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 9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 JAMES DAVID ROGERS,

16 Defendant.

CR No. 19-00700-JAK-1

GOVERNMENT'S SENTENCING
 MEMORANDUM; DECLARATION AND
 EXHIBITS

Hearing Date: 09/08/2022
 Location: Courtroom of the
 Hon. John A.
 Kronstadt

18 Plaintiff United States of America, by and through its counsel
 19 of record, the Acting United States Attorney for the Central District
 20 of California and Assistant United States Attorney Sara Milstein,
 21 hereby files its Sentencing Memorandum as to defendant JAMES DAVID
 22 ROGERS.

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1 This Sentencing Memorandum is based upon the attached memorandum
2 of points and authorities, the declaration of Sara Milstein and
3 attached exhibits, the files and records in this case, and such
4 further evidence and argument as the Court may permit.

5 Dated: 8/9/2022

Respectfully submitted,

6 STEPHANIE S. CHRISTENSEN
Acting United States Attorney

7
8 SCOTT M. GARRINGER
Assistant United States Attorney
Chief, Criminal Division

9
10 /s/

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SARA MILSTEIN
Assistant United States Attorney

12 Attorneys for Plaintiff
13 UNITED STATES OF AMERICA
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 For twelve long years, defendant JAMES DAVID ROGERS
4 ("defendant") terrorized a mother and her child by threatening to
5 torture, rape, and kill them. His indictment in this case forced
6 defendant out of the shadows and into the light, where he must now
7 face the consequences of his heinous conduct.

8 **II. STATEMENT OF FACTS**

9 In March 2007, defendant began a campaign of torment that he
10 would continue until his arrest in 2019. Obsessed with Victim 1 and
11 fixated on harming her, defendant learned Victim 1's address and
12 began sending her handwritten letters in which he promised to
13 torture, rape, and kill her. Defendant signed each letter in the
14 name of the fictional serial killer, Freddy Krueger.¹ In the year
15 2007, alone, defendant sent eleven threat letters to Victim 1. His
16 letters were meant to terrify and intimidate, and defendant succeeded
17 in that aim from the start. In one early letter from 2007, for
18 example, defendant told Victim 1 that the previous "Mother's Day may
19 be your last. I have been thinking how I am going to rape and kill
20 you and your daughter. . . . Maybe I must go see you in Los
21 Angeles." Ex. A.²

22 In another letter from 2007, defendant said he planned to rape
23 Victim 1 and her daughter, and then "kill you both and chopped [sic]
24 your bodies into small peices [sic]. I am going to enjoy killing you
25

26 ¹ Sometimes, defendant would spell the first pseudonym
27 "Freddie," or would sign his letters only with his first (fictional)
name.

28 ² Each lettered exhibit is attached to and incorporated into the
Declaration of Sara Milstein, filed herewith.

1 I hate you and I will destroy you. I want you to die bitch a most
2 horrible death. Before you die I want you to watch how I will rape
3 and kill what you treasure most[,] your daughter." Ex. B.

4 In 2008, defendant's obsession deepened and broadened in scope.
5 He sent nineteen threat letters, addressing them not only to Victim
6 1, but also to Victim 1's romantic partner at the time, and to Victim
7 2, who is Victim 1's minor child. In these letters, defendant upped
8 the stakes and multiplied his threats. He wrote to Victim 1, "Maybe
9 if we meet I won't hurt your boyfriend and daughter. I will see you
10 soon." Ex. C. In another letter, defendant taunted, "I am enjoying
11 stalking you. I am going to instill fear in every part of your
12 life." Ex. D. In yet another letter, he wrote, "Your husband will
13 not be able to save you. . . . You are a weak and vulnerable woman
14 who I am going to take advantage of it [*sic*]." Ex. E.

15 He also directed multiple threat letters to Victim 1's partner.
16 "I am writing to you to tell you to stay away from my woman, [Victim
17 1]. You need to break it off with her. I will kill you and [Victim
18 1]. She belongs to me. She is my property." Decl. ¶ 16.

19 Defendant's threats were relentless -- sometimes, he sent a
20 threat letter just one day after sending the previous one. Through
21 his incessance and violent rhetoric, defendant lived up to his pledge
22 that "my main mission in life is to stalk you rape you, and terrify
23 you. I want to make your life so miserable that you can't stand it."
24 Ex. F. The constant letters gave Victims 1 and 2 no respite from
25 fear that defendant would find them and attack them.

26 Defendant also made clear that his threats were founded in his
27 genuine intent to act. He wrote to Victim 1, "You should take me
28 seriously, [Victim 1]. I can do a great deal of damage to you and

1 your precious daughter, [Victim 2]. I would think you would want to
2 stop me for your daughter's safety. If I get ahold over [sic] her
3 you will be destroyed. You should be very scared of me. . . .
4 You're a great target for being raped. I am looking forward to rape
5 [sic] and kill [sic] you. I will talk to you soon." Ex. G.

6 Defendant's threats impacted the daily lives of his victims.
7 Victims 1 and 2 moved numerous times in hopes that defendant would
8 not find them again. They drove circuitous routes home, slept with
9 weapons nearby, and had discussions about how to seek help quickly if
10 defendant found them and tried to harm them. They tried to anonymize
11 their addresses as much as possible by avoiding receiving mail and
12 packages at their actual address. To no avail. Each time they
13 moved, defendant's letters -- and the victims' terror -- would always
14 follow. And defendant knew it. "I am back to stalk you," he wrote.
15 Ex. E. "I am going to find out where you live and rape you and your
16 daughter. Your husband will not be able to save you," he went on.
17 Id. Once he would find a new address, defendant made sure to let his
18 victims know and continue his threats. In one letter, defendant
19 wrote, "I have finally found you my dearest whore. I am going to
20 take my revenge upon you and your daughter [Victim 2]. There will be
21 no place on this earth that I can [sic] find you." Ex. H.

22 Defendant's letters to Victim 2, a minor child at the time, were
23 just as disturbing. In one letter sent to Victim 2's school, he
24 again identified himself as "Freddie Krueger," and "the stalker who
25 forced [Victim 1] out of her house 10 years ago." Ex. I. Defendant
26 menaced, "Now I am going to stalk you. . . . I am going to rape you
27 and make you pregnant with our child. . . . Then I will kill you and
28 the bitch of a mother you call [Victim 1]." Id.

1 In the weeks leading up to his arrest, defendant escalated his
2 tactics -- he repeatedly tried to make direct contact with Victim 2
3 by telephone. On October 23, 2019, defendant called Victim 2's
4 school and claimed to be her father. He asked a school
5 administrative assistant to confirm that Victim 2 was present at
6 school that day, and asked to speak with her. Before Victim 2 could
7 get on the phone, defendant instructed the administrative assistant
8 to have Victim 2 to call him back, and hung up the phone. Victim 2
9 then spoke with her mother, Victim 1, who contacted Victim 2's real
10 father and confirmed that he had not, in fact, called the school
11 looking for Victim 2. Decl. ¶ 11(a).

12 The next day, at approximately the same time, defendant called
13 Victim 2's school, asked if she was there, and said he needed to
14 speak with her. On October 30, 2019, at approximately the same time,
15 defendant called the school again. Defendant again identified
16 himself as Victim 2's father and asked to leave a message for
17 Victim 2 before hanging up. Decl. ¶ 11(b).

18 Then, on or about November 7, 2019, after regular school hours,
19 defendant left a haunting voicemail for Victim 2 by name. He said,
20 "Hello, I want to leave a message for [Victim 2]. This is the man
21 who is gonna rape her, molest her, and kill her. My name is Freddy
22 Krueger. Just let her know. Thank you." Ex. J.

23 Defendant proceeded to call Victim 2's school five more times on
24 November 11, 2019. Phone records show that defendant called Victim
25 2's school approximately 18 times in all. Decl. ¶ 11(c).

26 On November 12, 2019, the FBI arrested defendant. At the same
27 time, they executed a search warrant for his residence and digital
28 devices. They found a cell phone with numerous photographs of

1 Victims 1 and 2 on it, and the cell phone bore the same number as the
2 one that had repeatedly called Victim 2's school. The call log on
3 defendant's phone listed no recent calls, denoting that defendant had
4 deleted his call history. Decl. ¶ 11(d).

5 Prior to defendant's arrest, the FBI performed surveillance on
6 defendant at his place of work, a retirement and assisted living
7 facility. There, they saw defendant being fully mobile: sitting and
8 standing, walking normally, speaking professionally and coherently,
9 and performing duties without apparent difficulty. Decl. ¶ 13.

10 **III. GUIDELINES CALCULATIONS**

11 On July 22, 2022, the United States Probation Office disclosed
12 the Presentence Report ("PSR") and recommendation letter ("PSA
13 Letter"). (ECF Nos. 50-51.) The PSR provides the following
14 calculation for the group of related counts leading to the highest
15 offense level, per the United States Sentencing Guidelines, Nov. 1,
16 2021 ed. ("USSG" or "Sentencing Guidelines"):

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1	Base Offense Level	:	18	[USSG § 2A6.2(a)]
2	Threatened Use of Weapon	:	+4	[USSG §§ 2A6.2(b)(1)(D), (E)]
3	and Pattern of Stalking	:		
4	Victim Related Adjustment:	:	+2	[USSG § 3A1.1(b)(1)]
5	Multi-Count Adjustment	:	+2	[USSG § 2D1.1(b)(2)]
6	Acceptance of	:		
7	Responsibility	:	-3	[USSG § 3E1.1(a), (b)] ³
8	Total Offense Level	:	23	

8 PSR ¶¶ 2-31.

9 Accordingly, the government believes that defendant's total offense
 10 level is 23. As to defendant's criminal history calculation, the
 11 government concurs with the PSR's conclusion that defendant is in
 12 Criminal History Category I. The resulting Guidelines range is 46-
 13 57 months' imprisonment.

14 For the reasons stated below, the government asks that the Court
 15 impose a 57-month sentence of imprisonment, to be followed by a
 16 three-year term of supervised release, and the mandatory special
 17 assessments that total \$500. The government defers to the PSR's
 18 determination that defendant does not have the ability to pay a fine

21 ³ The government would ordinarily decline to move for the one-
 22 point reduction under U.S.S.G. § 3E1.1(b) in this case because
 23 defendant did not "assist[] authorities in the investigation or
 24 prosecution of his own misconduct by timely notifying authorities of
 25 his intention to enter a plea of guilty." U.S.S.G. § 3E1.1(b); see
 26 also United States v. Medina-Beltran, 542 F.3d 729, 731 (9th Cir.
 27 2008) (per curiam); United States v. Hopper, 27 F.3d 378, 385 (9th
 28 Cir. 1994). Quite the contrary. Defendant did not agree to enter a
 guilty plea in this case until approximately 2 years and 4 months
 after indictment, and approximately 1 year and 9 months after a plea
 agreement was issued and rejected. Defendant's delay is particularly
 egregious, given that the victims in this case continued to fear for
 their lives while defendant is released on bond. However, given the
 unusual circumstances of the pandemic and the unique difficulties it
 placed on both defendants and their counsel, the government will move
 for a one-point reduction under § 3E1.1(b) here.

1 and does not object to a waiver of the fine. PSR ¶¶ 89-90; PSA
2 Letter at 1.

3 **IV. SPECIFIC OFFENSE CHARACTERISTICS**

4 The PSR recommends the application of specific offense
5 characteristic enhancements to reflect defendant's threatened use of
6 a weapon, his pattern of stalking, and his victimization of a child.
7 The government concurs in these recommendations and respectfully
8 urges the Court to hold defendant to account for these uniquely
9 harmful aspects of his crimes.

10 **A. Defendant's Threats Involved the Use of a Dangerous Weapon
11 and Involved a Pattern of Stalking**

12 The Guidelines provide that the base offense level for stalking,
13 eighteen, may be increased two levels if an offense involved one of
14 five specified aggravating factors, including the "possession, or
15 threatened use, of a dangerous weapon" or a "pattern of activity
16 involving stalking, threatening, harassing, or assaulting the same
17 victim." USSG §§ 2A6.2(a), (b)(1)(D-E). If the offense involved more
18 than one of the five specified aggravating factors, the district
19 court may increase by four levels. Id. § 2A6.2(b)(1). The plain
20 language of § 2A6.2(b)(1)(D) requires either possession or threatened
21 use of a dangerous weapon, indicating that the latter alone is
22 sufficient grounds for the enhancement to apply. See United States
23 v. Yilmaz, 910 F.3d 686, 688 (2d Cir. 2018) (citing cases).

24 Comments to the Guidelines define a "dangerous weapon" as:

25 (i) an instrument capable of inflicting death or serious
26 bodily injury; or (ii) an object that is not an instrument
27 capable of inflicting death or serious bodily injury but
28 (I) closely resembles such an instrument; or (II) the
defendant used the object in a manner that created the
impression that the object was such an instrument (e.g. a
defendant wrapped a hand in a towel during a bank robbery

1 to create the appearance of a gun).

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3 Id. § 1B1.1 cmt. n.1(E).

4 Here, defendant threatened all manner of bodily harm to Victims
5 1 and 2. These threats included the use of a dangerous weapon,
6 including the one he would use to “kill you both and chopped [*sic*]
7 your bodies into small peices [*sic*].” Ex. B. In another letter,
8 defendant said he would “slit you from throat to pussy.” Decl ¶ 14.
9 Although defendant does not specify what type of dangerous weapon he
10 would use to “chop[]” the victims’ bodies or “slit” Victim 1’s
11 throat, he clearly implied the use of a knife. See United States v.
12 Walker, 665 F.3d 212, 232 (1st Cir. 2011) (referring to appellant’s
13 vow to “blow [the victim’s] head off” as a “prototypical example” of
14 evidence that “the appellant placed [the victims] in fear of harm
15 through, in part, threats to use a gun”).

16 The Application Notes define a “pattern” as “any combination of
17 two or more separate instances of stalking, threatening, harassing,
18 or assaulting the same victim, whether or not such conduct resulted
19 in a conviction.” Id. 2A6.2 app. n. 1. In this case, defendant has
20 conceded he engaged in a years’ long “course of conduct” that
21 involved threatening Victims 1 and 2 by letter and voicemail. See
22 ECF No. 38 ¶ 11. This admission, coupled with the fact that he sent
23 scores of threat letters over twelve years and left a threatening
24 voicemail for Victim 2, easily constitutes a “pattern” within the
25 meaning of USSG § 2A6.2(a), (b) (1) (E).

26 **B. Defendant Preyed on a Vulnerable Victim**

27 The Guidelines apply a two-point enhancement “if defendant knew
28 or should have known that a victim of the offense was a vulnerable

1 victim." USSG § 3A1.1(b)(1). The Guidelines define "vulnerable
2 victim" as a person "who is unusually vulnerable due to age, physical
3 or mental condition, or who is otherwise particularly susceptible to
4 the criminal conduct." Id. cmt. 2.

5 In this case, Victim 2 was a minor at the time he stalked and
6 threatened her, and defendant knew Victim 2 was a minor. Defendant's
7 letters show that he closely stalked Victim 1 for over a decade and
8 knew Victim 1 had a young daughter at the time. He also possessed
9 pictures of Victims 1 and 2 on the cell phone found in his house.
10 And in his various letters to Victim 2, defendant referred to Victim
11 2's youth, including her virginity, and "rob[bing] her of her
12 innocense [*sic*]." Decl ¶ 15. He referred to Victim 1 as Victim 2's
13 "mommy," and wrote, "I want you to be very afraid of the boggy [*sic*]
14 man." Id. In later letters, he noted that Victim 2 had "grown to be
15 a beautiful young woman." Id. And he stalked Victim 2 at her school
16 by mail and telephone, the latter in which he posed as her father to
17 try to gain access to her. All of these facts denote that defendant
18 had actual knowledge of Victim 2's youth and her status as a minor.

19 **V. ANALYSIS OF THE SECTION 3553(A) FACTORS**

20 The government submits that the factors set forth at 18 U.S.C.
21 § 3553(a) would be fulfilled by a custodial sentence of no less than
22 57 months, followed by three years' supervised release.

23 **A. 18 U.S.C. § 3553(a)(1)**

24 Section 3553(a)(1) requires the Court to consider the nature and
25 circumstances of the offense, as well as the history and
26 characteristics of defendant. Here, defendant engaged in a 12-year-
27 long campaign that terrorized a mother and daughter and effectively
28 evicted them from their homes each time defendant found them. But

1 Victims 1 and 2 were not defendant's sole targets; defendant also
2 threatened and stalked Victim 1's romantic partner at the time by
3 sending him threatening letters. The Guidelines actually undercount
4 the scope of defendant's conduct, because they do not account for
5 defendant's threat letters to Victim 1's romantic partner, to whom
6 defendant sent at least two letters with murder threats. See PSR
7 ¶ 31. The unaccounted-for victim of defendant's crimes, as well as
8 the scope and extent of defendant's threats toward Victims 1 and 2,
9 justify the imposition of a high-end sentence here, followed by the
10 maximum term of supervised release.

11 In mitigation, defendant said in his PSR interview that he had
12 learning difficulties as a child and that his father was unhappy and
13 an alcoholic. See PSR ¶ 47-49. Defendant reported having had a
14 happy respite from these difficulties while he resided with his
15 grandparents before returning to live either one parent or another.
16 Upon his return, he struggled in school, was a social outcast, and
17 was bullied. See id. ¶¶ 50-55. Despite these obstacles, defendant
18 graduated from high school, sought to serve in the military but was
19 discharged, and got an associate's degree. Id. ¶ 56-58.

20 Defendant now claims that he has difficulty standing and is
21 "barely able to walk." Id. ¶ 65. This representation is highly
22 suspect and should not be used in mitigation. Just a day before
23 defendant's arrest, the FBI performed surveillance on defendant at
24 the retirement and assisted living facility where he worked as a
25 nurse's assistant. There, agents saw a fully mobile defendant: they
26 saw him sitting and standing, walking normally, speaking
27 professionally and coherently, and performing duties without apparent
28 difficulty. Decl. ¶ 13. That defendant was -- and perhaps still is

1 -- able-bodied is consistent with the demands of his job title. The
2 Ohio Department of Job and Family Services provides that nursing
3 assistants “[p]rovide basic patient care under direction of nursing
4 staff. Perform duties such as feed, bathe, dress, groom, or move
5 patients, or change linens. May transfer or transport patients.”⁴

6 The government does not believe that defendant’s social or
7 family histories mitigate, justify, or explain his horrific behavior
8 in this case. Nor does it make him less dangerous or capable of
9 reoffending and engaging in threatening behavior anew. Defendant can
10 freely threaten Victims 1 and 2 even if, as he claims, he cannot
11 stand or walk well. Even if this Court credits defendant’s statement
12 that he is mobility challenged, the government does not believe this
13 challenge gives this Court cause to sentence defendant below the
14 high-end of the Guidelines, 57 months’ imprisonment. Defendant does
15 not deserve this Court’s mercy because he showed his victims none.
16 He should not obtain relief as a function of the Court’s solicitude
17 for other violators who, unlike defendant, may truly have mitigating
18 reasons for their behavior. This defendant does not.

19 Defendant’s portrayal of himself also stands in stark contrast
20 to the person he represented himself to be through 12 years of
21 threatening letters and calls. Before his arrest, defendant was
22 nurse’s assistant employed at a nursing home, where vulnerable
23 elderly and infirmed people reside. PSR ¶ 81. He claims to be the
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25 ⁴ Ohio Dep’t of Job & Family Services, Nursing Assistants - 31-
26 1014.00, available at
27 [https://jfs.ohio.gov/apprenticeship/program/Nursing-
28 Assistants.stm#:~:text=Nursing%20Assistants%20%2D%2031%2D1014.00%20%7C,of%20Job%20and%20Family%20Services&text=Provide%20basic%20patient%20care%20under,May%20transfer%20or%20transport%20patients](https://jfs.ohio.gov/apprenticeship/program/Nursing-Assistants.stm#:~:text=Nursing%20Assistants%20%2D%2031%2D1014.00%20%7C,of%20Job%20and%20Family%20Services&text=Provide%20basic%20patient%20care%20under,May%20transfer%20or%20transport%20patients) (last
visited Aug. 8, 2022).

1 caretaker for his elderly mother, who had a stroke. Id. ¶¶ 60-61.
2 For purposes of the PSR, defendant casts himself to be a mobility-
3 challenged man who cares for others and his mother. His actual
4 conduct could not be more at odds with those representations. Not
5 only did agents see him fully mobile and working and walking without
6 difficulty, but defendant made it a point to prey on vulnerable
7 people similar to the ones he claimed to care for. The government
8 submits that the version of defendant who lives a quiet life and
9 cares for the elderly and infirm is nothing but a mask. The real
10 defendant is the one he revealed over twelve years of stalking and
11 terrorizing a mother and child.

12 Defendant's criminal conduct and criminal history are otherwise
13 taken into account in the Guidelines when calculated properly under
14 the government's approach, and a custodial sentence of 57 months is
15 appropriate given these factors. The government also urges the Court
16 to impose the longest allowable term of supervised release -- 3 years
17 -- to protect the victims and deter defendant from reengaging in
18 stalking or threatening behavior.

19 **B. 18 U.S.C. § 3553(a)(2)**

20 Section 3553(a)(2) requires the Court to consider the need for
21 the sentence to reflect the seriousness of the offense, to promote
22 respect for the law, to provide just punishment for the offense, to
23 afford adequate deterrence to criminal conduct, to protect the public
24 from future crimes of defendant, and to provide defendant with any
25 needed training and guidance.

26 These factors also support a custodial sentence of 57 months.
27 If defendant were sentenced to serve any portion of his sentence
28 under house arrest or home confinement, it would give defendant free

1 rein to re-engage in his stalking behavior. After all, defendant
2 likely wrote all of his letters, made all of his phone calls, and
3 left his final voicemail all from the comfort of his own home.
4 Allowing him to stay at home would neither serve as punishment, nor
5 would it be an adequate specific deterrent. In this case, justice
6 requires both, and the Guidelines specifically provide that probation
7 and home confinement sentences are inappropriate for a person like
8 defendant. See USSG §§ 5B1.1, 5C1.1, 5F1.2.

9 **C. 18 U.S.C. § 3553(a)(6)**

10 Section 3553(a)(6) requires the Court to minimize sentencing
11 disparities among similarly situated defendants. Using the
12 Sentencing Guidelines to sentence defendant accomplishes this goal.
13 Similarly situated defendants with the same criminal history would
14 likely receive a sentence within the same range. See United States
15 v. Saeteurn, 504 F.3d 1175, 1181 (9th Cir. 2007) ("Our sister
16 circuits generally agree that 'Congress's primary goal in enacting
17 § 3553(a)(6) was to promote national uniformity in sentencing rather
18 than uniformity among co-defendants in the same case.'") (citations
19 omitted). Here, the recommended sentence falls within the applicable
20 Guidelines. A similarly situated defendant would be subject to the
21 same sentencing range.

22 **D. THE REMAINING 3553(a) FACTORS ALSO SUPPORT THE SENTENCE**
23 **REQUESTED BY THE GOVERNMENT**

24 Section 3553(a)(3) requires the Court to consider the kinds of
25 sentences available. A 57-month period of imprisonment, followed by
26 a three-year period of supervised release, is a fair sentence, given
27 the scope of harm of defendant's offense, the length of his course of
28 conduct, and the facts that defendant's conduct involved multiple

1 victims, one of whom was a minor for the extent of his offense
2 conduct, and another of whom (Victim 1's romantic partner) is not
3 accounted for by the Guidelines at all. The proposed sentence
4 provides punishment that is sufficient but not greater than necessary
5 to address the offense.

6 Sections 3553(a)(4) & (5) now merely require the Court to take
7 the sentencing Guidelines as "advisory."

8 **VI. CONCLUSION**

9 For the foregoing reasons, the government respectfully requests
10 that this Court sentence defendant to 57 months' imprisonment, 3
11 years' supervised release, and \$500 total in special assessments.

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