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October 13, 2022

Hon. Pete Buttigieg  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue S.E.  
Washington, DC 20590

Comments submitted electronically: <https://www.regulations.gov>

**RE: Comments on Notice of Proposed Rulemaking for the National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure**

**Docket No. FHWA-2021-0004; RIN 2125-AF99**

Dear Secretary Buttigieg:

Thank you for the opportunity to comment on the Federal Highway Administration of the U.S. Department of Transportation's ("FHWA") proposed rulemaking to institute a greenhouse gas performance measure for the national highway system, National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure, 87 Fed. Reg. 42,401 (July 15, 2022). This effort has the strong support of the Attorney General of California, Rob Bonta,<sup>1</sup> as well as of the Attorneys General of the States of Colorado, Illinois, Maryland, Minnesota, New York, Oregon, Rhode Island, Washington, Wisconsin, Vermont, and the Commonwealth of Massachusetts, and of the District of Columbia.

The proposed rule (referred to in this letter as "the GHG Emissions Measure," "the measure," or "the proposal") would require States and metropolitan planning organizations ("MPOs") to measure and report information on greenhouse gas ("GHG") emissions from on-road mobile sources, and establish declining targets for such emissions on the Interstate and non-Interstate National Highway Systems (collectively, "NHS") within their state or planning area

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<sup>1</sup> The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const. art. V, § 13; Cal. Gov't Code, §§ 12511, 12600-12612; *D'Amico v. Bd. Of Medical Examiners*, 11 Cal. 3d 1, 14-15 (1974).

geographic boundaries. If finalized, the proposal will allow States and MPOs, many of which are already measuring and reporting such data, to contribute consistent and timely information about on-road mobile source emissions on the NHS, which will help inform transportation investments and planning choices.

Our comments demonstrate that (1) there is a continuing need for a national GHG emissions performance measure to inform transportation investments and planning decisions; (2) FHWA has the legal authority to establish the GHG Emissions Measure; and (3) the measure is a necessary continuation of efforts that FHWA, along with many States and MPOs, has undertaken to address the environmental performance of the NHS. The GHG Emissions Measure is thus a timely and important step toward fulfilling the statutory goal under 23 U.S.C. § 150(b)(6) of ensuring that the NHS is environmentally sustainable.

### **Background of States' Involvement and Support for the GHG Measure**

The enactment of the 2012 Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141 (“MAP-21”), and the 2015 Fixing America’s Surface Transportation (“FAST”) Act, Pub. L. 114-94, required FHWA to establish “performance” measures that the States can use to assess performance of the Interstate and non-Interstate NHS. 87 Fed. Reg. at 42,404; 23 U.S.C. §§ 119(a), 150(c)(3)(A)(ii)(IV)–(V). The purpose of these performance measures is to refocus transportation investment on “national transportation goals” and improve project decisionmaking. 23 U.S.C. § 150(a). Significantly, one of these national goals is “environmental sustainability,” which is achieved by “enhanc[ing] the performance of the transportation system while protecting and enhancing the natural environment.” *Id.* § 150(b)(6).

In early 2017, citing the goal of environmental sustainability under 23 U.S.C. § 150(b)(6), FHWA adopted a measure similar to the GHG Emissions Measure now proposed, requiring State departments of transportation (“State DOTs”) and MPOs to collect data and establish performance targets for GHG emissions on the NHS. National Performance Management Measures, 82 Fed. Reg. 5970 (Jan. 18, 2017). After a change in administrations, however, FHWA delayed implementation of the 2017 GHG Measure multiple times. 82 Fed. Reg. 10,441 (Feb. 13, 2017); 82 Fed. Reg. 14,438 (Mar. 21, 2017). The Attorney General of California, leading a state government coalition, filed suit in the Northern District of California in September 2017 to challenge FHWA’s illegal delays.<sup>2</sup> Within days of the lawsuit’s filing, FHWA announced that it would place the 2017 GHG measure into immediate effect, pending its

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<sup>2</sup> In addition to the Attorney General of California, the multistate plaintiffs included the California Air Resources Board and the Attorneys General of Iowa, Maryland, Oregon, Vermont, Washington, and of the Commonwealth of Massachusetts, as well as the State of Minnesota by and through its department of transportation. *People of the State of California et al. v. FHWA*, No. 4:17-cv-05439 (N.D. Cal. filed Sept. 20, 2017).

formal repeal. 82 Fed. Reg. 46,427 (Oct. 5, 2017). The state coalition opposed the repeal.<sup>3</sup> FHWA nevertheless arbitrarily and capriciously repealed the 2017 GHG Measure in July 2018. 83 Fed. Reg. 24,920 (May 31, 2018) (final rule).

The undersigned Attorneys General welcome FHWA's renewed efforts to promulgate this GHG Emissions Measure. The measure would amend FHWA's regulations to require State DOTs and MPOs to: (1) set declining targets for CO<sub>2</sub> tailpipe emissions on the NHS, consistent with national GHG emissions reduction goals; (2) track and report their performance in meeting these targets; and (3) document the actions they will take in achieving their targets if "significant progress" is not made. 87 Fed. Reg. at 42,402, 42,421. To calculate GHG emissions on the NHS, State DOTs would use existing information or data that State DOTs are already required to collect, together with a formula for determining corresponding CO<sub>2</sub> tailpipe emissions provided by FHWA. 87 Fed. Reg. at 42,415, 42,416.

The GHG Emissions Measure also provides State DOTs and MPOs with flexibility to set declining CO<sub>2</sub> emissions targets that work for their respective policy priorities,<sup>4</sup> so long as such targets align with national GHG emissions reduction targets; but the measure does not set forth any specific penalty for failing to meet the targets set. 87 Fed. Reg. at 42,415, n.39. Notably, "significant progress" towards the declining targets is defined as either (1) the actual condition or performance level being better than the baseline condition or performance; or (2) the actual condition or performance level being equal to or better than the established target. 23 C.F.R. § 490.109(e)(1), (e)(2). Thus, under the GHG Emissions Measure as proposed, State DOTs and MPOs are considered to have made "significant progress" towards their targets so long as they have established declining GHG emissions in comparison to the baseline. Overall, the GHG Emissions Measure is an efficient and judicious tool for tracking and addressing GHG emissions on the NHS, allowing State DOTs and MPOs flexibility while aimed at ensuring investment and planning for the NHS align with the statutory goal of environmental sustainability.

**GHG Emissions From Transportation Contribute Significantly to Climate Change, Which, In Turn, Threatens the Safety and Reliability of the NHS.**

It is well-accepted within the scientific community that the anthropogenic addition of GHGs into the atmosphere, particularly from the burning of fossil fuels, is causing catastrophic climate change.<sup>5</sup> The U.S. Global Change Research Program's Fourth National Climate

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<sup>3</sup> The Attorneys General for the States of California, Maryland, Washington, Oregon, Vermont, and the Commonwealth of Massachusetts submitted comments on November 6, 2017 opposing the repeal.

<sup>4</sup> For example, a State DOT might choose to set targets resulting in steady, incremental progress toward net-zero emissions, targets leading to greater GHG emissions reductions in the near term, or targets that are more gradual at first. 87 Fed. Reg. 42,401, 42,412.

<sup>5</sup> National Research Council 2020, *Climate Change: Evidence and Causes: Update 2020*, at 5, <https://doi.org/10.17226/25733>.

Assessment finds that “the evidence consistently points to human activities, especially emissions of greenhouse or heat-trapping gases, as the dominant cause” of climate change.<sup>6</sup> GHG emissions continue to increase decade by decade, and are now more abundant in the earth’s atmosphere than at any time in the last 800,000 years.<sup>7</sup> Transportation is the top contributor to U.S. GHG emissions: it accounts for approximately 27% of all GHG emissions in the country.<sup>8</sup> In California, transportation accounts for an even greater percentage—the transportation sector is responsible for 40% of all GHG emissions in the state.<sup>9</sup> The transportation sectors in Vermont and Massachusetts account for similar percentages of statewide GHG emissions.<sup>10</sup>

In turn, extreme weather events caused by climate change, including heat waves, intense storms, and wildfires, can have devastating effects on the condition of the NHS.<sup>11</sup> As FHWA recognized in FHWA Order 5520 (Dec. 15, 2014), “Climate change and extreme weather events present significant and growing risks to the safety, reliability, effectiveness, and sustainability of the Nation’s transportation infrastructure and operations.”<sup>12</sup> Higher temperatures can cause

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<sup>6</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* (Reidmiller, et al. (eds.)), at 73. 1515 pp. doi: 10.7930/NCA4.2018, <https://nca2018.globalchange.gov/downloads/>.

<sup>7</sup> National Research Council, *Climate Change: Evidence and Causes: Update 2020*, at 6 (2020), <https://doi.org/10.17226/25733>. Alarming, global fossil CO<sub>2</sub> emissions are projected to increase by 4.8%, and U.S. fossil CO<sub>2</sub> emissions by 6.8%, in 2021. P. Friedlingstein et al., *Global Carbon Budget 2021*, *Earth Syst. Sci. Data*, 1917, 1934-35 (2022), <https://doi.org/10.5194/essd-14-1917-2022>.

<sup>8</sup> Jacobs, et al., *Fourth National Climate Assessment, Vol. II, Ch. 12, Transportation, in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment*, (Reidmiller, et al. (eds.)), at 481. doi: 10.7930/NCA4.2018.CH12, <https://nca2018.globalchange.gov/chapter/transportation>; Environmental Protection Agency (“EPA”), *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>.

<sup>9</sup> California Air Resources Board, Draft 2022 Scoping Plan Update, at 34, Figure 1-8 (May 10, 2022), <https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan>.

<sup>10</sup> See State of Vermont Agency of Transportation, *Climate Change*, <https://vtrans.vermont.gov/planning/climate-change>; Massachusetts Clean Energy and Climate Plan for 2025 and 2030, June 30, 2022, at 30, <https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2025-and-2030/download>.

<sup>11</sup> EPA, *Climate Impacts on Transportation*, [https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-transportation\\_.html](https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-transportation_.html).

<sup>12</sup> FHWA, *Order: Transportation System Preparedness and Resilience to Climate Change and Extreme Weather Events*, <https://www.fhwa.dot.gov/legsregs/directives/orders/5520.cfm>.

pavement to soften and expand, which can create rutting and potholes, and stress on bridge joints.<sup>13</sup> Hurricanes—such as the recent and particularly disastrous Hurricane Ian—heavy storms, and snowfall can also cause damage necessitating greater maintenance, repairs, and rebuilding.<sup>14</sup> Nationally, the total annual costs arising from temperature and precipitation related damage to paved roads is expected to approach \$20 billion in 2090; inland flooding, which threatens thousands of bridges across the country, is anticipated to result in average annual costs of \$1.2 billion to \$1.4 billion by 2050.<sup>15</sup>

As the proposal notes, addressing the causes and the impacts of climate change will require efforts from all levels of government. 87 Fed. Reg. at 42,406. Regarding actions that State DOTs and MPOs can undertake within the transportation sector, a study from the Georgetown Climate Center demonstrates that an emphasis on maintenance of existing roadways, along with investments in transit and charging infrastructure, has the potential to accelerate reductions in GHG emissions by comparison with highway expansion.<sup>16</sup> Other actions that may reduce GHG emissions include improving system efficiency, encouraging a shift away from single-occupant vehicles, and other measures that reduce on-road travel demand. 87 Fed. Reg. at 42,411. Such actions will depend in large part on planning and investment decisions being made by State DOTs and MPOs. *Id.*<sup>17</sup> Considering the above, it is both prudent and necessary for FHWA to collect consistent, comprehensive data on GHG emissions on the NHS, both to evaluate the data in relation to the GHG emissions reduction targets set by State DOTs and MPOs, and to provide transparency with respect to Federal, State, and local transportation planning and investment decisions.

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<sup>13</sup> EPA, *Climate Impacts on Transportation*, [https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-transportation\\_.html](https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-transportation_.html).

<sup>14</sup> *Id.*

<sup>15</sup> Jacobs, et al., *Fourth National Climate Assessment, Vol. II, Ch. 12, Transportation, in Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment*, (Reidmiller, et al. (eds.)), at 485. doi: 10.7930/NCA4.2018.CH12, [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch12\\_Transportation\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch12_Transportation_Full.pdf).

<sup>16</sup> Georgetown Climate Center, *Issue Brief: Estimating the Greenhouse Gas Impact of Federal Infrastructure Investments in the IJA* (Dec. 16, 2021), <https://www.georgetownclimate.org/articles/federal-infrastructure-investment-analysis.html>.

<sup>17</sup> *See also* Transportation Research Board, *Practitioners Guide to Incorporating Greenhouse Gas Emissions Into the Collaborative Decision-Making Process*, <https://nap.nationalacademies.org/catalog/22802/practioners-guide-to-incorporating-greenhouse-gas-emissions-into-the-collaborative-decisionmaking-process> (discussing the incorporation of GHG reduction strategies into transportation project planning).

**FHWA Has Legal Authority to Enact the GHG Emissions Measure.**

As previously expressed in the July 2017 State Attorneys General comment letter, FHWA has the legal authority to implement the GHG Emissions Measure. Under MAP-21, FHWA is required to establish “performance” measures to assess performance of the Interstate and non-Interstate NHS. 23 U.S.C. § 150(c)(3)(A)(ii)(IV)-(V). FHWA has correctly interpreted “performance” to include environmental performance. 87 Fed. Reg. at 42,402. Importantly, MAP-21 does not limit the meaning of “performance” under Section 150(c)(3)(A)(ii)(IV)-(V). And FHWA’s interpretation of “performance” to include environmental performance is consistent with the express goals of the Federal-aid highway program, which include environmental sustainability. 23 U.S.C. § 150(b)(6).

FHWA’s interpretation of “performance” is also consistent with the many other statutory provisions in Title 23 that make the environment an important part of the Federal-aid highway program, including Section 119(e), which, in furtherance of the NHPP, requires states to develop a “performance-driven” asset management plan that would support “progress toward the achievement of the national goals identified in section 150(b).” 23 U.S.C. § 119(e); *see also id.* § 101(b)(3)(G) (Congressional declaration that “transportation should play a significant role in...improving the environment”); *id.* §§ 109(c), (g), (h), (i), and (j) (requiring highway design to take into account environmental impacts and calling for FHWA to issue guidelines and standards for minimizing environmental effects of highway projects); *id.* § 134(a)(1) (stating national interest in “minimizing transportation-related fuel consumption and air pollution”); § 135(d)(1)(E) (requiring statewide transportation planning to “protect and enhance the environment”).

Opponents of the measure are wrong to claim that Section 150(c) limits FHWA to establishing only those performance measures specifically set forth in paragraphs (3)(A)(ii)(I)-(III), (c)(4), and (c)(5) (*e.g.*, performance measures for injuries, fatalities, pavement and bridge condition, congestion, on-road mobile source emissions, and freight movement). That reading fails to give meaning to paragraphs 150(c)(3)(A)(ii)(IV)-(V), which calls for FHWA to implement measures for the “performance” of the Interstate and National Highway Systems, without imposing limitations on the types of performance to be measured. Indeed, limiting FHWA only to these specifically delineated performance measures would render 23 U.S.C. § 150(c)(3)(A)(ii)(IV)-(V) redundant. *See Ysleta Del Sur Pueblo v. Texas*, 142 S.Ct. 1929, 1939 (2022) (effect must be given to all provisions of Section 107 of the Restoration Act, “so that no part will be inoperative or superfluous, void or insignificant”), *citing Corley v. United States*, 556 U.S. 303, 314 (2009). Instead, FHWA has appropriately interpreted the undefined term “performance” in accordance with the national goals expressly set forth by MAP-21.

**The GHG Emissions Measure is a Necessary Continuation of FHWA’s and the State DOTs’ Existing Efforts to Address Environmental Sustainability on the NHS.**

Consistent with its interpretation of “performance” to include environmental performance, FHWA has demonstrated through its long-standing policies and practice that

environmental sustainability is an important aspect of NHS performance. In 2013, for example, FHWA published guidance to State DOTs and MPOs on measuring GHG emissions from on-road vehicles and integrating GHG performance measures into investment and planning decisions.<sup>18</sup>

Further, as stated in an initial comment in support of the GHG Emissions Measure, many state departments of transportation are already fulfilling the proposed requirements in this measure.<sup>19</sup> For example:

- The Minnesota Department of Transportation has adopted GHG emission reduction targets for the transportation sector, and is reporting GHG emission estimates and targets on the NHS to FHWA on a bi-annual basis.
- The State of Oregon has set GHG reduction goals and provides monitoring reports for GHG emissions across all sectors, including transportation.<sup>20</sup>
- Since the Global Warming Solutions Act of 2006 Assembly Bill (AB) 32<sup>21</sup> became state law in California, the California Air Resources Board has developed a Scoping Plan,<sup>22</sup> which lays out California’s strategy for meeting its climate goals through reduced GHG emissions. AB 32 was followed by several other key bills and policies for California to address climate change, including but not limited to Senate Bill (SB) 375,<sup>23</sup> which requires CARB to set regional GHG reduction targets that metropolitan

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<sup>18</sup> USDOT / FHWA, *A Performance-Based Approach to Addressing Greenhouse Gas Emissions through Transportation Planning*, Publication No.: FHWA-HEP-14-020; *see also* FHWA 2013 Conditions and Performance Report (PDF version), “Advancing Environmental Sustainability” at 5-6 to 5-7, <https://www.fhwa.dot.gov/policy/2013cpr/pdfs.cfm> (discussing performance of the highway system in relation to sustainability, and referencing FHWA strategies and research regarding reduction of GHG emissions).

<sup>19</sup> Comment letter dated July 18, 2022, from the Minnesota, Colorado, Pennsylvania, Connecticut, Oregon, California, Vermont, Hawaii, Washington State, Illinois, and District of Columbia Departments of Transportation.

<sup>20</sup> See Oregon Department of Environmental Quality, *Oregon Greenhouse Gas Sector-Based Inventory Data*, <https://www.oregon.gov/deq/ghgp/Pages/GHG-Inventory.aspx> (explaining that data is “compiled by integrating data from [DEQ’s Greenhouse Gas Reporting Program](#) and modeled emissions estimates from [EPA’s State Inventory Tool](#)).

<sup>21</sup> 2006 Cal. Legis. Serv. Ch. 488 (AB 32) (West) (codified as amended at Cal Health & Safety Code § 38500-599), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060AB32](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB32)

<sup>22</sup> For more information visit: California Air Resources Board, *AB 32 Climate Change Scoping Plan*, <https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan>.

<sup>23</sup> 2008 Cal. Legis. Serv. Ch. 728 (SB 375, (West),



- planning organizations must show in a Sustainable Communities Strategy that the region can meet through integrated land use and transportation planning that reduces vehicle miles traveled.
- The Washington State Department of Transportation established a performance measure for GHG on the NHS, and is reporting GHG emissions estimates and targets on the NHS to FHWA bi-annually.
  - The Vermont Agency of Transportation has undertaken GHG research projects and recently issued a scope of work for a methodology to estimate the effect of its programs on GHG emissions and track and report progress toward achieving the State’s GHG reduction goals.<sup>24</sup>
  - The Massachusetts Department of Transportation and MPOs evaluate and report the aggregate transportation GHG emissions impacts of Statewide Transportation Improvement Programs and Regional Transportation Plans, respectively, in order to assess progress toward meeting required GHG emissions reductions for the state’s transportation sector.<sup>25</sup>
  - Since 2006, the District of Columbia has been tracking GHG emissions. It has made the commitment to achieve carbon neutrality by 2050, through a series of planning and legislative efforts. The District’s DOT (“DDOT”) has adopted several vehicle electrification strategies in its 2021 update of the statewide long-range transportation plan, moveDC.<sup>26</sup> In addition, the District has been collaborating with its MPO, the National Capital Region Transportation Planning Board, on the recently adopted on-road transportation GHG goals of 50% below 2005 levels by 2030 and 80% below by 2050.<sup>27</sup>

Because the GHG Emissions Measure only applies to the NHS and calls for State DOTs to use information that they are already required to report, and because the estimated total cost of the measure is limited—\$11 million to \$12.9 million over 10 years, 87 Fed. Reg. at 42,417—the

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<sup>24</sup> See, e.g., State of Vermont Agency of Transportation, *22-4 Smartgrowth, VMT and GHG*, <https://vtrans.vermont.gov/planning/research/projects/22-4>.

<sup>25</sup> See 310 Mass. Code Regs. 60.05, see also Massachusetts Office of Transportation Planning Sustainable Transportation, *Greenhouse Gas Assessment and Reporting Guidance—Guidelines to Assist Metropolitan Planning Organizations in Complying with 310 CMR 60.05: Global Warming Solutions Act Requirements for Transportation*, January 2020, <https://www.mass.gov/doc/transportation-improvement-program-greenhouse-gas-assessment-and-reporting-guidance-document-0/download>.

<sup>26</sup> moveDC, *The District of Columbia’s Multimodal Long-Range Transportation Plan* (December 2021), <https://movedc-dcgis/hub.arcgis.com>.

<sup>27</sup> Nathaniel Cline, *D.C. Region Leaders Want to Halve Transportation Emissions by 2030 Despite Road Widening Plans*, Virginia Mercury, August 24, 2022, <https://www.viriniamercury.com/2022/08/24/d-c-region-leaders-want-to-halve-road-emissions-by-2030-even-as-road-widening-plans-continue/>.



measure represents a limited, straightforward, and cost-effective tool that will result in minimal additional staff time or expense from State DOTs and MPOs.<sup>28</sup>

### **Conclusion**

As the proposed rulemaking notes, the GHG Emissions Measure would build on existing efforts by FHWA, State DOTs, and MPOs to track CO<sub>2</sub> emissions from on-road mobile sources, and would provide a consistent set of data to inform highway investment and planning decisions. 87 Fed. Reg. at 42,407. The measure is consistent with, and will help advance, the Federal-aid highway program's national goal for environmental sustainability under MAP-21, 23 U.S.C. § 150(b)(6). For the above reasons, the undersigned Attorneys General strongly support the GHG Emissions Measure.

Sincerely,

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<sup>28</sup> Moreover, as detailed above, many states already have been tracking GHG emissions statewide and across sectors. State DOTs and MPOs can and should coordinate with other state agencies on data collection and reporting to ensure state agencies and MPOs are performing these efforts in an efficient and consistent manner.

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