

No. 00-71217

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

————— ◆ —————
RICHARD D. WARREN; ELIZABETH K. WARREN
PETITIONERS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE
RESPONDENT-APPELLANT

————— ◆ —————
ON APPEAL FROM THE UNITED STATES TAX COURT

————— ◆ —————
BRIEF AMICUS CURIAE (at the supplemental briefing stage) OF
SPECIALTY RESEARCH ASSOCIATES, INC.,
in support of neither party.

Urging a finding of constitutionality.

————— ◆ —————
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FRAP RULE 26.1 DISCLOSURE STATEMENT

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INTEREST OF AMICUS

Specialty Research Associates, Inc., focuses on the historical research of issues relating to America's constitutional, moral, and religious heritage.

Possessing one of the largest privately-held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This historical expertise has resulted in appointments by numerous state boards of education and governors to assist in the formation and adoption of history and government education standards for students in those respective states. Additionally, Specialty Research Associates has been involved in the writing of several nationally published history textbooks for students. Expertise in historical research causes this organization to take a significant interest in the case now before the court and to submit this brief providing the historical background on the issue in question.

This brief is filed pursuant to the consent of the counsel of record for both parties and also, in accordance with instructions from the clerk, pursuant to a Motion for Leave to File a Brief Amicus Curiae.

ARGUMENT

I. IN ORDER TO EVALUATE THE CONSTITUTIONALITY OF IRC § 107(2) UNDER *TEXAS MONTHLY, INC. V. BULLOCK*, 489 U.S. 1 (1989), THIS COURT SHOULD EMPLOY THE HISTORICAL ANALYSIS UTILIZED IN *WALZ V. TAX COMMISSION*, 397 U.S. 664 (1970) BECAUSE EACH OF THE OPINIONS IN *TEXAS MONTHLY* LOOKED TO *WALZ* FOR GUIDANCE.

This Court has asked for supplemental briefing on whether IRC § 107(2) violates the Establishment Clause of the United States Constitution.¹ *Warren v. Commissioner*, 282 F.3d 1119, 1119 (9th Cir. 2002). In so doing, this Court specifically directed the attention of the parties and amici to *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). *Id.*

In order to understand *Texas Monthly*, however, another United States Supreme Court case, *Walz v. Tax Commission*, 397 U.S. 664 (1970), must be examined. Indeed, every opinion in *Texas Monthly* except Justice White's opinion (since Justice White would have decided the case under the Free Press Clause, *id.* at 26 (White, J., concurring)), interacted with *Walz*. *See id.* at 5 (plurality); *id.* at 26 (Blackmun, J. concurring); *id.* at 29 (Scalia, J., dissenting). In particular, the plurality decision of Justice Brennan and the dissenting opinion of Justice Scalia interacted with *Walz* in great detail.

The justices largely disagreed with each other in their respective readings of

¹ This Court also asked for supplemental briefing on the threshold questions of whether the Court has authority to consider § 107's constitutionality and, if so, whether it should exercise that authority. *Id.* This brief does not address these questions.

Walz, in which the Court upheld New York City’s property tax exemption for churches. Furthermore, Justice Scalia took Justice Brennan to task for relying on the *Walz* concurring opinions rather than on the *Walz* majority opinion. *Texas Monthly*, 489 U.S. at 38 (Scalia, J., dissenting). However, two things are especially important to note for present purposes. First, the *Texas Monthly* plurality explicitly reaffirmed the holding in *Walz*. *Texas Monthly*, 489 U.S. at 11-13. Second, both the *Walz* majority opinion, 397 U.S. 664, and each of the concurring opinions, *id.* at 680 (Brennan, J., concurring); *id.* at 694 (Harlan, J., concurring), emphasized the need to look to the original meaning of the Framers of the Bill of Rights and to historical practice as a guide to understanding that intent.

However, trying to arrive at the original meaning of the Establishment Clause is a task that has engendered great debate among scholars and jurists. *See generally*, Donald L. Drakeman, *Church-State Constitutional Issues* 51-80 (1981) (identifying various “camps” and sub-camps in this debate and summarizing their arguments). While all agree that history must serve as a guide, diametrically opposed conclusions are often reached. Thus, this brief will limit itself to the approaches of the *Walz* majority and concurrences in examining the historical record and the original meaning.

A. Section 107(2) is constitutional under the historic understanding of the Establishment Clause articulated by the *Walz* majority because, for purposes of constitutional analysis, income tax exemptions are identical to the property tax exemptions upheld in *Walz*.

Chief Justice Burger wrote for the *Walz* majority that: “It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.” 397 U.S. 667. The *Walz* Court went on to explain that:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Id. at 669-70.

Chief Justice Burger also pointed out the necessity of re-discovering the historic meaning of the Establishment Clause—even when there may be language in Supreme Court opinions that obfuscate that meaning: “The hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated

within the pages of the Court's opinion in *Everson*. MR. JUSTICE BLACK, writing for the Court's majority, said the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 670 (internal quotation marks and citation omitted). Chief Justice Burger then pointed out that despite Justice Black's broad statement, that justice had then held that the First Amendment did not prohibit New Jersey from spending tax-raised funds to aid religious schools that taught one particular religion. *Id.* (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 19 (1947)).

While Chief Justice Burger for the *Walz* majority, (at least implicitly) considered *Everson's* broad statement that "[n]either a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another," *id.* at 670, to be among the Court's "too sweeping utterances," *id.* at 668, he had high praise for *Everson's* actual holding. Chief Justice Burger characterized the *Everson* holding as "the Court's eminently sensible and realistic application of the language of the Establishment Clause. In *Everson* the Court declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Id.* at 671.

But Chief Justice Burger did not merely point out the general principle of

seeking the original meaning of the Establishment Clause with the aid of history.

Instead, he actually examined the particular history of property tax exemptions as a guide to the meaning of the Establishment Clause:

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms— economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. We cannot read New York’s statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

Id. at 673 (citing *Sherbert v. Verner*, 374 U.S. 398, 423 (1963) (Harlan, J., dissenting); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961); Paul G. Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in *The Wall Between Church and State* 95 (D. Oaks ed. 1963)).

Chief Justice Burger returned to his historical analysis repeatedly. For example, he wrote that “[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others

and none suffered interference.” *Id.* at 676-77. Again, Chief Justice Burger wrote:

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the “foot in the door” or the “nose of the camel in the tent” leading to an established church. If tax exemption can be seen as this first step toward “establishment” of religion, as MR. JUSTICE DOUGLAS fears, the second step has been long in coming.

Id. at 678.

It is especially important to note that many of Chief Justice Burger’s comments were not limited merely to property tax exemptions for church buildings. First and foremost, Chief Justice Burger noted that, for purposes of Establishment Clause analysis, property tax exemptions are identical to income tax exemptions: “For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an ‘aid’ to churches no more and no less in principle than the real estate tax exemption granted by States.” *Id.* at 676 (footnote omitted). Of course, what had then been true for over seventy-five years has now been true for nearly 110 years.

Furthermore, since *Walz* expressly upheld property tax exemptions and since income tax exemptions are “‘aid’ no more and no less,” *id.*, than property tax exemptions, the United States Supreme Court has, in effect, already passed upon

the constitutionality of income tax exemptions. If the exemption of religious organizations is not *per se* dispositive of the issue at hand, it is nearly so. The minor “aid” to clergy is surely less an establishment of religion than exempting all the “income” of churches.

A second point lends further historical support to the constitutionality of § 107(2). Chief Justice Burger noted the following tax exemptions that Congress or the City Council of Washington, D.C., acting under congressional authority, had granted to religious bodies: income tax exemptions in 1894, and from 1913 until the present; property tax exemptions in 1798, 1802, 1803, 1804, 1815, 1870, 1876, 1877, 1916, and 1967; and import duty exemptions for religious articles including printing plates, vestments, furniture, paintings, and bells in 1813, 1826, 1834, and 1836. *Id.* at 677-78.

It is important to remember that it was after discussing *all* of these practices that Chief Justice Burger penned the words previously quoted: “Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.” *Id.* at 678.

But Chief Justice Burger, writing for the majority, is not the only one to discuss such tax exemptions. Establishment Clause literature is rife with numerous

other examples of this sort of accommodation of religion, as well as more direct examples of “benevolent neutrality.” These include import duty exemptions, property tax exemptions, income tax exemptions, congressional and penitentiary chaplains, indirect aid to church social agencies, and clergy privileges such as exemption from jury duty. *See, e.g.*, D.B. Robertson, *Should Churches Be Taxed?* 89-103 (1968). It is no wonder then that the practice has continued into the present in various ways, including numerous provisions of the Internal Revenue Code, such as § 107(2). *See, e.g., id.* at 108-11; Paul J. Weber & Dennis A. Gilbert, *Private Churches and Public Money* 123-25 (1981); (both discussing tax and reporting exemptions for religious people and religious organizations).

Under the approach of the *Walz* majority, § 107(2) is just one of many ways in which the government accommodates churches and their clergy in the collection of income tax. Since the majority compared these exemptions to the property tax exemption and upheld that exemption, § 107(2) similarly passes constitutional muster.

B. Section 107(2) is constitutional under the historic understanding of the Establishment Clause contained in Justice Brennan’s *Walz* concurrence because the Founding generation re-enacted religious tax exemptions after ratification of the Bill of Rights, thereby demonstrating that exemptions were not one of the evils the Establishment Clause was intended to remedy.

Turning to Justice Brennan’s concurring opinion in *Walz*, which received significant attention from the *Texas Monthly* plurality opinion, one sees the same

insistence upon interpreting the Establishment Clause in a manner faithful to the understanding of the Founding Fathers. Quoting his own concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203, 294 (1963), Justice Brennan wrote: “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” *Walz*, 397 U.S. at 680 (Brennan, J., concurring) (internal quotation omitted). Justice Brennan explained why the historical record is so important in interpreting the Establishment Clause: “On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court’s interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation.” *Id.* at 681.

Turning to the New York exemption, Justice Brennan observed that “[t]he more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.” *Id.*

Again, while Justice Brennan was discussing property tax exemptions, not income tax exemptions, several matters make his comments germane to the issue

before this Court. First, his analysis is relevant beyond the particular exemption at issue in *Walz*. As mentioned previously, property tax exemptions and income tax exemptions are identical for Establishment Clause analysis. Thus, any historical evidence for either practice supports the constitutionality of the other practice.

In fact, many practices of a similar nature have developed as part of a larger continuum. And many of these practices went unmentioned upon for decades and centuries simply because, in the words of Justice Brennan, they were not “among the evils that the Framers and Ratifiers of the Establishment Clause sought to avoid.” *Id.* at 682. As Justice Brennan pointed out, “religious tax exemptions were not an issue in the debates preceding the petitions calling for the Bill of Rights, in the pertinent congressional debates, or in the debates preceding ratification by the States,” *id.*, despite being a wide-spread practice.

Justice Brennan found it particularly significant that within ten years of ratification of the Bill of Rights, four states passed laws exempting church property from taxation. *Id.* Justice Brennan correctly saw the significance of these post-Bill of Rights enactments. They demonstrate that in the midst of the movement to dis-establish churches at the state level and avoid establishment at the federal level, exempting church property from taxation was seen as compatible with those goals. In other words, exempting church property from taxation was neither an establishment of religion nor a goal of the anti- or dis-establishment movement.

Rather it was a legitimate accommodation of religion, worthy of re-enactment to make sure that “the baby wasn’t thrown out with the bath water.”

Justice Brennan found the experience of Virginia, one of the four states, particularly important because of the James Madison’s presence in the Virginia General Assembly during the vote on tax exemptions. *Id.* at 683. Similarly, Brennan found it significant that Thomas Jefferson had been President when Congress first granted exemptions to Washington, D.C., churches. *Id.* at 684

Justice Brennan put it this way:

I have found no record of their personal views on the respective Acts. The absence of such a record is itself significant. It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion. And if they had not either approved the exemptions, or been mild in their opposition, it is probable that their views would be known to us today. Both Jefferson and Madison wrote prolifically about issues they felt important, and their opinions were well known to contemporary chroniclers.

Id. at 684-85 (footnote omitted).

Justice Brennan also pointed out that no state or federal court had ever held that property tax exemptions violated the Establishment Clause, even though these exemptions have been in force in every state. *Id.* at 685. “For [now over] 200 years the view expressed in the actions of legislatures and courts has been that tax exemptions for churches do not threaten ‘those consequences which the Framers deeply feared’ or ‘tend to promote that type of interdependence between religion

and state which the First Amendment was designed to prevent.” *Id.* at 686 (citations omitted).

As has been mentioned in passing, the type of accommodation of religion represented by exempting church property from taxation is part of a larger tradition of extending numerous favorable tax treatments to religion. To the property tax exemptions explicitly upheld in *Walz*, one can add the federal income tax exemptions previously mentioned. This now represents a tradition extending for over 100 years. But that does not exhaust the list. In addition, the states extend similar exemptions to churches on income (and other) taxes. *See Note: Constitutionality of Tax benefits Accorded Religion*, 49 Colum. L. Rev. 968 (1949) (containing a now badly outdated, but then exhaustive, compilation of state provisions regarding religious exemptions from income tax, as well as from inheritance, estate, gift, excise, employment, and property taxes).

It is often claimed that state income tax has an historical record only approximately as long as the federal income tax. *See e.g.*, Sally Wallace & Barbara M. Edwards, *Personal Income Tax*, in *Handbook on Taxation* (W. Bartley Hildreth & James A. Richardson eds., 1999), (listing Hawaii’s 1901 income tax as the first modern “state” income tax). However, this is not really the case. For example, Richard T. Ely, *Taxation in American States and Cities* 122 (1888), notes that as early as 1796, both Pennsylvania and South Carolina levied taxes on the

profit of “trades and professions” from which ministers were exempted. (Ely also notes that in 1796 ministers were “generally,” i.e., in most states, exempted from poll taxes. *Id.* at 123.) This, too, is part of the 200 years of history that Justice Brennan surveyed.

As the *Walz* majority pointed out, in language quoted earlier, these traditions represent a “national heritage with roots in the Revolution itself.” *Id.* at 673.

Indeed, as the Supreme Court pointed out in another case, much of this tradition, or heritage, is older yet. As the Court pointed out in *Bob Jones University v. United States*, 461 U.S. 574, 588 (1983), “[t]ax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England. The origins of such exemptions lie in the special privileges that have long been extended to charitable trusts.” The *Bob Jones* Court went on to explicitly address “trusts for the advancement of religion” *Id.* at 589. In fact, the recognition of the advancement of religion as charity in British and American cases extends back to 1601 when the Statute of Elizabeth was applied to charitable uses. Herman T. Reiling, *Federal Taxation: What is a Charitable Organization?* 44 A.B.A.J. 525, 526 (1958).

Thus, the practice at issue in this case is in the mainstream of the church exemption “heritage.” While five justices of the Supreme Court found that the

particular publication tax exemption at issue in *Texas Monthly* was not within the mainstream of this heritage, three justices thought that it was. The parsonage exemption is not encumbered by complications of Free Press Clause considerations; by the unique problems of the limitations of the publication exemption (*see Texas Monthly*, 489 U.S. at 26-29 (Blackmun, J., concurring)); nor by recent vintage, as was the publication exemption.

Therefore, the parsonage exemption is well within the accommodation tradition dating at least to 1601, and extending through the early colonial and national period, including most significantly the dis-establishment era, right up until today. Indeed, the parsonage exemption is part and parcel of the types of reasonable accommodations listed by the three dissenting justices in *Texas Monthly*. These reasonable accommodations, described by the three justices as those which “today permeate the state and federal codes, and have done so for many years,” *id.* at 32 (Scalia, J., dissenting), include property tax exemptions for ministers’ library, for religious literature kept for sale, for the residences of various religious persons, for religious recreational day-care centers, and for vehicles used for religious purposes; transaction privilege tax exemptions for religious projects; sales tax exemptions for meals served by religious groups, for personal property held for re-sale, for vehicles used for religious purposes, and for church property; liquor tax, beverage tax, and licensing exemptions for sacramental wine; state

income tax exemptions for rental income from parsonages and for “receipts” from religious services; amusement tax exemptions for gospel singing programs; and nonprofit reporting exemptions. *Id.* at 30-33. While some of these practices might be problematic under *Texas Monthly* (after all, that was the concern of the dissent), many of them would not. Rather, they represent the modern-day continuation of our heritage and tradition of religious exemptions.

Interestingly, Justice Scalia included the statute at issue in the instant case in this litany of reasonable accommodations that have “permeate[d] the state and federal codes . . . for many years.” *Id.* at 32. In light of the comments of Justice Brennan in *Walz* (and of the *Walz* majority discussed above and of Justice Harlan discussed below), it seems obvious that §107(2) is well within the exemption tradition, even if the *Texas Monthly* exemption was not.

C. Section 107(2) is constitutional under the historic understanding of the Establishment Clause contained in Justice Harlan’s *Walz* concurrence because such exemptions are “expected and accepted as a matter of course.”

Justice Harlan also looked to the original meaning of the Establishment Clause as elucidated by history. While his concern was to note what he considered to be the proper present day standards by which to apply the Establishment Clause, he clearly stated that those standards must be based on the lessons of history. After declaring himself to be in “basic agreement” with the majority, he went on to state that “[w]hat is at stake as a matter of policy is preventing that kind and degree of

government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.” *Walz*, 397 U.S. at 694 (Harlan, J., concurring).

Justice Harlan restated his point this way: “[H]istory cautions that political fragmentation on sectarian lines must be guarded against.” *Id.* at 695. For him, exempting church property from taxation “neither encourages nor discourages participation in religious life.” *Id.* at 696. While this statement was made in a portion of the opinion dealing with modern Establishment Clause cases, it comports with history and common sense. No one has ever argued that Americans are more or less likely to be adherents of particular religions based upon whether states and localities do or do not tax church property. Similarly here, no one has ever argued that Americans are more or less likely to be adherents of particular religions based upon whether the Internal Revenue Service does or does not exempt a minister’s rental allowance or rental value from gross income.

Justice Harlan also made another observation, the wisdom of which must not be overlooked. He noted that “tax exemptions to nonprofit organizations are an institution in themselves, so much so that they are, as THE CHIEF JUSTICE points out, expected and accepted as a matter of course.” *Id.* at 698. As pointed out above, this tradition, this heritage, or as Justice Harlan so aptly put it, this “institution,” includes numerous tax and reporting exemptions that inure to

religion, and the exemption at issue in the case at bar falls naturally within this institution.

Finally, Justice Harlan drew one more lesson from the historic understanding of the Establishment Clause. He explained that while he agreed with Justice Douglas (the lone dissenter in *Walz*) that although exemptions and subsidies may be the same *economically*, there were *other* differences between the two. *Id.* at 718. While the validity of the Justices' economic views can be contested, *see, e.g.*, Erika King, *Tax Exemptions and the Establishment Clause*, 49 *Syracuse L. Rev.* 971, 993-1002 (1999), Justice Harlan did explain other valid differences. Of these, one is germane here, namely, "the longstanding tradition behind exemptions" *Walz*, 397 U.S. at 699. In other words, modern-day attempts to directly subsidize religion will fail constitutional muster, while exemptions will generally be upheld, especially those in the mainstream of our tradition.

Once again, § 107(2) is squarely within that tradition. Indeed, § 107 (together with its predecessor) is now eighty years old. 42 Stat. 239 (1921) (codified as amended at 26 U.S.C. § 107(2) (1998)). Thus § 107(2) has now existed longer than the seventy-five years that "income taxes . . . had any potential impact on churches" when *Walz* was written. *Id.* at 676. The *Walz* Court considered it significant that no court had ever held the basic income tax exemption unconstitutional during those seventy-five years. So here, it is

significant that no court has ever held § 107(2) to be unconstitutional, despite litigation over the section. This court should not be the first.

CONCLUSION

For purposes of constitutional analysis, income tax exemptions are no more and no less an aid to religion than the property tax exemptions upheld in *Walz*. The Founding generation re-enacted religious tax exemptions after ratification of the Bill of Rights, thereby demonstrating that exemptions were not one of the evils the Establishment Clause was intended to remedy. From that day until now, this country has had a rich tradition of enacting exemptions that benefit both religious organizations and religious people. Indeed, such exemptions are “expected and accepted as a matter of course.” For the foregoing reasons, this Court should uphold the constitutionality of § 107(2).

Respectfully submitted
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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Amicus Brief in the case of *Warren v. Commissioner*, No. 00-71217, on all required parties and on the court –appointed amicus by depositing the required number of copies of the same in the United States mail, first class postage, prepaid on May 3, 2002 addressed as follows:

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