No. 11-2303

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NICHOLAS E. PURPURA,
DONALD R. LASTER, JR.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Individually and as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; TIMOTHY F. GEITHNER, Individually and as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF TREASURY; HILDA A. SOLIS, Individually and as Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, Case No. 3:10-cv-04814

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court dismissed the case for lack of standing on April 21, 2011. Plaintiffs filed a notice of appeal on May 12, 2011. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly dismissed this *pro se* action for lack of standing because plaintiffs failed to allege injury-in-fact resulting from the Patient Protection and Affordable Care Act ("Affordable Care Act").

STATEMENT OF RELATED CASES

This case has not previously been before this Court. On August 3, 2011, this Court issued its decision in *New Jersey Physicians, Inc. v. Obama*, No. 10-4600, __ F.3d __, 2011 WL 3366340 (3d Cir. Aug. 3, 2011). Like this case, *New Jersey Physicians* addressed plaintiffs' standing to challenge provisions of the Affordable Care Act. This Court affirmed the order of dismissal for lack of standing in a published decision that is directly controlling here.

Another challenge to Affordable Care Act provisions is pending before a district court in this Circuit in *Goudy-Bachman v. U.S. Department of Health & Human Services*, No. 1:10-cv-763 (M.D. Pa.).

The Sixth Circuit recently rejected a challenge to the Act's minimum coverage provision in *Thomas More Law Center v. Obama*, No. 10-2388, __ F.3d __, 2011 WL 2556039 (6th Cir. June 29, 2011), *cert. petition pending*, No. 11-117 (S. Ct.). The following Affordable Care Act cases are pending before other courts of appeals:

> *Baldwin v. Sebelius*, No. 3:10-cv-1033, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010), *appeal pending*, No. 10-56374 (9th Cir.), *cert. before judgment denied*, 131 S. Ct. 573 (2010).
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> *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010), *appeal pending*, No. 10-2347 (4th Cir.).
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> *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*, No. 3:10-cv-91, __ F. Supp. 2d __, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), *appeals pending*, Nos. 11-11021 & 11-11067 (11th Cir.).
>
> *Kinder v. Geithner*, No. 1:10-cv-00101, 2011 WL 1576721 (E.D. Mo. Apr. 26, 2011), *appeal pending*, No. 11-1973 (8th Cir.).
>
> *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. Feb. 22, 2011), *appeal pending sub nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.).

STATEMENT OF THE CASE

Pro se plaintiffs Nicholas E. Purpura and Donald R. Laster, Jr., seek to challenge the constitutionality of the Affordable Care Act. They allege that the passage and enforcement of the Act violate the Constitution in numerous ways,

including allegations that the Act was not validly enacted because the President is not a naturally born citizen, Plaintiffs' Appendix ("Pl. App.") 78-80 (Complaint ("Compl.") 18-20), and that it creates a "private Presidential Army," Pl. App. 72 (Compl. 12). Plaintiffs also allege that the Act is invalid because it conflicts with other federal statutes.

The district court dismissed the suit for lack of standing, concluding that plaintiffs failed to allege injury-in-fact. Pl. App. 26 (Op. 20). The court explained that "[g]laringly absent from the Complaint . . . are any factual allegations concerning how Plaintiffs Purpura and Laster will be affected by the Act or any of its provisions." Pl. App. 11 (Op. 5). The court held that many of plaintiffs' claims were, "at best, generalized grievances for which Plaintiffs have no standing." Pl. App. 21 (Op. 15). The court further held that "neither the Complaint nor the supporting documents nor the voluminous briefs sufficiently allege — or for that matter, allege at all — that Plaintiffs will be subject to the Act's Individual mandate provision." Pl. App. 23 (Op. 17). The court examined the allegations found to be sufficient to create standing in other cases challenging that provision and concluded that no other court had found standing in a case where there were no allegations showing that plaintiffs "are or will be subject to the Act's provisions." *Ibid*.

On August 1, 2011, this Court issued an order that denied various motions filed by plaintiffs including their motion for an injunction pending appeal, their motion to vacate the government's extension of briefing time, their motion for entry of default, and their motion asking that the Court disclose the names of judges who have recused themselves. Plaintiffs then filed two motions to "recall and vacate" the order and to request "judicial intervention by an *en banc* court," which were denied by the full court on August 8, 2011. In prior litigation, this Court noted that plaintiff Purpura has been repeatedly sanctioned for "frivolous and abusive litigation." *Purpura v. Bushkin, Gaimes, Gains, Jonas & Stream,* 317 Fed. Appx. 263, 266 (3d Cir. 2009).

STATEMENT OF FACTS

A. Statutory Background

The Affordable Care Act is a comprehensive reform of our national health care system. The Act seeks to ameliorate the crisis in the interstate market for health care services that accounts for more than 17% of the nation's gross domestic product.

Millions of people without health insurance consume many billions of dollars worth of health care services each year. They fail to pay the full cost of those services and shift the uncompensated costs of their care — totaling $43 billion in 2008 — to health care providers regularly engaged in interstate commerce. Providers pass on much of this cost to insurance companies, which also operate interstate. The result

is higher premiums that, in turn, make insurance unaffordable to even more people. At the same time, insurers use restrictive underwriting practices to deny coverage or charge higher premiums to millions because they have pre-existing medical conditions.

The Affordable Care Act addresses these national problems through measures designed to make affordable health care coverage widely available, protect consumers from restrictive underwriting practices, and reduce the uncompensated care that is obtained by the uninsured and paid for by other participants in the health care market.

First, the Act builds upon the existing nationwide system of employer-based health insurance, the principal private mechanism for health care financing. Congress established tax incentives for small businesses to purchase health insurance for their employees. 26 U.S.C.A. § 45R. It also prescribed tax penalties for large employers if the employer does not offer full-time employees adequate coverage and at least one full-time employee receives a tax credit to assist with the purchase of coverage in a health insurance exchange established under the Act. *Id*. § 4980H.

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to use their collective buying power to obtain prices competitive with those of large-employer group plans. 42 U.S.C.A. § 18031.

Third, for individuals and families with household income between 133% and 400% of the federal poverty line who purchase health insurance through an exchange, Congress offered federal tax credits to defray the cost of premiums. 26 U.S.C.A. § 36B(a), (b).[1] Congress also authorized federal payments to help cover out-of-pocket expenses such as co-payments or deductibles for eligible individuals who purchase coverage through an exchange. 42 U.S.C.A. § 18071. In addition, Congress expanded eligibility for Medicaid to cover individuals with income up to 133% of the federal poverty line. *Id.* § 1396a(a)(10)(A)(i)(VIII).

Fourth, the Act regulates insurers to prohibit industry practices that have prevented people from obtaining and maintaining health insurance. The Act bars insurers from refusing coverage because of pre-existing medical conditions, canceling insurance absent fraud or intentional misrepresentation of material fact, charging higher premiums based on a person's medical history, and placing lifetime dollar caps on benefits. *Id.* §§ 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a), 300gg-11, 300gg-12.

Fifth, the minimum coverage provision at issue here will require, beginning in 2014, that non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. § 5000A. The requirement may be satisfied

[1] Except in Alaska and Hawaii, the federal poverty line in 2011 is $10,890 for one person and $22,350 for a family of four. HHS Poverty Guidelines, 76 Fed. Reg. 3637-02 (Jan. 20, 2011).

through enrollment in an eligible employer-sponsored plan; an individual market plan, including one offered through a health insurance exchange; a grandfathered plan; government-sponsored programs such as Medicare, Medicaid, or TRICARE; or similar coverage as recognized by the Secretary of Health and Human Services ("HHS") in coordination with the Treasury Secretary. *Id.* § 5000A(f)(1). Congress exempted certain groups, *id.* § 5000A(d), and made the tax penalty inapplicable to individuals whose household income is too low to require them to file a federal income tax return, whose premium payments would exceed 8% of household income, or who establish (under standards set by the HHS Secretary) that they have suffered a hardship with respect to the capacity to obtain coverage. *Id*. § 5000A(e).

In enacting the minimum coverage provision, Congress made detailed findings that establish the foundation for the exercise of its commerce power. Congress found that the minimum coverage provision "regulates activity that is commercial and economic in nature" — how people pay for services in the interstate health care market. 42 U.S.C.A. § 18091(a)(2)(A). Congress found that, as a class, people who "forego health insurance coverage and attempt to self-insure" fail to pay for the medical services that they consume, and shift substantial costs to providers and insured consumers, raising average family premiums by more than $1,000 a year. *Id*. § 18091(a)(2)(A), (F). In addition, Congress found that the minimum coverage

requirement is "essential" to the Act's guaranteed issue and community rating reforms that will prevent insurers from relying on medical condition or history to deny coverage or set premiums. *Id*. § 18091(a)(2)(I). Congress found that, without the minimum coverage requirement, many people would exploit these new consumer protections by waiting to purchase health insurance until they needed care, which would undermine the effective functioning of insurance markets. *Ibid*.

The Congressional Budget Office has projected that the Act's various provisions, taken in combination, will reduce the number of non-elderly people without insurance by about 33 million by 2019. Letter from Douglas W. Elmendorf to John Boehner, Speaker, U.S. House of Representatives, Table 3 (Feb. 18, 2011).

B. Prior Proceedings

1. Plaintiffs Nicholas E. Purpura and Donald R. Laster, Jr. brought this suit *pro se*, claiming to represent *"We the People*." Pl. App. 7 (Op. 1 n.1) (plaintiffs' emphasis). Because *pro se* plaintiffs cannot represent other parties, the district court treated the suit as "brought solely on behalf of the two individual Plaintiffs." Pl. App. 7 (Op. 1 n.1).

Plaintiffs' complaint alleges a litany of statutory and constitutional violations arising from the passage and enforcement of the Affordable Care Act. For example, they allege that President Obama is not a naturally born U.S. citizen and thus could

not validly sign the bill into law, Pl. App. 78-80 (Compl. 18-20), and that the Act creates a "private Presidential Army," Pl. App. 72 (Compl. 12). They allege that, under the Act, "all medical records will be forwarded to a government bureaucracy," and that the Act "allows the federal government to have direct, real-time access to all individual bank accounts," Pl. App. 82 (Compl. 22). They allege that the Act's tax on tanning salons violates equal protection because it "'*exempts citizens of color*' that have no need or desire to purchase said services." Pl. App. 91 (Compl. 31) (plaintiffs' emphasis). They also allege that the Act violates equal protection by treating large corporations differently from small businesses and by "discriminat[ing] against chain restaurants" in favor of small restaurants. Pl. App. 92 (Compl. 32). Plaintiffs allege that the Act is unconstitutional because it "exempts the federal government from the anti-trust laws." Pl. App. 89 (Compl. 29). And they allege that the Act is unconstitutional because legislators who voted for the bill had not read or understood it. Pl. App. 94 (Compl. 34).

Among the many claims in the complaint are seven counts challenging the minimum coverage provision. Plaintiffs allege, *inter alia*, that the minimum coverage provision exceeds Congress's power under the Commerce Clause, Pl. App. 69-71 (Compl. 9-11), and is a form of "involuntary servitude," Pl. App. 84 (Compl. 24).

2. The district court granted the government's motion to dismiss, concluding that plaintiffs failed to establish an injury in fact with respect to any of the claims in their complaint. Pl. App. 21, 25 (Op. 15, 19).

As an initial matter, the court "note[d] that the Complaint contains a litany of conclusory allegations concerning the Act's allegedly illegal, unconstitutional and fraudulent nature." Pl. App. 10 (Op. 4). However, the court observed that "[g]laringly absent from the Complaint . . . are any factual allegations concerning how Plaintiffs Purpura and Laster will be affected by the Act or any of its provisions." Pl. App. 11 (Op. 5). The district court concluded that, as to those counts of the complaint that did not involve the minimum coverage provision, "Plaintiffs' claims amount to nothing more than 'generally available grievance[s] about government — claiming only harm to [Plaintiffs'] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large.'" Pl. App. 22 (Op. 16) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (alternations in original).

Turning to the challenges to the minimum coverage provision, the district court contrasted the allegations in this case to those in other such challenges where courts have found standing. The court noted that the complaint does not indicate whether plaintiffs have health insurance. Pl. App. 23 (Op. 17). It observed that, unlike

plaintiffs in other cases, plaintiffs here did not allege that they must forgo spending in order to obtain insurance in 2014. And the court explained that "neither the Complaint nor the supporting documents nor the voluminous briefs sufficiently allege — or for that matter, allege at all — that Plaintiffs will be subject to the Act's Individual mandate provision." Pl. App. 23 (Op. 17). "Plaintiffs have not alleged any facts whatsoever regarding their financial situations, let alone set forth any facts demonstrating their inability to make purchases as a result of the Act." Pl. App. 25 (Op. 19).

The court noted that the only facts about plaintiffs were presented in a footnote in their opposition to dismissal. The court accepted those facts as true for purposes of deciding the motion, Pl. App. 11 (Op. 5), and held that they would not establish standing, Pl. App. 24 (Op. 18 n.11). Taking those facts into account, the court determined that "Plaintiff Purpura would *not* be subject to the Act's Individual Mandate since, based on his age alone, Mr. Purpura appears to qualify for Medicare." Pl. App. 24 (Op. 18 n.11).

The court reasoned that, instead of pleading facts to demonstrate an injury, plaintiffs "assert their belief that a 'violation of the Constitutional is an immediate personal injury of every citizen of this [sic] United States.'" Pl. App. 25 (Op. 19) (alternation in original). The court concluded that "such a generalized type of injury

flies in the face of well-established Supreme Court precedent." Pl. App. 25 (Op. 19). Accordingly, the district court dismissed this case for lack of standing, without reaching the merits. Pl. App. 26 (Op. 20).

Plaintiffs noticed this appeal, which challenges the standing ruling and also urges that "default" summary judgment should have been entered in their favor.

SUMMARY OF ARGUMENT

To establish standing, plaintiffs must show that they have "suffered an 'injury in fact,' which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003) (quoting *Lujan*, 504 U.S. at 560). The district court correctly held that plaintiffs failed to show any legally cognizable injury resulting from the Act. Pl. App. 22, 25 (Op. 16, 19). Plaintiffs have not alleged that they lack health insurance or that they will be required by the Act's minimum coverage provision to obtain it, let alone any facts demonstrating that they need to take action now in preparation for the provision's effective date in 2014. *See New Jersey Physicians, Inc. v. Obama*, No. 10-4600, __ F.3d __, 2011 WL 3366340 (3d Cir. Aug. 3, 2011). Nor have plaintiffs alleged any concrete injury resulting from any of their other challenges to the Act. Plaintiffs raise "only a generally available grievance about government." *Lujan*, 504 U.S. at 573-74.

STANDARD OF REVIEW

This Court reviews *de novo* an order dismissing a complaint for lack of standing. *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009).

ARGUMENT

The District Court Correctly Held That Plaintiffs Lack Standing To Challenge The Affordable Care Act.

To establish standing, plaintiffs must show that they "have suffered an 'injury in fact,' which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003) (quoting *Lujan*, 504 U.S. at 560). Standing requirements ensure that a plaintiff has a "personal stake" in the outcome of the litigation. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Article III courts are not the proper forum for citizens to "vindicate the public's nonconcrete interest in the proper administration of the laws." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment)).

This Court held in *New Jersey Physicians, Inc. v. Obama*, No. 10-4600, __ F.3d __, 2011 WL 3366340 (3d Cir. Aug. 3, 2011), that an individual lacked standing to challenge the minimum coverage provision because he failed to allege facts

showing present or imminent future injury. In that case, there were "no facts alleged to indicate that [the plaintiff] is in any way presently impacted by the Act or the mandate." *Id.* at 2011 WL 3366340, *4. This Court thus contrasted *Thomas More Law Center, v. Obama*, __ F.3d __, 2011 WL 2556039 (6th Cir. June 29, 2011), and other cases "in which the plaintiffs alleged or demonstrated that they were experiencing some current financial harm or pressure arising out of the individual mandate's looming enforcement in 2014." *New Jersey Physicians*, 2011 WL 3366340, *4. In addition, this Court explained that an individual plaintiff in *New Jersey Physicians* had failed to allege facts establishing a "'realistic danger' that he would be harmed by the individual mandate" when it takes effect, noting his failure to address potential exemptions. *Ibid*.[2]

As in *New Jersey Physicians*, plaintiffs here do not allege that they lack insurance and do not represent that they must take any action, now or in the future, as a result of the Act. The district court explained that "neither the Complaint nor the supporting documents nor the voluminous briefs sufficiently allege — or for that matter, allege at all — that Plaintiffs will be subject to the Act's Individual mandate

[2] District courts have dismissed other challenges to the minimum coverage provision where individuals failed to establish standing. *See, e.g.*, *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611, 621-22 & nn. 6-7 (W.D. Va. 2010), *appeal pending*, No. 10-2347 (4th Cir.); *Baldwin v. Sebelius*, No. 3:10-cv-1033, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010), *appeal pending*, No. 10-56374 (9th Cir.).

provision." Pl. App. 23 (Op. 17). On the contrary, plaintiff Purpura is 68 years old and likely qualifies for Medicare Part A, which, by statute, satisfies the minimum coverage requirement. Pl. App. 24 (Op. 18 n.11); 26 U.S.C.A. § 5000A(f)(1)(A)(i); *see also Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. Feb. 22, 2011) (finding that a plaintiff would not have an injury if eligible for Medicare by 2014).[3] Thus, plaintiffs have "alleged no predicate facts to demonstrate that [their] situation[s] will even change when the individual mandate takes effect on January 1, 2014." *New Jersey Physicians*, 2011 WL 3366340, *4.

Plaintiffs assert only the type of generalized interest that courts have held to be inadequate to support standing. Plaintiffs argue that "Any violation of the Constitution grants automatic 'standing,'" Pl. Br. 13, and that they have standing because "[w]henever the Constitution is usurped, it becomes an immediate present danger of direct injury and harm to our person, families, as well as to our Constitutional Republic." Pl. Br. 14 (emphasis omitted). But that is merely a generalized grievance, not a judicially cognizable injury. "The Supreme Court has

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[3] Plaintiff Laster's age is not in the record, so it is unclear whether he is also Medicare eligible. Plaintiffs may also qualify for other government health benefits; notably, they asserted in their second Motion for a Temporary Restraining Order that they served in the military. *See* Plaintiffs' Affidavit in Support of Order to Show Cause for a Restraining Order Due to Extrodinary [sic] Circumstances that Require Emergency Relief, at 9-10 (June 28, 2011).

consistently rejected claims of citizen standing predicated upon the right, possessed by every citizen, to require that the government be administered in accordance with the Constitution." *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194, 200 (3d Cir. 1986) (citing Supreme Court cases). Plaintiffs openly declare that their only grievances are "shared by . . . every citizen, resident and visitor[] of the United States." Pl. Br. 38.

Although plaintiffs allege no cognizable injury, they seek to distinguish other Affordable Care Act cases by declaring that this suit is "the most comprehensive challenge" to the Act and the district court was required to address the validity of their constitutional challenges as a "*threshold matter*." Pl. Br. 15-16 (plaintiffs' emphasis). Plaintiffs misunderstand standing doctrine. It is standing, not the merits of plaintiffs' claims, that "is a threshold jurisdictional requirement." *Interfaith Community Organization v. Honeywell Intern., Inc.*, 399 F.3d 248, 254 (3d. Cir. 2005) (internal quotation marks omitted).

Because plaintiffs lack standing, there is no reason for the Court to address plaintiffs' contention that they were entitled to "default summary judgment" on the ground that the government's motion to dismiss was untimely. Pl. Br. 6. Moreover, even if the government's motion had been untimely, plaintiffs would not have been entitled to default summary judgment. In fact, the government's motion was timely

filed. Plaintiffs never properly served their complaint on the United States. *See* Pl. App. 41 (Dec. 7, 2010 letter from the district court noting that "Plaintiffs have failed to properly effectuate service upon the United States"). In December 2010, the U.S. Attorney's Office received a mailing from plaintiffs containing their "Request for Declaratory Judgment." That mailing did not include a summons as required by Fed. R. Civ. P. 4(i)(1)(A)(i). The government nevertheless indicated that it would file a motion to dismiss. *See* Docket No. 20-1. The government received an automatic extension to January 4, 2011, pursuant to Local Rule 7.1(d)(5), and an additional extension to January 17 by order of the district court. Pl. App. 35 (order). The government filed its motion to dismiss on January 17, 2011, consistent with that order. *See* Docket No. 26 (motion to dismiss).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AUGUST 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is fourteen-point Times New Roman font, and the number of words is 3,900 (excluding the cover, tables, and certificates).

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CERTIFICATE OF BAR MEMBERSHIP,
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Counsel for appellees are federal government attorneys and are not required to be members of the Bar of this Court.

The text of the hard copy of this brief and the text of the brief in electronic PDF format are identical.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2011, I filed an electronic copy of the foregoing brief through this Court's appellate CM/ECF system and caused ten paper copies to be sent to the Court by Federal Express overnight delivery. I also served it upon plaintiffs by first-class mail at the following addresses:

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