

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DURAID HUSSEIN
Petitioner

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

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Issues Presented for Review

1. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court clarified that the word knowingly under 18 U.S.C. § 922(g) applies to both defendant conduct and status. Did the Ninth Circuit deny Petitioner procedural due process and the equal protection of its laws when it did not apply circuit precedent and dismiss the insufficient indictment as required by *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), and *United States v. Qazi*, 975 F.3d 989 (9th Cir. 2020)?
2. Whether the federal judiciary's sentence exposure analysis complied with the Sixth Amendment and this Court's clear directives in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).
3. Whether the panel decision is in conflict with *Greer v. United States*, 141 S. Ct. 2090 (2021), authoritative decisions of other United States Courts of Appeal, and the controlling precedent in the Ninth Circuit, which hold plain error relief is available if a defendant makes a sufficient argument that he did not, in fact, know he was a felon with a qualifying conviction.

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Petition for Writ of Certiorari

Petitioner, Duraid Hussein, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Memorandum Decisions and Orders Below

In an unpublished decision, the Ninth Circuit Court of Appeals affirmed Hussein's felon in possession of a firearm conviction on August 30, 2022. *United States v. Hussein*, 19-10181 (9th Cir., Aug. 30, 2022) is attached as Appendix A. The Ninth Circuit's order denying Hussein's request for panel rehearing is unpublished and attached as Appendix B. *United States v. Hussein*, 19-10181 (9th Cir., Oct. 13, 2022). The district court's orders denying Hussein's motion for new trial and his motion to dismiss the indictment are attached as Appendix C and Appendix D. *United States v. Hussein*, CR-17-01351-001-PHX-GMS (Arizona District Court, Docket Entry 165, Aug. 18, 2021); *United States v. Hussein*, CR-17-01351-001-PHX-GMS (Arizona District Court, Docket Entry 58, Oct. 12, 2018).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered judgment on August 30, 2022. It denied Hussein's joint request for panel rehearing and rehearing en

banc on October 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to 28 U.S.C. § 2101(b) and Rule 13 of the Rules of the Supreme Court, the petition for a writ of certiorari to review a judgment entered by a United States Court of Appeals is due by January 10, 2022.

Constitutional Statement

The Fifth and Sixth Amendments are at issue in this direct appeal. These provisions are reproduced in Appendix E of the Petition.

Statement of the Case

A. Factual and Procedural Background Giving Rise to Fifth and Sixth Amendment Violations.

Duraid Hussein and his family are Iraqi refugees and were granted permanent legal residency in the United States in 2009 when Hussein was 16 years old. In 2017, Hussein was charged with felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). State law determines whether a defendant has a felony conviction for the purposes of 18 U.S.C. § 922(g)(1), and Hussein sustained the underlying conviction in Arizona. Arizona replaced an indeterminate sentencing policy with a policy of presumptive sentencing in 1977, and, after the Court issued *Blakely v. Washington*, 542 U.S. 296 (2004), Arizona codified the requirements of jury trial and proof beyond a reasonable doubt for any fact that increases the penalty for a crime beyond the prescribed statutory maximum sentence. A.R.S. § 13-701(D); *State v. Brown (McMullen)*, 99 P.3d 15, 18 ¶ 12 (Ariz. 2004).

Hussein filed a motion to dismiss the indictment maintaining he had not sustained a qualifying conviction in state court to bring him within the purview of 18 U.S.C. § 922(g)(1). The presumptive sentence for the underlying offense he sustained is a 1-year sentence under the state's mandatory sentencing scheme. The documentation both parties submitted to the district court made it clear that Hussein had not sustained a prior conviction punishable by imprisonment for a term exceeding one year. Reasoning that it had an obligation to independently consider whether a defendant had previously been convicted of a felony within

the 10 years immediately preceding the date of the offense, the district court determined that Hussein was eligible to receive a maximum term of 1.5 years imprisonment. The district court then denied the motion to dismiss the indictment. Thereafter, the parties entered into a stipulation, providing, in relevant part, that Hussein had sustained a prior felony conviction. The trial court granted the stipulation and it was read to the jury. The jury found Hussein guilty as charged.

Shortly after the district court imposed the sentence, this Court held that for a felon in possession conviction to lie under § 922(g), the prosecution must prove a defendant knew he possessed a firearm and knew he belonged to the relevant category of persons barred from possessing a firearm. *Rehaif v. United States*, 139 S. Ct. 2191 (2019). It is the law in the Ninth Circuit that an indictment missing an essential element properly challenged before trial must be dismissed on appellate review. *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999); *accord United States v. Qazi*, 975 F.3d 989 (9th Cir. 2020); *United States v. Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004).

The Ninth Circuit did not dismiss the indictment under its circuit precedent, however. Instead, and in contravention of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely*, the Ninth Circuit held that the state court conviction had, in actuality, exposed Hussein to a term of imprisonment that exceeded one year.

This Court has held “any departure from the doctrine of *stare decisis* demands special justification.” *Patterson v. Lean Credit Union*, 491 U.S. 164, 172 (1988) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). The Ninth Circuit has likewise adopted the doctrine of *stare decisis* and prior reported decisions are binding on subsequent panels of the court. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

Du Bo is controlling and dispositive in the Ninth Circuit and the panel’s disregard of its precedent deprives Hussein of procedural due process and equal protection of the law under the Court’s Fifth Amendment jurisprudence. The injury resulting from the deprivation of procedural due process and equal protection of laws in criminal proceedings leads to direct consequences, as the government is pursuing removal proceedings against Hussein and proceeding apace with the direct appeal. United States Immigration and Customs Enforcement detained Hussein after he served the 54-month sentence imposed on the charge. He was released briefly but is again detained.

B. Conflict with this Court’s precedent and sister circuits.

After This Court issued *Rehaif*, it clarified that, “a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.” *Greer v. United States*, 141 S. Ct. 2090 (2021). Hussein had argued, in the alternative, that he was eligible for plain error relief under *Rehaif*, and *Greer* and but for the ruling of the district court

dismissing his motion to dismiss the indictment, would have presented evidence at trial that he did not, in fact, know he was a felon with a qualifying conviction. The panel concluded any *Rehaif* error was harmless in light of the guilty plea to aggravated assault in state courts and the prior felony conviction stipulation entered in district court. The panel decision is in conflict with *Rehaif/Greer* and authoritative decisions of other United States Courts of Appeal that hold plain error relief is available if a defendant makes a sufficient argument that he did not, in fact, know he was a felon with a qualifying conviction.

Reasons for Granting the Petition

I

The Ninth Circuit denied Petitioner procedural due process and the equal protection of its laws when it disregarded *stare decisis* and declined to dismiss a legally insufficient indictment as required by circuit precedent.

The Fifth Amendment provides that “[n]o person ... shall ... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. The government gives effect to due process and equal protection of law by following proper procedures when it takes away life, liberty, or property, and by treating similarly situated individuals the same. The Fifth Amendment does not expressly contain an equal protection clause but this Court has held that the concepts of equal protection and due process, which both stem from the American ideal of fairness, are not mutually exclusive. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Adarand Const. v. Pena*, 515 U.S. 200, 215 (1995); but see *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (casting doubt on whether the equal

protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment).

The expectation of consistency is inherent in the principle of “*stare decisis*” wherein the judiciary defers to precedent for an institutional reason. In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991), this Court declined to depart from *stare decisis* noting “the doctrine of *stare decisis* is of fundamental importance to the rule of law.” Adhering to principles of *stare decisis* in *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455 (2015), this Court declined to overturn an earlier case reasoning that standing by precedence is “a foundation stone of the rule of law,” and application of the doctrine is the “preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014); *Payne v. Tennessee*, 501 U.S. 808, 827–828 (1991)). In *Patterson*, this Court declined to overrule another of its decisions, explaining that *stare decisis* is “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’” 491 U.S. at 172 (quoting *The Federalist*, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). In *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986), this Court opined that *stare decisis* ensures “the law will not merely change erratically” and “permits society to presume that

bedrock principles are founded in the law rather than in the proclivities of individuals.”

The Ninth Circuit has likewise adopted the doctrine of *stare decisis* and prior reported decisions are binding on subsequent panels of the court. In *Hart*, the Ninth Circuit opined that “[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.” 266 F.3d at 1171.

In the Ninth Circuit, an indictment that is missing an essential element and is properly challenged before trial must be dismissed on appellate review. *Du Bo*, 186 F.3d at 1179; *accord*, *Qazi*, 975 F.3d at 994-95; *Rodriguez*, 360 F.3d at 958. Here the indictment was missing an essential element, it was challenged in a motion to dismiss, yet the panel affirmed Hussein’s felon in possession conviction even after this Court clarified the point at issue in *Rehaif* and *Greer*.

Hussein’s prosecution violated his right to due process under the Fifth Amendment, as the indictment was insufficient as a matter of law. In all criminal cases, the prosecution must prove to the finder of fact, beyond a reasonable doubt, all facts necessary to establish the defendant’s guilt of the charged offense. U.S. Const. amend. V; *In re Winship*, 397 U.S. 358, 364 (1970); *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (noting that “a conviction based on evidence that fails to meet the *Winship* standard” is an “independent constitutional violation”). In *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002), the Ninth Circuit stated that the district court is bound by the four corners

of the indictment when ruling on a pre-trial motion to dismiss an indictment for failure to state an offense. (citing *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996); *United States v. Caicedo*, 47 F.3d 370, 371 (9th Cir. 1995); *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982)). The Ninth Circuit has also stated the district court must accept the truth of the allegations in the indictment when analyzing whether a cognizable offense has been charged. *Id.* (citing *Jensen*, 93 F.3d at 669). Further:

The indictment either states an offense or it doesn't.
There is no reason to conduct an evidentiary hearing.

Boren, 278 U.S. at 914.

The inconsistent application of law in Hussein's prosecution undermines the four cornerstones of *stare decisis*: predictability, fairness, appearance of justice, and efficiency. The applicable law is settled, and the failure of the panel to follow the law of the circuit and Supreme Court precedent deprived Hussein of procedural due process and equal protection of its laws. As the Ninth Circuit has recognized, "a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court." *Hart*, 266 F.3d at 1171; *accord*, *United States v. Parker*, 651 F.3d 1180, 1183-84 (9th Cir. 2011).

Automatic reversal is warranted under *Du Bo* because Hussein timely alleged that the indictment was legally insufficient and the prosecution did not establish all the elements of felon in possession of firearms beyond a reasonable

doubt, as required by *In re Winship*, and *Rehaif*. There is no trial evidence establishing Hussein knew he had previously been convicted of a crime punishable by more than one year in prison. Nor did the jury instructions instruct that the prosecution had a burden of proving knowledge-of-status. In fact, the prosecution has acknowledged it did not believe it was required to prove the knowledge-of-status element before this Court concluded otherwise in *Rehaif*. (Doc.77 at 39, n.7, Brief of Appellee.)

The Court should grant the petition for a writ of certiorari because the decision of the panel violates the fundamental premise that similar litigants should be treated similarly and Hussein has been deprived of a “right to fairness in the criminal process.” *Jordan v. United States*, 235 A.3d 808, 816 (D.C. 2020) (identifying a right to finality in sentencing).

A writ of certiorari should also be granted because the Ninth Circuit deprived Hussein of procedural due process by disregarding binding precedent. The panel’s failure to adhere to its decisions has direct punitive consequences as the immigration arm of the government is relying on the lower court’s appellate disposition to remove Hussein from the United States. In *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010), this Court recognized that immigration penalties are intimately tied to the criminal court process and thereafter held defendants have a constitutional right to competent advice from their defense attorneys regarding the specific immigration consequences of their pleas and convictions. The consequences imposed on Hussein violate fundamental fairness.

II

This Court should grant the petition for a writ of certiorari as the determination the federal judiciary conducted stands in conflict with this Court’s clear directives in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004).

State law determines whether a defendant has a qualifying felony conviction for the purposes of § 922(g)(1). 18 U.S.C. § 921(a)(20). The presumptive sentence for the underlying offense is a 1-year term of imprisonment, and the district court could not conduct an analysis prohibited by the Arizona Supreme Court to find a qualifying felony based on “elig[ibility] to receive a maximum term of 1.5 years” (Appendix C), as occurred here (and as affirmed by the Ninth Circuit). (Appendix A.) Denying Hussein’s motion to dismiss after conducting a sentencing exposure analysis violated his right to a jury trial under the Sixth Amendment. U.S. Const. amend. VI.

Arizona replaced an indeterminate sentencing policy with a policy of presumptive sentencing and deviation from the presumptive sentence is permitted when the fact-finder finds unusual aggravating or mitigating circumstances. *State v. Thurlow*, 712 P.2d 929, 923 (Ariz. 1986) (citing R. Gerber, Criminal Law of Arizona, 91 (1978)). The Arizona Supreme Court modified its sentencing scheme after *Blakely*, to provide that the Sixth Amendment jury trial guarantee extends to the finding of aggravating factors and proof beyond a reasonable doubt. *Brown (McMullen)*, 99 P.3d at 18 ¶ 12. The Arizona Supreme Court expressly rejected the analysis the district court

employed to find that Hussein's actual sentencing exposure was for a maximum term of 1.5 years:

The court of appeals held that the “maximum sentence” for purposes of *Apprendi* analysis in this case was the super-aggravated twelve-and-one-half-year term authorized by § 13-702.01(A)(1), and therefore rejected McMullen’s argument that the aggravators justifying such a sentence were required to be found by a jury beyond a reasonable doubt. *McMullen*, 205 Ariz. at 333 ¶ 26, 70 P.3d at 462. The State now concedes that this opinion cannot withstand analysis in light of *Blakely*. We agree. The “maximum sentence” for *Apprendi* analysis in this case is the five-year presumptive sentence in § 13-701(C)(1). Because a sentence in excess of five years could be imposed on McMullen only after a finding of one or more of the aggravating circumstances in § 13-702(C), the Sixth Amendment guarantee of jury trial extends to the finding of these facts and requires proof beyond a reasonable doubt.

Brown (McMullen), 99 P.3d at 18 ¶ 12.

Further, a federal judge is not authorized to perform the aggravating circumstances analysis on behalf of a state judge. A state court must make an aggravated circumstance finding before a defendant is “actually exposed” to a sentence greater than the presumptive term:

A court must set forth on the record at sentencing one of the specific statutory aggravating factors enumerated in A.R.S. § 13–701(D)(1)–(23) before it may impose an aggravated sentence. We hold that once the court identifies one of these factors, it may rely on the “catch-all” aggravator provision in § 13–701(D)(24) to increase the sentence even if the court does not expressly use the specific statutory aggravator as a basis for increasing the sentence.

State v. Bonfiglio, 295 P.3d 948, 949 ¶ 1 (Ariz. 2013).

The federal judiciary was wrong to utilize the statutory maximum sentence as a unit of measure without regard to whether the statutory maximum sentence was actually imposed. This violated *Apprendi/Blakely*, as neither the district court nor the three-member panel were in a position to make an aggravated circumstances finding, which would have actually exposed Hussein to a sentence exceeding one year under Arizona's sentencing scheme. Moreover, their findings cannot satisfy the prosecution's *Rehaif* burden of establishing Hussein knew he belonged to the relevant category of persons barred from possessing a firearm. As noted above, the prosecution has acknowledged it did not believe it was required to prove the knowledge-of-status element before this Court concluded otherwise in *Rehaif*. (Doc.77 at 39, n.7, Brief of Appellee.) This Court should accordingly grant the petition for a writ of certiorari and reverse the decision below.

III

The panel decision is in conflict with *Greer v. United States*, 141 S. Ct. 2090 (2021), authoritative decisions of other United States Courts of Appeal, and controlling precedent in the Ninth Circuit.

In conjunction with the constitutional claims raised in Hussein's first claim for relief, this Court could address the panel's application of the harmless error standard instead of the plain error review mandated by *Greer*.

In his direct appeal, Hussein had contended, in the alternative, that he was eligible for plain error relief under *Rehaif* and *Greer*, as he could have presented evidence at trial that he did not, in fact, know he was a felon with a

qualifying conviction. The panel concluded any *Rehaif* error was harmless in light of the guilty plea to aggravated assault in state courts and the prior felony conviction stipulation entered in district court. (Appendix A-4.) The panel cited the following passage as the legal basis for precluding relief under the plain error standard:

[A]bsent any evidence suggesting ignorance, the jury can infer that a defendant knew that he . . . was a convicted felon from the mere existence of a felony conviction as evidenced by the defendant's stipulation.

(A-4 citing *United States v. Pollard*, 20 F.4th 1252, 1256-57 (9th Cir. 2021).)

The plain error standard applies however, and a petitioner “must show that (1) there was an error, (2) the error is clear or obvious, and (3) the error affected his substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Greer*, 141 S.Ct. at 2096. The third prong requires a defendant to show “a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Id.*

A guilty plea to aggravated assault in state courts and a stipulation in district court should not defeat Hussein’s request for plain error relief, as *Rehaif* error affected Hussein’s substantial rights (including the privilege of remaining in the United States), and the error seriously affected the fairness, integrity, and public reputation of judicial proceedings.

As set forth above, Hussein filed a motion to dismiss on the basis that he did not have a qualifying prior conviction. (2-ER-183, CR 42 Defendant’s Motion to Dismiss.) Hussein’s scant criminal history is documented in the documentary

evidence provided to the district court and in the presentence report. (2-ER-175, CR 42-1, Exhibit 1 to Defendant's Motion Dismiss; 2-ER-128, CR 43-1, Exhibits to Government's Response to Motion to Dismiss; 2-ER-95, CR 44-1, Government's Supplemental Exhibits; CR 121, PSR (Filed under Seal)). The terms of the plea agreement and the change of plea colloquy in state court advised that the presumptive sentence for the offense is a 1-year sentence under the state's mandatory sentencing scheme. (2-ER-165; 2-ER-101.) The state court did not actually impose a sentence but suspended it and placed Hussein on probation. (2-ER-161.) The finding of guilt was entered pursuant to A.R.S. § 13-702, which only applies to first time felony offenders. (2-ER-160.) In Arizona, an aggravating sentence can only be imposed if the court makes an express finding, and none was entered here. The prior felony conviction cannot qualify as a predicate offense for a violation of § 922(g)(1), because the state court suspended the imposition of sentence and never had occasion to make an aggravated circumstances finding as would actually expose Hussein to a sentence exceeding one year. (2-ER-161, Sentencing Minute Entry.) Had the district court not made a felon status determination, Hussein would not have entered into a stipulation with the prosecution, and would have presented the same evidence he presented to the district court to establish he did not have a qualifying conviction.

Further, it is not enough to point to a prior conviction and a stipulation, as the panel did here. Stipulations are essentially contracts and are interpreted in light of the circumstances under which an agreement was made. *See e.g., Nat'l*

Audubon Soc'y, Inc. v. Watt, 678 F.2d 299, 307 (D.C. Cir. 1982). And, stipulations are routinely utilized to avoid undue prejudice and to preserve the defendant's right to a fair trial. *Old Chief v. United States*, 519 U.S. 172, 191 (1997).

In *Rehaif*, this Court observed that a person who was convicted of a prior crime but was sentenced only to probation and served no prison time, might not know he was a felon. 139 S. Ct. at 2198. *Greer* instructs that a defendant may satisfy the substantial-rights prong by establishing he did not know he was a felon.

Of course, there may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms.

Greer, 141 S. Ct. at 2097.

The Fourth Circuit has noted that a petitioner may establish he did not know he was a felon by establishing he was sentenced to a term less than one year or to probation. *United States v. Caldwell*, 7 F.4th 191, 213 (4th Cir. 2021) (noting that there could be a case where a felon did not know he was a felon if, for example, he was previously convicted of a crime punishable by imprisonment for a term exceeding one year but was sentenced to a term less than one year or to probation).

In *United States v. Adams*, 36 F.4th 137, 153 (3rd Cir. 2022), the Third Circuit noted the record in the case before it did not establish a petitioner was sentenced to probation and, therefore, could not establish he did not know he was a felon.

The Seventh Circuit allowed Defendant Triggs to withdraw his guilty plea, as he had made the requisite showing he did not know he was a prohibited possessor, due to the complexity of the statutory definition of the underlying offense, “misdemeanor crime of domestic violence.” *United States v. Triggs*, 963 F.3d 710, 712 (7th Cir. 2020).

In *United States v. Werle*, 35 F.4th 1195, 1202-03 (9th Cir. 2022), the Ninth Circuit itself held that the district court’s summary denial of a 28 U.S.C. § 2255 motion was erroneous, as a defendant placed on probation may not know he is a felon with a qualifying conviction.

Hussein has only one prior conviction, was placed on probation, and the presumptive sentence for the charge was one year of imprisonment. Hussein had supported his argument with evidence that he did not know he had a qualifying felony conviction, thereby meeting the requirements for relief under plain error review. The panel decision is wrong and a writ of certiorari is warranted, as *Rehaif* error affected Hussein’s substantial rights to proof of all facts necessary to establish guilt of the charged offense and his privilege of remaining in the United States.

Conclusion

Based on the foregoing authorities and arguments, Hussein respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,
for Duraid Hussein
Petitioner

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