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A Primer on Governmental Accommodation of Religion

I

Polls consistently show that nearly nine out of 10 Americans say they are religious or spiritual. Along with a substantial Christian majority, our religious landscape reflects a plethora of religious traditions. Indeed, the United States is a very religious and religiously diverse nation, and our diversity is ever-increasing. According to a recent Pew Forum report, the United States has experienced a drastic demographic change in its religious population over the past three decades. Since 1974, those who identify themselves as neither Christian nor Jewish, combined with those who claim no religious affiliation, have increased from just over seven percent to more than 20 percent of the population.

We should applaud and celebrate the growing numbers able to enjoy America's promise of religious liberty. This amazing religiosity and plush pluralism, however, are accompanied by new constitutional, political, and cultural challenges in the area of church-state relations. New types of disputes constantly emerge as we seek to balance the majoritarian ethos of our democracy with the counter-majoritarian mandate of the

First Amendment and as we grapple with the tension between the religious rights of some and the civil rights of others.

Day by day, the popular media are replete with reports of disputes over the propriety of religious accommodation. For example, many public universities, responding to requests from Muslim students and employees, have installed footbaths in public restrooms. Others schools have set aside space at specific times during the day for prayer according to certain Muslim customs, such as the separation of men and women, if they wish to remain in the room. Hundreds of parents in Massachusetts have refused some state-mandated vaccinations for their children based on religious objections to these procedures. The California Supreme Court will soon hear arguments in a case in which a doctor is refusing to prescribe fertility drugs to a lesbian patient, raising the question of the balance between the free exercise rights of the doctors and the rights of patients to receive treatment without discrimination. A recent New York state law requiring employers with group insurance policies that cover prescription drugs to cover contraceptive medication has been met with resistance by religious groups. The free exercise rights of prisoners continues to be a front-burner issue. A federal appeals court in Pennsylvania is being asked to decide whether a department of corrections' limitation on the number of books an inmate may possess in his cell at one time

substantially burdens the inmate's religion that requires members of the Children of the Sun Church to read four different Afro-centric books per day.

For some, these accommodations represent good faith attempts to embrace diversity, while others see them as a dangerous preference of one faith over others. Critics also argue that free exercise concerns should not trump the government's interest in public safety.

How will the courts, politicians, and the culture at large address these kinds of questions? When does an effort to accommodate the exercise of religion become an establishment of religion? When does recognizing the free exercise rights of citizens come at the expense of third parties and the larger public good?

Responding to these and similar questions, my aim in this essay is to affirm the importance of, while acknowledging the limitations on, religious accommodation. I outline three types of accommodation – mandatory, permissible, and impermissible – a typology originally coined by Professor Lawrence Tribe of Harvard University. I then discuss two recent U. S. Supreme Court cases that bear on the propriety of religious accommodation and free exercise of religion generally. I next offer what I call the "Ten Commandments of Religious Accommodation," to assist legislators and other

government officials in crafting and implementing exemptions that will pass political and constitutional muster. I conclude by noting three implications of the widespread granting of religious exemptions from governmental regulation.

II.

We begin with the basics. Both of the First Amendment's religion clauses – No Establishment and Free Exercise – are essential to ensuring religious liberty. Just as the religion clauses often require government to impose constraints on state-sponsored religion, they also mandate, or at least allow, government to grant concessions to fully protect the exercise of religion. A proper understanding of the institutional and functional separation of church and state, therefore, requires government to accommodate religion but without advancing it; protect religion but without promoting it; lift burdens on the exercise of religion but without extending it an impermissible benefit.

A. Mandatory Exemptions

Accommodation may be required to remove government-imposed burdens on the exercise of religion. These governmental exemptions from regulation and laws are usually dispensed by the courts when the burden violates the Free Exercise Clause.

Sometimes they are afforded by legislatures when they incorporate a constitutional standard into a statutory framework, such as the Religious Freedom Restoration Act (1993) and the Religious Land Use and Institutionalized Persons Act (2000).

Along with the companion Establishment Clause, the Free Exercise Clause ensures religious liberty – often called our "first freedom." The religion clauses stand as testimony to our founders' belief that religious liberty is best protected when government seeks neither to advance nor to inhibit religion. Although government may restrict religion under certain circumstances, this should be the exception and not the rule. Accordingly, the U.S. Supreme Court historically, and certainly from 1963 through 1990, required government to show a compelling interest (e.g., an important public health, safety, or welfare concern) before it would be permitted to burden the exercise of religion, and then it could do so only if it has selected the least restrictive means available.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court accommodated the religious practice of a Seventh-day Adventist who, because she refused to work on her Sabbath, was denied unemployment benefits under South Carolina law. The Court found a clear, though indirect, burden on Sherbert's exercise of religion. In response to the charge that unemployment compensation was merely a "privilege," the Court wrote: "to condition

the availability of benefits on this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406**.** Finding no compelling state interest sufficient to justify the negation of that constitutional right, the Court concluded that an accommodation would not establish religion, because the exemption "reflects nothing more than the governmental obligation of governmental neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Id.* at 409.

Nearly a decade later, in a case involving the Old Order Amish, the Court continued in the same vein. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court granted an exemption to Amish children from compulsory education laws when it was demonstrated that requiring them to attend school past the eighth grade would violate the fundamental tenets of the Amish's religion. The Court wrote:

> [A] State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interests of parents with respect to the religious upbringing of their children . . . ." *Id.* at 214.

The Court concluded, based on the record before it, that despite the state's strong interest in universal education, it must defer to the accommodation of the conscience of the Amish parents and students.

Thus, strict scrutiny, if not absolute protection, was the standard that guided the Court's enforcement of the Free Exercise Clause for nearly three decades.

This way of interpreting the Free Exercise Clause changed dramatically in 1990. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court rejected the compelling interest/least restrictive means test in most free exercise cases. Under *Smith*, a facially neutral and generally applicable law does not receive strict scrutiny, even if it substantially burdens a claimant's exercise of religion. The compelling interest/least restrictive means test survives only if: (1) religion is targeted for discriminatory treatment, (2) the free exercise claim is combined with another fundamental constitutional right, or (3) the state's otherwise generally applicable policy involves making "individualized governmental assessment[s]." Writing that robust protection for the exercise of religion is a "luxury" that would "court anarchy," a five-justice majority concluded that it was the province of the legislature, not the judiciary, to grant exemptions based on religion.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993. RFRA restored strict scrutiny to the law of free exercise. Rather than legislating piecemeal, Congress chose to protect religious liberty across the board and again required government — federal, state, and local — to show a compelling interest before substantially burdening religious practice.

In 1997 the Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), declared RFRA unconstitutional when applied to state and local governments. In an opinion written by Justice Anthony Kennedy, a majority of six justices ruled that Congress violated principles of federalism by requiring states to comply with RFRA. The Court reasoned that Section 5 of the Fourteenth Amendment did not give Congress *substantive* power to declare what the Constitution means, and while Congress has *remedial* power under that section to "enforce" other constitutional rights, RFRA transgressed that limited role.

Accordingly, although RFRA continued to require the federal government to remove burdens on the exercise of religion, meaningful federal protection against *state* infringement was virtually eliminated. In response, many states passed their own Religious Freedom Acts that restored the compelling interest test as a matter of state law, and Congress passed the Religious Land Use and Institutionalized Persons Act

(2000) to require strict scrutiny in claims concerning land use and ones brought by prisoners.

Another area of church-state jurisprudence that involves the mandatory obligation to accommodate involves the church autonomy doctrine. This accommodation involves the refusal of the state, usually through the court systems, to decide essential internal disputes within a religious organization and to purport to second-guess decisions in matters of doctrine, governance, polity, and administration.

Typically, this rule of judicial deference involves the refusal to take sides in church schisms, adjudicate property disputes, or decide employment and labor issues unless the decision can be made entirely on basis of "neutral principles of law." For example, in a church dispute, a court will not decide which faction is right or who gets the property. Rather, it will defer to the highest judicatory in a hierarchical church and to the majority vote in a church with a congregational polity. Civil rights laws and other nondiscrimination statutes generally are not applied to a religious body's decisions concerning its clergy. This "ministerial exemption" serves the purpose of preventing the state, through the court system, from becoming involved in theological and spiritual issues concerning the calling, supervision, and firing of ministers. Similarly, the courts have interpreted the National Labor Relations Act narrowly to make it exceedingly

difficult to unionize teachers at religiously affiliated colleges and universities. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

Unlike the exemptions required by the *Sherbert*/*Yoder*/RFRA standard, accommodation under the church autonomy doctrine usually does not require the removal of a specific government-imposed burden, and the shield of non-interference typically cannot be breached by showing a compelling governmental interest.

In sum, all of these types of accommodations are examples of governmental regulation that would violate one's free exercise and autonomy rights. When that happens, the courts, and sometimes legislatures, generally must provide an exemption from otherwise applicable laws.

B. Permissible Exemptions

Other cases involve situations where accommodation may not be required but, for policy reasons, a legislature may decide to exempt religion anyway. These permissible accommodations will lift some kind of governmental impediment to religious practice, even though the burden on religious exercise may not be substantial enough to trigger a finding of a constitutional violation.

While granting mandatory exemptions is a relatively recent development in a law of free exercise, permissible legislative exemptions preceded the Bill of Rights and have roots in Colonial times. Judge Michael McConnell, in his landmark Harvard Law Review article on the origins of free exercise identifies early controversies involving the taking of oaths, military conscription, religious assessments and compelled tithes, and the removing of hats in court.[1] Colonial legislative bodies often accommodated requests for exemptions in these areas, even though there was no constitutionally grounded mandate requiring it. Thus, even before the First Amendment existed, legislative bodies in the colonies were impelled by respect for the rights of conscience and the principle of religious liberty to grant exemptions to otherwise generally applicable obligations and requirements.

Today, examples of these permissible accommodation abound. Indeed, Professor Douglas Laycock estimates, based on a computerized search technique performed by James Ryan, that there were some 2,000 religious exemptions in federal and state law in 1992.[2]

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[1] Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990).

[2] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1837(2006).

Perhaps the most obvious and pervasive permissible accommodation involves tax exemption. Religious organizations, along with secular charities, are generally exempt from federal income tax, local property tax, and most other forms of taxation. The Supreme Court, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), ruled that property tax exemptions for churches, while not constitutionally required, were permissible, at least where the same exemption is given to other, similarly situated nonprofit entities, secular and sacred alike. In this case, the Court famously declared:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. *Id*. at 669.

The Court justified its decision on the basis of historical precedent, the avoidance of entanglement between church and state that taxation would occasion, and the broad category of non-religious charities that are afforded the same benefit.

Within the general area of taxation, other legislative accommodations have been made, such as the ministerial housing allowance, an exemption from annual reporting

requirements, a presumption of tax exempt status for churches, and special protection from invasive governmental audits.

Another example of permissible accommodation involves an exemption from the Civil Rights Act of 1964 to allow religious organizations to discriminate on the basis of religion in hiring, even with respect to non-ministerial personnel. That is, while the ability to discriminate on any basis in hiring of ministers is generally viewed as constitutionally required, discrimination on the basis of religion with respect to all other employees is at least constitutionally permitted.

This exemption from the nondiscrimination provisions in Title VII was recognized in *Bishop v. Amos,* 483 U.S. 327 (1987), where the Supreme Court approved a religious organization's right to fire a of gymnasium janitor for religious reasons. Citing previous precedent, the Court declared such legislative exception did not establish religion:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause…. It is well established, too, that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. *Id.* at 334 (internal quotations marks and citations omitted).

The Court in *Walz* justified its decision, in part, on the fact that the exemption included secular entities. *Amos*, however, stands for the proposition that religion-specific accommodations can be appropriate. The Court wrote:

> Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities. *Id.* at 338.

Other religion-specific accommodations can be seen in "release time" programs in the public schools. These involve the excusing of willing students to attend off-campus religious instruction during the school day. Although not constitutionally required, the Court, in *Zorach v. Clauson* 343 U.S. 306 (1952), ruled that it was permissible for the public schools to provide that opportunity. The Court wrote:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *Id*. at 313-14.

Finally, the Court has held that it is constitutionally permissible to aid religious education in primary and secondary schools in the form of vouchers. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). States may provide financial aid for ministerial

students in college or seminary, even though they are not required by the Free Exercise Clause to make such aid available. *Witters v. Washington Department of Services for* the *Blind*, 474 U.S. 481 (1986); *Locke v. Davey*, 540 U.S. 712 (2004).

Although the array of mandatory exemptions is somewhat limited, there are numerous permissible legislative accommodations that have been and can be made. Some of these, as the next section will indicate, go too far.

C. Impermissible Exemptions

Sometimes an accommodation is neither required nor permitted. These involve ones that advance religion in violation of the Establishment Clause. The Court has outlined several effects that will render otherwise reasonable accommodation impermissible.

First, if the exemption is cast in absolutist terms and unduly burdens the right of third parties, the Court will condemn the exemption. In the *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court struck down a Connecticut law that *required* employers to grant leave to workers upon request for religious observance. Unlike in Title VII of the Civil Rights Act of 1964 (which the Court in *Bishop v. Amos* upheld as a proper

accommodation) the Connecticut law did not allow balancing of competing interests. The Court wrote:

> The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers. The statute arms Sabbath observers with an absolute and unqualified right not work on whatever day they designate as their Sabbath. *Id.* at 708-709.

Second, the Court will sometimes strike down an exemption that is accorded only to one particular denomination or religious tradition. In *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687 (1994) the Court struck down a New York law creating a special school district for a group of Satmar Hasidim whose boundaries were co-terminus with the boundary lines of the city. The Court recognized that "[b]ecause the religious community . . . did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one . . . ." *Id.* at 703. Along the same lines, the Court, in *Larson v. Valente,* 456 U.S. 228 (1982), struck down a special charitable solicitation law that exempted religious organizations but targeted one disfavored religious group by effectively removing them from the exemption. The Court acknowledged, as it has on many other occasions, that

"[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244.

Third, the Court will disapprove an exemption that delegates governmental power and authority to a religious organization. In *Larkin v. Grendel's Den,* 459 U.S. 116 (1982), the Court struck down a Massachusetts law that banned the sale of alcohol within 500 feet of a school or church, if the church objected. The Court recognized that the law effectively gave a religious organization unlimited veto power that was not in any way limited by state regulation or standards. This "fusion of governmental and religious functions" caused the Court to rule that excessive entanglement between the two rendered the purported exemption a violation of the Establishment Clause. And, in *Kiryas Joel v. Grumet*, *supra*, a plurality of the Court, relying on *Larkin*, invalidated the specially constructed school district because "a State may not delegate its civic authority to a group chosen according to a religious criterion." *Board of Education of Kiryas Joel,* 512 U.S. at 698.

Finally, the Court has invalidated an exemption from taxation, which, unlike in *Walz*, was granted *solely* for religious publications. In *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1 (1989), a plurality of the Court ruled that otherwise reasonable taxation did not amount to a burden (which a religion-specific exemption might be able to remove) and that the

cost of not taxing religious publications fell on and burdened other taxpayers. A concurring opinion further relied on the fact that the purported exemption amounted to a content-based discrimination on speech.

Thus, otherwise permissible accommodations will be invalidated when they offend the Establishment Clause in ways outlined in these cases.

III

Two cases recently decided by the Supreme Court involve the permissibility and scope of federal legislative accommodation. Both were unanimously decided and both indicate a willingness of the present Court to look favorably upon legislative accommodations, if not constitutionally required exemptions, under the religion clauses.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), a unanimous Court upheld the constitutionality of Section 3 the Religious Land Use and Institutionalized Persons Act (2000), accommodating the free exercise needs of prisoners. Justice Ruth Bader Ginsburg, delivering the opinion of the Court, acknowledged that Section 3 of RLUIPA,

"does not, on its face, exceed the limits of permissible government accommodation of religious practices." *Id*. at 714.

The Court noted that RLUIPA, as distinguished from RFRA, was far less sweeping and that Congress, after three years of hearings, tied its jurisdictional authority to the spending and commerce clauses of the Constitution.

After touting the importance of both religion clauses, the Court acknowledged the long-standing judicial aphorism that "there is room for play in the joints" between the two and held that Section 3 of RLUIPA "fits within the corridor between the Religion Clauses: On its face the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Id*. at 720. This flexibility in the First Amendment "allow[s] the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause," though Justice Ginsburg cautioned that "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Id*. at 713-14 (internal quotation marks omitted).

The Court noted that RLUIPA, unlike the Connecticut law in *Caldor,* did not extend an absolute and unqualified right and that it would not be applied in an inappropriate way, stating that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." Id. at 722. The Court further observed that, contrary to *Kiryas Joel*, there was no evidence that RLUIPA would "differentiate among bona fide faiths." Id. at 723. Finally, the Court also acknowledged the propriety of religion-specific accommodations, citing *Amos*. The Court wrote that "religious accommodations . . . need not come packaged with benefits to secular entities." *Id*. at 724 (internal quotation marks omitted).

In *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S.Ct. 1211 (2006), the Court expansively interpreted RFRA as applied to the federal government. In a unanimous opinion written by Chief Justice John Roberts, noting that RFRA adopted the compelling interest test from *Sherbert* and *Yoder*, the Court required the government to apply that standard seriously and with reference to the particular accommodation sought in a given case. The Court ruled that the federal government's interest in fighting the war on drugs and its desire to follow a fair uniform standard would not justify its refusal to accommodate the need of the religious claimants to ingest *hoasca*, a

mildly hallucinogenic and regulated drug under the Controlled Substances Act, as a part of its religious worship. (Justice Samuel Alito took no part in the decision.)

The Court did not ignore the difficulty that courts may face in interpreting and applying RFRA. But it observed that Congress "has determined that the courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." *Id.* at 1225.

Accordingly, both of these cases reveal a unanimous Court speaking positively in favor of permissible accommodations, upholding and generously applying the two most far-reaching religious liberty statutes adopted by Congress in the past 15 years. Moreover, the fact that Chief Justice Roberts authored *Gonzales,* his first church-state opinion, signals the prospect of leadership on the Court that favors the permissibility of legislative accommodations.

IV

This discussion of the history and current interpretation of the religion clauses and statues accommodating religion can be summarized with what I call the "10 Commandments of Religious Accommodation." I first learned these from my former mentor and colleague, Oliver S. Thomas, and I am indebted to him for these words of

admonition, as well as my broader understanding of the need for accommodation. I hope that these will assist those who seek accommodation, as well as government officials and legislators, in crafting and interpreting exemptions in ways that pass constitutional muster and are seen as good policy in the political arena.

Thou shalt…

1. Include in the exemption similarly situated, non-religious entities where possible. (*Walz*)
2. Avoid sect-specific language, even if only one religious tradition appears to benefit from the accommodation. (*Grumet*, *Larson*)
3. Steer clear of delegating governmental authority to religious bodies. (*Grumet*, *Larkin*)
4. Make sure that you are lifting state-imposed burdens on religious exercise. (*Amos*)
5. Beware of creating unreasonable or unfair burdens on third parties who do not benefit from the accommodation. (*Estate of Caldor*)
6. Make sure a palpable government burden is being lifted when you provide what could be deemed an indirect financial subsidy. (*Texas Monthly*)
7. Adopt existing categories with which courts are familiar. (i.e., "churches, integrated auxiliaries, and conventions and associations of churches" used in many tax-related exemptions.)

8. Think through whether the exemption is needed before you go after one. (It is foolhardy to squander political capital unless the exemption is really called for.)
9. Suggest that legislative bodies conduct hearings to make a record to create legislative history supporting the need for the exemption. (*Boerne*)
10. Write concisely, and use broad language. (If you're too specific you may be deemed to have left something out.)

V

This primer on the law of free exercise and the circumstances under which religion may or must be accommodated leads to at least three conclusions.

First, the propriety of accommodation under the religion clauses and the willingness of our governmental institutions to fashion religious exemptions throughout our legal system belies the oft-heard cries of "a war on Christianity" or the suggestion that religious persons are being persecuted in this country. Such politically inspired whining simply does not stand up to scrutiny and diverts attention from the many places in the world where persecution exists. It summarily redefines real persecution and demeans the suffering endured by many around the world for the sake of conscience. We do not always get the church-state balance right in this country. Our history reveals instances of intolerance, insensitivity and, yes, sometimes the hand of

persecution of religious minorities. However, our system's obvious willingness to accommodate religion in our laws and culture has created a milieu in which religion and religious pluralism can flourish to a degree that is envied by the rest of the world.

Second, legitimate Establishment Clause concerns and the rights of third parties must be honored and respected. A robust understanding of the Establishment Clause is at least as important to ensuring religious liberty as an expansive view of the Free Exercise Clause. Indeed, members of the modern Court who best champion religious liberty – i.e., William Brennen, Harry Blackmun, Thurgood Marshall, Sandra Day O'Connor, and David Souter – follow a bilateral church-state jurisprudence that takes both clauses seriously. We should, too.

Third, as critical as accommodation is to ensuring religious freedom, it is important that religiously based exemptions not be pressed too far. Persons of faith should be as solicitous of the civil rights of unbelievers as they want others to be of their religious rights. The old saw that "pigs get fat but hogs get slaughtered" is apt here. Attempts on the part of some to overreach could prompt a political or juridical backlash and may

well usher in an atmosphere where even needed and reasonable accommodations may not be made available. In that event, the loser would be religious liberty for all.

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