DATE FILED: November 1, 2023 2:23 PM
FILING ID: 35A8B482DE587
CASE NUMBER: 2023CA995

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Denver District Court
2022CV32315

Plaintiffs-Appellants:
David Migoya and The Denver Gazette,

v.

Defendants-Appellees:
Stacy Wheeler, in her official capacity as Custodian of Records and Denver Public Schools,

and

Intervenor-Appellee:
Denver School Leaders Association.

▲ Court Use Only ▲

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Court of Appeals
Case No.: 2023CA995

ANSWER BRIEF OF INTERVENOR-APPELLEE DENVER SCHOOL LEADERS ASSOCIATION

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements in Colorado Appellate Rules C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32. Those include:

Word Limits: Our brief has 4,130 which is not more than the 9,500-word limit.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☐ **For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☒ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal, and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

S/Joseph M. Goldhammer
Joseph M. Goldhammer
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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court acted within its discretion in permitting DSLA to present arguments and evidence at the January 23, 2023, hearing regarding C.R.S. §22-9-109(1) which renders confidential evaluation reports of licensed educators and public records used in the preparation of those reports.
2. Whether C.R.S. §22-9-109(1), bars public access to the FRISK records sought in Plaintiffs' CORA request, since evaluators use those records in preparing evaluation reports under that statute.
3. Whether the District Court correctly denied access to Plaintiffs of the FRISK records sought in their CORA request because disclosure would cause substantial injury to the public interest under C.R.S. §24-72-204(6)(a).[1]

STATEMENT OF FACTS AND OF THE CASE

On January 6, 2021, Plaintiff David Migoya, Senior Investigative Reporter for Plaintiff Denver Gazette (Collectively The Gazette) made a request under the Colorado Open Records Act (CORA) for all FRISK or disciplinary records against any administrator, including but not limited to principals and assistant principals, in

[1] DSLA has not addressed the issue of attorney fees in this case, because the relevant fee shifting statute, C.R.S. §24-72-204(5)(b) applies only to the custodian and makes no mention of attorney fees against an intervenor.

the Denver Public Schools for the calendar year 2021. (Exhibits p. 55). Eventually, Migoya expanded that request to the 3-year period beginning January 1, 2019. (Exhibits p. 49). Ultimately, Defendant Stacy Wheeler and Denver Public Schools (collectively DPS) denied the CORA request. (See CF Complaint, p. 8 ¶19 and Answer, p. 94 §K). On August 11, 2022, The Gazette then initiated an action under C.R.S. 24-72-205(5) of CORA against DPS seeking disclosure of the requested records and attorney fees. (CF pp. 4-11).

On October 11, 2022, the Denver School Leaders Association (DSLA), the union representing all principals and assistant principals in DPS, moved to intervene in the action. (CF pp. 103-108). The Court granted that motion on November 4, 2022. (CF pp. 270-275). Meanwhile, the parties briefed the legal issues then before the court, including whether CORA exempted disciplinary records from disclosure as part of the "personnel files" exception in C.R.S. §24-72-204 (3)(a)(II)(A) and whether the provision of CORA relating to sexual harassment records precluded disclosure of such records under C.R.S. §24-72-204(3)(a)(X)(A). (CF pp. 146-160, 202-216, 256-268, and 276-290). In The Gazette's reply brief, it argued for the first time that disciplinary records resemble records of "performance ratings" which the legislature expressly excluded from the definition of "personnel files" in C.R.S. §24-72-202(4.5) (CF p. 281).

On November 22, 2022, the Court issued its Order Regarding Plaintiffs' Request for Access to Public Records Under C.R.S. §24-72-204(5) (CORA) (CF pp. 322-332). In that order, the Court ruled that (1) FRISK records are not subject to the personnel files exemption and (2) FRISK records containing information regarding sexual harassment complaints and investigations are not subject to inspection. *Id* In making the former ruling, the Court found that disciplinary records are "more akin to performance ratings than the demographic information included in the personnel files exemption," and that "performance ratings are expressly carved out from the definition of personnel files." (CF p. 326).

In its November 22, 2022, Order, the Court also granted permission for DPS to apply to the Court to restrict disclosure of the records to which it granted access pursuant to C.R.S. §24-72-204(6)(a), which permits the Court to deny disclosures contrary to the public interest. (CF p. 331). The Court did not authorize DSLA to apply to the court for such a restriction, although DSLA alleged in its answer that disclosure of the records sought by The Gazette would "violate the public interest." (CF. p. 101).

On December 2, 2022, DPS filed its Motion to Restrict Access, and DSLA joined in that Motion. (CF pp. 333-345). The Gazette filed its objection on

December 12, 2022, (CF 346-365) the Court set the public interest issue for an evidentiary hearing on January 23, 2023 (CF 366).

On January 20, 2023, DSLA filed a "Notice of Testimony and Its Legal Basis of DSLA Witness Dr. Moira Coogan" with an attached letter to counsel for the other parties dated January 13, 2023. (CF 392-396). In the Notice, DSLA counsel explained that the letter responded to opposing counsel's request for a summary of the testimony of its witnesses and that DSLA counsel was submitting the Notice and letter to the court "in the event it might assist the Court in understanding the testimony and its legal basis." (CF p. 395) The Gazette responded with a "Motion to Strike Defendant Intervenor's Motion for Improper Sur-reply and/or Supplemental Briefing." (CF pp. 3378-383). On January 23, 2023, the Court denied that Motion in part, but offered the opportunity for The Gazette to respond to DSLA's arguments through closing arguments at the hearing of the same date and in a proposed findings of fact, conclusions of law, and order due at noon on January 30, 2023. (CF p. 410). The Gazette also filed a Motion in Limine, which the Court denied at the January 23, 2023, hearing. (CF p. 404-409).

The Court held an evidentiary hearing on January 23, 2023. (Tr. 1-136). At the conclusion of the hearing, the parties filed proposed findings of fact, conclusions of law and orders. (CF. 422-467). In its proposed findings, DSLA

argued that C.R.S. §22-9-109(1) precludes disclosure of the records sought by the Gazette, because disciplinary records are "used in preparing the evaluation report" as that phrase appears in that statute. (CF p. 462). Additionally, DSLA argued that disciplinary records cannot be disclosed even if the evaluation report has not yet been prepared at the time of the disciplinary action, since it would render the statute meaningless to reveal items which will predictably be used in preparation of the report before completion of the report. *Id.* Furthermore, DSLA argued that disclosure of disciplinary records would do substantial injury to the public interest. (CF pp. 463-466.)

The Court issued its Order Regarding Defendant's Motion to Restrict Access Pursuant to C.R.S. §24-72-204(6)(a) - (b) on April 24, 2023. (Supp. CF pp. 1-13). In the Order, the Court granted DPS's Motion to Restrict Access, holding that DPS and DSLA had carried their burden of proof in establishing that disclosure of the FRISK records requested by The Gazette would substantially injure the public. (Supp. CF p. 12). The Court credited the testimony of DSLA president Dr. Moira Coogan regarding the use of corrective actions as part of the "body of evidence" which evaluators use in conducting evaluations. (Supp. CF p. 7-8). She also credited Dr. Coogan's testimony that if disciplinary memos were released to the public, the potential for reputational harm is particularly problematic since such

memos can be one-sided and not subject to challenge at a hearing. (Supp. CF p. 8). In her analysis, the District Court specifically found that "DPS principals, assistant principals, and administrators have legitimately expected that their discipline records would be protected from disclosure. This legitimate expectation is the result of both the established policies and practices of DPS and the operation of CLPPEA, specifically C.R.S. §22-9-109." (Supp. CF pp. 10-11). The Court relied upon this Court's 3-part test found in *Freedom Newspapers, Inc. v. Tollefson,* 961 P.2d 1150, 1156 (Colo. App. 1998) to determine the privacy rights of those whose record may be disclosed. (Supp. CF p. 5).

SUMMARY OF THE ARGUMENT

The District Court properly considered the impact of the Colorado Licensed Professional Performance Evaluation Act (CLPPEA) and particularly C.R.S. §22-9-109(1) in determining whether the DPS must legally disclose the records sought by The Gazette. It held that disclosure would violate the public interest under C.R.S. §24-72-204(6)(a) by undermining the ability of the DPS to operate the school district and compromising the ability of their principals, assistant principals, and other administrators to do their work effectively and with legitimately expected privacy. The Court of Appeals should follow that lead, and should go even further in ruling, based on the evidence presented below, that C.R.S. §22-9-

109(1) directly prevents disclosures by school districts of FRISK records, because such records are "public records used in the preparation of evaluation reports," as provided in that statute.

Additionally, since disclosure of records prohibited by any act of the legislature, including CLPPEA, would substantially violate the public interest, the District Court correctly prohibited disclosure here under C.R.S. §24-72-204(6)(a). That subsection of the statute requires the Court to issue an order directing the custodian of records not to disclose the record to the public upon a finding that disclosure of the record is prohibited. The District Court did exactly that here.

This Court should also reject the invitation of The Gazette to evade the Court's responsibility to confront the impact of CLPPEA in this case by overturning the evidentiary rulings of the District Court which permitted evidence and argument regarding CLPPEA's applicability. The Gazette studiously avoided any substantive discussion of CLPPEA in its Opening Brief because it fears the damage that statute inflicts upon its cause. This Court reviews the evidentiary rulings of trial courts based upon an abuse of discretion standard, and the lower court does not abuse its discretion unless its ruling is arbitrary, unreasonable, or unfair. The District court here offered every opportunity to The Gazette to oppose DSLA's evidence regarding CLPPEA, and The Gazette's attempts to avail itself of

that opportunity failed. The Gazette in its Opening Brief relied only on its complaints that DSLA raised the issue too late and outside the scope of the January 23, 2023, hearing. The District Court's rulings here did not even approach violation of the arbitrary, unreasonable, or unfair standard.

The principals, assistant principals, and other administrators In public schools in Colorado deserve to know whether the law exposes documentation of even their mildest work infractions to public inspection. This Court should dispel any doubts they may have regarding that question by confronting the CLPPEA issue directly in this case and deciding the case favorably to DPS and DSLA.

ARGUMENT

I. The District Court Properly Exercised Its Discretion to Receive CLPPEA Evidence Reasonably and Without Arbitrariness or Unfairness.

Standard of Review and Preservation on Appeal:

DSLA agrees that The Gazette raised the issue of whether the DSLA could adduce its legal arguments and testimony concerning CLPPEA in its Motion to Strike and Motion in Limine. However, DSLA disagrees with The Gazette's statement of the standard of review on the issue whether the District Court should have granted those motions on page 28 of its Opening Brief. The Colorado

Supreme Court defined the standard of review which applies to a trial court's evidentiary rulings as follows:

> We review a trial court's decision on evidentiary issues for an abuse of discretion, and a trial court does not abuse its discretion unless its ruling is manifestly arbitrary, unreasonable, or unfair.

Murray v. Just in Case Business Lighthouse 374 P3d 443, 453 (Colo. 2016). This Court should apply the above quoted standard here.

Discussion:

The District Court's evidentiary rulings in this case fell well within the standard articulated in *Murray* supra. The Court wisely determined through her evidentiary rulings, to hear completely the positions of the parties in the case, rather than granting the prehearing motions filed by The Gazette which would have blocked a full disposition of all issues. With respect to the Motion to Strike DSLA's Sur-reply Brief, the Court stated as follows:

> I'm not going to grant it because I want to get this case right. And so, I want to know from all of you what legal authority you think exist both for or – in support of your position or, obviously, you have the duty of candor to tell me about authority that undermines your position as well.

(Tr p. 6). Likewise, the Court stated, in reference to CLPPEA and Dr. Coogan's testimony that, "I can't ignore a statute, I can't ignore a pattern and practice, right?" (Tr p. 17).

While recognizing the need to hear and decide all pertinent issues and "get it right" the District Court appropriately also recognized the importance of affording The Gazette due process. Before any testimony at the January 23, 2023, hearing the Court acknowledged that DSLA raised the CLPPEA issue "at the last minute." (Tr p. 17). To eliminate any prejudice, the Court offered The Gazette any remedies in her "toolbox" such as the "granting of continuances" and allowing "additional briefing, things along those lines." (Tr p. 17). Counsel for the Gazette then requested the opportunity for additional briefing after the hearing, to which the Court agreed. (Tr p. 17-18). The Court then decided to proceed with taking evidence at the hearing "since everybody is here from all around the country." (Tr p. 18). In this regard, the Court considered the convenience of out of state counsel for the Gazette, Mr. Tyler Takemoto, who attended the hearing in Denver after travelling from Washington, D.C. where he is a member of the bar. (CF pp. 372-375). Consistent with the Court's commitment to offer additional briefing at the close of the hearing, the Court ordered the parties to file simultaneous proposed findings of fact, conclusions of law and orders in which they could spell out their positions on all issues. (Tr p. 133 – 135). The Gazette availed itself of that opportunity by arguing its position on CLPPEA in its proposed findings and conclusions. (CF pp. 450-452).

Thus, the District Court acted reasonably and without arbitrariness or unfairness in accommodating The Gazette's right to present evidence and argument concerning the CLPPEA issue while balancing the imperative to get this case right by hearing all relevant evidence and argument from all sides. That is outstanding judicial performance, not an abuse of discretion.

The Gazette also objects under CRE 602 to the District Court's admission of the testimony of Dr. Coogan regarding her understanding of the requirements of CLPPEA (C.R.S. §22-9-109) in the daily functioning of her duties as a principal in DPS. (See pp. 31-32 Opening Brief). In the Gazette's quotation from the transcript in its Opening Brief and throughout the line of questioning of which it is a part, the Court made it clear that she accepted the testimony regarding Dr. Coogan's understanding of C.R.S. §22-9-109 only to show the witness's expectations regarding how the statute affected her job duties, and not as a legal conclusion. (Tr p. 65-68). No jury sat to determine facts in this case, so by admitting the testimony for the limited purpose of ascertaining the reasonable expectations of employees who work under CLPPEA daily the Court did not run the risk of allowing the testimony to sway decisions of the jury. This judge demonstrated full competence to weigh the testimony only for the limited purpose for which DSLA offered it, and this Court should not reverse the judge for doing so.

Accordingly, this Court should affirm the evidentiary rulings of the District Court because that Court did not abuse its discretion.

II. This Court Should Rule Directly that C.R.S.§22-9-109 prohibits disclosure of the FRISK records sought by the Gazette.

Standard of Review and Preservation on Appeal:

The Gazette did not address this issue in its Opening Brief. The standard of review is de novo, since DSLA seeks a statutory interpretation of C.R.S.§22-9-109(1). This Court reviews interpretations of the Colorado Open Records Act and other statutes de novo. *Prairie Mountain Publishing Company v. Regents of the University of Colorado,* 491 P3d 472, 475 (Colo. App. 2021) and cases cited therein. DSLA preserved this issue in the Notice of Testimony and Its Legal Basis, and the attached letter dated January 13, 2023, (CF pp. 392 – 396), in its opening statement at the hearing of January 23, 2023, (Tr p. 9 – 14) and it its Proposed Findings of Fact and Conclusions of Law (CF pp. 461-463).

Discussion:

The District Court did not reach the issue whether the operative section of CLPPEA, C.R.S. §22-9-109(1) directly prohibits public inspection of the records at issue in this case. A careful parsing of the statute considered in connection with the evidence and testimony offered in the case should lead this Court to so rule.

The Colorado Licensed Personnel Performance Evaluation Act ("CLPPEA"), C.R.S. §22-9-101 *et seq.*, prescribes the performance evaluation system for licensed educational personnel in the State. The parties do not dispute that all principals, assistant principals, and other administrators in DPS must have a license to perform their duties and that DPS evaluates them under CLPPEA. (Tr pp. 63 and 105-106). Since principals and assistant principals supervise the instructional program, they fit within the definition of "Licensed personnel." C.R.S. 22-9-103(1.5). Specifically, CLPPEA §109(1) starts with the words, "Notwithstanding the provisions of C.R.S. §24-72-204(3) C.R.S.…" indicating that CLPPEA supersedes that section of the Colorado Open Records Act (CORA). That section contains the "personnel files" exemption from CORA in section 204(3)(a)(II)(A) which this Court has narrowly construed to apply only to "demographic information." See *Daniels v. City of Commerce City* 988 P2d 648 (Colo. App. 1999) and *Jefferson County Education Association v. Jefferson County School District* 378 P3d 835 (Colo. App. 2016). Additionally, the definition of "personnel files," in C.R.S. §24-72-202(4.5) excludes "performance ratings," further weakening the personnel files exception. However, the initial phrase of CLPPEA renders all this case and statutory law constricting the definition of "personnel files" irrelevant. CLPPEA §109(1) stands on its own in

governing the exemptions from public inspection of educator evaluations and all public records used to prepare them.

Then, CLPPEA §109(1) proceeds to render confidential and only available to the "licensed person being evaluated"[2] the evaluation report "**and all public records as defined in section 24-72-202(6) C.R.S., used in preparing the evaluation report …"** (Emphasis added) Disciplinary records fall within this language for two reasons.

First, FRISK records qualify as "public records" as defined in C.R.S. §24-72-202(6). They are "writings made, maintained, or kept by the state, any agency, institution, or … political subdivision of the state…" The parties do not dispute that fact.

Second, evaluators use DPS disciplinary records "in preparing the evaluation report." It makes common sense that an evaluator of the performance of a licensed educator would have a great interest in all disciplinary records pertaining to the person being evaluated. Ostensibly, the evaluator would want to know whether the disciplined employee had made progress in reforming the conduct which caused the discipline, the severity of the conduct and the discipline, and all other details.

[2] CLPPEA §109(1) also enumerates other officials who have access to the evaluation and related preparatory records, but none of them apply here.

To transform these intuitions into actual evidence, Dr. Coogan confirmed them in her testimony. She explained that DPS requires the evaluator to consider a "comprehensive body of evidence" against specified standards and that disciplinary actions form a part of that body of evidence. (Tr. pp. 64-65).

Dr. Coogan then related the hypothetical example of a principal who may have received a disciplinary action for improperly performing budgeting or scheduling. (Tr p. 65) According to Dr. Coogan, the evaluator of that principal should use those facts in the comprehensive body of evidence in preparing the evaluation. (*Id)* Accordingly, Dr. Coogan's expectation regarding how CLPPEA §109(1) influences the actual performance of an evaluation does not derive from her subjective beliefs, as The Gazette would contend, but on her experience in performing evaluations in the real school setting.

The Gazette did not rebut that evidence. Further, it did not address this issue in its opening brief at all. [3] Thus, this Court, the DSLA, and the DPS have no knowledge of how, if at all, The Gazette contends that it can gain access to the records it seeks despite CLPPEA §109(1).

[3] While The Gazette complains that DSLA did not raise the CLPPEA issue until shortly before the January 23, 2023, hearing leaving it with no time to prepare a defense for that issue, The Gazette has now had approximately 9 months to formulate a defense and failed to raise the issue in its Opening Brief, showing that it never had a defense to this issue and never will.

In the Gazette's proposed findings of fact, conclusions of law, and order submitted to the District Court on January 30, 2023, it argued that the exemptions to public disclosure in CLPPEA §109(1) apply narrowly "to the enumerated evaluative paperwork public agencies must generate to comply with CLPPEA's operative provisions." (CF p. 450). It cites no authority for that argument and the plain language of the statute contradicts it, because that language exempts "**all** public records as defined in section 24-72-202(6) C.R.S. used in preparing the evaluation report…" (emphasis added) Apparently, The Gazette recognized the weakness of this argument, because it failed to raise it in its Opening Brief in this Court.

It should make no difference whether evaluators have yet used disciplinary records to formulate an evaluation at the time of the CORA request. Predictably, the next evaluator will use such records, and it would frustrate the purposes of the statute to disclose them before an evaluator had the opportunity to use them.

This Court should rule that The Gazette cannot gain access to the records it seeks, because all such records have been or will be "used in preparing an evaluation report" pursuant to CLPPEA §109(1).

III. This Court Should Affirm The District Court's Ruling That Disclosure of the Records The Gazette Seeks Would Substantially Injure the Public Interest under C.R.S. §24-72-204(6)(a).

Standard of Review and Preservation on Appeal

This issue presents mixed questions of law and fact. The evaluation of credibility of witnesses at the hearing of January 23, 2023, is a matter solely within the fact-finding province of the trial court, and an appellate court will not disturb it if supported by competent evidence. *CF & I Steel v. Air Pollution Control Division*, 77 P3d 933, 937 (Colo. App. 2003) citing *Cherry Hills Country Club v. Bd. Of County Commissioners,* 832 P2d 1105 (Colo. App. 1992). To the extent that the District Court's decision applied the law, this Court's review is de novo. *Prairie Mountain Publishing Company* supra at 475. DSLA preserved this issue in its Answer to the Complaint ¶ U (CF p. 101) and in its proposed Findings of Fact, Conclusions of Law, and Order. (CF pp. 459-461).

Discussion:

The District Court properly credited the testimony of the witnesses called by DPS and DSLA and correctly applied the law with respect to the public and privacy interests served by excluding the records sought by The Gazette from public inspection. The Court accurately found that the members of the school community relied upon their well-founded expectation that disciplinary records

would remain confidential, that disclosure of the records would impair the ability of administrators to provide candid and accurate evaluations, and that DPS would have trouble recruiting and retaining school leaders if the public could successfully demand disclosure of such records. As such, it applied the 3-part test enunciated in *Freedom Newspapers v. Tollefson,* supra.

In finding that school leaders legitimately expected the confidentiality of their disciplinary records, the court adverted,

> DPS principals, assistant principals and administrators have legitimately expected that their discipline records would be protected from disclosure. This legitimate expectation is the result of both the established policies and practices of DPS and the operation of CLPPEA, C.R.S. §22-9-109.

(Supp. CF pp. 10-11). While this finding does not explicitly hold that CLPPEA §109(1) independently prohibits disclosure here, the expectation of non-disclosure would not be legitimate if that statute did not have that effect.

The subsection of CORA establishing the public interest exception, C.R.S. §24-72-204(6)(a), provides that disclosure of a record in violation of CORA would itself contravene the public interest. The statute states,

> In the case of a record that may be prohibited from disclosure pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure of the record is prohibited, issue an order directing the official custodian not to disclose the record to the public.

DSLA readily concedes that CLPPEA §109(1) does not appear in part 2 of CORA. However, CLPPEA §109 modifies part 2 of CORA in its first phrase, by stating that its provisions shall apply "notwithstanding the provisions of section 24-72-204 (3)." The latter statute is in part 2 of CORA. This Court should adopt the general principle that disclosure contrary to any statutory provision influencing the operation of part 2 of CORA violates the public interest and, in that event, the trial court should act in accordance with §24-72-204(6)(a) by issuing an order directing the official custodian not to disclose the record to the public. Accordingly, since disclosure in this case would violate CLPPEA §109(1), disclosure would also violate the public interest under §24-72-204(6)(a). This logic provides an additional basis upon which this Court should affirm the District Court's finding in this case that disclosure would violate the public interest.

CONCLUSION

For the above stated reasons, this Court should affirm the judgment of the District Court.

November 1, 2023

S/Joseph M. Goldhammer
Joseph M. Goldhammer, Esq.
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ROSENBLATT, GOSCH & REINKEN, PLLC

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November 2023, a true and correct copy of the foregoing **ANSWER BRIEF OF INTERVENOR-APPELLEE DENVER SCHOOL LEADERS ASSOCIATION** was filed with the Clerk of Court via CCEF which will electronically serve all interested, registered parties including:

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