No. 20-6972

IN THE

Supreme Court of the United States

MARK A. JENKINS,

Petitioner,

v.

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE SISTER HELEN PREJEAN, TIM SHRIVER, CATHOLIC MOBILIZING NETWORK, CENTER FOR PUBLIC REPRESENTATION, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Sister Helen Prejean is a member of the Congregation of St. Joseph. She is a spiritual adviser to men and women on death row, and has been deeply involved in a range of issues regarding the death penalty.

Tim Shriver is Chairman of Special Olympics, a nonprofit organization. Special Olympics supports over 5 million athletes, 1 million coaches and volunteers, more than 100,000 competitions each year, and 32 Olympic-type sports in more than 170 countries. Through programming in sports, health, education, and community building, Special Olympics tackles the inactivity, stigma, isolation, and injustice that people with intellectual disabilities face every day. He is also the Founder of UNITE, a growing collaborative led by Tim and other Americans from all walks of life, dedicated to addressing universal challenges that can only be solved together.

The Catholic Mobilizing Network ("CMN") is a national organization that mobilizes people to address issues regarding capital punishment and the criminal justice system. CMN works closely with the United States Conference of Catholic Bishops and is a founding member of the Congregation of St. Joseph Mission Network.

The Center for Public Representation ("CPR") is a national legal advocacy organization that has assisted

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[1] Pursuant to Rule 37, counsel of record received timely notice of intent to file this brief, and consented in writing. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici Curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

people with disabilities for more than four decades. CPR is both a statewide and a national legal support center that provides assistance and support to public and private attorneys representing people with disabilities throughout the United States and to the federally funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with disabilities in more than 20 states and submitted amicus briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including those involved in the criminal justice system.

The National Association of Social Workers ("NASW") is a professional membership organization with 110,000 social workers in chapters in every State, the District of Columbia, and internationally. Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education, and enforces the *NASW Code of Ethics*. NASW also develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW supports a system that ensures that criminal defendants, especially in death penalty cases, receive thorough mental health, psychosocial, and trauma assessments.

SUMMARY OF ARGUMENT

Nearly two decades ago, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment bars the execution of individuals with intellectual disability. The Court has recognized the

importance of "the opportunity to develop the record for the purpose of proving an intellectual disability claim" in light of *Atkins*. *Brumfield v. Cain*, 576 U.S. 305, 321 (2015).

A hearing conducted after *Atkins* is not just important in theory; it has proven to be extremely important in practice. In numerous cases, a post-*Atkins* hearing has been essential to protect the rights of individuals with intellectual disability who had been sentenced to death. Unlike the judicial proceedings before *Atkins*, these individuals' post-*Atkins* hearings focused on whether they had intellectual disability, took into account clinical standards, and resulted in vindication of intellectual disability claims that would have been rejected on the basis of pre-*Atkins* records.

The Eleventh Circuit generated its own reasons why Petitioner Mark Allen Jenkins was not entitled to a post-*Atkins* hearing, in conflict with *Wilson v. Sellers*' directive that a federal habeas court "should 'look through' [an] unexplained decision to the last related state-court decision that does provide a relevant rationale," rather than creating its own rationale for the unexplained decision. 138 S. Ct. 1188, 1192 (2018). Amici agree with Petitioner's submission to this Court regarding the legal errors of the Eleventh Circuit's conspicuous outlier approach and the necessity for this Court's review on this important issue.

For the assistance of the Court in considering the certiorari petition, Amici highlight five cases in which a post-*Atkins* hearing was essential for compliance with this Court's decisions and for the protection of constitutional rights. In sharp contrast with the five

individuals discussed below, Mr. Jenkins never has had a meaningful opportunity to demonstrate his intellectual disability in light of *Atkins*, even though record evidence suggests that his claim is meritorious. As with the other individuals, it is vital that Mr. Jenkins receive that opportunity.

ARGUMENT

In *Atkins*, this Court recognized that, under prior law, it was hazardous for a capital defendant to introduce, emphasize, or develop evidence of his or her intellectual disability. Such evidence was "a two-edged sword": it could increase "the likelihood that the aggravating factor of future dangerousness w[ould] be found" at the penalty phase and, perversely, make a death sentence more likely. *Atkins*, 536 U.S. at 321 (citation omitted). Accordingly, before *Atkins*, there was "little reason" for a capital defendant to "present evidence relating to intellectual disability." *Brumfield*, 576 U.S. at 321; *see also, e.g.*, *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (recognizing that, "pre-*Atkins*," evidence of intellectual disability could be in prosecutor's interest because it could be considered an aggravating factor at sentencing); *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989) (evidence "concerning Penry's mental retardation indicated that one effect of his retardation [wa]s his inability to learn from his mistakes," which "suggest[ed] a 'yes' answer to the question of future dangerousness").[2] As a result, in light of the vastly different context for evidence of intellectual disability before this Court's *Atkins* decision, when the pre-*Atkins* record raises a question

[2] The term "mentally retarded" has been superseded by the term "intellectual disability." *See Hall v. Florida*, 572 U.S. 701, 704–05 (2014). Amici use the former term only when quoting sources.

as to intellectual disability, "[p]ersons facing [the death penalty] must have a fair opportunity to show that the Constitution prohibits their execution" in light of that decision. *Hall v. Florida*, 572 U.S. 701, 725 (2014).

The five stories presented below provide examples of the importance of post-*Atkin*s hearings, a vital function repeatedly recognized by this Court. They vividly underscore the need to afford Mr. Jenkins a hearing pursuant to *Atkins* as well.

I. POST-*ATKINS* HEARINGS HAVE BEEN ESSENTIAL TO PROTECTING THE RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITY WHO HAD BEEN SENTENCED TO DEATH.

William H. Bell Jr., Donald Griffin, Edward Bracey, Kenneth Simmons, and Ted Herring are individuals with intellectual disability who had a meaningful opportunity to present their *Atkins* claims and whose death sentences were vacated as a result. In all five cases, reliance on the pre-*Atkins* record would have resulted in a manifest injustice and the unwarranted and unconstitutional perpetuation of their death sentences.

A. William H. Bell, Jr.

William H. Bell, Jr. was tried and sentenced to death in South Carolina. *See State v. Bell*, 406 S.E.2d 165 (S.C. 1991). During his pre-*Atkins* trial, the court confidently proclaimed that there was "nothing wrong" with Mr. Bell's mental functioning. In post-*Atkins* proceedings, however, Mr. Bell presented his intellectual disability claim in light of *Atkins* during an evidentiary hearing, resulting in the court's informed conclusion that he was a person with

intellectual disability and ineligible for the death penalty. *See* Order Granting Post-Conviction Relief, at 1, *Bell v. State*, No. 2003-CP-04-1857 (C.P. Anderson, S.C. Nov. 18, 2016).

1. Pre-*Atkins* Proceedings

Without the benefit of *Atkins*'s guidance, and in the absence of a thorough assessment based on clinical standards, the pre-*Atkins* record about Mr. Bell told an incomplete story based on stereotypes and lay misimpressions. For example, on the question whether Mr. Bell was competent to stand trial, the trial court opined, based primarily on watching Mr. Bell testify and his having been educated through the eleventh grade, that Mr. Bell seemed to be a "very intelligent young man" who was "competent to stand trial," and had a "very good . . . , very pleasant mentality." Tr. of R., Vol. 2 of 3, at 819–20, *State v. Bell* (S.C.). Later, the court opined in conclusory terms that he saw "nothing wrong at all with any mental disability." *Id.* at 984. He further stated that Mr. Bell "seems to be a very bright person to me." *Id.* at 985; *see* Andrea D. Lyon, *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DePaul L. Rev. 701, 712 (2008) ("Many mistakenly believe that one can merely *look* at a person and tell whether he is mentally retarded.").

In the pre-*Atkins* proceeding, Mr. Bell did not attempt to develop a full record concerning intellectual disability; his defense team likely was attempting to show the opposite in light of the risks recognized by this Court in *Atkins* and other decisions. For example, an expert witness for Mr. Bell opined during the penalty phase that his social history

records indicated that "he was intellectually limited, although not retarded." Tr. of R., Vol. 2 of 3, at 927, *State v. Bell*. Yet another defense witness testified that Mr. Bell was well behaved, "clean cut, very neat, well mannered," and "very likable, very personable." *Id.* at 947. Mr. Bell had testified at trial that he could read and write. *Id.* at 609, 615; *see also Brumfield*, 576 U.S. at 321–22 ("[W]here a trial was conducted prior to *Atkins*, the defense's trial strategy may have been to shift the focus away from any diagnosis of mental retardation." (citation and internal quotation marks omitted)).

2. Post-*Atkins* Evidentiary Hearing

In contrast, during the post-*Atkins* hearing, Mr. Bell developed a record with robust evidence of his intellectual disability. The defense presented the testimony of three expert witnesses. Order Granting Post-Conviction Relief, at 2–4, *Bell v. State*, No. 2003-CP-04-1857. Two of these expert witnesses evaluated Mr. Bell after conducting extensive evaluations, including interviews with Mr. Bell, interviews with other witnesses, and a full review of birth, school, psychological, and employment records. *Id.* at 3–4, 11. The expert witnesses also reviewed data relating to Mr. Bell's IQ tests and evaluated his scores. *Id.* at 11–12.

These assessments revealed that Mr. Bell's IQ scores, based on seven tests he had taken since age seven, fell within the range of intellectual disability. Order Granting Post-Conviction Relief, at 16–17, *Bell v. State*, No. 2003-CP-04-1857. The evaluations also showed Mr. Bell had deficits in adaptive functioning in many aspects of life. *Id.* at 18–25. For example, by the second grade, school staff identified Mr. Bell as

needing special attention; he did not know "how to use coins or tell time to the half hour in the fourth grade." *Id.* at 18. At the same time, while Mr. Bell held jobs involving "very basic tasks, including cleaning up, using a screwdriver to tighten bolts, and assist[ing] . . . by bringing tools [to others]," he had been unable to learn to use a level after several weeks of instruction and never had obtained a job independently. *Id.* at 20–21. The court concluded that the record established that Mr. Bell was a person with intellectual disability.

Relying solely on the pre-*Atkins* record would have been a tragic misstep in determining whether Mr. Bell was eligible for execution. Only when he was afforded the opportunity to develop and present evidence pursuant to *Atkins* did the record more accurately convey Mr. Bell's intellectual disability and allow the court to reach an informed judgment.

B. Donald Griffin

Donald Griffin was convicted and sentenced to death in California. *See People v. Griffin*, 761 P.2d 103, 105 (Cal. 1988). His conviction became final on direct appeal in 1988. *See id.* His death sentence initially was vacated, but he again was sentenced to death before *Atkins*. *See id.*; *People v. Griffin*, 93 P.3d 344, 350 (Cal. 2004), *disapproved of by People v. Riccardi*, 281 P.3d 1 (Cal. 2012). At his pre-*Atkins* proceedings, no evidence of Mr. Griffin's intellectual disability was presented. He eventually was afforded a hearing to present his intellectual disability claim pursuant to *Atkins* and his death sentence was vacated. Judgment on Pet'r's Writ, at 1–2, 25–26, *In re Griffin*, No. 08 CRWR 679178 (Cal. Super. Ct. Nov. 12, 2015).

1. Pre-*Atkins* Proceedings

The trial court in 1980 declared in conclusory fashion that Mr. Griffin "suffered from no mental disease or disorder and that the circumstances of the crime did not evidence any impaired mental ability." *Id.* at 14–15. "[N]o evidence whatsoever concerning [his] retardation or intellectual impairment was presented at the trial." *Id.* at 15. Nor was the question of Mr. Griffin's intellectual disability squarely at issue during his second, pre-*Atkins* sentencing hearing, and no witnesses were asked to answer the question whether he had intellectual disability. *See id.* at 19.

2. Post-*Atkins* Evidentiary Hearing

At the hearing post-dating *Atkins*, Mr. Griffin presented reliable and meaningful evidence of his intellectual disability. Three expert witnesses testified on his behalf. Based on their testimony, it was evident that there were "several aspects" of Mr. Griffin's "personal history demonstrating his subaverage intellectual functioning." Judgment on Pet'r's Writ, at 12, *In re Griffin*, No. 08 CRWR 679178. For example, the evidence showed that Mr. Griffin was placed in special education classes starting at age nine; was unable "to progress beyond the second grade level in either verbal or math skills, despite thirty years of persistent, 'enthusiastic' effort in basic adult education classes"; was unable as a child to learn table manners and how to get dressed; and was unable to maintain jobs involving only simple manual labor. *Id.* at 12–13, 21.

Moreover, while Mr. Griffin's ex-wife testified that he was able "to repair things around the home and to put things together," expert witnesses assisted the

court to view this testimony in context. *Id.* at 23–24. They explained that "persons with significant subaverage intellectual functioning often possess performance skills which allow them to perform such tasks," and that Mr. Griffin's IQ scores were consistent with strengths in these areas. *Id.* at 13; *see Brumfield*, 576 U.S. at 320 ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)); *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (overemphasis on adaptive strengths reflects "lay stereotypes of the intellectually disabled" (citation omitted)); *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017) ("[T]he medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.").

The court also was unpersuaded by the State's evidence. It rejected the State's expert witness opinions that were "based on comparisons with patients" who are profoundly intellectually disabled. Judgment on Pet'r's Writ, at 25, *In re Griffin*, No. 08 CRWR 679178. Such comparisons inappropriately played into lay stereotypes of how intellectually disabled persons "should" look or behave. *See* Marc J. Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009) (evidence of strengths in certain areas could "confound a layperson" who "may erroneously interpret these pockets of strengths and skills as inconsistent with mental retardation because of their misconceptions regarding

what someone with mental retardation can or cannot do").

Without the opportunity to develop evidence in the *Atkins* context and test the reliability of the state's evidence, Mr. Griffin may have been executed despite his ineligibility for the death penalty.

C. Edward Bracey

Edward Bracey was convicted and sentenced to death in Pennsylvania in 1992. *See Commonwealth v. Bracey*, 662 A.2d 1062 (Pa. 1995). He also sought post-conviction relief in 1996, which the court denied. *See Commonwealth v. Bracey*, 117 A.3d 270, 272 (Pa. 2015) [*Bracey II*] Mr. Bracey's death sentence ultimately was vacated based on a judicial determination, after a post-*Atkins* proceeding, that he was a person with intellectual disability. *See Bracey II*, 117 A.3d at 272–73.

1. Pre-*Atkins* Proceedings

Consistent with this Court's understanding in *Atkins* and other decisions, the pre-*Atkins* proceedings in Mr. Bracey's case "[were] not about intellectual disability." *Bracey II*, 117 A.3d at 286. During these proceedings, the Commonwealth presented testimony that Mr. Bracey's "thoughts progressed in a normal associative manner" and that "he demonstrated an 'intact ability to think in abstract terms.'" *Id.* at 281–82 (citation omitted). If the record in Mr. Bracey's case were limited to the pre-*Atkins* record, he would not have been found to be a person with intellectual disability.

2. Post-*Atkins* Evidentiary Hearing

After *Atkins*, a court held a hearing on Mr. Bracey's intellectual disability claim, during which

Mr. Bracey presented testimony from expert witnesses and lay witnesses. *Bracey II*, 117 A.3d at 274. After reviewing Mr. Bracey's school, medical, and prison records and conducting interviews with Mr. Bracey and individuals who had known him throughout his life, an expert witness explained that Mr. Bracey was "significantly limited in (1) functional academics, (2) communication, (3) self-direction, (4) social/interpersonal skills, (5) self-care, (6) home-living, (7) work, and (8) leisure." *Id.* at 276. For example, Mr. Bracey "failed to reciprocate or understand the basis of conversations," could not go grocery shopping without assistance, and failed to complete basic chores or maintain entry-level jobs. *Id.* at 277.

The Commonwealth attempted to rely on the pre-*Atkins* evidence. But, consistent with this Court's decisions, the court that held the post-*Atkins* hearing emphasized that the pre-*Atkins* proceedings were not focused on the question whether Mr. Bracey was a person with intellectual disability. *Id.* at 286. The court in the post-*Atkins* proceeding was able to consider evidence related to Mr. Bracey's meritorious intellectual disability claim and evaluate it in the context of an intellectual disability framework.

The court found Mr. Bracey to be a person with intellectual disability, an informed judgment that it could not have made if it had relied solely on the pre-*Atkins* evidence.

D. Kenneth Simmons

Kenneth Simmons was convicted and sentenced to death in South Carolina in 1999. *See State v. Simmons*, 599 S.E.2d 448 (S.C. 2004). The pre–*Atkins* proceedings in Mr. Simmons's case did not lead to a

conclusion that he was intellectually disabled. Mr. Simmons ultimately was granted an opportunity to present his intellectual disability claim in a judicial proceeding after *Atkins*. The court concluded that Mr. Simmons had established intellectual disability and vacated his death sentence.

1. Pre-*Atkins* Proceedings

The pre-*Atkins* proceedings in Mr. Simmons's case did not address the question whether he was a person with intellectual disability. There was some evidence in the pre-*Atkins* record that Mr. Simmons had struggled academically, and at least one witness who knew Mr. Simmons from childhood testified that he had common sense but seemed "simple" in intellect. App., Vol 5 of 11, at 2223, 2263, 2268, *State v. Simmons*, No. 2014-000387 (S.C.). However, the record, of course, had not been developed for purposes of showing Mr. Simmons was intellectually disabled and therefore ineligible for execution.

2. Post-*Atkins* Evidentiary Hearing

In contrast, in a post-*Atkins* evidentiary hearing, the court was persuaded that Mr. Simmons "suffer[ed] from significant deficits in adaptive behavior." Order Granting Post-Conviction Relief, at 12, *Simmons v. State*, Case No. 05-CP-18-1368 (C.P. Dorchester, S.C. Oct. 21, 2013). Expert witnesses emphasized that Mr. Simmons encountered persistent academic difficulties. He functioned consistently at least two grade levels below his actual grade level. For example, he had to repeat the eleventh grade because he was functioning at only a fourth grade level. *Id.* at 6. Mr. Simmons also failed every grade in middle school, but was "socially promoted" to the next grade each time. *See id.* at 6–7. Furthermore, Mr. Simmons performed

exclusively basic and unskilled labor, and had never secured employment without assistance from family and friends. *Id.* at 10.

While some evidence from the pre-*Atkins* proceedings indicated Mr. Simmons might be a person with intellectual disability, only upon review of a more fully developed evidentiary record post-*Atkins* was Mr. Simmons's intellectual disability manifest.

E. Ted Herring

Ted Herring was convicted and sentenced to death in Florida in 1982. *See Herring v. State*, 446 So.2d 1049 (Fla. 1984). Mr. Herring ultimately was granted an opportunity to present evidence in support of his intellectual disability claim post-*Atkins*, and his death sentence was vacated as a result. *See Herring v. State*, CASE NO.: SC15-1562, 2017 WL 1192999, at *1 (Fla. Mar. 31, 2017).

1. Pre-*Atkins* Proceedings

Mr. Herring's death sentence was the subject of extensive litigation, but his intellectual disability never was addressed in any of these proceedings or decisions. *State v. Herring*, Case No. 81-1957-C, at 2 (Fla. 7th Cir. 2009). Some mitigation evidence in the pre-*Atkins* proceedings hinted at intellectual disability, but, consistent with the pre-*Atkins* framework, was not developed. Mr. Herring's mother testified, for example, that Mr. Herring had dropped out of school after completing the fifth grade, "was treated for psychological problems," "and was diagnosed as hyperactive with learning disabilities." *Herring I*, 446 So. 2d at 1052. Before *Atkins*, however, this evidence was not linked to the development of an intellectual disability claim.

2. Post-*Atkins* Evidentiary Hearing

During a post-*Atkins* evidentiary hearing, Mr. Herring presented testimony from expert witnesses addressing intellectual disability. *See State v. Herring*, 76 So.3d 891 (Fla. 2011); *Herring*, Case No. 81-1957-C. The evidence included the results of four IQ tests administered to Mr. Herring between the ages of eleven and 42, all falling in or around the intellectual disability-qualifying range of 70–75. *Herring*, 76 So.3d at 893. Ultimately, the court concluded that Mr. Herring had "significantly subaverage general intellectual functioning given his IQ scores of 72 and 74." *Herring*, Case No. 81-1957-C at 13.

The court also observed that "[t]he evidentiary hearing record [was] replete with evidence" that Mr. Herring suffered from significant limitations in adaptive functioning. *Herring*, Case No. 81-1957-C at 15. Mr. Herring presented evidence from school, medical, and psychological evaluation records showing, among other things, that he had difficulty "grasping concepts, organizing his thoughts and relating them in a logical, organized manner" at age 14; he "did not know the sequence of the seasons" by age 15; he "never developed age-appropriate peer relationships, choosing instead to spend time with older persons who would take care of him"; and he failed to "sustain employment of any kind and failed at multiple jobs." *Id.* at 16–17.

Only the availability of a post-*Atkins* hearing allowed Mr. Herring to establish his intellectual disability and to vindicate his constitutional rights.

II. MR. JENKINS SHOULD BE AFFORDED AN OPPORTUNITY TO PROVE HIS INTELLECTUAL DISABILITY CLAIM IN LIGHT OF *ATKINS*.

These five individuals—Mr. Bell, Mr. Griffin, Mr. Bracey, Mr. Simmons, and Mr. Herring—all found themselves in the same situation in which Mr. Jenkins finds himself here. Unlike Mr. Jenkins, however, these individuals were granted the opportunity to address the question whether they were individuals with intellectual disability after *Atkins*, even though misconceptions and stereotypes in the pre-*Atkins* proceedings, as well as incomplete evidence adduced pre-*Atkins*, were viewed as suggesting otherwise.

The post-conviction courts in Mr. Jenkins's case reached the troubling and misguided conclusion that the pre-*Atkins* record resolves the question whether he is a person with intellectual disability. *See, e.g.*, Pet. App. 30a, 39a, 41a. Like the records of the individuals discussed above, however, Mr. Jenkins's record contains sufficient evidence to warrant a post-*Atkins* hearing, including test scores that suggest intellectual disability, continual academic failure, a lack of basic life skills, and an inability to develop interpersonal skills. *See* Pet. 6–10.

As the cases detailed in this brief confirm, the opportunity for a post-*Atkins* hearing is essential to ensuring informed judicial determinations, adherence to this Court's decisions, and protection of constitutional rights. Exclusive reliance on pre-*Atkins* submissions is inappropriate and inadequate. This core principle, long recognized by this Court,

applies with full force and resonance in Mr. Jenkins's case, and strongly compels review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

March 1, 2021

Respectfully submitted,

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