

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE STATE SPORTSMEN’S
ASSOCIATION; BRIDGEVILLE RIFLE &
PISTOL CLUB, LTD.; and JOHN R.
SYLVESTER,

Plaintiffs,

v.

SHAWN M. GAVIN, in his official capacity
as Secretary of the Delaware Department of
Natural Resources and Environmental
Control; DELAWARE DEPARTMENT OF
NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL;
MICHAEL SCUSE, in his official capacity as
Secretary of the Delaware Department of
Agriculture; and DELAWARE
DEPARTMENT OF AGRICULTURE,

Defendants.

C.A. No. _____

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs, Delaware State Sportsmen’s Association; Bridgeville Rifle & Pistol Club, Ltd.; and John R. Sylvester, (collectively referred to as “Plaintiffs”), by and through their undersigned counsel, hereby file this Complaint for Declaratory Relief against Defendants Shawn M. Gavin, in his capacity as Secretary of the Delaware Department of Natural Resources and Environmental Control; Delaware Department of Natural Resources and Environmental Control (“DNREC”); Michael Scuse, in his capacity as Secretary of the Delaware Department of Agriculture; and

Delaware Department of Agriculture (“DOA”) (collectively referred to herein as “Defendants”), and assert the following:

Parties

1. Plaintiff Delaware State Sportsmen’s Association (“DSSA”) is a statewide private organization. The DSSA is the official Delaware state affiliate of the National Rifle Association of America and has a mailing address in Lincoln, Delaware.

2. Plaintiff Bridgeville Rifle & Pistol Club, Ltd. (“Bridgeville”) is a private organization based in Bridgeville, Delaware. Bridgeville is a constituent “Club Member” of the Delaware State Sportsmen’s Association.

3. Plaintiff John R. Sylvester is a member of Bridgeville.

4. Defendant Michael Scuse is Secretary of the DOA. The office of the Secretary of the DOA is located at 2320 South DuPont Highway, Dover, Delaware 19901.

5. Shawn M. Gavin is the Secretary of DNREC. The office of the Secretary of DNREC is located at 89 Kings Highway, Dover, Delaware 19901.

6. Defendant DNREC is an agency of the State of Delaware, established by 29 *Del. C.* § 8001, and which derives its powers from, *inter alia*, Title 7, Chapter 60 of the Delaware Code.

7. Defendant DOA is an agency of the State of Delaware that was established pursuant to 29 *Del. C.* § 8101.

Details about Plaintiffs

8. The DSSA is an organization that promotes and protects the interests of gun owners in and around Delaware. Many DSSA members are licensed to carry concealed deadly weapons pursuant to 11 *Del. C.* § 1441 and/or § 1441A, and also among its members are competitive shooters, casual recreational shooters, hunters, collectors and persons with an interest in personal and home protection.

9. Bridgeville conducts rifle and pistol sporting competitions, and those who participate often seek to use the facilities of DNREC and DOA (together “the Agencies”), such as camping areas at state parks and lodges at state forests. However, they are prohibited from using DNREC camping areas and DOA lodgings and other facilities of the Agencies while possessing, carrying or transporting those firearms that they will be using in the competition.

10. Plaintiff John R. Sylvester participates in rifle shooting competitions and but for Defendants’ regulations would avail himself of facilities at Trapp Pond State Park and similar facilities at state forests or state parks.

Applicable Law

11. Article I, Section 20 of the Constitution of the State of Delaware (“Section 20”) provides: “[a] person has the right to keep and bear arms for the

defense of self, family, home and State, and for hunting and recreational use.” The right to keep arms and the right to bear arms are two distinct rights.

12. The Second Amendment to the United States Constitution provides that: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”

13. Two decisions of the United States Supreme Court clarified that the Second Amendment codifies a personal right to possess and carry arms for defense of oneself and one’s home. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (applying Second Amendment to the states).

14. Two Delaware Supreme Court decisions recently clarified that, by its express terms, Section 20 recognizes a right to bear arms outside of the home. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 636 (Del. 2017) and *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 665 (Del. 2014). Specifically, the unanimous *en banc* Court explained in *Doe* regarding Section 20, that: “the Delaware provision is intentionally broader than the Second Amendment and protects the right to bear arms outside the home, including for hunting and recreation. Section 20 specifically provides for the defense of self and family *in addition to* the home.” *Id.* (emphasis in original).

15. In *Bridgeville*, the Delaware Supreme Court noted with approval a recent federal Court of Appeals decision that applied *Heller* and *McDonald* in interpreting the Second Amendment to extend the right of self-defense outside the home. 176 A.3d at 664, n. 146 (citing *Wrenn v. District of Columbia*, 864 F.3d 650, 671, n.5 (D.C. Cir. 2017)).

16. The Delaware General Assembly has enacted a comprehensive regulatory framework governing the use and possession of firearms, and those legislative restrictions on the referenced constitutional rights are not at issue in this litigation.

17. For example, the General Assembly has enacted statutes governing persons who may carry concealed deadly weapons within the State's borders. See 11 *Del. C.* §§ 1441; 1441A; and 1441B. Section 1441 enumerates the steps to be taken by persons wishing to be licensed to carry concealed deadly weapons. Section 1441A allows qualified law enforcement officers to carry concealed firearms. Section 1441B allows qualified retired law enforcement officers to carry concealed firearms.

18. Within Title 11 of the Delaware Code, the Delaware General Assembly has also established an extensive framework of restrictions on the possession of firearms that provide for criminal penalties. The General Assembly has imposed limitation such as: restricting sale, use and possession of sawed-off shotguns and

machine guns (11 *Del. C.* §1444); prohibiting sale or transfer of a firearm to a minor (11 *Del. C.* § 1445); criminalizing possession of a firearm during the commission of a felony (11 *Del. C.* §§ 1447, 1447A); prohibiting certain persons from owning, using or purchasing firearms (11 *Del. C.* § 1448); requiring a criminal background check prior to the purchase or sale of a firearm (11 *Del. C.* § 1448A); criminalizing the act of giving a firearm to a prohibited person or engaging in a sale or purchase of a firearm on behalf of a person not legally allowed to sell or purchase firearms (11 *Del. C.* §§ 1454, 1455); and criminalizing unlawfully permitting a minor access to a firearm (11 *Del. C.* § 1456). None of these restrictions imposed by the General Assembly are at issue in this case.

19. The General Assembly has only identified very few locations in Delaware where persons cannot lawfully possess or carry firearms.

20. The General Assembly has placed no restrictions on the lawful possession of firearms within Delaware state parks or state forests.¹

¹ The General Assembly gave municipal governments, by comparison, at 22 *Del. C.* § 111, the limited and narrowly circumscribed power to adopt ordinances regulating the possession of firearms, ammunition, components of firearms, or explosives in police stations and municipal buildings. Section 111, however, specifically states that “[a]n ordinance adopted by a municipal government shall not prevent the following in municipal buildings or police stations: ... (6) carrying firearms and ammunition by persons who hold a valid license pursuant to either § 1441 or § 1441A of Title 11 of this Code so long as the firearm remains concealed except for inadvertent display or for self-defense or defense of others” The General Assembly specifically excluded from the allowable limitations in § 111 those

21. Defendants recently finalized regulations forbidding the lawful use and possession of firearms, as set forth below, which are inconsistent with and preempted by the comprehensive regulatory scheme enacted by the Delaware General Assembly, and they do not pass muster under the Delaware Constitution or the United States Constitution.

Unlawful Regulations at Issue

DNREC Regulations

22. In response to the recent Supreme Court decision in *Bridgeville*, which invalidated prior DNREC regulations prohibiting firearms in state parks, DNREC issued new regulations effective on May 11, 2018, which amended 7 DE Admin. Code 9201 at Section 21.1. They provide as follows:

21.1 It shall be unlawful to display, possess or discharge firearms of any description, air rifles, B.B. guns, sling shots, or archery equipment within designated areas administered by the Division, except with prior written approval of the Director, or as set forth below.

21.1.1 Designated areas shall include park offices, visitor centers, nature centers, bathhouses, restaurants and snack bars, stadiums and facilities while used for sporting events, concerts, and festivals, museums, zoos, stables, educational facilities, dormitories, playgrounds, camping areas, swimming pools, guarded beaches, and water parks, and shall be identified by appropriate signage.

persons properly authorized to carry concealed firearms pursuant to 11 *Del. C.* §§ 1441 and 1441A.

- 21.1.2 The Director may grant written approval on a daily basis for the possession of firearms within designated areas, upon written application showing good cause related to self-defense or the defense of family, and due regard for the safety of others within the designated areas.

Active duty and qualified retired law enforcement officers may possess firearms within areas administered by the Division, including designated areas, provided that proper and current credentials shall be produced upon request.

- 21.1.3 Delaware residents holding an active current permit to carry a concealed deadly weapon may carry a firearm within areas administered by the Division, including designated areas, provided that the permit shall be produced upon request. Residents of other states holding an equivalent permit or license to carry a concealed firearm may be permitted to carry a concealed firearm at the discretion of the Director.

- 21.1.4 Firearms may be carried within areas administered by the Division, outside of designated areas, by any person not prohibited by 11 *Del.C.* §1448.

- 21.1.5 Law enforcement officers may limit the discharge of firearms and the use of other weapons within areas administered by the Division, in order to protect public safety and preserve the peace.

- 21.1.6 Any person possessing a firearm shall display identification upon request, sufficient to enable a law enforcement officer to undertake a background check.²

² It is noteworthy that firearms are permitted in the federally-regulated national parks in Delaware without the restrictions imposed by DNREC and DOA--despite the Second Amendment to the United States Constitution providing a more narrowly prescribed right to bear arms. *See* 36 C.F.R. § 2.4 and 54 U.S.C. § 104906 (b). *See Bridgeville*, 176 A.3d at n. 141.

Department of Agriculture Regulations

23. In response to the recent Delaware Supreme Court decision in *Bridgeville*, which invalidated prior DOA regulations banning firearms in state forests, the DOA issued new regulations effective on May 11, 2018, which amended 3 DE Admin. Code 402 at Section 8.8. They provide as follows:

8.8 Target shooting is prohibited. Firearms are allowed for legal hunting and are otherwise prohibited within designated safe areas on State Forest lands, except as set forth below.

8.8.1 Designated areas shall include State Forest Offices, education centers, and lodges, and shall be identified by appropriate signage.

8.8.2 Active duty and qualified retired law enforcement officers may possess firearms within areas administered by the Department, including designated areas, provided that proper and current credentials shall be produced upon request.

8.8.3 Delaware residents holding an active current permit to carry a concealed deadly weapon may carry a firearm within areas administered by the Department, including designated areas, provided that the permit shall be produced upon request. Residents of other states holding an equivalent permit or license to carry a concealed firearm may be permitted to carry a concealed firearm at the discretion of the Department.

8.8.4 Firearms may be carried within areas administered by the Department, outside of designated areas, by any person not prohibited by 11 *Del.C.* §1448.

8.8.5 Law enforcement officers may limit the discharge of firearms and the use of other weapons within areas

administered by the Department, in order to protect public safety and preserve the peace.

8.8.6 Any person possessing a firearm shall display identification upon request, sufficient to enable a law enforcement officer to undertake a background check.

General Challenges to New DNREC and DOA Regulations

24. The challenges in this suit to the quoted DNREC and DOA regulations are based on their conflict with both the Delaware Constitution and the United States Constitution, as well as for statutory reasons, as explained in more detail below.

25. The recent Delaware Supreme Court decision in *Bridgeville* invalidated prior firearms regulations of DNREC and DOA based on their incompatibility with the fundamental rights enshrined in Section 20 of the Delaware Constitution and also because the prior regulations exceeded the authority granted to the Agencies. That is, the prior regulations were outside of the authority granted to the Agencies by the legislature because the prior regulations were inconsistent with Section 20, and therefore violated 29 *Del. C.* § 8003(7) and 3 *Del. C.* § 101(3). *See Bridgeville*, 176 A.3d at 661.

26. The regulations quoted above, adopted by DNREC and DOA with an effective date of May 11, 2018 (the "Challenged Regulations"), suffer from some of the same legal infirmities found in the prior regulations invalidated in the *Bridgeville* decision. Although the Delaware Supreme Court in *Bridgeville* recognized that

certain “sensitive” areas, such as places where classes of schoolchildren gather, may be the subject of a lawful ban on firearms, part of the newly adopted Challenged Regulations ban firearms in areas that cannot be fairly labeled as “sensitive”, based on the opinion by the Delaware Supreme Court in *Bridgeville*. *See, e.g.*, 176 A.3d at 658-659.

27. The *Bridgeville* opinion describes government offices such as courthouses as sensitive because, for example, courthouses have limited entry with security provided at all times. By contrast, the thousands of acres of state parks and state forests are not controlled spaces, and have many unguarded entry points. The Challenged Regulations themselves acknowledge, regarding the areas regulated, that “there is no after-hours, night time or weekends security” so that “camping is at your own risk.” *See* 3 DE Admin. Code 402 at Section 7.5.

28. The *Bridgeville* decision noted that the First State National Historic Park, which includes 1,100 acres in New Castle County, permits lawful firearms with much fewer restrictions than those imposed on state parks, even though Section 20 grants more extensive rights to keep and bear arms than the Second Amendment-on which the much more lenient federal regulation of national parks is based. *See* 176 A.3d at n.141.

29. One of the false premises on which the Challenged Regulations are based is that without the Challenged Regulations, according to the Agencies, there

would be no restrictions on the use of firearms in state parks or state forests. To the contrary, the extensive existing comprehensive statutory scheme regulating firearms adopted by the General Assembly applies as much to the vast expanse of state parks and state forests as it does within the rest of the State of Delaware.³

30. The areas designated in the Challenged Regulations for prohibiting possession of firearms also suffer from vagueness regarding the specific boundaries that delineate the prohibited areas—a deficiency that cannot be cured by internal guidelines of the Agencies that are not part of the formal regulations.

³ See, e.g., 11 *Del. C.* § 1441 (allowing retired police officers to be specially licensed to carry a concealed weapon following retirement); 11 *Del. C.* §§ 1441A, 1441B (extending federal law found at 18 U.S.C. §§ 926B and 926C regarding retired law enforcement officers’ ability to carry concealed firearms); 11 *Del. C.* § 1442 (prohibiting a non-law enforcement officer from concealing any firearm without a license); 11 *Del. C.* § 1444 (prohibiting the possession of a firearm silencer, sawed-off shotgun, machine gun, or any other firearm or weapon adaptable for use as a machine gun); 11 *Del. C.* § 1448 (prohibiting the possession and purchase of deadly weapons by persons prohibited); 11 *Del. C.* § 1459 (prohibiting the possession of a weapon with an obliterated serial number); 11 *Del. C.* § 1460 (prohibiting possession of a firearm in a public place while under the influence); 11 *Del. C.* § 602 (prohibiting display of a firearm with the intent to place another in fear of imminent physical injury); 11 *Del. C.* § 603 (prohibiting guardians from allowing possession or purchase of a firearm by a juvenile); 7 *Del. C.* § 1707 (prohibiting the training of hunting dogs while carrying a firearm); 10 *Del. C.* §§ 2703, 2806 (regulating the possession of firearms by constables); 10 *Del. C.* § 9224 (requiring drug testing for Justice of the Peace employees permitted to carry firearms); 10 *Del. C.* § 1045 (allowing a court to order temporary relinquishment/ban on possession of firearms in connection with a protective order); 29 *Del. C.* § 9005 (requiring training for officers of Department of Services for Children, Youth and their Families who carry firearms at work).

31. The Delaware General Assembly has already imposed a wide range of restrictions on the possession and use of firearms, but has prohibited inferior governmental entities, such as the Agencies, from imposing additional restrictions. As the *Bridgeville* decision recognized: “It strains credulity to believe that the General Assembly intended to forbid, for example, elected officials in the historic City of New Castle from enacting firearm regulations, yet allow agency officials to ban firearms in the entirety of Redden State Forest, an area nearly five times larger.” 176 A.3d at 657.⁴

32. The Challenged Regulations also run afoul of the Plaintiffs’ rights under the Second Amendment, based on *Heller* and *McDonald*, as explained by several recent decisions of the United States Courts of Appeals. *See, e.g., Wrenn*, 864 F.3d at 671, n.5.

⁴ The Challenged Regulations go far beyond banning firearms in traditional “sensitive places.” The Delaware Supreme Court has previously held that some regulation of firearms could be constitutional in state-owned buildings where official business is being done. *Doe v. Wilmington Housing Auth.*, 888 A.3d 654, 668 (Del. 2014) (“Some regulation of possession of firearms on WHA property could pass intermediate scrutiny, for example prohibiting possession in offices where state employees work and state business is being done.”). Official state business is not conducted typically in bathhouses, restaurants and snack bars, museums, zoos, stables, group camping areas, swimming pools, guarded beaches, and water parks—all areas where the Challenged Regulations now ban firearms.

Specific Challenges to DNREC and DOA Regulations

33. The Challenged Regulations of both DNREC and DOA, by giving the Agencies the discretion to decide which permits from other states for carrying concealed deadly weapons will be recognized in Delaware, impermissibly extend the limited power of the Agencies by misappropriating the power of the Delaware Attorney General to determine which permits from other states for carrying concealed deadly weapons will be recognized in Delaware.⁵ *See* 11 *Del.C.* § 1441 (giving that power only to the Attorney General).

34. In addition, the Challenged Regulations of both DNREC and DOA impermissibly allow representatives of each agency to demand identification of any person, sufficient to perform a “background check”—without probable cause to make such a demand.⁶ *See* DNREC regulation at Section 21.1.6 and DOA regulation at Section 8.8.6.

Specific Challenges to DNREC Regulations Only

35. Moreover, the Challenged Regulations of DNREC purport to allow the Director to grant, in his sole discretion, a “day pass” to possess firearms. But the legislature has already enacted a comprehensive statutory scheme to regulate the

⁵ *See* DNREC regulation at Section 21.1.3, and DOA regulation at Section 8.8.3.

⁶ To be clear, the challenge in this complaint is focused on the improper prohibition against possession of a firearm in rented cabins, cottages, yurts, tents, lodges as well as privately-owned trailer campers—separate from the rights of those who may have a permit to carry a concealed weapon.

possession of firearms—which does not involve granting any discretion to DNREC officials to determine eligibility to exercise rights enshrined in Section 20 and in the Second Amendment. *See* DNREC regulation at Section 21.1.2.

36. The Challenged Regulations of DNREC prohibit firearms in “camping areas” and other “non-sensitive” areas in state parks.⁷ *See* DNREC regulation at Section 21.1.1. This aspect of the Challenged Regulations suffers from more than one infirmity. The reference to “camping areas” is overly broad and includes areas where one may park a trailer camper and sleep overnight, as well as areas where one may use a tent to sleep overnight. For example, at Cape Henlopen State Park, there is no demarcation line between camping areas for placing tents, and parking spaces for trailer campers--or between them and the adjacent cabins for rent. The website for state parks includes within its description of “campgrounds” (not camping areas), the following: “RV and Tent Camping;” “Cabins” and “Yurts.” *See* www.destateparks.com/camping/trap-pond/index.asp (last visited May 20, 2018). Those temporary living or sleeping accommodations become a temporary home for a family, and those persons should not be denied the right to self-defense as guaranteed by both Section 20 and the Second Amendment.⁸

⁷The DOA regulations do not prohibit firearms in camping areas in state forests.

⁸The DNREC regulations do not specifically refer to structures that are also available for overnight rental, such as yurts (living accommodations analogous to a tent) or cottages and cabins, but the areas where firearms are prohibited include the areas where these rental homes are located.

Specific Challenge to DOA Regulation Only

37. By including “lodges” as a prohibited area in Section 8.8.1 of its new regulations, the DOA has banned the possession of firearms in what serves as an overnight home for those persons and families who rent a lodge overnight. The Hunting Lodge at Redden State Forest, for example, is a large building that allows families to sleep there overnight. While denying these families their right to self-defense, DOA regulation at Section 7.5 warns these families that DOA does not provide security “after hours” or “at night time.” Such a prohibition on possessing firearms in one’s temporary home or temporary lodging violates the Second Amendment as well as Section 20, and the Delaware Supreme Court’s holdings in *Bridgeville* and *Doe*, in addition to the United States Supreme Court’s holdings in *Heller* and *McDonald*.

Harm Suffered

38. But for the Challenged Regulations prohibiting the lawful possession of firearms within many areas in Delaware state parks and state forests, Plaintiffs’ members would avail themselves of those facilities.

39. But for the Challenged Regulations prohibiting the lawful possession of firearms within many areas in Delaware state parks and state forests, Plaintiffs’ members would be able to enjoy state parks and state forests while exercising their rights to keep and bear firearms as guaranteed in Section 20, and the Second

Amendment, within the confines of the comprehensive statutory framework which the Challenged Regulations exceed.

Basis For Declaratory Relief

40. Plaintiffs are entitled to declaratory relief because the Challenged Regulations which restrict the lawful possession of firearms in Delaware state parks and in state forests beyond the existing comprehensive statutory framework: (i) violate the Second Amendment; (ii) violate Section 20; (iii) are preempted by existing Delaware law; and/or (iv) exceed the statutory scope of authority granted to Defendants by the Delaware General Assembly.

41. A deprivation of constitutional rights can constitute irreparable harm. *See Norfolk Southern Corp. v. Oberly*, 594 F. Supp. 514, 522 (D. Del. 1984).

42. Defendants are depriving Plaintiffs of their constitutional right to keep and bear arms both inside rented living spaces, and outside the home. These rights are recognized by the Delaware Supreme Court⁹ and described in Section 20, and in the Second Amendment as clarified by *Heller* and *McDonald*.

⁹ The rented public housing apartments and common areas in which the Delaware Supreme Court recognized the right to keep and bear arms in *Doe v. Wilmington Housing Authority*, *supra*, cost far less than the \$1,900 per week that one must pay to rent some cottages at Delaware Seashore State Park during the peak season. The cost to rent these cottages is even higher, in essence, because these families cannot possess firearms for their self-defense in these expensive rental homes. Thus, the complete cost includes the impact of a denial of fundamental rights.

43. Plaintiffs will be irreparably injured if the Challenged Regulations prohibiting the lawful possession of firearms in Delaware state parks and/or state forests are not invalidated. Plaintiffs have suffered and, without relief, will continue to suffer adverse effects including the deprivation of their constitutional rights, the threat of criminal penalties, and/or increased vulnerability to violent crime.

COUNT I

DECLARATORY RELIEF UNDER 10 DEL. C. § 6501

44. Plaintiffs incorporate by reference the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth at length herein.

45. A clear controversy exists between Plaintiffs and Defendants as to whether Defendants' regulations forbidding the possession of firearms within Delaware state parks and state forests are unlawful.

46. The controversy involves the rights or other legal relations of the Plaintiffs and this action is asserted among persons and entities who have an interest in contesting the claim, and have contested the claims.

47. The controversy is between parties whose interests are real and adverse, and the issues involved are ripe for judicial determination.

48. Plaintiffs seek a declaratory judgment that Defendants' regulations forbidding the lawful possession of firearms within Delaware state parks and state forests are unlawful (and therefore unenforceable) because they violate Section 20

and the Second Amendment; are preempted by existing Delaware law; and/or exceed the statutory scope of authority granted to Defendants.

49. A declaratory judgment is necessary and proper in order to determine whether the Defendants' regulations forbidding the lawful possession of firearms within Delaware state parks and state forests are unlawful.

WHEREFORE, Plaintiffs request that this Court:

1. Grant a declaratory judgment that the Challenged Regulations pertaining to the possession and/or carrying of firearms within Delaware state parks and state forests violate the Second Amendment to the United States Constitution; and Article I, § 20 Delaware of the Constitution of the State of Delaware; and are preempted by existing Delaware law; and/or exceed the statutory scope of authority granted to Defendants;

2. Issue a declaratory judgment prohibiting Defendants from enforcing the Challenged Regulations within Delaware state parks and state forests;

3. Award Plaintiffs relief as allowed by statute and common law;

4. Award Plaintiffs attorneys' fees and costs; and

5. Award such other and further relief as the Court deems just, proper, and

equitable, including costs, pre-judgment and post-judgment interest.

ECKERT SEAMANS CHERIN
& MELLOTT, LLC

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