No. 20-30739

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERIE MOORE, JR.; TAMARA GREEN;
TIFFANY ROBINSON,
Plaintiffs-Appellants,

v.

LASALLE MANAGEMENT COMPANY, L.L.C., INCORRECTLY NAMED AS LASALLE CORRECTIONS, L.L.C.; RAY HANSON; GERALD HARDWELL; ROY BROWN; REGINALD WILLIAMS; KENNETH HART; DANIELLE WALKER; DUAN ROSENTHAL; JEREMY RUNNER; REGINALD CURLEY, INCORRECTLY NAMED AS REGINALD CURLY; CITY OF MONROE; SHERIFF OF OUACHITA PARISH; DONALD MURPHY; CHASE WELLS; TOMMY CROWSON, INCORRECTLY NAMED AS OFFICER CROWSON; WILLIAM MITCHELL, INCORRECTLY NAMED AS NURSE MITCHELL; ALTON HALE; RICHWOOD CORRECTIONAL CENTER, L.L.C.; ARCHIE AULTMAN, INCORRECTLY NAMED AS AULTMAN,
Defendants-Appellees,

On Appeal from the United States District Court for the Western District of Louisiana, USDC No. 3:16-CV-1007

BRIEF OF *AMICUS CURIAE* RIGHTS BEHIND BARS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 5th Cir. R. 28.2.1, the number and style of the case are as follows: *Moore v. LaSalle Management Company, L.L.C.*, 5th Cir. No. 20-30739. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Rights Behind Bars ("RBB") legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison are treated humanely.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amicus* or their counsel, contributed money that was intended to fund preparation or submission of this brief. Plaintiffs-Appellants and Defendants-Appellees consented to the filing of this brief.

INTRODUCTION

Over the last half-century, the doctrine of qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based. The text of 42 U.S.C. § 1983 (Section 1983) makes no mention of immunity, and the common law of 1871 did not include any freestanding defense for all public officials. With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in need of correction.

Qualified immunity can be justified, if at all, only as an interpretation of 42 U.S.C. § 1983, yet the present form of the doctrine is not a credible interpretation of that statute. As with any other law, judicial interpretation of Section 1983 must endeavor to determine the "Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). While the United States Supreme Court has recognized that Congress did not intend to abrogate "[c]ertain immunities [that] were so well established . . . when § 1983 was enacted" that "Congress would have specifically so provided had it wished to abolish them," *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quotation marks omitted), the broad exemption from suit that the Court has fashioned in its qualified immunity

decisions has no grounding in the common law immunities that existed when Section 1983 was passed, nor in any indicia of congressional intent.

We invite the Court to reverse the decision below based on its existing qualified immunity jurisprudence which has clearly foreclosed the availability of the defense of qualified immunity for employees of large for-profit companies who provide health services to correctional facilities on a contract basis. But because qualified immunity doctrine has strayed so far from statutory text and constitutional principles, virtually any further curtailing of this doctrine would mark an improvement. This brief requests that this Court join the growing chorus of justices and judges who have recognized the serious legal and practical problems with qualified immunity. *See, e.g., Kisela v. Hughes,* 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Crawford-El v. Britton,* 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt v. Cole*,

504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards."); *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring) ("there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work . . . . But immunity ought not be immune from thoughtful reappraisal."); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) ("Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity."); *Est. of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment.").

ARGUMENT

I. Modern Qualified Immunity Is at Odds with the Text and History of Section 1983.

A. The text and purpose of 42 U.S.C. § 1983 does not provide for any kind of immunity.

For the first time in 1967, the Supreme Court identified a good-faith defense to a 42 U.S.C. § 1983 false arrest suit on the narrow rationale that "the defense of good faith and probable cause" applied to the analogous "common-law action for false arrest and imprisonment." *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967). Soon, however, the Supreme Court began applying a qualified immunity defense to all § 1983 suits, without investigating whether any corresponding common law claim included such a defense. The Court revised its approach repeatedly, expanding the doctrine to protect an ever-broadening array of official misconduct, until it reached its current formulation of the "objective test" in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The invention and expansion of qualified immunity rests on multiple errors, not least of which being the Court's fundamental deviation from the text and purpose of 42 U.S.C. § 1983. In the aftermath of the Civil War, Congress passed § 1983 allowing plaintiffs to sue state defendants for violations of their constitutional rights, with the concrete purpose to "combat lawlessness and civil rights violations in the southern states." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 49 (2018). Notably, "the statute on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language simply states that any person acting under state authority who causes the violation of a protected right "shall be liable to the party injured." As the Supreme Court has

recognized, the language of § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980).

Section 1983's unqualified textual command makes sense in light of this historical context. Indeed, its statutory purpose would have been undone by anything resembling modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years earlier, in 1868, and the full implications of its broad provisions were not "clearly established law" by 1871. If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless.

B. From the founding through the passage of Section 1983, good faith was not a defense to constitutional torts.

"Congress is understood to legislate against a background of common-law adjudicatory principles," *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457 (2012) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria*, 501 U.S. at 108 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). In the context of qualified immunity, therefore, the Supreme Court frames the issue as whether or

not "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)). But the historical record shows that the common law of 1871 did not, in fact, provide for such immunities on behalf of government officials, because "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55–58 (2018).[2] Strict official accountability for public officials began at the founding and persisted through Reconstruction, both before and after the enactment of § 1983. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* § 1676 (4th ed. 1873) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed."); *see also Mitchell v. Harmony*, 54 U.S. 115, 133–35, 137 (1851) (upholding a monetary award

[2] By contrast, judicial and legislative immunity from suits for actions arising out of the course of their duties were well-recognized since at least the sixteenth century as fundamental to the functioning of the legislative and judicial branches. *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (explaining that "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation."); *Pierson*, 386 U.S. at 553–54 (describing judicial immunity as fundamental to the legal system dating back to the English common law system). Immunities for all other public officials were notably absent.

against a U.S. colonel for seizing property in Mexico during the Mexican-American War, despite the defendant's "honest judgment" that the seizure was justified by wartime emergency). Instead, a subjective good faith test existed for only some claims, and even that subjective test bears no relation to the objective test invented by *Harlow*. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018).

In the early years of the Republic, constitutional claims typically arose as part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization as a federal officer; and the plaintiff would in turn claim the trespass was unconstitutional, thus defeating the officer's defense. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1506–07 (1987). As many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations. *See generally*, James E. Pfander, Constitutional Torts and the War on Terror 3–14, 16–17 (2017); David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 14–21 (1972); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414–22 (1986).

This "strict rule of personal official liability, even though its harshness to officials was quite clear," persisted through the nineteenth century. Engdahl,

Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. at 19. Its severity was mitigated somewhat by the prevalence of successful petitions to Congress for indemnification. *See* James E. Pfander & Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. Rev. 1862, 1867 (2010). But on the judicial side, courts continued to hold public officials liable for unconstitutional conduct without regard to a good-faith defense. *See, e.g., Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (holding liable members of a town health board for mistakenly killing an animal they thought diseased, even when ordered to do so by government commissioners).

Most importantly, the Supreme Court originally rejected the application of a good-faith defense to Section 1983 itself in *Myers v. Anderson*, a case that struck down a state statute that violated the Fifteenth Amendment's ban on racial discrimination in voting. 238 U.S. 368, 380 (1915). The Court soundly rejected the government's argument that they had acted on a good-faith belief that the statute was constitutional, evincing that the "logic of the founding-era cases [was] alive and well in the federal courts after Section 1983's enactment." Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. at 58.

C. The common law of 1871 provided limited defenses to certain torts, not general immunity for all public officials.

The Court's primary rationale for qualified immunity is the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g., Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But to the extent contemporary common law included any such protections, these defenses were incorporated into the elements of particular torts. *See, e.g., The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826) (holding that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense because a good-faith defense was incorporated into the *substantive* rules of capture and adjudication, rather than treated as a separate and freestanding defense). In other words, good faith might be relevant to the merits, but there was nothing like the freestanding immunity for all public officials that characterizes the doctrine today.

Similarly, as the Court explained in *Pierson v. Ray*, "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." 386 U.S. 547, 556–57 (1967). But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place (even if the suspect was innocent). *Id.*

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity. Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. at 52. *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id*. Critically, the Court extended this defense to include not just a good-faith belief in probable cause for the arrest, but a good-faith belief in the legality of the statute under which the arrest itself was made. *Id*. at 555.

Even this first extension of the good-faith aegis was questionable as a matter of constitutional and common-law history. Conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), and good faith as a defense to liability for admittedly unlawful conduct (as with enforcing an unconstitutional statute). As discussed above, the baseline historical rule at the founding and in 1871 was strict liability for constitutional violations. *See Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910) (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").

And of course, the Court had already rejected incorporation of a good-faith defense into Section 1983 in *Myers*—which Pierson failed to mention, much less discuss.

Nevertheless, the *Pierson* Court at least grounded its decision on the premise that the analogous tort at issue—false arrest—admitted a good-faith defense at common law. One might then have expected qualified immunity doctrine to adhere generally to the following model: determine whether the analogous tort permitted a good-faith defense at common law, and if so, assess whether the defendants had a good-faith belief in the legality of their conduct.

But the Court's qualified immunity cases soon discarded even this loose tether to history. In 1974, the Court abandoned the analogy to common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). And in 1982, the Court disclaimed reliance on the subjective good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court's qualified immunity jurisprudence has therefore diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board

defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342.

II. Qualified Immunity Is Unavailable for Employees of Large Private Contractors Who Provide Health Services to Jails or Prisons on a For-Profit Basis.

As this Court recognized in *Sanchez v. Oliver*, private actors may be liable for acting under color of state law under § 1983, but "it does not necessarily follow that [they] may assert qualified immunity." 995 F.3d 461, 474 (5th Cir. 2021) (citing *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018)); *see also Brewer v. Hayne*, 860 F.3d 819, 823 (5th Cir. 2017) ("A defendant may act under color of state law for the purposes of § 1983 without receiving the related protections of qualified immunity."). In *Sanchez*, this Court joined its sister circuits in holding that employees of large private contractors who provide health services to jails or prisons on a for-profit basis may not assert the defense of qualified immunity. *See, e.g., Tanner v. McMurray*, 989 F.3d 860, 871 (10th Cir. 2021); *Estate of Clark v. Walker*, 865 F.3d 544, 550–51 (7th Cir. 2017); *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012) (no immunity for privately paid physician of Community Behavioral Health working at county prison); *Jensen v. Lane Cnty.*, 222 F.3d 570, 578–79 (9th Cir. 2000); *Hinson v. Edmond*, 192 F.3d 1342, 1347 (11th Cir. 1999); *Currie v.*

Chhabra, 728 F.3d 626, 631–32 (7th Cir. 2013); *Harrison v. Ash*, 539 F.3d 510, 521–25 (6th Cir. 2008); *see also Richardson v. McKnight*, 52l U.S. 399, 401 (1997) (holding that prison guards employed by a private prison-management firm are not entitled to assert qualified immunity).

Although in limited circumstances some private contractors are eligible to assert qualified immunity, courts have drawn a distinction between a non-governmental employee who is embedded within a governmental entity and closely supervised by governmental employees, and employees of for-profit businesses who systematically compete to provide services to governmental entities on a large-scale basis, such as LaSalle in this case. Thus, for example, the Supreme Court held that a private sector attorney engaged to assist with an investigation into a city employee's questionable sick leave time was held to have the protection of qualified immunity. *Filarsky v. Delia*, 566 U.S. 377, 383–84 (2012).

Similarly, this Court held that two professors employed at a private university, who also provided part-time services to a state mental health facility, could assert qualified immunity. *Perniciaro v. Lea*, 901 F.3d 241, 247, 251–55 (5th Cir. 2018). *Perniciaro*, however, specifically contrasted the situation in that case with those, like the present case, involving large private contractors who are "systematically organized to perform a major administrative task for profit." *Id.* at 253 (quoting *Richardson*, 521 U.S. at 409–10)). The panel distinguished the facts in *Perniciaro*,

involving two university professors working part-time for a state facility, from those involving companies like "the large prison-management firm at issue in *Richardson*," as well as similar private entities in *McCullum*, *Jensen*, and *Hinson*, who like LaSalle are "'systematically organized to perform a major administrative task for profit' and do so 'independently, with relatively less ongoing direct state supervision." 901 F.3d at 253–54 (quoting *Richardson*, 521 U.S. at 409–10 (citing as examples where qualified immunity does not apply cases involving employees of Community Behavioral Health, Psychiatric Associates, and Wexford Health Sources). Employees of the latter *cannot* claim qualified immunity because for large private contractors "'ordinary marketplace pressures' typically suffice to incentivize vigorous performance and prevent unwarranted timidity." *Id.* at 254 (quoting *Richardson*, 521 U.S. at 409–10). Sufficient market forces arise from the competition for government contracts and other profit-incentives endemic to such work to sufficiently advance the interests that qualified immunity traditionally serves for public employees. *See id.* at 253–55 (noting, for example, that "employees of private firms generally do not need immunity because private firms can offset the risk of litigation and liability with higher pay or better benefits") (citing *Richardson*, 521 U.S. at 411).

The lower court's discussion of the *Richardson* factors ignored the market forces that substitute for qualified immunity for employees of private contractors

such as LaSalle that are organized to perform governmental tasks for profit, as discussed in *Richardson*, *Perniciaro*, and *Tolbert*, among other cases. Indeed, Defendant Mitchell does not even contest that he is an employee of a large for-profit contractor of the type which courts have repeatedly concluded disqualify its employees from asserting a qualified immunity defense. Mitchell and others are no doubt attracted to work for LaSalle and similar companies because of the pay and benefits they provide rather than pursuing public service. For-profit entities such as LaSalle compensate their employees with the benefits of their economic gain in a manner that substitutes for the protections of qualified immunity allowed public employees.

Moreover, the opinion below erred in failing to indulge all inferences in favor of Plaintiffs. Although he may have interfaced with public employees, there is no evidence that Mitchell was closely supervised by any public employee or that his decisions were subject to direct review by any government official. Though, as the lower court recognized, LaSalle was subject to "potential oversight" by the government, ROA.27191, this does not mean that Mitchell himself was closely supervised by any government employees or that his decisions were subject to any direct governmental review. It is difficult to imagine that any government contractor would not have some governmental policy guidance, whether established by regulation, contract, or otherwise. But Mitchell is not subject to "ongoing direct state

supervision" merely because he works with government employees under the loose framework of policies established by the state. Finally, the "unwarranted timidity" purpose of qualified immunity does not weigh in favor of Mitchell, as "'ordinary marketplace pressures" typically suffice to incentivize vigorous performance and prevent unwarranted timidity" on behalf of for-profit employees. *Perniciaro*, 901 F.3d at 254 (quoting *Richardson*, 521 U.S. at 409–10).

CONCLUSION

This Court should reverse the district court and remand for further proceedings.

Date: June 21, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 3,763 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Date: June 21, 2021

/s/ Samuel Weiss
Samuel Weiss

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on June 21, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: June 21, 2021

/s/ Samuel Weiss
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