No. 19-8875

In the Supreme Court of the United States

DAVID B. JONES,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner David Jones was convicted by a non-unanimous jury verdict, but his conviction and sentence became final in 2003. Years later—shortly after the Louisiana Supreme Court denied his petition for state post-conviction relief—this Court held in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that a conviction in state or federal court is invalid unless the jury's verdict was unanimous. Jones now petitions this Court for certiorari to review the Louisiana Supreme Court's denial of post-conviction relief. The questions presented are the following:

(1) Should the Court GVR this case merely to allow the state courts to consider whether to apply *Ramos* retroactively in state post-conviction cases, even though the Louisiana Supreme Court has repeatedly declined to consider that question?

(2) Can a petitioner in state post-conviction review retroactively benefit from *Ramos* as a matter of state law—even though the Louisiana Supreme Court has repeatedly declined every invitation to consider whether to apply *Ramos* retroactively?

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BACKGROUND STATEMENT

Over twenty-two years ago, on February 4, 1998, Petitioner David Jones was tried by a jury of twelve of his peers for the crime of first-degree robbery.[1] According to the extract of court minutes, the jury was polled and ten of the twelve jurors found him guilty. He was sentenced to serve 32 years at hard labor without benefit of probation, parole, or suspension of sentence.

He appealed his conviction and sentence. The Louisiana First Circuit Court of Appeal affirmed both without published opinion. *State v. Jones*, 1998-1202 (La. App. 1 Cir. 4/1/1999), 739 So.2d 1013; Pet. Appx. A, 1a. The record does not reflect that he appealed this decision to the Louisiana Supreme Court. Thus, his conviction was final in May of 1999.[2] The record does reflect that in 2002, the Louisiana Supreme Court affirmed what appears to be a post-conviction decision without published opinion. *State v. Jones*, 2002-0281 (La. 12/13/2002), 831 So.2d 980; Pet. Appx. B, 2a ("Applying for Supervisory and/or Remedial Writs, Parish of East Feliciana, 20th Judicial District Court Div. A, No. 97-CR-498; to the Court of Appeal, First Circuit, No. 2001-KW-1925").

Seventeen years passed. In 2019, after Louisiana changed its jury verdict laws, Petitioner filed a second application for post-conviction relief requesting that these new laws be applied retroactively to him. The trial court denied his petition. The Louisiana First Circuit Court of Appeals denied his writ application saying that the

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[1] *See* La. R.S. 14:64.1.

[2] La. C.Cr.P. art. 922B; Rules of Supreme Court of Louisiana, Rule X, § 5 (noting time to file is thirty days from mailing of notice of judgment).

Louisiana legislature expressly stated that the new laws would have prospective application only. *State v. Jones*, 2019-0348 (La. App. 1 Cir. 5/28/19), 2019 WL 2291982 (unpublished decision); Pet. Appx. C, 3a. The Louisiana Supreme Court also denied his writ application without opinion. *State v. Jones*, 2019-01127 (La. 3/9/20), 290 So.3d 1126; Pet. Appx. D, 4a.

On April 20, 2020, this Court issued its decision in *Ramos*. Jones timely filed a petition for a writ of certiorari with this Court on June 17, 2020.

SUMMARY OF ARGUMENT

In *Ramos v. Louisiana*, this Court held that a conviction—in state or federal court—based upon a non-unanimous verdict violates the Sixth and Fourteenth Amendments. But that holding cannot benefit Jones here because his conviction and sentence became final in 2003—seventeen years before this Court issued its decision in *Ramos*. As a general matter, under this Court's jurisprudence, new rules apply only to convictions that are not final. *See Griffith v. Kentucky*, 479 U.S. 314 (1987). This case arises from a *state collateral* proceeding.

Jones' petition asks for nothing other than a remand to allow the state courts to consider the issues of whether *Ramos* applies retroactively in collateral proceedings under state law and whether a non-unanimous jury verdict is error patent for the purposes of the Louisiana Code of Criminal Procedure. *See* Pet. at 9, 13, 17–18. But the Louisiana Supreme Court has declined to directly answer the question of whether *Ramos* is retroactive in state collateral proceedings although it has denied writs in all post-conviction cases raising the issue. *See infra* n.5. And, not only has it already

concluded that a non-unanimous jury verdict is error patent,[3] that ruling is irrelevant because Jones' convictions and sentences are final. Thus, remand is futile.

Even if the Court construes Jones' petition as a request to *require* Louisiana to retroactively apply *Ramos* as a matter of state law, the Court should deny certiorari. With only two narrow exceptions, new rules do not apply to cases that are final—like Jones'—because of the retroactivity bar this Court erected in *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent decisions. Because *Ramos* announced a new rule of criminal *procedure*, the *Ramos* rule would satisfy *Teague*'s second exception to the retroactivity bar only if *Ramos* announced a watershed rule of criminal procedure. Since adopting the *Teague* retroactivity framework, this Court has *never* found any new rule of criminal procedure to be watershed, despite considering the question numerous times.

To be sure, this Court has granted certiorari in *Edwards v. Louisiana* to answer the question of "whether this Court's decision in *Ramos v. Louisiana*, 590 U. S. ___ (2020), applies retroactively to cases on federal collateral review." 140 S. Ct. 2737, 2738 (2020). But, importantly, even if this Court granted relief to the *federal* habeas petitioner in *Edwards*, and declared the *Ramos* rule retroactive, that still would not benefit Jones. This is true because Jones seeks *state* post-conviction relief here. Whether or not Jones is entitled to state post-conviction relief is a question of state law.

Although this Court has held that its new *substantive* rules satisfying *Teague*'s

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[3] *See* discussion, infra, at p. 6-7.

first exception must be applied retroactively by the States, the same is not true for new *procedural* rules satisfying *Teague*'s second exception. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). In *Montgomery v. Louisiana*, this Court expressly reserved the question of whether a new procedural rules must be applied retroactively by the States. *Id.* at 729

The Court could not grant relief here unless it both declared the *Ramos* rule to be retroactive in *Edwards* and then took the extra step of requiring state courts to apply that rule in their post-conviction proceedings. Thus, there is no need to hold Jones' case for this Court's decision in *Edwards*. And Jones does not request that relief.

For these reasons, the States respectfully requests that the Court deny certiorari.

ARGUMENT

I. JONES ASKS THIS COURT FOR NOTHING MORE THAN A FUTILE REMAND TO THE STATE COURTS.

Jones asks the Court to decide whether a non-unanimous jury verdict rule violates the Sixth and Fourteenth Amendments. But the Court has already decided that issue in *Ramos*. And, in any event, Jones cannot benefit from *Ramos*' holding because his case is no longer on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). This action presents a *collateral* attack on Jones' conviction.

Jones never asks the Court to decide whether *Ramos* is retroactive for the purposes of state post-conviction review. On the contrary, he repeatedly and expressly makes clear that he would like this Court to remand his case to the Louisiana courts

to decide the issue of retroactivity in the first instance.[4] In support of his position that the issue is unanswered in the Louisiana courts, Jones only cites three circuit court cases, all decided by the same circuit.[5] Since those cases were decided, though, the Louisiana Supreme Court has had many, many opportunities to decide whether to apply *Ramos* retroactively as a matter of state law. And it has denied every request—at least forty-three denials.[6] Chief Justice Johnson pulled back the curtain in one of

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[4] *See, e.g.*, Pet. at 8 ("All Petitioner asks is that the Louisiana Supreme Court first be permitted to consider the claim at issue in light of this Court's opinion in *Ramos v. Louisiana*."); *id.* at 14 ("In this instance, before addressing the question of nonretroactivity of *Ramos v. Louisiana* in federal courts, or this Court, the State courts should be given an opportunity to adjudicate petitioners' claims in full."); *id.* at 16–17 ("[B]asic principles of federalism support the idea that the state courts should address the question of retroactivity first. And indeed, here, all that petitioner asks is that the Louisiana Courts be given an opportunity—and the responsibility—to address the validity of Mr. Jones' post-conviction petition with the insight and elucidation provided by this Court's opinion."); *id.* at 17 ("Whether this is a claim that should be adjudicated under La. C.Cr.P. art. 930.3(1) or La. C.Cr.P. art. 930.8(A)(2) is a determination that should be made by the Louisiana courts.").

[5] Since deciding those cases, that circuit court has reversed its position. *See State v. Rashan Williams*, 2020-KW-0930 (La. App. 1 Cir. 11/10/20) ("The question of whether *Ramos* must apply retroactively to cases on federal collateral review is currently pending before the [Supreme] Court. Moreover, the Louisiana Supreme Court has declined to definitively rule on whether *Ramos* should apply on collateral review in state court proceedings pending a decision in *Edwards*. Therefore, we are constrained to deny relief at this time." (internal citations omitted)).

[6] *See, e.g.*, *State v. Gipson*, 2019-01815 (La. 6/3/20), 296 So.3d 1051 * (writ application currently pending in this Court, No. 20-251); *State v. Dotson*, 2019-01828 (La. 6/3/20), 296 So.3d 1059 * (writ application pending before this Court, No. 20-5728); *Silva v. Vannoy*, 2019-01861 (La. 6/3/20), 296 So.3d 1033*; *Lionel Jones v. State*, 2019-01900 (La. 6/3/20), 296 So. 3d 1060*; *State v. Rochon*, 2019-01678 (La. 6/3/20), 296 So.3d 1028*; *State v. Young*, 2019-01818 (La. 6/12/20), 2020 WL 3424876 (involved request for polling slips to file PCR); *State v. Brown*, 2020-00276 (La. 6/22/20), 297 So.3d 721*; *State v. McKnight*, 2020-00873 (La. 7/17/20), 299 So.3d 64; *Dennis v. Vannoy*, 2019-01794 (La. 7/24/20), 299 So.3d 54; *State v. Essex*, 2020-00009 (La. 8/14/20), 300 So.3d 843; *State v. Cook*, 2020-00001 (La. 8/14/20), 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 8/14/20), 300 So.3d 861; *Joseph v. State*, 2019-01989 (La. 8/14/20), 300 So.3d 824; *State v. McGuire*, 2019-01632 (8/14/20), 300 So.3d 830; *State v. Johnson*, 2019-02075 (La. 8/14/20), 300 So.3d 858*; *State v. Spencer*, 2019-01318 (La. 8/14/20), 300 So.3d 855*; *Lawson v. State*, 2019-02074 (La. 8/14/20), 300 So.3d 858*; *State v. Triplett*, 2019-01718 (La. 8/14/20), 300 So.3d 827*; *Vincent Smith v. Louisiana*, 2019-02080 (La. 8/14/20), 300 So.3d 859; *State v. Rashan Williams*, 2020-00069 (La. 8/14/20), 300 So.3d 860*; *State v. Withers*, 2020-00258 (La. 8/14/20), 300 So.3d 860*; *State v. Wardlaw*, 2020-00004 (La. 8/14/20), 300 So.3d 859*; *State v. Mason*, 2019-01821 (La. 8/14/20), 2020 WL 4726952; *State v. Mims*, 2019-2088 (La. 8/14/20), 300 So.3d 867; *State v. Sonnier*, 2019-02066 (La. 8/14/20), 300 So.3d 857; *State v. Pittman*, 2019-01354 (La. 8/14/20), 300 So.3d 856; *State v. Carter*, 2019-02053 (La. 8/14/20), 300 So.3d 856*; *State v. Williams*, 2019-02010 (La. 8/14/20), 300 So.3d 856*; *Hernandez v. Vannoy*, 2019-02034 (La. 8/14/20), 300 So.3d

those cases and noted that "a majority of this court has voted to defer until the Supreme Court mandates that we act." *State v. Gipson*, 2019-01815, p. 1 (La. 6/3/20); 296 So.3d 1051. It would be futile for this Court to grant the writ, vacate Jones' conviction, and remand *this* case to the state courts merely for them to deny relief again.

Additionally, in the body of his petition, Jones asks the Court to remand to allow the state courts to determine whether a non-unanimous verdict "is error patent under Louisiana law." Pet. at 10. The Louisiana Code of Criminal Procedure allows an appellate court to correct a so-called "error patent" under limited conditions even if the error was not brought to the attention of the district court: The error must be "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920. Error patent review under Louisiana law is similar—but not identical—to plain error review under Federal Rule of Criminal Procedure 52. *See State v. Thomas*, 427 So. 2d 428, 433 (La. 1982) (identifying differences between plain error and patent error).

Jones' request to remand his case to the state courts for error patent review is

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857*; *State v. Eaglin*, 2019-01952 (La. 8/14/20), 300 So.3d 840*; *State v. Kidd*, 2020-00055 (La. 8/14/20), 300 So.3d 828*; *State v. Joseph*, 2020-01989 (La. 8/14/20), 300 So.3d 824; *State v. Barrett*, 2019-01718 (La. 8/14/20), 300 So.3d 827*; *State v. Harris*, 2020-00291 (La. 9/8/20), 301 So.3d 13; *State v. Skipper*, 2020-00280 (La. 9/8/20), 301 So.3d 16; *State v. Sims,* 2020-00298 (La. 9/8/20), 301 So.3d 17*; *State v. Jackson*, 2020-00037 (La. 9/8/20), 301 So.3d 33*; *State v. Hawthorne*, 2020-00586 (La. 9/29/20), 2020 WL 5793105; *State v. Alcus Smith*, 2020-00621 (La. 9/29/20), 2020 WL 5793717; *State v. Johnson*, 2020-00052 (La. 9/29/20), 2020 WL 5793805*; *Givens v. State Through Attorney General's Office*, 2020-00268 (La. 10/6/20), 2020 WL 5904873*; *Cassard v. Vannoy*, 2020-00020 (La. 10/6/20), 2020 WL 5905099; *State v. Brooks*, 2020-00378 (La. 10/14/20), 2020 WL 6059695; *State v. Moran*, 2020-00623 (La. App. 10/14/20), 2020 WL 6059685.

meritless for a couple of reasons. First, the Louisiana Supreme Court has already determined that a non-unanimous jury is error patent under state law. *See, e.g., State v. Boyd*, 2019-00953 (La. 6/3/20), 296 So. 3d 1024, 1025 ("If the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review." (citing La. C.Cr.P. art. 920(2))).[7] And, second, the determination that a non-unanimous jury verdict is patent error is completely irrelevant to Jones because his case is no longer on direct review. *See State v. Brown*, 19-370 (La. App. 5 Cir. 1/15/20), 289 So. 3d 1179, 1188, writ denied, 2020-00276 (La. 6/22/20), 297 So. 3d 721. Thus, remanding for this reason would be futile.

In sum, on the face of his petition, it appears that Jones asks for nothing more than a remand to allow the state courts to consider the issues of retroactivity and patent error. *See* Pet. at 9, 13, 17–18. The state courts have answered these questions, whether by inference or directly. Jones does not ask the Court to declare *Ramos* retroactive as a matter of Louisiana law nor to hold his case pending a decision in *Edwards*.[8] The Court can deny the petition for these reasons alone.

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[7] In response to this Court's holding in *Ramos*, the Louisiana Supreme Court remanded forty cases to the lower courts for reconsideration in light of that decision. In each case, it gave the lower court the same patent error review instruction.

[8] See Pet. at 8 ("This Court has granted certiorari in *Edwards v. Vannoy*, 19-5807. . . . This case presents a distinct and more narrow question, with regard to how the Louisiana courts address the validity of a non-unanimous conviction in state post-conviction and for purposes of La. C.Cr.P. art. 930.3. All Petitioner asks is that the Louisiana Supreme Court first be permitted to consider the claim at issue in light of this Court's opinion in *Ramos v. Louisiana*."); *id.* at 17 ("And regardless of this Court's opinion in *Edwards v. Vannoy*, the Louisiana courts should be given the opportunity to determine the scope of the application of *Ramos v. Louisiana* in post-conviction.").

II. TO THE EXTENT JONES ASKS THIS COURT TO DECLARE *RAMOS* RETROACTIVE AS A MATTER OF STATE LAW, THIS COURT SHOULD DECLINE HIS INVITATION.

If the Court is inclined to construe Jones' petition as a request for the Court to declare *Ramos* retroactive as a matter of Louisiana law, it should still deny certiorari. The question explicitly implicates only state law. Even if the Court grants relief to the petitioner in *Edwards v. Louisiana* by declaring the *Ramos* rule to be retroactive for the purposes of *federal* habeas review, that action would not affect Jones' case because Jones' petition arises from *state* post-conviction review.

A. Whether *Ramos* applies retroactively on state post-conviction review is a state law issue that does not warrant review from this Court.

As a general rule, new rules of criminal procedure announced by this Court apply only to cases pending on direct review. *See Griffith*, 479 U.S. at 328. Direct review ends when a criminal defendant's conviction and sentence become final. Here, there is no dispute that Jones' convictions and sentences became final in 2003, more than seventeen years before this Court handed down its decision in *Ramos*.

If a petitioner seeks to collaterally attack his conviction on *federal* habeas review after his conviction becomes final, he generally cannot benefit from a new rule announced by this Court. In *Teague* and subsequent cases, this Court erected a retroactivity bar—which prevents new rules from applying retroactively on federal habeas review unless the new rule falls under one of two very narrow exceptions. *Teague*, 489 U.S. at 310 ("U]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable [in federal habeas proceedings] to those cases which have become final before the new rules are

announced." (O'Connor, J., plurality op.)).

Under *Teague*'s first exception, new *substantive* rules generally apply retroactively. *See Schriro v. Summerlin*, 542 U.S. at 348, 351–52 (2004). These are "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S. Ct. at 728. They are retroactive "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351–52.

Under *Teague*'s second exception, an "extremely narrow" class of new procedural rules may apply retroactively. *Id.* at 352. Procedural rules differ fundamentally from substantive rules because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 136 S. Ct. at 730. Because new procedural rules have a "more speculative connection to innocence" than substantive rules, this Court has sharply curtailed *Teague*'s second exception. *Summerlin*, 542 U.S. at 352. It should "come as no surprise" that this Court has never identified a new rule satisfying *Teague*'s second exception, despite considering the question numerous times since adopting the *Teague* framework. *Beard v. Banks*, 542

U.S. 406, 417 (2004).

Importantly, *Teague*'s retroactivity bar exceptions regarding new procedural rules is applicable only in *federal* habeas proceedings. *See Danforth v. Minnesota*, 552 U.S. 264, 281–82 (2008) (discussing the understanding that "the *Teague* rule [w]as binding only [on] federal habeas courts, not state courts."). Under *Danforth v. Minnesota*, state courts are free to apply a new procedural rule retroactively even if this Court has decided against doing so for the purposes of federal habeas review. *Danforth* stands for the proposition that a state court's decision about whether to retroactively apply a new procedural rule—at least where this Court has not retroactively applied the rule—is a matter of *state* law. *Id.* at 289 ("States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed state law to govern retroactivity in state postconviction proceedings.").

In 1992, Louisiana reconsidered its retroactivity rules in light of *Teague*. *See State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La. 1992). While observing that it was "not bound to adopt the *Teague* standards," it *chose* to employ the *Teague* framework "for all cases on collateral review in [its] state courts." *Id.* at 1297.

Since this Court handed down its decision in *Ramos*, as discussed above, the Louisiana Supreme Court has had numerous opportunities to decide whether to apply the *Ramos* rule retroactively for the purposes of state collateral review. It has declined every opportunity. *See supra* n.6.

Because the decision of whether to retroactively apply a new procedural rule

for the purposes of state collateral review is a question of state law—and because the Louisiana Supreme Court has declined numerous opportunities to review that question—this petition for certiorari does not warrant this Court's review.

B. This Court has reserved the question of whether state courts must apply new watershed procedural rules retroactively on state collateral review.

Admittedly, there are some limits on a State's authority to decide whether new rules should apply retroactively. Although States are free to retroactively apply new rules even where this Court has declined to make those rules retroactive, States are not free to disregard a holding from this Court declaring that a new *substantive* rule applies retroactively.

In *Montgomery v. Louisiana*, this Court held that new *substantive* rules must be applied retroactively in state collateral proceedings—regardless of when the conviction became final. 136 S. Ct. at 729 ("This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final."). Distinguishing substantive rules from procedural rules, the Court expressly limited the holding in *Montgomery* to new *substantive* rules. The Court reserved the question of whether States could decline to apply a new *procedural* rule retroactively even if this Court found it satisfied *Teague*'s second exception. *Id.* ("This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here.").

This Court has not decided whether the new *Ramos* unanimity requirement

should apply retroactively on federal habeas review, but it has granted certiorari to consider that question in *Edwards v. Louisiana*. *See* 140 S. Ct. at 2738. Even if the Court decides that the *Ramos* rule satisfies *Teague*'s narrow second exception for new procedural rules in *Edwards*, that decision could not benefit Jones in this proceeding. The Court would still need to take the extra step of extending *Montgomery*'s holding to require state courts to apply new, watershed, procedural rules in post-conviction proceedings.

The Court should not take that step, even if it concludes that the *Ramos* rule is retroactive. As described above, there are important differences between new substantive and procedural rules. The most important difference, of course, is that new procedural rules have a "more speculative connection to innocence" than substantive rules. *Summerlin*, 542 U.S. at 352. As this Court has explained, substantive rules are retroactive "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52. But new procedural rules affect "only the manner of determining the defendant's culpability." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) (internal quotation marks omitted).

The important differences between substantive and procedural rules have led this Court to treat those rules differently for purposes of retroactivity. The logic of that distinction applies with equal force here. Although state courts are obliged to retroactively apply new substantive rules on post-conviction review, they should be

free to decide whether to retroactively apply new procedural rules that this Court identifies as satisfying *Teague*'s second exception (assuming it ever identifies a new watershed procedural rule).

For these reasons, even if the Court declares the *Ramos* rule to be retroactive in *Edwards*, Jones cannot automatically benefit from that holding because his case arises from *state* post-conviction proceedings. The Court should deny certiorari.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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