

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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COURTHOUSE NEWS SERVICE,)
et al.)
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)
vs.) CASE NO. 2:21-cv-132
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GABEL, et al.)
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Status Conference hearing held on Monday,
August 18, 2025, at 3:02 p.m., Burlington, Vermont,
before Honorable Christina Reiss, Chief District
Judge.

Lescha M. Wilder, Clerk and Courtroom Deputy

Sarah M. Bentley, CCR-B-1745 (via Zoom)
Registered Professional Reporter and Notary Public

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Also Present: Teri Corsones

I N D E X

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P R O C E E D I N G S

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4 THE CLERK: Your Honor, this is Civil
5 Case No. 21-132, Courthouse News Service vs.
6 Gabel.

7 Present for the plaintiffs are Attorney
8 Jonathan Fetterly and Matthew Byrne.

9 Present for the defendants are Attorneys
10 David Groff and Debbie Stevens.

11 Also present is Defendant Teri Corsones.

12 All parties are present via Zoom.

13 The matter before the Court is a status
14 conference.

15 THE COURT: Good afternoon. I am going
16 to tell you why I called the status conference
17 and what I'm thinking. You should feel free to
18 push back on it, suggest other things.

19 So you have been negotiating for a long
20 time. It seemed like a good use of time. I
21 extended the stay. It had gone on too long for
22 my liking, and I wanted to make sure that
23 progress was being made. I'm not so sure
24 progress has been made.

25 For example, in the defendants' status

1 report they indicate to date the parties'
2 discussions have not led to any agreements
3 regarding how to proceed in this matter.

4 I think that the only thing that I can do
5 is to issue a declaratory judgment and
6 injunction saying that the past practice is
7 unconstitutional. That's right in line with
8 what the 2nd Circuit suggested they would have
9 no problem with.

10 They said the District Court entered a
11 declaratory judgment that the pre-access process
12 followed by the Superior Court during the trial
13 evidence period violated the First Amendment or
14 imposed an injunction prohibiting the defendants
15 from continuing to employ those or similar
16 processes. We have no doubt we would have found
17 such a ruling to be a proper exercise in the
18 District Court's discretion.

19 If I try to rule on what I think would be
20 a constitutionally acceptable practice; like,
21 for example, I don't think that an hour delay or
22 four hours' delay is a significant period of
23 time, I'm basically issuing an advisory opinion.

24 So you can come to that agreement
25 yourself and then I can adopt it, but I don't

1 really have a pending issue where I would do
2 that without a full-blown hearing. It's not the
3 basis for the complaint in this case. It's not
4 the request for injunction.

5 So it's one thing if you agree to it and
6 I adopt it. It's another thing if I issue an
7 advisory opinion about what I think might be
8 constitutional.

9 I agree it's not -- I agree with the
10 defendants that it's not the most productive
11 thing to tell the State. Look, you can't do
12 what you were doing, go out and find something
13 else with no indication of whether or not it
14 would be acceptable to the Court, but I think
15 that's basically where we're left if you can't
16 agree to something yourself.

17 I also think that we need to have the
18 attorney's fees issue decided. One of the
19 things that you were negotiating is whether you
20 could reach an agreement on that. You seem
21 actually very far apart on that issue.

22 So that's my perception from the little
23 insights that I got from your status reports. I
24 might be wrong. You may have made more progress
25 than it seems, but I'm not seeing that from what

1 you submitted.

2 Let's start with the plaintiffs.

3 MR. FETTERLY: Good afternoon, your
4 Honor. This is Jon Fetterly with Bryan Cave on
5 behalf of the plaintiffs, and I agree with your
6 Honor's assessment. I don't really have much to
7 add or disagree with.

8 I will confirm that where we are today is
9 no different than where we were last week when
10 we filed our paper. The parties have not
11 reached agreements. We are where we said we
12 were in our filings. We agree with the Court's
13 view.

14 Following the 2nd Circuit's opinion is
15 exactly what we did in our report, and that the
16 2nd Circuit gave us language that can and should
17 be used here to bring this case to a close, and
18 we agree that this should come to a close.

19 One point I'll note is that in the
20 defendants' status report filed this morning, I
21 believe they make a reference to a live
22 controversy, and I don't think that's correct.
23 Judgment was entered and it has been affirmed,
24 and now we're left with the language that needs
25 to be put into the amended judgment. And,

1 again, I agree with what your Honor states, what
2 can and should be.

3 And then on a final point, in terms of
4 where we go next, we do agree that there is a
5 separate issue on the fees that needs to be
6 addressed by the Court.

7 We would ask that the Court set an
8 appropriate and reasonable schedule to be
9 handled separately, but we are not going to put
10 the cart before the horse. We are talking about
11 the amended judgment first, and we agreed that
12 this should be entered, as the Court states, and
13 that there really is nothing left.

14 The final thing I'll say, there's plenty
15 we can disagree with in the status report, but
16 I'll wait for the Court's invitation to address
17 that, given that we're in agreement on what we
18 believe should be the next and the last step
19 with respect to the amended judgment.

20 THE COURT: You might as well, if you
21 want to say it. I wasn't going to ask you what
22 you disagree with, with their status report, but
23 if you want to say that you might as well put
24 your cards on the table before I turn to the
25 defendants.

1 MR. FETTERLY: Thank you, your Honor.

2 The bottom line is what defendant just
3 proposed, I think the Court touched on this,
4 effectively a mandatory injunction, that is not
5 supported by evidentiary record. It's based on
6 new or different practices that are not before
7 this Court that have not been reviewed by this
8 Court or the 2nd Circuit.

9 And, quite frankly, it's just not part of
10 this case, particularly if you reopen a case
11 that is closed and a case for which a judgment
12 would be entered and affirmed.

13 THE COURT: So I don't think the case is
14 closed because it's back here on remand, and if
15 you said, yes, that would be acceptable to me, I
16 like your new practices, I think they are
17 working well and you've resolved our First
18 Amendment concerns and you presented it to me, I
19 wouldn't be bound to accept it. But if both
20 parties zealously represented, came to that
21 conclusion, I would be likely to introduce it.

22 So it's not for nothing, but if you're
23 not going to agree to it, then you're right, I
24 don't have any of those facts in front of me and
25 I don't know how I would get them in front of me

1 if you aren't asking for any of that kind of
2 relief. Then I don't have a pending case in
3 front of me about that issue. I want a new
4 injunction, I want to adopt these practices and
5 say that it's acceptable, and I don't know how
6 that wouldn't be an advisory opinion.

7 MR. FETTERLY: And I agree with that,
8 your Honor.

9 In close, and perhaps it's an incorrect
10 word procedurally where we stand, but I view
11 that that's I think the type of discovery and
12 proceeding that would be necessary and require
13 an order for us to go further and beyond, would
14 require effectively reopening matters that don't
15 need to be reopened, and plaintiffs would ask
16 that they be reopened and close this case and on
17 the terms that the Court outlined and suggested
18 and which we have proposed and are proposing.

19 THE COURT: And part of the problem, or
20 in your case not part of the problem, is that
21 it's your case. So if you don't want to
22 continue to litigate it, the defendants can't
23 effectively force you to.

24 So, okay, so let me hear from the
25 defendants.

1 MR. GROFF: Well, let me start where you
2 ended, your Honor. I don't frankly think that's
3 right. I think the complaint challenged the
4 procedure that Vermont uses to screen
5 complaints. That complaint is still pending.

6 THE COURT: Well, I agree with that, and
7 so let me just say I probably spoke a little bit
8 too loosely.

9 The 2nd Circuit said go ahead, issue a
10 declaratory judgment that says this is
11 unconstitutional. Issue an injunction to that
12 effect; that's fine with us.

13 If the plaintiff doesn't want to take it
14 further, now my question is to you, how would
15 the Court take it further?

16 MR. GROFF: Sure. So the Court could
17 take it further or differently in a number of
18 ways.

19 Let me start with saying what the 2nd
20 Circuit actually did was vacate the injunction
21 and remand for further proceedings in
22 conformance with the opinions.

23 So we think the Court could, number one,
24 issue an injunction based on the language of the
25 2nd Circuit and the evidence already before the

1 Court, in evidence, and find that, number one,
2 protecting confidentiality is a higher purpose
3 and, number two, procedures that are reasonably
4 narrowly, tailored to address that purpose and
5 don't result in undue delay would apply to the
6 First Amendment.

7 We think there's sufficient evidence in
8 the record, and we think that --

9 THE COURT: So could you go back to what
10 you were doing when the case started, or would
11 you have to do something different?

12 MR. GROFF: I think the Court could issue
13 an injunction that says if Vermont adopts
14 procedures consistent with the change that it
15 had made towards the end of the period for which
16 the evidence was adduced at trial, which is
17 before the Court, could base it on that.

18 And the Court could say in that
19 injunction, you can't go back to the prior
20 procedures but the procedures you were adopting,
21 so long as they were narrowing tailored to
22 address the delay -- I'm sorry, address the
23 confidentiality issues, is appropriate.

24 I think the Court could also take
25 evidence. And this case has been remanded.

1 It's back here for proceedings, further
2 proceedings in conformance with the 2nd
3 Circuit's opinions. There's nothing stopping
4 the parties from submitting an additional
5 affidavit. I mean, this trial is conducted on
6 paper. There are no live witnesses. We could
7 submit additional filings. We could move for
8 summary judgment, and it could be decided on
9 that basis.

10 But the point is that, number one, the
11 complaint challenged Vermont's process for
12 screening complaints, maintained that no
13 screening at all was possible. That position
14 was roundly objected to by the 2nd Circuit.
15 That complaint is pending.

16 The plaintiffs cannot voluntarily dismiss
17 the claim without an order to that effect
18 because we've answered. I mean, that's what
19 Rule 41 says. They can't just ignore their
20 complaint. The complaint is there. The
21 complaint is challenging Vermont's procedures.

22 And I think, also, it more broadly makes
23 sense for the Court to be willing to address the
24 system in place because it highlights -- I think
25 it will be instructive to the attorney's fees

1 issues as well.

2 I mean, from our view this is a pure
3 victory. The plaintiffs won a judgment that it
4 insists was no longer in place by the time the
5 injunction was issued, didn't pass
6 constitutional muster, when that system had
7 already been improved to the point where the
8 2nd Circuit found that a system like that could
9 likely pass constitutional scrutiny.

10 THE COURT: So this press review tool
11 that -- I am looking at your filing with the --
12 let me make sure it's yours.

13 No, it's the plaintiffs' filing.

14 So there's an attachment. It's a
15 press -- new press review tool where they can,
16 during business hours, access a public access
17 terminal and obtain it. Is that what you're
18 talking about or -- I really think that you are
19 putting a fairly glossy spin on what the
20 2nd Circuit said because they weren't like --
21 they could have easily said, yes, the new system
22 is fine and adopt that new system as the Court's
23 injunction, and that's not what they said.

24 So which system are you claiming that
25 they endorsed wholeheartedly and said this is a

1 system that passes constitutional muster?

2 Because I don't recall that in the
3 opinion.

4 MR. GROFF: Well, sure, and let me be
5 clear. They stopped short of saying that. But
6 they reviewed the system of centralized intake
7 that, by that point, had resulted in something
8 like 90 percent of complaints being reviewed
9 within one business day, and they found that
10 given the likely -- given past holdings,
11 findings similar, privacy interest, a higher
12 value, that a system like that may well pass
13 constitutional muster.

14 And the Court remanded its case to this
15 Court to impose a new injunction along with
16 those decisions.

17 THE COURT: But I mean usually I don't
18 get this much help on remand so I was kind of
19 happy that they said go ahead and issue this
20 injunction and declaratory relief, which isn't
21 much, I agree with you there.

22 It's saying you can't do what you were
23 doing. Let the State experiment and decide, you
24 know, what its new system is, but that's fine.
25 That's all you have to do.

1 You have to say what the plaintiffs
2 brought to you in their complaint. They're
3 right, it violates the First Amendment, issue a
4 declaratory judgment, an injunction to that
5 effect, and you are home free and don't do
6 anything more.

7 So when you and the plaintiffs decided to
8 negotiate, I thought that was a great idea
9 because I thought, well, you might come up with
10 something that will take it further down the
11 road. And if you-all agree that this is an
12 acceptable system and the Court can give its
13 blessing that it's constitutional, that will
14 certainly help out the case, so that's why I
15 gave you so much time to think about it.

16 But that hasn't happened and you're not
17 any closer in adopting an agreement, and the
18 invitation to reopen the injunction proceedings
19 and take new evidence, which I would have to do,
20 whether by affidavit or otherwise, when the
21 plaintiffs are saying, no, we don't want you to
22 do that. We'll be satisfied if you follow the
23 2nd Circuit's suggestion. We'll close the case.
24 We'll decide the attorney's fees, and the
25 plaintiff will then have the obligation to file

1 a new lawsuit if they don't like your new
2 system.

3 MR. GROFF: Let me start by saying, yes,
4 it would have been great if we could come to an
5 agreement, but that didn't happen.

6 And I would -- I would suggest that what
7 the 2nd Circuit did was not say, yes, go back
8 and enter this declaratory judgment and end the
9 case.

10 What the 2nd Circuit said was if the
11 Court had entered this declaratory judgment, we
12 could have just affirmed it.

13 But what the Court actually did was
14 vacated the injunction that was imposed and
15 remanded to consider a new injunction. And,
16 frankly, I'm not sure the Court can issue an
17 injunction about a system that's no longer in
18 place. Isn't that moot? That system is no
19 longer in place.

20 THE COURT: But I'm saying if the
21 plaintiffs are saying we're not -- we're not
22 pursuing a claim with regard to the State's new
23 system. We simply are not. We're not asking
24 for that relief.

25 So whether it's an injunction, which

1 probably would be moot because if the system has
2 been abandoned or declaratory judgment that says
3 what you're doing -- what you did in the past
4 was unconstitutional, that will terminate the
5 case. You could go about your new system, but
6 you have to, you know, go about it with the risk
7 that the plaintiffs are not satisfied and want
8 to bring a new lawsuit.

9 And that happens in cases where the Court
10 issues an injunction and new facts are developed
11 and new practices are developed, and the parties
12 are either okay with that or they come back to
13 the Court with a new action.

14 But I mean one thing that the 2nd Circuit
15 did not say is, hey, the State has a new system,
16 reopen the proceedings, consider the new system
17 and decide whether an injunction still is
18 something that should be issued. It just did
19 not say that.

20 And whether I could do that or not, the
21 big hurdle from the Court's perspective is that
22 plaintiffs, the captains of their -- and
23 master's of their own complaint, they're not
24 asking for that relief.

25 MR. GROFF: Right. So unfortunately,

1 Judge, I think I just have to disagree with you
2 about what the 2nd Circuit said you should do on
3 remand.

4 I think what the 2nd Circuit did say is
5 that the case was remanded for further
6 proceedings, including reconsidering terms of
7 the injunction, which I take to mean examining
8 the system that can be enjoined, which is the
9 system that's in place.

10 THE COURT: Okay. So let me ask you,
11 because I'm a pragmatist and I'm interested in
12 your opinion, if I adopt your view of what they
13 said, which I obviously, I disagree with, and
14 the plaintiffs tell me we're not interested in
15 pursuing a claim about the State's new system.
16 We brought a claim based on the old system. We
17 won. We had it declared unconstitutional. We
18 don't have to, and we don't want to pursue a
19 claim with the new-and-improved system.

20 How do I -- because that's not what their
21 complaint says, so that's not the operative
22 complaint.

23 How do I make them pursue that?

24 MR. GROFF: Well, number one, they
25 haven't taken that step. They haven't moved to

1 voluntarily dismiss their complaint, which is, I
2 think, what you're suggesting. The case is
3 here. It's filed. The complaint is active.

4 THE COURT: But the complaint is about
5 the old system. Can we agree on that?

6 Do you agree that the complaint is on the
7 old system?

8 MR. GROFF: The complaint -- I agree the
9 complaint is on the old system. I'm not sure
10 that it's limited to the old system. Let me put
11 it that way.

12 Certainly it was filed in the old system,
13 it describes the old system, but it took the
14 position that, no -- I'm sorry, no, no
15 pre-access review could take place at all, and
16 that's a live issue.

17 Vermont is doing pre-access review. So I
18 do think there is a live issue that was raised
19 in that complaint, and I think that the
20 plaintiffs haven't moved to voluntarily dismiss
21 their complaint and so I think that issue is
22 before the Court.

23 I mean, that is what -- that's within the
24 scope of the mandate from the 2nd Circuit to
25 re-examine -- re-examine the system and issue an

1 injunction in conformance with the Court's
2 decision.

3 THE COURT: Okay. So what about the
4 attorney's fees issue?

5 Anything you want to say about that?

6 You can -- I'll give you the same
7 opportunity. Not necessary but if you disagree
8 with their status report, you're allowed to say
9 something because I'm going to give them the
10 last word because I started with them.

11 MR. GROFF: Sure. Well, I guess I can
12 say we're in agreement that that should be
13 addressed first and that after that -- that's a
14 problem.

15 I would suggest that the best approach
16 would be for the parties to see if we can come
17 up with a schedule to address that, the fees
18 issue, a briefing schedule.

19 I mean, the State is going to have to
20 retain an attorney's fees expert, and you might
21 not be surprised to learn that our contracting
22 process isn't the nimblest in the world so we're
23 going to need a little bit of time to respond to
24 that.

25 But I would suggest that it makes some

1 sense to resolve the merits first and then for
2 the parties to take a crack at coming up with a
3 schedule. Hopefully we can agree on that much
4 at least, to brief an attorney's fees issues to
5 get that resolved, to do any discovery, if
6 necessary, on that issue and then brief it and
7 get it before your Honor.

8 THE COURT: All right.

9 Let me turn back to plaintiffs. And my
10 biggest question is, what are you going to do
11 with regard to your complaint?

12 Are you pursuing further injunctive
13 relief other than the injunction offered by the
14 Circuit that the past practice was
15 unconstitutional and can't be engaged in?

16 A declaratory judgment to that effect.
17 Is that all the relief you're requesting?

18 Do you need more time to make the
19 determination?

20 Is that was what you put in the proposed
21 judgment?

22 And then I do believe you probably can
23 agree to a briefing schedule. If you can't, I
24 would just impose one.

25 And, as I say, everybody has 100 percent

1 dissatisfaction with the one I impose, so I'm
2 happy to have the parties do it.

3 But let's hear from the plaintiffs.

4 MR. FETTERLY: Your Honor, starting with
5 the last point first, that will not be necessary
6 with respect to the Court's briefing schedule.
7 We'll certainly agree with the defendants.

8 I hear what counsel is saying about the
9 need for time and working with the state entity,
10 and that's all very reasonable and understood.
11 So the parties, I'm quite confident, can and
12 will agree to an appropriate schedule.

13 Very briefly to your Honor's question
14 about what we are seeking, the short answer is,
15 no, we're not seeking anything different than
16 what we outlined and discussed here today.

17 Just really briefly, because I want there
18 to be a clear record before we break and
19 convene, I think one of the practical problems
20 that we are left with is the reason why the
21 plaintiffs are proceeding as they are. As we
22 speak right now I'm not even sure we have a
23 common language or definition about what the
24 current practice or practices are in Vermont
25 from the press and public access point of view.

1 As of last week when we filed that
2 report, the reporter is at the courthouse
3 getting online pre-review access. Access is
4 great. There is no problem from our point of
5 view today. That's a result of what has
6 happened in the past.

7 Now, will that change in the future? It
8 may, but I think that underscores the Court's
9 point about issuing an advisory opinion. And
10 it's not even so much as what they can do but
11 how far back can they regress from where we
12 currently are. That's just not before us, and
13 there is no record for that and we don't see a
14 need to create one or invite them to regress or
15 change what amount of regress is allowed.

16 So as we sit here today access is quite
17 good. Mutual access worked fantastically from
18 the public's point of view, and for our part
19 given us some clear language on what this Court
20 can enter, and that's what we are requesting,
21 based on the past practice of what's found
22 unconstitutional.

23 Counsel was talking about summary
24 judgment and some other things. I thought about
25 it, how do you enter further judgment when

1 there's already a judgment that's been entered
2 and affirmed?

3 It gets procedurally tricky, and we have
4 clear language from the 2nd Circuit that we can
5 and should follow. And we have current
6 practices that are working quite good, and I
7 think it's time to end this case and stop
8 litigating and fighting over the merits and
9 that's where the plaintiffs are.

10 So, your Honor, no, we're not asking for
11 more or different than we submitted, and we
12 think counsel can certainly agree on a
13 reasonable schedule to account for all of the
14 issues that we'll need to take into account.

15 THE COURT: Okay.

16 In the upcoming weeks, short amount of
17 time, I will be issuing an injunction and
18 declaratory judgment in accordance with the
19 suggested language of the 2nd Circuit.

20 I do not believe I have a factual record
21 in front of me that would allow me to find some
22 other system. And I agree, I don't think
23 there's a meeting of the minds as to what this
24 other system is, is constitutional. That looks
25 like an advisory opinion to me.

1 But even if it wasn't, the plaintiff
2 isn't asking for that relief. The plaintiffs
3 are not asking me to opinion about a system that
4 was not before the Court during the pendency.

5 I mean, there was improvements in the
6 system and the time was getting shorter, but the
7 idea that the 2nd Circuit said, yeah, what
8 you're doing is great and you've eliminated all
9 the delay and we love the central system and
10 it's all okay and these are higher values and
11 you can go ahead and do with what you're doing,
12 they could have said that. They could have
13 said, you know, the State has rectified all the
14 problems that plaintiffs have identified, and
15 they just didn't.

16 So without the plaintiffs pushing that
17 and asking for that, I don't see that I have the
18 ability to decide something and open up the
19 record to find out what the State is doing
20 today.

21 By the same token, I'm not going to say
22 the State should continue its pre-review access
23 portal unless that's what you agree to, and I
24 was hoping you could agree to at least that.

25 If you agreed to that and you wanted the

1 Court to incorporate that, I would. But if
2 there's no agreement that that portal is going
3 to stay open, then I would not include that
4 either.

5 So I do want you to be thinking about a
6 briefing schedule, especially in light of the
7 State's concerns about the time needed for
8 obtaining expert testimony. I don't want it to
9 go on forever. This is one of my older cases,
10 and that's not your fault. It was up at the
11 Circuit for a long time.

12 So if I gave you 14 days after I issue
13 the declaratory judgment/injunction -- I'm not
14 so sure I need an injunction at this point
15 because, as Mr. Groff pointed out, its moot and
16 we're not using that system anyway. 14 days
17 after I issue what I'm going to do, would that
18 be enough time for you to reach a briefing
19 schedule?

20 MR. FETTERLY: Yes, your Honor, for the
21 plaintiffs.

22 MR. GROFF: I'm sure we could accommodate
23 that, your Honor. Thank you.

24 THE COURT: Okay. Anything further?

25 MR. FETTERLY: Nothing from the

1 plaintiffs, your Honor.

2 THE COURT: Thank you.

3 And thank you for your submissions in
4 advance. It was very helpful in shaping our
5 discussion.

6 And you are all free to leave the Zoom
7 call.

8 MR. FETTERLY: Thank you, Judge.

9 THE CLERK: All rise.

10 (Proceedings concluded at 3:33 p.m.)

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C E R T I F I C A T E

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4 I, SARAH M. BENTLEY, Certified Court
5 Reporter, Registered Professional Reporter and Notary
6 Public, do hereby certify that the said proceedings
7 were taken in machine shorthand by me at the time and
8 place aforesaid and were thereafter reduced to
9 typewritten form under my direction, Pages 1 - 29;
10 that the foregoing is a true, complete, and correct
11 transcript of said proceedings.

12 I further certify that I am not employed
13 by, related to, nor counsel for any of the parties
14 herein, nor otherwise interested in the outcome of
15 this litigation.

16 IN WITNESS WHEREOF, I have affixed my
17 signature and seal this 28th day of August, 2025.
18
19

20 /s/ Sarah M. Bentley, RPR

21 SARAH M. BENTLEY, CCR-B-1745
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