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No. 86188-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON,

Petitioner.

**BRIEF OF *AMICI CURIAE* LEGAL VOICE AND
CENTER FOR CHILDREN & YOUTH JUSTICE**

FILED
SUPREME COURT
STATE OF WASHINGTON
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I. INTRODUCTION

A.F.J. is a six-year-old boy with two mothers: his biological mother, Jackie Johnston, and his *de facto* mother, Mary Franklin. When A.F.J. was born in 2005, however, Ms. Franklin had no practical way to secure legal recognition of her relationship either with him or with her partner, Ms. Johnson. The state legislature had not yet recognized Ms. Franklin's right to form a domestic partnership with Ms. Johnson. Nor had it recognized their right to marry. Two short months following his birth, A.F.J.'s world shattered. As a consequence of his biological mother's drug addiction and his other mother's invisibility under Washington's statutory framework, he was declared a dependent of the state. Ms. Franklin, however, did not relinquish her parental role after A.F.J. entered dependency. She pursued all legal means available to her to ensure that she and her son remained together, and eventually she became his foster parent at the insistence of the Department of Health and Social Services (DSHS). Her willingness to become a licensed foster parent in order to continue living with and caring for her infant son should not cause her to lose her legal status as A.F.J.'s *de facto* parent.

"The demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion); *see also*

In re Parentage of L.B., 155 Wn.2d 679, 707 (2005). Given the complexity of modern family relationships, “statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations.” *See L.B.*, 155 Wn.2d at 706. “[I]nvariably, in the field of familial relations, factual scenarios arise, which . . . leav[e] deserving parties without any appropriate remedy, often where demonstrated public policy is in favor of redress.” *Id.* at 687.

Therefore, in *In re Parentage of L.B.*, this Court invoked its powers of equity and common law responsibility to “respond to the needs of children and families in the face of changing realities” by recognizing the right of adults who have “fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in [a] child's life” to establish standing as a *de facto* parent. *See id.* at 689, 708 (internal quotation marks and citation omitted). The *de facto* parentage doctrine fills the statutory gap left in situations like Ms. Franklin and A.F.J.’s, where deserving parties are left without an appropriate remedy, even though demonstrated public policy favors keeping their family together. *See id.* at 687.

This brief focuses on four points: (1) the *de facto* parentage doctrine is an equitable doctrine that must be applied to the individual circumstances of each case; (2) this Court adopted the *de facto* parentage

test with the recognition that it protected the constitutional rights of both the parents *and the children* at the center of the dispute; (3) *de facto* parentage is the only way to preserve the relationship between A.F.J. and Mary Franklin; and (4) affirming Mary Franklin as the *de facto* parent of A.F.J. will not open the floodgates to foster parents claiming *de facto* parentage status.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *amici curiae* Legal Voice and the Center for Children & Youth Justice are set forth in the Motion for Leave of Legal Voice and Center for Children & Youth Justice to File an *Amici Curiae* Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Respondent Mary Franklin's Supplemental Brief.

IV. ARGUMENT

A. *De Facto* Parentage Is an Equitable Doctrine That Courts Must Consider on a Case-by-Case Basis.

The *de facto* parentage doctrine is an equitable doctrine that affords trial courts flexibility to examine each unique case on a fact-specific basis. *See, e.g., In re Custody of B.M.H.*, ___ Wn. App. ___, 2011 WL 6039260, at *10 (Dec. 6, 2011) (holding that when no statute or case

speaks to the circumstances of a case, trial courts should apply *L.B.*'s *de facto* parentage test on a case-by-case basis).

De facto parentage is a doctrine rooted in equity. See *L.B.*, 155 Wn.2d at 689. A court's equity power is "inherently flexible and fact-specific." *Proctor v. Huntington*, 169 Wn.2d 491, 503 (2010), *cert. denied*, 131 S. Ct. 1700, 179 L. Ed. 2d 619 (2011). "Equitable doctrines grew naturally out of the humane desire to relieve [parties] under special circumstances from the harshness of strict legal rules." *Young v. Young*, 164 Wn.2d 477, 493–94 (2008) (internal quotation marks and citation omitted). The *de facto* parentage doctrine rejects notions of labels, strict categories, and harsh legal rules, and instead requires courts to determine whether a parent-child relationship exists and, if so, whether that relationship was fostered and encouraged by child's legal parent. "When equitable claims are brought, the focus remains on the equities involved between the parties," and not on "the 'legality' of the relationship." *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107 (2001); *cf. In re Parentage of J.A.B.*, 146 Wn. App. 417, 425 (2008) (holding that the marriage status of a petitioner for *de facto* parentage status was irrelevant to determining whether "a person who is not the legal parent is *in fact* the child's parent, and should be recognized as such by a court of equity").

In applying the *de facto* parentage doctrine, courts have the flexibility to fashion an equitable remedy on a case-by-case basis for children and parents whose legal situations the legislature failed to contemplate. *See L.B.*, 155 Wn.2d at 706, 707. Categorically excluding entire classes of petitioners, like foster parents, from being recognized as a *de facto* parent regardless of the specific facts of the case would create rather than resolve inequities in cases like this one. Ms. Franklin—about whom the trial court found it “absolutely clear” was “one of [A.F.J.]’s mommies *since birth*,” CP 711 (emphasis added)—had no legal means of maintaining custody of A.F.J. after the state petitioned for his dependency. She became a licensed foster parent only “because DSHS required her to do so.” CP 710. Broadly excluding foster parents from establishing standing as the *de facto* parents would mean, paradoxically, that because Ms. Franklin acted in A.F.J.’s best interests and did not leave a baby to be raised by strangers on the temporary basis of a typical foster care arrangement, the trial court could not act in what *it* determined to be A.F.J.’s best interest after determining that Ms. Franklin had met all the requirements of a *de facto* parent. CP 709. It would, in effect, punish Ms. Franklin for doing the right thing for the little boy she named and who shares her name. CP 709. It would also leave a six-year-old child “traumatized,” CP 709, when, as the result of legal proceedings beyond his

control or comprehension, he would lose the parent who had been responsible for him since before his birth. CP 711.

It is because of cases like this that the *de facto* parentage doctrine must remain focused on the specific facts of the case. Rules excluding entire categories of prospective *de facto* parents are “antagonistic to the clear legislative intent that permeates this field of law—to effectuate the best interests of the child in the face of differing notions of family.” *See L.B.*, 155 Wn.2d at 707.

B. The *De Facto* Parentage Doctrine Protects the Constitutional Rights of Children to the Care And Affection of Their Parents and the Maintenance of Family Relationships.

When recognizing the *de facto* parentage doctrine in Washington, this Court emphasized the importance of protecting the rights and interests of those least able to speak for themselves. *See id.* This Court noted that courts must remain centrally focused on the children at the center of parentage disputes and recognize that children like A.F.J. are not only the most vulnerable persons before the court—they are also the most powerless and voiceless. *See id.* at 712 n.29.

This Court has recognized that children possess an interest in having the affection and care of their parents. *See Moore v. Burdman*, 84 Wn.2d 408, 411 (1974). As this Court explained in another parentage action, “[i]t would be ironic to find issues of parent-child ties are of

constitutional dimension when the parents' rights are involved but not when the child's are at stake." *State v. Santos*, 104 Wn.2d 142, 143–44 (1985); *cf. Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

The importance of family "stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in promot[ing] a way of life." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 44, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977) (internal quotation marks and citation omitted). Emotional attachments do not depend on biology or even the recognition of parental status by the courts. *Id.* at 843 ("[B]iological relationships are not exclusive determination of the existence of a family." (footnote omitted)); *cf. Quilloin*, 434 U.S. at 255.

Thus, a child's interest in familial bonds does not apply only to relationships with biological parents; rather, the protections afforded under the Constitution extend to children's relationships with those persons with whom they have such emotional attachments. *See In re Marriage of Anderson*, 134 Wn. App. 506, 512 (2006) (citing *In re Custody of Shields*, 157 Wn.2d 126, 151 (2006) (Bridge, J., concurring)); *cf. Prince v. Massachusetts*, 321 U.S. 158, 159, 169, 64 S. Ct. 438, 88 L. Ed. 645

(1944) (treating relationship between a custodial aunt and her niece as a constitutionally protected parent-child relationship). Indeed, recognizing that families are not exclusively the realm of biological relations, “it logically follows that a child has a constitutionally protected interest in *whatever* relationship comprises his or her family unit.” *Shields*, 157 Wn.2d at 152 (emphasis added) (citing *Santos*, 104 Wn.2d at 146); *cf. Moore v. City of East Cleveland*, 431 U.S. 494, 504–05, 975 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (recognizing that the Constitution protects the sanctity of the family and the family tradition, a tradition not limited to nuclear families).

Ms. Franklin is A.F.J.’s mother. She has been one of his “mommies” since his birth. CP 711. She has acted in every way as his parent. CP 710. “She has been devoted to him and has fully and unequivocally assumed a parental role.” CP 711. And she has done so without the expectation of financial compensation. CP 711. Ms. Johnston knows Ms. Franklin is A.F.J.’s mother. She consented to and fostered Ms. Franklin and A.F.J.’s parent-child relationship with each other. CP 710. She agreed to raise A.F.J. jointly as co-parents with Ms. Franklin. CP 709. She treated Ms. Franklin in every way as A.F.J.’s parent. CP 710. A.F.J. knows Ms. Franklin is his mother. He lived in the same household with her for 99% of his early life. CP 710. He “thinks of her home as home.”

CP 711. He loves her, CP 707, and is attached to her, CP 711. He thinks of her as “mommy.” CP 711. As the trial court found, if Mary Franklin “does not qualify as a *de facto* parent under the analysis in *In re Parentage of L.B.* . . . , then no one would.” CP 711.

A child’s constitutional rights do not exist in a vacuum. There are demonstrated public policy reasons behind why courts protect the interests of children like A.F.J. For example, “[c]hild development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent.” *McDaniels v. Carlson*, 108 Wn.2d 299, 310 (1987). In this case, the trial court found—and even Ms. Johnston admitted—that A.F.J. “would suffer detriment . . . if he was cut off from contact with Ms. Franklin.” CP 709. Indeed, he would be “traumatized.” *Id.* Facts regarding the circumstances of his birth or the relationship between his parents that lawyers use to try to distinguish this case from another (*see, e.g.,* Pet. for Review 2) are incomprehensible to a six-year-old child. To A.F.J., it does not matter whether Ms. Franklin became his parent after she and his biological mother agreed to conceive a child with the intention of forming a family, as was the case in *L.B.*—or whether she became his parent after his biological mother became pregnant during a drug relapse while the two women were separated, as was the case here. What matters to a six year

old is that his parents love and take care of him, and keep him safe and protected. In short, what matters to A.F.J. is that he is able to keep both of the parents that he loves.

A.F.J. has a constitutionally protected interest in maintaining his relationship with Ms. Franklin—the woman who two courts have held stands in legal parity with his biological mother. *See* CP 713 (holding that Ms. Franklin is A.F.J.’s *de facto* parent); *In re Custody of A.F.J.*, 161 Wn. App. 803, 823 (2011) (affirming the determination that Ms. Franklin is A.F.J.’s *de facto* parent); *L.B.*, 155 Wn.2d at 708 (“[A] *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”). He has an interest in her affection and care. Depriving a small boy of the affection, care, and maintenance of a child-parent relationship simply because the mother became a foster care parent in order to maintain custody of him would undermined these protected interests.

C. *De facto* Parentage Is the Only Remedy for Families Whose Situations Were Not Contemplated Under Washington’s Legislative Framework.

1. Nonparental custody is not parentage.

The nonparental custody statute fails to provide an adequate remedy under the law to petitioners who can otherwise meet the stringent *de facto* parentage criteria. *See J.A.B.*, 146 Wn. App. at 426. A *de facto*

parent stands in legal parity with a biological parent and is accorded the same rights and responsibilities that attach to any parent in this state. *See L.B.*, 155 Wn.2d at 707, 708.¹ These rights include a parent's fundamental liberty interest in the care, custody, and control of his or her child. *Id.* at 709 (citing *Troxel*, 530 U.S. at 65). A parent's rights and responsibilities are related to the child's interest in support, inheritance, family bonds, and accurate identification of his or her parents. *See McDaniels*, 108 Wn.2d 299.

Residential placement is not equivalent to parental status. *J.A.B.*, 146 Wn. App. at 426. Nonparental custody confers only "a temporary and uncertain right to custody of the child for the present time, because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child." *Id.*; *see also In re Parentage of M.F.*, 168 Wn.2d 528, 539 (2010) (Chambers, J., dissenting); *B.M.H.*, 2011 WL 6039260, at *8.

Furthermore, many petitioners (like Ms. Franklin) who can

¹ Despite Ms. Johnston's assertions to the contrary, *see* Johnston Suppl. Br. 1-3, holding that Mary Franklin has standing to establish a *de facto* parentage claim does not violate Ms. Johnson's constitutional rights to the care and custody of her child. Parents who satisfy the *de facto* parentage test do not interfere with the constitutionally protected rights of legal or biological parents because the test requires a showing that the legal or biological parent "consented to and fostered" the parent-child relationship. *See Shields*, 157 Wn.2d at 146. Indeed, because the common law places *de facto* parents in parity with biological and adoptive parents, once a petitioner establishes standing as a *de facto* parent, then both the *de facto* parent and the biological or legal parent have a "fundamental liberty interest[]" in the "care, custody, and control" of their children. *See L.B.*, 155 Wn.2d at 710 (quoting *Troxel*, 530 U.S. at 65).

establish *de facto* parentage are unable to establish nonparental custody. The nonparental custody statute operates only where there is no available, suitable legal parent. *See J.A.B.*, 146 Wn. App. at 425. The remedy is available only when either the child is not in the physical custody of one of his or her parents or neither parent is a suitable custodian. *See* RCW 26.10.030(1). A parent is unsuitable only when he or she is unfit or, if the parent is fit, when placing a child with the parent would cause “actual detriment to the child’s growth and development.” *See Shields*, 157 Wn.2d at 144. The showing required to establish actual detriment is “substantial” and can be satisfied only in “extraordinary circumstances.” *See id.* at 145 (internal quotation marks and citations omitted). Thus, unless a petitioner can show either that a legal or biological parent is unfit or the situation is one of those “extraordinary circumstances” in which placing the child with the fit parent would result in actual detriment to the child’s growth and development, a nonparental custody will not be an available remedy. *See J.A.B.*, 146 Wn. App. at 425.

Finally, a petitioner’s ability to file a nonparental custody petition does not—and cannot—automatically preclude the petitioner from seeking and acquiring *de facto* parent status. *See B.M.H.*, 2011 WL 6039260, at *8. The law allows *any* person other than the existing legal parent to seek custody of a child. *See* RCW 26.10.030(1). Therefore, if nonparental

custody were per se a sufficient statutory remedy, then *no one* could obtain *de facto* parent status in Washington. See *B.M.H.*, 2011 WL 6039260, at *8. *L.B.* would be effectively overruled. See *J.A.B.*, 146 Wn. App. at 426 (“The [nonparental custody] statute focuses on the relationship between the legal parent and the child, not that between the petitioner and the child. No statute contemplates this latter relationship, which is why there was adequate statutory remedy in *L.B.*”). And A.F.J. would be deprived of a parent.

2. The *de facto* parentage doctrine is the only way to preserve the relationship between A.F.J. and Mary Franklin.

The *de facto* parentage doctrine is the only way to preserve the relationship between Ms. Franklin and A.F.J. Ms. Franklin had the same remedies theoretically available to her that the petitioner in *L.B.* did. Like the petitioner in *L.B.*, Ms. Franklin could neither marry nor establish a domestic partnership with A.F.J.’s biological mother. See RCW 26.60.010–.090 (enacted as Laws of 2007, ch. 156, §§ 1–33, effective July 21, 2007)); RCW 26.04.010(1), .020(1)(c).² Like the petitioner in *L.B.*,

² The Court should reject Ms. Johnston’s argument that the law would have treated a heterosexual couple the same as Mary and Ms. Johnston in 2005. See Johnston Suppl. Br. 8–9. Ms. Johnston states that if she had married a man after A.F.J. was conceived but before he was born, then “the man, a stepfather, would have been precluded from establishing himself as a *de facto* parent because the nonparental custody statute would have been an available remedy.” *Id.* In fact, the hypothetical man would not have needed to seek *de facto* parentage status or nonparental custody—rather, the law would have explicitly recognized him as the presumed legal parent under RCW 26.26.116. In

Ms. Franklin theoretically could have adopted A.F.J. Yet, as noted by the trial court, “it would be disingenuous to say that Ms. Franklin should have started an adoption proceeding in the less than two months between [A.F.J.’s] birth and the intervention by DSHS.” CP 710. Like the petitioner in *L.B.*, 155 Wn.2d at 713, Ms. Franklin in fact sought relief under Washington’s third-party action laws.³ Yet, the trial court held that nonparental custody was unavailable because (1) Ms. Johnston is a fit parent, CP 707, and (2) the case did not involve the “exceptional circumstances” in which living with his biological mother would cause a child actual detriment, CP 709.⁴ In summary, as Division I noted, like the petitioner in *L.B.*, Ms. Franklin had “no statutory remedy whereby she [could] attempt to have her relationship *a the child whom she has raised since birth* legally recognized.” *A.F.J.*, 161 Wn. App. at 817.

This circumstances of this case are distinguishable from the facts this Court confronted in *In re the Parentage of M.F.* 168 Wn.2d 528. In *M.F.*, this Court held that the *de facto* parentage doctrine did not apply to a

contrast, Ms. Franklin had no opportunity to establish a presumption of parentage when A.F.J. was born in 2005. As noted above, she and Ms. Johnston could not marry, and domestic partner rights had not yet been enacted.

³ Unlike Ms. Franklin, however, the petitioner in *L.B.* did not seek nonparental custody under RCW 26.10.030(1). Rather, in *L.B.*, the petitioner sought third party visitation under statutes that this Court had deemed unconstitutional.

⁴ As noted throughout this brief, however, the court expressly stated: “There certainly was a showing, however, and admitted by Ms. Johnston, that [A.F.J.] would suffer detriment and would in fact be traumatized if he was cut off from contact with [Mary] Franklin.” CP 709.

stepfather who entered his stepdaughter's life as a third party to the two existing parents whose respective roles already were established under Washington's statutory scheme. *Id.* at 532. In contrast, Ms. Franklin entered A.F.J.'s life as the second parent to a child whose biological father was absent and whose biological mother planned to raise the newborn with Ms. Franklin as co-parents. CP 709.⁵

D. The Facts of This Case Do Not Present a Risk of Opening the Floodgates for *De Facto* Parentage Claims by Foster Parents.

Ms. Johnston argues that this case has the potential to open the floodgates on a "parade of horrors" that will undermine the entire child welfare system, make a mockery of dependency proceedings, and bankrupt the state. *See* Johnston Suppl. Br. 16–19 & n.41. Ms. Johnston exaggerates. The *de facto* parentage test is strict and not easily satisfied.⁶ It will continue to prevent most foster parents from establishing standing as *de facto* parents. The facts of this case are distinguishable from the vast

⁵ Ms. Johnston improperly cites to an unpublished opinion of the Court of Appeals to support her argument regarding the holding in *M.F. Johnston* Suppl. Br. 6. "A party may not cite as an authority an unpublished opinion of the Court of Appeals." G.R. 14.1(a).

⁶ Under *L.B.*, if the circumstances of the case allow a petitioner to establish standing as a *de facto* parent, the petitioner must then satisfy the following five-part test: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature; and (5) the petitioner has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. *L.B.*, 155 Wn.2d at 708. *But see* Johnston Suppl. Pet. 4 ("To make sure it was difficult to become a *de facto* parent, this Court defined *six criteria* that all must be met before *de facto* parentage may be established." (emphasis added)).

majority of foster care situations. Most foster parents enter into the relationship with the understanding that their role is temporary, and few legal parents promote an unequivocally parental relationship between their child and his or her licensed foster parents. To the contrary, ordinary foster placements do not involve a biological parent who consents to and encourages a parent-child relationship between a dependant child and the foster parents.

In this case, Ms. Johnston did not suddenly begin encouraging a parent-child relationship between Ms. Franklin and A.F.J. when the baby went into emergency shelter care. Rather, her consent to and fostering of the parent-child relationship predated intervention by DSHS. *See CP 709.* Her encouragement of the parent-child relationship did not end after A.F.J. became a dependent. While A.F.J. was in dependency, Ms. Johnston consistently acknowledged Ms. Franklin as his parent, consistently said A.F.J. had two mommies, and consistently said that she wanted Ms. Franklin to be a parent. Ms. Johnston now claims that, during A.F.J.'s dependency, she *could* not consent and foster his parent-child relationship with Ms. Franklin. In effect, she wants it both ways: she wanted Ms. Franklin to co-parent their son when the state was in the process of terminating her parental rights and, now that her parental rights are secure, she wants Ms. Franklin out of his life. But Ms. Johnston cannot

retroactively and unilaterally invalidate the relationship she helped create: Ms. Franklin has been A.F.J.'s mother for his entire life. She was his mother before he entered the child welfare system, and she was his mother after he left the child welfare system.

V. CONCLUSION

To ensure that A.F.J. and children like him can maintain a legally protected relationship with the adults who have undertaken a permanent, unequivocal, committed, and responsible parental role in their lives, the *de facto* parentage doctrine must be equitable and free from categorical proscriptions that would prevent certain categories of persons from petitioning for parentage as a matter of law. Preserving the flexible, functional nature of the *de facto* parentage doctrine in recognition of the rights of children to maintain their family relationship will not open the floodgates to petitions from foster parents, nannies, and day care providers because most could not satisfy *L.B.*'s stringent five-part test. Rather, it will ensure that a vulnerable, voiceless six-year-old boy has a stable, legally protected relationship with the mother who raised him.

DATED: February 14, 2012 **CENTER FOR CHILDREN & YOUTH JUSTICE**

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DECLARATION OF SERVICE

I, Teresa Clickenger, hereby certify under penalty of perjury under the laws of the United States and the State of Washington that on February 14, 2012, I caused the Motion to File an *Amici Curiae* Brief and Brief of *Amici Curiae* Legal Voice and Center for Children & Youth Justice to be served as follows:

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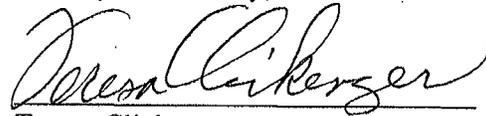
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DATED at Seattle, Washington this 14th day of February, 2012.


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