No. 13-2365

In The
United States Court of Appeals
For The Fourth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FREEMAN,

Defendant-Appellee,

and

THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 13-2365 Caption: *EEOC v. Freeman & US Office of Pers. Mgmt.*

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s/ Joshua P. Thompson DATED: April 8, 2014

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of racial discrimination, racial preferences, and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past four decades, including *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF has also participated as amicus curiae in many disparate impact cases such as *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

PLF submits this brief because it believes its public policy perspective and litigation experience in the area of equal protection and Title VII will provide an

additional viewpoint with respect to the issues presented, which will be helpful to this Court.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Like most businesses that employ thousands of people, Freeman has experienced workplace violence, employee theft and embezzlement, and worksite drug use. *EEOC v. Freeman*, 961 F. Supp. 2d 783, 787 (D. Md. 2013). In order to minimize the harms from these actions—and to shield itself from negligent hiring liability—Freeman began conducting criminal background checks on potential employees in 2001. *Id.* Under its policy, Freeman screened an applicants' criminal history for indications that the applicant would not be a reliable, trustworthy, or an effective employee. *See id.* at 787-88. Past convictions did not preclude an applicant from being hired; Freeman independently evaluated criminal history to determine whether the behavior made the individual suitable for employment. *Id.* at 787-88. Freeman's policy was entirely race-neutral.

Freeman's decision to conduct criminal background checks on its employee-applicants is consistent with our nation's civil rights laws. All 50 states impose restrictions that prohibit convicts from pursuing different varieties of government

[1] All parties, through their attorneys, have consented to the filing of this brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Pacific Legal Foundation, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

employment. *See* Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. Rev. L. & Soc. Change 527, 536 (2006). The federal government has conducted checks "since the Republic's earliest days," *NASA v. Nelson*, 131 S. Ct. 746, 749 (2011). Even the EEOC conducts criminal background checks as a condition of employment for all its employees. *Freeman*, 961 F. Supp. 2d at 786.

Nevertheless, EEOC brought this lawsuit against Freeman alleging that the business' decision to conduct criminal background checks on its employees results in a racially disparate impact in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(k). *Freeman*, 961 F. Supp. 2d at 789. The district court granted summary judgment for Freeman, because EEOC failed to meet its threshold burden that Freeman's policy resulted in a statistically significant racial disparity. *Freeman*, 961 F. Supp. 2d at 803 ("Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history.").

EEOC's lawsuit against Freeman is part of a new effort[2] to limit the ability of businesses to conduct criminal background checks on job-applicants. *See* Scott Thurm, *Employment Checks Fuel Race Complaints*, Wall St. J., June 12, 2013, at A1.[3] Yet, as evidenced by federal and state laws, as well as the EEOC's own policy, criminal background checks are a legal and commonplace means for employers to ensure a trustworthy and reliable workforce. Fortunately for employers like Freeman, Title VII allows businesses to rebut disparate impact claims by showing that criminal background checks are "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Prior to the EEOC's latest campaign, it was settled law that criminal background checks were consistent with Title VII. *See* Kristen A. Williams, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. Rev. 521, 541 (2007).

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[2] After initiating the lawsuit against Freeman and other businesses, EEOC issued guidelines on businesses' ability to conduct criminal background checks. U.S. EEOC, Notice 915.002, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited Apr. 4, 2014). This policy has already come under fire from the U.S. Commission on Civil Rights. *See Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy* (2013), *available at* http://www.eusccr.com/EEOC_final_2013.pdf (last visited Apr. 4, 2014).

[3] *Available at* http://online.wsj.com/news/articles/SB10001424127887323495604578539283518855020 (last visited Apr. 4, 2014).

There is little evidence that prohibiting criminal background checks even increases minority hires. Policies like the EEOC's that prohibit criminal background checks make it more likely that employers will hire a white applicant over a minority. Multiple studies have confirmed that criminal background checks allow employers to overcome their lingering racial prejudices and hire more minority applicants. *See* Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451, 471 (2006); Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 1 U. Chi. Legal F. 381, 403 (2009).

Beyond Title VII, EEOC's actions in this case also present serious constitutional equal protection concerns. As courts and commentators have noted, disparate impact enforcement can put employers between the rock of disparate impact liability and the hard place of disparate treatment liability. *See, e.g.*, *Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989); *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 448 (1975); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 Cato Sup. Ct. Rev. 53, 63. By subjecting employers to liability for hiring disparities—even those that arise from race-neutral criteria—disparate impact theory encourages employers to engage in race-conscious measures, including prophylactic racial balancing, or discarding race-neutral standards after they are found to result in

employment disparities. *See Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring). By suing Freeman for its commonsense decision to undertake criminal background checks before hiring employees, EEOC only increases the likelihood that employers will abandon objective, job-related criteria in favor of unconstitutional racial balance.

For these reasons, the decision of the district court granting summary judgment in favor of Freeman should be affirmed.

I

FREEMAN'S USE OF CRIMINAL BACKGROUND CHECKS IS JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY

In order to prove a prima facie case of unlawful disparate impact under Title VII, 42 U.S.C. § 2000e-2(k), a plaintiff is required to show that a business practice resulted in a statistically significant disparity between the members of a protected class and the relevant labor pool. *Wards Cove*, 490 U.S. at 650. In this case, EEOC alleges that Freeman's use of criminal background checks resulted in a disparate impact against black applicants. However, the court below held that EEOC failed to prove its prima facie case. *See Freeman*, 961 F. Supp. 2d at 803 ("[T]here are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the Defendant."). Because of EEOC's failure to prove a statistically significant disparity, the court below was correct to enter summary judgment in favor of Freeman. *Id.*

But even if EEOC were able to establish that there was a statistically significant disparity as a result of Freeman conducting criminal background checks, Freeman should be entitled to summary judgment because conducting criminal background checks on potential employees is "job related" and "consistent with business necessity." *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under Title VII, once a plaintiff has proven its prima facie case, the employer has the opportunity to rebut the allegations by showing that the challenged business practice has a "manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Freeman's decision to conduct criminal background checks on prospective employees—which the district court described as "common sense," *Freeman*, 961 F. Supp. 2d at 803—easily satisfies this requirement.

Freeman's business and history requires it to conduct criminal background checks on job applicants. As the lower court recognized, in the past Freeman "experienced problems with embezzlement, theft, drug use, and workplace violence by its employees." *Freeman*, 961 F. Supp. 2d at 787. As a business with over 25,000 workers nationwide, Freeman reasonably concluded that background checks would help it better evaluate "the trustworthiness, reliability, and effectiveness of prospective employees." *Id.* The background checks provided Freeman with important information that mitigates against employee-related loss, reduces workplace violence, and avoids negligent hiring lawsuits. *Id.*

For decades, courts across the country have resoundingly rejected claims that criminal background checks on prospective employees run afoul of Title VII. *See, e.g.*, *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989); *Davis v. City of Dallas*, 777 F.2d 205, 225 (5th Cir. 1985); *see also* Williams, *supra*, at 541 (explaining that courts have been "fairly lenient" in finding that employers who screen applicants for criminal histories do not run afoul of Title VII). "It is reasonable to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions." *Richardson*, 332 F. Supp. at 521.

In addition, criminal background checks increase employee safety and provide employers with security against negligent hiring lawsuits. Each year nearly 2 million American workers are victims of workplace violence. *See* U.S. Dep't of Labor, Occupational Safety & Health Admin., *Safety and Health Topics: Workplace Violence*.[4] This Court has recognized that employers who fail to conduct background checks may be liable for negligent hiring. *See Blair v. Defender Servs., Inc.*, 386 F.3d 623, 629 (4th Cir. 2004). Ensuring that employees do not have violent propensities, or "propensities which could have been discovered by reasonable investigation"

[4] *Available at* https://www.osha.gov/SLTC/workplaceviolence/ (last visited Apr. 4, 2014).

shields against negligent hiring lawsuits. *See* Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. Tex. L. Rev. 873, 879 (1996); *see also* Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 Del. J. Corp. L. 501, 506 (1988) (noting the many states that recognize negligent hiring liability).

In recent years, negligent hiring liability has expanded and placed tremendous pressure on employers to screen for negative traits. *See* Williams, *supra*, at 536; Minuti, *supra*, at 504 (explaining that employers may now even be held liable for off premise activities). Criminal background checks reduce the risk of liability because they have proven to be excellent predictors of employee behavior. *See Carolina Freight*, 723 F. Supp. at 753 (finding it "exceedingly reasonable" for employers to rely on criminal background checks to predict employee behavior); *see also* Stephen P. Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 Appalachian J.L. 145, 170-71 (2011) (criminal background checks have excellent predictive power). Indeed, often failure to conduct a criminal background check can result in liability, because they are an easy, successful, and cost-effective means of ascertaining a job applicant's likelihood to commit workplace crime. *See Blair*, 386 F.3d at 630; *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 914-15 (Minn. 1983).

For these reasons, punishing employers who examine an applicant's criminal history prior to hiring makes little sense. Such background checks are a "rational and legitimate component of a reasonable hiring process." *Freeman*, 961 F. Supp. 2d at 785. In other words, criminal background checks are "job related" and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

II

PROHIBITING EMPLOYERS FROM SCREENING APPLICANTS' CRIMINAL BACKGROUNDS CONTRAVENES TITLE VII AND HURTS MINORITY EMPLOYMENT

Title VII prohibits employers from treating employees and applicants for employment differently on the basis of race. The language of the statute is explicit:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(a)(1). Racially motivated decisions are prohibited because they judge individuals on a basis irrelevant to their employment. A fundamental purpose of anti-discrimination law is to ensure that all persons will be treated as individuals, not "as simply components of a racial class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Title VII was designed to remedy discrimination based on the traits individuals cannot control. *See* Thomas M. Hruz, *The Unwisdom of the Wisconsin*

Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records, 85 Marq. L. Rev. 779, 821 (2002).

EEOC's decision to sue Freeman for its use of criminal background checks is inconsistent with Title VII. The Supreme Court has recognized that distinctions between individuals based on past behavior do not raise the same concerns as distinctions based on immutable characteristics. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). Employers should be free to engage in "thoughtful scrutiny of individuals," without fear of running afoul of the nation's anti-discrimination laws. *Id.* Past criminal acts are precisely the type of behavior that the Supreme Court has found to be consistent with Title VII. *Id.*

The judiciary's reluctance to add past criminal behavior to Title VII's list of prohibited discrimination recognizes the court's proper role in adjudicating discrimination lawsuits. Congress has demonstrated that it will expand our discrimination laws when needed—for example, for age, disability, or pregnancy—and it is not for the courts (or agencies) to create new protected groups without legislative approval. *Manhart*, 435 U.S. at 709. Because Congress has not acted to prohibit behavioral characteristics, courts have consistently determined that Title VII protections only apply to immutable traits. *See* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. Colo. L. Rev. 1355, 1361 (2008); Bruce E. May, *The Character Component of Occupational*

Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities, 71 N.D. L. Rev. 187, 204 (1995).

Not only does the EEOC's attack on Freeman's use of criminal background checks contravene Title VII, but there is mounting evidence that such lawsuits *discourage* employers from hiring minority applicants. Businesses that are prohibited from conducting background checks tend to unintentionally rely on pernicious racial stereotypes to make up for the lack of information. Background checks, on the other hand, give employers access to concrete information about applicants, which reverses the effects of racial bias. *See* Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Reentry?* 5 (2002);[5] Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. Chi. L. Rev. 363, 366 (2008). In fact, background checks are so successful in defeating prejudice that they more than overcome any negative effect that results from higher African-American incarceration rates. Holzer, et al., *Perceived Criminality*, *supra*, at 471. Increased use of background checks results in less nonminority employment, since white applicants no longer benefit from unfair racial prejudices. Black applicants, on the other hand, tend to benefit greatly from employers having access to criminal records. *Id.*

[5] *Available at* http://www.urban.org/uploadedpdf/410803_positiverole.pdf (last visited Apr. 4, 2014).

Not only does prohibiting background checks have a negative effect on black employment, there is little evidence that it has an effect on employers hiring ex-convicts. *See* Stoll, *supra*, at 383 (noting a negligible difference in ex-convicts hired where background checks are prohibited). Employers will only hire ex-convicts where they have access to information concerning the nature and history of the offense, and can thereby avoid negligent hiring liability. *See* Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, Nat'l Poverty Ctr. Working Paper Series #07-08, Feb. 2007, at 23-24.[6] This tendency is exemplified by Freeman in this case. Freeman did not deny employment to all employees with past criminal histories. To the contrary, Freeman evaluated the nature of the crime, the length of time since the act, as well as a host of other factors before determining whether an applicant was fit to be hired. *Freeman*, 961 F. Supp. 2d at 788. To Freeman, convictions more than seven years old were irrelevant, and convicts who were truthful about their past crimes were much more likely to be offered employment as opposed to those who attempted to conceal them. *Id.*

The best way to prevent discrimination is to provide employers with more, not less information. *See* Strahilevitz, *supra*, at 374-75. Background checks serve "as a

[6] *Available at* http://npc.umich.edu/publications/u/working_paper07-08.pdf (last visited Apr. 4, 2014).

useful, and perhaps even necessary, supplement to the anti-discrimination laws' attack on statistical discrimination." *Id.* at 380.

III

THE EEOC'S DISPARATE IMPACT SUIT AGAINST FREEMAN RAISES SERIOUS EQUAL PROTECTION CONCERNS

EEOC's decision to challenge Freeman's use of criminal background checks because of a perceived racial imbalance may violate the equal protection component of the Due Process Clause of the Fifth Amendment. *See Adarand*, 515 U.S. at 204. The manner in which the EEOC has enforced Title VII's disparate impact provisions has a coercive effect, because the business may adopt race-conscious measures to avoid liability from using criminal background checks. Yet, racial imbalance cannot justify racial preferences, let alone warrant racial quotas. *See, e.g.*, *Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Pub. Schs.*, 197 F.3d 123, 132 (4th Cir. 1999); *Lewis v. Tobacco Workers' Int'l Union*, 577 F.2d 1135, 1142 (4th Cir. 1978). Because the government is prohibited from implementing quotas, it is also prohibited from enacting policies that force employers to do the same. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

While disparate impact theory was intended to combat employment practices that are the functional equivalent of intentional discrimination, in practice, the theory has the perverse effect of encouraging the very behavior our civil rights laws are

designed to prevent. After experiencing workplace theft, embezzlement, violence, and drug use, Freeman determined that the best way to limit such workplace behavior was to screen the criminal backgrounds of new applicants. This policy was entirely business-related, and race-neutral. If employers can be liable for even those hiring disparities that result from innocuous race-neutral job-related practices, the specter of disparate impact liability will steer them toward race-based hiring criteria to prevent disparities from arising in the first place. *See* Marcus, *supra*, at 63. Employer responses may include deliberate racial balancing, or discarding race-neutral standards after they prove to result in imbalance. *See* Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L. J. 429, 461 (1985). In this way, disparate impact subverts Title VII's primary purpose—prohibiting disparate treatment, to its secondary purpose—preventing disparate impact.

In theory, an employer's ability to assert that its hiring criteria are "job-related" means that it should only be held liable if it uses potentially discriminatory measures. An employer's ability to prove its criteria are "job-related," or consistent with "business-necessity," reduces the likelihood that its criteria are designed to harm or help a given race. *See Griggs*, 401 U.S. at 436 (Title VII's job-related requirement "measure[s] the person for the job" by ignoring irrelevant criteria). In some cases,

employers are even permitted to adopt classifications that would normally be considered impermissible where those classifications are a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *See* 42 U.S.C. § 2000e-2(e).

Disparate impact does not mandate that employers hire unqualified individuals in order to eliminate all racial disparities. *See Griggs*, 401 U.S. at 434. Disparate impact liability only makes unlawful those disparities that arise from one of the "prohibited bases." *Lewis*, 560 U.S. at 206. Congress' concern that disparate impact would spawn quota systems led to a specific prohibition against interpreting the Act to require racial balancing. *See Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 Yale L.J. 98, 103-04 (1974).

But as demonstrated by EEOC's actions in the present case, even obviously job-related race-neutral criteria can be subject to an EEOC lawsuit. And proving job-relatedness can be a technically difficult and economically burdensome endeavor. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1235 (1995). Given the threat of an expensive and onerous disparate impact lawsuit, an employer like Freeman may use improper, secret racial profiling in its hiring to ensure that disparities do not arise from the outset. Unless employers are given wide discretion to choose their employment protocol, disparate impact theory

"is a government mandate for proportional quotas in violation of the Equal Protection Clause." *See* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 Notre Dame L. Rev. 1153, 1153 (1993).

CONCLUSION

For these reasons, this Court should affirm the district court's order granting summary judgment to Freeman.

DATED: April 8, 2014.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2365 Caption: *EEOC v. Freeman & US Office of Pers. Mgmt.*

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DATED: April 8, 2014.

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I certify that on April 8, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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