IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY, Plaintiff, v. COUNTY OF LACKAWANNA TRANSIT SYSTEM, Defendant.	Civil Action No. 3:15-CV-00833-MEM (Judge Mannion)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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In its opposition brief, COLTS mischaracterizes Plaintiff's motion for summary judgment as arguing "that COLTS cannot limit speech on its advertising space." Def.'s Br. in Opp. to Pl.'s Mot. for Summary Judgment, ECF No. 39 (hereinafter "Def.'s Opp. Br.") at 1. Plaintiffs have *not* argued that COLTS can never limit speech in its advertising spaces. *See generally* Mem. Law Supp. Pl.'s Mot. for Summary Judgment, ECF No. 36 (hereinafter "Pl.'s Mem. Law"); Pl.'s Mem. Law in Opp. to Def.'s Mot. for Summary Judgment, ECF No. 41 (hereinafter "Pl.'s Opp. Br."). This case only challenges a specific COLTS policy—the 2013 Policy—that restricts speech for the explicit purpose of suppressing debate and discussion of public issues among bus riders, a goal that is not a legitimate reason for government censorship. As explained in Plaintiff's opening brief and brief in opposition to Defendant's motion for summary judgment, the undisputed facts of this case demonstrate that COLTS' 2013 Policy is unconstitutional under any level of scrutiny.

I. COLTS' ADVERTISING SPACE IS A DESIGNATED PUBLIC FORUM BECAUSE COLTS' POLICY AND PRACTICES SHOW THAT IT INTENDED TO OPEN ITS ADVERTISING SPACES TO SPEECH BY THE GENERAL PUBLIC.

Defendant's opposition brief reflects a fundamental misunderstanding of the "intent" that courts examine in order to determine whether the government has intentionally created a forum for speech that qualifies as a designated public forum.

Defendant emphasizes that there is no evidence COLTS intended for its advertising spaces to be analyzed as a public forum and suggests that this is dispositive of the forum question. *E.g.*, Def.'s Opp. Br. 4 ("The record in this matter fails to establish an intent by COLTS to do anything other than create a limited or non-public forum."); *id.* at 5 ("these cases suggest that courts should hinge their analyses largely on whether the government intended that the property become a designated public forum.").

But analyzing a government agency's "intent" as part of a determination of whether it has designated a forum for public speech is not a question of asking what level of scrutiny the agency wishes to be applied to the forum in First Amendment challenges. In other words, COLTS' statement of its "intent" with respect to the legal question of whether its advertising spaces constitute a nonpublic forum or a public forum is irrelevant. *See Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3d Cir. 1998); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1374 (3d Cir. 1990); *Am. Freedom Defense Initiative v. SEPTA*, 92 F. Supp. 3d 314, 325-26 (E.D. Pa. 2015) (finding that SEPTA's advertising space constituted designated public forum notwithstanding testimony that "it was never SEPTA's intention to create a public forum" and that "SEPTA intended to create a non-public forum").

Rather, the "intent" inquiry is an inquiry into whether the government intended to invite speech by the general public. *League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty*., 653 F.3d 290, 296 (3d Cir. 2011) (a "designated public forum" is government-owned property that is not a "traditional" public forum but which the government has "intentionally opened up for use by the public as a place for expressive activity."); *Christ's Bride Ministries, Inc.*, 148 F.3d at 248 ("We accordingly look to the authority's intent with regard to the forum in question and ask whether SEPTA clearly and deliberately opened its advertising space to the public."); *id.* ("the allowance of 'limited discourse'" does not necessarily create a designated public forum for speech).

In this case, it is undisputed that COLTS intentionally opened its advertising spaces for sale to the general public. *See* Pl.'s Stmt. Facts, ECF No. 33, ¶ 10; Def.'s Answer to Pl.'s Stmt. Facts, ECF No. 35, ¶ 10 (admitted). A government agency's actions are the best indicator of whether it intended to invite speech by the general public. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985) ("[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place . . . as a public forum. . . The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent."); *accord Christ's Bride Ministries*, 148 F.3d at 249; *see also Am. Freedom Defense*

Initiative, 92 F. Supp. 3d at 324 ("The authority's own statement of its intent . . . does not resolve the public forum question. Rather, intent is gauged by examining the authority's policies and practices in using the space and also the nature of the property and its compatibility with expressive activity."). COLTS' policies and practices with respect to its advertising spaces—as well as the nature of advertising spaces, which are not just compatible with expressive activity but *designed* for that very purpose—reinforce the conclusion that COLTS has clearly, intentionally created a forum for public speech. *See* Pl.'s Mem. Law at 11-13.

Defendant is also mistaken in asserting that whether its advertising spaces constitute a designated public forum turns on whether COLTS intended to invite the particular speech proposed by Plaintiff. *See* Def.'s Opp. Br. 6. ("In order to establish a non public [sic] forum, Plaintiff must provide some evidence to establish COLTS' intent to open the forum to the discussion of the existence or non-existence of god [sic]."). This alternate interpretation of the test for whether the government "intended" to create a designated public forum is incorrect in two respects.

First, a forum does not need to be open to all speech without restriction in order to constitute a designated public forum. Rather, the government can designate a forum for the discussion of certain subjects—or open a forum to general discussion with the exception of certain topics—and still have it constitute

a designated public forum. *Cornelius*, 473 U.S. at 802 ("In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.") (citation omitted); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects[.]") (citations omitted); *Am. Freedom Defense Initiative*, 92 F. Supp. 3d at 320 (finding that SEPTA had created a designated public forum in its advertising spaces though its policy prohibited 13 categories of ads).

Second, the question of whether the government created a forum for public expression is not a question of whether the government intended to accept the challenged ad or to impose the challenged restriction. If it were, the answer would be "no" in every case that results in litigation, and this would be a meaningless inquiry. For these reasons, it is irrelevant that COLTS has never articulated a desire to run ads discussing the existence of God.

II. COLTS' 2013 POLICY FAILS STRICT SCRUTINY BECAUSE IT IS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENT INTEREST.

COLTS bears the burden of justifying its restrictions on speech. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000); *McTernan v. City*

of York, 564 F.3d 636, 652 (3d Cir. 2009); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). Because COLTS' advertising spaces constitute a designated public forum, strict scrutiny applies. *Christ's Bride Ministries*, 148 F.3d at 247.

COLTS has not met this burden. Indeed, COLTS hasn't even attempted to justify its policy under strict scrutiny other than to assert in a conclusory fashion, without explanation or citation to law or evidence, that "the COLTS policy is narrowly tailored to achieve a compelling state interest of providing COLTS riders with safe public transportation." Def.'s Opp. Br. 8.

Defendant has not pointed to any evidence that would support the notion that the 2013 Policy is aimed at keeping bus passengers safe. Nor has COLTS cited any law to establish that this interest would qualify as "compelling" as a matter of constitutional analysis. At any rate, even if Defendant had identified both facts and law to support the conclusion that the 2013 Policy is aimed at a compelling government interest, the policy is plainly not narrowly tailored to achieve that interest. *See* Pl.'s Mem. Law 14-16 (articulating legal standard for narrow tailoring and explaining why COLTS' 2013 Policy is not narrowly tailored to COLTS' asserted interests); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 367 (3d Cir. 2016) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would

fail to achieve the government's interests, not simply that the chosen route is easier.") (quoting *McCullen v. Coakley*, —— U.S. ——, 134 S. Ct. 2518, 2540 (2014)).

The undisputed factual record establishes that COLTS had no basis for believing that running any of the prohibited ads would make riders less safe. Pl.'s Stmt. Facts ¶¶ 18, 36-37; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 18, 36 (admitted).[1] Indeed, COLTS was not concerned enough that about a potential safety threat created by riders engaging in debate or discussion to prohibit debates or impose any restrictions on what COLTS riders can discuss aboard buses, which would have been a much more direct way to accomplish the goal of keeping riders safe, if COLTS were sincerely motivated by that concern. *See* Pl.'s Stmt. Facts ¶¶ 19-20; Def.'s Answer to Pl.'s Stmt. Facts ¶ 20 (admitted).

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[1] In its Answer to Plaintiff's Statement of Undisputed Facts, Defendant denied many paragraphs, including paragraph 37. However, Plaintiff has filed a motion to declare Plaintiff's Statement of Undisputed Facts to be admitted in its entirety because in its opposition, Defendant failed to cite *any* evidence to support any of its denials and has not offered any basis for disputing the clear evidence Plaintiff cited in support of each fact. *See* ECF No. 42, filed Sep. 6, 2016. Accordingly, although Plaintiff will identify throughout this brief the paragraphs of Plaintiff's Statement of Undisputed Facts that Defendant has admitted, Plaintiff reiterates its request that the Court treat *all* of Plaintiff's Statement of Facts as uncontroverted.

III. COLTS' 2013 POLICY IS UNCONSTITUTIONAL EVEN IF COLTS' ADVERTISING SPACES ARE ANALYZED AS A NONPUBLIC FORUM.

A. COLTS' Restrictions on Speech Are Not "Reasonable" Because They Are Intended to Suppress Debate Among Riders, Not to Preserve the Ad Space for a Particular Use.

In a nonpublic forum, the government may make content-based restrictions on speech in order to "reserve the forum for its intended purposes[.]" *Perry Educ. Ass'n*, 460 U.S. at 46. In this case, the intended purpose of the forum is to generate revenue, and the restrictions contained in the 2013 Policy have nothing to do with that goal. *See generally* Pl.'s Opp. Br. Accordingly, the 2013 Policy is not "reasonable."

Instead of articulating any way in which the 2013 Policy advances COLTS' goal of revenue generation, Defendant relies heavily on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and seems to suggest that *Lehman* stands for the proposition that it is always constitutional for a transit agency to choose to exclude a particular type of advertising. *See* Def.'s Opp. Br. 1-3. That interpretation stretches *Lehman* too far. Authority subsequent to *Lehman* makes clear that forum analysis is fact-specific, turning on the specific nature, purpose, and history of the particular advertising policy at issue, and the history of its enforcement. *See, e.g.*, *United States v. Marcavage*, 609 F.3d 264, 275 (3d Cir. 2010) ("The question whether a particular sidewalk is a public or a nonpublic forum is highly fact-

specific and no one factor is dispositive."); *NEPA Freethought Society v. COLTS*, 158 F. Supp. 3d 247, 255 (M.D. Pa. 2016) ("A determination as to whether COLTS' advertising space is a designated public forum requires the court to engage in a fact-specific analysis of the forum itself.") (citing *Christ's Bride Ministries*, 148 F.3d at 248-52). Thus, not every transit agency's advertising spaces will be analyzed the same. COLTS' reliance on *Lehman* ignores the fact that COLTS' advertising policy was not designed to advance the same objectives as the City of Shaker Heights' policy. The undisputed record establishes that COLTS' policy was not aimed at "minimiz[ing] chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience," *Lehman*, 418 U.S. at 304, but rather, at a different—and wholly impermissible—objective: suppressing debate and discussion of public issues. Pl.'s Stmt. Facts ¶¶ 56-57, 61, 64-65; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 56, 64-65 (admitted); *see also* Pl.'s Stmt. Facts ¶¶ 22, 24-26, 28, 31-34, 41-43, 46, 48, 58-59, 71-72, 81, 87-88; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 22, 24-26, 28, 32-33, 41-43, 46, 48, 58-59, 71-72, 87-88 (admitted). In this case, "Plaintiff[']s claims must be analyzed 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Am. Freedom Defense Initiative*, 92 F. Supp. 3d at 322.

Defendant also argues that *Christ's Bride Ministries*, in which the Third Circuit found SEPTA's advertising spaces to be a designated public forum, is distinguishable because COLTS does not have a history of running ads on "issues of public concern" nor a history of running virtually all proposed ads. Def.'s Opp. Br. 4. Defendant is wrong on both the facts and the law.

With respect to the facts, COLTS' advertising scheme is actually similar to SEPTA's at the time of *Christ's Bride Ministries* in several relevant respects. First, COLTS *does* have a history of running non-commercial ads on issues of public concern, including the Diocese of Scranton's "Adoption for Life" ad that said "Choose Adoption… It Works!," an ad for "National Infant Immunization Week," and annual advertisements for a free children's Halloween party hosted by a public official. Pl.'s Stmt. Facts ¶¶ 15(g), 80, 83, 90; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 15, 80, 83, 90 (admitted); *see also DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 966 (9th Cir. 1999) ("where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora"); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (finding transit authority advertising space to be a public forum because the space had been "used for a wide variety of commercial, public-service, public-issue, and political ads").

COLTS also has a long history of running virtually all proposed ads, as did SEPTA. Though it has solicited advertising for more than a decade, COLTS rejected no ads at all prior to 2011 and rejected ads from only two advertisers (including Plaintiff) under the 2011 Policy that COLTS decided to "clarify" in 2013. Pl.'s Stmt. Facts ¶¶ 9, 12, 49, Pl.'s Ex. N; Def.'s Answer to Pl.'s Stmt. Facts ¶ 49 (admitted).

Moreover, COLTS' and SEPTA's advertising schemes were aimed at the same goal: revenue generation. *Christ's Bride Ministries*, 148 F.3d at 249; Pl.'s Stmt. Facts ¶¶ 10, 62; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 10, 62 (admitted). Indeed, in 2013, COLTS proclaimed that this revenue-generating goal was the "sole purpose" of the forum. Pl.'s Ex. N. As the Third Circuit has observed, opening advertising spaces to the public for the purpose of raising revenue "suggests that the forum may be open to those who pay the requisite fee" which supports the conclusion that COLTS has created a public forum. *Christ's Bride Ministries*, 148 F.3d at 252.

On the law, COLTS is mistaken that COLTS' adoption in 2013 of an even lengthier version of its advertising policy is sufficient to distinguish COLTS' policy from SEPTA's. *See* Def.'s Opp. Br. 4. SEPTA, too, tried on several occasions to pivot towards more restrictive advertising practices, and adopted a longer, wordier advertising policy, but multiple courts found, in light of SEPTA's

actual practices, that the changes in SEPTA's written policy were not sufficient to change the nature of SEPTA's advertising spaces from a designated public forum to a nonpublic forum. *See* Pl.'s Opp. Br. at 7-8 (citing *Christ's Bride Ministries*, 148 F.3d at 252; *Am. Freedom Defense Initiative*, 92 F. Supp. 3d at 325-26).

B. COLTS' 2013 Policy Is Facially Viewpoint Discriminatory.

One of the headings in Defendant's opposition brief asserts that COLTS' 2013 Policy is viewpoint-neutral. Def.'s Opp. Br. 7. In the body of the brief, however, Defendant argues only that its policy is "content-neutral," which is a distinct legal question. *See* Def.'s Opp. Br. 3, 7-8.[2]

To the extent that Defendant intended to argue that its restrictions on speech are viewpoint-neutral, it is incorrect. As explained in detail in Plaintiff's opposition to Defendant's motion for summary judgment, the 2013 Policy is facially viewpoint discriminatory—and thus unconstitutional even in a non-public forum—because it treats religious speakers differently from non-religious

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[2] As explained in Plaintiff's opening brief, the 2013 Policy is indisputably *content*-based. *See* Pl.'s Mem. Law at 15 & n.10. Indeed, the very standard that Defendant has urged this court to apply is the standard for *content-based* restrictions in a nonpublic forum. *Compare* Def.'s Opp. Br. 7 ("COLTS' 2013 Policy is viewpoint-neutral and reasonable in light of the purpose served by the forum") *with NAACP v. City of Philadelphia*, -- F.3d --, 2016 WL 4435626, at *4 (3d Cir. Aug. 23, 2016) (in nonpublic forum, "[c]ontent-based restrictions are valid so long as they are reasonable and viewpoint neutral.") (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009); *Cornelius*, 473 U.S. at 800).

speakers, and controversial speech differently from non-controversial speech. *See* Pl.'s Opp. Br. 15-18. Plaintiff incorporates those arguments herein.

C. COLTS' 2013 Policy Is Unconstitutionally Vague, Vests Officials with the Discretion to Approve or Reject Ads Based on Their Subjective Interpretation, and Leads to Arbitrary and Inconsistent Outcomes.

Defendant's opposition brief fails to meaningfully contradict Plaintiff's arguments and evidence demonstrating that several provisions of the 2013 Policy are so vague that they confer an unconstitutional amount of discretion on COLTS officials to approve or reject ads at will.

1. "No Debate" Provision

Defendant seems to argue—without citation to the record—that the "no debate" provision of the 2013 Policy[3] is not an independent basis for rejecting an ad separate from the enumerated prohibitions on certain subjects, and has never been invoked as the sole basis for rejecting an ad, and thus cannot be unconstitutionally vague. *See* Def.'s Opp. Br. 10. This response ignores the testimony cited in Plaintiff's brief that makes clear that the COLTS officials vested with responsibility for making the decision about whether to accept or reject an ad

[3] The "no debate" provision declares COLTS' intent "not to allow its transit vehicles . . . to become a forum for the dissemination, debate, or discussion of public issues." Pl.'s Ex. N.

do, in fact, view this ambiguous language as an independent basis for rejecting an ad. Indeed, when COLTS rejected Plaintiff's first two ad proposals in 2012 and August 2013 (under the 2011 version of COLTS' policy, which contained a substantially similar "no debate" provision), the "no debate" provision was the *sole basis* for the denial. Pl.'s Mem. Law at 18 (citing Pl.'s Stmt. Facts ¶¶ 41, 46-47; Pl.'s Ex. L); Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 41, 46-47 (admitted). COLTS' Communication Director also testified that, today, she would invoke the "no debate" provision of the 2013 Policy as the basis for rejecting a "National Infant Immunization Week" ad, which COLTS ran in 2012, because she now knows that "there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad" and only rejected the ad because in 2012 she was unaware "of the large debate concerning immunization in this country." Pl.'s Stmt. Facts ¶¶ 80-82; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 80, 82 (admitted).

2. "Religious and Atheist" Provision

Plaintiff's vagueness challenge to the "religious and atheist" provision of the 2013 Policy is supported by undisputed evidence that Defendant has construed this broadly worded provision to preclude some ads with no religious content submitted

by religious or atheist speakers[4] while permitting a church's pro-life ad that said "Consider Adoption . . . It Works!" Pl.'s Stmt. Facts ¶¶ 83-88; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 83-88 (admitted).

Defendant's only response to this argument is to assert, without elaboration or citation to evidence, that Plaintiff did not prove that the adoption ad was religious. *See* Def.'s Opp. Br. 11. This response ignores the undisputed testimony and documents cited by Plaintiff that establish that the ad was part of the Catholic Church's "Adoption for Life" campaign and that the ad was paid for by the Diocese of Scranton. Pl.'s Stmt. Facts ¶¶ 15(g); 83; Pl.'s Ex. S; Def.'s Answer to Pl.'s Stmt. Facts ¶¶ 15, 83 (admitted).

3. "Political" Provision

Defendant offers an equally weak rebuttal to Plaintiff's vagueness challenge to the provision banning ads "that are political in nature or contain political messages," which COLTS construed to allow some ads that reference elected officials and candidates for public office and which were paid for by elected officials and candidates. Defendant's only response is to argue—again without citation to any evidence— that the ads COLTS has run annually for a Halloween

[4] Specifically, the provision was applied to exclude Plaintiff's ads as well as ads for a parochial school's Polish food festival and a Lutheran social service agency's hospice and home care services.

party hosted by an elected official and candidate for public office "is not an ad which is 'political in nature or contains political messages.'" Def.'s Opp. Br. 11. This argument ignores the fact that COLTS' 2013 Policy explicitly defines the prohibited ads to *include* "advertisements involving political figures or candidates for public office[.]" Pl.'s Ex. N. Ads referring to Patrick O'Malley—an elected official and a candidate for public office—by name would seem to fall within the prohibition on ads "involving" political figures and candidates. However, defense counsel's own confusion as to what ads are permitted or precluded by the political provision speaks volumes as to its vagueness and the fact that the provision fails to provide explicit enough standards to constrain the discretion of the COLTS officials charged with applying the prohibition.[5]

For the reasons set forth herein and in Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and accompanying Statement

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[5] *See* Def.'s Opp. Br. 8-9 (observing that "laws that fail to provide explicit standards guiding their enforcement 'impermissibly delegate basic policy matters . . . for resolution on an ad hoc and subjective basis'" and that "the absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09; *Leonardson v. City of East Lansing*, 896 F.2d 190, 196, 198 (6th Cir. 1990)).

of Facts, COLTS' 2013 Policy is facially unconstitutional, and Plaintiff is entitled to summary judgment.

Dated: September 16, 2016

Respectfully Submitted,

/s/ Molly Tack-Hooper

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of Local Rule 7.8(b), in that it does not exceed 5,000 words, exclusive of tables and certifications. The body of this brief contains 3,860 words.

Dated: September 16, 2016

/s/ Molly Tack-Hooper
Molly Tack-Hooper

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was filed electronically and served on all counsel of record via the ECF system of the United States District Court for the Middle District of Pennsylvania.

Dated: September 16, 2016

/s/ Molly Tack-Hooper
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