

I. QUESTION PRESENTED

In the Northern District of West Virginia, Willard Lee Moss (“Moss”) proceeded to trial and was convicted of possession of firearms by a domestic violence offender in violation of 18 U.S.C. § 922(g)(9). Moss filed a notice of appeal and filed an opening brief with the United States Court of Appeals for the Fourth Circuit.

Then, on June 21, 2019, in *Rehaif v. United States*, this Court held that, in a prosecution under 18 U.S.C. § 922(g), the government must prove “both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.” 139 S. Ct. 2191, 2200 (2019). Moss raised the *Rehaif* error in a supplemental brief submitted to the Court of Appeals.

Moss relied upon *Rehaif* and the Fourth Circuit’s published opinion *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), which held that a standalone *Rehaif* error requires automatic vacatur of a defendant’s guilty plea on plain error review because the error is structural. Moss argued that the error in his case was the equivalent of the error in *Gary*, even though Moss went to trial and Gary entered a guilty plea. Moss argued that the error in his case was structural and that his conviction should have been reversed, without regard to the evidence versus the lack of evidence at trial about his knowledge of his prohibited status due to his prior convictions.

On April 22, 2020, the Fourth Circuit affirmed in an unpublished *per curiam* opinion here. The Fourth Circuit’s decision is wrong because it misapprehended

and misapplied the facts in the record, which clearly demonstrated that Moss did not know he was prohibited based on the nature of his prior convictions. Likewise, the decision is wrong because it failed to follow *Gary*. The question presented is whether the Fourth Circuit erred when it affirmed Moss's conviction for possession of a firearm by a domestic violence offender, where the evidence indicated Moss did not know the effect his prior convictions had on his right to possess firearms?

Addressing this question is somewhat complicated because, candidly, Moss submits that the applicable law is not settled. Recently, the government filed and this Court granted a petition for a writ of certiorari in *United States v. Gary*, case No. 20-444. The question presented in *Gary* is whether the court of appeals correctly held that the *Rehaif* error entitles Gary to relief, irrespective of whether Gary could show a reasonable probability that, but for the error, he would have gone to trial. This Court should affirm *Gary*, grant the writ here, and then reverse Moss's conviction and sentence because Moss is equally entitled to relief.

II. PARTIES TO THE PROCEEDING

Mr. Willard Lee Moss is the Petitioner. The United States of America is the Respondent in this matter.

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V. OPINIONS BELOW

The published opinion by the United States Court of Appeal for the Fourth Circuit in this case, *United States v. Willard Lee Moss*, 19-4161, is attached to this Petition as Appendix A. The Order denying the Appellant's Petition for Rehearing or Rehearing *En Banc* is attached as Appendix B. The judgment of the United States Court of Appeals for the Fourth Circuit is attached as Appendix C. The final judgment order of the United States District Court for the Northern District of West Virginia is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a published opinion of the United States Court of Appeals for the Fourth Circuit, decided on April 22, 2020. In this appeal, Appellant filed a timely Petition for Rehearing or Rehearing *En Banc* on July 17, 2020, and the Fourth Circuit denied the petition on September 29, 2020. Pursuant to Miscellaneous Order of March 19, 2020, Appellant files the instant Petition within 150 days of the Order denying of the Petition for Rehearing or Rehearing *En Banc*. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3. of this Court.

VII. CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the United States Constitution. Failure to honor the rule of *Rehaif* in older § 922(g) prosecutions stripped Moss of a whole series of fundamental constitutional rights under the Fifth and Sixth Amendments. These include the right not to “be held to answer” for a serious federal offense except upon charges found by indictment of a grand jury. U.S. Const. amend. V; *see Stirone v. United States*, 361 U.S. 212 (1960). Also abridged is the right “to be informed of the nature and cause of the accusation.” U.S. Const. amend VI; *see Fed. R. Crim. P.* 7(c)(1) (providing that indictment or information must state “the essential facts constituting the offense charged”). A conviction unsupported by proof beyond a reasonable doubt likewise deprives a defendant of due process of law. U.S. Const. amend. V; *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Finally, denying the defendant opportunity to contest essential facts at trial infringes the right to have a jury determine whether the presumption of innocence has been overcome. U.S. Const. amend. VI.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction.

Because these charges constituted offenses against the United States, the district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Factual Background.

At the time of his arrest, Willard Lee Moss, Jr., was a 37-year-old, stay-at-home father who lives with his partner of eighteen years, Danielle Farson, and the couple's two children in rural Pleasants County, West Virginia. Danielle worked at a McDonald's in nearby Richie County, and Moss tended to the children and the home. Pertinent to this case, as the result of two prior convictions for misdemeanor domestic violence, Moss was prohibited from possessing a firearm.

In approximately July 2017, due to some allegations of domestic violence between Moss and his teenaged son, Owen, early that year, Moss moved to Calhoun County, and Danielle Farson and the children moved into her parents' home (Rochelle Farson and Larry Farson) in Pleasants County, West Virginia. J.A. 149.¹ Rochelle Farson testified at trial that some firearms were stored in her home while Danielle and the children were living there. However, Rochelle testified that she had no idea

¹The reference to "J.A." indicates the page number in the joint appendix of the parties filed with the Fourth Circuit.

what kind of guns they owned, how many, what caliber, or what type the guns were.

J.A. 153.

In September 2017, due to the incident of domestic violence and Owen's behavioral problems, Darlene Ellis, an employee from New Beginnings, began making weekly visits to the home to offer education and counseling to the family. J.A. 115. Ellis testified that she had not seen any firearms in the home in September, October, and November 2017. J.A. 136. On December 4, 2017, Ellis observed, for the first time, an apparent hunting rifle in the home. J.A. 121. Ellis did not examine the rifle or document anything about it, other than its presence. J.A. 122. Ellis's concern about the rifle was limited to advising Moss and Danielle Farson about security measures to ensure that their son Owen could not use it without adult supervision.

J.A. 126.

On December 11, 2017, Ellis observed the rifle again, but with a trigger lock in place. J.A. 130. Danielle Farson, during a conversation with Ellis, told Ellis that she had also gotten a trigger lock for another firearm for which Danielle had a concealed carry permit, thus abating Ellis's concerns. J.A. 131. On this occasion, Ellis did not inspect the rifle or note any serial number. J.A. 137. The government presented no additional testimony about firearms being present in the home on other occasions in 2017 or during January 2018.

By February 15, 2018, an assistant county prosecutor in Pleasants County acquired Ellis's notes about the rifle observed in December 2017, and he decided to contact Deputy Rory Marant at the Sheriff's Department. Deputy Marant obtained

a search warrant for the home that day. J.A. 92. Upon arrival at the home, Deputy Marant explained the warrant to Danielle, who cooperated and retrieved five long guns and one pistol from an unoccupied bedroom. J.A. 95. Moss was not present. Rather, Moss was then incarcerated at the North Central Regional Jail in Doddridge County, West Virginia, serving a sentence for the domestic violence conviction from 2017.

A federal grand jury indicted Moss on August 6, 2018, charging him with the illegal possession of five firearms in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). J.A. 10. The firearms involved in this case included three single-shot rifles, one shotgun, and one 9mm pistol, seized from Moss's home on February 15, 2018. J.A. 366.

After the return of the indictment against him on August 6, 2018, Moss was released on bond and determined to exercise his constitutional right to a trial by jury, which took place over the course of two days, on October 15-16, 2018. J.A. 75. At trial, the government's most prominent evidence supported a conviction based on the alleged possession of a firearm prior to Moss's incarceration, on December 4, 2017 and December 11, 2017, rather than February 15, 2018. J.A. 124, 129-30. What's more, despite the vastly different date in the indictment, the government expressly argued to the jury in closing for a guilty verdict based upon the possession of a firearm in December 2017, rather than February 15, 2018. J.A. 263.

Moss prepared a defense for trial and argued, among other things, that it was impossible for him to possess the firearms, as he was incarcerated on February 15,

2018, and he lacked the power to exercise dominion and control of them. J.A. 189, 222-23. A jury found Moss guilty of the charge of the illegal possession of a firearm. J.A. 59-60.

The assigned U.S. Probation Officer prepared a presentence investigation report (“PSR”), in which Moss’s guidelines range for sentencing was set at 27-33 months for the illegal possession of five firearms. J.A. 379. Counsel for Moss filed several objections to the findings of the PSR, including: (1) an objection to a two-level adjustment for the possession of five firearms, arguing that Moss possessed at least one but less than five firearms; (2) an objection to the application of an upward adjustment for obstruction of justice due to alleged perjury in Moss’s testimony at trial; (3) an objection for the PSR’s failure to include a reduction for lawful sporting purposes and collecting; and (4) an objection to the conclusion that there were no mitigating factors in the case that should reduce the sentence. J.A. 369, 370, 382.

At sentencing, on March 5, 2019, the parties addressed the objections to the finding of the presentence report, and there were extensive disputes about the enhancement for obstruction of justice. J.A. 278-97. The district court ruled against Moss, determining that Moss should receive a two-level increase for obstructing justice by his “willful false testimony on a material issue.” J.A. 300. Moss chose not to give a statement at the time of sentencing. J.A. 302.

In a sentencing memorandum, counsel for Moss described several mitigating aspects of Moss’s life, including his disability due to mental illness and lack of

education. In addition, counsel for Moss articulated the family's poverty-level subsistence, which would degrade in the event of a prison sentence for Moss, who provided childcare for the family and tended the home while his partner worked at McDonald's. J.A. 384. The district court rejected the request for a downward variance sentence and declined to fully consider the substantial mitigating factors in the case because it believed Moss's personal and family circumstances were trumped by his alleged obstruction of justice. Accordingly, the district court sentenced Moss to 27 months of incarceration to be followed by three years on supervised release. J.A. 317-19.

C. The United States Court of Appeals for the Fourth Circuit.

Moss filed a timely notice of appeal on March 11, 2019. In an opening brief filed on June 3, 2019, Moss argued that the district court erred in failing to grant Moss's motion for judgment of acquittal or new trial on the issue of whether Moss suffered from a material variance between the allegations made in the indictment and the government's evidence presented at trial. The variance between the offense date of February 15, 2018, in the indictment and the proof at trial from early December 2017 plainly prejudiced Moss by unfairly surprising him at trial, hindering the preparation and presentation of his defense in violation of his constitutional rights.

In addition, Moss argued that the district court erred at sentencing and imposed an unreasonable sentence, as it failed to fully consider all of the relevant sentencing factors under 18 U.S.C. § 3553(a) and substantial mitigating

information, and placed an excessive amount of emphasis on both the advisory Guidelines and Moss's obstruction of justice sentencing enhancement.

On June 21, 2019, in *Rehaif v. United States*, the Supreme Court held that, in a prosecution under 18 U.S.C. § 922(g), the government must prove "both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. 2191, 2200 (2019). The Court explained that, "[w]ithout knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 2197. *Rehaif* overturned this longstanding precedent holding that the government need not prove that the defendant had knowledge of his status as a convicted felon. *See United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995).

On September 19, 2019, in a supplemental brief, Moss argued that the conviction for possession of a firearm pursuant to 18 U.S.C. § 922(g)(9) was insufficient given that the indictment failed to allege, the district court judge failed to instruct, and the jury failed to find beyond a reasonable doubt that Moss knew that he had been in a category of people prohibited from possessing firearms based upon prior domestic violence convictions.

Moss stood trial on an indictment whose sole count purported to state a violation of subsection (g)(9) of § 922, which prohibits possession of a firearm by persons previously convicted of a domestic violence offense. Yet, the indictment did not allege Moss knew he had a conviction meeting that definition or that he knew

he was prohibited. The district court did not provide an instruction along these lines and the jury failed to make a finding of such knowledge at trial. At the time the case went to the jury, these omissions did not offend controlling precedent, which held that it was sufficient to prove the defendant was a member of a proscribed class, regardless of whether he knew of that status.

After *Rehaif* was decided, the failure to charge and prove a defendant's knowledge of § 922(g)'s "crucial" status element, 139 S. Ct. 2197, is plain error of a kind that deprived Moss of several of the Constitution's most fundamental guarantees. To let stand conviction on a count that fails even to state an offense, after a trial at which there was no finding by the jury of a fact essential to guilt, is unfair and it invites disrepute to the judiciary.

The government filed a response to the supplemental brief on February 21, 2020. It stated that: "[t]he United States concedes that *Rehaif* changed the law which had existed for decades. In a firearms case involving a prohibited person, the United States must now charge and prove that a defendant knew of the fact or characteristic that made him a prohibited person (in this case, that he had been previously convicted of domestic violence). Accordingly, the indictment in this case was insufficient in that it did not allege *Rehaif* knowledge, and the jury instructions were deficient in that they did not instruct the jury as to the *Rehaif* knowledge element. This was error, and it is plain." *Id.* at 4. Yet, the government claimed that the error was not structural, it failed to affect Moss's substantial rights and did

not undermine the fairness, integrity and public reputation of the proceedings. *Id.* at 5-14.

On March 25, 2020, the Court of Appeals for the Fourth Circuit issued a published opinion *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), which was highly relevant to Moss's assertion that the undisputed *Rehaif* error in his case is structural. In *Gary*, the Fourth Circuit held that a *Rehaif* error is structural in nature. The result is that a defendant who pled guilty before *Rehaif* will necessarily be able to satisfy the third prong of the plain-error test, which requires a showing that the error affected substantial rights. The Fourth Circuit also exercised its discretion to grant relief under the test's fourth prong, and it did so using language that suggests a virtually categorical rule: "We cannot envision a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize the error and grant relief." *Id.* at 21.

On April 9, 2020, undersigned counsel submitted *Gary* as supplemental authority and argued that though Moss proceeded to trial, he was similarly deprived of basic constitutional rights and that the framework of his trial was fundamentally flawed, just like the guilty plea proceedings in *Gary*. Moss's indictment did not include every essential element prior to his trial and the district court failed to instruct the jury on every essential element of the offense, just as the district court failed to explain every essential element to the defendant in *Gary*.

prior the entry of the guilty plea. In both cases, in our view, the proceedings suffered from due process violations, requiring automatic reversal.

A panel from the Fourth Circuit issued an unpublished Opinion on April 22, 2020, affirming Moss's conviction and sentence. In doing so, the Opinion rejected both claims alleged in the opening brief. Likewise, the Opinion found that the *Rehaif* error, while plain, did not affect Moss's substantial rights.

In making a determination about Moss's substantial rights the Opinion failed to consider critical material facts elicited during the cross-examination of Moss at trial that demonstrate Moss did not understand that he belonged to the relevant category of persons barred from possessing a firearm due to his convictions for domestic violence. What's more, the Opinion failed to follow and, therefore, is in direct conflict with, the Fourth Circuit's published opinion in *Gary*.

On July 17, 2020, Moss petitioned the Fourth Circuit for a Rehearing/Rehearing *En Banc*, asking the Fourth Circuit to reconsider its Opinion in this case. The Fourth Circuit denied the Petition for Rehearing and Rehearing *En Banc* on September 22, 2020, with no judge requesting a poll under Federal Rule of Appellate Procedure 35.

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether the United States Court of Appeals for the Fourth Circuit properly affirmed Moss's conviction under *Rehaif*. Moss respectfully requests that this Honorable Court grant the writ in order to settle an important issue of federal law, namely, to clarify whether a defendant, like Moss, who proceeded to trial prior to *Rehaif* is entitled to the same constitutional protections as a defendant who entered a plea of guilty, such as in *Gary*.

ARGUMENT

A. The Court of Appeals' decision is wrong because the Opinion overlooked facts from the trial transcripts indicating that Moss lacked knowledge of his prohibited status due to his prior convictions for domestic violence.

As Moss did not object to the *Rehaif* error at trial, the Fourth Circuit conducted a review for plain error. As indicated, the government did not dispute the existence of the *Rehaif* error or that the error was plain. The important question in the Opinion, therefore, involved whether the *Rehaif* error at trial affected Moss's substantial rights. On this key issue, in two paragraphs or so, the Opinion stated:

"To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." United States v. Lockhart, 947 F.3d 187, 191 (4th Cir. 2020) (en banc). If Moss satisfies these three prongs, we will only correct the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. (internal quotation marks omitted). In Gary, we held that a "Rehaif error" is a "structural error that affects the substantial rights of the defendant." Gary, 2020 WL 1443528 at *4. This court noted in Gary that "the phrase

‘affects substantial rights’ means that ‘the error must have been prejudicial’ – that is, ‘[i]t must have affected the outcome of the district court proceedings.’” *Id.* at *5. We concluded that, in the context of a guilty plea, Gary’s plea was not voluntary and “intelligent” because a criminal defendant must “first receive[] ‘real notice of the true nature of the charge against him.’” We find—and the Government concedes—that Moss meets the first two prongs of plain error. **However, given Moss’ testimony at trial, he cannot show structural error and, therefore, fails to meet the plain error standard. During his direct testimony, Moss stated that he was well aware of his prohibited status because of his prior convictions.**

Id. at 5-6 (emphasis added).

This is not a correct assessment of the evidence at trial. On direct, Moss testified that in a court hearing to address his domestic violence charge in September 2017, “we had a meeting stating I could come back home and they said I wasn’t allowed to have no guns and I told [my family] to get all the guns out of the house, if where was any.” J.A. 191. Moss repeated that “I told them that I was not allowed around guns anymore, that they need to get all the guns out of the house.” J.A. 192. Similarly, Moss testified that he told his family “there was not supposed to be any guns in the house” and to get rid of them because he was “not allowed to possess a firearm [and] I cannot touch a firearm.” J.A. 194. Standing along, these statements on direct suggest that Moss knew he was a prohibited from possessing firearms after his court proceedings in his domestic violence case. **However, these statements certainly do not suggest the reason Moss believed he could not possess firearms and these statements do not suggest that Moss knew at**

that point Moss belonged to the category of persons barred from possessing a firearm due to convictions for domestic violence.

Making matters worse, the Opinion entirely fails to take into account Moss's critical testimony that he was sentenced to probation in state court. J.A. 191. At trial, the federal prosecutor, on cross-examination, asked Moss several follow up questions relating to Moss's understanding and the actions he took after his court hearing in the domestic violence case:

Q. And your testimony was that in September after you got convicted of domestic violence for the second time you had a conversation with your family?

A. Yes, sir.

Q. Okay. And at that point you instructed, as head of the household, that they had to leave?

A. Not as head of the household.

Q. Okay.

A. As a member of the household.

Q. All right. So, what were your instructions?

A. My instructions were I'm not allowed around guns. So, they needed to be removed from the house.

Q. Did you ask them to remove the guns?

A. **Yeah, because I was on probation. Yes, sir.**

J.A. 200 (emphasis added).

This testimony, elicited on cross-examination, clarifies this matter. It proves that Moss believed he could not possess firearms or in 2017 through 2018 **because**

he was on probation for domestic violence, and not because his convictions themselves caused him to become a permanent member of a prohibited class of people, as required by *Rehaif*. Indeed, Moss knew that he could not possess “**weapon[s] of any type**” because **he was on probation** -- a classic condition of probation not only in West Virginia but throughout the United States. J.A. 192. Accordingly, contrary to the extremely limited and flawed analysis of the Opinion, the record established that the *Rehaif* error prejudiced Moss. The error certainly affected the outcome of Moss’s trial because the record -- including the cross examination of Moss -- strongly suggests **Moss did not fully understand the impact of his prior convictions for domestic violence.**

B. The Court of Appeals’ decision failed to follow *Gary*, which was binding precedent within the Fourth Circuit at the time the Fourth Circuit issued the Opinion, and which is pending before this Court today.

As discussed, the trial record fails to clearly indicate that Moss was aware of his prohibited status because of the nature of his prior convictions for domestic violence. Rather, the record shows that Moss believed he could not possess firearms merely because of the terms and conditions of his sentence of probation. Though, this should have no impact upon the question of whether the error affected Moss’s substantial rights. *Gary* is clear that *Rehaif* error is structural error and necessarily requires reversal. Prejudice is not required. The Opinion fails to follow these instructions and, therefore, it was wrongly decided.

In *Gary*, the Fourth Circuit held that the district court’s failure to give a defendant notice that he belonged in a class of persons prohibited from possessing a

firearm during his plea colloquy constitutes a structural error that requires his guilty plea to be vacated. 954 F.3d 194 (4th Cir. 2020). The Fourth Circuit noted that this Court has instructed that a constitutionally invalid guilty plea cannot stand, even when there may be “overwhelming evidence that the defendant would have pleaded guilty regardless.” *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). Thus, the error is structural, regardless of the strength of the prosecution’s evidence or whether the error would have affected the ultimate outcome of the proceedings. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984).

On appeal, Gary argued that his guilty plea was constitutionally not valid because the district court misinformed him about the elements of his offense, *per se* affecting his substantial rights, supporting a conclusion that a defendant need not make a case-specific showing of prejudice, even in the face of overwhelming evidence that he would have plead guilty. 954 F.3d at 202. Further, Gary asserted that the district court’s error was structural, because it infringed on his autonomy interest in, as this Court has stated, “mak[ing] his own choices about the proper way to protect his own liberty.” *See Weaver v. Massachusetts*, --- U.S. ----, 137 S. Ct. 1899, 1907-08 (2017). *Id.* Gary contended that the error affected his substantial rights regardless of the strength of the prosecution’s evidence or whether the error affected the outcome of the proceedings. *Id.* at 202-03. The Fourth Circuit found Gary’s arguments persuasive. *Id.* at 203.

The Fourth Circuit found that the error in *Gary* was structural because it “violated Gary’s right to make a fundamental choice regarding his own defense in

violation of his Sixth Amendment autonomy interest.” *Id.* at 206. Gary had the right to make an informed choice about whether to plead guilty or exercise his right to trial. *Id.* at 205. He was deprived, however, of the “right to determine the best way to protect his liberty” by misinformation on the elements against him. *Id.*

Further, the Court also found that the deprivation of Gary’s autonomy interest under the Fifth Amendment due process clause had consequences “necessarily unquantifiable and indeterminate,” rendering the impact of the district court’s error “simply too difficult to measure.” *Id.* at 206.

Here, the Opinion found that Moss met the first two prongs of the plain error test, but he could not establish that a structural error occurred because Moss testified at trial that “he was well aware of his prohibited status because of his prior convictions.” Opinion at 6. Thus, the Opinion undertook the precise analysis prohibited by this Court in *Gary*, to scour the trial record to find evidence indicating, one way or another, whether Moss knew he was a prohibited person due to his prior convictions. Moss did not know. The panel improperly concluded that Moss did know. This analysis, however, is not permitted by *Gary*, when this Court announced that “the error is structural regardless of the prosecution’s evidence or whether the error would have affected the ultimate outcome of the proceedings.” *Id.* at 206. The Fourth Circuit’s holding in Moss’s case, in this way, is wrong and it conflicts its own holding in *Gary*.

X. CONCLUSION

For these reasons, Moss respectfully request that this Honorable Court grant a writ of certiorari and review the judgment of the Court of Appeals.

Respectfully submitted,

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