UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,
Employer,

and 6-RC-12276

NEWSPAPER GUILD OF PITTSBURGH,
COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 38061, AFL-CIO,
Petitioner.

BRIEF ON BEHALF OF THE PETITIONER NEWSPAPER GUILD OF PITTSBURGH, CWA, AFL-CIO, AND THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The petitioner Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations, as amicus curiae, submit this joint brief in response to the National Labor Relations Board's invitation to address the correct application of the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

After nine years of litigation, encompassing 20 days of hearings spanning three months, two Regional Director reports running to some 171 pages between them and a trip to the D.C. Circuit, the Board is no closer to determining whether the full-time faculty of Point Park University are "managerial employees" under *Yeshiva* than it was when the hearings closed in early 2004.

The President of the University and the faculty members were not confused about the "managerial" status of the Point Park professors. The President informed faculty members that she was under no obligation to follow or implement their suggestions with regard to academic policy. She responded to the professors' protests over this approach by bluntly stating, "This is not a democracy." DDE 30.[1] The President instructed the faculty's one representative to the University's Board of Trustees – who had no voting power – that he attended Board meetings as an employee and was not to speak unless spoken to. DDE 6 n. 17. And, when the faculty representative protested unilateral changes by the President to previously agreed-upon academic policies at a meeting of the Deans Council to which he had been invited, the faculty representative was told not to attend future meetings. Tr. 3814-15. The professors understood that they had been marginalized in many respects, most especially with regard to influencing University academic policy. *See* DDE 30. This was no doubt one of the reasons that the faculty voted by a greater than three-to-one margin – 49 to 14 – in favor of union representation.

The sum and substance of the matter is that all the days of hearing and pages of analysis have not allowed the Board to determine conclusively what was plain to

[1] "DDE" refers to the Regional Director's Decision and Direction of Election (April 27, 2004). Citations in this brief use the pagination in the original hard copy version issued by the Regional Director. The electronic version posted by the NLRB website is paginated in a way that does not correspond to the DDE's table of contents.

everyone at Point Park – the faculty members do *not* manage the University's academic program. The proceedings in this case thus amply demonstrate how "[t]he open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education," *Lemoyne-Owen College v. NLRB* 357 F.3d 55, 61 (D.C. Cir. 2004) (citation and quotation marks omitted), has caused the Board – and consequently the reviewing courts – to miss the forest for the trees. The Board should use this case for a considered reappraisal of the role of the so-called "*Yeshiva* factors" in determining the "managerial" status of college professors under the National Labor Relations Act.

1. THE "*YESHIVA* FACTORS" DO NOT CONSTITUTE A LEGAL TEST FOR DETERMINING WHETHER PROFESSORS ARE EXEMPT "MANAGERIAL" EMPLOYEES.

The "*Yeshiva* factors" are nothing more than the concrete set of circumstances identified by the Supreme Court to support its conclusion "that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Yeshiva*, 444 U.S. at 686. Before the Supreme Court's *Yeshiva* decision, the Board did not attempt to analyze what sort of faculty authority might be "managerial" in nature, because, in the Board's view, the fact that, "[i]n carrying out the[ir] duties and responsibilities, the faculty acts as a group, on the basis of collective discussion and consensus" precluded treating the faculty as "managerial" employees. *C.W. Post Center*, 189 NLRB 904, 905

(1971). The Supreme Court rejected that *per se* rule in *Yeshiva*. 444 U.S. at 678.

Following the Supreme Court's *Yeshiva* decision, the Board did not undertake its own analysis of what type of authority would make college professors "managerial" employees. Rather, the Board simply treated the circumstances cited by the Court in *Yeshiva* as "the criteria for collegial governance" that would cause "faculty to be 'managerial.'" *Bradford College*, 261 NLRB 565, 566 (1982). On that approach, whether a college's faculty members would be categorized as "managerial" depended on their authority "to make[] decisions and effective recommendations . . . in the critical areas relied upon by the Supreme Court in *Yeshiva University*." *Thiel College*, 261 NLRB 580, 586 (1982). *See, e.g., id.* at 583-85 (considering the faculty's authority in each area).

The *Yeshiva* opinion was intended to provide "a starting point only" and states that "other factors . . . may enter into the analysis." 444 U.S. at 691 n. 31. As the instant case demonstrates, marching through the "*Yeshiva* factors" in a mechanical fashion to determine how the authority of a particular college faculty matches up point-by-point with the authority exercised by the Yeshiva faculty has not served the Board – or the college administrations and professors – well. Nothing in the *Yeshiva* opinion suggests that the Board is required to address the "managerial" status of college professors in this manner. To the contrary, the *holding* of *Yeshiva* is that the "managerial" status of college faculty members must

be determined on the same basis as is applied in other contexts. *See* 466 U.S. at 686 ("The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial."). That is, the "*Yeshiva* factors" represent an application of the Board's more general analytical approach to determining managerial status in the concrete circumstances presented by the *Yeshiva* case, not a separate test unto itself.[2]

Moreover, nothing in the circuit court decisions following *Yeshiva*, including the decisions of the D.C. Circuit in *LeMoyne-Owen College* and in this case, requires the Board to determine the "managerial" status of a college faculty through a point-by-point comparison with the factors treated as significant by the courts in *Yeshiva*. To the contrary, the import of the D.C. Circuit decisions is that

[2] In endorsing the traditional approach to determining managerial status in the university context, the Court expressly recognized that "[t]here . . . may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial." *Id.* at 690-91 n.31. In fact, in the three decades since *Yeshiva*, the trend has been "that the faculty role in university governance is decreasing" as "[t]he pressures for efficiency and the achievement of performance goals are encouraging college and university presidents to focus more on the management of their institutions and less on the more collegial processes of academic decision making." William L. Waugh Jr., "Issues in University Governance: More 'Professional' and Less Academic," *Annals of the American Academy of Political and Social Science* 84 (January 2003). A recent study of federal data supports this conclusion, confirming that colleges have added managers and support personnel at a rate that "far outpac[es] the growth in student enrollment and instructors." Jeffrey Brainard, Paul Fain & Kathryn Masterson, "Support-Staff Jobs Double in 20 Years, Outpacing Enrollment," *The Chronicle of Higher Education* (April 24, 2009).

the Board needs to explain what is "'significant . . . and why,'" *Point Park University v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006), quoting *LeMoyne-Owen College*, 357 F.3d at 61, in deciding whether particular faculty members are or are not "managerial" employees.

If the Board is going to continue to test the "managerial" status of college professors by comparing them to the Yeshiva faculty on the basis of the particular factors listed in the *Yeshiva* decisions, the D.C. Circuit requires the Board to do what the Regional Director did so ably in his Supplemental Decision on Remand, *i.e.*, group the points of comparison hierarchically into the categories "Academic Matters," Supp. Dec. 9-32, "Academic-Related," Supp. Dec. 32-36, and "[N]onacademic," Supp. Dec. 36-48. We cannot improve upon the Regional Director's detailed application of this multifactor approach and explanation of which *Yeshiva* factors were significant and why.

We submit, however, that the Board is not bound to continue that approach and is free to take a more analytical approach to applying the Supreme Court's *Yeshiva* decision by undertaking a thorough reconsideration of the question of what authority would make college professors "managerial" employees. This reconsideration should begin with the statutory language and the Supreme Court's articulation of the "managerial" employee exception. Against that background, the Board should rethink its approach to determining the "managerial" status of

college faculty members based on the legal analysis underlying the *Yeshiva* decision, rather than the particular factual circumstances of that case.

2. THE NLRA'S BROAD STATUTORY DEFINITION OF COVERED "EMPLOYEES" EXPRESSLY ENCOMPASSES "PROFESSIONAL EMPLOYEES," SUCH AS PROFESSORS.

The proper starting point is the statutory language. The National Labor Relations Act has two definitions clearly indicating that employees performing the work typical of college professors are intended to be covered by the Act.

NLRA § 2(3) provides generally that "[t]he term 'employee' shall include any employee." 29 U.S.C. § 152(3). "The breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.'" *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 891 (1984). The Supreme Court has observed that a "broad, literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process." *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85, 91 (1995) (quotation marks and citations omitted).

What is more, the Act specifically defines a category of "professional employee" and grants those "professional employees" the right to vote on whether they will be separately represented from nonprofessionals in collective bargaining. 29 U.S.C. § 159(b)(1). Among the employees included in the category

"professional employees" are those "engaged in work [] predominantly intellectual and varied in character . . . involving the consistent exercise of discretion and judgment . . . [and] learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning." 29 U.S.C. § 152(12). Given that statutory definition, it is hardly surprising that "faculty members employed at institutions of higher learning have long been considered 'professional employees' protected by the Act." *David Wolcott Kendall Mem. School of Design v. NLRB*, 866 F.2d 157, 160 (6th Cir. 1989).

While the NLRA defines the term "employee" broadly, "the Act's definition also contains a list of exceptions." *Town & Country Electric*, 516 U.S. at 90. Significantly, none of the express statutory exceptions apply to the Park Point faculty.

As a general matter, the Supreme Court has cautioned "that administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). This warning applies *a fortiori* to the application of implied exemptions, such as the one created for "managerial" employees. "Because managerial employees are not excluded from coverage under the NLRA by any express language, but rather by an implied exception to the statute, the exception must be

narrowly construed to avoid conflict with the broad language of the Act, which covers 'any employee,' including professional employees." *David Wolcott Kendall Mem. School*, 866 F.2d at 160 (citation omitted).

3. THE IMPLIED "MANAGERIAL" EXEMPTION APPLIES ONLY TO THOSE EMPLOYEES WHO ARE SO MUCH MORE CLEARLY "MANAGERIAL" THAN THE EXPRESSLY EXEMPT "SUPERVISORS" THAT NLRA COVERAGE WOULD BE INCONCEIVABLE.

The NLRA, as enacted in 1935, "did not expressly mention the term 'managerial employee.' After the Act's passage, however, the Board developed the concept of 'managerial employee' in a series of cases involving the appropriateness of bargaining units." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). The early Board cases "established that 'managerial employees' were not to be included in a unit with rank-and-file employees" but left unclear whether "all 'managerial employees' [are] entirely outside the protection of the Act, as well as inappropriate for inclusion in a rank-and-file bargaining unit." *Id*. at 275-276.

In *Bell Aerospace*, the Supreme Court held that "all 'managerial employees' . . . are excluded from the protections of the Act." 416 U.S. at 274. The Court found the exclusion of "managerial employees" to be implicit in the express exclusion of "supervisors" that Congress enacted in 1947 to overrule the Supreme Court's holding in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), that the NLRA covers foremen. 416 U.S. at 277-284. In this regard, the *Bell Aerospace*

Court expressly relied upon "the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives," *id*., at 284, which the Court understood to have been ratified by the 1947 Congress. *See id*. at 278-279 (setting out the relevant portion of Justice Douglas' dissent).

The basic point of Justice Douglas's *Packard* dissent was that "if foremen are 'employees' within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents" and that "once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps." *Bell Aerospace,* 416 U.S. at 278, quoting *Packard*, 330 U.S. at 494 (Douglas, J., dissenting). In Justice Douglas' view, this would "obliterate the line between management and labor" in labor relations with the result that "the basic opposing forces in industry [would be] not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other." *Ibid*.

Against that background, the *Bell Aerospace* Court understood the 1947 amendment excluding "supervisors" as "intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." *Id.* *Bell Aerospace*, 416 U.S. at 288-289 n. 16, quoting *Retail Clerks v. NLRB*, 366

F.2d 642, 644-645 (D.C. Cir. 1967). The Court reasoned that the 1947 amendments did not include an express exception for nonsupervisory "managerial employees," because "Congress recognized there were other persons so much more clearly 'managerial' that it was inconceivable that the Board would treat them as employees." *Bell Aerospace*, 416 U.S. at 284.

Consistent with *Bell Aerospace*'s reading of the 1947 amendments, the Board has held that "managerial status . . . is reserved for those in executive-type positions, those who are closely aligned with management as true representatives." *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Of particular pertinence here, the Board has specified that "managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction." *Id*. at 857-78. Rather, the status of "managerial" employee is reserved to "true representatives of management in the traditional sense," *id*. at 858, *i.e.*, "faculty . . . involved in activities far beyond the core professional activities of a typical faculty," *Point Park*, 457 F.3d at 48.

4. PROFESSORS ARE EXEMPT "MANAGERIAL" EMPLOYEES ONLY IF THEY EXERCISE NEARLY ABSOLUTE AUTHORITY IN DETERMINING THEIR EMPLOYER'S ACADEMIC PROGRAM.

In *Yeshiva*, "[t]he controlling consideration . . . [wa]s that the faculty . . . exercise[d] authority which in any other context unquestionably would be

managerial." 444 U.S. at 686. In this regard, the Court emphasized that the faculty's "authority in academic matters is absolute," so that, "[t]o the extent the industrial analogy applies, the faculty determines . . . the product produced, the terms upon which it will offered, and the customers who will be served." *Ibid*. The authority of the Yeshiva faculty derived from the fact that the University "depend[ed] on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals," because their "professional expertise [wa]s indispensable to the formulation and implementation of academic policy." *Id*. at 689.

The Tenth Circuit accurately described the pertinent aspect of the relationship between Yeshiva's faculty members and the college administration:

> "[T]he administrative staff at Yeshiva was fairly small, at least in relation to the university's overall size, and there was no effective buffer between the faculty and top management. The university was, in effect, compelled to rely upon the faculty for advice, recommendations, establishment of policies, and implementation of policies. As a result, the Yeshiva faculty was by necessity aligned with management." *Loretto Heights College v. NLRB*, 742 F.2d 1245, 1254 (10th Cir. 1984) (citations and quotation marks omitted).

As a direct result of its almost total reliance on the expertise of the faculty when it

came to framing academic policy – such as the school's "curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules" – the administration of Yeshiva University was essentially the "executive arm of the faculty." *Yeshiva*, 444 U.S. at 676 & n. 4 (quotation marks omitted).

At the same time that it explained what made the faculty "managerial" employees, the *Yeshiva* Court also emphasized:

> "We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. * * * Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Id*. at 690.

Elaborating on this caution, the Court explained, "It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." *Id*. at 690 n. 31. And, with regard to framing the college's academic policies, the Court explained that a merely "advisory role" was "not managerial." *Id*. at 683.

Under *Yeshiva*, the central inquiry in determining whether college professors are exempt "managerial" employees is whether the professors' "authority in

academic matters is absolute," 444 U.S. at 686, so that the college administration functions essentially as the "executive arm of the faculty," *id*. at 676 n. 4 (quotation marks omitted). Professors will naturally influence their college's academic policy simply by engaging in their ordinary teaching duties (which includes determining not only the content of the courses they are assigned to teach but which courses in their field will be offered) and making known to the college administration their views on related academic matters. But *Yeshiva* makes clear that influence of this sort does not make the professors "managerial" employees. Rather, the faculty members must either have direct control over academic policy or their recommendations with regard to academic policy must be so routinely followed by the administration that they are effectively in control.

That being so, a particularly important aspect of determining whether the professors at a particular college are "managerial" employees is the relative size and nature of the college administration. If "the administration is fairly large in relation to the size of the College" and "possess[es] the professional expertise [that is] indispensable to the formulation and implementation of academic policy[,] [t]he availability of this expertise within the ranks of the administration obviates the College's need to rely extensively on the professional judgment of its faculty in determining and implementing academic policy." *Loretto Heights College*, 742 F.2d at 1254 (quotation marks omitted). Inclusion of academic personnel, such as

deans and department chairs, in a college administration indicates that the faculty does not control academic policy, because the point of including academics in the administration is to give it independent capacity to determine academic policy. If a college "has an effective buffer between the faculty and top management in the form of [personnel who] perform administrative duties and are part of the administration," while "possess[ing] the professional expertise that [is] indispensable to formulation and implementation of academic policy," then the nonadministrative teaching faculty are *not* "managerial" employees. *St. Thomas University*, 298 NLRB 280, 287 (1990).

Equally important is the extent to which the college administration acts independently of the faculty in formulating academic policy. To the extent that the administration formulates academic policy without faculty advice – or, even more tellingly, contrary to faculty advice – the administration's actions conclusively demonstrate that the faculty members' role in formulating academic policy is at most "merely advisory and thus not managerial." *Yeshiva*, 444 U.S. at 683. Even where the administration's formulation of academic policy is *always* in accordance with faculty advice, it must be shown that the administration is carrying out the faculty's directions – and not simply seeking the faculty's advice – for that circumstance to establish that professors are "managerial" employees.

Finally, the Board must remain cognizant of the Supreme Court's

admonition that "*[o]nly* if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Yeshiva*, 444 U.S. at 690 (emphasis added). As the Court explained, this means "that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." *Id*. at 690 n. 31. It is pertinent in this regard, that professors determine the content of their courses not only by formulating the specific contents of their assigned courses but also by participating more generally in the determination of what other courses in their field will be offered by their department.

5. THE PROFESSORS AT POINT PARK DO NOT EXERCISE SUFFICIENT AUTHORITY OVER ACADEMIC POLICY TO BE EXEMPT "MANAGERIAL" EMPLOYEES.

Under the legal analysis articulated by the Court in *Yeshiva*, the Point Park faculty members clearly do not come within the implied "managerial" exemption from the NLRA's broad statutory definition of covered "employees."

In 2002, Point Park was substantially restructured as part of the school's transition from a college to a university, so that its six academic departments were folded into four newly created schools, each of which was headed by a Dean appointed by the University President or someone in her administration. DDE 30-32, 59-61. Notably, faculty members were not involved in the decision to change

the structure of the school nor were they involved in Point Park's application for university status. DDE 9.

The four Deans sit on a Deans Council along with the Vice President for Academic Affairs and two directors. DDE 4. The Chairs of each Department within a particular school – who are stipulated to be part of President Henderson's management team and thus were not included in the unit of teaching faculty that voted on union representation – report to the particular Dean for their school. DDE 4.[3]

As a result of the restructuring, an extensive academic managerial staff encompassing at least 20 administrators – including the President, the Vice President of Academic Affairs, the Associate Vice President of Academic Affairs, the Deans, the Department Chairs and various Directors – runs the academic program of the University. The existence of such an extensive academic administration – including persons, such as the Deans and Department Chairs, who are directly involved in the University's day-to-day academic life – reduces the dependence of the college administration upon the teaching faculty in setting academic policy.

[3] In its Request for Review, p. 12 n. 7, the University asserts that the "Department Chairs are members of the faculty." That the Chairs may be both part of the faculty and part of the University management, as the parties have stipulated, merely demonstrates "that a rational line could be drawn between . . . faculty members, depending upon how a faculty is structured and operates." *Yeshiva*, 444 U.S. at 691 n. 31.

As the Regional Director explained:

> "[Faculty] input on academic matters became more diluted as the Administration added even more administrators to its substantial administrative staff. After restructuring the institution, the Administration had not one, but two buffers between it and the faculty. The department chairs and all but one program director were one buffer and the newly-created deans comprised a second buffer." DDE 10.

The ratio of academic administrator to full-time teaching faculty was 1 to 4. Supp. Dec. 10 n. 11.

What is more, the hierarchy of authority clearly indicates that the teaching faculty are not "managerial" employees. The teaching faculty report to their respective Department Chairs, who report to their respective Deans, who report to the Associate Vice President for Academic Affairs, who reports to the Vice President for Academic Affairs, who reports to the President. DDE 4. Within this chain of command, the teaching faculty can hardly be characterized as "so much more clearly 'managerial' [than the academic administrators to whom they report] that it [would be] inconceivable that the Board would treat them as employees." *Bell Aerospace*, 416 U.S. at 284.

The administration of Point Park University not only has the capacity to formulate academic policy independently of the faculty but has frequently acted

independently in formulating academic policy. For example, the University administration unilaterally implemented academic programs in Sports and Arts and Entertainment, and created the Innocence Institute. DDE 14-17. It unilaterally refused to implement academic programs approved by the faculty, including faculty-suggested programs in construction management, vocal performance and counseling. DDE 15. The administration also unilaterally altered existing academic programs without faculty consultation – or, in some cases, over faculty objection – such as the Government and International Studies Department, the International Masters of Business Administration program, and the English as a Second Language program. DDE 17-18, 24-25. And, the administration unilaterally altered degree requirements by adding a required freshman seminar, changing the requirements for an education degree, and unilaterally redesigning the honors program. DDE 19-21.

Moreover, unlike the case in *Yeshiva*, Point Park's administration's authority extends to many of the core professional activities typically exercised by faculty, such as course content and student evaluations. For example, the university administration unilaterally developed and implemented policies on online course offerings and independent studies, DDE 21-22, decreed the use of a plus/minus grading system despite faculty opposition, DDE 26-27, changed individual student grades without following established procedures for faculty participation, DDE 27,

denied bonuses to professors who issued what the administration considered too many A's, DDE 59, and imposed syllabi requirements, DDE 59.

The fact that the University administration has acted independently of the faculty in determining so many aspects of academic policy – as well as unilaterally determining many core faculty professional matters – conclusively demonstrates that the faculty's "authority in academic matters is [*not*] absolute." *Yeshiva*, 444 U.S. at 686. Rather, "the role of the faculty is merely advisory and thus not managerial." *Id*. at 683.

CONCLUSION

The National Labor Relations Board should adopt the Regional Director's determination of the appropriate bargaining unit and certify the results of the election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James B. Coppess, hereby certify that on July 6, 2012, I caused to be served a copy of the foregoing Brief on behalf of the Petitioner Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, by electronic mail on the following:

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