IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 98-7337

ALEXANDER MICKLE, et al.,

Appellants,

v.

MICHAEL MOORE, et al.,

Appellees.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION
OF INMATES DESIGNATED AS FIVE PERCENTERS"

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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I. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFFS' CHALLENGE TO THEIR LONG-TERM SEGREGATION.

A. Defendants fail to present the facts in this case properly under the standard for review of summary judgments.

It is axiomatic that in reviewing a summary judgment, this Court views "the facts in the light most favorable to the nonmoving party." Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998). "We also must 'draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.'" Id. (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991)).

It is plaintiffs, of course, who appeal the District Court's award of summary judgment allowing the South Carolina Department of Corrections (SCDC) to keep them in indefinite long-term segregation because of their religious beliefs. It is plaintiffs who are entitled to have the record below construed in their favor. Yet reading defendants' brief to this Court, one would think that plaintiffs had won summary judgment below. Defendants discuss only evidence that they believe supports their position. They ignore all evidence presented by plaintiffs and draw all possible inferences in their own favor.

They base their legal arguments entirely upon this improperly interpreted and inadequate factual record.

Consider these examples:

Defendants rely (Def. Br. at 5) on a one-page intelligence summary about the Five Percent Nation of Gods and Earths by the Federal Bureau of Prisons (BOP). This summary makes various conclusory and unsubstantiated statements, several of which directly contradict the SCDC's evidence in this case. The BOP states that the Five Percenters have a "[w]ell organized criminal structure." (JA 193). The Security Threat Group coordinator of the SCDC, by contrast, testified that the Five Percenters in the South Carolina prison system have neither a hierarchy nor any initiation or retaliation practices that he is aware of. (JA 418-22). He is unable to identify any inmate leaders. (JA 421-22, 425). The BOP states that the "main operating areas" of the Five Percenters "are concentrated in Monmouth and Ocean counties, New Jersey." (JA 193). The BOP states that the Five Percent Nation is "very heavily into drug trade." Id. SCDC's Security Threat Group coordinator does not know of any Five Percenter involvement in illegal drug dealing (JA 422, 425) and has not seen any Five Percenter literature advocating drug dealing (JA 430).

In their initial brief (Pl. Br. at 6-8), plaintiffs discussed the various "incidents" that defendants have used to justify the implementation of their categorical segregation policy in June 1995. Again, defendants have presented no evidence showing that these incidents

resulted from the exercise of Five Percenter beliefs or are related to any system-wide conspiracy.

Defendants cite (Def. Br. at 6) a report that an inmate had alleged harassment by an unidentified "group of inmates know as the 5%'s," but do not mention the report's "primary concern . . . that [the complaining inmate] might instigate trouble just to prove that he was being harassed." (JA 150).

Defendants assert (Def. Br. at 6-7) that they received unspecified "intelligence information" about the threat of "a widespread prison uprising in the South Carolina and the North Carolina prison systems on or around the 1995 New Years holiday," and imply that this uprising was averted after SCDC "took precautions." In fact, the memorandum cited by defendants describes no precautions other than the close "monitoring" of conditions. (JA 185). The memorandum concludes: "Fortunately, nothing occurred in South Carolina or North Carolina prisons during the prescribed time period." Id. In other words, defendants' intelligence information was wrong.

Defendants cite (Def. Br. at 7) an investigative report about an assault committed by six inmates, "[m]ost" of whom were "admitted Five Percenters (Muslims who follow the teachings of Louis Farakon [sic])." (JA 151). Aside from its erroneous parenthetical explanation (Minister Louis Farrakahn leads the Nation of Islam, not the Five Percenters), the report makes clear that this incident arose out of a disputed gambling debt. (JA 153). One of the participants was charged with a crime; seven were charged with institutional violations. (JA 154-55). The report provides, however, no link between these inmates'

conduct and the beliefs of the Five Percent Nation of Gods and Earths, and there is no suggestion of any larger conspiracy underlying this particular incident.

Defendants cite (Def. Br. at 7-8) a report discussing correspondence between a New Jersey inmate and a South Carolina inmate, but omit the New Jersey investigator's conclusion that he was "not overly concerned" because "the correspondence he had located did not indicate any type of security threat at this time." (JA 156).

Finally, in their discussion of the April 1995 riot at Broad River Correctional Institution (Def. Br. at 8-9), defendants fail to mention that none of the participating inmates were designated as Five Percenters when the SCDC implemented its segregation policy two months later. See (JA 390-98). In the SCDC's thirteen-page criminal investigative report on the riot, dated October 4, 1995 (JA 158), there is only one reference to the Five Percent Nation:

> Other than a possible reference in the demand that the grooming policy be revoked, the only conversation concerning religion was Crawford's reference to the fact that he was a "five percenter" and what the religion stood for.

(JA 170). Elsewhere the report summarizes the rioting inmates' justification for their conduct:

> [T]hey verbally expressed displeasure with the new Director. They stated that he had come in and taken everything away such as parole, personal clothes and religious haircuts. They stated something to the effect that he was, "coming in during the middle of the game and changing all the rules."

(JA 169). The Five Percent Nation does not require "religious haircuts" or other grooming techniques, as opposed to other religious groups like the Rastafarians. See (JA 270)

(SCDC Handbook of Inmate Religious Practice discussing "dreadlocks" of Rastafarian faith). Thus, the motivation of the inmates involved in this incident cannot be traced to Five Percenter beliefs generally. Nor have defendants established any connection between the five rioting inmates who were later identified as Five Percenters and the other, approximately 300 inmates whom defendants placed in segregation shortly thereafter -- other than their common religious affiliation.

Again, plaintiffs wish in no way to minimize the seriousness of institutional misconduct, especially assaults on prison staff. Inmates who commit such misconduct should be punished and/or criminally prosecuted, and inmates who the SCDC can show on the basis of objective, individualized information are likely to commit misconduct in the future may be removed from general population. What defendants cannot do is condemn all members of the Five Percenter religion merely by citing the misdeeds of individual members.

Defendants do not discuss in their brief plaintiffs' evidence regarding the religious texts used by the Five Percent Nation, the spiritual goals and practices of the group, the opposition of sincere Five Percenters to gang activity and other illegal conduct, or the excellent institutional records of South Carolina inmates whom defendants have placed in long-term segregated confinement. They barely mention the restrictive and harsh conditions to which Five Percenters have been subjected while in segregation, or defendants' policy of making inmates renounce their religious beliefs and affiliation before becoming eligible for release. See generally Pl. Br. at 4-9.

At the very least, this case involves serious issues of fact that preclude summary judgment to defendants. Defendants' disregard for the full factual record in this case reflects the erroneous focus of the District Court below. It is simply not true, as defendants assert (Def. Br. at 19), that the "inmates . . . have pointed to no evidence in the record that was overlooked or that created a genuine issue of material fact." To the contrary, in awarding defendants summary judgment the District Court did not give due consideration to any of plaintiffs' evidence. It did not, for example, accept as true plaintiffs' evidence showing that the Five Percenter belief system promotes peaceful behavior and spiritual development, or that many, if not most, adherents of the religion in the SCDC have excellent institutional records. Instead, it reformulated the objective inquiry of Turner v. Safley, 482 U.S. 78 (1987), into one asking whether defendants' intentions in deciding to segregate all Five Percenters were "rational" based on their limited knowledge of the group in June 1995. See Pl. Br. at 20-22. This was error both because the Turner analysis addresses objective fact, not subjective belief, and because Federal Rule of Civil Procedure 56 entitles plaintiffs to have their evidence credited as true during summary judgment proceedings. A trial is necessary to decide between the parties' conflicting versions of the truth.

B. Plaintiffs must be treated as members of a bona fide religion for purposes of this appeal.

Defendants attempt (Def. Br. at 14) to justify their categorical segregation policy on the basis that "the Five Percenters often acted as a group." They rely on a variety of documents (id. at 14-15) that mention suspected Five Percenters in the plural number. Among the documents cited by defendants are the BOP's one-page "intelligence summary" stating that the Five Percent Nation is a "[w]ell organized criminal structure that is very heavily into drug trade" (JA 193); the memorandum in which a New Jersey investigator expresses a general concern about "the upgrowth of this group" ("Diller stated that the correspondence he had located did not indicate any type of security threat at this time, but it was full of references to the evil white man and blacks who do not follow their beliefs.") (JA 156); and the investigative report about the April 1995 riot at Broad River -- a report that barely mentions the Five Percent Nation at all (JA 158-70).

From this evidence defendants conclude that all Five Percenters, even those with no history of institutional misconduct, are really members of a conspiracy that "attempts to align itself with the Muslim religion to hide covert acts of criminal activity." Def. Br. at 9; see also id. at 5 ("'a criminal group' that 'operates behind a facade of cultural and religious rhetoric'"), 18 (referring to "intelligence information about threatened activity by a network of Five Percenters" (emphasis in original)), 32 ("a gang that attempted to align itself with Muslim teachings to create the appearance of a legitimate religion").

The evidence cited by defendants does not support their broad conclusion. It is an cardinal rule of constitutional law that government may not suppress religious belief or practice, no matter how "varied and extreme" a group's views may be. United States v. Ballard, 322 U.S. 78, 87 (1944). This is true even when some members of a group misbehave. Defendants have presented no tangible evidence showing a widespread "network" or "gang" of Five Percenters conspiring to commit crimes throughout the SCDC. What evidence they do have of actual or suspected misconduct is limited to individual or small groups of inmates confined at particular institutions. Defendants have presented no evidence showing that the religious literature of the Five Percenters advocates unlawful activity in any way. They have presented no evidence showing that such individual adherents as Shaleek Azeem, Alexander Mickle, Walter Jenkins, and Ameed Stevenson -- inmates with excellent institutional records prior to their placement in long-term segregation, see (JA 355-58, 359-62, 363-67, 368-71) -- would endanger institutional security if returned to general population. They do not show why inmates who renounce the beliefs of the Five Percent Nation of Gods and Earths are less likely to engage in misconduct than those who remain faithful.

Insofar as all Five Percenters in South Carolina can be considered a group at all, it is only for the obvious reason that they are members of the same religion. The District Court assumed that the Five Percent Nation is a religion for purposes of summary judgment. (JA 529). This assumption must be respected on appeal. Even if they believe the District Court's assumption is false, see, e.g., Def. Br. at 15, defendants cannot argue that

summary judgment in their favor was warranted because the Five Percenters are in fact not a religion, but a gang. They are not entitled at this stage of the proceedings to denigrate plaintiffs' sincere religious faith as a mere "facade" for criminal activity. The District Court can determine for good whether the Five Percenters are a religion on remand. Until then, however, the question is whether defendants can justify their harsh treatment of all members of this particular religious group under the First Amendment. The case law makes clear that they cannot.

II. DEFENDANTS' POLICY OF CATEGORICAL SEGREGATION AND FORCED RENUNCIATION OF BELIEFS VIOLATES THE FIRST AMENDMENT.

In Cooper v. Pate, 378 U.S. 546, 546 (1964), the Supreme Court unanimously reversed a lower court decision allowing officials to deny a Black Muslim prisoner certain privileges enjoyed by other prisoners -- including non-segregated confinement -- "solely because of his religious beliefs." This case is directly on point. See Pl. Br. at 14-15; accord Sewell v. Pegelow, 291 F.2d 196, 196-97 (4th Cir. 1961) (reversing dismissal of claim brought by Black Muslims who were isolated "solely because of their religious beliefs"). Defendants carefully ignore the Supreme Court's decision by citing (in a footnote, no less) only the Seventh Circuit's decision on remand, Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967), and then stating that it was "never followed by the Fourth Circuit." See Def. Br. at 13 n.1.

The Supreme Court's ruling in Cooper remains good law. Since then, the Court has decided only two cases involving the religious freedom of prisoners. In Cruz v. Beto, 405 U.S. 319 (1972), it reversed the dismissal of a complaint alleging that Buddhist prisoners alone were denied the right to hold religious services. See generally Pl. Br. at 24-25. In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), it considered a neutral, generally applicable regulation that had the unintended effect of infringing certain inmates' religious freedom. Plaintiffs do not dispute that the "reasonableness" test of Turner v. Safley, 482 U.S. 78 (1987), applies to such regulations. See also Hines v. South Carolina Dep't of Corrections, 148 F.3d 353, 357-58 (4th Cir. 1998) (applying O'Lone and Turner test to "neutral and generally applicable" grooming regulation). This case, however, involves a policy that targets and burdens the religious freedom of only one religious group, the Five Percent Nation of Gods and Earths. Adherents of this group are segregated "solely because of their religious beliefs." A higher level of scrutiny applies.

Defendants maintain (Def. Br. at 22-23) that no matter how discriminatory a particular policy may be, only the Turner test is applicable in prisoner cases. But the case law does not support this position. The holding in O'Lone was limited to prison regulations that "infringe" -- not "target" -- prisoners' ability to exercise their religion. 482 U.S. at 353. Until the Supreme Court struck down the Religious Freedom Restoration Act, see City of Boerne v. Flores, 521 U.S. 507 (1997), lower courts generally applied that statute's heightened standard in all religion cases, so prisoner plaintiffs had no need

to argue for such a standard when challenging non-neutral policies and practices. Only now does this question require resolution. Furthermore, the Supreme Court has not equivocated when discussing government action that discriminates against particular religions. See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (stating that a "law targeting religious beliefs as such is never permissible"). The Court in Church of Lukumi did not recognize an exception under the First Amendment for policies that directly suppress religion but are implemented by prison officials.

Defendants argue in the alternative (Def. Br. at 24) that their policy of segregating all Five Percenters passes muster under the analysis in Church of Lukumi: "The policy is neutral and its provisions apply to all inmates within SCDC." This argument hardly requires a response. The policy that plaintiffs challenge is the SCDC's placement of all members of the Five Percent Nation of Gods and Earths in long-term segregation, with release available only to those who renounce their religious beliefs. See, e.g., (JA 411) (disposition of inmate request stating that inmate may gain release from "M custody" segregation only by "demonstrating his renunciation of affiliation" with Five Percent Nation). The SCDC targets no other religious group in such a manner. Defendants assert (Def. Br. at 25) that their Security Threat Group policy is "on its face, neutral toward religion" and that plaintiffs fit within the policy because "they are a group of three or more inmates, having a common name, and whose members have committed unlawful acts classified as safety and security threats." But almost any racial, ethnic, or religious

group of prisoners would fall under this description -- whites, African Americans, Catholics, mainstream Muslims, etc. -- as all these groups include some members who have committed qualifying "unlawful" acts. By defendants' reasoning, they could indefinitely lock down all Southern Baptist prisoners and yet avoid heightened scrutiny under Employment Division v. Smith, 494 U.S. 872 (1990), and Church of Lukumi. This cannot be the case; even in the prison context, constitutional guarantees cannot be so easily sidestepped. It is undisputed that the SCDC places all Five Percenters in long-term segregation, regardless of individual members' institutional records or likelihood of future misconduct. It is undisputed that defendants do not apply their Security Threat Group policy to other religious groups. This failure of general applicability triggers heightened scrutiny under Supreme Court precedent.

Defendants' policy, moreover, is not neutral. In Church of Lukumi, the Supreme Court rejected the argument that the facial neutrality of a particular law or regulation is determinative:

> The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."

508 U.S. at 534 (citations omitted). The Court in Church of Lukumi concluded that a law prohibiting the ritual slaughter of animals was not neutral because the drafters of the law

were concerned about only one religious group, the Santeria, and because the law "in its real operation" targeted Santeria sacrifices. Id. at 534-35. Similarly, in this case, at least at the time of the Security Threat Group coordinator's deposition on January 17, 1997, the Five Percenters were the only designated "security threat group" in the SCDC. (JA 417). And as explained above, by requiring that plaintiffs renounce their religious beliefs to gain release from segregation, defendants apply their policy in a manner that amounts to, in the words of the Supreme Court, "an impermissible attempt to target [plaintiffs] and their religious practices." Church of Lukumi, 508 U.S. at 535.

Defendants fare no better discussing the neutrality requirement under Turner v. Safley. They argue (Def. Br. at 16-17) that a challenged prison practice need not apply in a neutral manner, but only be supported by an ostensibly neutral governmental interest. The Supreme Court, however, has found it "important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner v. Safley, 482 U.S. at 90 (emphasis added); accord Thornburgh v. Abbott, 490 U.S. 401, 415 (1989). In Turner itself the defendant officials asserted a neutral objective, rehabilitation, in support of a regulation prohibiting inmates from marrying, but the Court found that in operation this objective was "suspect" and "lopsided" in that there was evidence of "excessive paternalism" and greater official scrutiny of marriages of female inmates. 482 U.S. at 98-99. Similarly, in Procunier v. Martinez, 416 U.S. 396 (1974), the Court struck down regulations that provided for censorship of letters that expressed "inflammatory political, racial, religious

or other views or beliefs." As the Court later observed, despite the prison officials' asserted security interest, these regulations were "decidedly non 'neutral' in the relevant sense" in that they invited suppression of expression and the exercise of officials' "personal prejudices and opinions." Thornburgh, 490 U.S. at 416 n.14.

In this case, defendants' segregation policy does not operate in a neutral fashion. It turns directly on the content of plaintiffs' religious expression: those who express even an interest in the beliefs or literature of the Five Percent Nation are placed in segregation and must renounce those beliefs to get out. Defendants have failed to show that their policy of categorical segregation and forced renunciation bears a "valid, rational connection" to their asserted interest of institutional safety and security. There is no evidence in the record, for instance, that inmates who renounce Five Percenter beliefs to gain release present a lesser security risk than those faithful inmates who remain locked down. Rather, this requirement is clearly designed to suppress inmates' exercise of Five Percenter religious beliefs. Defendants' policy reflects their general prejudice toward the Five Percenter religion, evident even in their brief to this Court. See, e.g., Def. Br. at 5 (describing Five Percent Nation as a "fear-based group who roam as a wolfpack").

Insofar as defendants' policy fails the neutrality requirement of Turner, this Court need not consider the other three factors of the test. "Nothing can save a regulation that promotes an illegitimate or non-neutral goal." Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998) (citing Turner, 482 U.S. at 90). In any case, these factors further demonstrate the unconstitutionality of defendants' policy.

Defendants argue (Def. Br. at 19) that, with regard to the second Turner factor, plaintiffs retain "alternative means of exercising the constitutional right." It is worth noting that plaintiffs have access to religious materials only as a result of the preliminary injunction entered by the District Court (JA 544-47) and the subsequent *Consent Order* making that injunction permanent (JA 549-51); before these orders took effect, defendants had prohibited all Five Percenter literature in the SCDC. Defendants are simply incorrect when they assert (Def. Br. at 20) that plaintiffs are able to "follow dietary restrictions"; because the SCDC does not recognize the Five Percent Nation as a religion, it denies all members their requests for pork-free diets. Defendants do not deny that plaintiffs' confinement in long-term segregation prevents them from congregating to pray or discuss spiritual matters, important aspects of Five Percenter religious practice. Most important, however, is the fact that defendants' policy is directed toward suppressing the Five Percent Nation religion altogether: they place individuals in segregation as soon as they are identified as adherents, and release them only after they renounce. How can defendants seriously maintain that this policy provides an adequate "alternative means of exercising" plaintiffs' religious beliefs? The possibility of prayer and meditation in isolated confinement hardly justifies the persecution that places adherents there in the first place.

As for the third and fourth Turner factors, there is at least a genuine issue of material fact whether defendants can carry out their asserted security objective in a manner that accommodates plaintiffs' Free Exercise rights. Plaintiffs have argued (Pl. Br.

at 22-24) that rather than using their religious affiliation as a generic proxy for dangerousness, defendants should evaluate inmates' dangerousness on the basis of objective and individualized information. This is precisely what defendants already do for other inmates in the SCDC. See (JA 228). (Contrary to defendants' suggestion (Def. Br. at 20), inmates in the SCDC may be reclassified for a variety of reasons, not just after "they commit a disciplinary infraction.") Defendants assert (Def. Br. at 18) that this accommodation would require "a return to the conditions under which SCDC was unsuccessfully attempting to deal with the Five Percenter problem before they were designated an STG." Even assuming that a real "Five Percenter problem" has ever existed in the SCDC, the record still does not support defendants' argument. For instance, they contend (Def. Br. at 8-9) that inmate Willie Gary (not a plaintiff in this case) was transferred from Lee Correctional Institution to Broad River Correctional Institution because of information received that he was a "troublemaker" and "going to seize a female hostage." At Broad River, Gary was one of the seven inmates involved in the serious hostage-taking incident of April 1995. Under plaintiffs' proposed accommodation, defendants would be able to isolate inmates like Gary whom they have good reason to believe may engage in future misconduct. Had defendants in fact done this prior to April 1995, perhaps they could have averted or minimized the Broad River incident. Similarly, plaintiffs would not object to the segregation of particular inmate leaders whom evidence shows advocate prison uprisings, like the one defendants believed would occur (but "[f]ortunately" did not) in North Carolina and South Carolina around New Year's Day 1995. (JA 185).

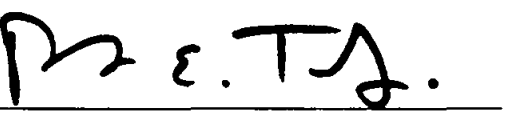
Defendants need not wait for trouble to occur before acting. The First Amendment prohibits them, however, from presuming that every member of a religious group will cause trouble regardless of what his institutional record and behavior demonstrate.

On remand from the Supreme Court's decision in Cooper v. Pate, the Seventh Circuit held that the disciplinary infractions of some Black Muslim prisoners did not justify the prohibition of their religion altogether. "[T]here are less drastic and less sweeping means of achieving necessary control of such group services than categorically banning them." 382 F.2d at 521. More recently, in Caldwell v. Miller, 790 F.2d 589, 598-99 (7th Cir. 1986), applying the Turner test, the court reversed an award of summary judgment where the prison officials had not proven that their "total ban on all group religious services is and was reasonably necessitated by security considerations." The policy challenged in this case, of course, not only denies plaintiffs the right to participate in religious services, but also subjects them to harsh and restrictive conditions until they renounce their religious beliefs. The Eighth Circuit has observed that the Turner reasonableness test

> does not obviate the need for accommodation. Reasonableness in this context refers not only to the relation between the goals of a regulation and its means, but also to the balance struck between the needs of the prison administrators and the constitutional rights of prisoners. Reed v. Faulkner, 842 F.2d 960, 962 (7th Cir. 1988) (Posner, J.). "In sum, there must be [a] mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Salaam v. Lockhart I, 856 F.2d 1120, 1122, 1124 (8th Cir. 1988).

Salaam v. Lockhart II, 905 F.2d 1168, 1171 n.6 (8th Cir. 1990) (citations modified), cert. denied, 498 U.S. 1026 (1991). Defendants' policy of categorical segregation and forced renunciation strikes no balance, allows for no accommodation of prison objectives with constitutional rights. Instead, it is an extraordinary instance of government suppressing unpopular religious beliefs. The District Court's award of summary judgment to defendants should be reversed, and this case remanded for trial.

Respectfully submitted this 28th day of December, 1998,



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