In the

United States Court of Appeals for the Seventh Circuit

Appeal No. 01-3002

DAN LINNEMEIER, PATRICIA C. CORBAT, and
FRANCISCO CARLOS AVILA

Plaintiffs-Appellants

v.

MICHAEL J. BIRCK, BARBARA H. EDMONDSON,
JOHN A. EDWARDSON, LEWIS W. ESSEX,
JOHN D. HARDIN, JR., J. TIMOTHY MCGINLEY,
D.WILLIAM MOREAU, JR.,
MAMON M. POWERS, JR., AMANDA S. TEDER,
and W. WAYNE TOWNSEND, as members of the
BOARD OF TRUSTEES OF
INDIANA UNIVERSITY-PURDUE UNIVERSITY, Fort Wayne

Defendants-Appellees

On Appeal from the United States District
Court for the Northern District of Indiana

Amici Curiae Brief for the American Association of University Professors, National Coalition Against Censorship, People for the American Way Foundation, and Volunteer Lawyers for the Arts in support of Defendants-Appellees

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INTEREST OF AMICI CURIAE

The American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines dedicated to advancing the interests of higher education. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. AAUP has participated before the U.S. Supreme Court and this Court in cases raising important legal issues in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984); *Lever v. Northwestern University,* 979 F.2d 552 (7th Cir. 1992). The Association's members include both faculty members and academic administrators at higher education institutions throughout the country, including Illinois, Wisconsin, and Indiana.

One of AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of university life. Numerous federal and state courts have relied on those policy statements, including this Court. *See Korf v. Ball State University*, 726 F.2d 1222, 1227 (7th Cir. 1984) (citing AAUP's *Statement on Professional Ethics).* The seminal 1940 *Statement of Principles on Academic Freedom and Tenure* was developed by AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by over 170 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS

3 (2001 ed.) ("1940 Statement"). The 1940 Statement is the country's fundamental, most widely-accepted description of the basic attributes of academic freedom and tenure, and has been relied upon by the Supreme Court. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972).

In 1990 AAUP endorsed a statement, *Academic Freedom and Artistic Expression*, which provides that "academic freedom in the creation and presentation of works in the visual and the performing arts . . . best serves the public and the academy." American Association of University Professors, *Academic Freedom and Artistic Expression,* AAUP POLICY DOCUMENTS & REPORTS 35, 37 (2001 ed.). Based on AAUP policy and First Amendment law, the district court properly denied the request by plaintiffs-appellants for injunctive relief.

The National Coalition Against Censorship (NCAC) is an alliance of 51 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil liberties groups. United by the conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy, we work to educate our members and the public about the dangers of censorship and how to oppose it. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 500,000 members and supporters nationwide. People For has frequently represented

parties and filed *amicus curiae* briefs in important cases defending the First Amendment guarantees of freedom of expression, including in the arts and at universities, and of religious freedom, including as it relates to the Establishment Clause. People For has joined in filing this *amicus* brief because the case implicates these important First Amendment principles, and the right of Americans to decide for themselves what to see and think and say with respect to controversial works of art.

Volunteer Lawyers for the Arts (VLA) is a nonprofit organization that provides legal and educational services to artists and art organizations with limited financial resources. VLA joins this brief as *amici curiae* in the belief that the appellants' actions taken against the university chill artistic innovation, expression, and exhibition and, therefore, violate the First Amendment. VLA submits this brief to emphasize that art should receive the most stringent First Amendment protection because of its vital role in challenging the status quo, and that no restriction of First Amendment rights should be allowed to manipulate and thereby chill the marketplace of expression.

SUMMARY OF ARGUMENT

The district court properly denied plaintiffs-appellants' request for a preliminary injunction compelling a public university to halt the campus production of a controversial play. Allowing the plaintiffs-appellants to interfere with the faculty's approval of a student-selected play to fulfill academic graduation requirements would violate the First Amendment rights of Indiana University-Purdue University, Fort Wayne (IPFW) and its faculty. The university quite properly refused to stop production of the play. The district court fully and correctly rejected each of the alleged constitutional premises for the plaintiffs-appellants' claims. The United States Supreme Court and

this Court have consistently affirmed that freedom of expression protected by the First Amendment includes artistic expression. Moreover, a university campus offers a particularly appropriate site for the display or performance of artistic works, including those which may challenge popular tastes and values. Indeed, principles of academic freedom protected by the First Amendment undergird the right of the university and its faculty to permit students freedom in choosing the plays they will direct in fulfillment of their curricular requirements in a theater course, and forbid censorship based on the content or viewpoint of those plays. Finally, there is no merit to the plaintiffs-appellants' claim that a public university would violate the Establishment Clause by permitting one of its students to choose for on-campus performance a play that either reflected a religious theme, or that might be perceived to disparage a major branch of religious faith or belief. Accordingly, *amici* urge this Court to affirm the judgment of the district court.

ARGUMENT

I. THE ACTION THAT PLAINTIFFS-APPELLANTS SOUGHT WOULD HAVE VIOLATED FIRST AMENDMENT PROTECTIONS OF FREE EXPRESSION, INCLUDING THE FIRST AMENDMENT RIGHT OF INDIVIDUAL PROFESSORS TO ACADEMIC FREEDOM.

The site of the current dispute—a university campus—is especially meaningful to the protection of artistic expression under First Amendment law generally and First Amendment academic freedom in particular. The plaintiffs-appellants went to court after the university properly refused to cancel a scheduled campus performance of a controversial, though constitutionally protected, work of theater art. The district court accurately observed that a university is "'a hub of

ideas' and a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth." *Linnemeier, et al v. Indiana University-Purdue University Fort Wayne, et al*, United States District Court, Northern District of Indiana Fort Wayne Division, Case No. 1:01-CV-0266, p. 13 (2001) (hereafter "Dist. Ct. Op."). As the Supreme Court declared a decade ago, a college campus is "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Several years later the high Court underscored that the university is a place "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 835 (1995). Most recently, in *Board of Regents v. Southworth*, 524 U.S. 217 (2000), the high Court emphasized the singular nature of the college campus, and the importance of tolerating—indeed, of fostering—the broadest array of expression within the academic community.

The *Rosenberger* and *Southworth* decisions bear upon this case in a closely related way. The First Amendment permits a public university to create a viewpoint- and content-neutral intellectual arena consistent with its educational mission. That is the case regardless of whether the plaintiffs-appellants' target is perceived as the treatment of a religious theme in general, or as a critique or disparagement of a dominant religious faith. In either sense, what the plaintiffs-appellants seek is government action that interferes with a public university's ability to maintain a constitutionally protected intellectual "marketplace of ideas."

Academic freedom is further implicated here, because plaintiffs-appellants ask the court to

interfere with the university's (and its professors') decisions regarding curricular content (here, the decision to allow students freedom to select the plays they will direct in fulfilling their course requirements, regardless of content or viewpoint). For the government to dictate that a university include or exclude specific courses or course content based on a particular viewpoint would violate the First Amendment. In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), this Court recognized that any such attempt to regulate expression on the basis of its viewpoint or message would constitute "thought control" and would establish "an 'approved' view" of the subject matter—drawing lines that the First Amendment simply does not accept. Later judgments of the Supreme Court have buttressed and broadened this doctrine—*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Rosenberger v. Rector and Visitors*, 515 U.S. 829 (1995), and most recently *Board of Regents v. Southworth*, 529 U.S. 217 (2000). It is surely not within the purview of the courts or the plaintiffs-appellants to impose such "thought control" by interfering with the academy's determination of academically appropriate criteria for the selection of plays by Theatre Department students.[1]

Thus the soundness of the district court's ruling emerges clearly from several closely related constitutional precepts, which this Court and the Supreme Court have consistently affirmed. The First Amendment fully protects artistic expression, even in forms that may evoke controversy or offend viewers and listeners. In cases such as *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Miller v. California*, 413 U.S. 15, 34 (1973); *Ward v. Rock Against Racism*, 491 U.S.

[1] AAUP's *Statement on Government of Colleges and Universities* provides that "[t]he faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction. . . ." American Association of University Professors, *Statement on Government of*

781, 790 (1989); and *Hurley v. Irish-American Gay*, *Lesbian and Bisexual Group*, 515 U.S. 557, 569 (1995), the Supreme Court has stressed in varied contexts the degree to which the First Amendment encompasses the creative and performing arts as speech for constitutional purposes.

This Court has strongly echoed and consistently reinforced those precepts. In *Nelson v. Streeter*, 16 F.3d 145, 148 (7th Cir. 1994), this Court noted that "government officials are not permitted to burn books that offend them, and we do not see any difference between burning an offensive book and burning an offensive painting." *See also Piarowski v. Illinois Community College District 515,* 759 F.2d 625 (7th Cir.), *cert. denied,* 474 U.S. 1007 (1985) (assuming the protected nature of artistic expression). And this Court's recent rebuke to efforts to regulate violent video games through analogies to obscenity law, *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), narrowly defines the scope of government power. That protection is especially clear on the public college and university campus, a sphere which, as this Court and the Supreme Court have recognized, should receive special deference and solicitude regarding the range of views and ideas that may be expressed and observed.

Academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The Supreme Court has consistently recognized that the First Amendment protects the academic freedom of professors. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise

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Colleges and Universities, AAUP POLICY DOCUMENTS & REPORTS 217, 221 (2001 ed.).

our civilization will stagnate and die."); *Keyishian*, 385 U.S. at 603 (Academic freedom is a "transcendent value to all of us and not merely to the teachers concerned").

This Court, too, has embraced the First Amendment right of professors to academic freedom. In *Dow Chemical v. Allen*, 672 F.2d 1262 (7th Cir. 1982), this Court, in refusing to issue a subpoena for materials based on toxicity studies in a university laboratory, recognized that a professor's First Amendment right of academic freedom "extends as readily to the scholar in the laboratory as to the teacher in the classroom." *Id.* at 1275. In so doing, this Court agreed with the position of the professors that scholarly research "lies at the heart of higher education" and therefore "comes within the First Amendment's protection of academic freedom." *Id.* at 1274; *see also Piarowski,* 759 F.2d at 629 (noting that academic freedom includes "the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy"); *Zykan v. Warsaw Com. Sch. Corp*, 631 F.2d 1300, 1306 (7th Cir. 1980) (observing that in the secondary school context "academic freedom precludes a local board from imposing a 'pall of orthodoxy' on the offerings of the classroom . . .which might either implicate the state in the propagation of an identifiable religious creed or otherwise impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry") (*quoting Keyishian v. Board of Regents,* 385 U.S. 589, 602 (1967)).[2]

[2] This Court has also recognized institutional academic freedom. *See Piarowski*, 759 F.2d at 629 (noting that academic freedom exists for the academy and faculty, and that the "two freedoms" may, in some cases, be in "conflict"); s*ee also Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."). In this case, however, no such "inconsistency" or "conflict" exists. Rather, the academic freedom concerns of the academy—administration, faculty,

Just as academic freedom encompasses the university laboratory, so too it embraces the university theater. The First Amendment right of academic freedom includes artistic expression. *See Dow Chemical,* 72 F.2d at 1275; *see also* AAUP, *Academic Freedom and Artistic Expression* at 37 (providing that "[f]aculty members and students engaged in the creation and presentation of works of the visual and the performing arts are as much engaged in pursuing the mission of the college or university as those who write, teach, and study in other academic disciplines"). And so, in *Piarowski,* 759 F.2d at 625, this Court, while recognizing that the location of a controversial stained glass artwork may be regulated on a public campus, assumed the protected nature of a professor's artistic expression.[3]

Two cases involving academic and artistic freedom in higher education may be helpful to this court. In *DiBona v. Matthews*, 269 Cal. Rptr. 882 (Cal. App. 1990), a student and a professor sued

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and students—are joined.

[3] These decisions suggest that the district court erred in one part of its analysis, although the error was unimportant to the decision it reached. The district court characterized this as a case in which the theater was a limited public forum with respect to performance of the student-directed play. We agree that the theater is a limited public forum when made available for the staging of plays selected by the public at large. *Southeastern Promotions,* 420 U.S. at 456. But here, the play being staged was in fulfillment of a course requirement. We do not believe that a course in a university or the classroom or academic setting in which instruction takes place is a limited public forum, or that the mandates of content and viewpoint neutrality applicable to a limited public forum should apply to the determination of curriculum content. *See Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring) (noting that "public forum" analysis "may needlessly undermine the academic freedom of public universities" and reasoning that a university should be free to decide for itself whether to prefer a student rehearsal of "Hamlet" or the showing of Mickey Mouse cartoons because "[j]udgments of this kind should be made by academicians, not federal judges. . .") Surely professors are allowed to select the readings (or plays) assigned in their courses without having to provide "equal time" to every competing viewpoint. Indeed, a contrary rule would invite endless lawsuits in which dissatisfied citizens would seek judicial involvement in the determination of course content. In the instant case, the distinction is not crucial to the outcome, as the professors' curricular choice was to allow students freedom to select their plays without regard to content or

the San Diego Community College District for canceling a drama course, which required that the students "produce and perform a play," because of disapproval by community church leaders. The play selected by the professor was Dennis McIntrye's "Split Second," which involved a black New York City police officer and a white suspect, in which the police officer shoots the suspect. The court ruled that the college had violated the plaintiffs' First Amendment rights because "[a] central premise of the constitutional guaranty of free speech is that difficult and sensitive political issues generally benefit from constructive dialogue of the sort which might have been generated by 'Split Second.'" *Id.* at 891. The court opined that the content of speech cannot be restricted simply because it "disrupts the tranquility of a campus or offends the tastes of school administrators or the public." *Id.* at 890 (*quoting Braxton v. Municipal Court*, 514 P.2d 697, 701 (Cal. 1973)).

Similarly, in *Brown v. Board of Regents of University of Nebraska*, 640 F. Supp. 674 (D. Neb. 1986), the University of Nebraska cancelled the scheduled showing of a controversial film, "Hail Mary," after a state senator and several other community members complained that the movie "blasphemed" their religious beliefs. The district court ruled that the cancellation of the film violated the constitutional rights of persons wishing to view it. *Id.* at 681. The court found that college students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . School officials cannot suppress expressions of feelings with which they do not wish to contend." *Id.* at 678 (*quoting Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982)); s*ee generally* Robert M. O'Neil, *Artistic Freedom and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 177, 182-87 (Summer 1990) (exploring

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viewpoint.

artists' freedom to display or perform works at colleges and universities). This case also implicates the First Amendment rights of those students and members of the public who want to view the play and form their own opinions about its meaning.

The precise context of the case at hand invokes the safeguards of academic and intellectual freedom with particular force. The IPFW Theatre Department's mission is "to educate its students in the art, craft, and discipline of the theatre, and is based on the belief that both production and classroom study are necessary components of a theatre education." Dist. Ct. Op. at 3., n3. In this case, the five faculty members of the Theatre Department unanimously approved the student's play selection, which the student was required to produce to fulfill his academic degree requirements. *Id.* at 3-4. IPFW Chancellor Michael Wartell did not interfere with the selection of the student production approved by the Theatre Department faculty, and would not, "unless the content was illegal." *Id.* at 5. That is because, according to Chancellor Wartell, there is a "general university policy, universities around the world actually, of academic freedom where administrators do not interfere with either how or what subject matter is taught in the classroom." *Id.* at 6. As in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), where the Supreme Court deferred to the university's determination of academic degree requirements, this record also "unmistakably demonstrates . . . that the faculty's decision was made conscientiously and with careful deliberation. . . ." *Id.* at 225. And, so "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Id.*

This Court has consistently ruled that the First Amendment protects artistic expression. This

Court has also recognized that the First Amendment right of academic freedom provides additional protection to public colleges and universities, a sphere which receives special deference and solicitude in the range of views and ideas that may be expressed and observed, including artistic expression.[4] The First Amendment rights of academic freedom of IPFW and its faculty confer on the academy the right to employ viewpoint neutral criteria in selecting projects, including plays, for academic credit.

II. THE PERFORMANCE IN A STATE UNIVERSITY THEATER OF A PLAY WITH A RELIGIOUS THEME, EVEN ONE THAT MAY OFFEND SOME RELIGIOUS BELIEFS, WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The plaintiffs-appellants have argued that the Establishment Clause of the First Amendment bars the performance on public premises of a play that contains a religious theme, the content of which allegedly would deeply offend some religious values and beliefs within the community. As the district court ruled after exhaustive analysis of the relevant judgments of this Court and of the United States Supreme Court, that claim is without merit.

Concern about possible offense to religious values and beliefs is hardly novel in our legal system. Nearly fifty years ago, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952), the Supreme Court, while striking down a state's ban on motion pictures with "sacrilegious" content, observed that "[t]he state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a

[4] As the First Amendment vests rights in faculty and students, as well as in the institution, there surely will be circumstances where the administration's efforts to "censor" will collide with the First Amendment rights of faculty and students. Here, as the administration did not purport to restrict the

particular religious doctrine, whether they appear in publications, speeches, or motion pictures." Some years later, in a very different context, the high Court reaffirmed this view: "that the State may have desired to protect the sensibilities of passersby" does not warrant the required removal of an offending symbol, at least so long as "anyone who might have been offended could easily have avoided the display." *Spence v. Washington*, 418 U.S. 405, 412 (1974).

The current case is said to differ from others because of the planned use of public facilities for the performance of the play. The claim is deficient for two reasons: (1) principles of academic freedom permitted the administration and professors wide scope in determining curriculum content, and that is the context in which the facilities were being used in this case; and (2) even if this production had not been part of a course, but simply a play staged by a member of the public, the university's neutrality is reflected by its lack of involvement in content or viewpoint. In the latter context, the facility is not unlike the municipal auditorium involved in *Southeastern Promotions, Ltd.,* 420 U.S. at 546, where denying the use of the auditorium for the performance of a controversial musical was treated as an invalid prior restraint on speech. Accordingly, any inference of governmental sponsorship or endorsement of religious views—in general or in particular—seems unwarranted and remote.

Under plaintiffs-appellants' reasoning a public university could be prohibited from presenting "The Ten Commandments" as part of a university film series or other works of art that plaintiffs-appellants might view in a positive light. This logic could severely undermine the ability of universities to teach and explore ideas about religion. Any suggestion that a public university that

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student's freedom of selection at all, such conflicts are not posed.

refuses to disfavor religious material has thereby endorsed or sponsored religious beliefs is quite at variance with settled Supreme Court doctrine. Some years ago, the Justices noted that "art galleries supported by public revenues display religious paintings of the 15th and 16th centuries," adding that "the National Gallery in Washington, maintained with Government support . . . has long exhibited masterpieces with religious messages, notably the Last Supper . . . among many others with explicit Christian themes and messages." *Lynch v. Donnelly*, 465 U.S. 668, 676-77 (1984).

While prominent religious displays on public property may in some settings convey a sense of endorsement or sponsorship, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), the circumstances of those cases differ so profoundly from the present case that they are, as the district court concluded after careful review, wholly inapposite. Permitting a few indoor performances of a play, which is selected by a student in the fulfillment of a curricular requirement that contains a religious theme or viewpoint, is categorically different from a seasonal display of a religious symbol which "no viewer could reasonably think. . . occupies this location without the support and approval of the government." *County of Allegheny,* 492 U.S. at 599-600; *see also American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987). Thus the district court properly distinguished the major rulings of this Court and of the Supreme Court that have barred highly visible religious displays or statues on endorsement or sponsorship grounds.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the judgment of the district court denying plaintiffs-appellants' the requested relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, the undersigned hereby certifies that the foregoing Brief of *Amicus Curiae* was dispatched (postage prepaid) this _____ day of August 2001 to a third-party commercial carrier (Federal Express) for next business day delivery to the Clerk of Court and counsel for Appellants and Appellee at the following addresses:

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