To Be Argued By:
STEVEN BANKS

New York County Clerk's Index Nos. 42582/79, 41494/82

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ROBERT CALLAHAN, et al.,

Plaintiffs-Respondents,

—against—

HUGH L. CAREY, as Governor of the State of New York, et al.,

Defendants-Appellants.

LOUISE F. ELDREDGE, et al.,

Plaintiffs-Respondents,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, et al.,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

Procedure No. 12-400 of New York City's Department of Homeless Services (the "Procedure") is a sea change in the City's policy of providing shelter from the elements to homeless women and homeless men. The new policy would permit the City, for the first time in over three decades, to turn these women and men, who are seeking a basic life need, back into the streets.

The trial court correctly found that the City violated the City Administrative Procedure Act ("CAPA"), N.Y. City Charter § 1041 *et seq.*, when it issued Procedure No. 12-400 with—by the City's own admission—no public vetting. A policy change of this magnitude requires rulemaking procedure, including an opportunity for public input. After a careful analysis of the record evidence, the trial court correctly concluded that no exception to CAPA insulated the City's radical policy change from public debate and review.

The trial court found that the Procedure is not discretionary, as the City claims it to be. The Procedure mandates the denial of shelter to, according to the City's own estimates, between 10 and 60 percent of those homeless women and men who seek it. Similarly, the trial court correctly found that such a dramatic policy change would clearly have a legal effect on these vulnerable women and men who would be denied life-sustaining shelter pursuant to the Procedure. The

court properly rejected the City's claim that the Procedure was merely "explanatory" of State directives from the 1990s that the City has never implemented in this manner but now claims are mandatory.

On this record, this Court should affirm the ruling below. The Court should not permit the City to abandon over 30 years' worth of policy and procedure without the public notice and comment that the City Administrative Procedure Act requires.

QUESTIONS PRESENTED

1. Whether Procedure 12-400, which declares that every homeless woman or man who seeks shelter in New York City's single adult shelter system shall be subject to a background investigation that determines access to shelter, is a "statement of general applicability," and therefore a rule.
2. Whether, by restricting homeless individuals' access to life-sustaining shelter, Procedure 12-400 has "legal effect" within the meaning of the City Administrative Procedure Act.

STATEMENT OF THE CASE

On November 3, 2011, New York City's Department of Homeless Services ("City," "DHS") notified Respondents' counsel that on November 14, 2011, just before Thanksgiving and the onset of winter, the City would implement Procedure No. 12-400. R.64.[1] The Procedure would determine which homeless women and men the City considers entitled to shelter. R.41-51. On November 10, 2011, Respondents sought, and the Supreme Court for New York County issued, an Order to Show Cause why the Procedure should not be enjoined. Respondents contended the Procedure is impermissible under the existing Consent Decree in this litigation, which, by the consent of the parties and the judgment of the court, obligates the City to provide shelter from the elements to homeless men and homeless women. R.29-31. Respondents also contended that the City had adopted the Procedure in violation of CAPA. R.29-31. On November 10, 2011, in open court, the City agreed to defer implementation of the Procedure pending the return date of the motion. R.172.

On December 7, 2011, the Council of the City of New York ("Council") filed a petition under Article 78 of the New York Civil Practice Law and Rules, also seeking to have the Procedure declared void for the City's failure to comply

[1] Citations to the Record on Appeal appear as "R.__."

with CAPA.[2] The Supreme Court consolidated the two cases for purposes of deciding the CAPA issues and bifurcated the portion of Respondents' case that related solely to the Consent Decree. R.12.

On February 21, 2012, the Supreme Court granted Respondents' motion to the extent of declaring the Procedure void for the City's failure to comply with CAPA. Memorandum and Decision, *Callahan v. Carey*, Index No. 42582/79, 2012 NY Slip Op 30400U (Sup. Ct., N.Y. County 2012) (R.26). The trial court denied the remainder of their motion, with respect to whether the Procedure violated the City's obligation under the Consent Decree to provide shelter from the elements, as academic pending proper review of the Procedure pursuant to CAPA. R.25-26. The City filed a notice of appeal on March 9, 2012 (R.3), and perfected this appeal on September 4, 2012. *See* Appellants' Brief, *Callahan v. Carey*, Index No. 42582/79 (1st Dep't filed Sept. 4, 2012) ("City Br.").

Following the trial court's ruling in February, the Procedure has not been implemented.

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[2] *See* Verified Petition, *Council of the City of N.Y. v. Dep't of Homeless Servs. of the City of N.Y.*, Index No. 403154/11 (Sup. Ct. N.Y. County Dec. 7, 2011). This Court can take judicial notice of papers filed in the related action. *See Grady v. Utica Mut. Ins. Co.*, 69 A.D.2d 668, 671 n.1 (2d Dep't 1979).

STATEMENT OF FACTS

A. The Consent Decree and New York City's Shelter System

DHS operates a system of shelters that provides temporary housing assistance to homeless women and men in the City. Many women and men who need shelter have suffered from the disastrous economic conditions of recent years; others may be going through brief periods of need in their lives; some have physical, mental, or social dysfunctions that limit their ability to secure or remain in their own housing or the housing of others. About 30 percent of women and men in shelter have significant mental health problems, and 60 percent have substance abuse problems. R.157; R.166. For all these women and men, shelter is a life-sustaining necessity. Without it, many would be forced to live on the streets, where they would face grave risks of injury or even death. R.68. For example, record evidence documented the gruesome effects of frostbite on women or men languishing on the streets. R.70-73; R.91-104.

For more than 30 years, the City's provision of shelter to homeless adult men and women in New York City has been governed by a Consent Decree entered as the final judgment of the Supreme Court on August 26, 1981. *See Callahan v. Carey*, Final Judgment by Consent, Index No. 42582/79 (Sup. Ct. N.Y.

County Aug. 26, 1981) ("Consent Decree") (R.335-354).[3] The Consent Decree represented a negotiated settlement of contentious litigation over the City's and State's constitutional obligations to provide aid to individuals in New York City in need of shelter. R.335-336. The City promised to "provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program . . .; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter." R.336-337.[4] "The consent decree acknowledges Plaintiffs' right to temporary shelter and relieves them of the perceived burden of establishing . . . eligibility to gain entry to temporary shelter." *Callahan v. Carey*, 307 A.D.2d 150, 154 (1st Dep't 2003). Various provisions of the Consent Decree set forth substantive standards for shelter (R.337-341, R.351-354), describe how homeless women and men may seek shelter

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[3] The original Consent Decree applied with respect to homeless men. This Court later extended the terms of the Consent Decree to homeless women. *Eldredge v. Koch*, 98 A.D.2d 675 (1st Dep't 1983). The trial court formally consolidated the *Eldredge* and *Callahan* cases in January 2010.

[4] The trial court retained jurisdiction (R.349) and has actively monitored and enforced the Consent Decree. *See, e.g.*, *Callahan v. Carey*, 12 N.Y.3d 496 (2009) (affirming order enforcing Respondents' right under Consent Decree to information about individuals ejected from shelter system); Tr. of Hr'g. in *Callahan v. Carey*, Index No. 42582/79, 35 (Sup. Ct. N.Y. County Dec. 21, 2009) (granting Respondents temporary relief against shelter denials and systemic "overnighting" practices developed because of severe lack of lawful shelter). The Coalition for the Homeless, an organization that advocates for and provides services directly to homeless New Yorkers, is an institutional plaintiff-respondent in *Callahan* and *Eldredge*.

(R.343-345), and establish information-sharing mechanisms to facilitate Respondents' monitoring of the City's compliance with the Decree (R.345-347).

In practice, as the City has operated the system for over 30 years, a homeless woman or man who needs life-sustaining shelter presents herself or himself at one of the designated intake centers. Shelter officials then assign such an individual a bed. For an initial period, that bed might be at an assessment center, but thereafter it is at a longer-term facility, eventually one that might provide additional services to help the person rebuild an independent life. R.408-409.

During these last three decades, the City has not conducted any background investigation of women and men seeking shelter, and it has not applied an access criterion to reject homeless women and men at the intake point. R.293; R.409. Straightforward entry to shelter, without a lengthy pre-screening process, is critical for many of the vulnerable individuals who need this support. Record expert evidence shows that substantial numbers of class members in this litigation are simply unable to navigate a complicated background investigation. R.162-165. Even those who are better equipped to participate in an investigation may not—in part because of their unstable living situations—have the documentation that might be necessary to satisfy the Procedure's access criterion. R.162-165.

Meanwhile, given the number of homeless women and men who seek temporary assistance from the City's shelter system on any given day, shelter intake is a mass-scale process. Impediments can rapidly lead to the point where homeless women and men suffer without access to the shelter they need. In 2009, for example, as the number of homeless New Yorkers grew as a result of the economic crisis, the City tried to manage the resulting flow by shuttling women and men from shelter to shelter in the middle of the night to any beds that were free for a few hours. Respondents documented how some homeless women and men were permitted to sleep only a few hours a night between transfers, while others slept on tables or chairs in waiting rooms and yet others gave up and retreated to the streets. The trial court issued a temporary restraining order against the City's practice, which had become a barrier to life-sustaining shelter. In compliance with that order, and in response to the growing need for shelter, the City made a "tremendous effort" to add capacity to the system.[5]

[5] Hr'g Tr. in *Callahan v. Carey*, Index No. 42582/79, p. 8 (Feb. 17, 2010). The City likely needs even greater shelter capacity today than it did then, because in 2011 the City terminated a rent subsidy program that was helping 16,000 previously homeless households, including families and individual women and men, live in their own housing. *See Zheng v. City of N.Y.*, 19 N.Y.3d 556, 582 (2012) (Ciparick, J., dissenting) (as a consequence of the termination, 16,000 tenants "face[d] eviction and homelessness"; quoting *Zheng v. City of N.Y.*, 93 A.D.3d 510, 519 (1st Dep't 2012) (Moskowitz, J., dissenting)).

B. 18 N.Y.C.R.R. § 352.35, 94 ADM-20, and 96 ADM-20

In 1994, the New York State Department of Social Services[6] grew concerned that in some localities the shelter systems, which the Department regarded as emergency relief, had become long-term assistance programs. To address this concern, the Department issued a directive calling on local social services districts to assess whether some individuals in their shelter systems could reasonably (and perhaps with some assistance) find their own independent housing. 94 ADM-20 (R.238-285). As issued, the directive expressly recognized that some districts, such as New York City's, have legal obligations under "court decisions which apply to the district's policies related to homeless persons and families, including "the Callahan v. Koch and the Eldridge v. Koch cases [sic]." R.241.

In 1996, the State formalized some aspects of 94 ADM-20 in a regulation, 18 N.Y.C.R.R. § 352.35 (R.234-R.236). The regulation established the concept of an "Independent Living Plan." R.235. For an individual who a local social services district determined could be assisted into independent housing, the district was to develop an individualized plan to facilitate the transition. R.235. Individuals for whom such plans were created had to cooperate with the plans, and

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[6] In 1997, that department was divided in two. The relevant functions are now in the Office of Temporary and Disability Assistance ("OTDA"). *See* L. 1997, ch. 436, § 122(a), (f).

shelter residents were expected to "actively seek housing" outside the shelter system. R.235. The State issued an additional directive, 96 ADM-20, to implement the regulation. The directive instructed local social service districts to assess whether shelter residents had access to other types of housing.

At the time, Respondents were concerned about the grave risks to class members if the City decided to extend the State regulation and directives from the context of shelter stays to shelter intake, by conducting an investigation process when homeless women and men arrive to seek shelter. *See* R.330. On that ground (among others), they brought a facial challenge to the regulation.[7] In response the City reassured the trial court that it would not be screening homeless women's and men's access to shelter at intake.[8] And the City told this Court that it sought to "requir[e] that those shelter ***residents*** who are able to do so take reasonable steps to ***end*** their dependence on emergency shelter" (emphasis added).[9] This Court

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[7] *See* Memorandum in Support of Plaintiffs' Motion to Declare State "Emergency" Regulations Null and Void, *Callahan v. Carey*, Index No. 42582/79, pp. 7-10 (Sup. Ct. N.Y. County, filed Dec. 8, 1995) (R.327-333).

[8] *See* City Defs.' Reply Memorandum of Law, *Callahan v. Carey*, No. 42582/79, p. 9 (Sup. Ct. N.Y. County, filed Dec. 23, 1999) (R.298) (City "ha[d] not" "chosen . . . [to] require[] the applicant to cooperate in a thorough investigation of housing alternatives").

[9] Br. of Municipal Appellants, *Callahan v. Carey*, Index No. 42582/79, p. 27 (1st Dep't, filed Oct. 18, 2002) (R.308). In the trial court, the City asserted that the Consent Decree would permit it to conduct an intake screening procedure if it so chose. R.298. Later in the case, the City told this Court that avoiding extensive background screening at intake was "the very purpose of the decree." R.310.

recognized that the Decree "relieves [Respondents] of the perceived burden of establishing public assistance eligibility to gain entry to temporary shelter." *Callahan v. Carey*, 307 A.D.2d at 154. In permitting the State directives to take effect, the Court held only that the City could adopt "reasonable standards" requiring "homeless individuals . . . to take steps . . . to reduce their reliance on temporary shelter." *Id*. Thus, despite Respondents' fears, the City adhered—as it represented to this Court that it would—to its longstanding practice of providing shelter without a background investigation process, consistent with the Consent Decree and mindful of the risks associated with denying access to life-sustaining shelter.

C. Procedure 12-400

At 5 PM on November 3, 2011, the City informed Respondents' counsel of a radical change in how class members access shelter. R.34; R.64. The new policy, memorialized as Procedure No. 12-400, *Single Adults Eligibility Procedure* (R.41-51) ("Procedure"), instituted just the sort of background investigation that the City had eschewed after the State issued 96 ADM-20. The new Procedure "sets forth the standards by which . . . Intake facilities will determine whether individuals who apply for [shelter] are eligible." R.41. The Procedure was to be implemented on November 14, 2011, just five business days after the City first gave Respondents

notice. R.41. The City stated publicly that it expected the Procedure to reject between 10 and 60 percent of homeless women and men seeking shelter. R.107; R.158.

Hardly any public deliberation was possible in the brief period between the announcement of the policy and its effective date. The City Council, alarmed by what appeared to be an attempt to elude public scrutiny, took the unusual step of scheduling an emergency Council hearing on November 9, 2011. R.157-158. At that hearing, Seth Diamond, DHS Commissioner, admitted that the City had sought no outside input on the policy. R.157.[10]

The Procedure calls for two factual determinations. First, a homeless woman or man must prove "by clear, convincing and credible evidence" that she or he "ha[s] actively sought and [is] unable to access any other temporary or permanent housing." R.43. City employees will review documents, interview "third parties who may be sources of housing for the applicant," and conduct field investigations. R.42. The inquiry will touch at least every place where the applicant resided in the year before seeking shelter. R.44. City officials will also

[10] The City did consult with OTDA, the State agency that supervises DHS. Commissioner Diamond initially asserted that OTDA had approved the Procedure, but OTDA later made clear it had only advised the City that the Procedure is not inconsistent with applicable State laws and regulations. R.289. OTDA's consultation did not address CAPA, but OTDA expressed "serious concerns" that the City intended to proceed without first submitting the Procedure to the trial court for review under the Consent Decree. R.289.

check on any other potential housing identified by the investigation. R.44. Second, an individual must also document her finances to show she lacks "the means to secure other housing." R.46. During the course of this lengthy shelter-entry process, the City will divert homeless women and men away to "explor[e] options other than shelter." R.47.

To support the City's decision-making process, a homeless woman or man must provide certain documents spelled out in the Procedure. "Applicants will complete . . . an Intake or Eligibility Determination Questionnaire . . . that collects a one year housing history." R.47. The application "contain[s] a release that the applicant *must sign* authorizing DHS to disclose and collect medical and other personal information." R.47 (emphasis added). A person who fails to provide the required documents and information "will be found ineligible based on non-cooperation." R.47. The sole exception is if "the reason for non-cooperation is mental or physical impairment." R.47. "When an applicant claims to have a mental or physical impairment," a licensed social worker "will . . . assess the applicant and render a determination whether the applicant is able to cooperate in the investigation." R.49.

Under the Procedure, the City will deem a homeless person "ineligible" for shelter:

- Even when a family member with whom the homeless person lived in the past states verbally and in writing that the person can no longer live in the home;

- Even when an outreach worker or police officer escorts the homeless person to an intake shelter, if the City claims the person has "not cooperated" with an eligibility investigation;

- Even when the homeless person's other supposed "housing option" is somebody else's public housing, in which the homeless person cannot reside without rendering the primary occupant ineligible for the housing subsidy;

- Even when the "housing option" identified by the City is unsafe, if the homeless person has failed to provide clear and convincing evidence of the safety hazards;

- Even after a landlord has ejected the homeless person, if the landlord did not file an eviction action that was actually adjudicated against the homeless person by a court;

- Even when City investigators have never visited an alleged "housing option" to see if it is actually available and/or suitable to meet the needs of the homeless person;

- If the homeless person is unable to document his or her complete one-year "housing history";

- If a family member or friend with whom the homeless person once resided refuses to cooperate with the City's background investigation;

- Even though the homeless person suffers from a mental or physical impairment or a social dysfunction, if the person fails to undergo an evaluation for such an impairment; and

- Even though the City's rejection of the homeless person was in error, if the homeless person cannot produce "new evidence" of homelessness.

R.37-38; R.41-51.

The City's implementation of the Procedure would have severe consequences for individuals in need of shelter. Of the hundreds of homeless women and men who would be subject to the Procedure every week, the City anticipates that 10 to 60 percent would be turned away as a result. *See supra* at 12.

Many of those turned away would probably have mental impairments that made it difficult for them to prove their need for shelter, to the "clear and convincing" standard of proof the Procedure demands. The Procedure purports to relieve such women and men from the obligation to participate in the background investigation. But the relief is only nominal at best. In reality, as record expert evidence established, many mentally impaired individuals have never been diagnosed, and so would be unable to claim their exemption. R.162-163. Those who have been diagnosed are often unable to tell others about their situations. R.163. Even if a shelter official somehow suspected an individual might be mentally impaired, it would be nearly impossible to make any meaningful assessment of the mental impairment in the context of mass-scale shelter intake procedures. R.163. Record expert evidence established that any serious attempt to do so would require substantial amounts of time (R.163), and even so would be highly prone to error.

Moreover, a great number of homeless women and men who might not have diagnosable mental impairments nevertheless have lives in disarray. R.164. The trauma of homelessness can lead people to shun social interactions such as participating in a background investigation or make it difficult or impossible for them to collect documents. R.164-165. By the harsh logic of the Procedure, these harmful consequences of homelessness would render their victims ineligible to receive help.

Significant problems and risks to life and limb like these suggest that intake is simply not an appropriate time to screen homeless persons for access to shelter or to conduct extensive investigations. Respondents and other interested parties could have helped the City understand these issues, had Procedure 12-400 been the subject of a public process of notice and comment. The defects in the Procedure illustrate the value the City and its residents could have gained from deliberative CAPA rulemaking procedures.

D. The Trial Court's Decision

Respondents challenged the Procedure as a violation of the Consent Decree and as being an unlawful rule promulgated in violation of CAPA. Respondents supported their enforcement motion with expert evidence about the likely impact of the Procedure on homeless New Yorkers in need of shelter. R.66-104; R.160-

167. The City asserted two excuses for failing to follow CAPA's rulemaking requirements. First, the City claimed the Procedure leaves shelter officials the discretion whether to provide shelter to any particular homeless woman or man and is therefore not a rule. Second, the City argued that the Procedure is not a rule because it is "merely explanatory" of the State regulation and directives described above.

The trial court, after reviewing the Procedure, found neither justification to be proper. The court found that the Procedure is of general applicability and is mandatory, not discretionary, for shelter officials. Under the Procedure, "DHS is required to investigate an applicant's eligibility." R.17. The court concluded that the applicability of the Procedure "is not a suggestion or a request, it is an across the board requirement." R.20. Whatever discretion may exist in how to carry out the Procedure, the court noted, "does not negate the [Procedure]'s general applicability because the discretion does not involve simply disregarding the [Procedure]." R.21.

Moreover, shelter officials' supposed discretion is actually quite restricted. "An applicant is required to cooperate," the trial court found, and when an applicant fails to provide all the required information, "the application for [shelter] must be denied" unless the applicant has a "verified mental or physical incapacity."

R.17. Although the Procedure refers to the "totality of the circumstances," the trial court found that "embedded within the [Procedure] are certain criteria . . . that are outcome determinative." R.17. "A plain reading of the [Procedure]," the trial court found, "makes it clear that it mandates certain results under certain circumstances." R.19.

The trial court also concluded that the Procedure has legal effect. The court found that the details of the Procedure go beyond what the State regulation and directives call for. For example, the Procedure requires homeless women and men to release all their medical information before they can obtain shelter from the City. R.18-19. The court found no basis for this requirement in the State directives. R.24.

The State's reaction to the Procedure further supported the court's conclusion. Although the City had sought State approval for the Procedure, the State would only say that the Procedure was "not inconsistent with State law." R.24.

More broadly, the trial court pointed out that the Procedure was new, while the State regulation and directives "ha[d] been in place for no less than 15 years." R.24. That fact alone indicated that the Procedure has legal effect. R.24.

ARGUMENT

As the City acknowledges, it adopted the Procedure without any opportunity for public input. *See* City Br. 17. As discussed below, the Procedure is a rule under CAPA: It is a statement of law or policy of general applicability, N.Y. City Charter § 1041(5). The City disputes this, and it also maintains that the Procedure is "merely explanatory" of preexisting law, *id*. § 1041(5)(b)(ii). The court below, in a thorough and well-reasoned opinion, properly rejected both of the City's excuses. This Court should affirm that decision: the Procedure was adopted in violation of CAPA.

POINT I.

THE PROCEDURE IS A STATEMENT OF GENERAL APPLICABILITY

A rule subject to CAPA means "the whole or part of any statement . . . of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency." N.Y. City Charter § 1041(5). Under the analogous State Administrative Procedure Act, the Court of Appeals has "adopted . . . the criterion" that a rule expresses "a fixed, general principle to be applied . . . without regard to other facts and circumstances relevant to the regulatory scheme." *Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301 (1994) (quoting *Matter of Roman Catholic Diocese v. N.Y. State Dep't of Health*, 66

N.Y.2d 948, 951 (1985); citing *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771 (1992)).[11]

A. The Procedure Applies to All Homeless Women and Men Who Seek Shelter in New York City

The Procedure is just such a statement of general applicability, as the trial court recognized. The Procedure "must be utilized at all DHS intake facilities," as "an across the board requirement." R.20. The Procedure establishes, for the first time, a policy that homeless women and men seeking shelter in the City's single adult system must go through an access control procedure before receiving help. R.41. The screening involves an onerous procedure—also wholly new, and mandatory—in which a homeless woman or man will be required to prove her or his circumstances by "clear and convincing evidence." R.43. Shelter officials will conduct extensive background investigations, including interviews with former landlords and reviews of financial records. R.42.

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[11] Relying on *Schwartfigure* and on *Matter of Homestead Funding Corp. v. State of N.Y. Banking Dep't*, 95 A.D.3d 1410 (3d Dep't 2012), the City suggests that only a "rigid, numerical policy," 83 N.Y.2d at 301, or a "[b]lanket requirement[]," 95 A.D.3d at 1412, counts as a rule. City Br. 18. Each of these cases, holding that a policy being challenged was a rule that had not been properly promulgated, simply affirmed that a certain category of policy satisfies the general criterion set forth in *Cordero*. Neither *Schwartfigure* nor *Homestead Funding* purported to narrow the scope of the *Cordero* criterion.

For more than 30 years, a homeless woman or man in New York City has been able to obtain needed shelter by presenting herself or himself at a designated intake facility. The City acknowledged this fact to the trial court. R.409. The change in policy, to begin conducting background investigations at intake and on that basis begin rejecting some homeless women and men from shelter, is momentous. As noted above, the City estimates that between 10 and 60 percent of would-be shelter entrants would be turned away under the policy. R.107; R.158. And the new background screening procedure would, by itself, force homeless women and men to wait for life-sustaining shelter notwithstanding the well-documented risks to life and health that barriers to obtaining shelter pose for vulnerable women and men, who are likely to give up and end up on the streets. *See supra* at 5-8; R.160-167; R.66-104.

Such a major shift in policy, erecting new requirements and obstacles for individuals seeking shelter, is easily the sort of change that courts of this State have held to be a rule. In *Cordero*, the State Racing and Wagering Board adopted a policy that a jockey who earned a suspension as a penalty for conduct at Saratoga must serve the penalty at Saratoga the following year. As "a mandatory procedure that pertains only to when and where a Saratoga suspension must be served," the Board's policy qualified as a rule that could only be adopted through rulemaking

procedures. 80 N.Y.2d at 773 (emphasis omitted). In *Matter of Medical Society of the State of New York v. Serio*, the Superintendent of Insurance adopted a new policy that a no-fault insurance claimant must file within a shortened deadline or provide "clear and reasonable justification" for a delay. 100 N.Y.2d 854, 868 (2003). The "clear and reasonable justification" standard constituted an "actual 'rule'" that was promulgated using rulemaking procedure. *Id*.; *see also Matter of J.D. Posillico, Inc. v. Dep't of Transp. of State of N.Y.*, 160 A.D.2d 1113, 1114 (3d Dep't 1990) (holding that policy requiring contractor to submit "clear and convincing proof" of a claim of mistake was a rule).

Matter of Home Care Ass'n of New York State, Inc. v. Dowling, 218 A.D.2d 126 (3d Dep't 1996), is particularly instructive. The Department of Social Services issued a memorandum to local social service districts throughout the State, instructing them to conduct new fiscal assessments of all home care recipients whose benefits had been discontinued on the basis of financial eligibility. The Third Department did not hesitate to call the memorandum a rule, because the fiscal assessments were required across the board. *Id*. at 128.

Procedure 12-400 not only imposes a "clear and convincing evidence" burden on homeless women and men seeking shelter, like the burdens of proof announced in *Serio* and *Posillico*, but implements a whole new shelter access

procedure. Regardless of how decisions are made under the Procedure, the rule that there shall be a background investigation, and a decision whether to permit access to shelter, applies without variation to every homeless woman or man who seeks shelter.

B. The Procedure Tightly Constrains Shelter Officials' Discretion

Besides mandating background investigations and access controls, the Procedure also prescribes in detail the substance of access decisions. It operates like a flow chart identifying numerous decision points and specifying the factual determination on which each decision is to be based. The trial court recited several examples. R.16-20. For instance, "[a]n applicant is required to cooperate by providing all information and documentation necessary," and if an applicant fails to do so "then the application for [shelter] must be denied." R.17. *Cf. Matter of 439 E. 88 Owners Corp. v. Tax Comm'n of City of N.Y.*, 307 A.D.2d 203, 203 (1st Dep't 2003) (Tax Commission adopted policy that a tax assessment would be automatically confirmed without review "unless property owners seeking such review disclose[d] whether they had any dealings with" two assessors suspected of bribery; policy constituted a rule because it "dictate[d] a specific result in particular circumstances"); *Matter of HD Servs., LLC v. N.Y. State Comptroller*, 51

A.D.3d 1236, 1238 (3d Dep't 2008) (policy of refusing to recognize certain agreements unless they were notarized constituted a rule). The Procedure prescribes one exception to the requirement, available if an individual's failure to cooperate results from a "*verified* mental or physical incapacity." R.17 (quoting R.43-44) (emphasis added).[12]

As another example, suppose an individual asserts that a past residence is unavailable because the primary tenant will not permit her to live there. This circumstance, the Procedure declares, cannot justify providing shelter to the individual. R.17-18 (primary tenant's statement is not "sufficient to establish that the housing is no longer available"; quoting R.44). *Cf. Matter of 10 Apartment Assocs. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 240 A.D.2d 585, 585 (2d Dep't 1997) (invalidating, for failure to follow rulemaking procedure, policy that if a landlord that has owned a building for less than two years, no claimed increase in operating expenses can justify an increase in allowable rent).[13] The City's brief to

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[12] In its briefing to the trial court, the City asserted that no individual would be rejected from shelter solely on the basis of failure to provide information. But Procedure 12-400 clearly mandates that result, and at argument counsel was unable to explain on what basis a shelter official would be authorized to deviate from the written policy. R.47 ("Applicants who do not comply with the application process will be found ineligible based on non-cooperation . . . ."); R.390-406.

[13] *See also Matter of Singh v. Taxi & Limousine Comm'n*, 282 A.D.2d 368, 368 (1st Dep't 2001) (policy on procedural matter of grace period for renewing licenses was rule because it "materially affect[ed] the rights of all [applicants] equally and without exception"); *Ousmane v.*

this Court recites other examples. *See* City Br. 20 ("An applicant's 'tenancy rights' make him/her 'ineligible, provided there is no imminent threat to health or safety,' an assessment that necessarily *must* be made by DHS.") (emphasis added). In short, the Procedure "mandates certain results under certain circumstances." R.19. The Procedure is not a set of "guidelines," as the City suggests, City Br. 18, because it specifies what outcome *must*—not just should—result for each set of facts.

C. The Procedure Is a Rule Even Though Outcomes Vary with Individual Circumstances

On this appeal, the City does not dispute that the Procedure itself applies across the board, and it does not contest the holding below that in this sense the Procedure is a statement of general applicability that can qualify as a rule. On that point the City must be taken to have waived any objection. The City also does not dispute that the Procedure significantly constrains shelter officials' discretion by prescribing how they must decide in various factual scenarios. Instead, the City argues that shelter access determinations will depend on individual circumstances and that the Procedure leaves officials with substantial discretion. The City says

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City of N.Y., 7 Misc. 3d 1016A (Sup. Ct., N.Y. County 2005) (policy restricting administrative judges' discretion over amount of penalty was rule).

that these features make the Procedure a guideline, not a rule. But on both points the City misapprehends the law.

First, a rule does not stop being a rule just because it prescribes different outcomes for different situations. The Procedure is a classic form of rule, one that "sets standards that substantially alter, or, in fact, can determine the result of future agency adjudications." *Matter of Alca Indus. v. Delaney*, 92 N.Y.2d 775, 778 (1999). Such a rule applies generally, but operates differently depending on the facts of each case being adjudicated. As another example, the policy in *Matter of Schwartfigure v. Hartnett*, 83 N.Y.2d 296 (1994), caused the deduction of 50% of benefits only from unemployment claimants who had previously received overpayments. The policy was a rule, even though the operation of the policy depended on the predicate, individual circumstance of a prior overpayment.

Thus, what distinguishes a "guideline" from a rule is that it permits officials to consider "other facts and circumstances," *Matter of N.Y. City Transit Auth. v. N.Y. State Dep't of Labor*, 88 N.Y.2d 225, 229 (1996) (quoting *Roman Catholic Diocese*, 66 N.Y.2d at 951)—*i.e.*, facts and circumstances *other* than those on which the rule operates. This distinction held true in each of the examples cited by the City in which an agency adopted a policy that a court concluded was not a

rule.[14] In *Roman Catholic Diocese*, the 50% policy that the petitioner challenged "was neither the sole nor the determinative basis for the finding of public need." *Matter of Roman Catholic Diocese of Albany v. N.Y. State Dep't of Health*, 109 A.D.2d 140, 146 (3d Dep't 1985) (Levine, J., concurring and dissenting in part), *rev'd*, 66 N.Y.2d 948. "Various other factors were considered and weighed." *Id*. In *Matter of Lue-Shing v. Travis*, 12 A.D.3d 802 (3d Dep't 2004), a policy set forth a grid of recommended sentencing ranges, but "the time ranges . . . are merely guidelines [and] [m]itigating or aggravating factors may result in decisions above or below the guidelines." *Id*. at 803-04 (brackets in original) (internal citation omitted).[15] *Matter of New York City Transit Auth. v. New York State Department of Labor*, 88 N.Y.2d 225 (1996), held that a guidelines document did not qualify as a rule because "[t]he guidelines do not dictate the result." *Id*. at 230.

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[14] *Matter of Dry Harbor Nursing Home & Health Related Facility v. Axelrod*, 137 A.D.2d 962, 964 (3d Dep't 1988), does not, as the City suggests, show that guidelines for "case-by-case analysis of the facts" cannot constitute rules. In that case, the dispute was whether in deciding the petitioner's case, the agency had actually considered all the facts or had applied a secret policy that predetermined the outcome. The court held that the agency had adopted no such secret policy, so there was obviously no rule.

[15] *See also Matter of Senior Care Servs., Inc. v. N.Y. State Dep't of Health*, 46 A.D.3d 962, 964-965 (3d Dep't 2007) (policy against permitting home delivery of mail-order medical equipment was not a rule because it was "not an absolute ban" and was not "invariably applied across-the-board") (internal citation omitted); *Matter of Taylor v. N.Y. State Dep't of Corr. Servs.*, 248 A.D.2d 799, 800 (3d Dep't 1998) (application of policy "depend[ed] on" an official's "assessment of individualized circumstances"); *Matter of Trustees of Masonic Hall & Asylum Fund v. Axelrod*, 174 A.D.2d 199, 204 (3d Dep't 1992) (policy permitted consideration of "variable factors unique to a facility").

Here, the Procedure does dictate the result. As the trial court found, the Procedure describes a variety of possible situations, for each of which it identifies the facts that will be "outcome determinative." R.17. It does not permit—and the City does not claim that it permits—officials to vary the result based on any other facts.[16]

Second, the "discretionary decision-making" that the City describes involves nothing more than officials' exercise of judgment in making the required factual determinations. For example, when a homeless individual fails to cooperate with the Procedure, a licensed social worker will be called on to "render a determination" whether the individual has a "mental or physical impairment" that "prevents the applicant from cooperating." R.49. *Matter of Taylor v. New York State Department of Correctional Services*, 248 A.D.2d 799 (3d Dep't 1998), illustrates the gap between this role and actual policymaking discretion. In *Taylor*, an agency official had the authority to prohibit an employee from carrying a

[16] The City notes that in its answer to the Council's petition, it hypothesized how shelter officials might actually implement the Procedure. City Br. 22 n.13. Even if the chance exists—and Respondents do not agree with the City's wishful thinking—that officials might in practice exercise discretion by ignoring the Procedure's clear mandates, that possibility is not relevant to this Court's review of the Procedure itself. The policy must be judged on the basis of its "plain language," not the City's contrary contentions. *See Maher v. N.Y. State Div. of Hous. & Cmty. Renewal*, 158 Misc. 2d 826, 829 (Sup. Ct., Westchester County 1993). *Cf. FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012) (due process "does not leave [regulated parties] . . . at the mercy of *noblesse oblige*").

weapon off duty if "the employee's mental or emotional condition is such" that his possession of the weapon posed a threat to safety. *Id*. at 799. The decision involved policy—about what kinds of mental or emotional conditions warranted removing a weapon—as much as factual determinations. By contrast, in *Yaretsky v. Blum*, 456 F. Supp. 653 (S.D.N.Y. 1978), Department of Health memoranda "allocate[d] numerical values to selected physical and mental impairments" as a basis for "determining the type of facility in which a patient will receive care." *Id*. at 656. Assessing the values "require[d] the application of professional medical judgment," but the assignment of values for a patient was a factual matter, not a policy choice. *See id*. (holding memoranda to be rules under SAPA). The "discretionary decision-making" in Procedure 12-400 is more like the finding of fact at issue in *Yaretsky* than the unguided choice in *Taylor*.

D. Even if Part of the Procedure Permitted the Exercise of Discretion, Its Mandatory Aspects Would Still Constitute a Rule

In any case, a rule does not cease to be a rule just because some of its applications involve the exercise of judgment. Were that the law, CAPA's rulemaking requirements would be an empty shell. An agency could convert any rule into a "guideline" by adding an element of discretion at one step of the decision-making. In fact, courts in this State have adhered to the text of SAPA and

CAPA: A rule constitutes "the whole or part of any statement." N.Y. City Charter § 1041(5). In *Cordero*, a policy mandating when and where to serve a penalty was a rule even though it "d[id] not purport to control the Board's discretion" about what penalty to impose. 80 N.Y.2d at 773. In *Serio*, a new requirement that an untimely claim must be supported with "clear and reasonable justification" was a rule, even though the agency gave insurers freedom to decide how to assess a claimant's justification. 100 N.Y.2d at 868. So too here: Even if the Procedure gave officials some freedom of decision, all the mandatory aspects of the Procedure would nonetheless be a rule.

POINT II

THE PROCEDURE DOES NOT QUALIFY FOR THE "MERELY EXPLANATORY" EXCEPTION

The City's second excuse for failing to engage in public rulemaking for Procedure 12-400 is that the Procedure has no "legal effect" and is "merely explanatory." "Rules," under CAPA, do not include any statement that "in itself has no legal effect but is merely explanatory." N.Y. City Charter § 1041(5)(b)(ii).

A. The Procedure Has Independent Legal Effect

The key question, as the City agrees with Respondents (City Br. 29-30; Plaintiffs' Jan. 9, 2012 Br. 4-5), is whether the Procedure has "legal effect" by

"creat[ing] or deny[ing] substantive rights of members of the public" or "impos[ing] any new obligation[s]," *Cubas v. Martinez*, 8 N.Y.3d 611, 621 (2007). *Cubas* illustrates the principle. A validly promulgated regulation of the Department of Motor Vehicles required driver's license applicants who lacked social security numbers to prove their ineligibility for such numbers. *Id*. at 617. An unpublished policy held that the only acceptable proof would be appropriate documentation from the federal Department of Homeland Security. *Id*. at 618. The Court of Appeals held that this policy was not a rule because the obligation at issue, to prove one's status *vis à vis* Social Security, "is imposed by a preexisting regulation." *Id*. at 621. The policy "does not provide that some people are eligible and some ineligible . . . but sets forth the procedure for the agency to follow in deciding who meets a predetermined test for eligibility." *Id*.

The Procedure, as the court below recognized, does "ha[ve] the effect of determining who gets [shelter] pursuant to the consent decree and existing law." R.22. The access criteria described in the Procedure were not "predetermined," and in fact have not been applied to homeless women and men in New York City for at least the last 30 years. R.409; R.293. Until now, it bears emphasis, homeless women and men have sought and obtained shelter from the City simply by presenting themselves at the intake facilities.

The City now maintains that it has been "neither expected nor obligated" to provide shelter except to those who "clearly demonstrated" their "immediate need for housing" and inability to find any other housing. City Br. 26 (quoting 94 ADM-20). But in point of fact the City *did* provide shelter, for over 30 years, to those who demonstrated their need simply by showing up, destitute and desperate, at the intake centers. Indeed, Respondents have enforced their right to obtain shelter through numerous motions under the Consent Decree, most recently (before this enforcement motion) in 2009.[17] Under the Procedure, the City has estimated, from 10 to 60 percent of homeless women and men in the shelter system would have been turned away. It is implausible at best to suggest that Procedure 12-400 would have no legal effect on those homeless women and men who are denied shelter pursuant to its requirements.

[17] As noted above, the City made "tremendous efforts" to add shelter capacity in compliance with the trial court's rulings in the 2009 enforcement motion. *See supra* at 8. If, all along, between 10 and 60 percent of those in shelter had no right to use the system in the first place, the City could have avoided all that expense. The City raised no such argument at the time. *See* Hr'g Tr. in *Callahan v. Carey*, Index No. 42582/79 (Feb. 17, 2010).

The City explains away the change as an implementation of a State regulation and associated directives, 18 N.Y.C.R.R. § 352.35, 94 ADM-20, and 96 ADM-20. Multiple indicators show this explanation to have no merit.[18]

First, these State policies are 17 years old. As the trial court pointed out, if Procedure 12-400 were implementing obligations already contained in those sources, "the procedures would have been in place for at least the last 15 years." R.24. The extraordinary delay, in itself, should make this Court doubt that the State directives actually impose the requirements and standards that Procedure 12-400 will mandate for women and men seeking refuge in New York City's shelter system.

Second, the State directives did not obligate homeless women and men in New York City to go through background screening procedures at intake, because the City's duty to provide shelter at intake is governed by the Consent Decree. The City has told this Court that the Decree "relieved applicants of the normal burden

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[18] The City does not and cannot cite any case in which a City agency policy was exempt from CAPA rulemaking procedures because it fulfilled a requirement imposed on the agency by another level of government. Indeed, CAPA itself makes clear that such policies can qualify as rules. CAPA exempts from a single element of rulemaking procedure—prior review by the City Law Department—any rule that "implement[s] particular mandates or standards set forth in . . . state . . . laws . . . with only minor, if any, exercise of agency discretion." N.Y. City Charter § 1043(d)(4)(iv). Clearly, then, policies in this category *are* rules as a general matter; and CAPA does not exempt them from other aspects of rulemaking procedure, such as the public vetting that the City failed to conduct here.

of establishing eligibility by providing entry to shelters for individuals who were apparently needy but could not navigate the normal process for establishing eligibility for cash public assistance." R.310. The City quoted Respondents' past counsel with approval: "[T]he very purpose of the decree was to obligate the defendants to provide shelter to men who needed it, without *immediate* analysis of *why* they needed it." R.310 (emphasis in original). Procedure 12-400, however, calls for exactly the immediate analysis that the Decree was meant to avoid.

The State directives did not purport to abrogate the Consent Decree. To the contrary, 94 ADM-20, as issued, noted that "each district is required to comply with all court decisions which apply to the district's policies related to homeless persons and families," including *Callahan* and *Eldredge*. R.324. Similarly, the State informed the City in this case that while Procedure 12-400 is not inconsistent with the State directives, the Procedure would represent a "policy change" for which the City should seek judicial approval pursuant to the Consent Decree. R.289.[19]

[19] As noted above, Respondents contended, in the instant motion, that Procedure 12-400 is contrary to the Consent Decree. *See supra* at 16. Having granted the requested relief—preventing the implementation of the Procedure—on the grounds that the Procedure violated CAPA, the trial court concluded that Respondents' claim that the Procedure violates the Consent Decree is academic at this time. The court therefore did not reach that issue at this stage of the litigation. R.25.

Third, the City's past litigation positions indicate that the City did not previously regard the State directives as obligatory. After the State issued 18 N.Y.C.R.R. § 352.35 and the two directives, the City adopted from § 352.35 the process described above for helping existing shelter residents find their own housing. *See supra* at 9-11. The City stressed to both the trial court and this Court that the City was only assessing the continuing need of clients *in* shelters, not imposing an onerous screening criterion for homeless women and men seeking to *enter* shelter. R.308 (City could validly "requir[e] that those shelter ***residents*** who are able to do so take reasonable steps to ***end*** their dependence on emergency shelter") (emphasis added); R.298 (City "ha[d] not" "chosen . . . [to] require[] the applicant to cooperate in a thorough investigation of housing alternatives"). But Respondents had challenged the State directives precisely out of fear that they would be used to justify something like the Procedure. If the City believed (as it now says) that the State directives *obligated* it to conduct intake background screening investigations, it was odd, at best, to defend against a facial challenge of this sort by saying that it would *not* be conducting such investigations.

Finally, even if the State directives established background investigation procedures and access criteria that apply to homeless women and men in New York City, the City has forborne from implementing them until now. The City's

decision to bring its shelter system within the remit of these State directives, after 17 years of operating under the City's own policies regarding shelter intake, in itself constitutes an important legal effect.

B. The Procedure Alters, Rather Than Explains, the Policy Contained in the State Regulation and Directives

The City, overlooking the evident legal effects of the Procedure, maintains that the details of the Procedure are "directly derived" from the State directives. City Br. 27. According to the City, the Procedure is "merely explanatory" of the directives and is therefore not a rule.

The trial court correctly rejected this argument. The court identified multiple features of the Procedure that have no basis in 94 ADM-20 or 96 ADM-20.[20] For example, nothing in those two documents contemplates requiring homeless women and men to release their medical records to obtain access to shelter; yet the Procedure does just that. R.24; R.47. As another example, the Procedure rigidly considers any housing at which an individual has "tenancy rights," no matter how theoretical,[21] to be a viable housing option, absent an

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[20] As the trial court correctly noted, 18 N.Y.C.R.R. § 352.35 is "far too broad a pronouncement" to consider the Procedure a mere explanation of the regulation. R.23.

[21] Under the Procedure, an individual cannot seek shelter until she has been formally evicted, through judicial process, and "a court has . . . ruled on the landlord's petition" (R.45),

"imminent threat to health or safety." R.24; R.44. This rule has no corresponding element in the State policies.

The City also quarrels with the standard by which the trial court judged the Procedure, for which the City complains the court relied on the dissenting opinion in *Cubas*. The City's objection is beside the point in any case, because a policy must be a rule if it has legal effect, regardless whether it is derived from some other source. *See Cubas*, 8 N.Y.3d at 621. As *Home Care Ass'n of New York State, Inc. v. Dowling*, 218 A.D.2d 126 (3d Dep't 1996), illustrates, an agency must use rulemaking procedure even if it is carrying out quite precise instructions, if the result has legal effect. *Id*. at 127.[22]

Moreover, regardless of whether a "merely explanatory" policy is one that "strictly interprets" existing law, R.22, or some other standard applies, a policy fitting this exception must be "explanatory" of something. But "adding 'guidance requirements' not expressly authorized by statute" is legislative activity, not mere explanation. *Matter of Destiny USA Dev., LLC v. N.Y. State Dep't of Envt'l*

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even though many women and men lose their homes without the benefit of formal eviction proceedings and in circumstances which leave them no legal recourse.

[22] As described above, in *Dowling* the State Department of Social Services instructed local social services districts to carry out fiscal assessments of discontinued home care recipients, with a view to reinstating some of them. *See supra* at 22. The State agency was required to issue that instruction to comply with a federal court order, but the instruction was nevertheless a rule needing rulemaking procedures. 218 A.D.2d at 128.

Conservation, 63 A.D.3d 1568, 1570 (4th Dep't 2009) (*quoting from HLP Props., LLC v. N.Y. State Dep't of Envt'l Conservation*, 21 Misc. 3d 658 (Sup. Ct., N.Y. County 2008), *aff'd*, 70 A.D.3d 469 (1st Dep't 2010)); *Matter of E. River Realty Co. v. N.Y. State Dep't of Envt'l Conservation*, 68 A.D.3d 564 (1st Dep't 2009) (similar); *see also Dawn Joy Fashions, Inc. v. Comm'r of Labor of the State of N.Y.*, 90 N.Y.2d 102, 108-09 (1997) (an agency "cannot under the guise of statutory interpretation impose [new] obligations"). A policy that effectively changes the law cannot be considered to be "merely explanatory" of it. *See Matter of SLS Residential, Inc. v. N.Y. State Office of Mental Health*, 67 A.D.3d 813, 815-816 (2d Dep't 2009) (where existing regulation defined "restraint" to mean use of apparatus, policy treating manual restrictions as restraint was amendment, not interpretation).

The Procedure demands that homeless individuals provide access to their medical records, as a precondition to receiving life-sustaining shelter. Such a requirement cannot be "explanatory" of State directives that relate to assessing individuals' alternative housing options. In that sense on its own, the Procedure makes law and policy, rather than explaining the State directives, and must go through rulemaking procedures.

CONCLUSION

For the foregoing reasons, the judgment of the court below, that Procedure 12-400 is a rule that must be promulgated through rulemaking procedures under CAPA, should be affirmed.

Dated: October 3, 3012

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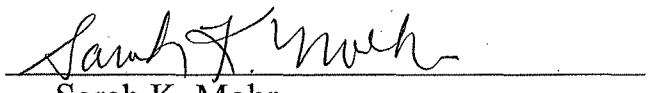

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