No. 16-16321

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR POINT NURSERY; FOWLER PACKING COMPANY, INC.,

Plaintiffs - Appellants,

v.

WILLIAM B. GOULD, IV; GENEVIEVE SHIROMA;
CATHRYN RIVERA-HERNANDEZ; J. ANTONIO BARBOSA,

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable Lawrence J. O'Neill, District Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Agricultural and Labor Relations Board access regulation, Cal. Code Regs. tit. 8, § 20900(e), confiscates an easement from Cedar Point Nursery and Fowler Packing Company (collectively, "the Growers"), in violation of the Fourth and Fifth Amendments to the United States Constitution. Under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), government action that takes an easement without providing compensation is unconstitutional. *Id.* at 831. Unable to dispute *Nollan* on this point, the Board instead argues, without support, that the protections of the physical takings doctrine accrue only when the government takes easements of a certain kind. *See* Board Br. 18-19 (characterizing the proposed easement in *Nollan* as a classic right-of-way easement, and the one it took from the Growers as one that provides only "qualified access"). This distinction is unavailing. Many easements, including the one proposed in *Nollan*, provide only qualified access, but nonetheless violate the prohibition against physical takings, *see infra*, Arg. I.

The Board's response to the Growers' Fourth Amendment claim fares no better. The Board attempts to classify a regulation that authorizes union activists to invade the Growers' private property as a "minimal" interference with the Growers' property interests. The interference is substantial and continually threatened. The access regulation eliminates the Growers' right to exclude, which the Supreme Court has repeatedly characterized as a fundamental possessory right. *See infra*, Arg. III.

Moreover, while the Board asserts a vague interest in the access regulation generally, it provides no reason why its general interest is relevant to the Growers' employees. Further, in the 40 years since the access regulation's passage, technological advancements have created numerous alternative avenues for communication. Because there are significantly less-invasive means that accomplish the same regulatory interests, a warrantless seizure of the Growers' property is unreasonable under the Fourth Amendment. *See 4,432 Mastercases of Cigarettes*, 448 F.3d 1168, 1179 (9th Cir. 2006).

ARGUMENT

I

THE ACCESS REGULATION EFFECTS A *PER SE* TAKING OF THE GROWERS' PROPERTY

Whether a regulation of property effects a taking depends in part on whether the regulation causes a physical invasion or instead imposes solely a restriction on the use of property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-25 (2002). Contrary to the Board's assertions, Board Br. 2, the access regulation should be treated under the physical takings framework, because it authorizes third-party interlopers to invade private property, and permanently takes the Growers' right to exclude. *See Loretto v. Teleprompter Manhattan CATV Corp.*,

458 U.S. 419, 432 (1982). Accordingly, the regulation violates the Takings Clause because it fails to compensate the Growers for the taking.[1]

Nollan controls here. The proposed easement in *Nollan* would have granted access on private property for the benefit of a third party. *See Nollan*, 483 U.S. at 831. Similarly, the easement taken here is for the use of third-party union activists. In *Nollan*, as in this case, the easement was ostensibly established to further what the government viewed as an important public interest. *Id.* at 835 (reciting the Coastal Commission's goals of establishing an easement: "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches"). Yet the Supreme Court held that the proposed easement in *Nollan* would have violated the constitutional prohibition against uncompensated takings. *See id.* at 831. This Court should reach the same conclusion here.

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[1] This Court should decline the Board's invitation to adopt the 1976 California state court decision in *Agricultural Labor Relations Board v. Superior Court (Pandol & Sons)*, 546 P.2d 687 (Cal. 1976). "[F]ederal courts are not bound by state court decisions on matters of federal law." *Key v. Wise*, 629 F.2d 1049, 1058 (5th Cir. 1980) (citing *Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942)). Moreover, that decision is plainly out-of-step with current takings jurisprudence, *see, e.g.*, *Nollan*, 483 U.S. at 831, and badly miscalculates the burdens and benefits imposed by union activists on private property, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (under federal law, labor interests prevail over private property rights only in "the rare case" that employees cannot be reached "through the usual channels").

Unable to dispute *Nollan*'s central holding, the Board rests its arguments on superficial differences between the easement taken in *Nollan* and the easement taken in this case. The Board contends that the access regulation is distinguishable because it does not allow "permanent and continuous" access for "whatever reason." Board Br. 17 (citing ER 39). However, a permanent physical occupation is a sufficient, but not necessary, condition for a *per se* taking. After all, the easement in *Nollan* was objectionable not because any "particular individual [was] permitted to station himself permanently upon the premises" but because private property "may [be] continuously traversed," *Nollan*, 483 U.S. at 831-32. The Board offers no response to the Growers' point that the entire purpose of an access easement like the one here is so that unwelcome interlopers can get to some *other* place.[2] Growers' Opening Br. 17.

The Board's assertion that the access regulation is distinguishable from *Nollan* on the basis that it "provides only qualified access" is also wrong. *See* Board Br. at 17-18. Easements typically only provide qualified access. *See* Restatement (First) of Prop. ch. 39, intro. note (1944, Oct. 2016 Update). Permissible limitations to the scope

[2] The Supreme Court has *analogized* the grant of an easement to a permanent physical occupation, but that does not mean that an easement will be occupied by a third party at all times.

of an easement include time, place, and manner restrictions, like those in the access regulation and those in the easement in *Nollan*.[3] *See id.*

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court held that state law requiring a shopping mall to allow solicitors onto the property did not violate the Takings Clause. The Board disputes the fact that the shopping center's choice to be open to the public distinguishes *Pruneyard* from *Nollan*, in which the easement would have allowed for physical invasion on quintessentially private property. *See* Board Br. 18 n.5. But the Supreme Court recently reaffirmed that distinction in *Horne*, where it emphasized that *PruneYard* involved "an already publicly accessible shopping center" and, as a result, the "use of the property as a [public] shopping center" remained largely the same. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015). By contrast, the access regulation at issue here changes the nature of the Growers' private property, transforming it from a private, closed business into a public forum for union activists.

Nor does *Kaiser Aetna* help the Board. In *Kaiser Aetna*, the Supreme Court analogized a proposed government order requiring property owners to provide access

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[3] *See, e.g.*, *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 988 (Cal. 1972) (easement "for automobile parking during church hours for the benefit of the church"); *Rye v. Tahoe Truckee Sierra Disposal Co., Inc.*, 170 Cal. Rptr. 3d 275, 281 (Ct. App. 2013), *as modified on denial of reh'g* (Apr. 9, 2014), noting the difference between exclusive easements and non-exclusive easements, which do not give the easement owner the right to exclude everyone from the easement. *Id.* at 282.

to their property to a "servitude" or "easement." *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The Court noted that the "public right of access" in *Kaiser Aetna* resulted in a taking. *Id.* at 178, 180. Although *Kaiser Aetna* contains some discussion of the regulatory taking framework, subsequent cases have clarified that a *per se* rule is the proper framework by which to scrutinize government action that takes an easement on private property. *See, e.g.*, *Nollan*, 483 U.S. at 831.

Nor can *Loretto* be distinguished on the ground that "admission to the employer's property" in that case was not "bound by strict time, place, and manner limitations." Board Br.16. As discussed above, time, place, and manner restrictions are common features of easements, and the Fifth Amendment does not allow the government to evade the Takings Clause by limiting its own use of the property taken.

In addition, the limitations contained in the access regulation, which allows union activists to enter private property for three hours per day and 120 days per year, could hardly be called "strict." Under the Board's logic, the California Coastal Commission could have evaded the prohibition on uncompensated takings in *Nollan* merely by closing the access easement during the winter. "The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991), and *Otay Mesa Property, L.P. v. United States*, 670 F.3d 1358 (Fed. Cir. 2012), are illustrative. *See* Growers' Opening Br. 17-19. In *Otay Mesa*, the Federal Circuit determined that the imposition of an easement to "install, maintain, and service sensors" periodically on private property was a physical taking. 670 F.3d at 1365. The Board accuses the Growers of "mistakenly focus[ing] on how long the access regulation will be in operation," Board Br. 19, but that was exactly the Federal Circuit's focus in *Otay Mesa*. Although government agents were not permanently situated on Otay Mesa's Property, the easement was permanent in the sense that it gave "the government the right to 'redeploy' the sensors," 670 F.3d at 1368, just as the easement here gives union activists the right to return to the Growers' properties.

The Board suggests that under *Otay Mesa*, the takings inquiry should focus "on how long, and under what limits, union organizers may access the Growers' worksites." Board Br. 19. But, if anything, the easement in *Otay Mesa* was far more modest than the one granted by the access regulation. The easement in *Otay Mesa* allowed government agents to enter undeveloped land, for the limited purpose of installing, maintaining, and servicing sensors. 670 F.3d at 1361. The government exercised the right to install sensors only 14 times in over six and a half years, *id.*, and the lower court decision revealed that "[o]nly infrequent maintenance need[ed] to be performed on the sensors, primarily to change a battery, which lasts from six months

to two years. (Herrera, Tr. 814.)" *Otay Mesa Prop. L.P. v. United States*, 93 Fed. Cl. 476, 482 (2010), *vacated and remanded*, 670 F.3d 1358 (Fed. Cir. 2012). By contrast, union activists may enter the private property of agricultural producers statewide, a right which they used 62 times in 2015 alone. ER 116-19 (Compl. Exh. A). The Board fails to explain how a less intrusive easement violates the Takings Clause, while a more intrusive easement does not. In any event, the Takings Clause does not require a court to tally physical intrusions on private property; the transfer of an easement on quintessentially private property to a third party is analyzed under a *per se* rule. *See Nollan*, 483 U.S. at 831.

The Federal Circuit in *Hendler* reiterated that "*Kaiser Aetna* and *Nollan* would seem to leave little doubt that" repeated intrusions upon private property, "even though temporally intermittent, is not 'temporary.' It is a taking of the plaintiffs' right to exclude . . . ." *Hendler*, 952 F.2d at 1378. The Board's efforts to distinguish *Hendler* are unpersuasive. The Board mistakenly focuses on the Federal Circuit's discussion of whether the EPA order allowing the agency and the State of California to access plaintiffs' property constituted a regulatory taking. *Id.* at 1374-75. In fact, the Federal Circuit affirmed the lower court's unremarkable holding that the EPA order, without additional facts about how the Order was applied, did not meet the tests for a regulatory taking. The court noted that "subsequent events . . . might have had sufficient economic impact on the plaintiffs to constitute a regulatory taking." *Id.* at

1375. The *Hendler* court then discussed whether the government's actions violated the Takings Clause under the traditional physical occupation category. Contrary to the Board's contentions, Board Br. 18-19, the court characterized the government's actions as "placing wells on plaintiffs' property *and* engaging in other activities on the site." *Id.* (emphasis added). The Federal Circuit specifically noted the government's ability to drive "equipment upon plaintiffs' land for the purpose of installing and periodically servicing and obtaining information from the various wells it had located there." *Id.* at 1378. *Hendler* is thus consistent with Supreme Court precedent holding that the taking of an easement on private property is analyzed under the physical takings doctrine.

II

THE ACCESS REGULATION VIOLATES THE FOURTH AMENDMENT'S SEIZURE CLAUSE

A. The Access Regulation Authorizes Meaningful Interference with the Growers' Possessory Interests

Laws that facilitate "some meaningful interference with an individual's possessory interests in that property" implicate the Fourth Amendment's Seizure Clause. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The access regulation, by allowing union activists to invade private property, impedes the Growers' right to

exclude,[4] a right that the Supreme Court has repeatedly held to be "one of the most treasured" possessory rights. *Loretto*, 458 U.S. at 435. Contrary to the Board's contention, the right to exclude is an integral part of California common law. *See, e.g.*, *Allred v. Harris*, 14 Cal. App. 4th 1386, 1390 (1993) ("[T]he right to exclude persons is a fundamental aspect of private property ownership."). Indeed, the access regulation itself recognizes the need to balance "the right of unions to access and the *legitimate* property . . . interests of the employer." Cal Code Regs. tit. 8, § 20900(b) (emphasis added).[5]

The Board contends that, in addition to the right to exclude generally, the right to *exclude union organizers* must be created by state law. Board Br. 26. This contention reads too much into a footnote in *Thunder Basin Coal Co. v. Reich*, 510

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[4] Contrary to the Board's contentions, Board Br. 33, the fact that the access regulation interferes with the Growers' ability to operate their business through interruptions of the workday and loss of goodwill is relevant to the Fourth Amendment analysis. *Cf. Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) (Fourth Amendment violations that cause injury to business reputation are compensable). In any event, those injuries are additional manifestations created by the loss of a legitimate, settled property right: the right to exclude.

[5] The Board also asserts that in failing to respond to this argument in their opening brief, the Growers have "waived the right to rebut [it]." Board Br. 26 n.10. But the case cited by the Board for this alleged waiver, *Tri-Valley CAREs v. U.S. Dep't of Energy*, only held that arguments or claims of error *as to the decisions below* are deemed waived if they are not raised within the opening brief "in a sufficient manner to put the opposing party on notice." 671 F.3d 1113, 1130 (9th Cir. 2012). Neither *Tri-Valley CAREs*, nor any of the cases cited therein, require the opening brief to put the opposing party on notice of their own defenses, or to preemptively respond to those arguments.

U.S. 200, 217 n.21 (1994). *Thunder Basin* merely established that the right to exclude (whether union activists or other unwelcome visitors) emanates from state common law rather than legislative action.[6]

The Board also attempts to categorize that interference as "minimal." Board Br. 23. Not so. The access regulation grants the Union a right to invade the Growers' property—and prevents the Growers from exercising their common law property right to exclude—for up to three hours per day, and up to 120 days per year. Cal. Code Regs. tit. 8, § 20900(e)(1) & (3). In *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), the Fourth Circuit held that the government's refusal to correct a map that erroneously showed a public access trail cutting across privately owned land constituted a seizure. *Id.* at 481. The Board's attempts to distinguish *Presley* do not withstand scrutiny. The Board argues that the seizure in *Presley* was effected by "considerable invasions" unrestrained by "time, place, and manner" restrictions. Board Br. 24. This argument ignores that the government-distributed map in *Presley* did not contain restrictions for physical invasions on private property precisely because it did not authorize such invasions at all. 464 F.3d at 483. The property owner in *Presley* retained her right to call the police and eject trespassers at all times. *Id.*

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[6] The same footnote discussed *Lechmere*, where the Supreme Court held that the access regulation's federal analog, the National Labor Relations Act, "do[es] not authorize trespasses by nonemployee organizers," even under "'reasonable regulations' established by the Board." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

The access regulation, by contrast, explicitly grants union activists the right to invade private property. Cal. Code Regs. tit. 8, § 20900(e) (granting a right of access to the premises to union activists). Thus, the Growers may not resort to the police to remove union activists from their property. Indeed, the Growers face potential fines for any attempts to exclude union organizers, which is treated as an unfair labor practice. *Id.* § 20900(a).

The Board cannot evade the Fourth Amendment's protection against unreasonable seizures by enacting statutory protections that prohibit "disruptive" conduct on the Growers' property. *Id.* § 20900(e)(4)(c). Meaningful interference under the Fourth Amendment is not co-extensive with disruptive behavior under the Agricultural Labor Relations Act (ALRA). The statute allows an employer to seek sanctions for disruptive behavior, but it provides no remedy for other violations of a property owner's Fourth Amendment right.

Disruptive behavior is one of several reasons why the Growers wish to exclude union activists from their private property, but it is not the only reason. Similarly, a meaningful interference with one's possessory interests in property does not require an allegation that the owner's use of that property is in some way restricted, only that

the government has temporarily interfered with the rights of ownership.[7] *United States v. Gray*, 484 F.2d 352 (6th Cir. 1973) (seizure of property where rifles were removed from a closet to write down serial number and then returned). By sanctioning union activities on the Growers' private property, the Board creates repeated and sporadic interferences with the Growers' possessory right of ownership. As in *Gray*, the sporadic nature of these activities does not save the access regulation under the Fourth Amendment's Seizure Clause.

B. The Access Regulation's Warrantless Seizure of the Growers' Property Is Unreasonable

The "reasonableness" inquiry of a seizure under the Fourth Amendment requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). A warrantless seizure of property is presumptively unreasonable, and requires the government to justify the burden. *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005).

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[7] That's not to say that the Growers' use of property is not restricted when unwelcome union activists welcome themselves in. Indeed, the access regulation explicitly allows activists to engage employees where "employees congregate" and "eat their lunch." And unlike the seizure in *Silverman v. United States*, 365 U.S. 505, 506-07 (1961), where only an unoccupied heating duct was usurped for government uses, the access regulation is designed to usurp otherwise *occupied* areas of the Growers' property.

Throughout its brief, the Board asserts vague governmental interests for enforcing the access regulation generally, but none of the evidence that the Board marshals in its response is applicable to the Growers. For example, the Board resorts to findings from "three public hearings in September 2015" to assert purported barriers to communicating with farmworkers. But these findings say nothing specific about the Growers and their employees.[8]

The Board also asserts, based on supposed evidence from the hearings, that a combination of monolinguistic indigenous-language speakers and technological illiteracy limits the use of newer communication methods.[9] These difficulties simply do not apply to the Growers and their employees. For example, the Growers presented evidence that over 90 percent of Cedar Point's employees and 50 percent of Fowler's employees use "a cellular or smart phone."[10] ER 24.

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[8] The Growers submitted declarations in the course of briefing during the Motion for Preliminary Injunction. *See* ER 59-102. These declarations are representative of the evidence that the Growers will provide on a Motion for Summary Judgment.

[9] The information from the public hearings constitutes legislative facts and therefore judicial notice was improper. *See* Fed. R. Evid. 201(a) (authorizing judicial notice of adjudicative not legislative facts); *cf. Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (explaining that legislative facts do not relate directly to the litigants and are used by courts only in construing law or policy).

[10] Within their declarations to the trial court, the Growers provided evidence that virtually none of their employees spoke any indigenous languages, or indeed any language other than English or Spanish. ER 60, 90.

Even assuming that language and technological problems did prevent the Growers' employees from learning about their ability to join the Union, the access regulation would be ineffective in resolving those issues. Absent sending union representatives that are well-versed in multiple indigenous languages onto the Growers' property, identical communication issues exist with traditional communication methods, newer technology, and the access regulation. In any event, because no employees live on the Growers' property, nothing prevents polyglot union representatives from meeting with employees at off-site locations—and without infringing on the Growers' property rights. *Cf. Lechmere*, 502 U.S. at 539 (federal courts permit access only in the rare instance in which employees live on an employer's property).

The Board's seizure is also unreasonable, as applied to the Growers, because the Union has less-invasive alternatives for reaching the Growers' employees. The Board suggests that the Growers' allegation on this point is insufficient under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Board Br. 29. Dismissal is appropriate under *Iqbal*, however, only when the complaint contains nothing more than "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." 566 U.S. at 681. Here, the Growers have elaborated on their allegations, asserting that no

employees live on site, and thereby obviating the usual justification for invasive labor access regulations. ER 108-09 (Compl. ¶¶ 27, 37). *Cf. Lechmere*, 502 U.S. at 537 (federal labor law overrides private property rights only in "the rare case" where employees cannot be reached "through the usual channels").[11]

Moreover, nothing in *Iqbal* requires the Growers to allege the emergence of personal computers, cell phones, the internet, and internet-connected smartphones — facts well within this Court's "judicial experience and common sense." *Iqbal*, 556 U.S. at 679. In light of technological advancements over the last four decades, there are now myriad other ways to reach workers including social media, cellular phones, and e-mail. Even assuming that workers lack access to these technologies, the workers do not live on site and are accessible to the Union at any time other than when they are at work. Cedar Point houses its workers in hotels in Klamath Falls, Oregon, and Fowler's employees generally live in their own housing. ER 108-09 (Compl. ¶¶ 27, 37). The Union does not need to invade private property to reach these workers.

[11] As was previously noted in the Growers' opening brief, Growers' Opening Br. 27 n.13, the district court did not address Fourth Amendment reasonableness in its ruling on the Motion to Dismiss, and to the extent that this Court finds any of those allegations insufficient, the Growers should have the ability to amend and allege those additional facts. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

The Board complains that the Growers did not seek judicial notice of newspaper articles that provide context for the Union's actions. Board Br. 32 n.11. Newspaper articles contain legislative facts, and thus requesting judicial notice is neither necessary nor proper. *See Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d at 1128 (finding error in trial court's judicial notice of legislative facts, including those contained in two newspaper articles). Appellate courts frequently consider legislative facts "from publicly available primary sources even if not developed in the record." *Isaacson v. Horne*, 716 F.3d 1213, 1220 n.7 (9th Cir. 2013).[12] In sum, because there are multiple alternative avenues available to reach the Growers' employees, the regulation constitutes an unreasonable seizure of the Growers' private property under the Fourth Amendment. *See 4,432 Mastercases of Cigarettes*, 448 F.3d at 1179.

[12] The amicus brief in support of the Board, acknowledging the difference between judicial facts and legislative facts, cites nearly a dozen authorities outside of the record, including speeches, scholarship, and the like. *See* United Farm Workers, Amicus Br. in support of Defs. 7-12, 14. The amicus brief also complains that the Growers have not submitted any declaration from an employee. *Id.* at 15. The Growers did not solicit declarations from their employees because doing so would have been an unfair labor practice under the ALRA. *See Carian v. Agric. Labor Relations Bd.*, 36 Cal. 3d 654, 671 (1984).

CONCLUSION

The district court's dismissal of the Growers' complaint should be reversed and the case remanded to the district court for further proceedings.

DATED: March 17, 2017.

Respectfully submitted,

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DATED: March 17, 2017.

s/ Wencong Fa
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