**U.S. Department of Transportation**

Office of the Secretary of Transportation

**General Counsel**

1200 New Jersey Ave., S.E.
Washington, DC 20590

February 25, 2016

Mr. Thomas A. A. Cook
Vice President & General Counsel
REACH Air Medical Services, LLC
1001 Boardwalk Springs Place, Suite 250
O'Fallon, MO 63368

Dear Mr. Cook:

Thank you for your letter seeking the U.S. Department of Transportation's (DOT) opinion on whether San Bernardino County's (County) requirements for air ambulance operations are subject to Federal preemption.[1] You express concern that the County's permit policy and contract requirements may violate the Airline Deregulation Act (ADA),[2] the Anti-Head Tax Act (AHTA),[3] or are preempted by the Federal Aviation Administration's (FAA) exclusive jurisdiction over aviation safety and aircraft operations.[4]

DOT does not typically take a position on specific disputes that may be subject to local administrative proceedings or private litigation. We are not privy to all the facts surrounding the circumstances described in your letter and, therefore, we do not offer an opinion on your particular matter. Instead, we offer general guidance based on our review of your letter and the County's policy and contracts for air ambulance operations, and our subsequent conversation with representatives from the County.[5]

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[1] Your letter points to over 30 individual County provisions you believe are subject to Federal preemption. In addition, you supplemented your initial letter with correspondence on October 16, 2015 and November 19, 2015. Although we cannot engage in an exhaustive examination of the numerous provisions identified in your letters, we address several in this letter, and refer you to the DOT's *Guidelines for the Use and Availability of Helicopter Emergency Medical Transport*, attached, for a summary of judicial decisions and previous DOT opinion letters on these matters. You may also find these guidelines online at https://www.transportation.gov/mission/administrations/general-counsel/elibrary.

[2] 49 U.S.C. § 41713(a).

[3] 49 U.S.C. § 40116.

[4] See City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 371 (3rd Cir. 1999).

[5] We understand that the County recently filed a State Court lawsuit seeking a declaratory order that the ADA does not preempt the contract management fee charged to air ambulances operating within the County. This letter does not offer any guidance on that issue, although it addresses the potential application of the AHTA to that fee. In any event, this letter should not be interpreted as a Departmental position on any litigation pending in the Courts, nor the Department's definitive position or final agency action with respect to any of the issues discussed herein.

Based on that review and discussion, we understand as follows: The County requires that air ambulances obtain a permit from the Inland Counties Emergency Medical Agency (ICEMA).[6] It is unlawful for air ambulances to "operate, conduct business, maintain, advertise, engage in or profess to engage in the business or service of the transportation of patients, by aircraft" without an ICEMA permit.[7] To receive a permit, the air ambulance operator must satisfy several conditions set forth in ICEMA's Emergency Medical Services (EMS) Aircraft Permit Policy (Policy),[8] enter into a contract with ICEMA, and pay a fee.[9] The permitting requirement and contract require that an air ambulance operator submit service delivery plans and rate schedules, among other things, to ICEMA. In addition, the Policy requires that an air ambulance operator comply with FAA and ICEMA requirements related to aircraft equipment and maintenance.[10] Once the permit is issued, air ambulance operators may only provide the services authorized by the permit, and they must comply with the staffing, operations, and equipment requirements described in the Policy and the permit. Permits may be revoked for failure to comply with these requirements.[11] You believe that the ICEMA requirements violate the ADA because they impermissibly relate to an air ambulance operator's rates, routes, or services. You believe that the annual contract management fee required by the contract violates the AHTA because it is calculated by the number of passengers picked up or dropped off within the County. You also believe that certain ICEMA requirements are subject to field preemption because they involve matters subject to FAA's exclusive authority over aviation safety and aircraft operations.

The ADA includes an express preemption provision, as follows:

> A State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation. . . . 49 U.S.C. § 41713(a).

As a threshold matter, an air ambulance operator, such as REACH Air Medical Services, LLC (REACH), that holds DOT economic authority to operate as a registered air taxi under 14 CFR part 298, along with an FAA air carrier operating certificate under 14 CFR part 135, is an "air

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[6] Inland Counties Emergency Medical Agency, EMS Aircraft Permit Policy (effective October 1, 2013). ICEMA is San Bernardino County's local emergency medical services agency and, as such, exercises the joint powers of San Bernardino, Mano, and Inyo Counties to operate and manage an emergency medical services system for these counties. Inland Counties Emergency Medical Agency Joint Exercise of Powers Agreement, dated January, 8, 2013, available at www.sbcounty.gov/icema/main/viewfile.aspx?DocID=1481 (last visited February 3, 2016).

[7] Policy, at § C.

[8] Id.

[9] Id. at §§ G(1) & (2).

[10] Id. at §§ F(12), (13), (16), (17), & S.

[11] Id. at § G(3).

carrier" for purposes of the ADA preemption provision.[12]

The U.S. Supreme Court has broadly interpreted the words "related to a price, route, or service" in the ADA. As illustrative examples, we refer you to the decisions in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); and Northwest, Inc. v. Ginsberg, 134 S.Ct. 1422 (2014).[13]

Under the County's regulations, an air ambulance operator may not transport patients within the County unless the operator obtains an ICEMA permit. It appears that the ICEMA permitting requirements include some matters that have been deemed preempted in previous judicial decisions. For instance, applicants for an ICEMA permit must document their proposed services and service area.[14] Once the permit is issued, the air ambulance provider may provide its services only within the service area specified on the permit.[15] These types of requirements relate to an air carrier's routes, and were found preempted by a Federal court in Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721 (E.D.N.C. 2008). In Med-Trans, the court considered a North Carolina law requiring prospective air ambulance operators to document a "defined service area." Id. at 738. The court found that the ADA preempted this requirement as an impermissible regulation of routes,[16] because it required the air carrier to define a service area. Id. It appears that ICEMA's Policy also requires air ambulance operators to define a service area and, further, once the policy is issued, would restrict the air ambulance operators to those defined routes. The County informed the Department, however, that "[t]here are no geographic limitations except the county boundaries."[17] We do not question the County's assertion, but do note that the regulations as promulgated are not clear in that regard.

We also note that the Policy vests ICEMA with discretion to require that air ambulance providers include in their permit application any other "facts or information" ICEMA may request.[18] The ICEMA Governing Board, comprised of San Bernardino County local elected officials, must

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[12] See Hughes Air Corp. v. Pub. Util. Comm'n, 644 F.2d 1334 (9th Cir. 1981); Hiawatha Aviation of Rochester, Inc. v. Minn. Dep't of Health, 389 N.W.2d 507 (Minn. 1986).

[13] See also Rowe v. N.H. Motor Transport Ass'n, 552 U.S. 364 (2008) (analyzing an almost identical Federal preemption provision applicable to motor carriers enacted in the Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305, codified at 49 U.S.C. § 14501(c)(1).

[14] Policy, at §§ F(11) & (14).

[15] Id. at § H; see also id. at § J(2)(c) (permitting ICEMA to revoke the permit if an air carrier fails to adhere to the conditions specified in the permit).

[16] In Med-Trans Corp., supra, the court found State regulations requiring an air ambulance to define a service area to be preempted by the ADA, even though the State regulations "d[id] not, on their face, limit [an air ambulance's] ability to define its own service area . . . ." 581 F. Supp. 2d at 738.

[17] Letter from Alan L. Green, County Counsel, County of San Bernardino, to Ronald Jackson, Assistant General Counsel, U.S. Dep't of Transp., dated Oct. 26, 2015 (County's October 26 Letter).

[18] Id. at § H(23).

approve a permit application and may refuse to do so if an air ambulance operator refuses to comply with the application requirements, including requests for any additional information that ICEMA requests. Further, even if the air ambulance operator has complied with all of the Policy requirements, the Policy appears to grant the ICEMA Governing Board discretion to deny the operator a permit.[19]

In Med-Trans, the court considered whether North Carolina could require a prospective air ambulance operator to obtain approval from county government officials prior to initiating air ambulance services. Upon reviewing North Carolina's requirements for county official approval, the court stated that "[t]he collective effect of the challenged regulations is to provide local government officials with a mechanism whereby they may prevent an air carrier from operating at all within the state. Such a total bar to entry relates to a carrier's routes and services and violates Congress's clear mandate in establishing the ADA."[20] The court concluded that North Carolina's regulations were preempted "to the extent that they require approval of county government officials which, if denied, would preclude [an air ambulance operator] from operating within the State." Id.

In a letter dated November 12, 2015, the County informed us that ICEMA uses the authority only to request additional information on the delivery of medical services.[21] Relatedly, the County acknowledges that its discretion to deny a permit could conceivably include discretion to deny an otherwise qualified applicant; however, the County states that "the validity of such denial would depend on the existing circumstances, and the nature of the information sought."[22] Like the laws at issue in Med-Trans, if the Policy vests ICEMA with discretion to deny a permit to an applicant, it might similarly be preempted as an impermissible regulation of an air carrier's routes and services. To be clear, however, the County retains its authority to regulate the provision of medical care within its borders. Thus, as an example, a County can require an air ambulance operator to obtain a medical permit to administer patient care, based on findings that the operator has adequate medical staffing and triage training.

In addition to the permitting requirement, it appears that an air ambulance operator is required by law to contract with ICEMA.[23] The form contract you provided as an attachment to your letter includes provisions requiring Commission on Accreditation of Medical Transport Systems (CAMTS) accreditation, and compliance with FAA requirements, which have been previously found by courts or DOT opinion letters to be preempted.[24] While the ADA does not preempt

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[19] Id. at § G(2) (providing that the Board "may" order issuance of a permit).

[20] Med-Trans, 581 F. Supp. 2d at 738.

[21] Letter from Alan L. Green, County Counsel, San Bernardino County, to Ronald Jackson, Assistant General Counsel, U.S. Dep't of Transp., dated Nov. 12, 2015.

[22] Id.

[23] Policy, at § G(1).

[24] For a discussion of CAMTS accreditation standards, as incorporated into State law, and Federal preemption, see Letter from Ronald Jackson, Assistant General Counsel for Operations, U.S. Dep't of Transp., to Congressman Rob

"everyday contractual arrangements,"[25] contracts that are the product of the government "performing its prototypical regulatory role," rather than ordinary bargaining, may be preempted.[26] In American Trucking, the Supreme Court found that concessionary contracts between the Port of Los Angeles and drayage companies were invalidated by a Federal preemption provision related to motor carriers, modeled after that of the ADA.[27] There, the Port required drayage companies to enter into contracts with the Port as a condition of accessing the Port land and terminals. The Supreme Court found that the "contract . . . functions as part and parcel of a governmental program wielding coercive power over private parties . . . ."[28] Thus, to the extent that the ICEMA contract provisions are the result of ICEMA acting in its regulatory capacity[29] and relate to an air ambulance operator's rates, routes, or services,[30] the provisions would also likely be preempted.

To the extent that the ICEMA Policy or contract requirements serve "primarily a patient care objective," however, those requirements would not be preempted. We have consistently recognized the holdings in Hiawatha and Med-Trans that a State may continue to act in its "traditional role in the delivery of medical services--the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions."[31] We note from the ICEMA Policy, for example, certain requirements related to the medical care provided by air ambulances, such as the requirements related to patient care training for EMS Air Ambulance Staff in Section (N)(1). Such

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Woodall (Apr. 21, 2015) (Apr. 21, 2015 DOT Letter). All DOT letters referenced in this letter may be found online at http://www.transportation.gov/mission/administrations/general-counsel/elibrary, "Aviation" section. Requirements related to compliance with FAA safety-related regulations are discussed later in this letter.

[25] Am. Trucking Ass'n, Inc. v. City of Los Angeles, 133 S.Ct. 2096, 2103 (2013); see also Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 229 (1995); Letter from Rosalind A. Knapp, Acting General Counsel, U.S. Dep't of Transp., to Gregory Walden, Counsel for Pacific Wings, L.L.C. (Apr. 23, 2007) (Apr. 23, 2007 DOT Letter).

[26] Am. Trucking Ass'n, 133 S.Ct. at 2103.

[27] The Federal Aviation Administration Authorization Act of 1994 provides, "[A] State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

[28] Am. Trucking Ass'n, 133 S.Ct. at 2103.

[29] We previously have stated that a "State or local government entity, as a customer of air ambulance services," could, via contract, include terms related to an air ambulance's rates, routes and services. In these instances, we have recognized that "such a position by the State or local government *as a customer* is distinguishable from action by the State or local government as a *regulator*." Apr. 23, 2007 DOT Letter. Based on our discussions with the County and a review of the ICEMA contract, it does not appear that the County is paying for or otherwise acting as the customer for the air ambulance operator's services.

[30] See the DOT's *Guidelines on the Use and Availability of Helicopter Emergency Medical Transport* for a discussion of provisions that have been deemed preempted by courts or in previous DOT opinion letters.

[31] Hiawatha Aviation of Rochester, 389 N.W.2d at 509; Med-Trans Corp., 581, F. Supp. 2d 72 (E.D.N.C. 2008); see, e.g., Apr. 21, 2015 DOT Letter (citing Hiawatha and Med-Trans for proposition that laws regulating medical services are not preempted by the ADA); Letter from D.J. Gribbin, General Counsel, U.S. Dep't of Transp., to the Honorable Greg Abbott, State of Texas (Nov. 3, 2008) (Nov. 3, 2008 DOT Letter) (same).

requirements are not preempted by Federal law, nor does any party appear to dispute that. For a further discussion of State authority to regulate medical standards and the ADA, see DOT's *Guidelines on the Use and Availability of Helicopter Emergency Medical Transport*, included as an attachment to this letter.

The contract also requires that air ambulance providers pay ICEMA an annual "contract management fee."[32] The contract management fee funds ICEMA's monitoring and enforcing air ambulance compliance with the contract and other activities related to ICEMA's management of emergency medical services within the County.[33] You state that the fee is a charge on "passengers picked up or dropped off anywhere within" the County and, as such, is preempted by the AHTA.

The AHTA states that a "State [or] a political sub-division of a State . . . may not levy or collect a tax, fee, head charge, or other charge on . . . the transportation of an individual traveling in air commerce."[34] "Air commerce" means –

> [f]oreign air commerce, interstate air commerce, the transportation by mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.[35]

To the extent that air ambulance operations are interstate, they clearly fall within the definition of "air commerce." In addition, air commerce can include purely intrastate flights if they are operated within the limits of a Federal airway, or affect, or may endanger safety in, foreign or interstate air commerce. Intrastate air ambulance operations qualify as "air commerce" on either of these bases.[36]

ICEMA's contract management fee is calculated based on air ambulance providers' total number of air transports within the County per year.[37] ICEMA calculates its fee in this way to "more equitably distribute ICEMA's regulatory costs for air ambulance services among the various

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[32] Standard Contract between Inland Counties Emergency Medical Agency and [Air Ambulance Operator] to Authorize EMS Aircraft Services, § IX(B).

[33] Id.

[34] 49 U.S.C. § 40116(b).

[35] 49 U.S.C. § 40102(a)(3); see also Ariz. Dep't of Revenue v. Cochise Airlines, 626 P.2d 596, 600 (Ariz. 1980) ("The prohibition against a tax on 'the carriage of persons traveling in air commerce,' apparently added late in the legislative process, is in effect a ban on the direct or indirect taxation of intrastate airline fares.").

[36] See Hill v. NTSB, 886 F.2d 1275 (10th Cir. 1989) (finding that intrastate helicopter operations occur in "air commerce"); Letter from Ronald Jackson, Assistant General Counsel for Operations, U.S. Dep't of Transp., to Gina Amacher, Director, Minn. Dep't of Revenue, dated May 21, 2014 (concluding that intrastate air ambulance operations occur in "air commerce" as that term is used in the AHTA).

[37] Standard Contract between Inland Counties Emergency Medical Agency and [Air Ambulance Operator] to Authorize EMS Aircraft Services, § IX(B).

providers ICEMA oversees."[38] The County also indicated that the fee is purely medical in nature (as evidenced, according to the County, in part, by the fact that it applies to both ground and air ambulances) and, thus, is not preempted.[39] Alternatively, the County argues that even if the fee would fall under subsection (b) of the AHTA, it is a permissible franchise tax under section (e)(1) of the AHTA, or is a reasonable operating cost of the County consistent with the types of charges permitted under subsection (e)(2).

Because the fee is based on the number of air transports, it appears to be a "fee . . . on the transportation of an individual traveling in air commerce." While the Department recognizes that the fee is used to fund the County's activities related to ambulance services and are primarily focused on medical care-related responsibilities, the Department previously has stated that "[t]he purpose, description, and category of [a particular fee] are not relevant in analyzing whether or not it is prohibited under the AHTA."[40] Thus, we have found that when a fee, like ICEMA's contract management fee, falls within the plain language of the AHTA, it is preempted, even if taxation of "an individual traveling in air commerce" is not the primary object of the fee.[41]

The County alternatively states that if the contract management fee is a fee on the "transportation of individuals in air commerce" prohibited under subsection (b) of the AHTA, it is a franchise tax permitted under subsection (e) of the AHTA.[42] Subsection (e)(1) of the AHTA states that *certain* "franchise taxes" are permitted; however, it also makes clear that any taxes or fees that fall within subsection (b) of the AHTA are not included among the types of charges "saved" from preemption under the AHTA. As previously stated, because the fee is calculated by reference to passengers carried in air commerce, it falls within the fees prohibited by subsection (b) of the AHTA and, thus, is expressly excluded from the list of taxes "saved" from preemption under 49 U.S.C. § 40116(e)(1).[43]

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[38] Letter from Alan L. Green, Deputy County Counsel, County of San Bernardino, to Dr. Howard Backer, Director, Cal. Emergency Medical Serv. Auth., dated July 14, 2014.

[39] County's October 26, 2015 Letter.

[40] Hawaii Inspection Fee Proceeding, Order 2012-1-18 (Jan. 24, 2012).

[41] Id. (referencing the holding in Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7 (1983), that "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether [a fee] is preempted."). While the object of the fee may be to facilitate a fair allocation of ICEMA's regulatory costs, its effect is to impose a fee on air ambulance operators for each transport of an individual in air commerce. This appears to fall within the types of charges prohibited by the AHTA. 49 U.S.C. § 40116(a).

[42] 49 U.S.C. § 40116(e)(1) ("[A] State or political subdivision of a State may levy or collect – taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services[.]").

[43] See, e.g., Letter from Ronald Jackson, Assistant General Counsel for Operations, U.S. Dep't of Transp., to Randy Ottinger, U.S. Parachute Ass'n, dated Dec. 30, 2013 (considering a State's amusement tax on skydiving operations and noting that, "[t]he Supreme Court has stated that the classification of a tax is not determinative under the AHTA, rather, if the tax – even if classified as something other than a 'gross receipts' tax – is measured by gross receipts from an individual traveling in air commerce, the purpose and effect of the tax would be to impose a levy on such gross receipts.") (citing Aloha, supra at 13-14); see also Hawaii Inspection Fee Proceeding, DOT Order 2012-1-18 (Jan. 24, 2012). This letter addresses only the contract management fee as calculated by the County, under the

The County also argues that the contract management fee is "analogous with AHTA's intent to allow local agencies' recovery of operating costs."[44] Section (e)(2) of the AHTA provides that a State or political subdivision of a State may levy or collect reasonable rental charges, landing fees, and other service charges *from aircraft operators for using airport facilities* of an airport owned or operated by the State or subdivision."[45] Both the AHTA's plain language and legislative history, however, make clear that the AHTA only permits airports to impose reasonable charges "for using airport facilities."[46] This provision cannot be read more broadly to permit charges by any government entity intended to recover operating costs.[47]

You also contend that some of the County's requirements may also be invalid under the doctrine of field preemption. The FAA has the exclusive authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."[48] This provision, as implemented by comprehensive FAA regulations, establishes a pervasive and exclusive Federal regime over the management and use of the navigable airspace, aviation safety, and aircraft noise and aircraft operations. Thus, DOT and courts have concluded that matters concerning aviation safety (including aircraft equipment, operation, and pilot qualifications) are under the FAA's exclusive jurisdiction and, therefore, State and local laws in this area are preempted.[49] The Policy includes several requirements related to aviation safety, such as provisions requiring that air ambulance operators maintain their aircraft in "safe facilities" and in a "mechanically sound condition."[50] The Policy also requires compliance with FAA safety and equipment requirements.[51] Even assuming the Policy requires nothing more than compliance with existing FAA regulations as a condition of receiving a permit, these provisions are likely preempted.[52] In

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AHTA. Whether a jurisdiction can impose some other type of fee on an air ambulance operator, consistent with Section 40116(e)(2) of the AHTA and the ADA, is not the subject of this letter and would have to be considered based on the particular circumstances.

[44] County's October 26, 2015 Letter.

[45] 49 U.S.C. § 40116(e)(2) (emphasis added).

[46] Tinicum Township Privilege Fee Proceeding, DOT Order 2008-3-18 (Mar. 24, 2008).

[47] See id.

[48] 49 U.S.C. § 40103.

[49] City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 371 (3rd Cir. 1999); see also Apr. 23, 2007 DOT Letter.

[50] Policy, at § F.

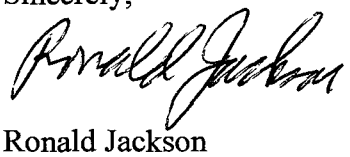
[51] Id. at § S.

[52] Ariz. v. U.S., 567 U.S. ___ (2012) ("Where Congress occupies an entire field . . . even complimentary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."); Morales, 504 U.S. at 386-87; see also Nov. 3, 2008 DOT Letter ("A State may not establish a duplicative regulatory regime to 'ensure' that Federal aviation requirements are being met.").

the County's October 26, 2015 Letter, the County acknowledged that these provisions are likely preempted and indicated that ICEMA intends to omit them from future ambulance provider contracts.

We are taking the liberty of copying the State of California Emergency Medical Services Authority and the County on this letter. I trust that this letter will be helpful to you, as well as State/County officials. Please be advised, however, that this letter provides only guidance and does not constitute a final action of the Department, either on the matters you raised or the merits of any particular proceeding. If you have any questions concerning this letter, please do not hesitate to contact me at (202) 366-9151. Thank you.

Sincerely,



Ronald Jackson
Assistant General Counsel for Operations

cc:

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