UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

New Mexico Turn Around ***Plaintiff*,** ***v.*** **Amy B. Baily**, in her official capacity as City Clerk for Albuquerque, New Mexico, ***Defendant*.**	**Civil Action No. _____** **Plaintiff's Memorandum in Support of Motion for Preliminary Injunction (ORAL ARGUMENT REQUESTED; INJUNCTIVE RELIEF SOUGHT)**

MEMORANDUM SUPPORTING PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

Plaintiff New Mexico Turn Around submits its Memorandum in Support of Motion for Preliminary Injunction, and in support thereof states as follows:

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." Section 16 of Article XVI of the Albuquerque City Charter and Part H(9) of 2009 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code, which regulate elections and campaigns in the city of Albuquerque, New Mexico, unduly impinge upon protected political speech and association in violation of the U.S. Constitution, and as set forth in

Buckley v. Valeo, 424 U.S. 1 (1976), *Davis v. FEC,* 128 S. Ct. 2759 (2008), and their progeny. Plaintiff seeks to have these sections of the Open and Ethical Elections Code preliminarily enjoined. An injunction will begin the process of prompt resolution so that Plaintiff and those similarly situated will not be chilled in their free expression and association or risk being unlawfully found in violation of the OEEC as a result of having engaged in what should be constitutionally-protected political expression in the upcoming 2011 election.[1]

ARGUMENT

I. Standards for Issuance of a Preliminary Injunction

A movant may obtain a preliminary injunction if: (1) the movant will be irreparably injured by denial of the relief; (2) the movant's injury outweighs any damage the injunction may cause the opposing party; (3) granting the preliminary relief would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) (citation omitted). For the reasons that follow, the standards for granting a preliminary injunction have been met in this case.

II. Plaintiff is Likely to Succeed on the Merits.

A. The Matching Fund is Unconstitutional.

1. Recent Caselaw Establishes the Unconstitutionality of Matching Funds.

Under the OEEC, city council candidates who participate in the city's public funding scheme may be eligible to receive "matching funds" from the government based on speech made in opposition to their candidacy. Specifically, Article XVI provides that

[1] The facts supporting this Motion are set forth in Plaintiff's Verified Complaint.

> when a Participating Candidate's Opposing Funds in aggregate amount are greater than the funds distributed plus any Seed Money spent to a Participating Candidate in the same race, then the Participating Candidate is entitled to receive matching funds in the amount that the Opposing Funds exceed the distribution from the fund plus any Seed Money spent. Total Opposing Funds to a Participating Candidate in an election are limited to twice the amount originally distributed to that Candidate pursuant to Section 12 of the Open and Ethical Elections Code.

Article XV, Sec. 16; City Clerk Regulations Section 9(a). The OEEC further provides that "the amount of Opposing Funds is calculated by totaling the Expenditures made by [the opponent of the Participating Candidate who has the highest total of Expenditures], the amount spent on Independent Expenditures in support of that opponent and the amount spent on Independent Expenditures in opposition to the Participating Candidate." Article XVI, Sec. 3(M).

The Circuit Courts have been divided over whether First Amendment rights are burdened by matching funds like those implemented in Albuquerque. However, the Supreme Court's recent decision in *Davis*, 128 S.Ct. at 2759, clarifies that a matching fund scheme like that of Albuquerque is unconstitutional. To see how the Supreme Court reached this determination, it is illustrative to see what led to the Court's decision.

In *Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994), the Eighth Circuit struck down Minnesota's matching fund on the grounds that making independent expenditures and contributions in support of a candidate that resulted in an equal contribution to that candidate's opponent improperly penalized First Amendment rights. The *Day* court reasoned that independent groups would be chilled from expending money opposing a candidate if they knew that doing so would result in an equal contribution to that candidate's campaign. *Id.* at 1356 ("[t]he knowledge that a candidate who one does not want to be elected will . . . receive a public subsidy equal to . . . the amount of the independent expenditure, as a direct result of that

independent expenditure, chills the free exercise of that protected speech"). Put simply, the matching fund turned independent expenditures over the trigger amount into de facto contributions to an opponent's campaign, and was therefore an impermissible restriction on First Amendment rights.

In *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 464-65 (1st Cir. 2000), the First Circuit upheld a Maine matching fund provision against a First Amendment challenge. The *Daggett* court rejected *Day*'s analysis, arguing that the provision for matching funds did not burden First Amendment rights. *Id.* at 464. The *Daggett* decision was premised on the supposition that matching funds simply made it possible for certified candidates to reply to campaign speech. *Id.* at 465 ("We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker").

However, in 2008, the Supreme Court settled this split between the circuits on the issue of matching funds with its decision in *Davis*. The *Davis* case involved the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act ("BRCA"). Under the Millionaire's Amendment of the BCRA, "when a candidate spends more than $350,000 in personal funds and creates what the statute apparently regards as a financial imbalance, that candidate's opponent may qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures." *Davis,* 128 S. Ct. at 2770. The Court found that the "scheme impermissibly burdens [the] First Amendment right to spend [one's] own money for campaign speech." *Id*. at 2771. The Court reasoned that:

> [w]hile BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right. [The Millionaire's Amendment] requires a candidate to

> choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.

Id.

The Supreme Court's decision in *Davis* demonstrates the flaws in the First Circuit's reasoning, thus allowing this Court to revisit their *Daggett* decision. In *Daggett*, the First Circuit stated that Maine's matching fund provision

> in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

Daggett, 205 F.3d at 464. The Supreme Court expressly rejected this view in *Davis*: "[T]he vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." 128 S.Ct. at 2772. The Supreme Court found that "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id*. The *Davis* Court approved of the reasoning in *Day*, stating that those who make the choice to trigger matching funds through their spending choices "must shoulder a special and potentially significant burden if they make that choice." *Id*. (*citing Day*). Thus, the Supreme Court has clarified that the *Day* reasoning, rather than the First Circuit's *Daggett* reasoning, controls the constitutionality of matching funds.

Since the *Davis* decision, three cases have applied the *Davis* reasoning. In two of the cases, an appellate court found that a matching funds scheme was unconstitutional in light of the *Davis* decision; litigation in the third case is in the petition stage at the U.S. Supreme Court. In

Green Party of Conn. v. Garfield, 648 F. Supp. 2d 298 (D. Conn. 2009), a district court analyzed Connecticut's campaign finance scheme, which included a matching fund. Connecticut's scheme provided matching funds for individuals participating in public funding when non-participating candidates reached an expenditure threshold. Relying on *Davis,* the court explained its decision that these matching funds were unconstitutional:

> Although it is true that the campaign finance provision at issue in *Davis* was a discriminatory, asymmetrical contribution limit for candidates in the same race, and not a matching funds provision in a public financing scheme, the holding was founded on the same principle advanced by the plaintiffs in this case: that it is a substantial burden on the exercise of First Amendment rights to force a candidate to choose between engaging in his or her right to make personal campaign expenditures, which then confers a benefit on an opponent, or adhering to a self-imposed limit on campaign expenditures. Although the benefit to CEP-participating candidates is not the same—rather than having contribution limits increased as in *Davis*, the CEP releases additional public funding grants—the effect is the same. The non-participating opponent making excess expenditures or the non-candidate making independent expenditures must choose whether to forgo his or her additional spending on speech or see his or her opponent receive an additional infusion of public funding.

Green Party, 648 F. Supp. 2d at 372. The district court emphasized the troubling First Amendment implications of Connecticut's matching fund for a traditionally funded candidate:

> Like the Millionaires' Amendment, there are no expenditure limits on the non-participating candidate or non-candidate's ability to expend funds. But also, like the Millionaires' Amendment, 'it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right [to self-finance his or her campaign]' because it requires the non-participating candidate and/or the non-candidate to choose between engaging in 'unfettered political speech' or self-limiting one's expenditures.

Id.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the district court's decision that the matching fund of the Connecticut public funding scheme "imposes what can

only be deemed a 'penalty' on [a candidate's] choice 'to spend personal funds for campaign speech.'" *Green Party of Conn. v. Garfield*, __ F.3d __, 2010 WL 2737153 *26 (2d Cir. 2010) (quoting *Davis*, 128 S.Ct. at 2772). The Second Circuit then noted that the use of public funds, given directly to a candidate under Connecticut's matching funds scheme "is *harsher* than the penalty in *Davis*, as it leaves no doubt that . . . the opponent of the self-financed candidate[] will receive additional money." *Id*. (emphasis in original). Ultimately, the Second Circuit concluded that "pursuant to *Davis* . . . the [matching fund] violates the First Amendment." *Id*. at *27.

After affirming that *Davis* required a finding that the matching fund of the Connecticut campaign financing laws were unconstitutional, the Second Circuit likewise found that the independent expenditure provisions of the law were unconstitutional:

> The only difference between the independent expenditure provision and the excess expenditure provision is the fact that independent expenditure provisions applies to individuals and organizations who are not themselves *candidates* in any race. We do not think that this difference carries any significance, as nothing in *Davis* suggests that the 'right to spend personal funds for campaign speech" is limited to *candidates only*.

Id. (*quoting Davis*, 128 S.Ct. at 2771) (emphasis in original). The Second Circuit concluded that "under the principles enumerated by the Supreme Court in *Davis*, the state's asserted interests cannot justify the independent expenditure provision" and concluded "that the . . . independent expenditure provision violates the First Amendment as it is construed by the Supreme Court in *Davis*." *Id*. at 28.

Shortly after the *Green Party* decision, the Arizona District Court considered a similar case and found that *Davis* applied to a matching funds scheme and that such matching funds scheme was therefore unconstitutional. In *McComish v. Brewer*, No. CV-08-1550, 2010 WL

2292213 (D. Ariz. Jan. 20, 2010), the Court analyzed the matching funds case before it under *Davis*: "Plaintiffs face a choice very similar to that faced in *Davis*: either 'abide by a limit on personal expenditures' or face potentially serious negative consequences. . . . Here, the negative consequence is having one's opponent receive additional funds." *Id.* at *8. The Arizona court then quoted *Green Party*, and concluded that "If lifting a candidate's opponent's fundraising limitations constitutes a 'substantial burden,' awarding funds to a candidate's opponent must constitute a 'substantial burden' as well. " *Id*. at *8. The Arizona court then found that the matching funds scheme in Arizona failed strict scrutiny, entered summary judgment for the plaintiffs in that case, and enjoined enforcement of Arizona's matching fund. *Id*. at *13.

On May 21, 2010, the Ninth Circuit reversed the District Court's decision. *McComish v. Bennett*, No. 10-14165, 2010 WL 2595288 (9th Cir. May 21, 2010). However, shortly thereafter, on June 8, 2010, the Supreme Court vacated the stay issued by the Ninth Circuit, pending timely filing and disposition of a petition for a writ of certiorari.[2] *McComish* v. *Bennett*, 130 S.Ct. 3408 (2010). The Supreme Court subsequently granted plaintiffs' cert petition, with oral argument held on March 28, 2011.[3] *McComish* v. *Bennett*, 131 S.Ct. 644 (2010).

Last year, the Eleventh Circuit, following *Davis* and *Green Party*, enjoined Florida's matching fund. The court found that the provision was subject to strict scrutiny, and that "it is

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[2] In *Green Party*, the Second Circuit noted and dismissed the Ninth Circuit's reasoning in *McComish*: "We are not persuaded by the Ninth Circuit's opinion, which, we note, has been stayed by the Supreme Court pending a petition for a writ of certiorari." *Green Party*, 2010 WL 2737153 at *27 n. 19.

[3] In *Green Party*, the Second Circuit noted and dismissed the Ninth Circuit's reasoning in *McComish*: "We are not persuaded by the Ninth Circuit's opinion, which, we note, has been stayed by the Supreme Court pending a petition for a writ of certiorari." *Green Party*, 2010 WL 2737153 at *27 n. 19.

obvious" that the provision "imposes a burden on nonparticipating candidates." *Scott v. Roberts*, 2010 WL 2977614 at *25 (11th Cir. July 30, 2010). The court also concluded "that the burden that an excess spending subsidy imposes on nonparticipating candidates 'is harsher than the penalty in *Davis*, as it leaves no doubt' that the nonparticipants' opponents 'will receive additional money.'" *Id*. at *27 (*quoting Green Party*, slip. op. at 49). As to corruption, the court found that "[t]he limit that the public campaign financing system imposes on the personal expenditures of participating candidates does not appear to reduce corruption or the appearance of corruption." *Id*. at *30. Finally, the court found that the matching funds scheme "appears primarily to advantage candidates with little money or who exercise restraint in fundraising. That is, the system levels the electoral playing field, and that purpose is constitutionally problematic." *Id*. at *31.

2. The Matching Fund Fails Strict Scrutiny.

The matching fund impermissibly burdens First Amendment rights by chilling and penalizing Plaintiff's speech, resulting in self-censorship at the cost of its First Amendment rights, and eclipsing their freedom of association. As the Supreme Court articulated in *Buckley*, a public funding scheme violates the right to free speech where it goes beyond mere promotion of voluntary use of public funding and improperly injects the government into the political process by attempting to equalize the relative financial resources of the candidates. *Davis*, 128 S.Ct. at 2774 ("[T]he unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment"). The matching fund provides a direct, dollar-for-dollar public subsidy to publicly funded candidates whenever an expenditure is made that either opposes that publicly funded candidate or

supports a traditionally funded candidate, and is above the trigger amount. Therefore, an individual or group intending to contribute to a publicly candidate's defeat becomes directly responsible for adding to his or her campaign. *Day*, 34 F.3d at 1360. Likewise, a traditionally funded candidate's spending may trigger matching funds to his opponent simply by engaging in protected political speech in furtherance of his campaign. Consequently, the political speech of the individual or group who made the expenditure "against" a publicly funded candidate is penalized by forcing the individual or group to choose between the right to engage in unfettered political speech and subjection to discriminatory fundraising. *Id.; Davis*, 128 S. Ct. at 2764.

In discussing limitations on usage of personal funds, the *Davis* Court noted that *any* limitations that have the effect of enabling an opponent to raise more money and use that money to counteract and diminish the effectiveness of a candidate's own speech imposes a substantial burden on the exercise of First Amendment rights. *Id.* at 2772. *See also Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."); *Day*, 34 F.3d at 1360 ("The knowledge that a candidate who one does not want to be elected will have her spending limits increased . . . as a direct result of that independent expenditure, chills free exercise of that protected speech.").

New Mexico Turn Around will curtail its expenditures in support of traditionally funded candidates or opposition to publicly funded candidates so as to avoid triggering funds to a publicly funded opponent. (Verified Compl. ¶ 13.) Although not direct censorship, this is "self-censorship" by those who would normally give freely their time and money to campaigns and, consequently, results in indirect restrictions by the government on independent expenditures. *See*

Davis, 128 S. Ct. at 2771. Furthermore, by giving matching funds to an opponent, independent groups like New Mexico Turn Around are advocating against, the matching fund essentially mutes the voice of such groups, neutralizing the financial benefit they intended to give. If they know their expenditure will merely trigger a matching donation to the opponent, no incentive to spend, and so no incentive to engage in protected political activity, exists.

Additionally, by making a contribution or expenditure supporting a candidate, an individual is necessarily associating with that candidate. Therefore, the matching fund also implicates "protected associational freedoms" by encroaching on the ability of "like-minded persons to pool their resources in furtherance of common political goals." *Buckley,* 424 U.S. at 22 (per curiam). By chilling New Mexico Turn Around's expenditures, the matching fund abridges its right to associate. This chilling effect on political speech is a severe burden on New Mexico Turn Around's First Amendment freedom of speech. *See Day*, 34 F.3d at 1360.

Having made a determination that the matching fund burdens First Amendment rights, the Court must next determine what level of scrutiny must be applied to those provisions, so that a proper analysis of their constitutionality may be made. The Supreme Court and subsequent caselaw have determined that matching funds, such as those of the OEEC, impose a substantial burden upon the core freedoms protected by the First Amendment. *Davis*, 128 S. Ct. at 2774-75; *Scott*, 2010 WL 2977614 at *25; *Green Party*, 2010 WL 2737134 *26; *Day,* 34 F.3d at 1356. Such provisions "cannot stand unless they are 'closely drawn' to serve a 'sufficiently important interest,' . . . ." *Davis*, 128 S. Ct. at 2770. Put in more traditional terms, this is the scrutiny test initially outlined in *Buckley*, which requires that the matching fund be narrowly tailored and "justified by a compelling state interest." *Id*. at 2772; *see also Buckley*, 424 U.S. 1, 64 (1976).

Since *Buckley*, there has been only one legitimate compelling government interest for restricting campaign finance: the interest in preventing corruption or the appearance of corruption. *See FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) ("The corruption-related interest cited by the *Buckley* Court remains "the only legitimate and compelling government interest [] thus far identified for restricting campaign finances"); *see also Davis*, 128 S. Ct. at 2771 (reaffirming *Buckley*'s argument that an expenditure cap cannot be justified on grounds of equalizing the relative financial resources of candidates competing for government office). Thus, the City can only justify infringing First Amendment rights through the OEEC is if the provisions of the Act deal with corruption or the appearance of corruption.

The City must therefore advance an argument as to why the matching fund of the OEEC advances the government's interest in preventing corruption or the appearance of corruption. However, the City can advance no such argument–Plaintiff is not aware of any allegations of corruption or the appearance of corruption in races for City Council since the original implementation of Albuquerque's campaign financing scheme.[4]

Even if such a corruption interest existed in Albuquerque, the matching funds provisions

[4] Another potential purpose for the Albuquerque statutes is to equalize the spending power of campaigns. However, the Supreme Court has been unequivocal in its statements that such attempts to equalize the amounts of money spent by candidates are not compelling government interests in the realm of campaign finance. *Davis*, 128 S.Ct. at 2773 ("Our prior decisions provide no support for the proposition that [asymmetrical limits are] a legitimate government objective"); id. ("The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications . . . ."); *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Similarly, the Supreme Court has indicated that the government's interest in effectuating the trigger provision is not a sufficiently compelling interest to justify restriction of First Amendment rights. *Davis*, 128 S. Ct. at 2775.

of the Act would not address this corruption. While a public funding scheme in general might serve a corruption interest, *see Buckley,* 424 U.S. at 57, the matching fund is a constitutionally burdensome tool for providing these funds. Other means of funding candidates are available that still severe an anticoruption interest. This renders the matching fund not narrowly tailored.

New Mexico Turn Around face imminent injury to their First Amendment rights to free political speech and free association as a direct result of this statutory scheme. The City's payment of matching funds—which, unlike an independent expenditure, is directly controlled by the participating candidate—neutralizes the voice of the group when it makes an independent expenditure. The knowledge that making an independent expenditure that opposes a government-funded candidate will directly result in that candidate receiving a dollar-for-dollar matching public subsidy (with no effect on that candidate's spending limit) creates a chilling effect on New Mexico Turn Around's free exercise of protected speech, and imposes a climate of self-censorship on speech that is inimical to our American heritage of unfettered political discourse. In so doing, the statute also encroaches upon the ability of like-minded persons to pool their resources in furtherance of common political goals in violation of New Mexico Turn Around's right to freedom of association. *See Day*, 34 F.3d at 1360.

This chill on the First Amendment exists long before the trigger threshold is reached, because of the aggregation of funds brought about through the independent expenditure provisions of the OEEC. The District Court in *Green Party* recognized this exact problem:

> Because the independent expenditure provision contemplates aggregating the campaign expenditures of all non-participating candidates with any independent expenditure by a non-candidate individual or advocacy group, there is no minimum amount of money that a non-participating minor party candidate must expend in order to trigger matching funds for participating candidates.

Green Party, 648 F. Supp. 2d at 368.

A further problem with this scheme is illustrated by examining the potential effect of having three individuals participating in a race in which only one candidate is participating in the public funding scheme. Candidate A and Candidate B are traditionally funded candidates; Candidate C is publicly funded. Even if neither Candidate A nor Candidate B intend to spend enough to pass the matching fund threshold, and even if those wishing to make independent expenditures related to Candidate A and Candidate B are attentive to keeping each individual candidate from crossing the threshold, their combined expenditures may well cause the threshold to be crossed, and Candidate C will receive matching funds. One can even see how this situation would allow the publicly funded candidate to spend *more* than the traditionally funded candidates, particularly if the threshold is crossed late in the campaign and the traditionally funded candidates do not realize that their aggregated spending has surpassed the threshold amount. The same is true in the instance of a non-candidate organization, such as New Mexico Turn Around, whose concern about triggering funds to a candidate's opponent causes them to not make their own expenditures, even though such expenditures are presumptively not corrupting. *See Davis,* 128 S. Ct. at 2771 (*quoting Buckley,* 424 U.S. at 52-53). Such an effect does little to minimize corruption or its appearance while significantly burdening those who desire to make their own expenditures during the campaign.

III. Plaintiff Will Be Irreparably Harmed if An Injunction is Not Granted.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury . . . ." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The loss of First Amendment

freedoms is an irreparable injury. Plaintiff has demonstrated that the matching funds provisions of the OEEC violates its First Amendment rights and causes the loss of their First Amendment rights. Thus, without an injunction, Plaintiff will suffer the continuing irreparable injury to its First Amendment rights, and meet the second requirement for the issuance of a preliminary injunction.

IV. The Balance of Hardships Favors Granting Plaintiff a Preliminary Injunction.

As set forth above, the loss of First Amendment rights is an irreparable injury; Plaintiff's harm thus outweighs any potential non-irreparable injury suffered by the City. *See Elrod*, 427 U.S. at 373. Although a preliminary injunction would result in those candidates who are currently participating in public financing of their campaigns to be enjoined from such participation, the preliminary injunction would also protect the First Amendment rights of those candidates who have not chosen to participate, as well as Albuquerque voters, who will be able to fully participate in upcoming elections.

V. The Public Interest Will Be Served by Granting a Preliminary Injunction.

In the case before this Court, there simply is no interest—strong or otherwise—which can justify the challenged laws. Enjoining the offending conduct is the only way to overcome their pernicious effects. Thus, an injunction is in the public interest and this Court should grant it.

CONCLUSION

For the foregoing reasons, a preliminary injunction should issue after a proper hearing. Because of the complex constitutional issues involved here, Plaintiff requests oral argument.

Dated: June 17, 2011

Respectfully submitted,

/s/ Brant Lillywhite

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