

The practical problems in banning tainted stars and ways of improvement

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Abstract. In recent years, “banning” has gradually become a common means for public power to control the quality of development of cultural industry and improve public civilization. The concerns about the “banning” system have gradually become a hot issue in society. From the theoretical analysis, “banning” refers to the administrative penalties imposed by the National Radio and Television Administration on tainted stars by removing their works from public platforms and restricting their employment. According to the practical experience, there are three main types of “banning”: banning for criminal violations, moral problems, and the wrong attitude toward sensitive issues. According to the social practice of “banning”, there are still problems such as inappropriate agencies for punishment, lack of detailed means, and inadequate relief mechanisms. In this regard, the following aspects should be improved in the future: regulating qualified subjects of punishment, formulating detailed means, and establishing diversified relief mechanisms.

Keywords: banning; tainted stars; legal regulation; the administration punishment.

1. The Origin of “Banning”

Nowadays, with the increasingly developed Internet technology, the deeds of these tainted stars quickly aroused widespread concern and discussion among the whole society. Based on the characteristics of public figures, the deeds of tainted stars often have a baneful social impact and challenge the bottom line of public order and moral values. Therefore, in recent years, public power has started to control the general mood of society through increasingly diverse ways such as “banning the person involved” and “removing their works from public platforms” to establish a good social environment and guide the public opinion.

Actually, the concept of “banning” first appeared in 2014. In September 2014, National Radio and Television Administration (NRATA, henceforth) issued the *Notice of the General Office of the State Administration of Press, Publication, Radio and Television on Strengthening the Production and Communication Management of Radio and TV Programs, Film and Television Drama and Internet Audiovisual Programs* (Notice, henceforth), indicating that public power can directly manage the cultural industry by limiting the exposure of actors. The "Notice" stipulates that all stars suspected of taking drugs, soliciting prostitute or other illegal and criminal activities should be suspended, and their works should be prohibited from appearing on radio and television programs again.

It is easy to see that the “banning” is mainly aimed at stars suspected of taking drugs, soliciting prostitute, and other illegal or criminal acts. However, with the development of the times, the misdeeds of stars are becoming more diverse, thus the reasons and scope of “banning” also exceed. Although it is the responsibility of public power to maintain the high-quality development of cultural industry and purify the social environment, there is still no clear theoretical understanding on whether the “banning” of individual stars by public power is legitimate, or whether the power of “banning” is reasonable under the new situation.

Since the promulgating of the “Notice” by NRATA in 2014, relative academic discussion has been continuous, despite its low social popularity. It is easy to see that most scholars (e.g., Chu, 2015; Gong, 2019; Liu, 2018) believe that although it is reasonable for the public power to interfere with the cultural industry, the power of “banning” not only lacks legal basis, but it is also difficult to effectively regulate the limits of its use. At the same time, scholars generally believe that expanding the scope of “banning” as time passes on does not meet the requirements of the proportionality principle. If the restriction on a citizen’s basic right is so severe that he or she completely loses it, it

would seriously deviate from the original intention of protecting basic rights and it also violates common sense (Chu, 2015). Today, the penalty of “banning” of the government is so powerful, that the stars of “banning” is never likely to have a second chance due to one single mistake. In addition, due to the ambiguity of the legal nature of “banning” and the vacancy of related mechanisms, the interested persons is in a vulnerable position in front of the public power, without any means of revision or relief. Therefore, according to the current research, most scholars hold a negative and skeptical attitude towards the gradual expansion of “banning”. However, as the phenomenon has only appeared for a short time, and the discussion among scholars is limited, there is still much room for further reserch. At the same time, most of the existing scholarly opinions focus on the theoretical discussion of the legal nature of it, but they pay little attention and consideration on its practical problems and improvement. Therefore, it is of great theoretical value and practical significance to investigate the legal regulation of the “banning” of tainted stars.

2. The Concept and Classification of “Banning”

It has been eight years since the concept of “banning” appeared, and the supplementary documents to this system are also increasing. In the past eight years, the system of “banning” has been continuously developed and improved, and its classification has become more and more diversified. However, the administrative departments have never officially explained the nature of this penalty. Therefore, if we want to further explore the rationality and existing problems of the “banning”, we must first characterize and classify it.

2.1 Definition of the concept of “banning”

Administrative penalty refers to the behavior where the administrative department punishes citizens, legal persons, or other organizations who violate the administrative order by impairing their rights and interests or increasing their obligations. According to this definition, it is obvious that “banning” is a form of restricting the exposure of tainted stars by issuing instructions to various radio and television institutions, which diminishes the rights and interests of tainted stars. Therefore, essentially it is an administrative punishment. At the same time, it is not difficult to find out that tainted stars were mainly banned in two ways, that is, removing all their main works or preventing them from coming back to the public again. Although there is no superior legislation to explain this at present, it is obvious to see from the means mentioned above that the current banning is close to restricting employment, which is a form of administrative penalty.

2.2 Classification of “banning”

Since the appearance of the notice, with the progress of the times and the development of the Internet, the scope of public power’s interference in the cultural industry and spiritual fields has gradually exceeded drug abuse and soliciting prostitute. By summarizing the development trend in recent years, the types of banning can cover three main categories: banning for criminal violations, banning for moral problems, and banning for wrong attitude towards sensitive issues.

At the same time, it should be pointed out here that the “banning” discussed in this paper is limited to government’s compulsory interference with the public power, which is different from the banning due to touching the interests of corporate groups (such as Zhou Bichang, and Shang Wenjie being banned by the Hunan Channel due to their termination of the contracts) and the spontaneous banning by the market due to personal problems (for example, Li Xiaolu was spontaneously boycotted by public and the market despite the unconfirmed cheating controversy). These two kinds of banning are not controlled by the public power derived from NRATA’s notice, but rather spontaneous “banning” adjusted by the market, and do not belong to the scope of today's discussion.

The first kind of banning is due to illegal and criminal acts. It refers to the scenario where a star’s film and television works and exposure opportunities are officially removed due to criminal acts or violation of relevant laws. At present, the criminal acts covered by this kind of banning include but

are not limited to tax evasion (Deng Lun, Fan Bingbing, Weiya, etc.), use drugs (Ke Zhendong, Song Dongye, etc.), soliciting prostitute (Huang Haibo, Li Yundi, etc.), surrogacy (Zheng Shuang), etc. Most of these actions are relatively quite severe or even violate the law, which has an extremely adverse social impact.

The second kind of banning is because of moral problems. It refers to the scenario in which stars are restricted from employment opportunities by public power because of their distorted values, low morality, or even vulgarity. For example, actor Zhai Tianlin once posted his admission to Peking University on his Weibo account, but it was later revealed that his admission was based on academic cheating, which led to his banning. Another online celebrity “teacher Guo” was banned by all internet platforms because she used vulgar language in the live broadcast, distorting the aesthetics of the public and attracts attention. It is not difficult to find that the actions of this kind of stars do not constitute a serious degree of violating the law and disturbing social order, but they are spurned and hated by the public because of their corrupt morals and distorted values, breaking the bottom line of public order.

The third type of banning due to sensitive issues refers to the scenario in which stars are banning because of a wrong attitude on “issues that can touch people’s emotions and nerves, such as national interests, historical traditions, values, etc.” (Wang, 2016). For example, when it was revealed that actor Zhang Zhehan had visited the Yasukuni Shrine and posted a photo with the former “first lady” of Indonesia, Mrs. David, who advocated the secession of China, supported the independence of Tibet, and denied the Nanjing Massacre, the China Association of Performing Arts issued an announcement asking its members to boycott Zhang Zhehan. The singer Zhang Huimei was blocked for singing the “National Anthem of the Republic of China” in public because it touched on the bottom line of the One China principle. Most of these bannings have touched national interests or political stances, and require a strong statement from the state to maintain principles.

3. Realistic Problems of “Banning”

Although banning tainted stars is necessary and caters to public interest, it should be noted that the legality of banning is still unclear, and a lot of problems have arisen in practice that needs to be solved immediately.

3.1 Lack of qualification of punishment agencies

According to the existing legal endorsement of the banning order, it can be seen that the main bodies formulating its relevant regulations are NRATA and industry organizations headed by the China Association of Performing Arts. However, in fact, both of them lack certain qualification in their power to formulate such an administrative penalty and related regulations.

For NRATA, its disqualification is mainly reflected in two aspects. First of all, NRATA has no power to increase or modify the types of administrative penalties. NRATA belongs to the institutions directly under the State Council, and the effectiveness of the notices issued by NRATA is equal to the level of departmental rules. According to Article 13 of the Administrative Penalty Law, “The departmental rules of the State Council can make specific provisions within the scope of acts, types, and ranges of administrative punishments prescribed by laws and administrative regulations. If no laws or administrative regulations have been formulated, the administrative penalty of warning, informed criticism or a fine may be set by the departmental rules of the State Council for acts violating the administrative order. The fine limit is stipulated by the State Council.” Because there is no upper-level legislation on the employment restriction of tainted stars in the current types of administrative penalty, the rules issued by NRATA does not belong to the case of further specific provisions under the existing types of administrative punishment, but rather the scenario where no laws or administrative regulations have been formulated, that is, the second section of Article 13. However, after careful study of the second section, we can also see that the ban order does not belong to any of the stated administrative penalties such as warning, informed criticism, or fine. Therefore, the notice

of NRATA, as a departmental rules, lacks the subject qualification for the relevant matters concerning banning.

Secondly, the administrative penalty of banning stipulated by NRATA conflicts with its own functions and lacks legal support. The latest Regulations on the Administration of Radio and Television, articles 32 and 43, are related to the investigation and punishment of tainted stars. It emphasizes that the objects that NRATA can regulate in the construction of spiritual civilization are only cultural products, not stars themselves. This means that the scope of NRATA's "banning" duty only includes the supervision of film and television works, but it does not have the power to ban tainted stars. According to the legal principle of punishment in China's administrative penalty law, administrative penalty without a legal basis is invalid. The banning rules formulated by NRATA has no clear legal support, so the effectiveness of its self-styled "banning" is still open to question.

As for the China Association of Performing Arts, its official website clearly demonstrates that it is a social organization headed by the Ministry of Culture and registered with the Ministry of Civil Affairs, and it is a national, professional, and non-profit social organization voluntarily formed by performance operators and performance practitioners. From its description, it is not difficult to see that the China Association of Performing Arts is actually a social organization rather than a state organ, so the legal effect of the Administrative Measures for Self-discipline of Performers in Performance Industry promulgated by the association can only be regarded as a self-regulatory document, not as a legal endorsement for the public authority to ban tainted stars. Therefore, it is still debatable whether the China Association of Performing Arts has the authority to make the banning regulations. At the practical level, according to Article 13 of the Administrative Penalty Law, "administrative punishment shall be imposed by administrative organs with the power to impose administrative punishments within the scope of their statutory authority", and the China Association of Performing Arts is obviously not an administrative organ, so it does not have the power to impose administrative punishments as an administrative act.

3.2 The unspecificness of means and forms

The proportionality principle is one of the basic principles of rational administration and a basic requirement of administrative law. The necessary requirement of the proportionality principle is that administrative actions should be limited to the necessary degree to achieve the purpose. When multiple means are available, the method that infringes least on the rights and interests of the concerned persons needs should be chosen. Although the aim of NRATA is to better regulate the development of the entertainment market, the cost of the interested persons due to its "totally banning" policy is clearly beyond reasonable limits, and also brings additional losses to them.

First of all, the NRAT's main purpose of preventing the works of tainted stars from appearing on TV screens is to control the social atmosphere. As the stars have great social influence, if we do not raise the cost of their mistakes, impose stricter moral constraints on them but let them continue to be active in public opinion after making mistakes, it may cause the decline of the bottom line of the society and bring adverse effects. Therefore, it is reasonable to impose more severe punishment on tainted stars than in other professions. However, its original intention is to criticize the wrong deeds of tainted stars. "Banning" is only a means of punishment, and its essence is to show an negative attitude to the tainted stars.

But is removing all related products and banning stars from the whole industry the only way to achieve the purpose of denying tainted stars? The answer is obviously no. In view of the publicity requirement of the administrative penalty, we can criticize the specific misdeeds of stars through warning, admonition, fines, and even administrative detention. Once the official notification of the star's bad behavior, this person is stamped with the mark of "violation of crime" or "corruption of private morality", and there is no need to use the policy of "banning of the whole industry". Thus, "banning" is not the only way to officially guide and judge the stars' behaviors. As the most severe punishment method, "banning" will have an irreversible negative impact on the star's career once it

is used. If other ways can achieve the same purpose, choosing to banning, which has the greatest impact on stars, violates the requirement of the proportionality principle.

At the same time, the current form of banning is too rough, and the rigid uniform in the practice of banning has become the mainstream. The types of misdeeds that requires a ban are roughly classified, and there is no difference in the punishment among different types: whether it is due to illegal and criminal problems such as drug abuse and soliciting prostitute, or due to moral problems such as vulgarity in fraud, all of them are treated equally, and all of the tainted stars are punished by restricting their exposures. Concerning the degree of errors, different degrees of errors of the same type are equally punished: drug abuse is a criminal act, while soliciting prostitute is an illegal act. However, there is a clear legal judgment on which is lighter or heavier, but they are equal in the face of banning.

There is a clear difference in the level of punishment and sentencing between first-time offenders and repeated offenders in face of the law, but there is no difference in the level of punishment between stars who take drugs for the first time and stars who take drugs for many times. In addition, the criteria for banning is ambiguous, and there is no clear rule determining the scope of banning. On a matter of personal morality, some cyber celebrities are blocked from the whole platform just because they used vulgar language in the live broadcast, while some stars cheat in marriage can be safe and sound. Judging from relevant documents concerning banning, the banning mechanism includes penalties that are not proportionate to the seriousness of offenses.

3.3 The imperfection of the legal relief mechanism

As a kind of administrative punishment, “banning” is a disciplinary action that diminishes the rights and interests of stars. Article 7 of China’s Administrative Penalty Law stipulates that “citizens, legal persons or other organizations have the right to make statements and defend oneself on administrative punishments given by administrative organs; Those who refuse to accept the administrative punishment have the right to apply for administrative reconsideration or forward an administrative appeal according to law”. That is to say, after being “banned”, administrative reconsideration or appeal of this administrative punishment is a basic right of stars, and it is also the legal relief required by law. However, in practice, the agency who imposed the ban did not leave any space for legal relief for the interested persons. For example, Song, Dongye, a singer, was once detained by authorities for drug abuse. After the three-year banning according to the law, his personal concert was still canceled because of the report. When there was no space for legal relief, he had to post on Weibo, and then his Weibo account was also suspended. Although his words on Weibo obviously is merely an excuse for what he has done, it also reflects the reality that the legal relief opportunities are infinitely compressed in the face of “banning”. NRATA often determines the fate of the tainted stars through a mere notice. Whether the reasons and contents of the ban are reasonable or not, stars have no way to express different voices, which actually infringes their legitimate rights and interests.

In addition to the lack of necessary ways of relief such as administrative reconsideration and administrative appeal, “banning” is not guaranteed by a hearing system, which makes NRATA’s actions lack necessary supervision. According to the provisions of Article 63 of the Administrative Penalty Law, when an administrative organ makes a decision of “ordering the suspension of production or business, ordering the closure, restricting employment and other heavier administrative penalties”, “it shall inform the concerning parties of their right to request a hearing, and if the parties request a hearing, the administrative organ shall organize one”. In fact, banning tainted stars from the whole industry has reached the extent of restricting their employment. Once stars are banned, it will have an irreversible impact on their acting career. Based on this, such a punishment should be considered as a “heavier administrative punishment”, and stars have the right to request a hearing and participate in decision-making. However, in practice, banning sometimes even becomes the internal behavior of administrative organs, often through simply issuing notices to lower-level organs, the

banning is completed without the knowledge of the parties concerned. There is no room for the relevant stars to participate in decision-making.

At the same time, in addition to the fact that tainted stars themselves cannot obtain legal hearing rights, other subjects involved in the ban cannot protect their rights and interests. In practice, the situation “where one person makes a mistake, the whole group suffers” becomes the normality. A hot drama, a movie, or even an entire production group may all be canceled or removed because of a single person’s mistake. For example, after actor Zheng Shuang was exposed of a series of illegal and criminal acts such as surrogacy and tax evasion, many outstanding film and television works starring her, such as *Love O2O* and *Rush to the Dead Summer*, were removed and were no longer allowed to be released. Thus, although the administrative punishment of “banning” seems to merely punish tainted stars as concerned persons, it involves many other rights and interests: the reputation and employment rights of tainted stars, the property rights of other actors and directors in works, and even the related rights and interests of publishers and network video operators. Thus, the punishment of banning will inevitably involve a third party. Banning the works of tainted stars infringes the rights and interests of a third party to a certain extent, while they cannot express opinions and participate in decision-making through a hearing. Such decision-making obviously lacks the basis of public opinion, which greatly affects the credibility of the administrative subject (Liu, 2018).

4. The Improvement Path for “Banning” tainted Stars

Based on the analysis of the two parts above, it is obvious that although the “banning” has revealed some problems in practice, the new situation in the cultural industry and the progress of science and technology requires the administrative agency to do something. Then, in the face of many problems and difficulties, how should the administrative agency make good use of this sharp weapon while grasp the scope of administrative rights?

4.1 The provisions of the qualified subject of punishment

There are two main reasons for the flaw of the subject qualification of NRATA: firstly, there is no superior legislation basis for banning. Thus, as a new type of administrative punishment, the regulations made by NRATA regarding it is invalid due to the department level. Secondly, the internal rules of NRATA also have no provisions on banning actors themselves, which leads to the fact that NRATA has no right to add rules on blocking actors. Therefore, if NRATA want to play the role of the “visible hand”, we need to make it qualified to prescribe relevant regulations.

By enacting new administrative regulations or departmental rules of the State Council or judicial interpretation of relevant laws and regulations of existing laws, the effect of “banning” can be clearly regulated, which can give NRATA the upper-level legislation basis for interpretation, so that it can be legally qualified to formulate relevant rules and regulations. As NRATA is a functional department of the State Council, the notices issued by NRATA belong to departmental regulations which cannot set up restrictions on employment, etc. According to the Administrative Penalty Law, if it wants to be the qualified agency to formulate regulations, it is necessary for NRATA to obtain relevant rights by “making specific provisions within the scope of acts, types, and ranges of administrative punishments prescribed by laws and administrative regulations” according to the law. Therefore, the State Council can confirm the nature and severity of the banning through administrative legislation according to the Film Industry Promotion Law and other related contents, so as to give support to this new system of blocking by the superior legislation. At the same time, by urging the Supreme Court to introduce judicial interpretation of the Drug Law and other laws related to the restriction of stars’ reemployment as soon as possible, which can also achieve the purpose of giving NRATA a law to follow and give it enough room for further interpretation.

In addition, the State Council can also re-establish the rights, and obligations of NRATA in the cultural industry by amending the Regulations on the Administration of Radio and Television, so as to give its legal subject qualification to ban individual stars. For example, the State Council can amend

Article 32 of the Regulations on the Administration of Radio and Television, adding “If actors, directors, screenwriters and other personnel violate the circumstances mentioned above, NRATA may, according to the degree of their mistakes, impose a penalty of restricting their employment according to relevant laws and regulations”. Amending the regulations will endow NRATA with relevant rights, so that the subject of its banning can be expanded from only cultural products themselves to individual stars of inferior quality.

As far as the China Association of Performing Arts is concerned, it is not an administrative agency authorized by law, but a self-discipline organization within the industry, belonging to a non-governmental organization. Therefore, the Administrative Measures for Self-discipline of Performers in Performance Industry, which was formulated by it, cannot be used as a legal endorsement, but can only be used as an industry standard. If we want to solve the problem of the subject qualification of the China Association of Performing Arts, the only method will be authorizing it as a formal administrative agency by law. However, the China Association of Performing Arts does not necessarily need the qualification to play its role of industry supervision. As long as it realizes its nature and regards its management method as a guide rather than a command, it can better play the linkage role between industry and market. It can monitor areas such as private morality that can't be regulated by law to prevent the government from excessively interfering in the development of entertainment market.

4.2 Formulations of detailed means and forms

Due to the short development time and the confusion of the detailed rules in regulation, the rigid uniform in the practice of banning has become the mainstream when it is used to block tainted stars. It is mainly reflected in the fact that the administrative agency regards restricting employment as the only way to punish misbehaving stars, ignores the degree and type of bad deeds of them.

Adhering to the principle of proportionality is a necessary prerequisite to prevent the government from placing all of tainted stars on the bed of Procrustes. By blacklisting these stars, the government mainly aims to make the public realize that the attitude of society and law towards these misdeeds is negative, thus achieving the purpose of arousing social shock. At the same time, the negative nature of banning itself has subtly changed the public view of the misbehaving stars, which will trigger the market to resist them spontaneously. Therefore, the means of banning should be diversified, such as warning, fine and other original administrative penalties. Meanwhile, these punishments should be supplemented by the official informed criticism, which could publicize the actions of tainted stars and their punishment results, causing social shock and vigilance. This official criticism not only meets the requirement of choosing the measures that cause the least infringement on the legitimate rights and interests of tainted stars when we have to take measures to block them, but also innovates and enriches the means and forms of blocking, which contributes to the implementation of the principle of proportionality and maintains the fairness and prestige of public power (Wang, 2016).

At the same time, the administrative agency should issue corresponding banning rules, including the types of actions that should be banned, the time limit for banning, the standards for blocking, and other corresponding contents. For the behaviors that can be formulated with clear banning standards, the government should prescribe different levels of punishment according to the requirements of the law. For example, different levels of punishment should be given to illegal acts and criminal acts, so as to follow the principle of proportionality. The government should also give different regulations on the time limit or method of penalty for the problem that can be distinguished in degree. For example, in the case of illegal activities, the sentencing of the first offender should be less than that of the recidivist, so as to implement the principle of unity of crime and punishment. At the same time, we should give full play to the role of trade organizations for moral problems that cannot be clearly determined by administrative regulations. As there is still a lot of debate in the society about whether and how to ban the person who has bad morality, it is necessary to set up an expert review group and other organizations within the industry organizations to make a comprehensive judgment on the objective factors such as the severity and influence of tainted stars' behavior and give play to the

regulating role of the market. Only by spontaneously resisting them according to the public's preferences can we truly achieve the equivalent penalty.

4.3 Establishment of diversified relief mechanisms

It is required by law to have the right of administrative reconsideration and administrative litigation when facing severe administrative penalty that is close to restricting employment. If there is no relief mechanisms, the power of banning can easily be exaggerated by the administrative agency, resulting in the abuse of administrative power. Therefore, the establishment of a perfect relief mechanism is an inevitable requirement to promote a more reasonable banning system.

Establishing an administrative reconsideration or administrative litigation system can provide the relevant rights holders an opportunity to appeal for themselves. In the face of the implementation of banning, government agencies should actively set up a special channel of administrative reconsideration for the concerned persons, patiently treat their appeals, and give review and reply as required. At the same time, another major reason for the current shortage of relief rights is that the interested persons are afraid to apply for administrative reconsideration or administrative litigation. On the one hand, tainted stars lack the courage to do so because of their own behavior defects, and even if they think that the punishment is unreasonable, they dare not fight for legitimate rights and interests. On the other hand, many people think that arguing with the administrative authorities about the penalty is tantamount to throwing straws against the wind, which may even lead to the heavier punishment. To solve this problem, the state should improve the legal aid mechanism and open channels for the concerned persons to fight for their rights and defenses. By improving the relevant legal service system, it is ensured that the relevant rights holders can get legal aid after being “banned” and have the possibility to struggle against the severity of this administrative punishment. Through standardizing the administrative procedures of relevant departments, the state could ban the retaliation against the concerned persons, and equally protect the rights of every citizen.

Different from administrative reconsideration and administrative litigation, hearing, as a way for the public to participate in government decision-making, is the front line of administrative penalty. For stars facing an unemployment crisis, it is very important whether they can participate in decision-making and express their thoughts as much as possible through hearing. In view of the fact that there is a lack of hearing channels, the administrative agency should convene the concerned persons to hold a hearing regulation according to the requirements of the Administrative Penalty Law. Through the hearing, the agency should listen to the opinions of the parties and stakeholders and take them into consideration in the final decision. For the hearing request made by the interested persons, the administrative organ shall promptly organize and carry out it according to the legal procedures, give the parties the opportunity to defend themselves, record the hearing contents according to law, and make a fair and reasonable judgment. For other stakeholders that may be affected, the administrative agency should consider their situation as much as possible, invite parties of interest to attend the meeting and listen to their opinions, and fully discuss the measures and intensity of the punishment. It is necessary to improve the procedure of law enforcement, establish a record system of the whole process, and improve the relief mechanism of the interested persons (Wang, 2016). Only in these ways can we protect the rights of the parties to the greatest extent possible.

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