NO. 20-

IN THE

SUPREME COURT OF THE UNITED STATES

EUGENE DAVIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "savings clause" in Section 2255(e) of Title 28 permits a court to entertain a habeas corpus petition when the remedy under that section is inadequate to test the legality of detention. Petitioner challenged his detention based on a change in the law rendering him ineligible for prosecution under the Armed Career Criminal Act, but which could not have been brought under Section 2255. The question presented is whether courts have jurisdiction to consider habeas claims in this circumstance, when the remedy under Section 2225 is inadequate, as several circuits have held (the Fourth, Sixth, Seventh, and Ninth) or, as others have ruled, is jurisdiction foreclosed (the Third, Fifth, Tenth, and Eleventh).

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Eugene Davis.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Eugene Davis, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Third Circuit, affirming the district court's order entered June 17, 2019.

OPINIONS BELOW

The order of the court of appeals is unpublished, *see Davis v. Warden Allenwood FCI*, 818 F. App'x 147 (3d Cir. 2020), and is reproduced in the appendix to this petition ("Pet. App.") 1a-5a. The decision of the district court is also unpublished, *see Davis v. Spaulding*, No. 3:17-CV-00968, 2019 WL 2501459 (M.D. Pa. June 17, 2019), and is reproduced in the appendix. Pet. App. 8a-18a.

JURISDICTION

The order sought to be reviewed was entered by the court of appeals for the Third Circuit on June 17, 2020. Pet. App. 7a. The deadline for a petition for a writ of certiorari is November 21, 2020. This Court has jurisdiction over this timely petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * *

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*

28 U.S.C. § 2255(e) (emphasis added).

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

28 U.S.C. § 2241.

INTRODUCTION

Everyone agrees that Eugene Davis is serving a sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), that could not be imposed today—it would be illegal. *See* Pet. App. 10a. Indeed, the district court itself observed that Mr. Davis' petition for a writ of habeas corpus presents compelling circumstances and a "convincing" case for relief. *See* Pet. App. 15a, 17a. For these reasons, the government at first conceded that the writ should be granted. Then the Government reversed its position, but on appeal, returned to its initial position. Despite the government's concession, the Third Circuit found that there is no remedy for this illegality.

Yet several circuits have held that habeas corpus has always been available to contest the legality of one's detention. And that is precisely what Mr. Davis contested.

STATEMENT OF THE CASE

1. Factual and procedural background

a. Mr. Davis is prosecuted under the ACCA, and he challenges its application on direct appeal and collateral review.

In 2009, in the Northern District of Iowa, Mr. Davis pleaded guilty to possessing a 12-gauge shotgun with a shortened barrel after having been convicted of three felonies, in violation of the ACCA. *See United States v. Davis*, 414 F. App'x 891, 892 (8th Cir. 2011). The predicate convictions were third-degree burglaries of automobile dealerships. *See id.* From the outset, Mr. Davis objected to how the burglaries affected his sentence. Before sentencing, he challenged the use of commercial burglaries as "crimes of violence" for the career-offender enhancement under the Sentencing Guidelines. *See id.* The district court denied that objection, imposing a 210-month term of imprisonment. And the Eighth Circuit affirmed. *See id.*

Then in 2012, Mr. Davis moved to correct sentence under Section 2255, arguing, among other things, that counsel had rendered ineffective assistance because the burglary predicates for the ACCA did not meet the definition of generic burglary. *See* Pet. App. 9a. The district court summarily dismissed this motion without a hearing and declined to issue a certificate of appealability. *See id.*

In the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Davis, *pro se*, challenged his conviction under the ACCA, requesting permission to file a successive Section 2255 motion. In these filings, Mr. Davis argued, again, that the

burglary convictions did not satisfy the generic burglary definition required by the Supreme Court under the ACCA. *See Davis v. United States*, No. 15-2906, Doc. 00812840975 at 3 (8th Cir.). In January 2016, the Eight Circuit denied this request.

In May 2016, however, a counseled application to file a successive Section 2255 motion was filed on behalf of Mr. Davis. In this filing, Mr. Davis argued that under *Johnson* he no longer qualified under the ACCA. Pet. App. 9a. Mr. Davis also advised the court that the ruling in *Mathis v. United States*, 136 S. Ct. 2243 (2016), supported his argument that he did not have adequate predicates for the ACCA. *See* Pet. App. 9a-10a. The Eighth Circuit denied the request. Pet. App. 10a.

b. Mr. Davis files a habeas corpus petition under Section 2241, the government at first agrees to relief, but then changes its position.

Mr. Davis filed the current Section 2241 petition in June 2017, and the government responded, agreeing that he was entitled to relief. *See* Pet. App. 10a. But then, the government reversed course, arguing that challenges like Mr. Davis' to one's career-offender status are not properly raised in a Section 2241 filing. *See* CA at 144-145.[1] In the government's view, only claims that render a petitioner's conduct non-criminal can be brought under Section 2241. *See id*. Mr. Davis submitted a reply brief, arguing that his claim fell within the purview of the savings clause's plain terms, courts had recognized relief in similar circumstances, and the Third Circuit had not directly ruled on the issue. *See* CA at 201-206.

[1] "CA" refers to the appendix filed in the court of appeals. And the reference to "career offender" status is a mistake, as Mr. Davis challenged his conviction and sentence under the ACCA.

c. The magistrate judge adopts the government's revised position.

The magistrate judge, however, accepted the government's revised position. Although acknowledging a circuit split on whether a petitioner could seek relief under Section 2241 for an illegal sentence, the magistrate determined that only claims of actual innocence invoke the savings clause under Section 2255(e) and thus allow a prisoner to proceed under Section 2241. *See* Pet. App. 24a-25a. The magistrate reasoned that innocence of a sentencing enhancement differs from innocence of the offense. *See* Pet App. 26a. Here, the magistrate emphasized, Mr. Davis was not convicted as an Armed Career Criminal; instead, he was convicted under the Iowa burglary statute. *See* Pet. App. 27a. Thus, the magistrate found that Mr. Davis could not claim actual innocence, and that while the burglary convictions could not serve as ACCA predicates, this fact did not render his conduct non-criminal. *See* Pet. App. 27a-28a.

d. Mr. Davis objects to the magistrate's report, but the district court adopts it.

To begin, the district court acknowledged that, Mr. Davis' would prevail on his claim in other circuits, his argument was convincing, and his circumstances were compelling. *See* Pet. App. 8a, 15a, 17a.[2] And the court observed that the Third Circuit's non-precedential decisions were unclear on whether a sentencing claim like Mr. Davis' was cognizable. *See* 16a -17a. Indeed, the court noted that it

[2] In framing Mr. Davis' claim, the district court characterizes it as a challenge to the career-offender enhancement. *See* Pet. App. 13a. As above, *see supra* n.1, this characterization was inaccurate. In any event, the court ultimately assessed the issue by reference to the ACCA, 18 U.S.C. § 924(e). *See* Pet. App. 15a.

was "odd to conclude that Section 2255 is 'adequate' or 'effective' where a petitioner denied relief 'was right when [the lower courts] were wrong." Pet. App. 17a. Yet, the district court viewed the Third Circuit's precedent as foreclosing jurisdiction because his underlying claim would not render his conduct non-criminal. *See* Appx11-12. For this reason, the court adopted the magistrate's report.

e. The Third Circuit affirms

On appeal, the Third Circuit affirmed. In doing so, the court neither acknowledged the circuit split nor its own conflicting authority. Instead, the court noted that it had originally interpreted the savings clause under 28 U.S.C. § 2255(e) as limited to when a Supreme Court decision rendered the petitioner's conduct non-criminal. *See* Pet. App. 4a (citing *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997)). But here the court characterized the ACCA as merely a sentencing enhancement—not a separate offense. *See* Pet. App. 4a-5a.[3] Viewed as such, the court explained that Mr. Davis' claim fell outside the savings clause in Section 2255(e). *See* Pet. App. 5a.

[3] In casting the ACCA as simply a sentencing enhancement, the Third Circuit cited *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000). But the divided panel in that case specifically avoided addressing whether this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) affected its view of the ACCA. *See Mack*, 229 F.3d at 236 (Becker, J. concurring and noting that the majority need not reach the *Apprendi* issue).

REASONS FOR GRANTING THE PETITION

Following this Court's rulings in *Johnson v. United States*, 576 U.S. 591 (2015) and *Mathis v. United States*, 136 S. Ct. 2243 (2016), Mr. Davis could not be convicted and sentenced under the ACCA. Moreover, Mr. Davis has done everything possible to raise this issue. Beginning with his initial Section 2255 motion to correct sentence and continuing through both of his requests to file a successive Section 2255 motion, Mr. Davis has asserted that the Iowa third-degree burglary predicates used to prosecute and punish him under the ACCA did not meet the necessary definition of generic burglary. *See* Pet. App. Appx12. But at every turn, his efforts under Section 2255 were thwarted.[4]

1. The circuits are deeply divided as to the availability, the scope, and requisites for the remedy under the savings clause.

This circuit split involves a four-way division over interpreting Section 2255(e)'s savings clause. More important, this division has engendered unfairness and disparity, has prevented the uniform administration of federal law, and is firmly entrenched. *See generally United States v. Wheeler*, 734 F. App'x 892, 893 (4th Cir. 2018) (Agee, J., dissenting from the denial of rehearing en banc).[5]

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[4] As the district court recognized,

> Mr. Davis' petition is made all the more compelling by his particular situation: he brought up, on direct appeal, the same argument that carried the day in *Mathis*, regarding the same Iowa statute. It may seem odd to conclude that Section 2255 is 'adequate' or 'effective' where a petitioner denied relief 'was right when the [lower courts] were wrong.'

Pet. App. 17a (quoting *United States v. Doe*, 810 F.3d 132, 161 (3d Cir. 2015)).

[5] *Accord* Gov't Pet. for a Writ of Certiorari, *United States v. Wheeler*, No. 18-420 at 13, 139 S. Ct. 1318 (2018).

a. In the Fourth, Sixth, Seventh, and Ninth Circuits, Mr. Davis could proceed under the savings clause.

To begin, several circuits recognize that the savings clause encompasses statutory sentencing claims like Mr. Davis'. But within those circuits, there is disagreement over whether the claim must depend on a change of Supreme Court or circuit precedent.

For example, the Fourth Circuit allows a prisoner to challenge his sentence under Section 2255(e)'s savings clause when the claim follows a new, retroactive circuit court change in statutory interpretation. *See United States v. Wheeler*, 886 F.3d 415, 429-30 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1318 (2019). In *Wheeler*, the Fourth Circuit changed its interpretation of a "felony drug offense" for purposes of the former language in the statutory sentencing enhancement under 21 U.S.C. § 841(b)(1)(B).[6] The *Wheeler* court held that Section 2255 is inadequate and ineffective to test the legality of a sentence when (1) the sentence was legal at the time of sentencing based on settled circuit or Supreme Court precedent; (2) that precedent changed after the prisoner's direct appeal and initial Section 2255 petition and applies retroactively; (3) the prisoner cannot meet Section 2255(h)(2)'s requirements for a successive petition; and (4) the change in the law renders the sentencing error grave enough to be a fundamental defect. *See Wheeler*, 886 F.3d at 429-30. The Fourth Circuit later extended *Wheeler's* rationale to challenges

[6] Section 401 of the First Step Act of 2018 changed the definition for the drug predicates. *See* Pub. L. No. 115-391, 132 Stat. 5194, § 401 (2018).

involving a career-offender designation under the former mandatory Sentencing Guidelines. *See Lester v. Flournoy*, 909 F.3d 708, 716 (4th Cir. 2018).

Similarly, the Seventh Circuit permits a prisoner to proceed under the savings clause when challenging a sentence based on a circuit precedent that changed the interpretation of a statute. *See Beason v. Marske*, 926 F.3d 932, 938-39 (7th Cir. 2019).[7] And the Ninth Circuit has allowed a Section 2241 habeas petition when its interpretation of a statute has changed, thereby raising a claim of actual innocence. *See Alaimo v. United States*, 645 F.3d 1042, 1048 (9th Cir. 2011). In *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), the Ninth Circuit extended this rule to claims rendering a prisoner innocent of a mandatory sentencing enhancement. *See id*. at 1190.

The Sixth Circuit, however, takes a slightly narrower view of the savings clause. There, a prisoner like Mr. Davis may challenge a statutory sentencing enhancement based on a change in Supreme Court precedent. *See Hill v. Masters*, 836 F.3d 591, 595-96 (6th Cir. 2016). But unlike the Fourth, Seventh, and Ninth Circuits, the Sixth Circuit will not allow a prisoner's Section 2241 petition to proceed under the savings clause where it's based on a change in circuit precedent. *See Hueso v. Barnhart*, 948 F.3d 324, 336-37 (6th Cir. 2020).[8]

[7] *Accord Brown v. Rios*, 696 F.3d 638, 640-41 (7th Cir. 2012).

[8] A petition for a writ of certiorari in pending. *See Hueso v. Barnhart*, No. 19-1365 (distributed for conference on November 20, 2020).

b. The Third and Fifth Circuits allow prisoners to proceed under the savings clause when the claim is for actual innocence of the underlying criminal conviction.

The Third Circuit first addressed the availability of the remedy in the savings clause in *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). There, the prisoner sought relief under the savings clause for his conviction under 18 U.S.C. § 924(c). In particular, Dorsainvil argued that his conviction was invalid based this Court's later interpretation of the statutory language. *See id*. at 247. And the Third Circuit permitted the filing, framing the inquiry as whether Dorsainvil was being detained for conduct that had since been rendered non-criminal. *See id*. at 252.

Although the Third Circuit has declined to extend *Dorsainvil* to sentencing issues, *see Gardner v. Lewisburg USP*, 845 F.3d 99, 103 (3d Cir. 2017), its jurisprudence on this point has been less than clear. *See United States v. Doe*, 810 F.3d 132, 161 (3d Cir. 2015) (allowing that a sentencing challenge may fall within the savings clause). Indeed, the district court here recognized the same absence of clarity. *See* Pet. App. 16a-17a.[9]

The Fifth Circuit observed that Section 2241 may be employed to challenge a conviction or sentence. *See Reyes-Requena v. United States*, 243 F.3d 893, 901 (5th Cir. 2001). But for purposes of the savings clause, the remedy is available only

[9] Comparing non-precedential decisions in *In re Baer*, 763 F. App'x 278 (3d Cir. 2019) ("[W]e have not determined whether § 2255(e)'s saving clause is available when a prisoner, like Baer, argues that an intervening U.S. Supreme Court case renders his career-offender designation invalid[.]"); *Newman v. Kirby*, 755 F. App'x 208, 209 n.1 (3d Cir. 2018); *Thomas v. Warden Fort Dix FCI*, 712 F. App'x 126, 128 n.3 (3d Cir. 2017); *Pollard v. Yost*, 406 F. App'x 635, 638 (3d Cir. 2011) *with Murray v. Warden Fairton FCI*, 710 F. App'x 518, 520 (3d Cir. 2018) ("We have not held that innocence-of-the-sentence claims fall within the exception to the rule that habeas claims must be brought in § 2255 motions."); *Pearson v. Warden Canaan USP*, 685 F. App'x 93, 96 (3d Cir. 2017); *Scott v. Shartle*, 574 F. App'x 152, 155 (3d Cir. 2014); *United States v. Brown*, 456 F. App'x 79, 81 (3d Cir. 2012).

when (1) a retroactively applicable Supreme Court decision establishes that the prisoner may have been convicted of a nonexistent offense and (2) this claim was foreclosed by circuit law when it should have been raised. *See id*. at 904.

c. The Tenth and Eleventh Circuits foreclose nearly any remedy through the savings clause.

The Tenth and Eleventh Circuits have the most restrictive view of the savings clause. In *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), the court interpreted the savings clause as allowing habeas relief only when "something about the initial § 2255 procedure . . . *itself* is inadequate or ineffective for testing a challenge to detention." *Id*. at 589. Under this standard, a new legal rule changing the scope of a statute is insufficient for allowing a Section 2241 habeas petition to proceed. *See id*. Rather, a petitioner must show that there was a weakness in the actual Section 2255 proceedings. For instance, when the sentencing court has been dissolved. *See id*. The Eleventh Circuit followed suit in *McCarthan v. Dir. Of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc) (joining the Tenth Circuit).

As the above legal landscape highlights, the divide on interpreting the savings clause requires this Court's intervention. *Accord Wright v. Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar J., concurring) (emphasizing that: "[t]he circuits are already split. The rift is unlikely to close on its own. What's more, so

long as it lasts, the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets.").[10]

2. The history of Sections 2241 and 2255 and the plain text of the savings clause, conflict with the restrictive view of the Third, Fifth, Tenth, and Eleventh Circuits.

Congress amended Section 2241 several times, including a recodification in 1948. The 1948 amendments added Section 2255, which provided that prisoners could seek post-conviction relief separate from a habeas petition under Section 2241. *See Medberry v. Crosby*, 351 F.3d 1049, 1056 (11th Cir. 2003). Congress' reason for adding Section 2255 was practical—federal courts located near prisons were being flooded with habeas petitions because Section 2241 required that they be filed in the district of confinement. *See Boumediene v. Bush,* 553 U.S. 723, 775 (2008); *United States v. Hayman*, 342 U.S. 205, 210 (1952). And Section 2255 allowed the prisoner to file with the sentencing court. *See id*.

The 1948 amendments also added the savings clause. The legislative history, however, fails to explain this language. *See Wofford v. Scott*, 177 F.3d 1236, 1240-42 (11th Cir. 1999), *overruled by McCarthan*, 851 F.3d at 1096-98. But this Court has described the clause as ensuring that the limitations in Section 2255 do not violate the suspension clause. *See Boumediene*, 553 U.S. at 776.

[10] *See also* Ashley Alexander, Note, *One Strike, You're Out: The Post-Hueso State of Habeas Corpus Petitions Under the Savings Clause*, 57 Am. J. Crim. L. Rev. 84, 94-97 (Spring 2020); Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255 (e)*, 108 Geo. L. J. 287, 298-99 (Dec. 2019); Lauren Casale, Note, *Back to the Future: Permitting Habeas petitions Based on Intervening Retroactive Case Law to Alter Convictions and Sentences*, 87 Fordam L. Rev. 1577, 1599-1602 (March 2019).

As a result, Section 2255 is the general mechanism for a prisoner to challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974). And it affords a remedy identical in scope to habeas corpus. *See id.* Thus, a court may entertain a Section 2241 habeas petition under Section 2255(e)'s savings clause when the prisoner can show that the "remedy by [a Section 2255] motion is inadequate to test the legality of his detention." 28 U.S.C. § 2255(e) (emphasis added). The plain text of this clause does not limit it to claims involving only guilt or actual innocence. Indeed, detention may be illegal because a petitioner should not have been convicted or, as here, the sentence now exceeds the statutory maximum.

Had Congress intended to limit the remedies under Section 2255(e), it would have used the terms "conviction" or "offense," as it did elsewhere in the statute, rather than "detention," which necessarily implies imprisonment. *See Wheeler*, 886 F.3d at 427-28. This construction squares with the core function of habeas corpus, which includes challenges to "the duration of a prisoner's sentence." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *accord Preiser v. Rodriquez*, 411 U.S. 475, 484 (1973) (emphasizing that the historical purpose of habeas corpus is "to secure release from illegal custody").

3. Because the ACCA functions like a separate offense, Mr. Davis' claim is distinct from those involving sentencing enhancements.

The Third Circuit characterized Mr. Davis' challenge as involving merely a sentencing enhancement. Pet. App. 4a. But the ACCA functions like a separate

offense. Indeed, the Government charged, prosecuted, and convicted Mr. Davis as an armed career criminal. *See United States v. Davis*, No. 1:09-CR-0052, Doc. 2.

Consistent with the language of the savings clause, even the Third and Fifth Circuits recognize that a prisoner may file a Section 2241 petition when, as here, this Court has altered the scope of a statute. *See, e.g.*, *In re Dorsainvil*, 119 F.3d at 251-52; *Reyes-Requena*, 243 F.3d at 903-04. In those instances, the crime was using a firearm during or in relation to a crime of violence or a drug trafficking offense, 18 U.S.C. § 924(c). Mr. Davis' claim, notably, relates to the same statute, Section 924 (Penalties), although a different subsection. The Third Circuit failed to explain why subsections within the same statute receive differing treatment under the savings clause. That is, allowing habeas relief for those convicted under Section 924(c), *e.g.*, *In re Dorsainvil*, while precluding relief for those under Section 924(e).

Although courts could draw a line around Section 924(c), differentiating it because it has ultimately been construed as setting forth a stand-alone crime. *See generally Castillo v. United States*, 530 U.S. 120, 125 (2000) (tracing the history of Section 924(c) and the conflict over whether it was solely a penalty provision). This was not always the case. *See generally United States v. Gonzales*, 520 U.S. 1, 10 (1997) (discussing Section 924(c) as an enhancement).

In any event, from a constitutional perspective, Section 924(e) does more than just enhance a sentence like the career-offender provision within the Sentencing Guidelines. By increasing the statutory penalties to a mandatory minimum of 15 years and a maximum of life—well beyond the otherwise applicable

10-year maximum—Section 924(e) functions as a separate offense. *Cf. Alleyne v. United States*, 570 U.S. 99, 103 (2013). Because the ACCA is more than a mere sentencing enhancement, Mr. Davis' claim falls within the savings clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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