No. 15-474

In The Supreme Court of the United States

ROBERT F. MCDONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE BENJAMIN TODD JEALOUS, DELORES L. MCQUINN AND ALGIE T. HOWELL, JR. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONER ROBERT F. MCDONNELL

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INTEREST OF AMICI CURIAE[1]

Benjamin Todd Jealous, Rhodes Scholar and immediate past president and chief executive officer of the National Association for the Advancement of Colored People ("NAACP"), The Honorable Delores L. McQuinn, 70th District, Virginia House of Delegates, and The Honorable Algie T. Howard, Jr., Vice-Chair of the Virginia Parole Board, join together to file this brief *amici curiae* on behalf of Petitioner Robert F. McDonnell ("Governor McDonnell").

Mr. Jealous has dedicated his life to social justice issues and civil rights. As a college student at Columbia University, he worked as an organizer for the NAACP Legal Defense Fund. Later, in Mississippi, he assisted the NAACP with obtaining full state funding for three historically African-American colleges, thereby ensuring they would remain open.

Ms. McQuinn is an associate pastor at the Mount Olivet Baptist Church in Richmond, Virginia, and represents the 70th District of Virginia in the House of Delegates. A resident of Richmond for many years, she has had a lifelong commitment to political activism at the local and state levels.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of amici's intent to file this brief and consented to its filing by filing a letter granting blanket consent to *amicus curiae briefs*.

Mr. Howell currently serves as the Vice-Chair of the Virginia Parole Board after more than a decade representing the 90th District in the Virginia House of Delegates. His commitment to the fair administration of justice is exemplified by his current service on the parole board and past service as the President of the Norfolk Chapter of Southern Christian Leadership Conference.

Mr. Jealous, Ms. McQuinn and Mr. Howard have spent their careers fighting for and protecting the individual rights of African-Americans and other disadvantaged minorities in this country. They recognize that one of the greatest challenges to achieving fairness for minorities targeted by the criminal justice system is being tried before a fair and impartial jury in an age when overwhelmingly prejudicial pre-trial publicity interferes with those protected by the Bill of Rights and, in particular, the Sixth Amendment to the United States Constitution. Broadcast news combined with cable and local media outlets, newspapers, radio and social media—unheard of a decade ago—too often paint a picture of guilt before the facts can be introduced and tested in a court of law.

Key to a fair trial for this minority criminal defendant is the ability to conduct—or have the court do so—meaningful *voir dire*. It is through this particular process—as opposed to pre-trial investigation or use of jury consultants—that the biases and prejudices of prospective jurors can emerge. Merely asking the venue members if they can be fair despite pre-trial publicity is like asking

them if they can be honest. Who among them will say "no"? Penetrating *voir dire*, however, is likely to illicit more accurate self-assessments.

This issue, therefore, has an enormous impact on the minority community to which Mr. Jealous, Ms. McQuinn and Mr. Howard have devoted a substantial portion of their lives. To them and countless others, the Court's ruling on this issue has huge repercussions beyond the effect on Governor McDonnell—as important as that is. Mr. Jealous, Ms. McQuinn and Mr. Howard ask the Court to recognize the societal interest here that transcends this particular case and consider their *amici* brief.

INTRODUCTION

Next to the treason prosecutions of Aaron Burr and Jefferson Davis, Governor McDonnell's public corruption trial may be the most significant federal criminal proceeding in the history of the Commonwealth of Virginia—at least in terms of the pervasive and intense negative pretrial publicity. Yet, the Fourth Circuit Court of Appeals upheld a *voir dire* procedure in which the trial court: (i) rejected any inquiry into whether any *venireman* had prejudged guilt or innocence, and then (ii) forced the panel to render a collective self-assessment of its impartiality by asking the prospective jurors to stand if they had been exposed to pretrial publicity and to sit if they could render a fair decision. All 140 plus panel members—*including a number whose questionnaire answers indicated potential bias*—took their seats.

This procedure—characterized by the Fourth Circuit as "merely asking for a show of hands" (App. 31a)—impermissibly conflicts with the relevant authority governing jury selection from this Court and other Circuits. It is such a radical departure "from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Rule 12.6 of the United States Supreme Court.

From the earliest days of American jurisprudence, the trial court's focus in impaneling a jury has been to disqualify those who "have deliberately formed and delivered an opinion on the guilt of the prisoner as not being in a state of mind to fairly weigh the testimony." *United States v. Burr*, 25 F. Case 55 (1807). Questioning potential jurors and observing them while they respond are fundamental—indeed essential—to discovering juror bias. It is upon this rationale that this Court has committed *voir dire* to the sound discretion of the trial judge. Such discretion is abused, however, when, after torrents of pre-trial publicity have flooded the community in which the potential jurors live and work, *voir dire as conducted here* not only fails to address the question of prejudice but merely accepts the prospective jurors' collective self-assessment of impartiality.

When the immediate past Governor of Virginia is tried in Richmond for alleged corruption after almost two years of intense, speculative, salacious and frequently misleading pretrial publicity, the likelihood of prejudice is exceptionally high. Indeed, if a case such as this one does not

include effective *voir dire*, Sixth Amendment protections have little meaning. Discovering the extent to which individual members of the *venire* had already developed notions of guilt or innocence or of the crucial facts of the case was of paramount importance in selecting the jury. Although the district judge acknowledged the extensive media coverage, he nonetheless *failed to inquire initially whether any potential jurors had formed any opinions about the case*. Moreover, he allowed the jury to render collective *self-assessment of their impartiality* through the following process.

Although a lengthy jury questionnaire was submitted, it contained a mere *four questions* about pretrial publicity. Without posing in the courtroom any questions to address the written responses, the judge asked the potential jurors to stand if they had been exposed to the pretrial publicity and, then asked them to sit down if they felt that they could render a fair decision. All the panel members—*including a number whose responses to the questionnaire indicated potential bias*—took their seats. This development likely concealed bias. Or are we to conclude that every one of these *veniremen* was correct when looking inwardly while in the presence of others?

After accepting this collective self-assessment at face value, the trial court acceded to Governor McDonnell's request to individually examine some potential jurors whose pre-trial publicity questionnaire answers had been flagged for potential bias. *Even though the entire panel had passed the Fourth Circuit's "show of hands" impartiality test,*

two of the five panelists who were questioned individually proved to be biased and were removed from the panel. Thus, some of the bias concealed just moments beforehand was revealed. This establishes beyond question that the self-assessment method was severely flawed.

Although obviously aware of the substantial possibility—indeed likelihood—that the massive pretrial publicity had tainted at least some members of the panel, the judge denied Governor McDonnell's repeated requests for additional *voir dire* on that issue. This refusal impermissibly deprived him of the opportunity that appropriate *voir dire* affords to obtain sufficient information to either challenge for cause or intelligently exercise peremptory strikes.

While the trial court's approach conducting *voir dire* might be sufficient in cases with little or no prejudicial publicity, it fell well short of the mark in the corruption trial—in a federal courthouse in Richmond—of a governor (and his wife) just months after vacating his office. This Court should hear this case on appeal and reverse the judgment below because the trial court's refusal to inquire whether any panel members had prejudged the case, along with its acceptance of the panel's self-assessment of impartiality, effectively denied former Governor McDonnell his Sixth Amendment right to a fair trial.

ARGUMENT

1. *Voir dire* which did not include sufficient inquiry into prospective juror bias coupled with the trial court's acceptance of the panel's self-assessment of impartiality merit review by this Court.

Voir dire is an indispensible feature of the Sixth Amendment right to a fair trial. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). It "enables the court to select an impartial jury and assists counsel in exercising peremptory challenges." *Mu'min v. Virginia*, 500 U.S. 415, 421 (1991). Although committed to the sound discretion of the trial court, that *discretion is not unlimited*. From a Sixth Amendment perspective, discretion is abused when the *voir dire* procedure renders a "defendant's trial fundamentally unfair." *Skilling v. United States*, 561 U.S. 358, 387 (2010), citing *Mu'Min v. Virginia*, at 425-426.

In *Skilling*, the most recent review of federal jury selection process, this Court approved specific devices that may be employed in jury screening and *voir dire* to secure a defendant's right to a fair trial in cases of intense pretrial publicity. This Court noted that Skilling's trial judge had (i) employed a pretrial jury questionnaire which for jurors' "opinions regarding the defendants and their possible guilt or innocence" and (ii) agreed to "exclude . . . every prospective juror who said that a pre-existing opinion . . . would prevent her from impartially considering the evidence at trial." *Id.*, at 371 -372. After *voir dire* of the collective jury panel,

the trial judge brought the individuals before the bench where counsel was given an opportunity to ask follow-up questions and examine the venire individually about pretrial publicity. *Id.*, at 373-374.

In comparison, the Fourth Circuit approved *voir dire* in Governor McDonnell's case in which none of this procedure was employed. Instead, the trial judge assumed general media exposure stating that (i) the "case has generated a lot of media interest and there have been quite a few newspaper articles, radio and television media items relating to this case and the parties involved" and (ii) "most of you have read in the newspaper or seen on television or heard on the radio, at least once, some of these media items or news stories."[2] App. 160a. Then he

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[2] Pretrial publicity had been intense from the time it began with a reported investigation of the Executive Mansion chef, and it continued unabated through the eve of trial when the Commonwealth's leading newspaper, the *Richmond Times-Dispatch,* published a satirical article entitled "The Top 7 Sound Bites You Won't Hear at The McDonnell Trial." A sampling from the *Times-Dispatch* provides a sense of the tenor and pervasive nature of these inflammatory and prejudicial articles:

- Jeff Shapiro, *McDonnell Legacy Could Be Changed by Gifts Issue*, April 10, 2013. ("Gov. Bob McDonnell is putting some distance between him and the Star Scientific . . . It means the steady trickle of reporting on the McDonnell-Williams relationship and perceived emoluments for both keeps alive a strictly negative narrative. *McDonnell will be viewed with suspicion, seen as dissembling; perhaps, branded dishonest*.") (emphasis added.)
- Olympia Meola, *Tarnished Image*, August 21,

2013. ("But increasingly, *the gifts controversy is becoming inescapable. It is hobbling what's supposed to be a victory jog to the finish line of his administration while a chorus grows for him to step aside*.") (emphasis added.)

- Jeff Shapiro, *Politicians Humiliating Selves While All Watch*, April 14, 2013. ("In a harmonic convergence unparalleled in Virginia politics, Gov. Bob McDonnell and the two men who want to succeed him are waist-deep in personal controversy -- the kind that sinks ambition because it confirms the suspicions of voters. To what do we owe this distinction? The Wee Three—*McDonnell,* Republican Ken Cuccinelli and Democrat Terry McAuliffe—*appear to share an innate talent for embarrassing themselves when everyone's watching*.") (emphasis added.)
- A. Barton Hinkle, *McDonnell Family Values,* May 12, 2013. ("In the church of social conservatism, few doctrines receive more veneration than personal responsibility and family values. Virginia Gov. Bob McDonnell is now making a mockery of both.")
- Jeff E. Shapiro, *Governor's Woes Could Take Down Cuccinelli,* June 30, 2013. ("Virginia's Rolex-wearing governor is a political time bomb. Bob McDonnell's career is badly damaged, if not destroyed. It is a *casualty of his continuing dissembling over tens of thousands of dollars in undisclosed gifts to him; his wife, Maureen*; and their children from Jonnie Williams Sr., the dietary supplement executive. This includes a $6,500 Rolex watch that has vanished from McDonnell's wrist.) (emphasis added.)
- Jim Nolan, *Legislator Urges Governor to "Come Clean" or Resign,* July 3, 2013. ("A Virginia lawmaker is calling on Gov. Bob McDonnell to

"come clean about the undeclared gifts he and his family have received from donors or resign.")

- Jim Nolan, *AG Distances Himself from McDonnell,* July 11, 2013. ("Attorney General Ken Cuccinelli on Wednesday put some distance between himself and the man he wants to succeed with his strongest remarks to date on the *cascading gift scandal* engulfing Gov. Bob McDonnell's administration.") (Emphasis added.)
- Editorial, *"News" Release,* July 12, 2013. ("Commonwealth of Virginia. Office of the Governor. For Immediate Release. Gov. Bob McDonnell Announces $120,000 Investment in Gov. Bob McDonnell. RICHMOND. Governor Bob McDonnell today announced that Jonnie Williams . . . has invested more than $120,000 in Governor Bob McDonnell. . . . Speaking about today's announcement Governor McDonnell said: *'Jonnie Williams maintains a strong Virginia presence, and this major investment is great news for me and my local economy. These investments will produce major benefits for the McDonnell family that will enable the McDonnells to continue to grow and thrive in the Commonwealth.*'") (emphasis added.)
- Editorial, Jeff E. Shapiro, *This Isn't McDonnell's First Brush With Scandal,* July 21, 2013. (In one of the few interviews Gov. Bob McDonnell has granted since managing Giftgate overtook managing government as his day job, he told Richmond television station WTVR: 'In 37 years, no one has raised questions about my integrity or my character.' How quickly he forgets.")
- Editorial, *What They Are Saying About . . . "Giftgate",* July 22, 2013. ("A More Subtle Corruption . . . McDonnell's head-spinning hypocrisy has stained his reputation . . . It's time

asked the entire panel of over 140 members to stand if they had been exposed to such media. After most of the panel stood, the judge invited them to sit if they felt that they could be fair to both sides in

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for him to stop dodging hard questions and hiding behind legal niceties . . . Weasel words and weasel logic from a smart , savvy lawyer and politician who should know better . . . *It's shameful and disgusting*.") (emphasis added.)

- Editorial, *Givers and Takers,* August 12, 2013. ("Virginians have expressed almost unanimous outrage over the scandal involving Gov. Bob McDonnell and his benefactor Jonnie Williams, Sr.")
- Editorial, *Give and Take,* October 8, 2013. ("Thanks to the relationship between Gov. Bob McDonnell and his family and Jonnie Williams Sr. "giftgate" has entered the political lexicon.")
- Editorial, *Was It Friendship or Something More?,* February 8, 2014. ("Former Gov. Bob McDonnell and his wife, Maureen, have been charged with 14 counts of fraud. . . . *I find it interesting how the media have played a large role throughout this case*, catching McDonnell sending a text to Williams asking for a $20,000 loan.") (emphasis added.)
- Editorial, *From Ballroom to Courtroom,* July 20, 2014. ("On Jan. 16, 2010, Bob McDonnell carried his wife, Maureen, over the threshold of Virginia's Executive Mansion -- their state-subsidized home for the next four years. . . . Now, the McDonnells are in a very different place. Graying, somber and drawn, they are on the threshold of a July 28, corruption trial on charges that *they conspired to sell for personal gain the state's highest office, whose previous occupants include Patrick Henry and Thomas Jefferson*.") (emphasis added.)

hearing the evidence. Everyone standing then sat down—*every single one*.[3]

Nonetheless, the judge indicated he was satisfied with that response. App. 160a. He must have found this approach to be a sufficiently probing inquiry to "determine the circumstance, the impact thereof on the juror, and whether or not it was prejudicial." *Oswald v. Bertrand*, 374 F.3d 475, 479 (7th Cir. 2004), *citing Remmer v. United States*, 347 U.S. 227, 230, 98 L.Ed. 654, 74 S.Ct. 450 (1954). That such limited inquiry was *insufficient*, however, is underscored by the fact that all of the prospective jurors took their seats when asked if they could be impartial, *notwithstanding that a number of the prospective jurors had indicated on the questionnaires that they had previously formed opinions about issues in the case*. Consider, for example:

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[3] Some social science studies have concluded that jurors are intimidated by the formal courtroom atmosphere and respond to the need to conform when questioned in a group. See, Jones, *Judge Versus Attorney-Conducted Voir dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 134 (1987) (indicating that formal courtroom environment hinders juror self-disclosure), and Suggs & Sales, *Juror Self-Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 259 (1981) (suggesting that group *voir dire* questions tend to elicit uniform responses due to individual need to conform). Given the content of the answers to some of the questionnaires, this is precisely what happened here.

- Juror 220 – "Should know the limits of the law related to gifts." App. 166a.

- Juror 452 – "I do feel like they knew that they were doing something that wasn't quite right." App. 168a.

- Juror 154 – " The governor will not be remembered for whatever good he's done but for what he's accused of." App. 170a.

- Juror 190 – "Thought it was wrong if this is true." App. 171a.

The trial court even rejected a *jointly-proposed* question about whether the prospective jurors had *formed* any opinions. App. 150a, 159a. Instead, the trial court limited the questionnaire to whether prospective jurors had *expressed* any opinions. Written answers to these questions did not cure the trial court's impermissible failure to conduct or allow counsel to conduct inquiry into the pre-trial publicity to which the *veniremen* had been exposed and whether they had already formed opinions about the case. *See United States v. Rucker*, 447 F.2d 1046, 1048 (4th Cir. 1977).

Moreover, written answers to questions circulated prior to trial did not convey the prospective juror's "demeanor" which "plays such an important part" in the trial court's "determination of impartiality." *United States v. Lancaster*, 96 F.3d at 738. The trial judge's role in *voir dire* "is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility

by relying on their own evaluations of demeanor evidence and of responses to questions." *Rosales-Lopes v. United States*, 451 U.S. 182, 188, 68 L. Ed. 2d 22, 101 S.Ct. 1629 (1981). (emphasis added.)

The trial court erroneously limited itself to "the cold record in conducting its review" by accepting the questionnaire responses at face value—and then compounding the error by its collective inquiry of the jury panel and acceptance of its collective response. In light of the extraordinary amount, duration and tenor of the pretrial publicity, the trial court instead should have overseen individual questioning to "determine what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed." *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978). By virtue of the process actually employed, however, Governor McDonnell was denied the opportunity to uncover and deal with bias arising from pervasive, negative pretrial publicity. Reversal of his conviction is required as a result.

2. The Fourth Circuit's approval of ending *voir dire* after the discovery of pretrial publicity bias is in stark conflict with precedent handed down by this Court as well as other circuit courts.

Following the trial court's declaration that it was satisfied with the *venire's* collective assessment of its impartiality, defense counsel sought individual questioning of a number of the panel members

whose questionnaire responses indicated bias. When this further questioning exposed bias in two of the panel members, the court *sua sponte* struck them. App. 168a, 170a.[4]

Once individual responses to pretrial questionnaires raise *the possibility* of biased or ill-suited *veniremen*, a trial judge's general inquiry of the panel as a whole and *without individual focus* will not suffice—even when the tainted *veniremen* are removed by peremptory challenge. *United States v. Rucker*, 447 F.2d 1046, 1048 (4th Cir. 1977).

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[4] Governor McDonnell initially proposed a series of additional questions for jurors with exposure to pre-trial publicity, but the trial judge refused to ask them. App 151a. After the judge finished his initial *voir dire*, Governor McDonnell renewed his request for additional pre-trial publicity inquiry because none of the prospective jurors had responded to the trial court's general question as to whether there was any reason that they could not be fair, even though bias had been expressed in some of the questionnaire responses. Stating that he had a list of potential jurors with pre-trial publicity issues, defense counsel pointed to Juror Number 154 as an example, because his questionnaire answer "expressed an opinion that there are no honest politicians and governor should have known better." The judge refused to ask follow-up questions of any nature at that point, indicating that the questionnaire responses were sufficient and that he would do something of his own invention on pre-trial publicity – the standing group assessment of impartiality, followed by individual questioning of the prospective jurors on defense counsel's list. App. 157a – 159a. It was this individual questioning that led to the striking for cause two of the five questioned.

Patiriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968) ("the significant possibility of exposure to potentially prejudicial material" requires the individual examination of each prospective juror apart from the others.); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2nd Cir. 1963) (pro forma "assurances of impartiality is [sic] insufficient."); *Waldorf v. Shuta*, 3 F.3e 705 (3rd Cir. 1993) (examination to provide objective basis for determination); *United States v. Dellinger*, 472 F.2d 340 375 (7th Cir. 1972) (recognizing the natural tendency of a juror to answer in the negative when asked if there is a reason he could not be fair and impartial.); *Silverthorne v. United States*, 400 F. 2d 627, 639 (9th Cir. 1968) (requiring individual examination in the face of voluminous negative publicity); *Jordan v. Lippman*, 763 F.2d 1265, 1281 (11th Cir. 1985) (conclusory questioning about opinions of guilt or innocence is insufficient.)

The approach to *voir dire* used here deprived Governor McDonnell of "sufficient information brought out on *voir dire* to enable him to exercise his challenges in a reasonably intelligent manner." "A *voir dire* that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice." *Id.* at 1049, *citing Swain v. Alabama*, 380 U.S. 202, 219, 13 L.Ed. 2d 759, 85 S.Ct. 825 (1965), *United States v. Lewin*, 467 F.2d 1132 (7th Cir. 1972), and *United States v. Ricks*, 802 F.2d 731, 734 (4th Cir. 1986) (peremptory strikes is a "right of such significance that denial or substantial impairment of the right constitutes per se reversible error."). Obviously, both the sources and extent of a

particular juror's exposure to media bias and whether any opinions have been formed about the case are crucial to any determination to assert a challenge for cause or to exercise a peremptory strike. Governor McDonnell's attorneys were deprived of even this elementary information.

It is the immediate contact with the *voir dire* proceeding that accords the trial court a superior position to evaluate the prospective jurors' individual responses to the questions—as contrasted with an appellate court "which can only rely on the cold record in conducting its review." *United States v. Nash*, 910 F.2d 749, 753 (11th Cir. 1990). Of comparable importance is the ability to observe and gauge the words, expressions, demeanor and even body gestures or positions of individual panelists. *See United States v. Brown*, 799 F.2d 134, 136 (4th Cir. 1986) ("the essential function of *voir dire* is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel."); *United States v. Lancaster*, 96 F.3d at 738-39 (trial judges must "reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence.").

After having dismissed several panel members, the district court failed to appreciate the possibility of publicity-generated bias tainting other members of the jury pool. The dismissed jurors destroyed any reasonable basis to believe that the self-assessment could reveal juror bias and questionable impartiality. The Fourth Circuit approved this procedure, but it is at odds with the

standing precedent of this Court and at least the six other circuits cited herein—and thus merits review by this Court and eventual reversal of Governor McDonnell's conviction.

CONCLUSION

That the right to a fair and impartial jury is fundamental to our criminal justice system is beyond question. *Voir dire* and the techniques employed by the trial court to insure the selection of a fair jury panel are the only true mechanisms to protect this right. This Court has the supervisory authority to review the discretion employed in this case and to establish the minimum requirements for an effective *voir dire.* That supervisory authority should be exercised in this case because this foundational requirement of our criminal justice system should not be relegated to a simple "show of hands" on the vital question of impartiality—an issue the becomes more vexing and problematic when the case at question, like the instant case, involves intense, prolonged negative pre-trial publicity about the principal defendant. Governor McDonnell's conviction cannot stand.

Dated: November 16, 2015

Respectfully submitted,

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