NO. 84362-7

SUPREME COURT
OF THE STATE OF WASHINGTON

MATTHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

BRIEF OF *AMICI CURIAE*, THE HONORABLE DANIEL J. EVANS, WASHINGTON GOVERNOR, 1965-1977, THE HONORABLE JOHN SPELLMAN, WASHINGTON GOVERNOR, 1981-1985, THE HONORABLE MIKE LOWRY, WASHINGTON GOVERNOR, 1993-1997, THE HONORABLE GARY LOCKE, WASHINGTON GOVERNOR, 1997-2005, AND THE HONORABLE CHRISTINE GREGOIRE, WASHINGTON GOVERNOR, 2005-2013

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I. INTRODUCTION

Amici Curiae Daniel J. Evans, John Spellman, Mike Lowry, Gary Locke, and Christine Gregoire ("the Governors")—every living former Washington governor, submit this brief at what the Governors believe is a moment of extraordinary constitutional importance and consequence for our three coequal branches of government and the people of this great State. Though labeled a show-cause hearing, the Court's September 3rd proceeding presents an important opportunity—perhaps the last, best opportunity before the Legislature's crucial 2015 Budget Session—to restore focus on the Court's, the parties', and the Governors' shared goal of providing the best education to all of Washington's children.

The Court's original decision rightly emphasized Washington's paramount constitutional duty to make ample provision for the education of all children residing within the State as well as the State's failings in this regard. That is where the focus must remain.

To maintain that focus, the Governors urge the Court to delay further consideration of the Court's Show-Cause Order until after the 2015 Budget Session for three reasons. First, the Governors believe that the Legislature can and indeed must make real progress in the 2015 Budget Session towards fulfilling its constitutional mandate. Second, because the Governors believe that the 2015 Budget Session presents the best

opportunity for the Legislature to make meaningful progress towards its 2018 deadline to make ample provision for K-12 education, the Governors also believe that the 2014 Short Session is not a sufficient benchmark from which to measure contempt, and that the ongoing legislative process affecting this critical issue is too important and too fluid to address with sanctions at this juncture. Finally, the Governors fully support this Court's role as not only the State's constitutional arbiter but as a trusted partner in providing for our children's education, and urge the Court to help ensure the legitimacy of the process and the result by continuing to exercise both vigilance and restraint.

II. INTEREST OF AMICI

The Governors presided over the State's Executive Branch for most of the last fifty years, serving during much of the period recounted by the Court in the decades leading to its historic 2012 decision. The Governors are thus not only well acquainted with the State's longstanding education funding issues but are also thoroughly invested in the State achieving its paramount and constitutional duty to the State's children. Having governed in different decades and political parties, the Governors stand united in their conviction that the Legislature must be given the space and opportunity in the 2015 Budget Session to work towards fulfilling its constitutional mandate under the watchful eye of this Court.

III. ARGUMENT

> *I have been restrained. I have been complimentary. I have negotiated in good faith. . . . Time's up. Time is up. My frustration level is as high as it gets. Time for us to get a budget to the table, bring me a budget.*
>
> Governor Christine Gregoire, 1st Special Legislative Session, 2012[1]

The Governors understand what it is like to be frustrated with the Legislature, and they fully support the Court's conclusion that the Legislature has not fulfilled its duties with respect to funding K-12 education. The Court was correct to give the Legislature until 2018 to meet its constitutional obligation, while also rightly refusing to "abdicate [its] judicial role" in enforcing this duty.[2] Though the Governors recognize that this case "test[s] the limits of judicial restraint and discretion,"[3] the Governors appreciate and respect this Court's measured response thus far, and urge the Court to continue that restraint and avoid a course of action which could set back this critical process and undermine the legitimacy of any result it helps produce.

The Governors are not apologists for the Legislature. But based on a near half-century of combined experience as the stewards of this State's

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[1] Mike Baker, *Senate Budget Writers Agree: No Education Cuts*, Seattle Times (May 15, 2012), http://seattletimes.com/html/localnews/2017761394_apwaxgrbudgetrepublicans4thldwritethru.html.

[2] *McCleary v. State*, 173 Wn.2d 477, 541, 269 P.3d 227 (2012).

[3] *Id.* at 519.

Executive Branch, they firmly believe that the democratic process can and must work and that significant progress towards constitutional compliance can be achieved in the 2015 Budget Session through "dialogue and cooperation between coordinate branches,"[4] under this Court's vigilant watch. The Governors therefore respectfully urge the Court continue to hold a steady hand and permit the Legislature the opportunity to make significant progress towards fulfilling its constitutional mandate during the upcoming 2015 Budget Session, before the Court considers a contempt finding and sanctions.

A. The Legislature Can and Must Make Real and Measurable Progress in the 2015 Budget Session

The Court issued a 2012 opinion endorsing 2009[5] legislation, and is considering holding the 2014 Legislature in contempt for its failure to adopt a plan in the 2014 Short Session to fund that legislation by 2018. But for a variety of reasons, it was never likely that the Legislature would be able to complete its work on such a complex matter during that sixty-day session. The Governors know from experience that it would be far more realistic for a satisfactory plan to be adopted by the 2015 Legislature, which will not even be elected until two months after this Court's show-cause hearing.

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[4] *Id.* at 546.
[5] *Id.* at 545 (citing ESHB 2261, Laws of 2009, ch. 548 ("ESHB 2261")).

Though this Court directed the Legislature in 2014 to submit a "complete funding plan,"[6] for any such plan to have substance and effect, it would essentially amount to a budget directing the allocation of hundreds of millions or billions of dollars in future biennia, and yet realistically could not be crafted in an off-budget year. Having governed during nine of the twelve administrations prior to Governor Inslee taking office, and during eighteen of the twenty-four legislatures elected during that time, the Governors understand that the best laid plans are usually developed over a period of years, not days.

Moreover, while fully funding public education is a crucial component of providing this State's children the top-notch education to which they are entitled, enhanced funding alone is insufficient. Satisfying the constitution's paramount requirement for public education means ensuring that the money is properly and effectively invested in the best programs, curriculum, and institutions. That is a budget necessitating a full budget session, not a short legislative session.

Attempting to craft a plan to fund significant commitments in subsequent biennia, in the shadow of the 2013 budget, with an election and the 2015 Budget Session looming, would elevate legislative form over fiscal substance. If, as the Court observed, the 2013 Budget Session was

[6] Order at 3, *McCleary v. State*, No. 84362-7 (Wash. June 12, 2014).

"the first *full* opportunity for the State to lay out a detailed plan and then adhere to it,"[7] then the 2015 Budget Session—not the now-completed 2014 Short Session—was (and is) the next full opportunity to make meaningful progress towards amply funding K-12 education by 2018.

B. The 2014 Short Session Is the Wrong Measure of Contempt

1. These proceedings run the risk of constitutionalizing the evolving products of the legislative process.

The issues confronted by the parties and the Court have been decades in the making, yet the current posture of the case reflects a focus on far shorter periods by which to evaluate progress. In a complex dialogue among the people of Washington and the three coequal branches of government, there is a risk of focusing on the procedural trees rather than the constitutional forest. As the Court has already noted, in recent years the Legislature continued to fund K-12 education using formulas "based on a snapshot" of mid-1970s staffing levels and school district expenditures rather than at the levels necessary to meet more recent performance-based standards.[8] And just as the Court was concerned that the Legislature would fund today's education based on a moment in time nearly forty years ago, so too should the Court be concerned that it is

[7] Order at 1, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014) (quotation marks omitted, emphasis added).
[8] *McCleary*, 173 Wn.2d at 530.

being asked to judge the Legislature's 2014 ability to achieve a 2018 result based on "only a static snapshot of a process that is ongoing."[9]

Each of the Governors presided over the Executive Branch of Washington's government during times captured in the Court's thorough recounting of progress—and lack thereof—on K-12 education. Viewed in isolation, each administration, each duly constituted legislature, and each budget or short session, might be judged with the benefit of hindsight as having failed Washington's children—at least, to some extent. If the lens of contempt is that narrow, then there are probably many instances in the decades since the *Seattle School District*[10] case in which legislators should have been hauled before the Court on show-cause orders.

Consider that it was during Governor Spellman's term that a group of school districts brought suit challenging the adequacy of K-12 education funding in the 1981-83 biennium.[11] And the learning goals outlined in Engrossed Substitute House Bill 1209,[12] adopted in 1993 during Governor Lowry's administration pursuant to the work of Governor Booth Gardner's Council on Education Reform and Funding, form part of the heart of the definition of "basic education" that the

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[9] State of Washington's Response to the Court's Orders Dated July 28, 2012, and December 20, 2012: The Legislature's 2013 Post-Budget Report at 5, *McCleary v. State*, No. 84362-7 (Aug. 29, 2013).
[10] *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978).
[11] *McCleary*, 173 Wn.2d at 489.
[12] Laws of 1993, ch. 336.

Legislature must provide for.[13] Later, in the years leading to this action, Governor Gregoire led Washington at time when "significant reforms to the education system and school finance were again underway,"[14] and yet during this same period, the legislature funded and then eliminated cost-of-living adjustments for teachers in successive biennia.[15] Ripped from context, any of the seventeen legislatures since *Seattle School District* might possibly be viewed in a snapshot as being contemptuous in light of *McCleary*. And, viewed over time, the present result is still not up to the constitutional standard. Still, there is a clear sense that the political process is evolving and that the Legislature is devoted to meeting its constitutional duty.

At the same time, there is a risk of constitutionalizing legislatively enacted goals and deadlines by declaring anything short of their full attainment a violation deserving sanction. While there is a justifiable concern that the Legislature may be running too slowly to cross the finish line in time, the people's representatives should be afforded the chance to make democracy work. The urge to tell them to hurry, to provide some proof *now* that they can finish *then*, is nearly irresistible. But just as this Court's initial restraint has incrementally given way to a more forceful

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[13] *McCleary*, 173 Wn.2d at 523-24 (quotation marks omitted).
[14] *Id.* at 495.
[15] *Id.* at 497.

tone with the Legislature, so too has the Legislature's work to fulfill its duties continued to evolve since this suit was instituted. Stop at any point along the way and there were moments when the Legislature might have been compliant and others where perhaps it could be viewed as contemptuous. But this only serves to underscore that the legal certainty of a contempt order from the judicial branch is a particularly blunt instrument to address the messy business of adopting legislation.

The Governors agree with the Court's view that ESHB 2261 represents "a promising reform program."[16] Enacted during the 2009 Regular Session, if fully implemented and funded, ESHB 2261 might very well remedy the deficiencies that inspired this suit. Yet, by "retain[ing] jurisdiction over this case to monitor implementation of the reforms under ESHB 2261," there is a risk of constitutionalizing the 2009 actions of the 61st Legislature as the benchmark. That is not to say that the Legislature should be free to set and then revise or even eliminate its own views of constitutional compliance, dodging this Court's orders along the way. To the contrary, the question of whether the Legislature is satisfying its duties under the Washington Constitution is clearly the province of the Court. Yet, as this Court observed, even while this matter was pending, "the legislature passed an appropriations bill that failed to provide full funding

[16] *Id.* at 543.

for ESHB 2261."[17] Thus, had this taken place *after* the Court's decision rather than during the pendency of the case, the Legislature might rightly worry that its failure to fully fund the legislation would support a contempt finding and sanctions.

Thus far, this Court has not sanctioned the Legislature, and has instead recognized that these matters are complicated and take time. Accordingly, the Governors respectfully submit that it would be ineffective, if not counterproductive, to declare at this point (before the 2015 Budget Session) that the Legislature has not made any "significant progress"[18] and hold the Legislature in contempt for failing to submit a plan which the Governors believe could not have realistically emerged from the 2014 Short Session.

2. The 2014 Short Session could not do justice to Washington's children.

The Governors are well-acquainted with the possibilities—and, unfortunately, the limitations—of short and special sessions of the Legislature.

Plaintiffs correctly point out that the Legislature is capable of producing targeted results under tight deadlines in short and special

[17] *Id.* at 540.
[18] Order at 6, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014).

sessions,[19] and it is tempting to ask: If the Legislature can act quickly to fund a new baseball stadium or keep aerospace jobs in the State, why can't it comply with this Court's order and create a funding plan to fulfill its paramount constitutional duty to the children of this State under similar time constraints? The Governors respectfully submit based on their experience that the plan which Plaintiffs seek, and which the Court has ordered, greatly exceeds the import, complexity, and scope of a stadium or a tax incentive. Indeed, the Governors submit that ample provision for education encompasses far more than one-off appropriations of funds. There are myriad legislative policy choices to be made along the way as to how education funding should be spent, not just about how much funding there should be. Moreover, substantial expenditures that will shape K-12 education for years to come demand a thoughtful approach which pairs funding with accountability. Thus, even if the 2014 Short Session had provided a sufficient number of days to pass a finance plan, that narrow window (or even a possible special session before the end of 2014) likely would have been insufficient for the Legislature to carry out this Court's order or to make meaningful progress towards fulfilling the Legislature's constitutional mandate.

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[19] Plaintiff/Respondents' 2014 Post-Budget Filing at 30-33, *McCleary v. State*, No. 84362-7 (May 21, 2014).

Furthermore, though the Legislature has not completed its work, it would be a mistake to dismiss the progress the Legislature has made since this Court's decision in 2012. In the substantial experience of the Governors, the simple fact that a comprehensive solution was not adopted does not mean that the 2014 Short Session (or the previous budget session) did not yield some positive results. Being at loggerheads in a short session can often be part of a process that leads to a better result in the long-term than politically expedient short-term fixes upon which the House and Senate have occasionally settled. Like this Court, the Legislature cannot act as one body until each member has been heard, with many separate dialogues amongst and between its legislators along the way. Though these many separate dialogues within the Legislature do not always appear to represent progress, often that is precisely what they are. The Governors experienced just such typical starts and stops of legislative process as they visited the House and Senate chambers during legislative sessions and wondered if a bill might ever reach their respective desks. But just as this Court's jurisprudence is often the product of a conversation, where a dissenting view sometimes influences the majority or even becomes a majority opinion, the Governors have seen firsthand that "unsuccessful

bills introduced in one Legislature may lay the groundwork for successful bills in a subsequent Legislature."[20]

That is not to say that the Court should be a potted plant. The Governors fully support the Court's retention of jurisdiction, in part "to foster dialogue and cooperation"[21] between the branches and within the Legislature. To date, however, the dialogue has been something more akin to competing monologues between the parties. This is the first time since the *Seattle School District* case more than thirty years ago that this Court has "reviewed a broad challenge to the State's alleged failure to comply with article IX, section 1."[22] That means that some seventeen legislatures came and went in the intervening decades. Since this Court's decision in *McCleary*, there has been just one full legislature and one budget session. It would be a mistake to conclude that the lack of sufficient progress in the 2014 Short Session is a fair predictor of the 2015 Budget Session's outcome or determinative of progress toward full funding by 2018. To be clear, the Governors are not suggesting that this Court extend the Legislature's self-imposed [23] and judicially codified[24]

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[20] 2014 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation at 28, *McCleary v. State*, No. 84362-7 (May 1, 2014).
[21] Order at 8, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014).
[22] *McCleary*, 173 Wn.2d at 515.
[23] *Id.* at 508.
[24] *Id.* at 547.

deadline beyond 2018. Rather, what the Legislature requires is the Court's continued patience as a partner in the near term.

It was nearly five years to the day from the filing of this suit to issuance of this Court's opinion. As frustrated as this Court, Plaintiffs, and the Governors may be with the Legislature's progress since 2012, in the same breath the Governors can say based on their collective experience that the progress the Legislature *has* made in the single budget session since should not be dismissed. En route from the Court's initial decision in 2012 to the 2018 deadline for full implementation, there will surely be alternating signs of hope and despair.

However, if legislative policy choices, changes in funding inputs, and bills that don't make it out of committee are the standard for contempt, the parties may well find themselves before this Court on show-cause motions many times in the next four years. Any sudden moves by the Legislature in the months since the Court issued its decision should not be cause for alarm, *yet*. As frustrating as it might be for this Court to gaze across the Flag Circle separating the Temple of Justice from the Legislative Building and wonder whether the Legislature takes its constitutional duties and the Court's orders seriously, the Governors urge patience, *to a point*. Just as 2018 is the deadline but not the endline, the 2014 Short Session is the wrong measure of contempt.

C. The Court's Actions as a Trusted Partner Can Help Ensure the Legitimacy of the Result

The 2018 deadline—self-imposed by the Legislature nearly three years prior to this Court's decision—is within reach. Yet, there is bound to be a continuing, robust debate on how—not whether—to meet this deadline, particularly in a local-control state like Washington where 147 legislators try to fund what nearly 300 independent school districts try to deliver. The Governors strongly believe that it is only possible to achieve and sustain that result through a hard-fought, legitimate compromise and the political process. In the Governors' experience, progress must be made from within the Legislature to be sustainable, and external attempts to force such progress can undermine the potential for compromise and the legitimacy of the legislative product. Such legitimacy demands the full-throated support and action of the public, the Executive Branch, the Legislature, and our education system—all under the constitutional vigilance of this Court. Without that crucial legitimacy and compromise, long-term funding is far from guaranteed and the State could end up right back where it started.

The Governors believe that the Legislature's paramount duty to make ample provision for K-12 education is not limited to funding plans like the one at issue before this Court now, nor is that duty limited even to

just children of school age. To the contrary, this Court's decision and the Legislature's choices do not occur in a vacuum. Instead, reverberations of any sanctions or orders for specific legislative action will be felt throughout the State's budget, affecting the public at large.

Washington State faces finite resources. Washington's children deserve stability and accountability in their public education, and the Court understandably charged the Legislature with funding that education "through regular and dependable tax resources."[25] Yet, as Governor Gregoire can attest, the State was confronting its constitutional duties with respect to education and this litigation just as it was facing a historic economic downturn requiring a number of special sessions to address.[26] Going back even further, Governor Evans supported a legislative referendum on a constitutional amendment[27] to the voters in 1973 providing for an income tax, in large part to "[g]uarantee[ ] full state funding of basic education"[28]; the referendum was rejected by nearly 80

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[25] *McCleary*, 173 Wn.2d at 547.
[26] Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation at 24-25, *McCleary v. State*, No. 84362-7 (Sept. 17, 2012).
[27] Laws of 1973, 1st Spec. Sess., H.J.R. 37, at 1888.
[28] Wash. Sec'y of State, *Official Voters Pamphlet, General Election Tuesday, November 6, 1973*, at 16 (1973), *available at* http://www.sos.wa.gov/legacy/images/publications/SL_voterspamphlet_1973/SL_voterspamphlet_1973.pdf.

percent of the voters.[29] Absent substantial growth in revenue, the budget is a zero-sum game: adding to one budget means subtracting from another. As such, the Governors are deeply concerned that actions now could harm other funding initiatives that are critical to the welfare and education of Washington's children. In particular, higher education, early childhood education, foster care, and children's healthcare funding would suffer immensely from reductions, a potential result if the Legislature is forced to cut and splice together funding to fulfill its mandate under *McCleary*. Sacrificing these critical programs for K-12 education, as important (and indeed, paramount) as it is, would achieve only a hollow victory, merely shifting the harm to our kids from one cause to another. It is crucial, therefore, to advance not only funding for K-12 education, but simultaneously for other programs and funding for our public universities. Allowing the Legislature the space to consider all of its obligations to the people of Washington—and how its paramount duty to fund K-12 education fits within those obligations, will reinforce the Court's role as a partner in this process.

The Court has a rare opportunity to restore the focus in this case to Washington's children and exercise restraint to place the Legislature in the

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[29] Wash. Sec'y of State, Election Search Results, November 1973 General, http://www.sos.wa.gov/elections/results_report.aspx?e=40&c=&c2=&t=&t2=5&p=&p2=&y=.

best position to accomplish significant gains in the 2015 Budget Session. The Governors cannot guarantee what the Legislature will do or whether what it does do will satisfy the Court, and the Governors would be disappointed if the 2015 Budget Session failed to yield significant progress. But what the Governors can say, based on experience, is that there is wisdom in waiting, at least at this juncture.

IV. CONCLUSION

This is a narrative of frustration and failure.

> The Honorable William T. Beeks, describing the Washington Legislature in 1964[30]

The frustration and failure Judge Beeks described fifty years ago could apply with equal force to this Court's experience today. The *Thigpen* court deferred acting on Washington's unconstitutional legislative district apportionment pending the outcome of a ballot initiative to reapportion the legislature.[31] After the initiative was defeated by Washington voters, the court continued its restraint, "tak[ing] notice of the fact that a new legislature [would soon] convene," and "deferring final action to afford [the legislature] the opportunity of discharging its constitutional mandate."[32] Two years later, "after being assured that the legislature would perform its constitutional duty," and after a "general

[30] *Thigpen v. Meyers*, 231 F. Supp. 938, 939 (W.D. Wash. 1964).
[31] *Id.*
[32] *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W.D. Wash. 1962).

session, followed by a special session" still failed,[33] The court was seemingly out of patience:

> Like an echo from the past, we are again assured that the 1965 legislature will lawfully reapportion itself if we stay the effect of our decree . . . and permit matters to proceed. . . . This we refuse to do.[34]

If the legislature's promises were an echo fifty years ago, similar assurances from today's Legislature understandably echo even louder in this Court's recounting of the Legislature's action and inaction.

This Court is being assured that, if only it waits, the next legislature will surely comply with the Court's order. As the *Thigpen* court was fifty years ago, this Court is right to be skeptical. Yet, in the next legislative session following the *Thigpen* decision, under court order to redistrict before attending to any other legislation, "[a]fter forty-seven days of debate, discussion, compromise, and open hostility, the Legislature finally passed a redistricting plan,"[35] and Governor Evans signed the resulting bill into law.[36] A cynical view of the *Thigpen* narrative would suggest that the Legislature will only act when on the receiving end of a court order. The Governors urge the Court to reject that

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[33] *Thigpen*, 231 F. Supp. at 939.
[34] *Id.* at 940.
[35] Wash. Sec'y of State, *Shifting Boundaries: Redistricting in Wash. State*, http://www.sos.wa.gov/legacyproject/ShiftingBoundaries/1960s/1965/ (last visited July 29, 2014).
[36] Laws of 1965, ch. 6.

view and instead consider that, as in *Thigpen*, difficult issues may require stops and starts and conversations that take place in and between budget and short legislative sessions. The *Thigpen* court refused to abdicate its duty in 1964,[37] and fifty years later this Court rightly refuses to abdicate its "judicial role" under our state's constitution.[38] A contempt finding now has the potential to freeze the dialogue started by this Court. The Governors submit that the Court's patience at this critical juncture would be a more forceful expression of its judicial role than any sanction, and that the better course would be to revisit the Court's Show-Cause Order after the 2015 Budget Session.

DATED this 4th day of August 2014.

Respectfully submitted,

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[37] *Thigpen*, 231 F. Supp. at 940.
[38] *McCleary*, 173 Wn.2d at 541.

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Attached for filing are a Motion of Amici Curiae for Leave to File Amici Curiae Brief, Brief of Amici Curiae, and Certificate of Service in:

McCleary v. State of Washington
Cause No. 84362-7

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