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October 3, 2022

Department of Health & Human Services Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: Nondiscrimination in Health Program and Activities RIN 0945-AA17

Dear Sir or Madam:

On behalf of the Catholic Benefits Association (CBA), we respectfully submit the following comments on the proposed rule, published in 87 Fed. Reg. 47824 (Aug. 4, 2022), on nondiscrimination in health programs and activities issued pursuant to Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116.

The Catholic Benefits Association is the largest association of Catholic employers in the United States. The CBA has almost 1,400 members. They include dioceses, schools, hospitals, universities, Catholic-owned businesses, and others. The CBA exists to support Catholic employers that, as part of their religious witness and exercise, provide health or other benefits to their respective employees in a manner consistent with Catholic values and teaching. Given the substantial numbers of employers it represents in carrying forward the healing ministry of Christ as well as ensuring its employees have the necessities of a just wage, including healthcare benefits, the CBA is grateful for the opportunity to comment on the proposed rule.

The proposed rule aims to fulfill Section 1557's purpose of Section 1557 of "ensur[ing] access to and coverage of health care in a nondiscriminatory manner." 87 Fed. Reg. 47825. The proposed rule purports to do so principally by interpreting Section 1557's incorporation of Title IX's prohibition on sex discrimination to require covered entities provide and cover (1) abortion and (2) "gender-affirming care." The proposed rule, moreover, refuses to import Title IX's abortion-neutrality provision and its religious-organization exemption for the benefit of religious organizations like the members of the CBA.

For the reasons explained below, the proposed rule needs substantial revision.

1. The proposed rule undermines Section 1557's aim of increasing access to life-giving healthcare.

While seeking to ensure access to healthcare for all Americans must be applauded, the Department's proposed rule presents at least two serious moral concerns that undermine Section 1557's purpose. First, the proposed rule interprets Section 1557, which is the Affordable Care Act's anti-discrimination provision, to require so-called gender-affirming care. 87 Fed. Reg. 47918 (§ 92.207(b)(4)-(5). Second, the proposed rule interprets Section 1557 to require covered entities to cover abortion. 87 Fed. Reg. 47916 (§ 92.101(b)). As a matter of policy, neither proposal accomplishes the rule's purported goal of ensuring access to healthcare regardless of background. Abortion is the intentional killing of our society's most vulnerable persons—often carried out for reasons prohibited by Section 1557: the race, sex, or disability of the child, *see Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1790-91 (2019) (Thomas J., concurring) (noting that"67%" of all children diagnosed with Down syndrome in utero are aborted; that "recent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States"; and that "abortion in the United States is also marked by a considerable racial disparity"). And "gender-affirming care" rejects the fact of biological sex to mutilate properly functioning human organs. Indeed, "gender-affirming care" for children often leads to impotence, sterility, and "considerably higher risks [of] mortality, suicidal behavior, and psychiatric morbidity." Cecilia Dhejne, et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, (Feb. 22, 2011); *see also* WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 50 (7th version 2011) ("[F]eminizing/masculinizing hormone therapy limits fertility.").

2. Section 1557 incorporates Title IX's religious exemption and prohibition against facilitating abortion.

Beyond these profound ethical failures, the proposed rule fails as a matter of law. Specifically, it imposes on Catholic and other religious entities and individuals a duty to provide "gender-affirming care" and abortions despite Section 1557 expressly providing many religious organizations with exemptions from mandates "[in]consistent with the[ir] religious tenets." 20 U.S.C. §§ 1681(a)(3), 1687(4).

Section 1557 incorporates by reference the anti-discrimination provisions of Title IX of the Education Amendments of 1972, among other provisions. Section 1557 says in relevant part, "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." The

proposed rule interprets this reference to the "ground prohibited under" Title IX to incorporate Title IX's prohibition on sex discrimination *but not* Title IX's exemption for religious corporations or Title IX's exemption of coverage of abortion. 87 Fed. Reg. 47839-40. The proposed rule characterizes these provisions as "exceptions" to Title IX, which allows the proposed rule to then reason that Section 1557 does not import all of Title IX. 87 Fed. Reg. 47840.

This cramped reading of Section 1557 and Title IX is wrong for two reasons.

First, Section 1557 expressly incorporates all of Title IX's sections, not just its prohibition on sex discrimination. Specifically, Section 1557's use of the Latin phrase "*et seq.*" in the phrase "on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 ***et seq.***)" expressly incorporates all of Title IX's sections. (Emphasis added). "Et seq." means "and the following." The reason for the phrase's use in Section 1557 as it refers to Title IX is that Title IX encompasses not just one section, but seven: 20 U.S.C. § 1681 *and the following* sections, 20 U.S.C. § 1682 through § 1688. So, yes, Section 1557 incorporates Title IX's prohibition on sex discrimination found in 20 U.S.C. § 1681(a). But Section 1557 *also* incorporates Title IX's exemption of "religious organization[s]" in 20 U.S.C. §§ 1681(a)(3), 1687(4), and Title IX's prohibition against interpreting sex discrimination to require payment for or provision of abortion in 20 U.S.C. § 1688. Had Congress intended to prohibit sex discrimination in Section 1557, as the proposed rule argues, it would have only referred to 20 U.S.C. § 1681(a) not § 1681(a) *and the following* provisions of Title IX.

Second, the proposed rule rewrites the plain text of Section 1557 to prohibit discrimination "on the ground[s]" prohibited under Title IX, 87 Fed. Reg. 47840 (alteration inserted by the proposed rule), when the text of Section 1557 uses the singular "ground," 42 U.S.C. § 18116. The effect of this revision is to equate Section 1557's incorporation of specific antidiscrimination statutes like Title IX with prohibition on discrimination against certain "protected classes" in an homage to *Carolene Products* footnote four as opposed to the Congressionally scoped anti-discrimination provision found in Title IX.

But the choice of the singular in Section 1557 was intentional. "Ground" as used in Section 1557 means "to base (something, such as a legal principle or judicial decision) on" as in "the court grounded the decision on common law." *Ground*, Black's Law Dictionary (11th ed. 2019). The "base" or ground at issue is the discrimination "prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.)". This distinction matters as Title IX not only prohibits sex discrimination, *it also prohibits discrimination on the basis of visual impairment*. *Compare* 20 U.S.C. § 1681(a) (sex discrimination), *with* 20 U.S.C. § 1684 (visual impairment). Title IX similarly does not prohibit sex or visual-impairment discrimination if that discrimination conflicts with the beliefs of a religious organization, 20 U.S.C. § 1681(a)(3), or purports to require Title IX's prohibition against interpreting sex discrimination to require payment for or provision of abortion in 20 U.S.C. § 1688.

This dovetails with the other provisions incorporated by Section 1557. For example, Section 1557 prohibits discrimination on healthcare "on the ground prohibited under . . . section 794 of Title 29." Section 794 of Title 29, however, does not prohibit discrimination against a "protected class," but instead prohibits discrimination against an "otherwise qualified individual with a disability in the United States, *as defined in* [29 U.S.C. § 705(20)(A)]." 29 U.S.C. § 794(a) (emphasis added). Excluded from that as-defined definition of the term "individual with disability" in 29 U.S.C. § 705(20) are certain things including: "homosexuality . . . transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders," as well as "compulsive gambling, kleptomania . . . pyromania; or . . . psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211(a) and (b); *see also* 29 U.S.C. § 705(20) (flush language) (incorporating by reference the exclusions set forth in the Americans with Disabilities Act).

The upshot of Congress's belt-and-suspenders approach to ensuring *all* of Title IX's provisions are imported to Section 1557 is that Section 1557 incorporates the statutorily defined prohibitions on discrimination found in Title IX and other federal statutes. Section 1557, like Title IX, does not simply prohibit sex or visual-impairment discrimination and leave it up to the courts or the Department to define what that means. No, these provisions carefully define what sex discrimination does and does not entail. And at least two categories of conduct are not, in Congress's view, sex discrimination for purposes of Section 1557 and Title IX: (1) religious decisions by a religious organization that conflict the terms of Title IX and (2) the refusal to provide or pay for abortion. The proposed rule fundamentally errs by ignoring the scope of the right protected by Section 1557 and Title IX.

3. The proposed rule should clarify its reading-between-the-lines abortion mandate.

By reading Title IX's abortion neutrality provision out of Section 1557, the proposed rule does its best to clear the deck for requiring covered entities, including Catholic members of the CBA, to cover and provide abortion. Yet despite this apparent attempt to eliminate any legal obstacles to an abortion mandate, the proposed rule does not explicitly state that, to comply with Section 1557 and Title IX's prohibition against sex discrimination, covered entities must perform abortions. It instead prohibits "[d]iscrimination on the basis of sex," which it defines to include "pregnancy or related conditions." 87 Fed. Reg. 47916 (§ 92.101(b)). But the reader must look elsewhere, to the commentary on the proposed rule, to determine the scope of "pregnancy or related conditions." The commentary more forthrightly states that pregnancy discrimination includes "termination of pregnancy" because (1) regulations under Title IX define sex discrimination to include "termination of pregnancy" within the ambit of sex discrimination, and (2) the Department disagrees with the reasoning of the court in *Franciscan Alliance* that interpreted Section 1557 to not include abortion within its terms. 87 Fed. Reg. 47878-79. Furthermore, the Department issued the proposed rule only weeks after its provided "guidance" to the nation's pharmacies that Section 1557 requires them to stock the abortion pills mifepristone, misoprostol, and methotrexate and that refusal to do so "because [such pills] may prevent a pregnancy,

[means] the pharmacy may be discriminating on the basis of sex." Department of Health and Human Services, *Guidance to Nation's Retail Pharmacies: Obligations Under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services* (July 13, 2022).

The CBA urges the Department to state clearly whether it intends to interpret discrimination on the basis of sex under Section 1557 and Title IX to include abortion. If the Department believes that Section 1557 is an abortion payment-and-provision mandate, it should say so, and it should be clear whether this requirement includes "contraceptives" that function as abortifacients, chemical abortion, and surgical abortion. Basic principles of fair notice require as much. Covered entities such as the members of the CBA that oppose abortion and view it as the opposite of healthcare must be informed that the Department interprets Section 1557 to mandate the procedure.

But simply defining sex discrimination to include abortion is not enough. The Department must also explain how the myriad legal prohibitions against federal funds flowing to abortion and prohibiting an abortion mandate do not apply here. By the CBA's count, there are at least *eight* federal prohibitions on a federal abortion mandate, including:

- The Comstock Act, which exposes healthcare providers to criminal and civil liability for providing or assisting in abortions. 18 U.S.C. § 1461.
- The Weldon Amendment, which forbids funds appropriated to HHS from being "made available to a Federal agency or program, or to a state or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, 2022, Public Law 117–103, div. H, title V General Provisions, § 507(d)(1) (Mar. 15, 2022).
- The Coates-Snowe Amendment, which forbids federal and state governments from "subject[ing] any health care entity to discrimination on the basis that" the entity refuses to perform, train, or assist in the provision of abortions. 42 U.S.C. § 238n(a).
- The Church Amendment, which prohibits the Department from requiring any individuals or entities that receive funds from the Department to make its facilities available for or perform abortions if doing so would violate the entity or individual's religious beliefs. 42 U.S.C. 300a–7(b)(2)(A), (d). Section 1302 of the Affordable Care Act, which does not require health plans to cover abortions, prohibits discrimination by healthcare plans against providers and healthcare facilities that refuse to provide abortion, and expressly applies all federal conscience protections for those who object to providing, performing, or assisting abortions. 42 U.S.C. § 18023(b)(1), (b)(4), (c)(2).
- Title VII as amended by the Pregnancy Discrimination Act, which does not "require an employer to pay for health insurance benefits for abortion." 42 U.S.C. § 2000e(k).

- Executive Order 13535, *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act* (Mar. 24, 2010), which directs the Department to "establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services."
- Title IX's abortion-neutrality provision described above. 20 U.S.C. § 1688.

The Department must also explain how it can promulgate a rule finding that the denial of abortion coverage or services constitutes sex discrimination under Section 1557 after the United States Supreme Court recently held that that barring abortion does not constitute illegal sex discrimination under the Equal Protection Clause. *Dobbs v. Jacskon Women's Health*, 142 S.Ct. 2228, 2245 (2022) ("[A] State's regulation of abortion is not a sex-based classification.").

These authorities constitute overwhelming evidence that the Department has no authority to impose an abortion mandate under the auspices of Section 1557. There is no colorable argument to the contrary.[1]

4. The proposed rule should clarify the meaning of "gender-affirming care."

The proposed rule, as explained, has two principal mandates: that Section 1557 prohibits discrimination on the basis of "pregnancy-related conditions" and that Section 1557's prohibition on sex discrimination requires "gender affirming care." *See* 87 Fed. Reg. 47916 (§ 92.101(a)(2) (prohibition on discrimination based on "pregnancy or related conditions); 87 Fed. Reg. 47918 (§ 92.207(b)(4)-(5) (prohibition on coverage exclusions or limitation "related to gender transition or other gender-affirming care"). The former is, as explained, contrary to the myriad federal prohibitions on federal abortion mandates.

The latter faces a different problem: "gender-affirming care" is wholly undefined. Despite its centrality to the proposed rule's purpose, "gender-affirming care" does not appear in the proposed rule's definition section, § 92.4, or in any other provision. The reader is instead again left to look elsewhere, to the footnotes of the preamble of the proposed rule, for notice as to what procedures and services the Department views as gender-affirming care. Footnote 139 explains, "the term 'gender-affirming care' refers to care for transgender individuals . . . that may include, but is not necessarily limited to, counseling, hormone therapy, surgery, and other services designed to treat gender dysphoria or support gender affirmation or transition." 87 Fed. Reg. 47834 n.139.

[1] The commentary on the proposed rule suggests that the Emergency Medical Treatment and Active Labor Act (EMTALA) requires healthcare providers to provide abortions in certain contexts. 87 Fed. Reg. 47879. But that argument has no basis in the Act's text, which imposes duties on healthcare providers to care for *both* a pregnant woman *and* her "unborn child." 42 U.S.C. § 1395dd(e)(1)(A)(i). It similarly ignores that this interpretation of the Act has been enjoined. *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022).

The CBA once again urges the Department to define the scope of the proposed rule's mandates. Covered entities are entitled to fair notice of what the Department views as gender-affirming care. And indeed, the inscrutability of the term opens the possibility that the Department will require covered entities to perform, cover, and provide a host of immoral and unconscionable procedures contrary not only to Catholic belief, but also basic science. For example, does the rule also require puberty blockers and social affirmation as the HHS Office of the Assistant Secretary of Health announced just before the Department published the proposed rule? *See* OASH, *Gender-Affirming Care and Young People* (2022), https://bit.ly/3y9xdzS. Does the proposed rule's gender-affirming-care mandate require puberty blockers for children as the World Professional Association for Transgender Health (WPATH) says it does?[2] What about the provision of cross-sex hormones, genital mutilating surgeries, feminizing and masculinizing cosmetic surgeries, testicular tucking breast binding, and penile prosthesis—all of which are procedures endorsed by WPATH.[3] Does gender-affirming care require covered entities to cover and provide artificial-reproductive technology to individuals who have chosen to sterilize themselves in aid of gender transition?[4] Does it require covered entities to cover and provide chemical and surgical castration for individuals who identify as eunuchs?[5]

Assuming these procedures meet the proposed rule's definition of gender-affirming care, there is more scoping the Department must do. If, for example, the proposed rule requires puberty blockers and cross-sex hormones, is there an age below which these drugs are inappropriate? Similarly, if the proposed rule requires gender-transition surgeries, does this entail coverage for breast augmentation, mastectomies, scrotoplasty, erection prostheses, testicular prostheses, penectomies, orchiectomies, vaginoplasties, clitoroplaties, vulvoplasties, liposuction, lipofilling, voice surgery, Adam's apple reduction, gluteal augmentation, and hair reconstruction? If any or all of these surgeries are mandated, is there an age below which they are not appropriate? Can a Catholic hospital refuse to perform these surgeries on a nine-year old? And what about social affirmation? Does the proposed rule's mandate require covered entities to believe and validate a child's preferred pronouns, encourage transition, and silence their own professional judgment on biological sex? Does social affirmation include hairstyles, clothing, pronouns, and access to formerly single-sex restrooms and other facilities? Does the rule require providing "safe folders" for children transitioning as declared by the National Child Traumatic Stress Network which is funded by HHS? *See* NCTSN, *Gender-Affirming Care Is Trauma-Informed Care*,

[2] *See* WPATH, *Standards of Care for the Health of Transgender and Gender Diverse People Version 8*, Int' J. of Transgender Health (Vol. 23, No. S1, 2022) (removing age limits for hormone therapy of children).

[3] *Id.* at S18.

[4] *Id.* at S119.

[5] The proposed rule prohibits discrimination based upon "sex characteristics." 87 Fed. Reg. 47,916 at Rule 92.101(a)(2). "Sex characteristics" includes "gonads" and presumably the unwanted presence of gonads. *Id.* at 47,858. WPATH's standards describe eunuchs as an additional gender identity who "seek castration to better align their bodies with their gender identity" and prescribe castration as the "medically necessary" standard for many such persons. WPATH Standards, *supra* n.2, at S88-S92.

https://bit.ly/3E7jHRj. Does it require self-examination by medical providers and employers "to recognize and shift your own biases"? *Id.*

These questions are all left open by the proposed rule's failure to define its gender-affirming-care mandate. The Department must clarify what procedures are mandated by the proposed rule and their scope.

5. The proposed rule improperly delegates authority to private third-party activist groups.

The proposed rule repeatedly asserts that its gender-affirming-care mandate "should follow clinical practice guidelines and professional standards of care." 87 Fed. Reg. 47868; *see also id.* at 47834 n.139, 47867 n.416. Indeed, this appears to be the proposed rule's suggestion as to the substantive content of its gender-affirming-care mandate. Rather than define that term so that covered entities will have notice of the proposed rule's scope, the rule delegates the authority to define the term to private, non-governmental activist groups. In one section of the preamble to the proposed rule, the Department explains that "[g]ender-affirming care, like all medical care, should follow clinical practice guidelines and professional standards of care." 87 Fed. Reg. 47868. According to the Department, moreover, those professional standards of care are defined by a number of medical societies, including an activist organization: WPATH. *See id.* n.423 (defining "professionals standards of care" with reference to the WPATH standards).

This incorporation of WPATH's ever-evolving standards of care is an improper delegation of power to a non-governmental organization. It is a dubious proposition that Congress intended to delegate to the Department sweeping power to make such a "major policy decision" that all covered entities must provide gender-affirming care. *See W. Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). This proposition is, however, doubly dubious when considered in the light of the Department's decision to leave the key term "gender-affirming care" undefined and to delegate the authority to WPATH and other radicalized medical societies to define its content and thus regulate covered entities. Indeed, the proposed rule gives WPATH unchecked authority to define the scope of required gender-affirming care as the Department retains no authority to "review" WPATH's final say on what procedures covered entities provide. *See Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 708 (5th Cir. 2017) (private delegation is illegal when private parties have "final say" regarding agency rules).

This improper delegation must be removed from the proposed rule in favor of a clear definition of "gender-affirming care."

6. The proposed rule should include an automatic religious exemption for religious entities and individuals.

The proposed rule fails to provide a religious exemption for covered entities that are religious. Although the Department pays lip service to the robust protections afforded religious institutions under the Constitution and various federal laws, *see* 87 Fed. Reg. 478641 ("[T]he Department is fully committed to respecting conscience and religious freedom law when applying this rule"), it refuses to adopt Title IX's categorical exemption for religious institutions because "[h]ealth care settings differ significantly from educational settings with respect to both the ability of affected parties to choose or avoid a certain religiously affiliated health care institution and the urgency of the need for services provided by covered entities," *id.* at 478640. In the Department's view, religious freedom is best served by a case-by-case analysis performed by the Department so the "ramifications of applying" religious freedom can be taken into account. *Id.* at 478641. This refusal to respect religious freedom is contrary to the finest traditions of our Republic.

"[R]eligious freedom" is "the flower . . . that so adorns America," proclaimed then-Representative-Schumer in support of the Religious Freedom Restoration Act in 1993. 139 Cong. Rec. 27240 (daily ed. Nov. 3, 1993) (statement of Rep. Schumer). "It is so important for us to allow that freedom to flourish," he continued, "and not come down on it unless we really have to." *Id.* Religious freedom is the most distinctive feature of the American experiment in constitutional government. In his *Memorial and Remonstrance against Religious Assessments*, James Madison argued that "the Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of James Madison* at 183, 188 (G. Hunt ed. 1901). And indeed, Madison's understanding that "the rights of Conscience in the fullest latitude" must be protected, *see* Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), was ultimately enshrined in the expansive language of the First Amendment that the government of the United States shall not abridge its citizens' rights to "the free exercise" of religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1483-84 (1990).

Religious freedom reflects dual insights that human beings are religious creatures and that religion is a leaven in society. One need look no further than the profound contribution of Catholic hospitals to the American system of health care. St. Joseph's, Mercy, St. Anthony's, Holy Cross, Ascension—American cities are dotted with Catholic hospitals fervently committed to carrying out the healing ministry of Christ just as were the religious orders of nuns that founded most of them. These hospitals exist because their founders were able to exercise the religious freedom at the core of the American constitutional order.[6]

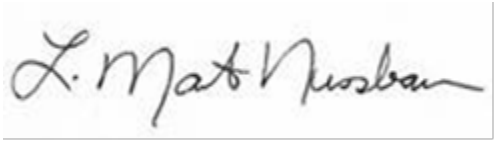
[6] For an encyclopedic listing of the social benefits of religious institutions and religious people being permitted to exercise their faith, *see* Elizabeth Clark, *The Impact of Religion and Religious Organizations*, Liberty and Law Center Research Paper No. 22-03 (May 31, 2022) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119695).

* * *

The CBA once again applauds the efforts of the Department to ensure access to healthcare for all. Its proposed rule interpreting Section 1557, however, presents serious concerns as a matter of law, policy, and respect for religious freedom. The CBA respectfully submits this comment to urge the Department to adopt Title IX's and other federal guarantees of religious freedom and neutrality as to abortion.

Respectfully,

Doug Wilson
Chief Executive Officer
Catholic Benefits Association



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