No. 19-

IN THE

Supreme Court of the United States

ERICA Y. BRYANT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is error, when considering a state statute of repose, for an MDL transferee court to ignore the decisions of the transferor court's state supreme court and federal circuit court of appeals, together with the actions of its legislature, substituting instead decisions of the transferor's circuit where, as a result, plaintiffs in the transferred action have their cases dismissed where such actions would not have been dismissed had they remained in the transfer state?

PARTIES TO THE PROCEEDING

1. ERICA Y. BRYANT, LINDA JONES, ROBERT BURNS, DANIEL GROSS, II, SHARON KAY BOLING and ESTELLE RIVERA, petitioners on review, were plaintiffs-appellants below.

2. UNITED STATES OF AMERICA, DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, DIVISION DIRECTOR, DEPARTMENT OF ENVIRONMENTAL PROTECTION AGENCY, and DEPARTMENT OF DEFENSE, SECRETARY OF THE NAVY, respondents on review, were the defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

This petition is filed by individuals against the United States and its departments or agencies.

STATEMENT OF RELATED CASES

1. *In re Camp Lejeune North Carolina Water Contamination Litigation*, United States District Court, Northern District, Georgia, Atlanta Division, No. 1:11-MD-2218-TWT, December 5, 2016.

2. *Bryant v. United States*, United States Court of Appeals, Eleventh Circuit, No. 12-15424, October 14, 2014.

3. *In re: Camp Lejeune, North Carolina Water Contamination Litigation*, United States Court of Appeals, Eleventh Circuit, No. 16-17573, May 22, 2019.

4. *In re: Camp Lejeune, North Carolina Water Contamination Litigation*, United States Court of Appeals, Eleventh Circuit, No. 16-17573-GG, September 5, 2019.

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TABLE OF APPENDICES

Petitioners adopt and incorporate, as if separately stated and reproduced in this petition, the Appendix in a related matter also presently before the Court upon petition for review, *Douse v. United States, et al.*, No. 19-737

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STATUTES AND OTHER AUTHORITIES

ERICA Y. BRYANT, LINDA JONES, ROBERT BURNS, DANIEL GROSS, II, SHARON KAY BOLING, and ESTELLE RIVERA ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is available at 774 Fed. Appx. 564 (May 22, 2019) ["*Bryant II*"]. [Appendix A] The opinion of the district court granting Respondents' [variously referred to as "Government"] motion to dismiss, granting Respondents' motion for lack of subject matter jurisdiction, granting Respondents' motion to dismiss all cases based on North Carolina's statute of repose, and other miscellaneous relief is reported at 263 F.Supp.3d 1318 (N.D. Ga., Atlanta Division, 2016), reh'g denied 2017 WL 5505312 (January 4, 2017) [Appendix B].

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 22, 2019. This petition is timely under Rule 13(5) of the Rules of the Court, as Petitioners' application for extension of time to submit this petition was granted by Justice Thomas until February 5, 2020. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

N.C. Gen. Stat. Ann. § 1-52(16)

Unless otherwise provided by law, for personal injury or physical damage to claimant's property, the cause

of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Except as provided in G.S. 130A-26.3 or G.S. 1-17(d) and (e), no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. Ann. § 130A-26.3

The 10-year period set forth in G.S. 1-52(16) shall not be construed to bar an action for personal injury, or property damages caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant, including personal injury or property damages resulting from the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant. For purposes of this section, "contaminated by a hazardous substance, pollutant, or contaminant" means the concentration of the hazardous substance, pollutant, or contaminant exceeds a groundwater quality standard set forth in 15A NCAC 2L .0202.

N.C. Sess. L. 2014-44, § 1

2014 North Carolina Laws S.L. 2014-44 (S.B. 58)
NORTH CAROLINA 2014 SESSION LAWS
2014 GENERAL ASSEMBLY FIRST SESSION
Additions are indicated by Text; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~ ;
stricken material by **~~Text~~** .

S.L. 2014–44
S.B. No. 58
AN ACT TO MAKE TECHNICAL CORRECTIONS TO SESSION LAW 2014–17.

The General Assembly of North Carolina enacts:

SECTION 1.(a) Section 1 of S.L. 2014–17 reads as rewritten:

SECTION 1. The General Assembly finds that prior to the United States Supreme Court ruling in *CTS Corp. v. Waldburger*, that there was ambiguity and uncertainty regarding the effect of federal law on the North Carolina statute of repose in certain environmental cases. The General Assembly finds that it was the intent of the ~~legislature~~ General Assembly to maximize under federal law the amount of time a claimant had to bring a claim predicated on exposure to a contaminant regulated by federal or State law. The General Assembly finds that the Supreme Court's decision is inconsistent with the ~~legislature's~~ General Assembly's intentions and the ~~legislature's~~ General Assembly's understanding of federal law at the time that certain actions were filed. The General Assembly finds that it never intended the statute of repose in G.S. 1–52(16) to apply to claims for latent disease caused or contributed to by groundwater contamination, or to claims for any latent harm caused or contributed to by groundwater contamination.

SECTION 1.(b) G.S. 130A–26.3, as enacted by Section 3 of S.L. 2014–17, reads as rewritten:

§ 130A–26.3. Limitations period for certain groundwater contamination actions

The 10–year period set forth in G.S. 1–52(16) shall not be construed to bar an action for personal injury, or property damages caused or contributed to by ~~the consumption, exposure, or use of water supplied from~~ groundwater contaminated by a hazardous substance, pollutant, or ~~contaminant~~. contaminant, including personal injury or property damages resulting from the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant. For purposes of this ~~subsection~~, section, "contaminated by a hazardous substance, pollutant, or contaminant" means the concentration of the hazardous substance, pollutant, or contaminant exceeds a groundwater quality standard set forth in 15A NCAC 2L .0202.

SECTION 1.(c) Section 4 of S.L. 2014–17 reads as rewritten:

SECTION 4. This act is effective when it becomes law and applies to actions ~~arising~~ **filed, arising,** or pending on or after that date. For purposes of this section, an action is pending for a plaintiff if there has been no final disposition with prejudice and mandate issued against that plaintiff issued by the highest court of competent jurisdiction where the claim was timely filed or appealed as to all the plaintiff's claims for relief to which this act otherwise applies. ~~This act expires on June 19, 2023, and is not effective for claims for relief brought on or after that date, but does not affect actions pending on that date.~~ Nothing in this act is intended to change existing law relating to product liability actions based upon disease.

SECTION 2. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of June, 2014.

Approved 4:29 p.m. this 30th day of June, 2014

INTRODUCTION

This case presents the question of whether an MDL transferee court is duty-bound to apply the law of the jurisdiction of the transferor court so as to assure a plaintiff in the transferred action receives the same treatment such a plaintiff would receive in the transferor court when applying those laws which determine the timeliness of plaintiff's action under a statute of repose.

STATEMENT

1. "In this Multidistrict Litigation (MDL), the Plaintiffs are service members and/or their family members who allege they were exposed to toxic substances in the water supply while living at Marine Corps Base Camp Lejeune in North Carolina. The Plaintiffs further contend that the United States failed to monitor the quality of the water supply at Camp Lejeune and failed to provide notice to the Plaintiffs concerning the presence of toxic substances in the water supply. The Plaintiffs allege that they have suffered illnesses or death as a result of the actions of the United States and bring their actions pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–2680." *In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F.Supp.3d 1318, 1325 (N.D. Georgia, Atlanta Division, 2016) [*"In re Camp Lejeune"*]. Appendix B.

2. "The United States moved to dismiss the case, arguing that the North Carolina statute of repose, which provided that 'no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action,' N.C. Gen. Stat. §1-52(16) (2010), precluded the plaintiffs from bringing this case." *Bryant v. United States ["Bryant I"]*, 768 F.3d 1378, 1379 (11th Cir. 2014). Appendix C.

3. In the decision below, the Eleventh Circuit held that despite the decision of the Supreme Court of North Carolina, the Fourth Circuit Court of Appeals, and the North Carolina legislature, its decision in *Bryant I* continued to be good law, even though it worked to dismiss Petitioners' actions against the Government – a result which would not have occurred had Petitioners' cases remained in the transferor court. "Neither the Supreme Court nor this Court sitting *en banc* has overruled *Bryant [I]*, so its holding remains good law." *Bryant II* at 567.

REASONS FOR GRANTING THE PETITION

THE ELEVENTH CIRCUIT FAILED TO APPLY THE LAW OF THE TRANSFEROR COURT IN THIS MDL PROCEEDING

The court below held that North Carolina's ten-year statute of repose applied to bar Petitioners' claims. It expressly stated that its decision reached no other issues raised by Petitioners, such as claims under the Federal Tort Claims Act or the *Feres* doctrine [*Feres v. United States*, 340 U.S. 135 (1950)]. *Bryant II* at 556. In a prior interlocutory appeal, the court had already decided that North Carolina's statute of repose, N.C. Gen. Stat.

§ 1-52(16) (2010), while it certainly *applied* to Petitioners' claims "did not contain an exception for latent diseases" such as those suffered by Petitioners. *Bryant I* at 1385. That decision, rejected by the Fourth Circuit in *Stahle v. CTS Corp.*, 817 F.3d. 96 (4th Cir. 2016), was ignored by the Eleventh Circuit in a footnote to the decision below. This, despite the fact that the circuit court which decided *Stahle* encompassed North Carolina. In its defense, the Eleventh Circuit noted that *one* member of the *Stahle* majority had stated that the Supreme Court of North Carolina had sent out "mixed signals" about the scope of the statute of repose and that there were "differing views of the statute's scope" expressed by four other circuit courts of appeal. *Bryant II* at 567, note 2, discussing *Stahle*, 817 F.3d. at 114 [*Thacker, J., concurring*]. Such comments neither affected this controlling precedent nor did it undercut it applicability to Petitioners. Nonetheless, the court below gave decided that "[g]iven the difficulty of this question and the diversity of interpretation it has produced," it would stand fast and dismiss Petitioners' actions. In its own words, contained in a footnote, the Eleventh Circuit concluded that "Plaintiffs' suggestion that we plainly erred in *Bryant* [*I*] is plainly misguided." *Bryant II* at 567, note 2.

The Eleventh Circuit ultimately affirmed the district court's dismissal of Petitioners' claims on the statute of repose issue, relying on its own decision in *Bryant I* alone, stating that is was "axiomatic" that the decision in *Bryant I* would stand "unless and until it is overruled or undermined to the point of abrogation" by this Court. *Bryant II* at 567.[1]

1. Another alternative offered by the Eleventh Circuit, a contrary ruling of its own court, *en banc*, is not applicable to the facts of this case.

The Court itself generally defers to a home circuit's interpretation of the state law of one of the states within its jurisdiction. "'We generally accord great deference to the interpretation and application of state law by the courts of appeals.'" *Expressions Hair Design v. Schneiderman*, ___ U.S. ___, 137 S.Ct. 1144, 1149 (2017), quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 484, n. 13 (1986). "[L]ower federal courts 'are better schooled in and more able to interpret the laws of their respective States.'" 137 S.Ct. at 1150, quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1975).

For good reason, this general rule of deference by the circuit court for interpretation of the state law of one of the states within its own ambit has been extended to MDL courts as well. A change of venue is just a change of courtrooms, not a change of state law. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). Circuit and district courts have repeatedly held that under 28 U.S.C. 1407, the transferee court in an MDL action is bound to apply the state law that the transferor court would have applied. *See, e.g.*, *Marshall Investments Corp. v. Krones, A.G.*, 572 Fed. Appx. 149, note 4 (3rd Cir. 2014); *In re Plumbing Fixtures Litig.*, 342 F.Supp. 756, 758 (J.P.M.L. 1972), both citing *VanDusen*. In the case at bar, this is especially true as the questions raised by Petitioners are state-based claims and Petitioners, as this case demonstrates, would not be treated the same if the case were tried in North Carolina or the federal district court sitting in the Fourth Circuit, which encompasses North Carolina. *Ferens,* 494 U.S. at 524 (1990) [transfer under 28 U.S.C. 1404(a) should not deprive parties of state-law advantages], discussing *Van Dusen.* Under the challenged ruling, Petitioners have had their cases dismissed by the Eleventh Circuit, where they

would have not been dismissed by the Fourth Circuit, as a result of the MDL transfer and for no other reason.

Deference to a home circuit in interpreting one of its constituent state's laws not only benefits the administration of justice in encouraging an accurate application of state law, but ensures a uniform application of those laws in support of the state legislature that made them. Indeed, these are the two problems that occurred in this case because deference was not afforded to the home circuit. The circuit court's interpretation of North Carolina law is diametrically opposed to the application given that law by the home circuit and the North Carolina legislature itself[2], and has led to a circuit split on the application of North Carolina state law. In according deference to a home circuit, the Supreme Court, Second Circuit, D.C. Circuit, and Sixth Circuit have each sought to "avoid creating 'the oddity of a split in circuits over the correct application' of one's state law[,]" as is presented here. In fact, the only reason that the Sixth Circuit has articulated for departing from the home circuit rule is if "the home circuit has 'disregarded clear signals emanating from the state's highest court pointing towards a different rule[.]'" *In re Dow Corning Corp.*, 778 F.3d 545, 549 (6th Cir. 2015).

In contrast to the decision below, the Fourth Circuit's interpretation of North Carolina law has been consistent and exactly in accord with the North Carolina legislature's own explicit interpretation as provided for in its clarifying amendment. The Eleventh Circuit's refusal to defer to

2. The North Carolina legislature even went to the effort to clarify the state's statute of repose in order to prevent its misreading by errant courts. N.C. Sess. L. 2014-44, § 1.

that long-settled interpretation by the home circuit is in sharp conflict with the most basic concepts of an MDL proceeding.

There can be no mistake. The Fourth Circuit has repeatedly affirmed its understanding of North Carolina law as having "always recognized" the distinction that "disease presents an intrinsically different kind of claim" from that of latent injury. *Stahle*, 817 F.3d at 101, citing *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30, 34 (4th Cir. 1986), quoting *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66, 70 (1985) [disease claims are "intrinsically different" from personal injury claims because they "normally develop over long periods of time after multiple exposures to offending substances"]. Indeed, the Fourth Circuit has long "articulated [its] understanding that 'the [North Carolina] Supreme Court does not consider disease to be included within a statute of repose directed at personal injury claims unless the Legislature expressly expands the language to include it." *Stahle*, 817 F.3d at 100, quoting *Hyer*, 790 F.2d at 34.

In *Hyer*, a unanimous Fourth Circuit panel explicitly agreed, in view of its analysis and reasoning in *Wilder*, that the North Carolina Supreme Court views disease claims as fundamentally different from personal injury claims, and not included within any statute of repose directed at personal injury claims. The Fourth Circuit has applied *Hyer* multiple times, in four published and unanimous opinions. See *Bullard v. Dalkon Shield Claimants Trust*, 74 F.3d 531, 534-36 (4th Cir. 1996); *Burnette v. Nicolet, Inc.*, 818 F.2d 1098, 1101 (4th Cir. 1986); *Guy v. E. I. DuPont de Nemours & Co.*, 792 F.2d 457, 459-60 (4th Cir. 1986); *Silver v. Johns-Manville Corp.*, 789 F.2d

1078, 1080 (4th Cir. 1986). Furthermore, although these decisions have been "on the books and applied for several decades, neither the North Carolina General Assembly nor the North Carolina courts have taken exception to [the Fourth Circuit's] expressed understanding of North Carolina law or the implications of the *Wilder* decision." *Stahle*, 817 F.3d at 103. Thus, as interpreted by the North Carolina legislature, the North Carolina Supreme Court, and the Fourth Circuit, unless disease is *expressly included* in a statute of repose, North Carolina state statutes of repose directed at personal injury claims have *not included disease claims*. This was the state of the law, and the substantive rights of both Petitioners and the Government, when the underlying conduct occurred and when Petitioners first brought their claims.[3] This was the state of the law recognized by the North Carolina General Assembly when it passed clarifying legislation during the pendency of Petitioners' claims as well.

In *In re Camp Lejeune*, the district court below noted that the North Carolina legislature had amended

3. In the same manner, in the case of Petitioner Bryant, whose action was not originally filed in North Carolina and its Fourth Circuit, but in Georgia and the Eleventh Circuit, the FTCA requires that court apply the law of the place where the torts occurred. 28 U.S.C. § 1346(b)(1) ["the law of the place where the act or omission occurred"]. In Petitioner Bryant's case, the torts occurred in more than one state, *i.e.*, the initial chemical exposure tort occurred in North Carolina while the decades later failure to warn and wrongful death tort occurred in Georgia.

Because the court below expressly stated that it was not deciding the FTCA issues in its review, those issues are not ripe for review in this petition. However, Petitioners here do not waive their right to seek such review at an appropriate time.

the statute of repose in June 2014 to add the following language: "The 10-year period set forth in G.S. 1-52(16) shall not be construed to bar an action for personal injury, or property damages caused or contributed to by … the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance, pollutant, or contaminant." (quoting N.C. Gen. Stat. Ann. § 130A-26.3). The district court further explained that the North Carolina "General Assembly specified that this amendment applied to any actions 'filed, arising, or pending' on or after June 20, 2014", citing *Bryant I* at 1382.

As the court below itself noted in *Bryant I,* the very *title* of the law passed by the North Carolina legislature left no doubt. It was "'An Act Clarifying that Certain Civil Actions Relating to Groundwater Contamination Are Not Subject to the Ten-Year Statute of Repose Set Forth in G.S. 1-52,' ["Clarifying Act"]. The title of a law provides some evidence of legislative intent. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) [explaining that even when the text of a statute is plain, "the title of an act should be considered in ascertaining the intent of the legislature.") *Bryant I* at 1383-84.

Moreover, in § 1 of the Session Law, the General Assembly found that prior to the Court's decision in *CTS Corp. v. Waldburger*, ___ U.S. ___,134 S. Ct. 2175 (2014), "there was ambiguity and uncertainty regarding the effect of federal law on the North Carolina statute of repose in certain environmental cases." N.C. Sess. L. 2014-44, § 1. The legislature also found that "it was the intent of the General Assembly to maximize under federal law the amount of time a claimant had to bring a claim predicated

on exposure to a contaminant regulated by federal or State law." *Id.* Furthermore, the General Assembly found the Court's decision in *Waldburger* to be "inconsistent with the General Assembly's intentions and the General Assembly's understanding of federal law" and that "it never intended the statute of repose in G.S. 1–52(16) to apply to claims for latent disease caused or contributed to by groundwater contamination, or to claims for any latent harm caused or contributed to by groundwater contamination." *Id.* Finally, there is the fact that the General Assembly expressly made the statute retroactive. Although inclusion of an effective date, standing alone, may not prove that an amendment is intended to be clarifying or altering, see *Ray*, 366 N.C. at 9–10, 727 S.E.2d at 682, the fact that the General Assembly expressly made Session Law 2014–44 retroactive lends further support to the conclusion that the amendment is only a clarifying amendment and that it applies to the Petitioners' claims. *Bryant I*, 768 F.3d at 1384.

The Court has regularly applied intervening statutes conferring or ousting jurisdiction. Unfortunately, considering this North Carolina provision in the context of two precedential opinions of the Court, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) and *Republic of Austria v. Altman*, 541 U.S. 677 (2004), it was then clearly erroneous and worked manifest injustice to Petitioners for the circuit court to apply a conclusion diametrically *opposed* to the North Carolina legislature's clear and express intent. Until that time, the law, as understood by not only the legislature, but the North Carolina Supreme Court and the Fourth Circuit as well, was just the opposite.

In *Landgraf*, 511 U.S. at 273, the Court instructed that although it had long embraced a presumption against statutory retroactivity, "for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision,' *Bradley* [*v. School Bd. of Richmond*], 416 U.S. [696,] at 711, 94 S.Ct.[2006], at 2016 [(1974)], even though that law was enacted after the events that gave rise to the suit .... Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."

Here, the law that was in effect at the time the court below issued its decision in Petitioners' case was both N.C. Gen. Stat. Ann. § 1-52(16) and the Clarifying Act, and the Clarifying Act included a specific legislative authorization so that it would apply to suits, such as Petitioners', that were pending on or after June 20, 2014. See N.C. Gen. Stat. Ann. § 130A-26.3; N.C. Sess. L. 2014-44, § 1.

The Court in *Landgraf* stated the controlling principle in such situations. "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. By the same token, in *Republic of Austria*, the Court re-emphasized that rule. "[W]e sanctioned the application to all pending and future cases of 'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction." 541 U.S. at 693. By engaging in such application, permitted court to apply changes in procedural rules "'in suits arising before [the rules'] enactment without raising concerns about retroactivity.'" *Id.* (quoting *Landgraf*, 511 U.S. at 275).

In light of the Court's guidance on this issue, and the fact that the effect of the Clarifying Act that was passed during the pendency of Petitioners' claims was merely to confirm what the North Carolina Supreme Court, the North Carolina General Assembly, and the Fourth Circuit had interpreted the law to be all along, it was error for the Eleventh Circuit, sitting as an MDL transferee circuit, to ignore those rulings. The rule involved in this petition, binding on the transferor court, was ignored by the transferee court in a manner uniquely its own; a manner that would ensure that Petitioners would be treated *differently* than they would in their own home courts, and face dismissal of their otherwise meritorious actions. Petitioners stand deprived of their right to just compensation for the injuries they suffered at the hands of a government that candidly acknowledges its participation in the acts which caused such injuries.

Reversal of the ruling below is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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