05-2516cr(L)

05-3061-cr(CON), 05-6068-cr(CON), 05-6178-cr(XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant-Respondent,

— v. —

JAMES CUTLER,

Defendant-Petitioner,

MONTY D. HUNDLEY, HOWARD ZUKERMAN,

Defendants-Appellants,

SANFORD FREEDMAN,

Defendant-Appellant-Cross-Appellee-Petitioner.

ON PETITION FOR REHEARING *EN BANC*

BRIEF FOR THE NEW YORK COUNCIL OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 235 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL submitted amicus briefs in *United States v. Booker*, 543 U.S. 220 (2005), *Rita v. United States*, 127 S. Ct. 2456 (2007), *Claiborne v. United States*, 127 S. Ct. 2245 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007), and has an interest in the standards for appellate review of sentences outside the advisory-guidelines range. NYCDL also has an interest in promoting a just and comprehensive sentencing policy that includes alternatives to incarceration. We believe that it is imperative to the protection of our clients' rights, and to the establishment of a more just sentencing system, that the sentencing judge be able to make an individualized sentencing determination and that, as a consequence, courts of appeals afford the same degree of deference to sentences imposed below the advisory-guidelines range, including probation, as they do to sentences within it.

Petitioners consent to the filing of this brief; the United States neither opposes nor consents. Accordingly, NYCDL has filed a motion for leave to file a

brief as *amicus curiae*, pursuant to Federal Rule of Appellate Procedure 29(b).

SUMMARY OF ARGUMENT

Congress has instructed district courts to "impose a sentence sufficient, *but not greater than necessary*, to comply with" the purposes of sentencing set forth in the Sentencing Reform Act. 18 U.S.C. § 3553(a) (emphasis added). Absent any significant procedural errors,[1] a court of appeals reviews sentencing determinations for "reasonableness." *Gall*, 128 S. Ct. at 594. Reasonableness review, the Supreme Court has explained, "merely asks whether the trial court abused its discretion." *Rita*, 127 S. Ct. at 2465; *see Gall*, 128 S. Ct. at 594. "[A]ppellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . *or outside that range*," *Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring), and "appellate judges must still *always defer* to the sentencing judge's individualized sentencing determination," *id.* at 2472 (Stevens, J., concurring) (emphases added). The Supreme Court has thus "reject[ed] . . . an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the

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[1] As Judge Pooler noted in her concurring opinion in this case, if the district court has committed significant procedural errors, "the district court is entitled to the opportunity to correct [them]," and "if or when a procedurally correct sentence is imposed, and is appealed, [the court of appeals] may engage in substantive reasonableness review." *United States v. Cutler*, 2008 U.S. App. LEXIS 5646, at *111 (2d Cir. Mar. 17, 2008) (Pooler, J., concurring); *see Gall*, 128 S. Ct. at 597 (appellate court "must *first* ensure that the district court committed no significant procedural error . . . . *Assuming that the district court's sentencing decision is procedurally sound*, the appellate court should then consider the substantive reasonableness of the sentence imposed . . . .") (emphases added).

Guidelines range." *Gall*, 128 S. Ct. at 595. Mindful of these principles, this Court should grant rehearing *en banc* for at least two reasons.

First, even though it acknowledged the abuse-of-discretion standard that governs review of sentences subject to the now-advisory guidelines, the panel gave "*virtually no deference* to the District Court's decision that the § 3553(a) factors justified a variance." *Gall*, 128 S. Ct. at 600 (emphasis added). Instead, it repeatedly "engaged in an analysis that more closely resemble[d] *de novo* review of the facts presented," as well as the District Court's weighing of those facts, and "determined that, in its view, the degree of variance was not warranted." *Id.* The panel's decision thus conflicts with the Supreme Court's decision in *Gall*. Left undisturbed, the opinion is likely to be read by this Circuit's district courts as a signal that within-guidelines sentences are favored, in contravention of the Supreme Court's directive in *Rita* that the district courts are not to operate from a presumption that a below-guidelines sentence is unreasonable. 127 S. Ct. at 2467.

Second, in rejecting as an improper basis for variance the District Court's reasonable determination that the amount-of-loss figure resulted in guidelines enhancements that vastly overstated the seriousness of Petitioners' offense, the panel failed to give the District Court latitude to vary from the *advisory* guidelines range in a manner not precisely contemplated by the guidelines. That approach is flatly contrary to the Supreme Court's decision in *Kimbrough*, inconsistent with

circuit precedent and the decisions of other courts of appeals, and will have grave consequences for white-collar defendants. Their would-be guidelines sentences are tethered to speculative and uncertain loss calculations which, even if accurate, will often yield sentencing ranges that are wildly out of synch with the purposes of § 3553(a)—and, for that matter, any rational conception of proportionate punishment. As a leader in the development of white-collar jurisprudence, this Court should avail itself of the opportunity to provide guidance to the district courts on this recurring issue of exceptional importance.[2]

ARGUMENT

I. THE PANEL REPEATEDLY SUBSTITUTED ITS JUDGMENT FOR THE REASONED JUDGMENT OF THE DISTRICT COURT, CONTRARY TO THE SUPREME COURT'S DECISIONS IN *BOOKER*, *RITA*, AND *GALL*

As the Supreme Court has emphasized, a sentencing judge has "greater familiarity with . . . the individual case and the individual defendant before him than the Commission or the appeals court." *Rita*, 127 S. Ct. at 2469. The district court is therefore "'in a superior position to find facts *and judge their import* under § 3553(a)'" in a particular case. *Gall*, 128 S. Ct. at 597 (citation omitted); *accord,*

[2] White-collar cases have historically accounted for a higher percentage of the docket in this Circuit than in any other. *See* United States Courts of Appeals Database, *available at* http://web.as.uky.edu/polisci/ulmerproject/appctdata.htm (last accessed Apr. 20, 2008); s*ee also* Peter R. Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 Yale L.J. 1427, 1441 n.60 (1985) (noting "the focus of the white-collar criminal defense bar on and the concentration of financial activity in" the Second Circuit).

e.g., *United States v. Choi*, No. 06-2870-cr, 2008 U.S. App. LEXIS 7624, at *3 (2d Cir. Apr. 10, 2008) ("'The appellate function in this context should exhibit *restraint*, not micromanagement.'") (citation omitted) (emphasis added); *United States v. Verkhoglyad*, 516 F.3d 122, 136 (2d Cir. 2008). A reviewing court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 128 S. Ct. at 597.

The panel recited some of these principles, but did not apply them and instead repeatedly substituted its judgment for the District Court's, with respect to both the District Court's factual findings and its judgments about their significance in the § 3553(a) analysis. The panel relied heavily on departure case law, but effectively ignored Judge Preska's consideration of the § 3553(a) factors and determination that she would have imposed identical sentences irrespective of the guidelines, based solely on § 3553(a). 2008 U.S. App. LEXIS 5646, at *87-*110. Indeed, the panel scarcely referred to—let alone deferred to—any of Judge Preska's findings concerning the § 3553(a) factors. As Judge Pooler explained, the panel majority apparently reversed based on its own determination that longer, custodial sentences were called for, "an exercise we are reminded is not within our province to accomplish." *Id*. at *111 (concurring). The panel majority stated, for example,

that Cutler's sentence (a prison term of 12 months and one day, to be followed by 5 years of supervised release) "reflect[ed] an erroneous interpretation of § 3553(a)(2)(A)'s requirement for punishment that is 'just.'" *Id.* at *32, *67. That statement fairly summarizes the panel's *substantive disagreement* with the District Court on the ultimate sentences imposed; but it does not evince a basis for concluding that the sentences were outside the range of permissible alternatives.

The panel also ignored the severity of the probationary sentence imposed on Mr. Freedman. Judge Preska imposed several conditions on Mr. Freedman's term of probation, most significantly, 700 hours of community service per year. Given Mr. Freedman's frail health, that amounts to a nearly-full-time commitment. Judge Preska also conditioned the sentence upon Mr. Freedman's disclosure of any and all financial information upon request, and ordered him not to incur any credit charges or open lines of credit without approval of his probation officer. Freedman JA 355. The District Court reasonably concluded that this substantial restriction of freedom was a sufficiently stern sentence to effectuate congressional goals of punishment. *See Gall*, 128 S. Ct. at 595-96. These defects in the panel majority's decision are just examples of a systemic failure to accord proper deference to the District Court's sentencing determinations, as the Supreme Court has directed.[3]

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[3] *See* Freedman Pet. 4-14. The decision stands in stark contrast to other courts of appeals decisions applying *Gall*. *See, e.g.*, *United States v. Pyles*, 2008 U.S. App. LEXIS 7286, at *11 (4th Cir. Apr. 4, 2008) (affirming sentence of 6

II. THE HEIGHTENED STANDARD OF REVIEW THAT THE PANEL APPLIED TO THE DISTRICT COURT'S CONCLUSION THAT THE LOSS AMOUNT WOULD YIELD SUGGESTED GUIDELINES SENTENCES GROSSLY DISPROPORTIONATE TO PETITIONERS' CULPABILITY CONTRAVENES *GALL* AND *KIMBROUGH*

The District Court concluded that the amount of money involved in Petitioners' bank fraud offense magnified their would-be guidelines sentences to an extent that "wildly overstate[d]" their culpability. Freedman JA 328; *see also, e.g.*, Cutler JA 227. In its analysis of the factors set out in § 3553(a), the District Court further explained that "although necessary to the offense," Mr. Cutler's "role in the offense was far more limited than the role of other defendants." Cutler JA 230. With respect to Mr. Freedman, the District Court "reiterate[d] . . . that the loss amount of [$100 million] very seriously overstates the participation of this defendant and his culpability . . . ." Freedman JA 338. The panel held that Judge Preska lacked authority to deviate from the advisory guidelines on this basis, notwithstanding her thorough consideration of the relevant factors and her ultimate conclusion that the sentences imposed were "sufficient, but not greater than necessary" to comply with the purposes of § 3553(a). *Id.* at 337-38. In this respect, the panel's opinion cannot be reconciled with *Gall* and *Kimbrough v. United States*, 128 S. Ct. 558 (2007). The decision severely limits the district courts' ability to

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months' home confinement and 5 years' probation for crack cocaine trafficking, "[g]iving due deference to the district court's sentencing decision," and noting that "probation, although less severe than incarceration, is not a 'get-out-of-jail free card' either") (citation omitted).

craft an appropriate, and just, individualized sentence and correspondingly limits the ability of defense counsel, and the Government, to present arguments regarding what sentence is appropriate for the individual defendant based on the particular circumstances of that defendant's offense. Left unaltered, the decision will signal to the district courts of this Circuit that imposing a below-guidelines sentence for a financial crime, based on a disagreement with the way in which the amount of pecuniary loss would magnify the would-be guidelines range in a particular case, will be viewed as *presumptively unreasonable* on appeal. This Court should grant rehearing *en banc* to clarify the deference owed to such judgments, before the panel's decision steers the law in this Circuit off course.

A. Where the Amount of Loss Would Result in a Guidelines Sentence that Is Disproportionate to the Defendant's Culpability and Greater than Necessary to Serve the Purposes of § 3553(a), the District Court Has Discretion to Grant a Downward Variance

The panel's analysis of the loss amount erroneously implies that the guidelines are still binding in some respect. The panel focused on the guidelines, which provide that "the amount of loss attributable to a defendant includes the reasonably foreseeable pecuniary loss caused by all 'reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,'" 2008 U.S. App. LEXIS 5646, at * 57 (quoting U.S.S.G. § 1B1.3(a)(1)(B)). The panel continued: "Although there may be *unusual cases* in which the record reveals

a combination of circumstances that warrant a departure from the application of this principle, any finding of such circumstances in this case—had one been made—would be clearly erroneous." *Id.* at *58 (emphasis added). The panel further held that the District Court "misinterpreted the Guidelines in concluding that it had authority to depart downward on the basis of a role that could not be considered either minimal or minor, . . . and clearly erred in finding that the magnitude of the banks' losses overstated Cutler's conduct and role." *Id.* at *65. Nor could the court depart on the ground that loss overstated the seriousness of the offense itself, the panel majority stated, because the intended loss *actually occurred*. *Id.* at *66.[4]

There are at least two serious defects in this analysis warranting consideration by this Court *en banc*. *First*, the opinion holds that amount of loss cannot be adjusted except in the "unusual case"—requiring a heightened standard akin to the "extraordinary circumstances" standard explicitly rejected by the Supreme Court in *Gall*. *See* 128 S. Ct. at 595. *Second*, it instructs that the district court may not decide that a reduced sentence is appropriate for an economic offense unless it also finds that the defendant would qualify for a departure under

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[4] The panel's reliance on *United States v. Canova* to opine that the departure contemplated by § 2F1.1 "typically applies in cases . . . 'where the intended loss is almost certain not to occur,'" 2008 U.S. App. LEXIS 5646, at *66, was misplaced. In *Canova*, which pre-dates *Gall* and *Kimbrough*, the court reversed because the district court had reduced Canova's sentence after finding that there was little "actual harm" from the fraud, but had *failed to consider* whether the (greater) amount of *intended* harm overstated the seriousness of Canova's offense. 485 F.3d 674, 677, 680 (2d. Cir. 2007).

§ 3B1.2(b) for having played a minor role in the offense. That holding is flatly contrary to the Supreme Court's decisions in *Booker* and *Kimbrough*.

Under *Booker* and its progeny, "the district court is free to make its own reasonable application of the §3553(a) factors, and to reject (after due consideration) the advice of the Guidelines." *Kimbrough*, 128 S. Ct. at 577 (Scalia, J., concurring). *Kimbrough* confirmed a district court's authority to vary from the guidelines based solely (or in part) on a policy disagreement with them. *Id*. at 573-74. By definition, such deviations will not be "authorized" by the guidelines. Here, the District Court concluded that although Petitioners played critical roles in the bank fraud scheme, and thus would not qualify for a departure under § 3B1.2(b), the advisory-guidelines sentence that resulted from inputting the total amount of pecuniary loss nevertheless yielded sentences that vastly overstated their culpability. Under the rationale of *Booker* as clarified in *Kimbrough*, the district courts have discretion to vary from the guidelines in ways not contemplated by the old departure structure, so long as the court reasonably applies § 3553(a). *Id*. at 571-74. A sentencing court must be able to determine, in the exercise of its discretion, that a defendant's role—while perhaps more than "minor" when measured under the standards set by the sentencing guidelines—was less substantial than the resulting advisory-guidelines sentence would reflect.

The District Court had ample discretion to conclude that the offense level

resulting from mechanical application of pecuniary loss to the guidelines would yield inappropriately severe sentences. After thorough consideration of the § 3553(a) factors, the District Court reasonably concluded that guidelines sentences based on this loss figure would be far "greater than necessary" to achieve the purposes of § 3553(a). Whether a sentencing court characterizes such a variance as an adjustment for "the gravity of the offense" or for the "role" or "culpability" of the defendant is immaterial under *Gall* and *Kimbrough*. *But see Cutler*, 2008 U.S. App. 5646, at *57. The District Court reasonably concluded that the distorting effect of the loss figure magnified Petitioners' would-be guidelines sentences to an extent that would be wildly inappropriate, given the nature of the offense, Petitioners' roles in it, and in view of the totality of all the § 3553(a) factors. That ultimate determination is owed deference under *Gall* and *Kimbrough*. Whether one characterizes the resulting reduction in the sentence imposed as a "departure" or simply a "variance" is purely an issue of semantics; implicit in the District Court's determination of the appropriate sentence was a permissible disagreement with the structure of the guidelines, which place inordinate emphasis on the amount of loss, resulting in potentially absurd sentences in many cases, and extreme variation in sentences among defendants who engage in essentially the same conduct.[5]

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[5] Even when the guidelines were *mandatory*, this Court recognized that a sentencing court could depart downward upon a finding that the amount of loss overstated the seriousness of the offense *or* of the defendant's culpability in the

B. Calculations of Loss Are Speculative, Subject to Manipulation, and May Grossly Overstate a Defendant's Culpability

Left undisturbed, the panel majority's opinion will be interpreted by the district courts as reinforcing the pre-*Gall* practice of requiring extraordinary justifications for downward variances and probationary sentences (and of comparing sentences with the amount of loss the government alleges, per the guidelines). This will effectively deter sentencing courts from imposing a reduced custodial sentence or probation where appropriate in cases involving economic harm. Prior to *Gall*, excessive emphasis on mechanical guidelines calculations, particularly post-Sarbanes-Oxley, led to disproportionately harsh sentences for defendants who committed economic offenses. For example, at age 63, Bernie Ebbers was sentenced to 25 years, which this Court noted was "longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007).[6] These extreme

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commission of that offense. *See, e.g.*, *United States v. Restrepo*, 936 F.2d 661, 667 (2d Cir. 1991). The panel majority's attempt to distinguish *Restrepo* on its facts is undermined by this Court's precedent and the Commission's Application Note. *See United States v. Lara*, 47 F.3d 60, 66-67 (2d Cir. 1995) (granting departure where drug quantity overstated defendant's culpability, without any role adjustment under §3B1.2(a)); Cutler Pet. 12-14.

[6] Other very lengthy white-collar sentences include 24 years for Jeffrey Skilling, 15 years for John Rigas (the 80-year-old founder of Adelphia), 30 years for Patrick Bennet, and 20 years for Steven Hoffenberg. *See generally* Ellen S.

sentences resulted from guidelines calculations that base the offense level for economic crimes on the pecuniary loss resulting from the crime, much like drug quantity for drug offenders.[7] As this Court has recognized, "when an aggravating factor is translated to a sliding scale of offense levels, the assumptions underlying the translation cannot fairly reflect every possible case." *United States v. Restrepo*, 936 F.2d 661, 667 (2d Cir. 1991). Judge Rakoff has aptly observed the "travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006); *see also* Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279, 280 (2007); *United States v. Jeross*, Nos. 06-2257, 06-2502, 2008 WL 906207, at *23 (6th Cir. Apr. 4, 2008) (Merritt, J., dissenting) ("Judges' minds are closed down and sentences ratcheted up by applying convoluted conversion formulas . . . . The recent *Blakely-Booker-Cunningham* line of Supreme Court cases has given judges an opportunity to rid the system of some of the worst aspects of guidelinism, but we judges soldier on by applying the old mandatory system as though nothing of significance had happened.").

As many scholars have documented, loss calculations are often imprecise

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Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279 (2007) (noting the long sentences now routinely given to first-time white-collar offenders).

[7] *See* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* ("*15 Year Report*") 50 (Nov. 2004).

and subject to manipulation by prosecutors.[8] Guidelines calculations based on speculative and highly contested pecuniary loss estimates often result in sentencing ranges that *exceed* the statutory maximum for a given offense. *See, e.g.*, *United States v. Botts*, 135 Fed. Appx. 416, 417-18 (11th Cir. 2005) (loss calculation resulted in range of 151 to 188 months, triple the 60-month statutory maximum); *Adelson*, 441 F. Supp. 2d at 509, 511 (guidelines calculation for first offender convicted of securities fraud was a draconian 85 years' imprisonment). The guidelines in this area have "so run amok that [the calculations] are patently absurd on their face." *Id.* at 515.

Such excessively severe sentences are inconsistent with the Sentencing Commission's goal to "ensure 'a short but definite period of confinement' for a larger proportion of these 'white collar' cases, both to ensure proportionate punishment and to achieve adequate deterrence."[9] Substantial evidence has emerged since the guidelines were written suggesting that even a short term of imprisonment is often not necessary to achieve the goals of sentencing for some defendants in white-collar cases. For example, studies have shown—as Judge Preska noted (*see* Cutler JA 231)—that the *length* of imprisonment does not have a

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[8] *See, e.g.*, Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 Wm. & Mary L. Rev. 721, 739-40 (2005).

[9] *15 Year Report* 56 (citation omitted).

significant effect on deterrence of financial offenses.[10] In short, ample evidence suggests that the guidelines do not serve the Commission's or Congress's goals in white-collar cases. This Court should *encourage* the district courts to exercise their broad discretion, consistent with the Supreme Court's directive, to consider below-guidelines sentences, including probation, in appropriate circumstances.

CONCLUSION

For the reasons stated above, *en banc* consideration is necessary to secure uniformity of law in this Circuit and conformity with Supreme Court authority on a question of exceptional importance.

Respectfully submitted,

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[10] *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999) ("[T]he disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment," suggesting "that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal.").

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

The undersigned counsel of record for *amicus* New York Council of Criminal Defense Lawyers certifies pursuant to Federal Rule of Appellate Procedure Rules 32(a)(7)(A) and 35(b)(2) that the foregoing Brief does not exceed 15 pages, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure Rule 32(a)(5)-(6), this brief has been prepared in 14-point Times New Roman font.

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I certify that on this 21st day of April, 2008 I caused to be served two (2) copies of **Brief for the New York Council of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioners** by first-class mail, postage prepaid and by e-mail, upon the following:

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