No. 21A209
CAPITAL CASE

IN THE
Supreme Court of the United States

BIGLER JOBE STOUFFER,

Applicant,

v.

SCOTT CROW, *et al.*

Respondents.

**To the Honorable Neil Gorsuch,
Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit**

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

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Execution Scheduled for December 9th, 2021 at 10:00 a.m. CT

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RESPONSE TO APPLICATION FOR STAY OF EXECUTION

Applicant Bigler Jobe Stouffer murdered elementary-school teacher Linda Reaves over thirty-six years ago. Although his fellow death-row inmates have litigated the State's method of execution since 2020, including inmates who were not originally in the 2014 challenge, Applicant waited until shortly before his impending execution date to file copycat litigation. With his execution soon at hand, he now seeks a stay of execution from this Court. But his Application does not even meaningfully address the Tenth Circuit's reasons for denying a stay of execution. Instead, he focuses on the district court's independently sufficient reasons for denying an injunction of his execution. Because neither the district court nor the Tenth Circuit abused their discretion in denying Applicant delay of his justly-imposed sentence, this Court should swiftly deny the Application for Stay of Execution.

STATEMENT

I. Background of this Case

A number of Oklahoma's death-row inmates filed a lawsuit in the Western District of Oklahoma in June of 2014, challenging the State's method of execution. *Warner v. Gross*, No. 14-cv-0665, 2014 WL 7671680 (W.D. Okla. June 25, 2014). Applicant was not among those plaintiffs.

On November 20, 2014, Applicant filed a motion to join what has since become referred to as the *Glossip* litigation. The district court denied that motion because Applicant failed to properly serve all parties. The district court further refused to

exercise its discretion to overlook Applicant's failure to serve the motion because the action had advanced beyond the preliminary stage, including review of a motion to dismiss and a three-day hearing on a motion for preliminary relief. The district court further found no exigencies, such as a concern that Applicant might not benefit from any ruling in the named plaintiffs' litigation. ROA 142-143.[1]

After this Court affirmed the denial of a preliminary injunction in *Glossip*, that litigation resumed in the district court. Then, in October of 2015, the case was administratively closed, during which time the Oklahoma Attorney General agreed not to seek execution dates until certain conditions were met, at which point the case could be reopened. ROA 145-149. In November 2018, after exhausting all challenges to his judgment and sentence, another inmate—Wade Lay—filed a motion to join the *Glossip* litigation. The court denied the motion without prejudice because the case was administratively closed, and the Attorney General had agreed not to seek execution dates until the litigation resumed. ROA 151-153.

In February of 2020, after the conditions in the October 2015 stipulation were satisfied, the *Glossip* plaintiffs moved to reopen the case. *See* ROA 491. On March 12, 2020, the district court granted inmate Lay's motion by his new counsel to intervene as a plaintiff. ROA 493. The *Glossip* case then proceeded through a motion to dismiss, lengthy discovery, and summary judgment.

[1] "ROA" refers to the Record on Appeal at the Tenth Circuit below, which is available on the Tenth Circuit's electronic docket for this case.

Unlike inmate Lay and others, Applicant never again sought to join the *Glossip* litigation, even after his challenges to his judgment and sentence were exhausted in 2017. Nor did he file his own lawsuit—until approximately three weeks after his execution date was set. ROA 7.[2] And even then he waited an additional week before filing his motion for a stay of execution. ROA 15.

II. The Proceedings Below

On October 19, 2021, Applicant filed a motion for stay of execution before he had served any defendants. *See* ROA 15. After he served the defendants, he amended his motion on November 12. *See* ROA 108. The court held an evidentiary hearing on November 22. *See generally,* 11/22/21 Tr.[3]

At the hearing, Applicant proffered no live witnesses, but instead proffered two affidavits to which Respondents stipulated. Through one affidavit, Applicant himself testified that he thought he would not be executed based on what he "heard from other inmates." ROA 718, ¶ 14. Through the other affidavit, an attorney who represented Applicant in some habeas matters, Mark Barrett, offered testimony on the habeas proceedings and his understanding of the *Glossip* case, in which he did not participate. ROA 722.

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[2] The Oklahoma Court of Criminal Appeals entered an order on September 20, 2021, setting Applicant's execution date for December 9, 2021. *See* Order Setting Execution Dates, *In re Setting of Execution Dates*, Nos. D-2000-653 *et al.* (Okla. Crim. App. Sept. 20, 2021).

[3] For clarity, this Brief cites to the district court transcripts as MM/DD/YY Tr. ##.

Applicant also sought judicial notice of numerous pleadings, reports, and declarations filed in the *Glossip* case. ROA 459. Respondent opposed judicial notice on the ground that those filings were not undisputed facts, ROA 674, but the district court overruled the objection and granted the motion, 11/22/21 Tr. 9. Then, based on the district court's overruling of the objection, Respondents cross-designated their motion for summary judgment and appendix of exhibits filed in the *Glossip* case. *Id.* at 27-29.

Applicant's designations in the *Glossip* record included two declarations regarding the recent execution of John Grant in Oklahoma: One from assistant public defender Meghan LeFrancois and the other from her investigator, Julie Gardner. Both declarations recounted what they witnessed at the Grant execution. Supp.ROA 2803-05, 2811-12.[4]

In addition to the *Glossip* materials, Respondent presented two live witnesses. Dr. Joseph Antognini, an expert in medicine and anesthesiology, testified as to why a 500mg dose of midazolam will render an inmate unconscious and insensate to pain and why movement is not uncommon during anesthesia, including various natural responses under anesthesia such as coughing and regurgitation. 11/22/21 Tr. 54-55. Dr. Ervin Yen, also an expert in medicine and anesthesiology, testified as to what he

[4] "Supp.ROA" refers to the Supplemental Record on Appeal filed at the Tenth Circuit on November 29, 2021.

personally witnessed at the Grant execution and concluded that Grant was unconscious and insensate to pain shortly after he received midazolam. *Id.* at 130.

The district court denied the injunction. App. 7-39.[5] On the Eighth Amendment challenge (Count II), the district court found that Applicant had not demonstrated a likelihood of success under either element of the *Glossip* test. *Id.* at 35-37. It held that the denial of summary judgment in *Glossip* was not sufficient to satisfy the legal standards for a preliminary injunction. *Id.* at 21, 28-29, 36. Then, on the first *Glossip* element, it found that "[t]he preponderance of the evidence before me on this motion establishes that a 500-milligram dose of midazolam will reliably render a person unconscious and insensate to pain." *Id.* at 29. As it relates to the first element, the district court also made several findings regarding the Grant execution. For example, the court found Dr. Yen's testimony persuasive and that "Mr. Grant lost consciousness soon after the midazolam was pushed." *Id.* at 32. Based on all those findings, the district court held that "[t]he John Grant execution does not call into question the efficacy of midazolam as the first drug in the three-drug sequence." *Id.* at 34. On the second *Glossip* element, the Court held that "Mr. Stouffer presented no evidence in support of his proposed alternative methods of execution." *Id.* at 36. It noted that his proposals have to be "sufficiently detailed" to be carried out "relatively

[5] "App." refers to the Appendix filed with the Application to this Court, using the consecutive pagination denoted at the bottom-center of each page.

easily and reasonably quickly," holding that Applicant had not met that burden. *Id.* at 37.

For the equal protection and promissory estoppel claims, the district court found that the October 2015 stipulation in *Glossip* regarding execution dates "was the only commitment the State ever made in *Glossip* for the benefit of any prisoners who were not plaintiffs in that case," and that this commitment was honored. *Id.* at 11. It found Applicant had been entitled to file his own case, at public expense, any time in the five years since he was denied intervention in the *Glossip* case. *Id.* at 12. It further found that despite allegations by Applicant, "[t]here was no discussion at [the March 2020] conference of the status of anyone other than the *Glossip* plaintiffs." *Id.* at 13. The district court further noted that the minute sheet from that conference "does not purport to memorialize any agreement." *Id.*

The district court then held the equal protection claim unlikely to succeed on two grounds. First, Applicant "is not similarly situated to the *Glossip* plaintiffs." *Id.* at 16. Second, he "has not shown that the State's action in scheduling his execution was without rational basis." *Id.* The court observed that Applicant was not litigating a method-of-execution challenge when his execution was scheduled. *Id.* at 16-17. Thus, the Court held he was unlikely to succeed on his equal protection claim. *Id.* at 17.

The district court also held the promissory estoppel claim was unlikely to succeed. In response to Applicant's allegations about a promise from the Attorney

General of Oklahoma, the district court found that "the record shows no such promise, and none was made." *Id.* at 18. The district court further stated that the Attorney General's "acquiescence" to the Court's remarks, to the extent it could be construed as a promise, involved no assurance "encompassing any prisoners who were not before the Court in the *Glossip* case" because the Court neither sought such assurance nor was given it in March 2020. *Id.* at 19. There was no promise at issue, let alone a clear and unambiguous promise or one made to Applicant. *See id.* Thus, the district court held that Applicant failed to demonstrate likelihood of success on promissory estoppel.

The district court did not address the remaining requirements for an injunction, noting that such factors need not be addressed where an inmate in a method-of-execution challenge has failed to demonstrate likelihood of success. *Id.* at 38. When Applicant sought a stay of execution on appeal to the Tenth Circuit, however, the Tenth Circuit denied a stay based on those independently sufficient grounds.

Specifically, the Tenth Circuit noted that Applicant "has not addressed the last three stay factors" and "[i]n particular, he has not identified the threat of irreparable harm he may suffer if the stay or injunction is not granted." *Id.* at 2. Noting that there appeared to be no dispute that any irreparable harm would only flow from the *method* of execution (rather than the execution itself), the Tenth Circuit limited its ruling to "whether, absent a stay, Mr. Stouffer has shown he will be irreparably harmed by

being subjected to an unconstitutionally painful method of execution in violation of the Eighth Amendment." *Id.* at 2-3.

After reviewing the record, the Tenth Circuit held that Applicant had "failed to establish a threat that he will be irreparably harmed by a violation of his Eighth Amendment rights if he is executed using Oklahoma's three-drug protocol, including midazolam." *Id.* at 4. And given that Applicant failed to prove irreparable harm, the court opted not to "discuss whether he has satisfied the other stay factors," instead holding that Applicant "has not shown that the circumstances justify an exercise of our discretion to issue a stay pending appeal." *Id.* at 4-5. A day after the Tenth Circuit's ruling, Applicant now seeks a stay of his execution from this Court.[6]

ARGUMENT

I. Applicant has consistently failed to prove irreparable harm or that any other equitable factor warrants a stay of execution.

After reviewing the record, the court below denied Applicant a stay of execution based on his failure to show irreparable harm absent a stay of execution, yet Applicant spends little effort contesting that ruling. His failure to demonstrate irreparable harm is sufficient reason to deny the Application.

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[6] Applicant claims that "the State intends to begin the execution … even if this application remains pending." Appl. 1. That is false. Yesterday, counsel for Applicant e-mailed the undersigned, stating: "We plan to file an Application for Stay of Execution with the USSC tomorrow. Please advise your position on the matter so I can include it in my pleading. If you could let me know by noon tomorrow that would be greatly appreciated." The undersigned responded within fifteen minutes by stating simply, "We oppose the application." No further communication on this matter between counsel occurred prior to the filing of the Application.

As Respondents argued below, and Applicant did not contest in his reply brief or otherwise, Applicant is not challenging his conviction or sentence. He will be condemned to die irrespective of the outcome of this litigation. Rather, he is challenging the *method* by which his sentence will be carried out. But Applicant fails to demonstrate the method of execution will cause irreparable harm, for example, by showing he will suffer a constitutionally impermissible level of pain as compared to another available and constitutional method he proposes. He has not argued the district court clearly erred in finding to the contrary when addressing this issue in terms of likelihood of success on the merits on his Eighth Amendment claim, nor has he argued the Tenth Circuit erred when addressing the risk of unconstitutional pain in the context of any irreparable harm that might befall Applicant absent a stay. The record below amply demonstrates that Oklahoma's execution protocol "will reliably render a person unconscious and insensate to pain," App. 29, and Applicant's total failure to contest these findings of fact warrants denying his requested stay.

Applicant claims that his motion for stay at the Tenth Circuit addressed the equitable factors for injunctive relief, Appl. 8, but the Tenth Circuit correctly held there was no such intimation—much less persuasive argument grounded in the record—in his motion for stay before that court. Not even the words "irreparable harm" are anywhere to be found in Applicant's Tenth Circuit brief. Nor does he show irreparable harm from an execution that is sure or very likely to cause unconstitutional pain in his Application before this Court.

At most, Applicant argues he will be harmed by "the denial of his right to litigate his claim" before his execution, Appl. 8, 16-18, but there is no such right. Rather, a stay of execution "is not available as a matter of right" merely because an inmate has filed a challenge to his method of execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also Warner v. Gross*, 776 F.3d 721, 727-28 & n.5 (10th Cir. 2015). Like any other litigant seeking injunctive relief, he must show a likelihood of success on the merits and irreparable harm, and he has failed to do so here. Indeed, when the Tenth Circuit in the *Glossip* litigation granted a stay because the plaintiffs there had survived summary judgment on one element of their Eighth Amendment claim, this Court promptly vacated that stay. *See Crow v. Jones*, No. 21A116 (Oct. 28, 2021). And the Tenth Circuit later confirmed that showing a dispute of material fact sufficient for trial is also insufficient to meet the likelihood of success on the merits factor for injunctive relief. *See Jones v. Crow*, 21-6139, 2021 WL 5277462 (10th Cir. Nov. 12, 2021).

Here, Applicant has not even proceeded past summary judgment and nonetheless seeks a stay merely because he has filed a complaint (or because *other* litigants have survived summary judgment in a separate case). Accepting a standard where inmates are owed a stay every time they have a live claim in federal court—or, under Applicant's arguments, every time *other* inmates are litigating, Appl. 17—would as a practical matter halt executions across the country altogether. None of this is sufficient to show irreparable harm.

Meanwhile, the State and the family members of the Applicant's victims have an important, protectable interest in the timely enforcement of the sentence imposed by the jury. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019). It has been an unconscionable thirty-six years since Applicant murdered Linda Reaves and seriously injured Doug Ivens by shooting them multiple times at close range. "The people of [Oklahoma], the surviving victims of [the Applicant's] crimes, and others like them deserve better." *Id.* at 1134. So "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584.

Finally, there is the matter of Applicant's timing. He waited to file a method-of-execution challenge until approximately three weeks after an execution date was set. These are exactly the sort of dilatory litigation tactics that this Court has warned litigants against time and time again. *See, e.g., Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020); *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew*, 139 S. Ct. at 1134. There is a "strong equitable presumption against the grant of a stay" especially when a plaintiff is dilatory in bringing his claim. *Hill*, 547 U.S. at 584. Applicant's attempts to justify his delay rely on his flawed claim that the State promised not to execute him, which is addressed below, *infra* Part III. Applicant's request for a stay should be denied.

II. Applicant's equal protection theory does not justify a stay of execution.

On September 20, 2021, the Oklahoma Court of Criminal Appeals set execution dates for seven inmates: six inmates in the *Glossip* litigation who had no live claims because summary judgment had been entered against them and Applicant who had no live claims because he had never brought suit challenging his method of execution. *See* Order Setting Execution Dates, *In re Setting of Execution Dates*, Nos. D-2000-653 *et al.* (Okla. Crim. App. Sept. 20, 2021). Applicant's theory of equal protection asks this Court to hold that the Constitution requires the State to have refrained from setting an execution date for Applicant because it had so refrained for the remaining *Glossip* inmates that, unlike Applicant, had legal challenges to their method of execution going to trial. *See* Appl. 12-16. He essentially seeks a reward for his delay in bringing suit.

Equal protection claims only apply to persons differently treated from those "similarly situated." *See Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602-04 (2008). Applicant is not similarly situated to the plaintiffs in *Glossip* going to trial next year because he failed to bring suit, whether through counsel or pro se, when the State announced a new protocol in February 2020. Nor did he have a pending suit or live claims when his execution date was set. While only some death row inmates brought suit in 2014—the suit Mr. Stouffer tried to join pro se later that year—all of his fellow death-row inmates brought suit in 2020, which was before any execution dates were set. Only after after execution dates were set for all inmates with no live claims

challenging their method of execution (including Applicant) did Applicant complain that he should be treated as though he filed almost two years ago and had a live challenge to his execution when his execution date was set. That is the opposite of the legal standard: death-row inmates do not benefit from their delay. *Hill*, 547 U.S. at 583-84.

In part, Applicant's claim appears to be that Respondents should be enjoined because of the actions of the *Glossip* plaintiffs' counsel. *See* ROA 101, ¶¶ 257-261. After all, the reason that he alleges he is not in the *Glossip* lawsuit appears to be that the *Glossip* plaintiffs' counsel refused to represent him. *See id.* Respondents had no choice in who sued them, let alone any say in whether plaintiffs' counsel in *Glossip* would represent Applicant. There is no relevant action of the *Glossip* plaintiffs' counsel that is attributable to Respondents such that Respondents violated the Equal Protection Clause.

Nor are Respondents responsible for Applicant's failure to file a pro se complaint. In February 2020, both he and inmate Wade Lay were death-row inmates not represented in the *Glossip* case. Inmate Lay was able to determine that he needed to file suit pro se in 2020 to be similarly situated to counseled plaintiffs. Applicant offers no reason that he could not similarly file pro se, let alone any actions by Respondents that prevented him from doing so. Thus, regardless of any denial of intervention in *Glossip* seven years ago, Respondents did not prevent Applicant from joining the counseled plaintiffs in *Glossip* in 2020 (as other death-row inmates did),

from joining pro se (as Wade Lay did), or from filing his own suit over the last seven years (as he belatedly is doing now after his execution date was set). *See* App. 6.

In short, Applicant is not similarly situated to his fellow inmates going to trial in *Glossip* because of his own delay. As the district court concluded, unlike any of those other inmates, Applicant did not have any live challenges to his method of execution when the State resumed the process of setting execution dates, so he is unlikely to succeed on any Equal Protection Clause claim. App. 15-16. Any purported differential treatment only arises because of Applicant's delay in bringing suit until the eve of his execution.

III. Applicant's promissory estoppel theory is wrong as a matter of fact and law, and does not warrant a stay of execution.

Applicant's promissory estoppel claim relies entirely on disagreeing with the district court's findings of fact—findings regarding an off-the-record conference that the same district court held in a different case, where neither Applicant nor his counsel was present. He offers nothing to show why those fact findings were an abuse of discretion, and his remaining arguments necessarily fail under the facts found by the district court.

After the *Glossip* case reopened, the district court held an off-the-record status conference in March 2020. ROA 493. As later recounted by the court, at that status conference then-Attorney General Mike Hunter offered remarks acquiescing to the court's desire that he not rush the court's adjudication of the *Glossip* plaintiffs' claims by setting those plaintiffs' execution dates (hereinafter, the "Hunter Remarks").

Supp.ROA 2733-74. This acquiescence was specific to the plaintiffs in that case. *See* ROA 445-446 (court recounting "the Attorney General of Oklahoma acquiesced in my suggestion that none of ***the plaintiffs*** should be set for execution, as long as there was anything for him to litigate in this Court" (emphasis added)). No formal agreement was entered, nor any specific terms discussed—much less any clear and unambiguous promise that Applicant would not be executed while a case in which he was not a party was pending—and Attorney General Hunter never requested any execution dates for the subsequent 14 months of his tenure.

None of that provides a basis for promissory estoppel, especially for Applicant. Under state law, "[t]he elements necessary to establish promissory estoppel are: (1) a clear and unambiguous promise, (2) foreseeability by the promisor that the promisee would rely upon it, (3) reasonable reliance upon the promise to the promisee's detriment and (4) hardship or unfairness can be avoided only by the promise's enforcement." *Russell v. Bd. of Cty. Comm'rs, Carter Cty.*, 952 P.2d 492, 503 (Okla. 1997).

To start, the district court correctly concluded this argument must fail because there was no promise to Applicant or for Applicant's benefit. It is undisputed that he was not part of the *Glossip* case, nor represented by anyone at the March 2020 conference in the *Glossip* case. Nor was it clear or unambiguous that the off-the-record Hunter Remarks was a promise not to execute Applicant while a case in which he was not a plaintiff was pending. The district court correctly found that the

conference involved no discussion of Applicant, and that finding was not in clear error. App. 13-14, 18-19. Indeed, Applicant does not explain why he would have been discussed at hearings where, again, he was not represented. As the district court explained, the *Glossip* record "clearly shows that the comments by counsel and the Court were made in the context of that case and the plaintiffs in that case." App. 14. So to the extent that any promise was made, "if we can call it that," the district court correctly found that it only concerned "those plaintiffs" in the *Glossip* case—not Applicant. *Id.* at 13-14. Accordingly, because the Hunter Remarks were not made to him or his representative, nor did they unambiguously contain any terms for his benefit, they are not enforceable regardless of whether the remarks could possibly be viewed as a promise sufficient to require a stay of a court-ordered execution date.

Applicant's argument about third-party beneficiaries misunderstands the concept. To be sure, the Restatement envisions promissory estoppel applying to third parties in some circumstances, although courts have long split on this point. *See Pub. Serv. Co. of New Hampshire v. Hudson Light & Power Dep't*, 938 F.2d 338, 346 (1st Cir. 1991) (declining to permit a third-party action against a promisor in part because "our research has disclosed that only five courts have taken the suggested step"). But regardless, the Restatement simply does not contemplate third party reliance on a promise that was not intended to cover them and did not, in fact, encompass them. *See, e.g.*, Restatement (Second) of Contracts § 302, Comments (a) & (e) ("*a.* … This Section distinguishes an 'intended' beneficiary, who acquires a right by virtue of a

promise, from an 'incidental' beneficiary, who does not. … *e.* … Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created."); *see also Hudson Light*, 938 F.2d at 346 (noting that courts applying promissory estoppel to third parties have done so "where it appears that the third part *foreseeably* … relied on the promise" (emphasis added)). In sum, whether it is phrased as a "reasonabl[e] expect[ation]" (§ 90) or a matter of "intent" (§ 302), it is clear here that nothing in the supposed promise was ever understood or should have been reasonably understood to apply to Applicant.

All of Applicant's other authorities, Appl. 11, involve promisees who were present to hear a promise, either personally or through their agent, or were members of a class expressly identified in the promise. *See G.E. Cap. Info. Tech. Sols., Inc. v. Okla. City Pub. Sch.*, 173 P.3d 114, 118 (Okla. Civ. App. 2007); *Manokoune v. State Farm Mut. Auto. Ins. Co.*, 145 P.3d 1081, 1087 (Okla. 2006); *Oil Capital Racing Association v. Tulsa Speedway, Inc.*, 628 P.2d 1176, 1179 (Okla. Civ. App. 1981). No authority supports his arguments that he can become a promisee for an alleged promise neither he or his agent were present to hear, nor intended for his benefit as an individual or member of a class. Applicant has not shown how he is entitled to benefit from a purported promise to the *Glossip* plaintiffs and only for the benefit of the *Glossip* plaintiffs.

The other elements of promissory estoppel also fail. The Hunter Remarks were neither clear nor unambiguous on their own terms, aside from their limitation to the *Glossip* case. It was unforeseeable that a party unrepresented at the status conference would rely on anything said there, nor is it reasonable for a non-party to rely on off-the-record remarks in a case to which he is not a party. Finally, Applicant could have avoided hardship by, like Mr. Lay, filing a pro se complaint to protect his interests. For any of these reasons, Applicant has failed to show the district court erred in finding that there was no promise for the benefit of Applicant and holding that he is unlikely to succeed on his promissory estoppel claim. That state-law contract theory therefore does not warrant a stay of execution.

CONCLUSION

For the foregoing reasons, the Application for Stay of Execution should be denied.

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