Case No. H041563

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FRIENDS OF THE WILLOW GLEN TRESTLE, an unincorporated association,

Plaintiff, Respondent

v.

CITY OF SAN JOSE AND CITY COUNCIL OF THE CITY OF SAN JOSE,

Defendants, Appellants

Appeal from the Superior Court of the State of California
County of Santa Clara, Case No. 1-14-CV-260439
Honorable Joseph Huber, Judge Presiding

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANTS CITY OF SAN JOSE AND CITY COUNCIL OF THE CITY OF SAN JOSE

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SIXTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: H041563
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APPELLANT/PETITIONER: City of San Jose and City Council of the City of San Jose RESPONDENT/REAL PARTY IN INTEREST: Friends of the Willow Glen Trestle	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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Date: June 19, 2015

Carissa M. Beecham
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

This Amicus Curiae Brief is submitted by the League of California Cities (the "League"), an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The trial court in this case erroneously applied the "fair argument" standard to the City of San Jose's ("City") discretionary determination of whether a physical structure[1] is historic for purposes of the California Environmental Quality Act ("CEQA").[2] Application of this uniquely heightened standard of review deprived the City of the discretion afforded by statute, and widely recognized by the courts, to determine whether a previously undesignated, unqualified resource is historical.

Public Resources Code section 21084.1 and its implementing guidelines[3] have been interpreted to "establish three analytical categories for use in determining whether [a resource] is an historical resource for purposes of CEQA: (1) mandatory historical resources; (2) presumptive

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[1] The structure at the center of the present controversy is an existing wooden trestle bridge across Los Gatos Creek in the Willow Glen area of San Jose.

[2] The California Environmental Quality Act is set forth at Public Resources Code, section 21000 et seq.

[3] The CEQA Guidelines are set forth at Cal. Code of Regulations, title 14, § 15000 et seq.

historical resources; and (3) discretionary historical resources." (*Valley Advocates v. City of Fresno* ("*Valley Advocates*") (2008) 160 Cal.App.4th 1039, 1051 [emphasis added; referencing *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* ("*League for Protection*") (1997) 52 Cal.App.4th 896, 906-907]; and 2 Kostka and Zischke, *Practice Under the California Environmental Quality Act* (Cont.Ed.Bar 2006) § 20.109, pp. 1060-1061).) This case involves the third category – discretionary resources.[4]

By applying the fair argument standard to preliminary determinations of whether resources are historical, the trial court's decision runs contrary to statutes and regulations, legislative history, and case law. Lead agencies, including the City and all other California cities, require discretion when determining historicity. Discretion is vital to ensure adequate planning for community resources and proper stewardship of those resources. A lead agency's discretion is ensured by applying the substantial evidence standard at the initial stage of review. The trial court's decision has the opposite effect, and effectively forecloses agency discretion in the realm of historical resources.

Lastly, to the extent the City has complied with the terms of the trial court's peremptory writ in certifying an EIR for the underlying project, the

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[4] The trestle is not a mandatory resource, which category includes resources listed in or determined to be eligible for listing in the California Register of Historical Resources. Nor is the trestle a presumptive resource, which includes those appearing in a local register of historic resources or deemed significant pursuant to section 5020.1. (*Valley Advocates*, *supra*, 160 Cal.App.4th at 1051; see Order Re: Petition for Writ of Mandamus, p. 2 [describing the resource at issue as "a structure which Petitioner claims may be a historic resource," and providing no evidence of listing or other designation].)

appeal is not moot because of the continuing nature of the legal issues at stake, the broad public interests involved, and the relatively high likelihood of similar occurrences and related litigation in other jurisdictions.

For each of these reasons, the trial court's decision and issuance of a writ of mandamus should be reversed.

II. THE FAIR ARGUMENT STANDARD DOES NOT APPLY TO THE DESIGNATION OF HISTORICAL RESOURCES

Public Resources Code section 21084.1 states:

> A project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment. For purposes of this section, an historical resource is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude *a lead agency from determining whether the resource may be an historical resource* for purposes of this section.

(Emphasis added.) The plain language of the statue makes clear that the lead agency has discretion to determine historical significance.

CEQA Guidelines section 15064.5(a)(3) further supports agency discretion via the substantial evidence standard rather than the fair argument standard, and addresses the designation of historical resources when reviewing the discretionary category of resources. "Any [resource]. . . which *a lead agency determines* to be historically significant . . . may be considered to be an historical resource, *provided the lead agency's determination* is supported by substantial evidence in light of the whole record." (*Id.* (emphasis added); *see Valley Advocates, supra,* 160 Cal.App.4th at 1059; *see also Citizens for the Restoration of L Street v. City of Fresno ("Citizens")* (2014) 229 Cal.App.4th 340; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.)

The statue and Guidelines are clear on their face that a lead agency retains discretion to determine historical significance of this third category of resource based on substantial evidence. Moreover, the legislative history resolves any lingering ambiguity in favor of applying the substantial evidence standard to the preliminary designation of historical resources.

A. THE LEGISLATIVE HISTORY OF PUBLIC RESOURCES CODE SECTION 21084.1 SUPPORTS LEAD AGENCY DISCRETION WHEN DESIGNATING HISTORICAL RESOURCES

Although the plain language of section 21084.1 and the Guidelines provide for discretion when designating historical resources, courts routinely consider the applicable legislative history to resolve alleged ambiguities. (*See Valley Advocates, supra,* 160 Cal.App.4th at 1069-1072, (citing *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 at 1070); *see also* Request for Judicial Notice ("RJN"), Exhibit "A" at 11 (Sen. Nat. Res. and Wildlife Comm., Senate Floor Amendments Committee Analysis on

Assem. Bill No. 2881 (1991-1992 Reg. Sess.), as amended August 21, 1992); *see also* RJN, Exhibit "A" at 87 (Assem. Comm. Water, Parks and Wildlife on Assem. Bill No. 2881, as amended May 11, 1992 at para. 6 and at 62, 66 [Gov'rs OPR, Enrolled Bill Report on Assem. Bill No. 2881, August 24, 1992 at p. 9]).)

Earlier versions of the bill enacting Public Resources Code section 21084.1 drew objection by the League and others because the proposed legislation did not provide sufficient discretion to local agencies to conclude that a resource listed on a local register was not historical for purposes of CEQA. (RJN, Exhibit "A" at 87 [Assem. Comm. Water, Parks and Wildlife on Assem. Bill No. 2881, as amended May 11, 1992 at para. 6 (stating that "[c]oncern has been expressed that the definition of 'local register of historic resources' may be overly broad and may expand the number of projects over which either an environmental impact report or a negative declaration would be required.")].) After the bill was amended to allow a lead agency to declare as "not historic" a resource appearing on a local register, the opposition was removed. (RJN, Exhibit "A" at 62, 66 [Gov'rs OPR, Enrolled Bill Report on Assem. Bill No. 2881, August 24, 1992 at p. 9 (stating that, "[w]hen the author . . . added a provision that would allow a local lead agency to declare a project on a local register 'not historically significant,' these companies removed their opposition to the bill.")].)

The legislative history confirms that three different standards of review apply to the determination of whether a building is a historic resource. The fair argument standard, which forecloses discretion, is not

one of the standards.[5] The analysis of final amendments to AB 2881 includes the following:

> SEC. 8. 21084.1 has been revised. As a result:
>
> 1. Only historical resources either included in or determined eligible for inclusion in the California Register of Historical Resources are statutorily significant for CEQA purposes. This means that either an EIR or mitigated negative declaration would probably be required for any project that would substantially harm such resources. A lead agency would have no discretion to consider such resources as anything but significant.
>
> 2. Resources on a local register of historical resources or included in the State Inventory of Historic Resources with a ranking of 5 or higher would NOT be statutorily significant for CEQA purposes but would be PRESUMED to be significant unless the weight of evidence demonstrated they were not. A lead agency would almost certainly have to consider such resources significant for CEQA purposes. However, the door would be left open for someone to argue against significance and if convinced by such argument, *a lead agency would have the discretion to consider the resource not to be significant*. If this occurred, neither an EIR nor a mitigated negative declaration would be required.
>
> In effect, this means that for CEQA purposes, local properties or those in the State Inventory

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[5] In both *Valley Advocates* and *Citizens*, the court concluded that the fair argument standard was entirely incompatible with the exercise of discretion. (*Valley Advocates, supra,* 160 Cal.App.4th at 1039; *Citizens, supra,* 229 Cal.App.4th at 369.) (See *infra*, § III.B.)

> are not considered quite as important as properties included in or eligible for inclusion in the California Register.
>
> 3. Resources which have not been considered for the California Register, for a local register or for the State Historic Resources Inventory may, *at the discretion of a lead agency*, be evaluated to determine if they are significant for purposes of CEQA.

(See RJN, Exhibit "A" at 11 (Sen. Nat. Res. and Wildlife Comm., Senate Floor Amendments Committee Analysis on Assem. Bill No. 2881 (1991-1992 Reg. Sess.) as amended August 21, 1992) [emphasis added].) "This excerpt from the legislative history demonstrates the legislature's intent to allow a lead agency to make a discretionary decision about the historic significance of certain resources, including, if appropriate, a decision that would preclude the need for an EIR or a mitigated negative declaration." (*Citizens*, *supra*, 229 Cal.App.4th at 368.)

B. THE FAIR ARGUMENT STANDARD IS INCOMPATIBLE WITH THE EXERCISE OF DISCRETION

After construing the legislative history of section 21084.1 to support agency discretion with respect to the designation of historical resources, the court in *Valley Advocates* made clear that the "fair argument standard" was incompatible with this intent. The court explained:

> [T]he fair argument standard cannot apply at the same time as a rule that allows a presumption of historicity to be rebutted by a preponderance of the evidence. In other words, the fair argument standard is not compatible with the rebuttable presumption.
>
> . . .

> In addition, we note, use of the fair argument standard would be incompatible with the concept of a discretionary historical resources category because the fair argument standard presents a question of law. As a question of law, the presentation of substantial evidence supporting a fair argument would decide the matter, and there would be no need to exercise discretion by weighing evidence or competing interests or values.
>
> Based on these incompatibilities and the legislative history of sections 21084 and 21084.1, we conclude the Legislature did not intend that the fair argument standard apply to the question of historicity during the preliminary review stage of an environmental review.

(*Valley Advocates*, *supra,* 160 Cal.App.4th at 1072.)

The language of section 21084.1 and the legislative history underlying the statute make clear that *lead agencies may exercise discretion* in designating historical resources. Because the fair argument standard is incompatible with the exercise of agency discretion, that particular legal standard does not apply.

Applying the fair argument standard in this context could require the preparation of an EIR every time a purported expert opines in favor of historicity. This scenario would hamstring local governance and planning efforts in cities throughout the State and was roundly rejected by the Legislature in any event.

C. CASE LAW STRONGLY SUPPORTS THE SUBSTANTIAL EVIDENCE STANDARD

The law could not be more clear: "the only reasonable interpretation of [Public Resources Code] section 21084.1 is that *the fair argument*

standard does not govern a lead agency's application of the definition of a historic resource . . . [but] once the resource has been determined to be a historical resource, then the fair argument standard applies . . ." (*Valley Advocates, supra,* 160 Cal.App.4th at 1072 (emphasis added); *see also Valley Advocates, supra,* 160 Cal.App.4th at 1046.) An agency's discretionary determination regarding whether the "resource" at issue is historic must instead be subject to the traditional and more deferential substantial evidence test. (*Id.* at 1068-1069.) The *Valley Advocates* court relied upon section 21084.1, the CEQA Guidelines, the legislative history, and logic to determine that the fair argument standard is not applicable to the designation of historical resources pursuant to CEQA Guidelines section 15064.5(a). (*See, generally, Valley Advocates, supra,* 160 Cal.App.4th 1039.) The court properly concluded that the Legislature intended a lead agency to exercise discretion. (*Id.* at 1071-1072.) The application of agency discretion is incompatible with the low threshold fair argument standard in designating historical resources. Ultimately, "[a] fair argument is not extinguished by the existence of substantial or even a preponderance of the evidence on the opposite side of an issue." (*Id.* at 1071.) Thus, the "fair argument standard cannot apply at the same time as a rule that allows a presumption of historicity to be rebutted." (*Id.* at 1072.)

There is no longer just a ripple of support for the substantial evidence standard; it has become a wave. The longstanding holding in *Valley Advocates* was recently affirmed by both the Fifth District Court of Appeal in *Citizens*, as well as by the California Supreme Court in *Berkeley Hillside Pres. v. City of Berkeley* ("*Berkeley Hillside*") (2015) 60 Cal.4th

1086.[6]

In the *Citizens* case, the court examined application of the fair argument standard to the determination of whether a "threatened building or site is an 'historical resource' for purposes of CEQA." (*Citizens, supra*, 229 Cal.App.4th at 362.) The court carefully reviewed the legislative history, and conclusively affirmed the *Valley Advocates* rule that, during the preliminary CEQA assessment process, "the fair argument standard does not apply to the question of whether a building or other object qualifies as an historical resource for purposes of CEQA." (*Id.* at 369.)

> [T]he question whether an object is an historical resource and thus part of the environment protected by CEQA must be resolved by the lead agency, under the three analytical categories established by section 21084.1 and Guidelines section 15064.5, subdivision (a), before it applies the fair argument standard to determine whether the project may have a significant adverse impact on the environment.

(*Ibid.*)

In *Berkeley Hillside*, the California Supreme Court affirmed the *Valley Advocates* requirement to apply the substantial evidence standard at the initial factual determination stage, which in that case was the determination of "unsual circumstances." The Supreme Court explained:

> This bifurcated approach to the questions of unusual circumstances and potentially significant effects comports with our

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[6] The Supreme Court's recent holding in *Berkeley Hillside* addressed the "unusual circumstances" determination and not the designation of historical resources. As discussed in this brief, however, the Supreme Court expressly adopted the bifurcated approach from *Valley Advocates*. (*Berkeley Hillside, supra,* 60 Cal.4th at 1115.)

> construction of the unusual circumstances exception to require findings of both unusual circumstances and a potentially significant effect. *It would be inappropriate for an agency to apply the fair argument standard to determine whether unusual circumstances exist.* That standard is intended to guide the determination of whether a project has a potentially significant effect, not whether it presents unusual circumstances.

(*Berkeley Hillside, supra,* 60 Cal.4th at 1115 (emphasis added).) Application of the fair argument standard to the initial designation of historical resources would be similarly inappropriate.

Even cases pre-dating *Valley Advocates* do nothing to undermine this now settled standard. In *League for Protection*, the court rejected respondents' argument "that nothing less than official designation of a building as historic in a recognized register suffices to trigger CEQA requirements." (*League for Protection, supra,* 52 Cal.App.4th at 907.) The court only generally discussed the fair argument standard, stating, "if substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified." (*Id.* at 904.) This recitation of longstanding CEQA law is entirely unnoteworthy. (*Id.*, citing *Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; see also Pub. Resources Code, § 21100(a).) Moreover, the City of Oakland's underlying determination was premised largely on its misunderstanding that formal listing on a "national, state or local register [was] a prerequisite to historical status." (*League for Protection, supra,* 52 Cal.App.4th at 907.) The court found substantial evidence in the record to presume the resource was historic; it did not include an in-depth discussion of the standard

applicable to this determination, concluding that presumption was not "rebutted by any evidence in the record." (*Id.* at 908.)

League for Protection is not only constrained by the more recent *Valley Advocates* decision, but any claim that the fair argument standard should apply to historical resource determinations was explicitly overruled in *Valley Advocates*, which was in turn affirmed by the Supreme Court's approach in *Berkeley Hillside*. (*Valley Advocates*, *supra*, 160 Cal.App.4th at 1072; *Berkeley Hillside, supra,* 60 Cal.4th at 1117.)

In *Architectural Heritage Assoc. v. County of Monterey* ("*Architectural Heritage*") (2004) 122 Cal.App.4th 1095, both parties accepted the fair argument standard, and the court was not required to consider another standard in determining whether an EIR was necessary for the demolition of a jail. (*Id.* at 1108.) The initial study explicitly stated, "the old jailhouse is a significant historical resource as defined by CEQA." (*Id.* at 1113.)

Unlike the parties in *Architectural Heritage*, no such agreement arose with respect to the City's approvals under review in this case. Equally important, uniform application of the fair argument standard in this context to all lead agencies is not only unsupported by the statute, Guidelines and case law, but could substantially constrain vital infrastructure, community, and resource projects by requiring a more expensive and lengthy environmental review process. The agreement between the parties in *Architectural Heritage* in and of itself distinguishes that case. *Valley Advocates* expressed in no uncertain terms that "the court's statement [in *Architectural Heritage*] should not be read to mean that the fair argument standard always, or even generally, applies to the question whether a building or object is an historical resource during

environmental review conducted before the preparation of an EIR." (*Valley Advocates*, *supra*, 160 Cal.App.4th at 1068.) *Valley Advocates* makes clear that the holding of *Architectural Heritage* must be limited to the unique facts of that case, and that the fair argument standard does not apply to the identification of historical resources. (*Ibid.*)

Given the definitive holdings in *Citizens* and *Berkeley Hillside*, the legal standard has clearly been settled. California cities now have consistent guidance regarding how to address the designation of historical resources from the Courts of Appeal and the Supreme Court.

III. THE TRIAL COURT'S DECISION DEPRIVES LEAD AGENCIES OF THE DISCRETION TO DETERMINE HISTORICAL RESOURCES

Ultimately, when the trial court applied the fair argument standard to the designation of historical resources in this case, it conflated the initial determination of historicity with the secondary question of whether a project will have a significant impact on the environment. Mandatory application of the fair argument standard to the initial CEQA inquiry could then effectively require an environmental impact report ("EIR") every time a project opponent presents potential issues of historicity and the project potentially impacts the environment. Project opponents and others could frustrate the purposes of CEQA, cause substantial delay, and greatly increase agency expense, merely by raising assertions of historicity sufficient to meet the lower fair argument threshold. "The Legislature [did not intend] CEQA to be applied in a way that maximizes the expense and delay incurred before a final decision is reached about a building's historic significance and the propriety of demolition." (*Citizens*, *supra*, 229 Cal.App.4th at 371.)

While the League agrees that concerns about project delay and expense are important, equally important are the policy implications of expanding the multi-layered CEQA statute. Exemptions, negative declarations, and mitigated negative declarations exist for a purpose. The Legislature did not intend for every project to command an EIR. (*Id.* at 368.)

Contrary to the Fifth District's explanation in *Citizens*, Respondent's interpretation of the Public Resources Code could require an EIR virtually every time a purported expert opines in favor of historicity. Both the legislative history and the final amendment clarifying the exercise of discretion by lead agencies for designation reflect a desire to avoid just such a scenario. (*Valley Advocates*, *supra*, 160 Cal.App.4th at 1070-1072.)

IV. THE CITY'S APPEAL IS NOT MOOT

The City's appeal is not rendered moot as a result of the City's compliance with the underlying Peremptory Writ because the appeal addresses legal issues "of broad public interest that are likely to recur." (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 900, fn. 3 (permitting appellate review of the City's appeal of a decision invalidating an ordinance pursuant to CEQA despite city's subsequent compliance with CEQA and reenactment of the ordinance).) "[T]here is a recognized exception to the rule of automatic dismissal in moot cases that affect the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed." (*Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park District* (1994) 28 Cal.App.4th 419, 425; see also *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867 (stating, "[t]he general rule regarding mootness,

however, is tempered by the court's discretionary authority to decide moot issues. When an action involves a matter of continuing public interest that is likely to recur, a court may exercise an inherent discretion to resolve that issue, even if an event occurring during the pendency of the appeal normally would render the matter moot.").)

Here, lead agencies -- including cities -- will continue to consider projects requiring review of potential historical resources and related CEQA issues, and the standard of review for these determinations will continue to be an issue. Clarity and direction is required, not only to reverse the trial court's error, but also to prevent further litigation at the expense of the taxpayers and in the interest of judicial economy.

V. CONCLUSION

For all the above reasons, it is respectfully requested that trial court's application of the fair argument standard to the designation of historical resources be found in error and the judgment be reversed.

Respectfully submitted,

Dated: June 19, 2015

STOEL RIVES LLP

By: 

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPESET AND TYPEFACE REQUIREMENTS

1. This brief complies with the type-volume limitation of the California Rules of Court, rule 8.204(c).

2. The brief contains 3,873 words, excluding the parts of the brief exempted by the California Rules of Court, rule 8.204(c).

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4. This brief has been prepared in a proportionally spaced typeface in Times New Roman 13-point type with footnotes in Times New Roman 13-point type.

Respectfully submitted,

Dated: June 19, 2015

STOEL RIVES LLP

By: 

Timothy M. Taylor
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DECLARATION OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of Sacramento and my business address is 500 Capitol Mall, Suite 1600, Sacramento, California 95814.

On June 19, 2015, at Sacramento, California, I served the attached document(s):

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANTS CITY OF SAN JOSE AND CITY COUNCIL OF THE CITY OF SAN JOSE

on the following parties:

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