

# EMERGING LEGAL ISSUES IN URBAN EDUCATION



## The Supreme Court with Justice Kavanaugh: What Might Recent and Future Cases Mean for Urban Education?

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## Presenters



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# Agenda

- I. 2017-2018 Key Supreme Court Decisions
- II. Justice Kavanaugh
- III. Cases to Watch



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## 2017-2018 Key Supreme Court Decisions



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## ***South Dakota v. Wayfair, Inc. et al.***

- Remote sellers with no physical presence in a state, but with substantial virtual and economic presence, can be compelled to collect sales/use tax without violating the commerce clause.
  - Previously under Supreme Court rulings, a seller could not constitutionally be required to collect sales/use tax in a state if the seller did not have a physical presence in the state.



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## ***South Dakota Background***

- South Dakota enacted legislation requiring out-of-state sellers to collect sales tax on goods shipped to South Dakota if the seller sold \$100,000 or more of goods or services into South Dakota or 200 or more separate transactions for the delivery of goods and services into South Dakota on an annual basis.
- The Supreme Court found “this quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”
- The Supreme Court found that previous Supreme Court precedent “does not align analytically” with “modern e-commerce.”



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## Implications of *South Dakota*

- *South Dakota* could lead to future litigation if state sales/use tax economic nexus statutes do not have these same features.
- States now can compel large, national retailers to collect sales/use tax, even if these large, national retailers lack a physical presence in the state. This decision bodes well for public schools, which receive funding through sales tax in many states.



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## *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*

- Plaintiff Mark Janus, who works as a child-support specialist for the Illinois Department of Healthcare and Family Services, was not a member of the local branch of the American Federation of State, County, and Municipal Employees (AFSCME) Council 31. Mr. Janus challenged the \$45 per month that is deducted from his paycheck that went to AFSCME. Mr. Janus argued that requiring him to pay even \$45 to cover the cost of collective bargaining violates the First Amendment, because it finances speech by the union intended to influence the government on issues like salaries, pensions, and benefits for government employees.



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## ***Janus* Supreme Court Holding**

- **The Supreme Court of the United States held that requiring fair-share fees in the public sector violates the First Amendment of the Constitution.**
- **Now, government employees represented by a union, but do not belong to that union, cannot be required to pay a fee to cover the union's costs to negotiate a contract that applies to all employees.**



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## ***Implications of Janus***

- **This decision could cripple public sector unions by reducing their resources and members. Non-members who receive benefits negotiated by unions will no longer be required to pay agency fees. This decision could greatly affect a union's ability to speak as one unified voice for its members, hurting the union's political strength and overall effectiveness.**



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## ***Masterpiece Cakeshop LTD. V. Colorado Civil Rights Comm'n***

- The Supreme Court of the United States held that the Colorado Civil Rights Commission's action of requiring Jack Phillips, owner of Masterpiece Cakeshop LTD., to create a cake for a same-sex wedding would violate Mr. Phillip's right to free speech.
- The Supreme Court, in a 7-2 decision, held by compelling Mr. Phillips to exercise his artistic talents to express a message with which he disagreed violated his right to the free exercise of religion, therefore, violating the First Amendment's Free Exercise Clause.



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## ***Implications of Masterpiece Cakeshop***

- The Court's ruling was a relatively narrow victory for the cake shop, finding that its owner did not receive a fair and impartial tribunal hearing. The Court recognized the general principle that business owners cannot rely on religious or philosophical objections to discriminate against protected individuals, including LGBT individuals, in violation of public accommodation laws.



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## ***National Institute of Family and Life Advocates v. Becerra***

- California enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act), that requires pro-life crisis-pregnancy centers to prominently place a notice informing clients that California offers low-cost and even free abortions to women who qualify and providing them a phone number that grants quick access to abortion clinics.



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## ***National Institute of Family and Life Advocates continued...***

- Ninth Circuit Court of Appeals held that the FACT Act is constitutional.
  - Decision carved out a First Amendment exception for what it deemed “professional speech” — “speech that occurs between professionals and their clients in the context of their professional relationship” — and ruled that the state had much greater leeway in regulating, for example, doctor/patient communication.



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## ***National Institute of Family and Life Advocates continued...***

- The Supreme Court held that Petitioners are likely to succeed on their claim that the California FACT Act violates the First Amendment.
  - The licensed notice is a content-based regulation. By compelling petitioners to speak a particular message, it “alters the content of [their] speech.”
  - Although the licensed notice is content-based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates “professional speech.” But this Court has never recognized “professional speech” as a separate category of speech subject to different rules.



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## ***Implications of National Institute of Family and Life Advocates***

- **The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster an idea they find morally objectionable.**
- **The Court did not foreclose the possibility that some such persuasive reason to apply different rules to professional speech exists but held that the licensed notice cannot survive even intermediate scrutiny.**



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## ***Trinity Lutheran Church of Columbia Inc. v. Comer***

- The Trinity Lutheran Church Child Learning Center is a Missouri preschool and daycare center. Originally established as a nonprofit organization, the Center later merged with Trinity Lutheran Church and now operates under its auspices on church property. Among the facilities at the Center is a playground.
- In 2012, the Center sought to replace a large portion of playground by participating in Missouri's Scrap Tire Program. The program, run by the State's Department of Natural Resources, offers reimbursement grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires. The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.



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## ***Trinity Lutheran Church of Columbia Inc. v. Comer continued...***

- The Supreme Court ruled the Missouri Department of Natural Resources' express policy of denying grants to any applicant owned or controlled by a church, sect or other religious entity violated the rights of Trinity Lutheran Church of Columbia, Inc., under the free exercise clause of the First Amendment by denying the church an otherwise available public benefit on account of its religious status.



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## Implications of *Trinity Lutheran Church of Columbia Inc. v. Comer*



- The Supreme Court reaffirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.
- The Department's discriminatory policy did not survive the "most rigorous" scrutiny test applied to laws imposing special disabilities on account of religious status.



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## *Trump v. Hawaii*

- On January 27, 2017, President Donald Trump signed Executive Order No. 13,769 (EO-1), which, among other things, suspended entry for 90 days of foreign nationals from seven countries identified by Congress or the Executive as presenting heightened terrorism-related risks.
- EO-1 was immediately challenged in federal district court, and the judge entered a nationwide temporary restraining order enjoining enforcement of several of its provisions. A panel of the Ninth Circuit denied the government's emergency motion to stay the order pending appeal. Rather than continuing to litigate the matter, the government announced that it would revoke that order and issue a new one.



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## *Trump v. Hawaii continued...*

- On March 6, 2017, President Trump issued Executive Order No. 13,780 (EO-2). Section 2(c) of EO-2 directed that entry of nationals from six of the seven countries designated in EO-1 be suspended for 90 days from the effective date of the order, citing a need for time to establish adequate standards to prevent infiltration by foreign terrorists.
  - Section 6(a) directed that applications for refugee status and travel of refugees into the United States under the United States Refugee Admissions Program (USRAP) be suspended for 120 days from the effective date "to review the adequacy of USRAP application and adjudication procedures."
  - Section 6(b) suspended the entry of any individual under USRAP once 50,000 refugees have entered the United States in fiscal year 2017.



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## *Trump v. Hawaii continued*



- On September 24, 2017—the same day EO-2 was expiring—President Donald Trump issued a Proclamation restricting travel to the United States by citizens from eight countries. That Proclamation too was challenged in federal court as attempting to exercise power that neither Congress nor the Constitution vested in the president.



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## ***Trump v. Hawaii continued...***

- The Court assumed without deciding that the plaintiffs' claims are justiciable and held that the Proclamation does not violate the president's statutory authority or the Establishment Clause. The Court did not resolve the question whether the district court's global injunction is impermissibly overbroad.



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## ***Trump v. Hawaii continued...***

- On its face, the majority found the Proclamation did not favor or disfavor any particular religion. But even looking behind the face of the Proclamation, the majority found that the facts that many majority-Muslim countries were not subject to restrictions and that some non-majority-Muslim countries were subject to the restrictions supported the government's contention that the Proclamation was not based on anti-Muslim animus and was instead based on "a sufficient national security justification."



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## Implications of *Trump v. Hawaii*

- Travel restrictions from that order can now take effect for nationals from Iran, Libya, Somalia, Syria and Yemen. The restrictions prevent most immigrants, refugees and visa holders from these countries from entering the United States. A waiver program is available on a case-by-case basis. Applicants who cannot afford an attorney to assist with the waiver process will likely face extreme difficulties trying to immigrate to the U.S.



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## Justice Kavanaugh



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## Justice Brett Kavanaugh

- **Nominated by President Donald Trump on July 9, 2018**
- **Confirmed by a 50-48 Senate vote on October 6, 2018**



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## Justice Kavanaugh Background

- Son of a teacher
- Former law clerk to retired Justice Kennedy
- Was an author of the Starr Report, which urged the impeachment of President Bill Clinton
- After the 2000 U.S. presidential election, Kavanaugh joined President George W. Bush's staff



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## Justice Kavanaugh Path to Supreme Court

- In 2003, Kavanaugh was nominated to the Court of Appeals by President Bush.
  - These confirmation hearings were contentious and stalled for three years.
  - Kavanaugh was finally confirmed in May 2006
- In 2018, Kavanaugh experienced a controversial nomination process which included allegations of sexual misconduct and lying under oath.



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## Justice Kavanaugh Constitutional Viewpoints

- **“The Constitution is primarily a document of majestic specificity, and those words have meaning.”**



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## Justice Kavanaugh Judicial Philosophy

- “A judge must be independent and must interpret the law, not make the law. A justice must interpret statutes as written and a judge must interpret the Constitution as written informed by history, and tradition, and precedent.”



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## Justice Kavanaugh and Special Education Decision

- In *Hester v. D.C.*, 505 F.3d 1283 (D.C. Cir. 2007), Kavanaugh wrote the majority opinion overturning a district court’s decision granting summary judgment for a student. Specifically, an incarcerated special education student sued the city of Washington D.C., where he originally attended public school, alleging that the city failed to provide him a “FAPE.” While the student was in a Maryland prison, Maryland provided him special education services.



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## Justice Kavanaugh on the Second Amendment

- In *Heller v. D.C.*, 670 F.3d 1244 (D.C. Cir. 2011), he wrote a dissenting opinion, stating that he believes, under the law, semi-automatic rifles and handguns are constitutionally protected.



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## Justice Kavanaugh and Head Start

- In *Camden County Council on Econ. Opportunity v. U.S. Dept. of Health & Human Services*, 586 F.3d 992 (D.C. Cir. 2009), Judge Kavanaugh wrote the majority opinion finding that the Department of Health and Human Services could terminate a county's Head Start grant which provided federal funding for pre-school services to low-income children.



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## Justice Kavanaugh and Religious Liberty

- In the 1990s, he chaired the Federalist Society's Religious Liberty practice group and served as pro bono counsel on cases defending religious freedom.
- While on the bench, he wrote a dissent in *Priests for Life v. HHS* and concluded that the Affordable Care Act's contraceptive mandate violated the rights of religious organizations. See *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 14 (D.C. Cir. 2015).



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## Justice Kavanaugh and School Prayer

- Justice Kavanaugh wrote an amicus brief in December 1999 in favor of a Texas high school's policy allowing the use of a public address system for student-led and student-initiated prayers at school football games
  - The Supreme Court declared this school policy unconstitutional under the First Amendment's Establishment Clause



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## Justice Kavanaugh and Affirmative Action

- Co-wrote an amicus brief on behalf of the Center for Equal Opportunity arguing that a Hawaii law allowing only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs was unconstitutional in prohibiting people from voting because of their race



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## Justice Kavanaugh and School Choice

- Kavanaugh said during his 2004 Senate confirmation hearing that he had previously served as the co-chairman of the Federalist Society's "School Choice Practice Group."
  - Kavanaugh also said, in response to written questions, that he had "worked on school choice litigation in Florida for a reduced fee." He didn't provide additional details about that matter.
- On private school choice, Kavanaugh predicted in a TV appearance in 2000 that school vouchers would one day be upheld by the Supreme Court.



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## Justice Kavanaugh and CFPB

- Kavanaugh in a October 2016 opinion declared the structure of the Consumer Financial Protection Bureau unconstitutional.
- The CFPB, which was created by the 2010 Dodd-Frank law, pursued high-profile cases against for-profit colleges and student loan companies, during the Obama administration.



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## Justice Kavanaugh and Presidential Power

- In 2009, Kavanaugh wrote a law review article in which he recommended that while the president is in office, the president should not be subject to civil lawsuits or to criminal investigation or prosecution.
  - He explained that based on his first-hand experience in the White House, he has come to believe that “the job of President is far more difficult than any other civil position in government.”



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## Cases to Watch



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## ***Doe v. Boyertown Area School District***

- The school district's policy permits students identifying as transgender to submit a request to use the facilities for the gender to which they are transitioning.



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## ***Doe Procedural History***

- A three-judge panel of the U.S. Court of Appeals for the Third Circuit unanimously concluded, fifteen minutes after oral argument, that the plaintiffs/appellants had failed to meet the high burden to obtain a preliminary injunction.
- En banc review in July 2018 yielded the same conclusion



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## ***Grimm v. Gloucester County School Board***

- The plaintiff is a transgender student named Gavin Grimm who alleges the school board's policy prohibits his use of the bathroom that corresponds to his gender identity, rather than his biological sex, is unconstitutional.
- Judge Wright Allen ruled that the plaintiff alleged sufficient facts to support his claims that the policy at issue constituted impermissible sex stereotyping in violation of his rights under both Title IX and the Equal Protection Clause of Fourteenth Amendment.



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## **Grimm Procedural History**

- This case was originally filed in 2015 in U.S. District Court for the Eastern District of Virginia. The case went to the Fourth Circuit Court of Appeals and was set to be heard before the Supreme Court in 2017.
- The Trump Administration, however, withdrew Obama-era guidance on facilities use by transgender students so the Supreme Court remanded this case without issuing a decision.



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## **Grimm continued...**

- Judge Allen noted two other federal appeals courts (Sixth Circuit and Seventh Circuit) have ruled that excluding transgender youths from restrooms corresponding with their gender identity may subject them to prohibited discrimination.



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## ***R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission***

- Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (“the Funeral Home”), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work.



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## ***R.G. & G.R. Harris Funeral Home continued...***

- After the District Court granted summary judgment in favor of the Funeral Room, Stevens appealed. On appeal, the Sixth Circuit issued a four-part ruling.
  - (1) The Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex;
  - (2) The Funeral Home has not established that applying Title VII’s proscriptions against sex discrimination to the Funeral Home would substantially burden Rost’s religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA;



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## ***R.G. & G.R. Harris Funeral Home continued...***

- (3) Even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and
- (4) The EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC.



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## **Trump Administration Rationale for Rescinding Obama-era Guidance re Transgender Rights**

- The Trump administration said the Obama-era guidance did not provide "extensive legal analysis" of how its position was consistent with Title IX.
- The letter cited "significant litigation" caused by the guidance, showing the need for "due regard" of the role of states and local school districts in shaping education policy.



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## Department of Health and Human Services and Transgender Rights

- The Department of Health and Human Services is leading an effort to establish a legal definition of sex under Title IX.
- This legal definition would define gender as a biological, immutable condition determined by genitalia at birth. Any disputes about one's sex would have to be clarified using genetic testing.



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## *Mandeville v. Matayoshi*

- J.M., by and through his mother Maria Mandeville have filed for certiorari after an adverse district court judgment affirmed on appeal by the Ninth Circuit.
- The district court upheld a decision by an administrative hearing officer concluding that the individualized education program proposed by the defendant state officials and agencies in 2014 provided J.M. with the "free appropriate public education" required by the IDEA.



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## ***Maryland-Nat'l Capital Park & Planning Comm'n v. Am. Humanist Assn'n***

- Case was granted review by the U.S. Supreme Court on November 2, 2018
- District Court held that a local Maryland government did not violate the Establishment Clause when it displayed and maintained on public property a 40-foot tall Latin cross, established in memory of soldiers who died in World War I



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## ***Maryland continued...***

- The Fourth Circuit reserved and remanded the district court's judgment and held that the monument has the effect of endorsing religion and excessively entangles the government in religion
  - Court explained that the Latin cross is the core symbol of Christianity and the cross is prominently displayed in the center of one of the busiest intersections in Prince George's County, Maryland



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## ***Students for Fair Admissions v. Harvard University***



- Lawsuit was filed by a group of Asian students who are alleging that Harvard's race conscious admissions policy is discriminatory against them



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## **Harvard Example**

- Justice Department agreed that Harvard is discriminating against Asian-American applicants
  - “Harvard’s race-based admissions process significantly disadvantages Asian-American applicants compared to applicants of other racial groups — including both white applicants and applicants from other racial minority groups.”



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## Harvard's Statement

- "Harvard does not discriminate against applicants from any group, and will continue to vigorously defend the legal right of every college and university to consider race as one factor among many in college admissions, which the Supreme Court has consistently upheld for more than 40 years."



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## Future change in the law?



- Associate Justice Neil M. Gorsuch joined the Supreme Court on April 10, 2017 after a 54-45 vote
- President Trump nominated Judge Brett Kavanaugh to the Supreme Court on July 9, 2018
- Judge Brett Kavanaugh was confirmed on October 6, 2018 after a 50-48 vote



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## Race-Blind Policies

- The Trump administration has advocated for ‘race-blind’ policies in which all ethnic backgrounds are viewed as equals
  - In the re-posted 2008 guidance, the DOE “strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools.”



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## Questions?



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