No. 11-45

# In the Supreme Court of the United States

MICHAEL B. ELGIN, ET AL., PETITIONERS

*v.*

DEPARTMENT OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, precludes petitioners from seeking equitable relief in district court based on allegations that they were unconstitutionally terminated from federal employment.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 641 F.3d 6. The opinion of the district court granting petitioners' motion for partial summary judgment and denying in part and granting in part respondents' motion to dismiss (Pet. App. 65a-93a) is reported at 594 F. Supp. 2d 133. The opinion of the district court granting respondents' motion for reconsideration and granting respondents' motion to dismiss (Pet. App. 39a-64a) is reported at 697 F. Supp. 2d 187.

## JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. The petition for a writ of certiorari was filed on July 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978) (*Senate Report*)). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judgment." *Id.* at 444-445 (citations omitted); accord *Senate Report* 63.

"Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), which "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal

employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445. The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * *, including the availability of administrative and judicial review," *id.* at 443.

b. Under the CSRA, a federal employee who believes that an unlawful adverse action, including removal, has been taken against him may appeal the agency's decision to the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see 5 U.S.C. 7512, 7513(d); see also 5 U.S.C. 1201, 1204; 5 C.F.R. 1201.3. If the MSPB decides in favor of the employee and reverses the employing agency's removal action, it is empowered to order appropriate relief, including reinstatement and back pay. See 5 U.S.C. 1204(a)(2); *Smith* v. *Department of the Army*, 458 F.3d 1359, 1364-1365 (Fed. Cir. 2006).

An employee may seek judicial review of a final determination by the MSPB. 5 U.S.C. 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such judicial review is the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b). The Federal Circuit is required to review the record and to "hold unlawful and set aside any agency action, findings, or conclusions found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; procedurally improper; or "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. Petitioners are four former federal employees who were discharged (or allegedly constructively discharged) by their employing agencies for knowingly and

willfully failing to register with the Selective Service. Pet. App. 3a. The Military Selective Service Act requires all male U.S. citizens and permanent-resident aliens between the ages of 18 and 26 to register for the military draft in the manner prescribed by the President. 50 U.S.C. App. 453(a). Although President Ford briefly suspended the selective-service-registration requirements in 1975, President Carter reinstituted them in 1980 for men born on or after January 1, 1960, and they remain in force today. 50 U.S.C. App. 453 note.

In 1985, Congress passed a law, codified at 5 U.S.C. 3328, disqualifying from federal employment anyone who has "knowingly and willfully" failed to comply with the current selective-service requirements. 5 U.S.C. 3328(a); see Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Congress further directed the Office of Personnel Management (OPM) to promulgate implementing regulations, including regulations governing the determination of whether a failure to register was knowing and willful. 5 U.S.C. 3328(b). OPM's regulations require agencies to discharge employees over the age of 26 who failed to register for the Selective Service when required to do so, unless OPM determines in response to the employee's explanation that the failure was neither knowing nor willful. 5 C.F.R. 300.705(d), .707; see also 5 C.F.R. 300.706 (procedures for OPM determination).

Following their termination (or alleged constructive termination) under those provisions, none of the petitioners pursued his CSRA remedies to completion. Pet. App. 3a. Only one of petitioners, Michael B. Elgin, appealed his termination to the MSPB. Pet. 8-9. His appeal was referred to an administrative judge for an initial decision. Pet. App. 94a; see 5 U.S.C. 7701(b)(1) (per-

mitting referral of MSPB appeals to administrative judge); see also 5 C.F.R. 1201.111. The administrative judge dismissed the case "for lack of jurisdiction." Pet. App. 95a. Elgin raised constitutional challenges to Section 3328, but the administrative judge concluded that the MSPB "lacks authority to determine the constitutionality of a statute." *Id.* at 101a. The decision advised Elgin of his rights to petition for review by the full MSPB and to appeal a final MSPB decision to the Federal Circuit. *Id.* at 105a-107a; see also 5 C.F.R. 1201.113 and .114 (describing procedures for petitioning for full MSPB review). Elgin pursued neither option. Pet. App. 4a.

3. Petitioners subsequently filed this putative class-action suit in the District of Massachusetts. Pet. App. 4a, 65a. They do not presently contest that they knowingly and willfully failed to register for the selective service. *Id.* at 3a. Nor do they presently contest that 5 U.S.C. 3328 and OPM regulations required their discharge. They instead contend that Section 3328 is unconstitutional, alleging that it is both a bill of attainder and discriminates on the basis of gender in violation of the equal protection component of the Fifth Amendment. See U.S. Const. Art. I, § 9, cl. 3 ("No Bill of Attainder * * * shall be passed."); U.S. Const Amend. V. They seek a declaratory judgment that 5 U.S.C. 3328 is unconstitutional, injunctive relief barring enforcement of Section 3328, and reinstatement with full back pay and benefits. C.A. App. 36-37.

The district court initially dismissed the equal-protection claim but granted partial summary judgment for petitioners on the bill-of-attainder claim. Pet. App. 65a-93a. The court reasoned that the equal-protection issue was controlled by this Court's decision in *Rostker*

v. *Goldberg*, 453 U.S. 57 (1981), which rejected an equal-protection challenge to the Military Selective Service Act. Pet. App. 86a-93a. The court initially took the view, however, that Section 3328 is an unlawful bill of attainder, *i.e.*, "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Id.* at 70a (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)); see *id.* at 70a-86a.

The district court subsequently granted the government's motion for reconsideration and dismissed the case. Pet. App. 39a-64a. In its motion, the government had argued that petitioners' suit was barred because the CSRA provided the exclusive mechanism for challenging petitioners' terminations. *Id.* at 41a-42a. The district court rejected that argument, reasoning that no CSRA provision expressly granted the MSPB jurisdiction to consider petitioners' constitutional claims; that certain administrative decisions (including in Elgin's case) had concluded that the MSPB lacked authority to consider such claims; that the Federal Circuit would similarly lack authority to consider such claims; and that the claims were therefore properly brought under the general district-court jurisdictional statute, 28 U.S.C. 1331. Pet. App. 43a-51a. But, reconsidering its earlier constitutional analysis, the district court agreed with the government that Section 3328 is not a bill of attainder because the statute does not target an individual or class that was readily ascertainable at the time it was enacted. *Id.* at 54a-63a.

4. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss petitioners' complaint on jurisdictional grounds "without prejudice to the pursuit of remedies under the CSRA to

the extent that they may be available at this late date." Pet. App. 15a; see *id.* at 1a-38a. Stating that "there is something of a circuit split" on the issue, the court held that the CSRA bars district-court adjudication of petitioners' challenge to their dismissals. *Id.* at 11a-12a & n.4; see *id.* at 5a-15a. Petitioners did not dispute, the court noted, that the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." *Id.* at 6a. The court concluded, contrary to petitioners' contentions, that the CSRA provides "a route to direct review of their constitutional claims by an Article III court." *Ibid.* The court reasoned that even if the MSPB itself lacks authority to strike down a statute on constitutional grounds, the Federal Circuit could do so on review of the MSPB decision and then order the MSPB to grant relief. *Id.* at 13a. The court of appeals noted that the Federal Circuit had in fact recognized that "if a colorable constitutional claim were presented, it would have to address the issue." *Id.* at 14a (citing cases). Although the court noted that "[t]he substantive constitutional claims in this case are unpromising," it concluded that those claims were properly channeled to the Federal Circuit under the CSRA. *Ibid.*

Judge Stahl concurred in the judgment. Pet. App. 15a-38a. In his view, petitioners' complaint was properly before the court because CSRA does not clearly foreclose district-court jurisdiction over constitutional claims like petitioners'. *Id.* at 15a-26a. He would, however, have affirmed the district court's dismissal of petitioners' complaint on the merits. *Id.* at 27a-38a.

**ARGUMENT**

The court of appeals correctly concluded that the CSRA provided an avenue for petitioners to contest

their terminations and precludes a district-court suit challenging the agencies' actions on constitutional grounds. The decision is consistent with this Court's precedents recognizing the comprehensiveness and exclusivity of the CSRA, and further review in this case is not warranted to resolve any differences in approaches taken by the courts of appeals. Certiorari should accordingly be denied.

1. This Court has consistently held that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies that the statute explicitly provides. In *United States* v. *Fausto*, 484 U.S. 439 (1988), for example, the Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," *id.* at 445, the absence of provision in the CSRA for excepted-service employees to obtain judicial review of a suspension meant such employees were precluded from seeking review under the Back Pay Act of 1966, 5 U.S.C. 5596. *Fausto*, 484 U.S. at 448. The Court concluded that the comprehensive nature of the CSRA made it "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Id.* at 448-449.

In *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court declined to infer a private right of action for federal employees to enforce their statutory right under the CSRA to fair representation. Noting that the CSRA "expressly provide[s]" employees with "an administrative remedy" before the Federal Labor Relations Authority (FLRA)

for a union's breach of its duty and allows for judicial review of the FLRA's decision, this Court declined to infer a judicial right of action in district court against the union. *Id.* at 533. The Court explained that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA and to confine the courts to the role given them under the Act." *Id.* at 536-537.

Similarly, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages based on alleged First Amendment violations occurring during the plaintiff's federal employment. The Court concluded that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush*, 462 U.S. at 368.[1]

2. The court of appeals noted that petitioners "do not contest the view that the statutory route, where it applies, is the exclusive remedy for an employee chal-

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[1] Although the agency actions at issue in *Bush* took place before the CSRA was enacted, see 462 U.S. at 369-370, the decision discussed the CSRA, see, *e.g.*, *id.* at 385 n.25, and its reasoning applies equally to the CSRA. See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc; per curiam); see also *Karahalios*, 489 U.S. at 536.

lenging removal." Pet. App. 6a. They contend (Pet. 21-32) that the CSRA does not in fact provide an avenue for judicial review of their constitutional claims, and that a freestanding cause of action in district court is therefore necessary to vindicate their constitutional rights. Citing *Webster* v. *Doe*, 486 U.S. 592 (1988), petitioners assert that the CSRA may not be construed to preclude judicial review of constitutional claims such as theirs in the absence of a clear statement of congressional intent.[2]

Contrary to petitioners' argument, the CSRA does not preclude judicial review of their constitutional claims, but instead merely channels such review to a particular judicial forum: the Federal Circuit. Like other covered federal employees who believe they have been unlawfully terminated, petitioners could (and one petitioner did) challenge their terminations before the MSPB. See pp. 3-5, *supra*. Insofar as petitioners challenge the constitutionality of federal statutes disqualifying them from federal employment, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994) (brackets in original; citation omitted), and the MSPB has accordingly concluded that it is "without authority to determine the con-

[2] Petitioners correctly observe (Pet. 23) that the government's brief in *Whitman* v. *Department of Transportation*, 547 U.S. 512 (2006) (per curiam), acknowledged that "[t]he language of the CSRA does not meet the 'heightened showing,' *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims." U.S. Br. at 47, *Whtiman*, *supra* (No. 04-1131). But *Webster*'s "heightened showing" requirement is irrelevant here because, as explained in the text, the CSRA provides an avenue for judicial review of constitutional claims like petitioners' in the Federal Circuit, and thus does not "foreclose" judicial review of such claims.

stitutionality of Federal statutes" on their face (although it will adjudicate as-applied challenges). *Bayly* v. *OPM*, 42 M.S.P.R. 524, 525-526 (1990). But in the absence of adequate relief from the MSPB, petitioners could have sought judicial review from the Federal Circuit. 5 U.S.C. 7703(a)(1) and (b)(1); see Pet. App. 3a-4a. That court, in the exercise of its judicial-review authority under the CSRA, would have been able to adjudicate their constitutional challenges to 5 U.S.C. 3328.

As this Court has recognized in analogous contexts, even if a federal agency cannot itself adjudicate a constitutional claim, the claim may nevertheless be "meaningfully addressed by the Court of Appeals" in reviewing the agency's decision. *Thunder Basin Coal Co.*, 510 U.S. at 215 (discussing statutory-review scheme in the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 801 *et seq.*); see *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000) (concluding that court reviewing agency's Medicare-related determination could "resolve any statutory or constitutional contention that the agency does not, or cannot, decide"); see also Pet. App. 13a. The CSRA expressly authorizes the Federal Circuit to "hold unlawful and set aside" any agency action found to be "not in accordance with law." 5 U.S.C. 7703(c)(1). The Federal Circuit accordingly would have authority to consider (and potentially grant relief on) petitioners' constitutional claims, even if the MSPB were unable to do so in the first instance.

Petitioners nevertheless hypothesize (Pet. 30-31) that, had they availed themselves of the CSRA's judicial-review provisions, the Federal Circuit would have refused to consider any constitutional arguments that the MSPB believed were beyond an administrative

agency's power to decide. Petitioners cite no Federal Circuit case that so holds, however, and we are aware of none. See Pet. App. 14a ("The Federal Circuit has never said that it was powerless to act where a removal occurred and the underlying statute that prompted the removal was itself unconstitutional."). Petitioners' prediction is based on cases in which the Federal Circuit has stated that "the scope of its jurisdiction on appeal is coextensive with the MSPB's." Pet. 30. But the cases cited by petitioners merely stand for the proposition that the types of personnel actions that the Federal Circuit can review on petition from an MSPB decision are limited to the types of personnel actions that the MSPB itself is authorized to adjudicate. See Pet. 31 (citing *Perez* v. *Merit Sys. Prot. Bd.*, 931 F.2d 853 (Fed. Cir. 1991) (MSPB, and therefore Federal Circuit, lacked authority to adjudicate certain type of personnel action); *Manning* v. *Merit Sys. Prot. Bd.*, 742 F.2d 1424 (Fed. Cir. 1984) (same); *Rosano* v. *Department of the Navy*, 699 F.2d 1315 (Fed. Cir. 1983) (same)). The cited cases do not stand for the proposition that the Federal Circuit (an Article III court) lacks authority to consider legal arguments concerning personnel actions subject to MSPB review simply because an administrative agency could not consider them. As discussed above, that proposition is incorrect, and there is no reason to assume that the Federal Circuit would adopt it.[3]

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[3] Petitioners point to instances in which MSPB appeals presenting constitutional challenges to 5 U.S.C. 3328 have been referred to individual administrative judges who have then dismissed the appeals for "lack of jurisdiction." Pet. 28 & n.5 (citing additional cases); see also Pet. App. 95a. The individual-judge decisions cited by petitioners are not precedential, 5 C.F.R. 1201.113, and would not be binding on the full MSPB or the Federal Circuit.

Indeed, the government has previously acknowledged, and the Federal Circuit has accepted, that the Federal Circuit has the power to determine the constitutionality of a federal statute underlying an employee's removal from government service, even when the MSPB itself concluded that it lacked authority to address the issue. *Briggs* v. *Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1310-1312 (Fed. Cir. 2003) (considering challenges to the Hatch Political Activity Act, 5 U.S.C. 1501-1508, 7321-7326). Petitioners' prediction that the Federal Circuit might reach a contrary conclusion in a different case does not warrant this Court's review.

3. a. Petitioners contend (Pet. 14-23) that this Court should grant review to resolve a conflict among the courts of appeals about the availability of equitable relief to federal employees outside the framework of the CSRA. The court of appeals' decision in this case is consistent with the conclusions of the majority of circuits to have addressed the question presented. As petitioners acknowledge (Pet. 19-20), the Second and Tenth Circuits have held that the comprehensive nature of the CSRA precludes district courts from adjudicating claims for equitable relief from constitutional violations alleged to arise out of a federal personnel action. See *Dotson* v. *Griesa*, 398 F.3d 156, 180 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006); *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961-962 (10th Cir. 1989).

The Ninth Circuit has likewise concluded that the CSRA provides the exclusive means for an employee covered by the statute to seek review of a personnel action alleged to violate the Constitution. *Saul* v. *United States*, 928 F.2d 829 (1991). Petitioners err insofar as they suggest (Pet. 17-19 & n.3) that the Ninth Circuit retreated from *Saul* in *American Federation of Govern-*

*ment Employees Local 1* v. *Stone*, 502 F.3d 1027 (2007). *Stone* addressed whether district-court actions seeking injunctive relief from assertedly unconstitutional personnel actions are precluded where the CSRA affords no alternative remedy—a circumstance not present in *Saul*. See *id.* at 1037. The decision below, which concluded that the CSRA does provide a remedy to petitioners, does not conflict with the holding of *Stone*.

Two circuits have concluded that, at least in some circumstances, the CSRA does not prevent a covered federal employee from seeking equitable relief for a constitutional employment claim. The Third Circuit, in *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995), permitted federal-employee plaintiffs to bring First Amendment retaliation claims in district court, although it recognized that "a good argument can be made that a federal employee who has meaningful administrative remedies and a right to judicial review under the CSRA or another comparable statutory scheme should not be permitted to bypass that scheme by bringing an action under 28 U.S.C. § 1331 and seeking injunctive or declaratory relief." *Id.* at 34. The District of Columbia Circuit has suggested that equitable relief is at least sometimes available for federal employees asserting constitutional claims, but it generally requires exhaustion of administrative remedies as a prerequisite to bringing suit. See *Steadman* v. *Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (1990) ("Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court.").

b. Contrary to petitioners' contention (Pet. 21-23), any disagreement among the circuits does not warrant further review in this case. The court of appeals noted

that petitioners did not "contest the view that the statutory route, where it applies, is the exclusive remedy for an employee challenging removal," but instead argued that "the statutory remedy is not available to them." Pet. App. 6a. The court of appeals' conclusion that the CSRA does afford a remedy to petitioners does not conflict with the holdings of other circuits and, for the reasons explained above, see pp. 9-13, *supra*, does not warrant this Court's review. Moreover, the narrow issue whether a employee covered by the CSRA should be able to opt out of the CSRA's judicial-review provisions and instead bring suit in district court has been infrequently litigated and is thus of limited practical importance. The government is aware, for example, of only one instance, in the 16 years since *Mitchum* was decided, in which a federal employee has sought equitable relief in district court in the Third Circuit based on an allegedly unconstitutional employment-related action. See *Rhodes* v. *Holt*, No. 4:CV 06-1686, 2007 WL 1704653 (M.D. Pa. June 12, 2007).

This case would not be an appropriate vehicle to resolve the alleged conflict in any event. Resolution of the question presented would not be outcome-determinative in this case because petitioners' constitutional claims are insubstantial. Both the district court (Pet. App. 54a-64a, 86a-93a) and the dissenting judge on the court of appeals (Pet. App. 27a-38a) rejected petitioners' arguments on the merits. And the court of appeals majority labeled petitioners' claims as "unpromising, given that one [the equal-protection argument] conflicts with governing Supreme Court precedent [*Rostker* v. *Goldberg*, 453 U.S. 57 (1981)], and the other [the bill-of-attainder argument] ignores the fact that [petitioners] were free to avoid the bar by timely registration" with the Selec-

tive Service. Pet. App. 14a. No further review of those claims, or petitioners' ability to bring them notwithstanding their failure to exhaust their remedies under the CSRA, is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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