IN THE SUPREME COURT OF IOWA

NO. 19-0048

DAVID MICHAEL JOHNSTON,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEANIE VAUDT

APPELLEE'S BRIEF

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ROUTING STATEMENT

Transfer to the Iowa Court of Appeals is appropriate given the matter can be decided through the application of existing legal principles and established precedent based on the findings of the district court. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

The respondent/appellee Iowa Department of Transportation (hereinafter "respondent") is satisfied with the petitioner's statement of the case. *See* Iowa R. App. P. 6.903(3).

STATEMENT OF THE FACTS

The underlying facts are not in dispute and the respondent is satisfied with the petitioner's statement of the facts. *See* Iowa R. App. P. 6.903(3). In addition, respondent adopts the "Background Facts and Proceedings" set forth by the district court as its own and incorporates them by reference herein. App. at 11-12.

LEGAL ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT A DEFERRED JUDGMENT IS A CONVICTION FOR PURPOSES OF IOWA CODE SECTION 321.555(1).

Error Preservation

This issue was presented to the district court and petitioner's notice of appeal from the decision of the district court was timely filed. Therefore, petitioner is correct in his assertion that error has been preserved as to this issue.

Scope of Review

When exercising its power of judicial review of agency action, the district court functions in an appellate capacity to correct errors of law by the agency. *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n*, 359 N.W.2d 491, 492 (Iowa 1984); *Willett v. Iowa Dept. of Transp.*, 572 N.W.2d 172, 173-174 (Iowa Ct. App. 1997) (citing *Teleconnect v. Iowa State Commerce Comm'n*, 404 N.W.2d 158, 161-62 (Iowa 1987)). In the review of the district court's action, the Iowa appellate courts "merely apply the standards of section [17A.19(10)] to the agency action to determine whether [the] conclusions [of the appellate court] are the same as

those of the district court." *Northwestern Bell Telephone Co.*, 359 N.W.2d at 492; *Willett*, 572 N.W.2d at 174.

The appellate court should not interfere on judicial review unless it finds Mr. Johnston carried his burden of proof as a matter of law. *Heidemann v. Sweitzer*, 375 N.W.2d 665, 670 (Iowa 1985). The licensee's burden of proof is to show "compliance with all lawful requirements for the retention of the license." *Mary v. Iowa Dept. of Transp.*, 382 N.W.2d 128, 132 (Iowa 1986). The heavy burden of proving a lack of substantial evidence is on the driver. *Missman v. Iowa Dept. of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002); *Lee v. Iowa Dept. of Transp*., 693 N.W.2d 342 (Iowa 2005). This Court need only scrutinize the record to see if there is substantial evidence supporting the agency's decision.

Pursuant to Iowa Code section 321.2(1), "[t]he state department of transportation shall administer and enforce the provisions of this chapter." Petitioner's driving privileges were revoked pursuant to Iowa Code chapter 321. In fact, as the underlying facts are not in dispute, the record evidence could fail to support the agency action in this matter **only** if a reviewing court were to examine the relevant statutes and hold as a matter of law that the agency's actions exceeded its statutory authority and unjustifiably

applied law to fact. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-11 (Iowa 2010); *Good v. Iowa Civil Rights Comm'n*, 368 N.W.2d 151, 155 (Iowa 1985).

> The resolution of the issue at hand involves the agency's application of law to the facts. The legislature clearly vested the agency with the application of the law to the facts. We are required to give the agency appropriate deference because the legislature vested the application of the law to the facts with the agency. *Id.* §17A.19(11)(c). We give the agency the appropriate deference by only reversing or modifying the agency action "upon an irrational, illogical, or wholly unjustifiable application of law to fact."

Drake University v. Davis, 769 N.W.2d 176, 182 (Iowa 2009).

Just as this Court held in *Drake*, above, so does the case at hand rest on the agency's application of law to the facts. Since this matter has been properly vested by law with the agency, it follows that, pursuant to Iowa Code section 17A.19(11)(c), deference is to be given to the agency's decision. Thus, reversal is appropriate only if the agency's application of the law was irrational, illogical or wholly unjustifiable.

Argument

Petitioner contends that a deferred judgment does not constitute a conviction for purposes of an administrative license revocation as a habitual offender under Iowa Code section 321.555(1). The administrative law

judge, the agency and the district court all rejected this argument as it contradicts established legal precedent.

The issue of whether or not a deferred conviction constitutes a final conviction for purposes of an administrative license revocation has squarely been addressed by this Court in *Schilling v. Iowa Dept. of Transp*., 646 N.W.2d 69 (Iowa 2002). In *Schilling*, 646 N.W.2d 69 at 73, this Court held that a deferred judgment is a final conviction for purposes of the driver's license revocation statute. The facts and legal issues in *Schilling* are virtually identical to those presented here, right down to the statutory basis for the conviction.

> Schilling pled guilty to eluding a law enforcement vehicle in violation of Iowa Code section 321.279 (1999). The district court accepted the plea, and on February 28, 2000, the court entered an order granting Schilling a deferred judgment. On March 23, the DOT sent Schilling a notice under Iowa Code section 321.209 that, as of thirty days from the notice, his driver's license would be revoked for one year, based on his eluding conviction. On April 14, 2000, Schilling petitioned for judicial review, contending a deferred judgment did not constitute a "final" conviction, as required by Iowa Code section 321.209.

Id., 646 N.W.2d at 70.

In rejecting Schilling's argument, the Iowa Supreme Court conducted a detailed analysis of the deferred judgment provisions of Iowa Code chapter

907 in connection Iowa Code section 312.209(7) (the habitual offender statute at that time), and found as follows:

> The first question is whether the license revocation is aimed at the protection of the public or as a punishment measure. If it is the former, a conviction without judgment may be a sufficient basis for revocation. *See Kluesner*, 389 N.W.2d at 372. If the revocation statute is protective in nature, the establishment of the following elements will be sufficient to show that a conviction exists: (1) A judge or jury has found the defendant guilty, or the defendant has entered a plea of guilty; (2) the court has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed; (3) a judgment of guilty may be entered if the person violates the terms of probation or fails to comply with the requirements of the court's order; and (4) the conviction has become final. A conviction is final if the defendant has exhausted or waived any postorder challenge.
>
> We believe section 321.209(7) is designed for the protection of the public, not for punishment. Therefore, a broad definition of "conviction" is appropriate. *See Kluesner*, 389 N.W.2d at 372. Applying the test for conviction as set out above, it is undisputed that Schilling pled guilty, thereby satisfying the first element. As to the second element, the court imposed a restraint on Schilling's liberty by requiring him to abide by the terms of his deferred judgment agreement, report any violations of law, attend a defensive-driving school, appear in court on a set date to show cause why his probation should not be revoked, and pay the court costs. As to the third element, under the deferred judgment order and Iowa Code section 907.1, a judgment of guilt or order of contempt may be entered if Schilling violates the terms of his probation. Under the fourth element, finality, it is clear Schilling's conviction has become final because he is not entitled to appeal the order; there is no judgment from which to appeal. *Anderson*, 246 N.W.2d at 279.

> **We conclude that the deferred judgment constitutes a Conviction**, and the conviction became final prior to Schilling's challenge in district court.

Id., 646 N.W.2d at 73 (*emphasis added*).

The petitioner also relies on *State v. Tong*, 805 N.W.2d 756 (Iowa 2011), in support of his argument that a deferred judgment does not constitute a conviction. This reliance is misplaced. Although the underlying facts in *Tong* are quite different from *Schilling* in that *Tong* concerns whether a deferred judgment constitutes a conviction for purposes of possession of a firearm, the Court's analysis and conclusion were the same.

> Historically, we have treated a deferred judgment as a "conviction" when the purpose of the statute was to protect the community, but not when the statute's purpose was to increase punishment. *See, e.g., Schilling*, 646 N.W.2d at 71–72 (holding a deferred judgment was a "final conviction" for driver's license revocation purposes and noting that "[w]e have distinguished between a conviction used to increase a criminal penalty and one used to protect the public"); *Kluesner*, 389 N.W.2d at 372–73 (holding a deferred judgment was a "judgment of conviction" for the purposes of Iowa's restitution law because that law was intended to protect the public); *State v. Blood*, 360 N.W.2d 820, 822 (Iowa 1985) (holding a deferred judgment would be taken into account in determining whether the defendant had committed his third OWI offense for license revocation purposes as this provision was not intended to punish the driver but solely to protect the public)…
>
> . . .

> [W]e hold a deferred judgment constitutes a conviction for purposes of section 724.26 where the defendant (as here) has not completed his term of probation.

Tong, 805 N.W.2d at 602-603.

Simply put, there is nothing distinguishable about the present case to remove it from the purview of this Court's holding in *Schilling*. The district court was correct in holding as follows:

> It is well settled under controlling Iowa case law that a deferred judgment does constitute a conviction for purposes of administrative action under the facts presented here. [Petitioner's argument was addressed and rejected by the Iowa Supreme Court (the Court) in *Schilling v. Iowa Dep't of Transp.*, 646 N.W.2d 69, 73 (Iowa 2002). The Schilling decision is still good law for the purposes of the instant matter.

App. at 12.

As the district court noted, "existing case law, particularly *Schilling*, makes it clear that [petitioner's] deferred judgment for a conviction for eluding qualifies as a 'final conviction' for the purposes of section 321.555." App. at 14. Thus, since petitioner's first argument has already been squarely decided by established legal precedent, it fails.

II. THE DISTRICT COURT CORRECTLY HELD THAT IT IS THE DATE OF OFFENSE, NOT THE DATE OF CONVICTION, WHICH IS CONTROLLING FOR PURPOSES OF DETERMINING THE IMPOSITION OF THE HABITUAL OFFENDER STATUTE.

Error Preservation

This issue was presented to the district court and petitioner's notice of appeal from the decision of the district court was timely filed. Therefore, petitioner is correct in his assertion that error has been preserved as to this issue.

Scope of Review

When exercising its power of judicial review of agency action, the district court functions in an appellate capacity to correct errors of law by the agency. *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n*, 359 N.W.2d 491, 492 (Iowa 1984); *Willett v. Iowa Dept. of Transp.*, 572 N.W.2d 172, 173-174 (Iowa Ct. App. 1997) (citing *Teleconnect v. Iowa State Commerce Comm'n*, 404 N.W.2d 158, 161-62 (Iowa 1987)). In the review of the district court's action, the Iowa appellate courts "merely apply the standards of section [17A.19(10)] to the agency action to determine whether [the] conclusions [of the appellate court] are the same as

those of the district court." *Northwestern Bell Telephone Co.*, 359 N.W.2d at 492; *Willett*, 572 N.W.2d at 174.

The appellate court should not interfere on judicial review unless it finds Mr. Johnston carried his burden of proof as a matter of law. *Heidemann v. Sweitzer*, 375 N.W.2d 665, 670 (Iowa 1985). The licensee's burden of proof is to show "compliance with all lawful requirements for the retention of the license." *Mary v. Iowa Dept. of Transp.*, 382 N.W.2d 128, 132 (Iowa 1986). The heavy burden of proving a lack of substantial evidence is on the driver. *Missman v. Iowa Dept. of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002); *Lee v. Iowa Dept. of Transp*., 693 N.W.2d 342 (Iowa 2005). This Court need only scrutinize the record to see if there is substantial evidence supporting the agency's decision.

Pursuant to Iowa Code section 321.2(1), "[t]he state department of transportation shall administer and enforce the provisions of this chapter." Petitioner's driving privileges were revoked pursuant to Iowa Code chapter 321. In fact, as the underlying facts are not in dispute, the record evidence could fail to support the agency action in this matter **only** if a reviewing court were to examine the relevant statutes and hold as a matter of law that the agency's actions exceeded its statutory authority and unjustifiably

applied law to fact. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-11 (Iowa 2010); *Good v. Iowa Civil Rights Comm'n*, 368 N.W.2d 151, 155 (Iowa 1985).

> The resolution of the issue at hand involves the agency's application of law to the facts. The legislature clearly vested the agency with the application of the law to the facts. We are required to give the agency appropriate deference because the legislature vested the application of the law to the facts with the agency. *Id.* §17A.19(11)(c). We give the agency the appropriate deference by only reversing or modifying the agency action "upon an irrational, illogical, or wholly unjustifiable application of law to fact."

Drake University v. Davis, 769 N.W.2d 176, 182 (Iowa 2009).

Just as this Court held in *Drake*, above, so does the case at hand rest on the agency's application of law to the facts. Since this matter has been properly vested by law with the agency, it follows that, pursuant to Iowa Code section 17A.19(11)(c), deference is to be given to the agency's decision. Thus, reversal is appropriate only if the agency's application of the law was irrational, illogical or wholly unjustifiable.

Argument

Petitioner asserts that the agency erred in using the dates the qualifying offenses occurred rather than the dates of conviction in imposing the habitual offender bar. The ALJ, the agency and the district court all

rejected petitioner's argument on this issue as well. As the ALJ correctly noted, "[t]he Iowa Supreme Court has addressed this argument and specifically found that the date the violations were committed, not the conviction date, controls the time period for determination of the habitual offender statute." App. at 5. *See State v. Phelps*, 417 N.W.2d 460, 462 (Iowa 1998) ("Accordingly, we hold that the two-year time period in the [then habitual offender statute] defines the time within which the violations, not convictions, must have occurred.") The district court echoed this holding in its conclusion that *Phelps* is controlling as to this issue.

Petitioner relies on *State v. Brauer*, 540 N.W.2d 442 (Iowa 1995), in support of his argument that, despite *Phelps*, conviction dates are the "proper yardstick" under Iowa Code section 321.555. This reliance is similarly misplaced and was discussed at length by the district court.

> In *Brauer*, the Court briefly stated, without analysis, that "Iowa Code section 321.555(1) defines a habitual offender as a person who has three or more convictions for specified offenses within a six-year period." *Id* at 443. The issue in *Brauer* was whether the district court had discretion to refuse to adjudicate a driver as a habitual offender. *Id*. The *Brauer* Court did not address what David casts as a contradiction between the *Brauer* holding with the *Phelps* Court's conclusion that the violation date, and not the conviction date, controls the time frame for determining habitual offender status.

> There is no contradiction. The *Brauer* court said what it said in getting to the issue it addressed which, as noted above, did not concern the interpretation of either "offense" or "conviction" in section 321.555(1) or 321.555(2) nor the interrelationship between the two provisions. Brauer's progeny is likewise silent on the argument David poses here. *Heineman v. Iowa Dep't of Transp*., No. 07-0089, 2007 WL 2711016, at *2(Iowa Ct. App. Sept. 19, 2007) (finding substantial evidence supported conclusion that Heineman was convicted six times and thus was a habitual offender, citing *Brauer* as controlling).

App. at 15-16.

The district court was correct in rejecting petitioner's argument and going on to conclude that "[f]or the purposes of the record presented to the court, the passing reference in *Brauer* that [petitioner] hinges his argument upon is dicta. Furthermore, his argument runs contrary to the *in pari materia* doctrine, which requires related statutory provisions relevant to the subject matter at issue to be construed together and harmonized. *State v. Hensley*, 911 N.W.2d 678, 681 (Iowa 2018)." App. at 17.

The district court also discussed the legislative history of Iowa Code section 321.555, which supports the holding in *Phelps*.

> Furthermore, the legislative history of section 331.555(1) suggests the legislature intended to focus on offenses rather than convictions in section 331.555(1), as noted by the reviewing officer on intra-agency appeal:

> The General Assembly passed the Habitual Offender Act in 1974. At that time, section 321.555(1) read as follows: "Three or more *convictions* within a six-year period, of the following offenses, either singularly or in combination . . . ." Six years later, the statute was amended to read,
>
> "Three or more of the following *offenses*, either singularly or in combination, within a six-year period. . . ." *See* 1980 Iowa Acts, ch. 1103, sec. 15. As it has been amended, section 321.555(1) clearly refers to three or more offenses, not convictions, within a six-year period. When a statute is plain and its meaning is clear—like this statute—we should not reach for meaning beyond its express terms. *State v. Landals*, 465 N.W.2d 660 (Iowa 1991). Moreover, the language "for which final convictions have been rendered" does not qualify a time frame required for such convictions. *State v. Phelps*, 417 N.W.2d 460 (Iowa 1988).
>
> (07/31/18 Final Agency Order; Certified Agency Record at p. 4, ¶ 1) (emphasis added).

There is no legal precedent for the argument petitioner advances here.

App. at 16-17.

The district court went on look at the entirety of petitioner's argument and properly concluded as follows:

> The court is unaware of any reported case law—and the parties pointed to none—giving the court any direction as to why section 321.555(1) should be construed to require using a date of conviction for determining habitual offender status, while a date of offense should be used for determining habitual offender status under section 321.555(2)—a related section that directly follows section 321.555(1) in the Iowa Code and deals with the same subject matter. Both provisions when compared contain remarkably similar language. Finally, if there is a need

> to clarify the language employed in these two provisions, that option is within the purview of the Iowa legislature in the first instance, who saw fit in 1980 to amend section 321.555(1) to say what it says now.
>
> For all of the reasons discussed above, David's argument that the IDOT erred in using offense dates rather than conviction dates fails.

App. at 17.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE ISSUE OF "PURSUING" AS REFERENCED IN IOWA CODE SECTION 321.555(1)(G) AS AN ELEMENT OF AN ADMINISTRATIVE LICENSE REVOCATION WAS NOT PROPERTLY PRESERVED FOR REVIEW.

Error Preservation

As previously stated, notice of appeal from the decision of the district court was timely filed. However, this issue was not properly raised in the administrative tribunal, nor did respondent otherwise have notice, and therefore, as the district court correctly held, it has not been preserved for review.

Scope of Review

Because this issue was neither presented nor decided by the district court, it has not been preserved for appeal. That argument notwithstanding, should this Court address the issue, the standard of review is correction for errors of law. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Although this Court is not bound by the district court's legal conclusions, it is bound by the district court's findings of fact if they are supported by substantial evidence. *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998).

Argument

It is well settled that the appellate court's review is limited to questions considered by the administrative agency. *Ahrendsen v. Iowa Dept. of Human Services*, 613 N.W.2d 674 (Iowa 2000); *see also Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685 (Iowa 1994). It is well settled that issues on appeal not raised below in the proper forum are deemed waived. *State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011). Issues must be both raised and decided by the district court in order to be preserved for review. *Meier v. Senecaut, supra*.

The agency record in this matter is completely devoid of any mention of petitioner's argument regarding the definition of "pursuing" in connection with an administrative license revocation under Iowa Code section 321.555 as petitioner raised it for the first time in his appeal to the district court.

> A careful review of the certified agency record confirms that David's argument on this point was not presented to, and thus not considered by, the agency because David did not raise this argument in front of the agency. David raised this issue for the first time in his judicial review brief to the district court.
>
> Iowa Code section 17A.19(7) mandates that "[i]n proceedings for judicial review of agency action in a contested case . . . a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by the Constitution or a statute to the agency in that contested case proceeding. Iowa Code §17A.19(7). It is well settled that an appellate court's review "is limited to questions considered by the [administrative] agency." *Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). In *Schaefer v. Iowa Department of Transportation*, No. 02-0580, 2002 WL 1842482, at *3 (Iowa Ct. App. Aug. 14, 2002), the court held that a motorist whose driver's license was revoked for one year for OWI did not preserve, for purposes of appeal, his claim that he was denied due process of law since he raised that claim for the first time on appeal.

App. at 18.

Since this issue was neither advanced in front of, nor considered by, the agency, it has not been properly preserved for consideration on judicial

review. However, should this Court nonetheless decide to consider the issue, there simply is no such legal requirement that the department present additional evidence regarding "pursuit" before using Iowa Code section 321.555(1)(g) as a basis for imposing a habitual offender bar. Petitioner's argument that the language of 321.555(1)(g) somehow imposes an extra burden on the department to show the element of "pursuing" is entirely lacking in legal merit. There is no material distinction between the requirements for a conviction under the criminal statute for eluding and the habitual offender language of Iowa Code section 321.555(1)(g), which specifically provides that "eluding or attempting to elude a pursuing law enforcement vehicle in violation of section 231.279."

The fact that petitioner was convicted of eluding under Iowa Code section 321.279 unquestionably invokes the habitual offender definitional provision of section 321.555(1)(g), and it defies all known legal authority to conclude that an agency would be required to prove additional elements of a criminal charge before taking administrative action based on a conviction of said criminal charge. When petitioner was convicted of eluding under Iowa Code section 321.279, the department's action under section 321.556 in imposing a bar on petitioner's driving privileges as a habitual offender,

based in part on the eluding conviction as provided in section 321.555(1)(g), was lawful in all respects.

CONCLUSION

For the petitioner to prevail on his first two arguments in the matter at hand, he is asking this Court to disregard legal precedent and overturn not one but two of its previous decisions. As this Court has noted on numerous occasions, "[t]he Supreme Court does not overturn its precedents lightly and will not do so absent a showing the prior decision was clearly erroneous." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005). "From the very beginnings of this court, we have guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." *Id*., citing *Kiesau v. Bantz*, 686 N.W.2d 164, 180 (Iowa 2004). No such showing has been made here.

Petitioner's remaining argument regarding the definition of "pursuing" in connection with the imposition of a habitual offender sanction under Iowa Code section 321.555 was not preserved for appeal. Just as the district court "respectfully decline[d] [petitioner's] invitation to ignore our long standing error preservation rules," (App. at 19), so should this Court here.

As recognized by the district court, the respondent's decision to impose a five-year bar on petitioner's driving privileges as a habitual offender under Iowa Code section 321.555 is supported by substantial evidence, and the district court's decision in upholding the agency was not erroneous in any manner. Rather, it was based on the well-reasoned application of existing case law to the facts at hand. Since there is no legal error for this Court to correct, this case should be affirmed in its entirety.

REQUEST FOR ORAL ARGUMENT

Appellee hereby requests oral argument upon submission of this case.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 4,258 words, excluding the parts of the brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

I, Michelle E. Rabe, hereby certify that on August 13, 2019, a copy of Appellee's Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief on that same date to:

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