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## Supreme Court of New Jersey

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H.G., a minor, through her guardian TANISHA GARNER; F.G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through his guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO,

*Plaintiffs/Petitioners,*

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT;

*(For Continuation of Caption  
See Reverse Side of Cover)*

DOCKET NO.: \_\_\_\_\_

CIVIL ACTION

APPELLATE DIVISION DOCKET  
NO. A-004546-16T4

SAT BELOW:

HON. JOSE L. FUENTES, P.J.A.D.  
HON. ELLEN L. KOBLITZ, J.A.D.  
HON. THOMAS V. MANAHAN,  
J.A.D.

TRIAL COURT DOCKET  
NO. MER-L-2170-16

SAT BELOW:

HON. Mary C. Jacobson, A.J.S.C.

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### PLAINTIFFS/PETITIONERS' PETITION FOR CERTIFICATION

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and nominal defendant CHRISTOPHER CERF,  
in his official capacity as Superintendent of the  
Newark Public School District,

*Defendants/Respondents,*

-and-

NEW JERSEY EDUCATION ASSOCIATION, a  
New Jersey nonprofit corporation, on behalf of  
itself and its members,

*Intervenor/Respondent,*

-and-

AMERICAN FEDERATION OF TEACHERS,  
AFL-CIO, AFT NEW JERSEY and THE  
NEWARK TEACHERS UNION,

*Intervenors/Respondents.*

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**PRELIMINARY STATEMENT**

New Jersey has long protected the fundamental right of children in the School Development Authority ("SDA") districts, like the Newark Public School District ("Newark"), to a thorough and efficient education pursuant to the New Jersey Constitution, art. VIII, § IV, para. 1 ("Thorough and Efficient Clause"). The majority of those cases arise in the Abbott v. Burke line of cases. However, those cases did not address standing or ripeness in relation to constitutional claims, like those asserted here, based on district-level policies and statutory workarounds that impact a child's education.

The Appellate Division's ruling on ripeness, and its decision not to address standing, raises an unduly high barrier for children seeking to protect their right to an education that, as this Court has recognized, "must account for the needs of students" in SDA districts like Newark and "exceeds that needed by students in more affluent districts." Abbott v. Burke, 119 N.J. 287, 319 (1990) ("Abbott II") (emphasis added). Central to that right must be the ability to bring actions to challenge statutes, school district policies, and classroom experiences impeding a district's ability to adequately address these constitutionally protected educational needs. To impose impossible jurisdictional requirements that require a very specific harm to occur before a claim may be brought, as the

Appellate Division has done, forecloses actions to protect this fundamental right, now as well as in the future.<sup>1</sup> Certification for review should be granted so that this Court can provide clarity and address when, outside of Abbott, (i) students have standing and (ii) their constitutional claims are ripe.

**STATEMENT OF THE MATTER INVOLVED**

This petition arises from the Appellate Division's affirmance of the Complaint's dismissal without prejudice on the basis that it was not yet ripe for review. The Complaint concerns the impact on students in Newark of the Last In, First Out statutes, N.J.S.A. 18A:28-10 & -12 (2013) ("LIFO"), which require districts, without considering teacher performance, to lay off teachers in impacted positions solely on the basis of seniority when engaging in a reduction-in-force ("RIF") and prioritize re-hiring on seniority should positions later open. Plaintiffs contend LIFO violates the Thorough and Efficient Clause by virtue of actions Newark currently takes to circumvent LIFO's application and the foreseeable likelihood of the harm from a RIF that Newark modeled. That model demonstrates that the teachers laid off in a RIF would primarily be those rated as effective or highly effective. Newark's actions to avoid a RIF

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<sup>1</sup> "Children go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed . . . [and] will have irreparable consequences . . . ." Abbott v. Burke, 206 N.J. 332, 478 (2011) ("Abbott XXI") (Albin, J. concurring).

include paying teachers not to teach by placing them in an Educators Without Placement Sites ("EWPS") pool, and taking a variety of different actions to meet its budget without instituting a RIF, despite an excess of teachers.

The Appellate Division also declined to address whether Plaintiffs had standing, the additional ground provided for dismissal by the trial court.

#### **I. NEWARK'S ACTIONS DUE TO LIFO**

Very few students in Newark receive an education that allows them to meet the State's minimum proficiency benchmarks in language arts or math. Pa7-9.

As teacher effectiveness is the single most influential school-based variable in a child's education, New Jersey has set standards to measure the quality of its teachers' performance. Pa10-11; Pa67. The State evaluates its teachers as "highly effective," "effective," "partially effective," or "ineffective." Pa11; Pa67. Information about a teacher's rating is confidential and not publicly available. When the Complaint was filed, Newark, a SDA district, employed nearly half of the "ineffective" teachers in New Jersey, along with 10% of the State's "partially effective" teachers. Pa11; Pa67. Any RIF pursuant to LIFO is quality-blind and ratings are ignored.

In February 2014, Newark described the impact of a RIF when it sought a temporary reprieve from quality-blind layoffs in the



form of an equivalency request pursuant to N.J.A.C. 6A:32-5.1 (2013) ("Equivalency Request") submitted to the State. Pa10; Pa67. If Newark implemented a RIF, LIFO would mandate that 75% of the laid-off teachers would be rated effective or highly effective, while only 4% would be rated as ineffective. Pa16; Pa70; Pa94-95. A RIF would cause as many as 8,000 children within Newark to miss out on an effective teacher every year. Pa16; Pa70. The Equivalency Request remains unanswered. Pa10. Consequently, in order to retain quality teachers, Newark cut other critical programming and resources to account for the district's reduced funding and avoid a RIF. Pa10, 17; Pa67, 70.

Prior and subsequent to the Equivalency Request, Newark engaged in a LIFO workaround by creating the EWPS pool. Pa3, 17; Pa54, 70. During the 2013-2014 school year, the EWPS pool included 271 teachers, and cost Newark approximately \$22.5 million. Pa17. In 2015, Newark could no longer afford to keep all EWPS pool teachers out of the classroom, see Pa93, and force-placed them into schools without the consent of the principals. Pa17-18; Pa71. These force-placed teachers' salaries cost Newark more than \$25 million, and \$10 million in salaries remained in the EWPS pool. Pa18; Pa71. Recent figures put the cost of the EWPS pool salaries at \$8 million. HG28a.

Newark's children, including Plaintiffs, are therefore suffering from (i) budget cuts to offset the cost of the EWPS

pool, (ii) resource limitations due to the diversion of money essentially to pay teachers not to teach, and (iii) ineffective teachers in the classroom when a RIF may be better served to address declining enrollment and budget shortfalls. Meanwhile, a disproportionately high concentration of ineffective teachers remains employed in Newark, and any future RIF, as modeled in the Equivalency Request, would terminate effective teachers and leave ineffective teachers in the classroom.

## **II. PROCEDURAL HISTORY**

After Plaintiffs filed their Complaint, the State and Newark answered. Teachers' unions intervened and moved to dismiss. On May 4, 2017, the trial court dismissed the Complaint without prejudice following oral argument, referencing the reasons set forth at oral argument and finding that (i) Plaintiffs lacked "standing to pursue their claims in the absence of a particularized harm to Plaintiffs" caused by LIFO, and (ii) their claims were not ripe without "an actual, or immediate threat of harm to Plaintiffs" caused by LIFO. HG20a.

Plaintiffs appealed. Again, the unions led the opposition. Newark did not submit any briefs to the Appellate Division. On April 10, 2018, the State belatedly submitted a motion to file a proposed position letter in which the State, for the first time, asserted that the Trial Court's order should be affirmed. However, the Appellate Division did not address the State's

application, and neither the State nor the District appeared at oral argument two weeks later.

On June 27, 2018, the Appellate Division affirmed the Complaint's dismissal, but only on the ground that the claim was not ripe as (i) "a RIF causing ineffective tenured teachers to teach students while effective tenured teachers are removed may never occur" and the LIFO ramifications should a RIF occur are speculative, and (ii) "[t]o the extent the District's resources could be better spent elsewhere absent an EWPS pool of ineffective or partially effective teachers, the expenditure does not raise an issue of constitutional proportions." HG17a. As the claim was not ripe, the Appellate Division determined it "need not address the standing issue." Ibid.

Because of the Appellate Division's interpretation of ripeness, its determination not to address the standing question, and the admitted impact of LIFO on students' constitutional rights, Plaintiffs seek this Court's review.

#### QUESTIONS PRESENTED

1) Is a constitutional claim ripe when it challenges a statute, statutory workarounds, and district policies that an SDA district has admitted are harmful and unsustainable, and that adversely affect the substantive standard of education provided to public school students in that district?

2) Do public school students in an SDA district have standing to bring a constitutional claim when they do not have access to their teachers' ratings, but the district has admitted (i) the presence of ineffective teachers in the classroom, (ii) workarounds are in place that impact the students' education, and (iii) resources are currently being diverted to maintain these workarounds?

ERRORS COMPLAINED OF

1) The Appellate Division erred by determining that, in order for Plaintiffs' claim to be ripe, there needs to be an instituted RIF. In so doing, the court ignored the ongoing harm presented by the EWPS pool, as well as the modeled harm of a RIF in Newark. The court further ignored that Plaintiffs may not have a remedy if they wait for a RIF, as maintaining the status quo pending disposition would exacerbate the ongoing harm without addressing budgetary considerations leading to the RIF.

2) The Appellate Division erred by determining that there could be a constitutional test such that a district's expenditures below an unspecified value may not raise an issue of constitutional proportions.

3) The Appellate Division erred by not addressing the issue of standing as that issue would need to be re-litigated in connection with any amended Complaint or in the event of other challenges pursuant to the Thorough and Efficient Clause.

## REASONS TO GRANT CERTIFICATION

This appeal presents two issues, ripeness and standing, that are of "general public importance" or are "similar to a question presented on another appeal to the Supreme Court." R. 2:12-4. Because the claims here involves constitutional rights, the appeal also presents questions where "the interest of justice" requires the Court's involvement. Ibid.

Each issue is critically important to protecting students' rights to an education consistent with the requirements of the New Jersey Constitution, especially when this Court proactively sought to ensure that the rights of children in SDA districts are defined by comparison to their suburban counterparts. The Appellate Division's decision raises questions about how these children, outside of challenging broad statewide funding schemes as in the Abbott cases, would be able to protect those rights. This Court's intervention is needed to provide clarity on both issues presented to the Appellate Division, especially as ripeness and standing were inextricably linked by the trial court when it focused on the harm alleged by Plaintiffs in considering these jurisdictional questions.

### **I. RIPENESS REQUIREMENTS**

This Court has stated that "[r]ipeness depends on two factors: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld

at this time." Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 99 (2010) (citation and internal quotations omitted). Declaratory judgment claims, such as this one, are ripe unless "the facts illustrate that the rights or status of the parties are future, contingent, and uncertain." Garden State Equality v. Dow, 434 N.J. 163, 189 (2013) (citation and internal quotations omitted).

The Appellate Division left open the question as to when a constitutional claim pursuant to the Thorough and Efficient Clause would be ripe, especially where the Complaint alleges ongoing harm due to the operation of a statute and the policies adopted to avoid its operation. There is nothing future, contingent, or uncertain when, as here, the state actor has admitted that it engages in a variety of harmful measures, including expenditures that are otherwise needed for academic programming, to avoid the specific event the actor admits would cause harm. On top of this, the state actor publicly modeled the harm that would occur if it instituted that event.

The Appellate Division's decision is contrary to the strong mandate this Court has put forth to protect the educational rights of students in SDA districts through the Abbott cases and the broad nature of the types of harms that might give rise to such claims. As the Court stated in Abbott II, discussing historic jurisprudence, "the clear import is not of a

constitutional mandate governing expenditure per pupil, equal or otherwise, but a requirement of a specific substantive standard of education." 119 N.J. at 306 ("[T]he Constitution does not mandate equal expenditures per pupil. We implied that the level can--and should--be defined in terms of substantive educational content"). However, "the education provided depends to a significant extent on the money spent for it, and on what that money can buy--in quality and quantity--and the ability to innovate." Id. at 319. Therefore, where the substantive standard of education offered to students is at issue and policies are created that impact the quality of education (but do not implicate a statewide funding scheme), the question remains: when are such claims brought under the Thorough and Efficient Clause ripe? Clarity from this Court would address a variety of educational contexts, not just the circumstances Plaintiffs face in this action.

## II. STANDING REQUIREMENTS

There is no language in New Jersey's Constitution limiting the exercise of judicial power to actual cases and controversies, and "New Jersey cases have historically taken a much more liberal approach on the issue of standing than have the federal cases." Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 101 (1971). In New Jersey, standing requires a "sufficient stake and real adverseness with

respect to the subject matter of the litigation [and a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009) (quoting In re Adoption of Baby T, 160 N.J. 332, 340 (1999)).

When the Appellate Division declined to address standing here, it raised the specter that students, like Plaintiffs, may never have standing to bring constitutional claims pursuant to the Thorough and Efficient Clause unless they can show a tie between a specific harm currently suffered in the classroom and a district-level policy or State statute solely responsible for that specific harm. However, such a requirement ignores the nature of a child's education, whereby, as here, two school budget years can pass during the pendency of an action and Plaintiffs move from one classroom to the next during that time. The present harm suffered by virtue of the EWPS pool is exacerbated by the passage of time and the attendant additional harms associated with the likelihood of a quality-blind RIF.

There should be no question that students are able to bring this action. See id. at 645 ("[C]ore concept of New Jersey jurisprudence" is that rules of procedure "were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the expeditious and even



administration of justice." (citation omitted).<sup>2</sup> Students have been harmed (as Newark admits), and such harm will only increase in the future should there be a RIF. Such considerations matter especially when considering constitutional claims. See, e.g., Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 337-38 (1983) (in Mount Laurel litigation, "any individual demonstrating an interest in, or any organization that has the objective of, securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds"); Jordan v. Horsemen's Benev. and Protective Ass'n, 90 N.J. 422, 432 (1982) ("Any slight additional private interest is sufficient to afford standing to private litigants who raise issues of great public interest, such as a constitutional challenge to a statute. . . . The interest of horseowners in the winnings of their horses is a sufficient additional private interest to accord them standing.").

Outside of New Jersey, courts have found, in the context of federal proceedings, that standing exists where harm occurs due to a specific policy or event and such harm may increase in the

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<sup>2</sup> See also Parents Involved in Community Schools v. Seattle School Dist., 551 U.S. 701, 718-19 (2007) (in equal protection case, finding parental organization had standing where it sought declaratory and injunctive relief on behalf of members whose elementary or middle school children "may be" denied admission, based on race, when they apply in the future to high school).

future. See, e.g., In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 641 (3d Cir. 2017) (concluding improper disclosure of personal data in violation of statute is cognizable injury for standing where only damages alleged were due to disclosure); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634 (7th Cir. 2007) (dismissing case, but found "injury-in-fact" where "threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions"); Johnson v. Allsteel, Inc., 259 F.3d 885, 889-90 (7th Cir. 2001) (finding injury-in-fact where administrator unilaterally amended benefit plan to give itself more discretion even though it had not yet used expanded discretion to disadvantage plaintiff); but see, e.g., Reilly v. Ceridian Corp., 664 F.3d 38, 41 (3d Cir. 2011) (declining to find standing where no statutory basis for claim, and plaintiffs sought recovery only for increased risk).

The federal decisions are similar to a New Jersey court's ability to evaluate claimed damage for an enhanced risk of harm where some harm has previously occurred due to the same injury. Cf. Karol v. Berkow, 254 N.J. Super. Ct. 359, 367 (App. Div. Mar. 6, 1992) (discussing Evers v. Dollinger, 95 N.J. 399 (1984) and Scafidi v. Sieler, 119 N.J. 93 (1990), both medical malpractice cases: "plaintiff may recover for an enhanced risk

of harm if the harm has in fact occurred and the increased risk can be found to have been a substantial factor in producing it."); see also Scafidi, 119 N.J. at 118 (Handler, J. dissenting) ("[T]he occurrence of ultimate harm should not be a condition precedent to the recovery of compensatory damages. If that chance or risk is demonstrated by evidence grounded in reasonable medical possibility, it should, based on ordinary experience and notions of fairness and sound policy, constitute a sufficient basis for redress.").

This Court should grant review to clarify the connection between a student's ongoing educational experience and claims challenging statutes that infringe upon their fundamental constitutional rights, either by operation or as a result of district workarounds, when it comes to standing questions.

### **III. OTHER CONSIDERATIONS**

Guidance regarding LIFO is also an issue of general applicability as evidenced by the State of New Jersey's efforts in 2016 to reopen and modify Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX"), and Abbott XXI. The State sought, among other things, to address the impact of LIFO on SDA districts' ability to meet their constitutional requirements.<sup>3</sup> Plaintiffs sought to intervene, but their motion was mooted on January 31, 2017 when the Court denied the State's application without

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<sup>3</sup> See Abbott v. Burke, Dkt. No. M-378-16, Dkt. No. M-668.

prejudice to defendants' right to file an action for relief in the trial court as the issue had not previously been the subject of prior litigation in the Abbott line of cases. Plaintiffs now seek to create the record on LIFO, and their action should be permitted to go forward.

#### COMMENTS ON THE APPELLATE DIVISION DECISION

Although Plaintiffs' claims squarely relate to a constitutional right, the Appellate Division (i) found this action is not ripe and (ii) declined to address whether Plaintiffs have standing to assert their claims. In so doing, the court fundamentally undermined the ability of children to contest the actions of any school district based on their classroom experience, and the ability of children to contest a district's actions when it admits it undertakes certain harmful measures to avoid an admittedly greater harm.

#### **I. THE APPELLATE COURT ERRED IN FAILING TO FIND THE CLAIM RIPE**

By focusing on the need for a RIF and/or for a level of expenditures before a Thorough and Efficient Clause claim is ripe, the Appellate Division erred in focusing solely on the future harm discussed in a Complaint that also alleged present harm. A RIF's timing may be uncertain, particularly where Newark undertakes extraordinary efforts to avoid one even when faced with declining enrollment and budget shortfalls, but the current harm is not. Plaintiffs suffer by virtue of Newark's

actions, and the appropriate question is whether these measures taken due to LIFO's existence are ripe for judicial review, given what Newark is currently doing. Review is required to clarify whether a claim is ripe when it is admitted that a district avoids engaging in a specific statutory action due to foreseeable harm.

Also, the Appellate Division basically created a monetary threshold for ripeness. Although, in the Abbott line of cases, the Court addressed the overall allocation of funds to certain mandatory programs, it did not opine on a district's actual expenditures. See, e.g., Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") (discussing educational and operational allocations set forth in state funding plan). The Court has never set a constitutional litmus test based on money spent. Instead, it has been careful to seek parity in funding between SDA districts and their wealthier comparators. See id. at 531. Taken to its logical conclusion, the Appellate Division's decision would permit SDA districts to divert resources, e.g., \$8-\$10 million, to expenditures that do not benefit students in any way except to avoid a more consequential harm when a district is faced with budget deficits and shortfalls. This is contrary to the spirit of the Abbott decisions and the Thorough and Efficient Clause.

Finally, the Appellate Division, in discussing ripeness, failed to address the unique nature of a claim that is based in

the classroom. School for these children, like time, marches on regardless of what is happening in the courtroom. If one ignores the current and ongoing harm discussed supra, it still does not follow that a RIF must occur before a student's claim is ripe, especially where Newark has modeled out the attendant harm of the RIF. To foreclose relief until a RIF occurs takes the ripeness requirement to the extreme. Meanwhile, students languish in classrooms where, as this Court has acknowledged, they face challenges to acquiring their constitutionally entitled thorough and efficient education, which go beyond those harms imposed by LIFO.

For this reason, the Court should provide clarity on when students' claims are ripe outside of the context of Abbott.

## **II. THE APPELLATE DIVISION ERRED IN NOT ADDRESSING STANDING**

Neither the Robinson v. Cahill line of cases nor the Abbott line of cases address standing. Here, Plaintiffs challenge district-level policy decisions. Newark admits it took these actions, contrary to the best interests of its students, in order to avoid the far worse outcome of terminating effective teachers pursuant to LIFO simply because they are more junior.

In 2016, the State deemed these issues so significant that it sought to reopen the Abbott cases to, in part, seek judicial intervention on the issue of LIFO. This was not their first

effort to bring these issues to the Court's attention. See Abbott XXI, 206 N.J. at 367.

Standing was not addressed in these applications, but it defies reason that students in classrooms, who do not have access to the specific ratings of their teachers but are subject to the district-wide harms that result from LIFO, do not have standing to assert a constitutional claim when the State and Newark continuously seek to bring it to the Court's attention.

Based on the Appellate Division's decision, the standard for standing in these types of cases is an open one. But, should Plaintiffs amend their Complaint, the standard by which an amended Complaint would be judged is the one previously set by the trial court: Plaintiffs need to show particularized harm to have standing -- i.e., that they are in a classroom with an ineffective teacher who is there solely as a result of the applicable statute (here, LIFO). This ignores the present harm of the various LIFO workarounds that go beyond the misallocation of district expenditures, particularly the lifelong impact of the presence of an effective or ineffective teacher in a classroom, which, even into adulthood, is extremely beneficial or extremely detrimental, respectively.

Such a standing requirement is almost impossible for any child to satisfy, and is inconsistent with the broad standing rules in this State and the general considerations associated

with standing in actions alleging constitutional violations. Among other things, it ignores that a child's education is not static such that the harm of an ineffective teacher would be experienced this year versus the next or was already experienced in a prior year. It ignores the non-public nature of individual teacher effectiveness ratings, and that a child cannot commence tenure proceedings against a teacher. It fails to take into account that, although Plaintiffs are harmed today due to the existence of the EWPS pool and Newark's workarounds, there is a high likelihood that Plaintiffs' harm either has occurred or will increase in the future due to the presence of an ineffective teacher in the classroom.

Given this backdrop, the Court should grant review to clarify what is required for a student in the classroom to have standing in these types of cases.

#### CONCLUSION

Because it presents critical questions relating to the fundamental constitutional rights of children, this Petition should be granted.

Dated: July 27, 2018



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