just because that person is not observing a Sabbath. The *amicus* APWU therefore urges that Petitioner's position on Question 2 be rejected, and that the Court adhere to its holdings in

Caldor and its longstanding Free Exercise jurisprudence.

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