Case No. 93548-3

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARNIE L. SIMMONS,
Petitioner,

v.

MICROSOFT CORPORATION,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

Although Ms. Simmons asks the Court to review Division I's July 5, 2016 Unpublished Opinion ("Opinion") to affirm dismissal of both her race and age discrimination claims (Petition at 1), she presents no argument regarding her age claim and instead focuses solely on her race claim. As such, while the petition should be denied in any event, there is no procedural basis for the Court to consider review of the age claim.

II. STATEMENT OF THE CASE

The undisputed facts upon which Division I relied in affirming summary judgment for Microsoft are set forth in the Opinion. Per RAP 10.3(b), Microsoft restates certain material facts here.

A. Ms. Simmons

Ms. Simmons was born in California in October 1969 and moved to the Seattle area when she was about 13. CP 18 at 15-16; CP 19 at 19-20; CP 20 at 11-24. She identifies as Pacific Islander because her mother was born in Hawaii. CP 20 at 25; CP 21 at 1-3; CP 22 at 22-25; CP 23 at 1. Her father was not Pacific Islander. CP 20 at 25; CP 21 at 1.

In July 2006, Ms. Simmons began working for Microsoft as an at-will employee. CP 37 at 15-18; CP 139 at 22-25; CP 140 at 1-7; CP 229 at ¶ 2.

B. Ms. Simmons' Performance from 2008 to 2011

In 2008, Ms. Simmons became an executive assistant ("EA") reporting to Rosanna Ho. CP 35 at 17-18. In this role, Ms. Simmons had ongoing problems in her communications and interactions with coworkers. In March 2009, Ms. Ho encouraged her to improve her interpersonal skills. CP 51 at 10-21; CP 76-94. In September 2009, Ms. Ho again identified Ms. Simmons' interpersonal challenges and encouraged her to pay closer attention to details. CP 49 at 23-25; CP 50 at 1-7; CP 58-75. In March 2010, Ms. Ho noted Ms. Simmons had shown improvement but urged her to continue working on these issues, which are critical to success in an administrative support role. CP 52 at 8-25; CP 95-104.

C. Ms. Simmons Becomes Bret Arsenault's EA

In 2010, Bret Arsenault was Microsoft's Chief Information Security Officer (CISO) and leader of the Information Security Risk Management (ISRM) group. CP 34 at 3-7; CP 38 at 11-14; CP 232-233 at ¶ 3. In this role, he oversees hundreds of employees; is responsible for enterprise-wide information security, compliance, and business continuity efforts; and leads a global team of security professionals with a strategic focus on information protection, assessment, awareness, governance, and enterprise business continuity. CP 232-233 at ¶ 3.

In 2011, Mr. Arsenault needed to hire a full-time EA. CP 233 at ¶ 5. In March 2011, Ms. Simmons interviewed with some members of Mr. Arsenault's group. CP 36 at 14-18; CP 53 at 10-15; CP 233 at ¶ 6. She was recommended for hire because of her technical skills and experience, but concerns were raised regarding her interpersonal skills. CP 233 at ¶ 6; CP 240-243. Mr. Arsenault then interviewed Ms. Simmons. CP 53 at 10-15; CP 233 at ¶ 7. While he had concerns based on the feedback from other interviewers, he felt she was a good candidate for the job. CP 233 at ¶¶ 6-7; CP 240-243.

When Mr. Arsenault's first choice for the position (a temporary employee who had worked as his interim EA for about a year) could not take the position, he offered the Level 56 role to Ms. Simmons. CP 33 at 5-6; CP 36 at 24-25; CP 233 at ¶ 7. In May 2011, Ms. Simmons accepted the role and began reporting to Mr. Arsenault as his EA. CP 233 at ¶ 7.

D. Ms. Simmons' Job Responsibilities

As CISO, Mr. Arsenault has significant demands on his time. CP 43 at 17-19; CP 232 at ¶ 3. Ms. Simmons' job was to support him by handling his scheduling, logistical, and administrative needs so as to maximize his time for high value work. CP 43 at 13-25; CP 44-48; CP 49 at 1-22. She was also expected to be diplomatic and professional when communicating with partners. CP 46 at 23-25; CP 47 at 1-8. Failure to

meet these expectations and to work seamlessly with others on the team resulted in unnecessary drains on Mr. Arsenault's time. CP 233 at ¶ 4.

In September 2011, Mr. Arsenault gave Ms. Simmons a "2" rating on her annual performance review. (The ratings at that time were from "1" to "5" with "1" being highest and "5" lowest.) CP 108 at 11-25; CP 109 at 1-2; CP 110 at 2-7; CP 149-154; CP 233-234 at ¶ 8. This favorable rating was based largely on her performance in her previous position and to some extent the time she had been in this new role. CP 233-34 at ¶ 8. Given what he had seen over the first few months, Mr. Arsenault felt Ms. Simmons was a "great hire" but noted the same interpersonal skills concerns that Ms. Ho had identified in 2009 and 2010 and that were raised during her interview process in March 2011. CP 108 at 11-25; CP 109 at 1-2; CP 110 at 2-7; CP 149-154; CP 233-234 at ¶ 8.

E. Ms. Simmons' Documented, Ongoing Performance Issues from 2011 to 2013

In September 2011, Mr. Arsenault hired Ken Sexsmith as the group's Business Manager. CP 234 at ¶ 9. Mr. Sexsmith was hired at a Level 64 (i.e., eight levels higher than Ms. Simmons) and was responsible for aligning the ISRM group's strategic and financial objectives, workforce plan, and rhythm of business. *Id.* Ms. Simmons had difficulty working with Mr. Sexsmith, and they had a strained relationship

throughout her employment. CP 41 at 22-25; CP 42 at 1-2, 19-22; CP 234 at ¶ 10.

In January 2012, Mr. Arsenault made clear to Ms. Simmons and Mr. Sexsmith his expectation that they resolve their difficulties and work together effectively. CP 111 at 22-25; CP 112 at 1-10; CP 155-156. Mr. Arsenault asked each of them to draft three requests they had of the other and three commitments they could make to improve the relationship. CP 156. Mr. Arsenault was disappointed with Ms. Simmons' proposed commitments and sought guidance from Microsoft's Human Resources department on how best to proceed. CP 111 at 22-25; CP 112 at 1-10; CP 155-156; CP 234 at ¶ 10; CP 244-47.

In January 2012, Mr. Arsenault met with Ms. Simmons to discuss his concerns about her interactions with others on the team. He advised that she needed to show immediate and sustained improvement to succeed in her role. CP 113 at 12; CP 157-164 at pp. 7-8; CP 234 at ¶ 11. Ms. Simmons initially showed some improvement, but it did not last. CP 234 at ¶ 11. In March 2012, Mr. Arsenault again addressed these performance issues and set forth his expectations moving forward. CP 113 at 12; CP 157-164 at pp. 7-8; CP 234 at ¶ 11.

Despite Mr. Arsenault's direct feedback and coaching, Ms. Simmons did not sustain her short-lived improvement. CP 234-235 at ¶

12. Over the next few months she had regular conflict with others on the team and refused to take accountability for her actions. *Id.* As a result, Mr. Arsenault spent an inordinate amount of time away from his own tasks in an effort to address these issues and manage her performance. *Id. See also, e.g.*, CP 114 at 3-10; CP 119 at 20-21; CP 165-168; CP 115 at 3-8; CP 169-170; CP 116 at 18-25; CP 117 at 1-3; CP 171; CP 176-178.

In June 2012, Mr. Arsenault again asked Human Resources for guidance on how to address these issues with Ms. Simmons and help her meet basic performance expectations. *See, e.g.*, CP 118 at 22; CP 172-175; CP 235 at ¶ 14. He also continued to work with Ms. Simmons and Mr. Sexsmith in an effort to improve their relationship. *See, e.g.*, CP 120 at 22-25; CP 121 at 1-4; CP 179-181; CP 235 at ¶ 15.

In August 2012, Mr. Arsenault met with Ms. Simmons again to discuss her performance and reiterated how critical it was that she work cooperatively with Mr. Sexsmith. CP 235 at ¶ 16; CP 122 at 18-24; CP 182-183. Ms. Simmons denied she had any issues and instead blamed Mr. Arsenault and Mr. Sexsmith. CP 182-183. Later that day, Mr. Arsenault reminded Ms. Simmons there had been little improvement in her performance and advised her to reflect on why. CP 182. Despite Mr. Arsenault's frank feedback, Ms. Simmons continued to have issues working cooperatively with Mr. Sexsmith. CP 235 at ¶ 16.

In September 2012, Mr. Arsenault provided Ms. Simmons with her annual performance review, this time giving her a "5", which was the lowest rating. CP 124 at 14-25; CP 125 at 1-8; CP 235 at ¶ 17. The review reflected his frustrations and concerns with Ms. Simmons' ongoing performance issues. CP 235 at ¶ 17; CP 123 at 8-25; CP 184-203. Ms. Simmons disagreed with Mr. Arsenault's assessment of her performance, refused to sign her review, and rejected the idea that she had any performance issues at all. CP 125 at 7-25; CP 126 at 1-24; CP 127 at 4-25; CP 136 at 25; CP 137 at 1-7.

Nevertheless, Mr. Arsenault still hoped Ms. Simmons would take his feedback to heart and improve her performance. CP 235 at ¶ 17. To this end, in September 2012 he asked her to create a performance plan and suggested she take a training class on interpersonal awareness. CP 128 at 24-25; CP 129 at 1-10; CP 134 at 5-8; CP 235 at ¶ 17.

Meanwhile, through the remainder of 2012 and into January 2013, Ms. Simmons' performance issues continued. *See, e.g.*, CP 130 at 2-10; CP 208-216; CP 130 at 24-25; CP 131 at 1-12; CP 217-220; CP 236 at ¶¶ 23-24; CP 135 at 10-17; CP 225-227. In late January 2013, Mr. Arsenault again reminded Ms. Simmons of the previously-identified areas for improvement and reiterated his expectations and concerns. CP 132 at 23-25; CP 133 at 1-4; CP 221-224. By late January 2013, Ms. Simmons still

had not provided the performance plan Mr. Arsenault requested from her after her September 2012 performance review. CP 237 at ¶ 28. Mr. Arsenault emailed Ms. Simmons regarding this issue and related concerns. CP 132 at 23-25; CP 133 at 1-4; CP 221-224.

Throughout this time, other team members voiced concerns about Ms. Simmons to Mr. Arsenault and Human Resources, and Mr. Arsenault continued to work with Human Resources in his effort to manage and improve Ms. Simmons' performance. *See, e.g.*, CP 236-237 at ¶¶ 25-27; CP 249 at ¶ 8; CP 251-254.

Ms. Simmons' performance issues continued into February 2013. *See, e.g.*, CP 135 at 10-17; CP 225-227; CP 237 at ¶ 29. At this point, Mr. Arsenault consulted with Human Resources and decided to terminate Ms. Simmons' employment. CP 237 at ¶ 30. As Mr. Arsenault's EA, Ms. Simmons' role was to provide administrative support so he could work as efficiently and effectively as possible in meeting his multiple commitments and demands on his time. *Id.* Instead, Ms. Simmons prevented him from working efficiently as he had to spend inordinate amounts of time debating with her about her performance issues and seeking to resolve conflicts involving her. *Id.* Unfortunately, Mr. Arsenault did not see the improvement he expected or any indication she would improve sufficiently in the near future. *Id.* Ms. Simmons' ongoing

performance issues, coupled with the demands of the business, drove the need for change. *Id.* On February 11, 2013, Ms. Simmons' employment was terminated. CP 137 at 25; CP 138 at 1-12; CP 228; CP 237 at ¶ 30.

Shortly after Ms. Simmons' separation, Sara Young, a Business Administrator in Mr. Arsenault's group who had worked directly with Ms. Simmons, started managing Mr. Arsenault's calendar. CP 237-238 at ¶¶ 33-34. In approximately March 2013, Ms. Young began working as his interim EA. CP 238 at ¶ 34. In May 2013, following an open hiring process, Mr. Arsenault hired Ms. Young as his fulltime EA.[1] *Id.* Ms. Young has performed well in the role. CP 238 at ¶ 34. The conflicts that occurred throughout Ms. Simmons' tenure ended when Ms. Simmons left. CP 237 at ¶ 32.

F. Procedural History

In September 2014, Ms. Simmons filed this lawsuit, alleging age and race discrimination. On July 31, 2015, the trial court summarily dismissed her claims. On July 5, 2016, Division I affirmed.

[1] In her statement of the case, Ms. Simmons references Ms. Young as being "white." (Petition at 7) This reference should be stricken or, at a minimum, ignored, as nothing in the record indicates Ms. Young's race.

III. ARGUMENT

A. Discretionary Review Standard

Ms. Simmons seeks review on two bases under RAP 13.4: the Opinion (1) directly conflicts with a Supreme Court decision, *Scrivener v. Clark College*, 181 Wn.2d 439, 334 P.3d 541 (2014) ("*Scrivener*"); and (2) misconstrues the *McDonnell Douglas* burden-shifting standard and involves an issue of substantial public interest that should be determined by the Supreme Court. As explained below, neither basis has merit and her petition should be denied.

B. The Opinion is Entirely Consistent with *Scrivener*

Ms. Simmons first argues the Opinion conflicts with *Scrivener* because Division I disregarded (1) "the remarks by the decision maker as insufficient to give rise to an inference of discriminatory intent" and (2) her "evidence of inconsistent reasons for her termination." (Petition at 9-10) Both assertions are completely incorrect and should be rejected.

As to the first assertion, Ms. Simmons refers to "remarks" – i.e., in the plural – but the *only* remark at issue is Mr. Arsenault allegedly stating with respect to a different Pacific Islander that he was "bringing in the real kahuna." Division I properly affirmed that remark did not suffice to create a material dispute of fact warranting a trial on Ms. Simmons' race claim. This is fully consistent with *Scrivener*. As Ms. Simmons addresses the

alleged "real kahuna" remark in connection with her "substantial public interest" argument, Microsoft discusses it below at pp. 12-18.

Ms. Simmons' "inconsistent reasons" assertion is also without merit. *Scrivener* does not even address this issue. As such, Division I's alleged failure to properly review it could not create a direct conflict with *Scrivener*. Regardless, Ms. Simmons' argument would fail in any event. On appeal, she tried to show inconsistencies through Mr. Arsenault's declaration, in which he said he was concerned with her "interactions with others" and in the same paragraph referred to such conduct as "performance issues." (Opinion at 14) There is nothing inconsistent about these statements, and the reasons given for terminating Ms. Simmons' employment have always focused on aspects of her performance and its impact on the business, particularly her communication style and difficulty working with others on the team. Division I properly concluded Microsoft had consistently articulated its reason for termination as due to "her performance issues related to lack of interpersonal, communication, and collaboration skills as well as her ongoing conflict with [Ken] Sexsmith." (*Id.*)

C. Division I Did Not Misconstrue *McDonnell Douglas* or Create a Substantial Public Interest Issue

Ms. Simmons also seeks review because the Opinion purportedly misconstrues the *McDonnell Douglas* burden-shifting analysis and thus creates a substantial public interest issue. (Petition at 10-17) To this end, she claims Division I improperly (1) focused on the objective meaning of the "real kahuna" comment rather than Ms. Simmons' subjective perception of it and (2) accepted Microsoft's characterization of her performance. Both arguments are without merit.

1. Division I Properly Reviewed the Alleged "Real Kahuna" Comment

Ms. Simmons' subjective view of the alleged "real kahuna" comment is legally irrelevant and does not present an issue for review. She alleges that in 2011, about 15 months before her employment was terminated, when Mr. Arsenault hired Brian Fielder (who was from Hawaii) for a leadership position on his team, Mr. Arsenault (who had hired and worked with Mr. Fielder before and considered him a talented addition to his team) told Ms. Simmons he was "bringing in the real kahuna." (Opinion at 11) She did not ask him what he meant or otherwise discuss this alleged comment with him. (Opinion at 16)

For three reasons, Division I – applying the *Scrivener* standard – found Mr. Arsenault's alleged "real kahuna" comment did not indicate an

animus toward Pacific Islanders or create a triable issue of fact: (1) the comment was allegedly made more than one year before Ms. Simmons' separation, (2) the record showed Mr. Arsenault had worked with Mr. Fielder and considered him a friend, and (3) Ms. Simmons' argument was based solely on her subjective negative interpretation of the phrase, while the objective meaning was complimentary. (Opinion at 16-18)

Ms. Simmons seeks review based on the third reason. To this end, she contends that if the objective—rather than subjective—meaning of "real kahuna" is what matters, then plaintiffs in employment discrimination cases will face an additional burden of proving an employer's explanation of such comments is unworthy of credence. (Petition at 11-12) This is not the law and plainly not a legitimate substantial public interest concern. Simply put, there is and must continue to be an objective standard when reviewing allegedly discriminatory comments. Were it otherwise, regardless of how positive or non-discriminatory a comment is on its face, who said it, when it was said, or even whom it is about, an employer could face trial simply because an employee said she perceived a comment as evidencing discriminatory animus towards her.

Indeed, Ms. Simmons wants the Court to review and reverse Division I's Opinion and send this case to trial even though Mr. Arsenault

undisputedly hired another Pacific Islander, the "real kahuna" comment (if made at all) was made more than one year prior to Ms. Simmons' separation, and the record shows Mr. Arsenault did not know her father was not Pacific Islander, thus undermining even her subjective belief of what he meant by the alleged comment. This would be contrary to relevant law and, for that matter, common sense, and no substantial public interest would be served by turning the law on its head.

Ms. Simmons argues that focusing on the objective meaning of comments could result in employees being subjected to "volumes of subtly racist, ageist, and otherwise disconcerting comments...." (Petition at 13) This, too, is contrary to relevant law and does not create a substantial public interest issue. It also fails factually as Ms. Simmons did not allege "volumes" of comments. Rather, she has alleged only one. Further, her implication that Division I failed "to determine whether what took place was, in fact, grounded in an unlawful pretext" (Petition at 13) falls flat as this is exactly what Division I did. She may disagree with the Opinion, but she based her entire race claim on one neutral, complimentary comment made about another Pacific Islander more than one year before her employment was terminated.

Ms. Simmons points to this Court's *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 285 P.3d 854 (2012) decision for the

proposition that alleged discriminatory comments should be placed in context rather than reviewed in isolation. (Petition at 13) That case is readily distinguishable and does not change the analysis here.

Unlike the instant case, *Loeffelholz* involved a hostile work environment claim based on sexual orientation. The Court reviewed the manager's statement that he would return from his deployment to Iraq "a very angry man" in the context of numerous prior comments and actions. For example, he previously asked plaintiff if she was gay and then told her not to "flaunt it" around him (*id.* at 268), told other employees he disliked her because she was gay and overweight (*id.* at 269), and asked other employees for information about her so he could fire her (*id.*). He told plaintiff he had a gun in his vehicle and had anger management issues. *Id.* at 268. He revoked her flexible work schedule, denied her overtime and training opportunities, and refused to give her performance evaluations despite her repeated requests. *Id.* He also repeatedly alluded to his military training, use and proficiency in guns and firearms, killing people, and the like. *Id.* at 269. "When considering the totality of the circumstances" – including the types of conduct listed above – the Court concluded the "angry man" comment was sufficiently similar to and related to the previous comments as to preclude summary judgment. *Id.* at 275-76.

The only reason the "angry man" comment was at issue was because the prior conduct occurred before the Washington Law Against Discrimination was amended to prohibit discrimination based on sexual orientation and the amendment was not retroactive. Although the plaintiff could not recover based on pre-amendment conduct, "because of the unique nature of a hostile work environment claim, this unrecoverable conduct is admissible as background evidence to give context to the post-amendment 'angry man' comment." *Id.*

Thus, if anything, *Loeffelholz* entirely undermines Ms. Simmons' petition. In stark contrast to that case, there is no hostile work environment claim here and no other statements or acts which create context for the alleged "real kahuna" comment. Division I's analysis was entirely proper and consistent with the record.

Ms. Simmons next argues Division I created "too onerous a burden" for employment discrimination plaintiffs by requiring them to "disprove the neutrality" of language such as the "real kahuna" comment at issue here. (Opinion at 14-15) This, too, is without merit. Microsoft did not place the alleged "real kahuna" comment at issue in this case. Ms. Simmons did. Like any plaintiff, it was her burden to prove the alleged comment presents a triable issue of fact. Again, she presented nothing in the record by which to survive summary judgment.

Ms. Simmons strains mightily in contending Division I improperly focused on the individual word "kahuna" rather than the phrase "real kahuna." (Petition at 15) "Kahuna" is defined as "native master of a craft or vocation." (Opinion at 17, n.8) Its plain meaning is complimentary regardless of whether the "real" is added or not, and adding "real" could not have been aimed at insulting Ms. Simmons as it is undisputed Mr. Arsenault did not know her father was not Pacific Islander. Further, if anything, Mr. Arsenault's decision to hire and retain Mr. Fielder (who, again, is Pacific Islander) in 2011 completely undermines any notion of racial animus towards Ms. Simmons and instead supports Division I's ruling that the comment was insufficient to present a triable issue of fact that her race was a substantial motivating factor in the decision to terminate her employment in 2013.

Ms. Simmons' effort to distinguish the *Ya-Chen Chen* and *Montes* cases cited in the Opinion also presents no basis for review. (Petition at 14-16)

Ms. Simmons refuses to recognize the similarities between the *Ya-Chen Chen* plaintiff and herself. Just like Ms. Simmons, that plaintiff tried to point to non-discriminatory words—"collegiality" and "stop"—as evidence of discrimination. In affirming dismissal of the plaintiff's claims, the Second Circuit stated, "even if sincerely held, a plaintiff's

feelings and perceptions of being discriminated against do not provide a basis on which a reasonable jury can ground a verdict." (Opinion at 17); *Ya-Chen Chen v. City Univ. of N.Y.*, 805 F.3d 59, 74-75 (2d Cir. 2015) (citations and quotations omitted). Even though this statement applies to Ms. Simmons' situation just as much as—if not more than—it did to that plaintiff, Ms. Simmons challenges Division I's reliance on it and insists her subjective interpretation of "real kahuna" is what matters. Her understanding of the law is inaccurate.

Ms. Simmons' reliance on *Montes* is equally unavailing. In that case, the Haitian plaintiff was referred to as "la bête noir" at least three times. *Montes v. Greater Twin Cities Youth Symphonies*, 540 F.3d 852 (8th Cir. 2008). The Eighth Circuit concluded that even though the literal meaning of the phrase was "the black beast," it had been integrated into the English language as a race-neutral statement meaning "one that is particularly disliked or that is to be avoided" and the comment therefore did not create a triable issue of discrimination. *Id.* at 854, 858-59. If the facts in *Montes* were insufficient to establish a triable issue , so, too, are the facts here—and even more so. Indeed, unlike in *Montes*, the alleged "real kahuna" comment was positive in nature, used to describe someone other than Ms. Simmons, and made only one time more than a year before the termination decision was made.

2. Division I Properly Reviewed the Parties' Declarations and Exhibits Thereto

Finally, Ms. Simmons vaguely alleges Division I improperly believed statements made in Microsoft's declarations regarding her performance and termination rather than giving credence to her views on these topics. (Petition at 16-17) It is not clear which declarations or statements Ms. Simmons has in mind, but, regardless, plaintiffs in employment discrimination cases cannot establish discrimination or create a genuine issue of fact merely by disagreeing with their employers' stated reasons for termination. *See, e.g., Fulton v. DSHS*, 169 Wn. App. 137, 162, 279 P.3d 500 (2012). They must instead tie the decision to a protected class (e.g., race or age), which is exactly what Ms. Simmons failed to do. *Id.* at 148 n.16. Division I did not weigh the evidence and decide to believe Microsoft over Ms. Simmons. Rather, Ms. Simmons failed as a matter of law to produce any evidence creating a triable issue of fact on her claims.

IV. CONCLUSION

Ms. Simmons has not met her burden under RAP 13.4 to establish a basis or reason for review of the Opinion. Her petition should be denied.

DATED this 30th day of September, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of September, 2016 I served a true and correct copy of the foregoing Respondent's Answer to Petition for Review at the address stated below, via the method of service indicated below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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