No. 15-1720

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY,

Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE, SOUTH BEND,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION
(HON. RUDY LOZANO)

MOTION OF FIVE MEMBERS OF CONGRESS AS *AMICI CURIAE* FOR LEAVE TO FILE AN ELEVEN-PAGE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

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Pursuant to Federal Rules of Appellate Procedure 27, 29, and 40, five Members of Congress (Senators Jeffrey A. Merkley, Tammy Baldwin and Cory A. Booker and Representatives David N. Cicilline and Mark Takano; the "Members") move this Court for leave to file the attached brief as a*mici curiae* in support of Plaintiff-Appellant Kimberly Hively's petition for panel rehearing or rehearing *en banc*. In support, the Members state:

1. The Members wish to file an *amici curiae* brief in support of the Plaintiff-Appellant's petition for rehearing.

2. Any petition for rehearing is currently due on August 25, 2016. Therefore, *amicus curiae* briefs in support of this petition are also due on August 25, 2016. *Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in Chambers).

3. Members of Congress, as officers of the United States, typically may file *amici curiae* briefs without the parties' consent or leave of the Court. Fed. R. App. P. 29(a). However, since this is an *amici curiae* brief in support of a petition for rehearing, rather than in support of a party's principal brief, the Members seek leave from this Court to file.

4. There does not appear to be either a federal or local rule prescribing the page- or word-limit for *amicus curiae* briefs in support of petitions for rehearing. *See* Comm. on Rules of Prac. & Proc. of the Judicial Conference of

the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* at 18 (Aug. 2014), available online at http://www.uscourts.gov/file/preliminary-draft-proposed-amendments-federal-rules-appellate-bankruptcy-civil-and-criminal.

5. The maximum page length for a petition for rehearing is fifteen pages. Fed. R. App. P. 40(b). Federal Rule of Appellate Procedure 29(d), in turn, provides that "[e]xcept by the court's permission, an *amicus* brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief". If Rule 29(d) applied to the Members' submission, the maximum page length would therefore be seven and one-half pages.

6. But a petition for rehearing may not constitute a "party's principal brief" for purposes of Rule 29(d). In *Fry*, this Court held that a petition for rehearing is not a "party's principal brief" for purposes of Rule 29(e), which allows an *amicus curiae* to file seven days after a party's filing. 576 F.3d at 725. Former Chief Judge Easterbrook explained that "[a] petition for rehearing *en banc* is not a 'brief' of any kind; further briefing may follow a grant of rehearing, but the petition for rehearing is a request for discretionary relief rather than a brief". *Id*.

7. Thus in an abundance of caution, the Members respectfully request leave to file a brief of eleven pages (excluding the cover page, table of contents, table of authorities, certificate of compliance, and certificate of service) in support

of Plaintiff-Appellant's petition for rehearing. The length of the Members' *amici curiae* brief would not exceed the maximum allowable length of Plaintiff-Appellant's petition for rehearing. *See* Fed. R. App. P. 40(b).

8. Both the Plaintiff-Appellant and the Defendant-Appellee consent to this motion.

The Members therefore respectfully ask this Court for leave to file an eleven-page brief as *amici curiae* in support of Plaintiff-Appellant's petition for panel rehearing or rehearing *en banc*.

August 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Evan R. Chesler
Evan R. Chesler

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BRIEF *AMICI CURIAE* OF FIVE MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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I. STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici are United States Senators Jeffrey A. Merkley, Tammy Baldwin and Cory A. Booker and members of the United States House of Representatives David N. Cicilline and Mark Takano. All are cosponsors of the Equality Act,[1] which, when enacted, will both clarify and expand current civil rights laws to better protect people of color, women and lesbian, gay, bisexual and transgender ("LGBT") Americans from discrimination. The Equality Act represents the latest bipartisan legislative effort to update our nation's laws with respect to LGBT Americans. It uses a "belt-and-suspenders" approach to reflect what the Act's cosponsors and various federal regulatory and judicial bodies recognize: LGBT Americans are *already* protected against discrimination on the basis of sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964, because sexual orientation and gender identity are inherently aspects of a person's "sex".

As members of Congress, we are uniquely able to advise the Court on draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation—particularly when differing interpretations alternately vindicate or eliminate the rights of the constituents we represent. Varying interpretations of Title VII have led to uncertainty in the workplace and left LGBT Americans inconsistently protected from workplace harassment and discrimination, despite applicable federal law. We firmly believe that Title VII's sex discrimination provision already prohibits discrimination based on an individual's sexual orientation and gender identity. We urge the Court to grant Plaintiff-Appellant Hively's petition for panel rehearing or rehearing *en banc* in order to overrule erroneous Seventh Circuit precedent to the contrary.

[1] This brief cites to the Senate version of the Equality Act, but the House and Senate versions, H.R. 3185 and S. 1858 respectively, are identical in substance.

II. SUMMARY OF ARGUMENT

> "Numerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity and sex stereotypes. In particular, the Equal Employment Opportunity Commission has explicitly interpreted sex discrimination to include sexual orientation and gender identity. The absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law, as well as some conflicting case law on how broadly sex discrimination provisions apply, has created uncertainty for employers and other entities covered by these laws. This lack of clear coverage also causes unnecessary hardships for LGBT people." Equality Act of 2015, S. 1858, 114th Cong. § 2(8)-(9) (2015).

This is why *Amici* introduced the Equality Act of 2015 and drafted it both to codify the status of current law and to provide clarity and stability for the American people. The Equality Act expressly adds "sexual orientation" and "gender identity" to Title VII of the Civil Rights Act, S. 1858 § 7, and it *also* defines "sex" to *include* "sexual orientation and gender identity", S. 1858 § 9(2). *Amici* drafters did this intentionally because we wanted to recognize that, under current law, "sex" already includes and is inseparable from sexual orientation and gender identity. *Amici* are part of a larger group of 128 members of Congress and Equality Act cosponsors who recently submitted an amicus brief in the Second Circuit detailing how sexual orientation discrimination is (1) sex discrimination by its very definition, (2) impermissible gender stereotyping under *Price Waterhouse* and (3) impermissible sex-based associational discrimination. Brief *Amici Curiae* of 128 Members of Congress in Support of Plaintiff-Appellant and Reversal at 13-26, *Christiansen v. Omnicom Grp., Inc.*, No. 16-748-cv (2d Cir., June 28, 2016).

Rehearing—either by a panel or *en banc*—is necessary in this case, given the *Hively* decision's faulty application of a prior decision by the Supreme Court and the exceptional need to correct the interpretation of federal civil rights law within this Circuit. *See* Fed. R. App.

P. 35(a). A panel of this Court affirmed the dismissal of Plaintiff Hively's Title VII discrimination claims on the basis of Seventh Circuit precedent tracing back to *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (1984), including the 2000 decisions in *Hamner v. Saint Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701, and *Spearman v. Ford Motor Co.*, 231 F.3d 1080. *See Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703, at *1-3 (7th Cir. July 28, 2016). But *Ulane*'s emphasis on a "narrow", "traditional" interpretation of "sex" under Title VII was overruled by the Supreme Court when it rejected such a limited interpretation in *Price Waterhouse v. Hopkins*. *See generally* 490 U.S. 228 (1989). Therefore the holding in *Hamner*, *Spearman* and all of *Ulane*'s progeny, which relies on *Ulane*'s interpretation of "sex" to conclude that sexual orientation discrimination does not constitute sex discrimination under Title VII, is contrary to law. It is also contrary to common sense, as even this Court recognized in its opinion on appeal. *See Hively*, 2016 WL 4039703, at *11 ("The cases as they stand . . . create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."); *id.* at *12-13 (noting "sexual orientation cases highlight [the] inconsistency in courts' applications of Title VII to sex as opposed to race" even though it is "well established that . . . the classifications within Title VII—race, color, religion, sex, or national origin—must all be treated equally"); *id.* at *14 ("It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes—with whom a person engages in sexual relationships.").

Contrary to this Court's suggestion on appeal, the obvious paradox of current Title VII jurisprudence is unquestionably the judiciary's concern. *Cf. Hively*, 2016 WL 4039703, at *11. While Congress attempts to codify, update and expand civil rights protections

for all LGBT Americans, courts continue to play a vital role by applying the law in individual cases. Indeed, the landmark Supreme Court cases of *Windsor* and *Obergefell* demonstrated the important role of the judiciary as a coequal branch with a duty to protect civil rights. The judiciary has an equal interest in the rule of law and in upholding an employee's statutory right to a workplace free of proscribed discrimination. The paradox's solution is straightforward, logical, just and supported by *Amici*. This Court should grant Hively's petition for panel rehearing or rehearing *en banc* and recognize that "sex" under Title VII encompasses sexual orientation. Any case law in this Circuit to the contrary should be overturned.

III. THE *HIVELY* DECISION SHOULD BE RECONSIDERED BECAUSE IT RELIED ON OUTDATED LAW AND INCORRECT INTERPRETATIONS OF CONGRESSIONAL ACTIONS TO JUSTIFY AN INCOHERENT INTERPRETATION OF "SEX" UNDER TITLE VII.

The Seventh Circuit's holding in *Ulane*'s progeny—now including *Hively*—that a claim for discrimination based on sexual orientation is not cognizable under Title VII's sex discrimination prohibitions, *see, e.g.*, *Hamner*, 224 F.3d at 704, *Spearman*, 231 F.3d at 1084-85, is inconsistent with the law and misinterpreted the intent of Congress. The Equality Act aims to counter such erroneous judicial interpretations of legislative history by clarifying the existing protections of Title VII.

A. *Hively*'s Reliance on *Ulane*'s Interpretation of Title VII and the Employment Non-Discrimination Act's Legislative History Was Misplaced.

Hively's reliance on *Ulane* and its short discussion of legislative history are wrong in several respects. First, *Hively* treated *Ulane*'s interpretation of "sex" under Title VII as binding precedent, 2016 WL 4039703, at *1-3, even though that interpretation was overruled by the Supreme Court. Second, *Hively* erroneously described the legislative history of the Employment Non-Discrimination Act (ENDA) as a Congressional "rejection" of the notion that sexual orientation was a prohibited form of sex discrimination under Title VII. *Id*. at *3. Third,

Hively cited Congress's supposed refusal to pass ENDA, including during the 104th Congress in 1996, as evidence that Congress did not intend to expand the Civil Rights Act to protect against sexual orientation discrimination. *Id*. Below we address each of these flawed assumptions.

In 1984, the Seventh Circuit first considered whether an employee who faced discrimination because she was transgender had a cognizable Title VII claim for sex discrimination. *Ulane*, 742 F.2d 1081. *Ulane* held she did not, interpreting "sex" under Title VII "narrow[ly]" because "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex". *Id*. at 1085. The Seventh Circuit has repeatedly looked to this interpretation to likewise hold that sexual orientation discrimination does not constitute impermissible sex discrimination—most recently in the *Hively* appeal. *See, e.g.*, *Hamner*, 224 F.3d at 704 (citing to *Ulane* when holding that "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation"); *Spearman*, 231 F.3d at 1084 (same); *Hively*, 2016 WL 4039703, at *1-3.

But the *Ulane* holding, which emphasized a "narrow" interpretation of "sex" rooted in "traditional", biological conceptions, predated the Supreme Court's recognition in *Price Waterhouse* that discrimination on the basis of gender stereotypes, *as well as* biological sex, violates Title VII. 490 U.S. at 235, 250-51. Given the clear conflict between *Ulane*'s and *Price Waterhouse*'s interpretations of "sex", the circuit courts now agree "with near-total uniformity that 'the approach in . . . *Ulane* . . . has been eviscerated'". *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*."). Even if *Ulane*'s interpretation of "sex" were consistent with

the enacting Congress's understanding—a notion with which *Amici* cannot agree—"statutory prohibitions often go beyond" "the principal evil Congress was concerned with when it enacted" the statute. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (also rejecting a narrow interpretation of "sex" purportedly based on the enacting Congress's intent). Indeed, increasing numbers of courts applying the *Price Waterhouse* standard reject *Ulane*'s approach, instead recognizing that transgender individuals *are* protected from sex discrimination under Title VII because they are defined in part by their nonconformity with the sex stereotypes associated with the sex they were assigned at birth. *See, e.g.*, *Glenn*, 663 F.3d 1312; *Smith*, 378 F.3d 566; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk*, 204 F.3d 1187; *see also Fabian v. Hosp. of Cent. Connecticut,* No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at *14 n.12 (D. Conn. Mar. 18, 2016) ("The fact that the Connecticut legislature added [the term 'gender identity'] does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

In the *Hively* the decision, the Court went on to assume its "understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act, so far, appears to be correct" because "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation". 2016 WL 4039703, at *3. The Court cited to various iterations of ENDA in the House and Senate, then referred to earlier bills seeking to amend Title VII to explicitly encompass sexual orientation. *Id.* at *3 n.2.

But the Supreme Court has warned against giving too much significance to failed amendments to current law:

> "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted).

Contrary to the discussion in *Hively*, ENDA's failure to pass was a function of unusual circumstances, not a reflection of congressional intent to reject ENDA. In the 104th Congress, for example, ENDA failed in the Senate by only one vote, because of a single missing Senator who was called home for a family emergency. *See also* Richard Socarides, *Kennedy's ENDA: A Seventeen-Year Gay-Rights Fight*, New Yorker, Nov. 5, 2013. ENDA eventually *did* pass the Senate in 2013, by an overwhelming vote of 64-32. *On Passage of the Bill (S. 815 As Amended)*, United States Senate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232. The Seventh Circuit has repeatedly assumed that Congress introduced ENDA because it believed sexual orientation was not protected under Title VII, and that ENDA's failure represented a congressional refusal to expand Title VII protections. But it is equally plausible that ENDA was introduced to *clarify* as well as expand Title VII's protections, and that ENDA was not enacted because *Price Waterhouse* had superseded case law holding that sexual orientation was outside the scope of Title VII. For this Court to select one inference over another was inherently arbitrary.

Although *Hively* emphasized ENDA as evidence of congressional intent, it also cited to *Ulane* for a list of "the many failed attempts to amend Title VII to add 'sexual orientation' between 1975 and 1982". 2016 WL 4039703, at *3 n.2. But the Court failed to acknowledge that, unlike ENDA, the numerous attempts to create similar legislation over the years have had no discernible effect on Title VII jurisprudence. For example, only ten years

after the Civil Rights Act was passed, Congress introduced the Equality Act of 1974, which would have provided expansive protections for lesbians and gay men, women and unmarried individuals in employment and places of public accommodation. Equality Act of 1974, H.R. 14752, 93d Cong. (1974). Yet there is no indication that courts inferred any congressional intent from the introduction of this legislation—which, in contrast to ENDA, would have amended Title VII—or its failure to pass. In fact, courts have consistently held that unmarried women are covered under Title VII as a subset of sex, despite the fact that a proposed amendment would have added marital status protections explicitly. *See, e.g.*, *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 389 (7th Cir. 1975) (describing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), as the "final determination" on the merits, which rejected employer's argument that its single-women-only hiring policy was acceptable as "not directed against all females, but only against married females" and holding that "so long as sex is a factor in the application of the rule, such application involves discrimination based on sex").

Similarly, *Ulane* pointed to a range of legislative proposals from 1975 to 1982 to prohibit "discrimination based upon 'affectational or sexual orientation'" as evidence that Title VII did not protect transgender individuals. 742 F.2d at 1085-86 (quoting proposed legislation). Yet that same legislative history had no effect on the Supreme Court's more expansive interpretations of "sex" in *Price Waterhouse* and *Oncale*. Nor has it precluded more and more courts from correctly recognizing that discrimination against transgender individuals is sex discrimination under Title VII. *Ulane* and its progeny simply do not reflect the scope of Title VII's existing protections.

B. *Amici* Introduced the Equality Act To Codify Existing Law and Provide Explicit Protections for LGBT Americans Using a "Belt and Suspenders" Approach.

The Equality Act was drafted to codify current law and administrative rulings, to expand civil rights laws that do not currently prohibit sex discrimination and to put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law. *Amici* also wished to avoid further confusion in the courts over whether legislative measures to protect employees from sexual orientation and gender identity discrimination were an indication that such protections did not already exist under current law. There are now 218 members of Congress cosponsoring the Act to prohibit discrimination against people of color, women and LGBT Americans across many different aspects of public life. But the Equality Act acknowledges that Title VII *already* protects against sexual orientation and gender identity discrimination. S. 1858 § 2(8). *Amici* explicitly sought *not* to overrule case law and administrative holdings that discrimination based on sexual orientation and gender identity are sex discrimination. We therefore took a "belt and suspenders" approach when drafting the Equality Act's substantive provisions.

First, the Equality Act would amend Title VII to explicitly include "sexual orientation" and "gender identity" as protected characteristics alongside "sex". S. 1858 § 7. We believed this would help clarify the statute for the average American who would look at its text without the benefit of legal experience or a repository of case law. For instance, anyone Googling the Civil Rights Act would learn that sexual orientation and gender identity were protected classes. In addition, "EEO is the Law" posters[2] would be amended to include sexual

[2] "EEO is the Law" posters are prepared by the EEOC and posted by employers in the workplace. They summarize federal laws prohibiting employment discrimination and explain how an employee or job applicant can file a complaint. *See "EEO is the Law" Poster*, U.S. Equal Employment Opportunity Commission, https://www1.eeoc.gov/employers/poster.cfm.

orientation and gender identity, thereby giving workers in a variety of fields and who speak a number of languages clearer guidance about their rights.

Second, in keeping with the proper interpretation of Title VII, the Act also *defines* "sex" as including "a sex stereotype[,] . . . sexual orientation or gender identity". S. 1858 § 9(2). This would codify both existing case law and EEOC rulings. *See generally* Brief *Amici Curiae* of 128 Members of Congress, *Christiansen v. Omnicom Grp., Inc.* (No. 16-748-cv). This definitional structure is the "suspenders" of our approach, and was drafted with circumstances such as the present case in mind.[3] We further included a "no negative inference" provision, to ensure nothing in the amended Civil Rights Act "shall be construed to support any inference that any Federal law prohibiting a practice on the basis of sex does not prohibit discrimination on the basis of . . . sexual orientation, gender identity, or a sex stereotype". S. 1858 § 9(3).

Therefore, we not only believe this Court should review *Hively*—either in a panel rehearing or a rehearing *en banc*—in light of a proper understanding of ENDA, but also that if this Court once again considers proposed legislation to inform its Title VII interpretation, the Equality Act of 2015 is the correct benchmark for such an inquiry.

[3] Sexual orientation and gender identity are not the only examples of *Amici*'s efforts to codify Title VII's existing protections. Associational discrimination and discrimination based on sex stereotypes are already prohibited under current law. *See* Brief *Amici Curiae* of 128 Members of Congress, *Christiansen v. Omnicom Grp., Inc.* (No. 16-748-cv), at 20-26. The Equality Act would make those express provisions of the statute. S. 1858 § 9(2) (defining "race" and "sex" as encompassing the "the race . . . [and] sex . . . respectively, of another person with whom the individual is associated or has been associated" and defining "sex" to include "a sex stereotype").

IV. CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant Plaintiff-Appellant's petition for panel rehearing or rehearing *en banc*.

August 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 12-point font.

August 25, 2016

/s/ Evan R. Chesler
Evan R. Chesler

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Evan R. Chesler
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