IN THE FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM CODY CHILDRESS, a minor, by and through John Childress, Natural Father;	)	**Civil Action No.: 2:10-CV-24-P-A**
Plaintiff	)	
v.	)	
TATE COUNTY SCHOOL DISTRICT; GARY WALKER, TCSD Superintendent, in his official and individual capacities; COREY BLAYLOCK, Independence High School Principal, in his official and individual capacities,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, OR, IN THE ALTERNATIVE, A TEMPORARY RESTRAINING ORDER

INTRODUCTION

"The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse," stated America's fourth president, James Madison. If Madison was speaking today, many would conclude he was talking about the Tate County School District (hereinafter TCSD) and its over active principal wielding a paddle.

By subjecting Plaintiff to an excessive, dehumanizing and discriminatory show of corporal punishment, Defendant Corey Blaylock, with the blessing of his employer, continued an ugly history of abuse that can be traced backed to the cotton fields of this state. And now, decades after slaves were freed from the threat of paddling, a new generation of students is subjected to the same abuse it took a civil war, and over 600,000 dead, to stop.

But this time the class be targeted is not indentured servants, but male students who are more than three times more likely to be at the receiving end of a paddle than their female counterparts. *See* Plaintiff's Verified Complaint, ¶ 48.

Make no mistake, the use of paddling is falling out of fashion from Connecticut to California. In 1976 1,521,896 American students were paddled, but that number has dramatically dropped to 223,190 thirty (30) years later. *Id* at ¶ 61.

This, however, does not mean the corporal punishment crisis is taking care of itself. Of those 223,190 students paddled, a whopping 40 percent live in Mississippi and Texas. Thus, students in Mississippi are still suffering from an unconstitutional and discriminatory punishment while the rest of the nation progresses. It is for this reason this Court must act today and intervene to stop an unconstitutional punishment from causing further harm to a class of citizens.

FACTUAL BACKGROUND

Plaintiff is a sixteen (16) year old student who lives in Senatobia, Mississippi and is a student currently enrolled in the Tate County School District. *See Verified Complaint*, ¶ 14. He currently attends Independence High School. *Id.*

On or about September 1, 2009, while in the care and custody of the Tate County School District, Plaintiff was severely paddled by Defendant Corey Blaylock, principle of Independence High School. *Id.* at ¶¶ 28-30. This infliction of corporal punishment was in violation of Defendant Tate County School District's, hereinafter "TCSD," own policies. *Id.* ¶¶ 51-58. The paddling was so severe, Plaintiff's step-mother, after Plaintiff complained he was in serious pain, was compelled to take Plaintiff to the hospital for treatment. *Id.* ¶¶ 31-32.

The facts giving rise to Plaintiff's case illustrates the constitutional issues linked to corporal punishment in schools.

Plaintiff Paddled Over Female Counterpart

With just minutes to go before the final school bell rang, Plaintiff was in his seventh (7^{th}) period biology class on September 1, 2009. *Id.* ¶ 22. On that day, Plaintiff's normal teacher was not in class and he was under the supervision of a substitute teacher named Mr. Galloway. *Id.* It was at this time Mr. Galloway had told the students, including Plaintiff, to talk quietly amongst themselves until class was dismissed. *Id.* Plaintiff followed Mr. Galloway's instruction. *Id.*

Ten minutes prior to the class's dismissal, Mr. Galloway approached Plaintiff and instructed him to go directly to the principal's office. *Id.* at ¶ 23. Mr. Galloway was upset because Plaintiff was looking at a picture displayed on a digital camera. *Id.* at ¶ 24. The camera belonged to a female student and the female student had showed the picture to Plaintiff. *Id.*

But despite the fact the female student had possession of the camera and picture and enticed Plaintiff to look at the picture, she was not sent to the principal's office. Rather it was Plaintiff, a male student, who was kicked out of class. *Id.* at ¶ 25.

After arriving at the principal's office, Defendant Blaylock told Plaintiff he needed to be disciplined. *Id.* at ¶ 26. Defendant Blaylock instructed Plaintiff to sign an undisclosed piece of paper. Plaintiff, following the orders of a authority figure, signed the paper because he felt he had no other choice. *Id.* The contents of this paper are unknown as Defendant Blaylock did not give Plaintiff a copy. *Id.*

At this point, Defendant Blaylock told Plaintiff he was going to be punished. *Id.* Plaintiff was still unsure as to why he was getting punished, but did not wish to disrespect his principal. Plaintiff was never given a choice of punishment, but was paddled unilaterally. *Id.* Defendant Blaylock told Plaintiff he was going to be paddled because Plaintiff's parents would be upset if he had an in school suspension on his academic record. *Id.* at ¶ 27. Plaintiff followed the instructions because Defendant Blaylock had taken away his choice. *Id.* at ¶ 29.

Defendant Blaylock struck Plaintiff twice with a paddle. *Id.* at ¶ 30. The blows to Plaintiff's buttocks were so severe that Plaintiff could not sit. *Id.* The paddling left visible bruising on Plaintiff's buttocks and made it painful for him to use the restroom. These symptoms lasted days after the paddling.

Once Plaintiff returned home, he was in such pain he informed his step-mother about the incident. *Id.* at ¶ 31. His parents proceeded to examine Plaintiff's injuries and determined it was necessary to take Plaintiff to the hospital. *Id.* at 32. Plaintiff's step-mother also informed Tate County Law Enforcement about the incident and filed a complaint against Defendant Blaylock.[1] *Id.* at ¶ 33.

Paddle Replaced Policy at TCSD

There is little, if no, policy governing corporal punishment in Mississippi. *Id.* at ¶ 3. Rather, Mississippi has enacted two statutes granting schools immunity for liability, so long as the corporal punishment administered is "reasonable" and not "excessive." *Id.* at ¶ 2.

School districts, therefore, are free to paddle students and may or may not adopt a framework governing such actions. TCSD permits paddling and provides no guidance on how and why a student should be paddled.

TCSD policy states, "Corporal punishment may be administered in the Tate County School System as a disciplinary procedure for infractions deemed appropriate. In each instance, another staff member shall be present. Corporal punishment may be administered to both sexes." *Id.* at ¶ 51.

TCSD policy, however, suggests Plaintiff should not have been paddled in the first place.

In regards to minor violations, the student handbook reads, "The classroom teacher should handle minor violations." *Id.* at ¶ 56. The policy continues, "The principal will notify the parent upon first referral. Each student will be given a copy of his/her referral to give the parent. This type

[1] This matter is still pending in Tate County Circuit Court, *styled State of Mississippi v. Cory Blaylock*, Cause No.: CR2009-163-BT.

of violations includes, but is not limited to... general disruptions and/or excessive distractions of other students." *Id.* at ¶ 57. None of these procedures were followed before a paddle was used to inflict harm on Plaintiff.

Corporal Punishment Stands on Feet of Clay

Corporal punishment in Mississippi, as well as the United States, is running into a constitutional roadblock due to it's unequally and disproportionately propensity to target a specific gender and/or race. Because corporal punishment is inherently a flawed, it is falling out of fashion among the fifty (50) states.

Throughout the 2006-07 school year, the DOE reported 223,190 students were struck by school officials as a form of punishment. *Id.* at ¶ 40. This number is down significantly from the over 1.5 million school children struck by school officials in 1976. *Id.* at ¶ 62.

Despite the fact many states have either enacted laws banning corporal punishment in schools or have abandoned the practice, Mississippi maintains an active practice of paddling. During the 2006-07 school year, Mississippi's school administrators paddled over 30,000 students or 7.5 percent. *Id.* at ¶¶ 42, 48. This is the highest rate of paddling students in the country. *Id.* at 42.

When Mississippi's paddling numbers are combined with the numbers in Texas, forty (40) percent of the nation's acts of corporal punishment come from within the Fifth Circuit. *Id.* at ¶ 63. Such a travesty is further exasperated by government statistics demonstrating corporal punishment is inherently unequal.

Statistics compiled and published by the U.S. Department of Education shows males and blacks are subjected to corporal punishment at a disproportionate rate than females and whites. *Id.* at ¶ 48. In completing its study, 6,000 U.S. school districts were surveyed by the DOE. *Id.* at ¶ 45. Not all school districts were asked to participate, nor where they required to. *Id.* at ¶ 46.

Every day in Mississippi approximately 184 students are disciplined by a school district using some means of corporal punishment. *Id.* at ¶ 47. School officials, however, administer corporal punishment in a sexist, gender-biased manner. *Id.* at ¶ 48.

Of the 33,055 students who received corporal punishment in Mississippi, 8,625 of the students were female while an overwhelming 24,430 where male; thus roughly three-quarters of the students paddled in this state were male even though they constitute 51 percent; a slim majority of the state student population. *Id.* at ¶ 48.

The student population at TCSD and Independence High School mirrors that of the state average. Forty eight percent of the students registered in the TCSD are female, while 52 percent are male *Id.* at ¶ 43.Thirty-eight (38) percent of the IHS's students are black, three (3) percent are Hispanic and fifty-nine (59) percent are white. *Id.*

Forty-seven (47) percent of the students attending IHS are female, while fifty-three (53) percent are male. *Id.* at ¶ 44. Forty (40) percent of the IHS's students are black, two (2) percent are Hispanic and fifty-eight (58) percent are white. *Id.*

Corporal punishment has also targeted students based on race. *Id.* at ¶ 61. Black students, therefore, also suffer disproportionately when it comes to corporal punishment. Even though black students constitute 17 percent of the U.S. public school student body, 36 percent have had corporal punishment inflicted on them, according to the DOE study. *Id.* Such a number is more than twice the than that of the white student body population. *Id.*

ARGUMENT

This case should be an easy, but deeply disturbing case. In a day and age where nations like Zimbabwe, Zambia and Pakistan have found it prudent to ban corporal punishment in schools, it remains painful unclear why some states remain beholden to a practice that was born in the cotton fields.

The idea of a government official taking the place of a parent and physically striking a child should not just raise eyebrows, but outrage, as well. Students, traditionally in poorer communities and from unstable socioeconomic backgrounds, become beholden to government officials in which the state affords immunity and policy provides no appeal.

But corporal punishment is much more than a moral debate, it has a constitutional dimension that renders it inherently unequal.

Children in this nation have the right to receive an education free from danger, discrimination and derision. Even further, the right to be treated equally in the classroom ascends to a higher level of importance in the pantheon of protected liberty interests.

Paddling a child because he is a male or black student is not just immoral; it is unconstitutional. Male students have been targeted by school officials and, therefore, are paddled a disproportionate rate than their female counterparts.

Bestowing to state officials the ability to inflict physical harm on students in an arbitrary and capricious manner runs afoul of the Fourteenth Amendment to the U.S. Constitution. And to protect a system in which male and black students are subjected to physical harm at a higher rate than others similarly situated is repugnant to the 14th Amendment's Equal Protection Clause.

Because corporal punishment is administered in this state in a manner that fosters and breeds unequal treatment, a preliminary injunction, or in the alternative, a temporary restraining issue, should issue post haste.

I. THE SUPREME COURT PRECENT IN *INGRAHAM* DOES NOT APPLY TO PLAINTIFF'S CASE

The Supreme Court had occasion to address corporal punishment in the case of *Ingraham v. Wright,* 430 U.S. 651 (1977). In reaching its decision the 5-4 majority held "that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable." *Id.* at 671. The Court further held, "the Due Process Clause does not require notice

and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law." *Id.*, at 682.

In terms of equal protection, the opinion rendered in *Ingraham* is silent. The *Ingraham* decision, while decided on constitutional grounds, did not take into account corporal punishment was administered in a disproportionate and discriminatory fashion. It did not take into account that forty (40) percent of the nation's corporal punishment now occurs in two state – Mississippi and Texas – while seventy-five (75) percent occurs in five states – Alabama, Arkansas, Georgia, Mississippi and Texas. *Id.* at ¶ 41.

The *Ingraham* precedent did not address the fact of the over 33,000 instances of corporal punishment in Mississippi, 24,430 were male students. *Id.* at ¶ 48. Nor did it address the fact that black students, seventeen (17) percent of the U.S. public school student body, constitute thirty-six (36) percent of those students receiving corporal punishment. *Id.* at ¶ 61. In other words, *Ingraham* did not touch upon corporal punishment' tendency to target certain classes of individuals; it did not examine who is being paddled and why.

Ingraham, because of its narrow scope, did not address the equal protection issues raised by the modern-day use of corporal punishment. Because the Court did not address such an issue, the *Ingraham* precedent is not binding on Plaintiff's case.

II. PLAINTIFF'S FEDERAL RIGHTS, AS PROTECTED BY THE FOURTEENTH AMENDEMNT'S EQUAL PROTECTION CLAUSE, WERE VIOLATED BY DEFENDANT'S ACTIONS

By paddling Plaintiff in lieu of the female student who was the cause of the disruption, Defendants TCSD and Blaylock violated Plaintiff's clearly established rights protecting him from sex-based discrimination. Defendants' paddling of Plaintiff further demonstrated the constitutional infirmities institutionalized in the administration of corporal punishment.

The Equal Protection Clause grants to all Americans "the right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). Thus, "When a state actor turns a blind eye to the Clause's command, aggrieved parties ... can seek relief pursuant to 42 U.S.C. § 1983." *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996). To establish liability under § 1983, a plaintiff must show the defendants acted with a nefarious discriminatory purpose, *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), and discriminated against him based on his membership in a definable class. *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir.1992), aff'd, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir.1989).

It is painstakingly clear the Fourteenth Amendment provides that a State shall not deny to any person within its jurisdiction the equal protection of the laws. Because of the Equal Protection Clause's mandate, the Supreme Court interpreted the Equal Protection Clause to prevent arbitrary gender-based discrimination. *See Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971) ("To give a mandatory preference to members of either sex over members of the other ... is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause...."). Not long after its decision in *Reed*, the Court, in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), held that discrimination based on "gender-based generalization[s] in society runs afoul of the Equal Protection Clause. *Id.* at 645

The Supreme Court has long recognized the ability of men to seek judicial relief from discrimination based on gender. *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute imposing gender-based differentials in regulating the sale of alcoholic drinks). The Court went a step further when, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d

1090 (1982), it held a state school could not exclude males from enrolling in a state-supported nursing school.

When undertaking an equal protection analysis, the Court must first determine if state action is present. *Shelley v. Kraemer*, 334 U.S. 1 (1948). *See also Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Once state action is established, the Court must determine whether the classification being made by the law or policy is *de jure* or *de facto*.

In instances where the discriminatory classification is *de facto*, i.e. neutral on its face, such as the case at bar, the Court must decide whether the statute and/or policy has a disparate impact on a protect class. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). If the impact is not glaring, the court than has to determine whether there is a discriminatory purpose. *Washington v. Davis*, 426 U.S. 229 (1976).

Once a Plaintiff shows a disparate impact and/or and discriminatory intent, the burden shifts back to the state to show a non-discriminatory motive was present and the Court will be required to apply the appropriate scrutiny applicable to the class being discriminated against. *Alexander v. Louisiana*, 405 U.S. 625, 628-629 (1972).

A. State Action is Clearly Present

There is no doubt "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley*, 334 U.S. at 13. "The vital requirement is State responsibility that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights. *Terry v. Adams*, 345 U.S. 461, 473 (1953) (J. Frankfurter, concurring).

Providing a public education to Mississippi's children is a quintessential example of state action. *Brown v. Board of Education, et. al.*, 347 U.S. 483, 493 (1954) (*explaining* "education is perhaps the most important function of state and local governments"). In providing a public education,

states are expressly forbidden from engaging in discrimination based upon sex/gender. *Hogan,* 458 U.S. 718.

Plaintiff, in the case at bar, clearly establishes state action is present. First, Defendant TCSD has an adopted policy of utilizing corporal punishment to discipline students. *See Verified Complaint* at ¶ 51. Plaintiff was subjected to corporal punishment when he was struck by Defendant Blaylock on or about September 1, 2009. Id. at ¶¶ 26-30. This infliction of corporal punishment was mandated by Defendant TCSD. *Id.* at ¶¶ 37, 51.

Furthermore, corporal punishment is approved and sanctioned by the State of Mississippi. *Id.* at ¶ .

In administering its policy, Defendants, as state actors, have disproportionately targeted male students over similarly situated female students. *Id.* at ¶ 48. All of which demonstrates a state action has occurred.

B. Corporal Punishment is Inherently Sexist and Discriminatory

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Feeney*, 442 U.S. at 273 (*citing Caban v. Mohammed*, 441 U.S. 380, 398 (STEWART, J., dissenting)). Such discrimination, however, is not always flagrant and insidious but can take the form of a seemingly innocent statute, law or policy. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Thus, "When a statute gender-neutral on its face is challenged on the ground that its effects upon [men] are disproportionably adverse, a twofold inquiry is thus appropriate." *Feeney*, 442 U.S. at 274.

In determining whether a statute and/or policy violates the Equal Protection Clause of the Fourteenth Amendment the Court has held:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based

> discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution."

Id. (*citations omitted*).

1. Corporal Punishment is Gender-Based, Thus *Yick Wo* and Its Progeny Should Apply.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo*, 118 U.S. at 373-374. Thus, "discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-266.

"If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Feeney*, 442 U.S. at 275 (*citing Washington v. Davis*, 426 U.S., at 242; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, supra, at 266). In other words, there are examples of cases in which impact alone can unmask a discriminatory motive and an invidious classification. *Feeney*, 442 U.S. at 275.

In such cases a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights* 429 U.S. at 266 (*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)." In such cases, "[t]he evidentiary inquiry is then relatively easy."

While such cases are admittedly rare, they are not extinct. When a pattern emerges that is so glaring, the court is compelled to identify and expunge the discriminatory statute, law or policy. Additionally, even in cases where the pattern may not be as stark as those demonstrated in *Yick Wo*

or *Gomillion*, the Supreme Court has found an equal protection violation due to the nature of the discrimination. Jury selection cases are the most common examples of such a situation. *Arlington Heights*, 429 U.S. at 266 fn 13 (*explaining*, "Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*. *See, e.g., Turner v. Fouche*, 396 U.S. 346, 359 (1970); *Sims v. Georgia*, 389 U.S. 404, 407 (1967)).

Make no mistake, *Yick Wo* and its progeny should apply to this case as it is clearly distinguishable from the *Feeney* facts. In *Feeney*, the Supreme Court was faced with determining whether a Massachusetts veterans' preference statute denied equal protection to women. *Feeney*, 442 U.S. at 259. In bringing the case, it was argued that because a vast majority of men are veterans, non-veteran women were disproportionately impacted by the statute. The Supreme Court, while admitting the disparate impact, rejected the argument.

"But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans." *Feeney*, 442 U.S. at 275. The Court further explained:

> Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. ***Although few women benefit from the preference, the nonveteran class is not substantially all female.*** To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.

Id. (***emphasis added***).

In the case at bar, the students paddled in Mississippi paddled ***are*** substantially male, while those students not paddled are female. *See Verified Complaint*, ¶ 48. This is not a fine line distinction between veterans and non-veterans, but rather a clear distinction between male and female students.

Where the *Feeney* Court could argue a vast number of men are not veterans, such an argument will not fly in Plaintiff's case. All children have to be students, less they run afoul of truancy laws, and, of all students, males are disproportionately paddled over females. This is a key distinction that favors the conclusion that paddling males over females cannot be rationally explained.

Every day in Mississippi approximately 184 students are disciplined by a school district using some means of corporal punishment, according to a U.S. Department of Education study. *Id.* at ¶ 47. School officials, however, administered corporal punishment in a sexist, gender-biased manner. Of the 33,055 students who received corporal punishment in Mississippi, 8,625 of the students were female while an overwhelming 24,430 where male; thus roughly three-quarters of the students paddled in this state were male even though they constitute 51 percent; a slim majority of the state student population. *Id.* at ¶ 48.

Just like in *Yick Wo*, Plaintiff's case is analogous to the 200 Chinese laundrymen who were denied permits and tossed in jail. The similarities are glaring.

In *Yick Wo* there were "no rules by which its impartial execution can be secured or partiality and oppression prevented." *Yick Wo*, 118 U.S. at 372-373. In Plaintiff's case, Mississippi provides school districts zero guidelines in administering corporal punishment. Outside of two liability statutes, Mississippi educators are free to paddle as they see fit, so long as corporal punishment is deemed "reasonable." Thus, according to Defendant TCSD's own policies, a student may be paddled for fighting or he may be paddled because he chewed gum in the classroom. When a

government official is given the power to inflict physical harm on a citizen, especially a minor citizen, the power is great and, absent sufficient guidelines, such power can be greatly abused.

The *Yick Wo* court recognized such a potential for abuse and explained, "when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration." *Id.* at 374.

The same facts are present in the case at bar, for male and female students in Mississippi are treated differently when it comes to the paddle. In Plaintiff's case, he, along with the rest of his class, was told to sit and talk quietly amongst other students. *See Verified Complaint*, ¶ 22. Plaintiff followed the order. *Id.*

A female student in Plaintiff's class, however, was showing a digital photo to students and Plaintiff happened to look at the photo. *Id.* at ¶ 24. Mr. Galloway, Plaintiff's substitute teacher for the day, became inexplicably upset over Plaintiff's decision to look at the photo, and dispatched him the Defendant Blaylock's office. *Id.* at ¶ 23. The female student who showed the picture and possessed the camera stayed in the classroom while Plaintiff received two severe blows to the buttocks. *Id.* at ¶¶ 25-30.

Plaintiff was singled out not because he misbehaved, but because he was a male. Both he and the female student were equally at fault, yet it was Plaintiff who had to bend over and assume the position. This trend is further supported by the DOE study highlighting the disproportionate rate male students are paddled over female students.

As explained by *Yick Wo*:

> For the cases present the ordinances in actual operation, and the facts whown establish an administration directed so exclusively against a

> particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.

Id. at 373.

Statistical evidence shows male students in Mississippi receive seventy-five (75) percent of paddlings even though they constitute just a slim majority, fifty-one (51) percent of the student population. *See Verified Complaint*, ¶¶ 43, 48. Again, it must be stressed, of the over 33,000 paddlings in Mississippi, 24,430 of them were male.

Even if this Court concludes the corporal punishment's gender gap is not as severe as the laundry gap presented in *Yick Wo*, the very nature of educating school children, not unlike that of jury selection, dictates the statistical evidence is sufficient to prove an equal protection violation. *See Turner,* 396 U.S. at 359 and *Sims,* 389 U.S. at 407.[2] As detailed above, the statistical evidence compiled by the DOE is sufficient to a pattern of discrimination that compels judicial intervention.

And if Defendants are to survive such a finding, Defendants must explain why such a disparity exists. Defendants, however, cannot justify such a disparity.

It could be argued boys are more likely to misbehave, but such a charge is as sexist as the infliction of corporal punishment. Generalizations about gender roles and expectations cannot rationalize why male students are paddled at such a high rate. Furthermore, the very generalization

[2] In *Sims*, the Court found an equal protection violation because "Negroes constituted 24.4% of the individual taxpayers in the county. However, they amounted to only 4.7% of the names on the grand jury list and 9.8% of the names on the traverse jury list from which petitioner's grand and petit juries were selected." *Sims*, 389 U.S. at 407. Similarly, in *Turner*, the Court also found a violation existed because "Negroes composed only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the representation that their percentage (60%) of the general Taliaferro County population would have led them to obtain in a random selection." *Turner,* 396 U.S. at 359.

itself is suspect, as the days of girls being Donna Reed and boys being Dennis the Menace are well behind us.

So we are left with the question of why male students are disproportionately singled out when it comes to corporal punishment. The only answer is leads us to discrimination's doorstep.

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution." *Yick Wo*, 118 U.S. at 374.

2. Even if This Court Fails to Apply *Yick Wo*, Plaintiff can Prove a Discriminatory Purpose/Intent.

In order to prove an equal protection violation when the disparate impact is not as severe as to trigger the *Yick Wo* analysis, a Plaintiff must prove a discriminatory purpose behind the statute, law or policy. *Davis*, 426 U.S. at 240-242. A discriminatory purpose is one implying "the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

Such a rule, however, does not require a Plaintiff provide the proverbial smoking gun to be successful in litigating an equal protection claim. *Id.*

The Court limited the burden of proof by stating, "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination." *Id.* at 240.

Just a year after *Davis* was decided, the Supreme Court explained, "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely

can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S.at 265. Thus, the Court concluded, "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.*

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. To prove a discriminatory purpose a plaintiff can utilized a number of evidentiary proofs such as (i) a clear pattern unexplainable on other grounds, (ii) historical background of the timing of the decision and (iii) legislative history. *Id.* at 266-68. It is key to note, however, "The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us." *Id.* at 268.

a. Unexplainable Pattern

"Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S. at 266. Such a pattern has emerged in the case at bar with the sole exception the discriminatory pattern also includes gender.

The statistics explained *supra* are clear: male students receive seventy-five (75) percent of the corporal punishment administered in Mississippi even though they represent just a slim fifty-one (51) percent majority of Mississippi students. *See Verified Complaint*, ¶¶ 42, 48. In other words, of the 33,055 students who were paddled in Mississippi, 24,430 of them were male. *Id.* at ¶ 48.

In a state that ranks highest in the nation in terms of paddling – Mississippi paddled over seven (7) percent of its student population during the 2006-2007 school year – how is it that male students have a three in four chance of being paddled when compared to their female counterpart?

Even further, over forty (40) percent of the nation's paddling takes place in Mississippi and Texas. Despite such a large percentage of paddling, male students are the one who receive the brunt of the paddle. Again, why are male students targeted while female students get a pass?

Gender classifications suggest a social acceptance to subject males to corporal punishment instead of females. Societal constructs support the notions that males need to toughen up and become strong, thus a paddling will not only discipline a male student; it will shape his character to conform to the machismo characteristics that define male development. Female students are not subjected to such stereotype.

But there may be non-stereotypical reasons for corporal punishment's gender imbalance.

Are male students more likely to misbehave than female students? Pushing aside the sexist generalization such a question embodies, such reasoning further supports the inherent discrimination in corporal punishment.

Assuming arguendo male students misbehave at a greater rate than female students, the next question would be why? Is it because the development of male students is different from that of their female counterparts? Or do male students have a greater psychological disposition to act out and rebel? Or is it harder to engage male students in education than it is female students?

But at the end of the day the pattern boils down to this realization – male students are three times as likely to be paddled than their female counterparts. The system is broken.

In finding a discriminatory purpose the Court must find "the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its

adverse effects upon an identifiable group. *Feeney*, 442 U.S. at 279. The facts of this case not only support the discriminatory pattern, they satisfy the dictates of *Feeney*.

In this case Plaintiff, like the rest of his class, was talking quietly as instructed by Mr. Galloway. *See Verified Complaint*, ¶ 22. A female student distracted Plaintiff when she showed him a picture on a digital camera. *Id.* at ¶ 24. Plaintiff looked at the picture. *Id.* Mr. Galloway, for whatever reasons, was upset by this and ordered Plaintiff to Defendant Blaylock's office where Plaintiff was subsequently paddled. *Id.* at ¶¶ 23, 26-30. The female student, the instigator in this fact pattern, remained in the classroom and spared the paddled. *Id.* at ¶ 25.

Such a pattern cannot survive an equal protection challenge because it demonstrates the unequal treatment male students receive especially when there are less intrusive means of disciplining students.

b. Historical Background

"The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267 (*citations omitted*). The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purposes. *Reitman v. Mulkey*, 387 U.S. 369, 373-376 (1967); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

Corporal punishment' history is suspect because (i) social attitudes have changed towards its acceptance, (ii) its history is steeped in discrimination and (iii) there is no official policy governing how it is administered in Mississippi.

In *Ingraham,* as stated *supra.*, the Supreme Court touched on the topic of corporal punishment and based its decision on the social acceptance of corporal punishment, as well as its common law roots. Discussing corporal punishment, the Supreme Court reasoned:

> The use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period. It has

> survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to play a role in the public education of schoolchildren in most parts of the country. Professional and public opinion is sharply divided on the practice, and has been for more than a century. Yet we can discern no trend toward its elimination.

Id., 430 U.S. at 660-661. Times, however, have changed.

Since *Ingraham* was decided thirty-two (32) years ago, statistics and cultural acceptance has changed, as well as an understanding of corporal punishment's tainted history.

Cultural attitudes towards corporal punishment have changed dramatically since Justice Powell penned the 5-4 majority decision. A year after the Court ruled in *Ingraham*, 1.4 million students were subjected to corporal punishment. *See Verified Complaint*, ¶ 62. Three decades later, just 223,190 students were at the wrong end of the paddle. *Id.*

Just 21 states have laws permitting corporal punishment, while the vast majority of states have enacted laws banning its use or have just denied educators the right to use it's as a means of discipline. This trend has gone international with most of Europe banning corporal punishment in the classroom. Even nations like Zimbabwe, Zambia and Pakistan have banned the practice.

The result is corporal punishment has become a marginalized and regional practice with forty (40) percent of corporal punishment limited to Mississippi and Texas. *Id.* at ¶ 63. When Arkansas, Alabama and Georgia are added to the mix, the five states are responsible for seventy-five (75) percent of the nation's corporal punishment. *Id.* In other words, children in the South, particularly male students, have a greater chance of getting paddled than any other students in the nation. Such an inequality smacks of discrimination.

The history of corporal punishment is further blemished when its use and roots are examined. Paddling is a practice that thrived in the cotton fields of Mississippi. *Id.* at ¶ 60. It is a

practice that originated to demean and control and while it has common law roots, such roots alone cannot justify its continued use in the schoolhouses of the South.

Even more disturbing, there are zero guidelines governing corporal punishment in Mississippi. *Id.* at ¶ 3. Each individual school district is free to set its own policy as to how corporal punishment is administered. *Id.* Without the benefit of guidelines, an arbitrary atmosphere is created in which school officials can target and paddled students for any reason ranging from fist-fighting to chewing gum. And because male students are more likely to be disciplined than female students, the odds males will be subjected to corporal punishment is greatly disproportionate to women.

Mississippi has even acknowledged the inherent evils created by a system in which each school district is free to corporally punish students without the benefits of strict guidelines. *Id.* By attempting to pass a bill creating such guidelines, Mississippi took steps to correct a system that has slipped out of control. But the inherent discriminatory nature of corporal punishment would render any attempt to fix – absent a total ban – fruitless.

Make no mistake, the lack of rules governing corporal punishment calls its constitutionality into doubt. Just as Plaintiff was paddled in lieu of the female student,. Corporal punishment cannot be rehabilitated.

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949) (concurring opinion) (J.Jackson) "Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Id.*

For these reasons, the history of corporal punishment, as well as its how it is administered, further supports its discriminatory purpose.

C. Corporal Punishment is Not an Important Government Interest Substantially Related to the Government's Objectives.

"To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

On numerous occasions the Supreme Court has rejected claims that policies of ease or convenience rise to the level of an important government interest. *Id.* (*holding* "Decisions ... have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications"). *See also Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); and *Schlesinger v. Ballard*, 419 U.S. 498, 506-507 (1975).

"In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Stanley*, 405 U.S. at 658. *See also Cleveland Board of Education. v. LaFleur*, 414 U.S. 632, 650 (1974).

Though an allegedly neutral policy, corporal punishment in Mississippi has evolved in such a fashion that male students are struck more frequently than female students. The difference is so great that seventy-five (75) percent of corporal punishment in Mississippi, roughly 24,430 students, is male. *See Verified Complaint*, ¶ 48. Furthermore, such a pattern is supported by the gender-based notion that it is more appropriate, if not easier, to strike male students than female students.

Most compelling, however, is the fact corporal punishment is not the least restrictive means of disciplining students. Schools have a plethora of discipline options at their disposal – all of which do not involve a government official striking a student. In-school suspensions, detentions,

suspensions all satisfy the government's objective of maintaining order at school. And because the majority of states in this country – as well as the majority of nations throughout the world – have eliminated corporal punishment from their disciplinary arsenal, it is evident such a policy of striking children is not essential to maintaining order.

Because corporal punishment is fueled by outdated gender stereotypes and because it is not essential to maintaining order at school, it fails to be an important government interest substantially related to the objective of schoolhouse discipline.

III. THIS COURT HAS THE AUTHORITY TO ISSUE A TEMPORARY RESTRAINING ORDER PROTECTING PLAINTIFF'S CLEARLY ESTABLISHED STATE AND FEDERAL RIGHTS.

"The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures-boards of education not excepted." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). In that respect, federal courts have a proud history of protecting the rights of students from unlawful government intrusion.

In the landmark decision *Brown*, the Supreme Court held:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. This judicial commitment to educational rights is just as relevant to Plaintiff today as it was a child of color living in the 20th Century.

Historically, Courts have taken extraordinary steps to protect the education rights of students and have not hesitated to use the powers of equity to ensure a child was able to receive a

public education. Thus in addressing issues of education rights, especially among instances of discrimination, "the courts will be guided by equitable principles." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 -330 (1944).

In *Brown* II, Chief Justice Earl Warren recognized, "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner." *Id.*

When a Plaintiff shows school authorities have failed in their constitutional and statutory obligations to protect the educational interests of a child, precedent demonstrates "judicial authority may be invoked." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971) It is pivotal to note, "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.*

In the case at bar, it is evident that local and state authority has defaulted. Corporal punishment is being utilized in a manner that targets male students at a rate substantially disproportionate to female students. This, in turn, has impact Plaintiff's education rights, violated his Equal Protection rights and run afoul of numerous federal and statute statutes. Because the school authorities have failed in protecting such rights, judicial action is not only warranted, but is necessary

III. A PRELIMINARY INJUNCTION, OR IN THE ALTERNATIVE, A TEMPROARY RESTRAINING ORDER, SHOULD ISSUE BECAUSE PAINTIFF'S REIGHTS ARE BEING IRREPARABLY HARMED

The standard for issuance of a preliminary injunction is the same as a temporary restraining order. The standard for a preliminary injunction in the Fifth Circuit is well-established. The factors to be considered were noted in *Roho, Inc. v. Marquis*, 902 F.2d 356 (5th Cir. 1990):

> [A] preliminary injunction is an extraordinary remedy that should not be granted unless the movant has demonstrated, by a clear showing: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from an injunction to the non-movant; and (4) that the injunction will not undermine public interests.

902 F.2d at 358l; see also *Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1453 (5th Cir. 1993) (citing *Roho, Inc.*).

While the grant or denial of a preliminary injunction rests in the discretion of the trial court, the court's discretion is not unbridled and a preliminary injunction "must be the product of reasoned application of the four factors held to be necessary prerequisites [to a preliminary injunction]." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana* ("C.E.P.E."), 762 F.2d 464, 472 (5th Cir. 1985) (quoting *Florida Medical Ass'n v. H.E.W.*, 601 F.2d 199, 202 (5th Cir. 1979)). These four factors are (a) a substantial likelihood of prevailing on the merits; (b) a substantial threat of irreparable harm if the injunction is not granted; (c) the threatened injury outweighs any harm that may result from an injunction to the non-movant; and (d) the injunction will not undermine public interests. *Roho.* at 358; *Hull* at1453.

A. Likelihood of Success on the Merits

The evidence in favor of Plaintiff is not only compelling, but is overwhelming. Here the Court is faced with a situation where the factual evidence demonstrates the unequal application of corporal punishment. Male students in Mississippi constitute seventy-five (75) percent of all

instances of corporal punishment, though they are only fifty-one percent (51) of the student body. *See Verified Complaint*, ¶¶ 42, 48.

Nationally speaking, corporal punishment is falling out of fashion and many are questioning its utility. Mississippi further exasperates the situation due to the fact that there are zero guidelines governing how the punishment is administered. *Id.* ¶ 3. Rather each individual school district is free to paddle any student it chooses so long as the paddling is "reasonable." *Id.* Thus, a student, as evident by Defendant TCSD's own handbook, could be struck by a principal for chewing gum. *Id.* at ¶ 51.

Even further, due to the nature of the education system, male students receive the brunt of the paddlings. Hence, it is not beyond a jury's ability to conclude that corporal punishment has a discriminatory purpose and a disparate impact on male students. It could further conclude that corporal punishment, because of its nature, in inherently unreasonable.

More telling, Plaintiff's case demonstrates how male students are singled out over female students. When a female student showed Plaintiff a picture on her camera, such an act irritated Mr. Galloway the substitute teacher. *Id.* at ¶ 23-24. Rather than send both students to Defendant Blaylock's office, Mr. Galloway dispatched Plaintiff while the female instigator remained in class. *Id.* at ¶¶ 25-30. It was at this point Plaintiff was paddled. *Id.*

Schools have a plethora of disciplinary measures available to them. Detentions, suspensions, in school suspensions are just a few of the disciplinary actions available to school districts. Corporal punishment, which involves striking a student, is not narrowly tailored to meet the school's objective of keeping order. Rather, it is a practice that disparately impacts male students, as well as black students.

Because statistics are clear and the history of corporal punishment is questionable, Plaintiff is likely to win on the merits of his case.

B. Plaintiff Will Suffer Irreparable Harm if Relief is not Granted

Plaintiff is facing a situation where he can be paddled for chewing gum in the classroom and that scenario increases threefold because he is male. The State of Mississippi has zero guidelines governing how corporal punishment is administered and a track record of paddling male students had a much higher rate than female students.

Plaintiff's harm is real, as he has been deprived of his constitutional rights. He faces a disproportionately high chance of being subjected to corporal punishment, again, just because of his gender. If Plaintiff was a female, he would not have this concern.

C. Defendants Will Not Suffer Irreparable Harm if the Temporary Restraining Order Issues

Make no mistake, granting a TRO and preliminary injunction until final resolution of this federal suit will do little or no harm to Defendant. It is clear an injunction preventing the use of corporal punishment will not harm Defendants. The vast majority of states have outlawed corporal punishment and school districts have not been harmed. Rather, they have utilized other, less intrusive, methods of disciplining students.

If, on the other hand, the TRO and preliminary injunction fails to issue, Plaintiff will face a much greater chance of being physically struck by school officials than his female counterparts. \

D. The Public Interest Will Not be Harmed if a Temporary Restraining Order Issues

The requirement that the public interest not be harmed if the TRO or injunction issues is also satisfied in accordance with applicable law. Just as the Chief Justice Earl Warren opined in *Brown*, "It (education) is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child

may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown*, 347 U.S at 493.

Subjecting students to physical harm just because of their gender never advances the public interest. Thus, the public interest is harmed by the continuance of a practice that stems from the cotton fields.

CONCLUSION

Plaintiff has suffered and continues to suffer irreparable injury arising in the context of the of this case. The relief sought by Plaintiff is a temporary restraining order and injunctive relief against the action of Defendants; it is the kind of relief that does not raise a special problem, yet cries out for federal intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010, I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the ECF system. This document will be served upon Defendants concurrently with the Verified Complaint at the below listed addresses:

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