IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-2992

JUDICIAL WATCH, INC., *et al.*,

Plaintiffs,

v.

JENA GRISWOLD, et al.,

Defendants.

PLAINTIFFS' RESPONSE TO OBJECTIONS OF PROPOSED INTERVENORS VOTO LATINO AND VOTE.ORG TO RECOMMENDATION OF U.S. MAGISTRATE JUDGE THAT THEIR MOTION TO INTERVENE BE DENIED

Plaintiffs Judicial Watch, Inc., et al., ("Plaintiffs") submit this memorandum in response to the objections (Doc. No. 49) of proposed intervenors Voto Latino and Vote.org ("Movants") to the recommendation (Doc. No. 48) of Magistrate Judge Kathleen M. Tafoya that their motion to intervene be denied. Doc. No. 17.

Introduction

The complaint in this action seeks declaratory and injunctive relief to enforce the National Voter Registration Act of 1993 ("NVRA"). Plaintiffs named the chief State election official, who is charged by law with ensuring compliance with the NVRA, and the State of Colorado, which is subject to the NVRA. Doc. No. 1, ¶¶ 8-9. Plaintiffs' sole and narrow claim against these Defendants is for violations of Section 8(a)(4) of the NVRA, which requires them to employ reasonable efforts to remove from the voter rolls voters who have died or have moved. *Id.* ¶ 73 (Count I). In other words, Plaintiffs request enforcement of the NVRA only with respect to

ineligible voters. The only remedy sought is compliance with existing law. (*Id.*, Prayer for Relief.)

Movants, who can *never* be named defendants because they are private parties not subject to the NVRA, seek to intervene as Defendants here. Their papers raise issues outside the scope of the complaint, including remedies Plaintiffs do not seek. Movants' motion is based on the unwarranted assumption that any relief ordered by this Court will remove *eligible* registrants from the rolls in violation of federal law. They speculate that presently unknown and unrequested relief that *might* be imposed at the remedial stage of this litigation *might* violate federal law.

Magistrate Judge Tafoya's Recommendation to Deny Intervention

In recommending that the motion to intervene be denied, the Magistrate Judge rightly noted that "Movants do not offer factual support for how the removal of eligible registrants would occur." Doc. No. 48 ("MJR") at 8; *see id.* at 3 (claim that eligible voters will be improperly removed is "without evidentiary support"). This crucial finding of fact—which is reviewed, as set forth below, under the highly deferential "clearly erroneous" standard—dooms the motion to intervene. First, Movants cannot claim intervention as of right, because there is "simply no relationship between the Movants' professed interest and the claims at issue in this case, which concern removing *ineligible* voters." *Id*. at 8 (emphasis added). Second, "Movants do not raise sufficiently common issues of law and fact … so as to support permissive intervention," given that ensuring that eligible voters are not removed "is not the subject matter of the case." *Id*. at 10.

Indeed, the Magistrate Judge noted that the interests Movants claim are shared by existing parties. Ensuring "that eligible persons are registered and allowed to vote as set forth in the NVRA [] is not inherently unique to the Movants," and "appears to be shared with Plaintiffs, who are likewise urging compliance with the NVRA." MJR at 7. Furthermore, Movants, who are seeking

to intervene as Defendants, presumably "simply side with Defendants, in that they contend that Colorado state officials are fully enforcing, and complying with, the NVRA as written." *Id*. at 10. Thus, "the Movants are adequately represented, given that they share the same ultimate interests and objectives as the current parties." *Id*. at 10-11. The addition of Movants would "only clutter the action unnecessarily … without adding any corresponding benefit to the litigation." *Id*. at 10 (citation and internal quotations omitted).

Standards Applicable to Movants' Objections

Movants object to the Magistrate Judge's recommendation pursuant to Fed. R. Civ. P. 72(a). Doc. No. 49 at 1. That rule provides that a party may object to a magistrate judge's decision regarding "a pretrial matter not dispositive of a party's claim or defense." Fed. R. Civ. P. 72(a). The district judge must then "consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id*.

"This is a deferential standard." *Beltran v. InterExchange, Inc*., No. 14-cv-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 49925, at *9 (D. Colo. Mar. 27, 2018) (citation omitted).

> As to factual findings by the magistrate judge, the 'clearly erroneous' standard "requires that the reviewing court affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus*., 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. United States Gypsum Co*., 333 U.S. 364, 395 [] (1948)).

Id. In applying this standard, the Court "is not entitled to reverse the magistrate judge's findings 'simply because it is convinced that it would have decided the case differently,'" or to "decide factual issues *de novo*." *White v. Deere & Co*., No. 13-cv-02173-PAB-NYW, 2016 U.S. Dist. LEXIS 188448, at *5-6 (D. Colo. Jan. 29, 2016) (citations omitted). Further, a magistrate's order is "contrary to law" only "if it applied an incorrect standard … or applied the appropriate legal

standard incorrectly." *Beltran*, 2018 U.S. Dist. LEXIS 49925, at *8-9 (citations omitted).

In their objections, Movants briefly suggest that a standard of de novo review used for dispositive motions should apply. Doc. No. 49 at 7. But Movants are foreclosed from making this argument, because they moved pursuant to Fed. R. Civ. P. 72(a), which plainly adopts the clearly erroneous standard. Doc. No. 49 at 1. If Movants contended that they were objecting to a ruling regarding a dispositive motion, they should have moved under Fed. R. Civ. P. 72(b), which incorporates the de novo standard. *See* Fed. R. Civ. P. 72(b)(3).

In any case, motions to intervene are nondispositive matters. *See Eco-Site LLC v. Cty. of Pueblo*, 352 F. Supp. 3d 1079, 1082 (D. Colo. 2018) (treating grant of motion to intervene as nondispositive); *PDC Energy, Inc. v. DCP Midstream, LP*, No. 14-cv-01033-RM-MJW, 2014 U.S. Dist. LEXIS 199492, at *2 (D. Colo. Sep. 3, 2014) (treating denial of motion to intervene as nondispositive). This makes sense, given that the grant or denial of a motion to intervene is "not dispositive of a *party's* claim or defense." Fed. R. Civ. P. 72(a) (emphasis added).

Accordingly, Movants' objections should be denied unless the Magistrate Judge's order "is clearly erroneous or is contrary to law." *Id*.

ARGUMENT

I. The Court Should Deny Movants' Request for Intervention As Of Right.

Movants first seek to intervene as of right under Rule 24(a)(2), which permits intervention if (1) the motion is timely; (2) the movant claims an interest in the property or transaction which is the subject of the action; (3) that interest may as a practical matter be impaired by the action; and (4) that interest is not adequately represented by existing parties. *U.S. v. Albert Inv. Co.*, 585 F.3d 1386, 1391 (10th Cir. 2009) (citations and quotations omitted). Though the Tenth Circuit

follows "a somewhat liberal line in allowing intervention," *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001), the "central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention." *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019), quoting *San Juan Cty. v. U.S.*, 503 F.3d 1163, 1193 (10th Cir. 2007) (en banc).

A. Movants Have No "Significantly Protectable Interest" That Will be Impaired Without Their Participation.

Intervention as of right requires an interest in the subject matter of the litigation that is "direct, substantial, and legally protectable." *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) (citations omitted); *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) (must be "a significantly protectable interest"). Though "[t]he threshold for finding the requisite legally protectable interest is not high," an "intervenor must specify a particularized interest rather than a generalized grievance." *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 246 (D.N.M. 2008) (internal quotation and citation omitted). Movants may not "raise interests or issues that fall outside of the issues raised in the lawsuit." *Id.*, citing *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994).

The NVRA (and this lawsuit) seek the removal of *ineligible* registrants. Section 8(a)(4) commands the removal of two kinds of voters: those who have died, and those who have moved out of a jurisdiction. 52 U.S.C. § 20507(a)(4). For those who have moved (and have not informed the state), they may only be removed from the rolls *after* (1) they are sent, and do not answer, a forwardable, pre-addressed, postage-paid card requesting address confirmation, *and* (2) they fail to vote, appear to vote, or contact the registrar for the next two general federal elections—basically, a period of from two to four years. *Id.* § 20507(d)(1)(B), (d)(2). A registrant may still vote during

that period, which halts the removal process for that voter. *Id.* § 20507(e).

In their effort to locate a significant, protectable interest, Movants resort to wholly unsupported speculation about this process. The protectable interest they ultimately claim supposes that (1) relief Plaintiffs *might* seek, (2) which Defendants *might* not contest, (3) which the Court *might* order, (4) will violate the voting rights of those Movants assist, (5) in a way that compels Movants to divert their resources. In their moving brief and in the two, insubstantial affidavits filed with it, Movants rely heavily on adjectives and adverbs, referring to "broad and aggressive voter purge efforts," "aggressive purging," "overly aggressive voter purges," and "over-inclusive and over-aggressive voter purging efforts." Doc. No. 17 at 2, 4, 5, 6, 11; Doc. No. 17-1, ¶ 9; Doc. No. 17-2. In response, Plaintiffs implicitly challenged Movants to identify any paragraph in the complaint that inspires this fear, or, in the alternative, to identify any case in which court-ordered relief on an NVRA claim caused eligible voters to be improperly removed. Doc. No. 36 at 5. But Movants did not do so, either in their reply, or now in their objections. It is simply baseless conjecture to suggest that Plaintiffs would ever request an "aggressive voter purge," that government Defendants would agree it, or that this Court would order it. *Id.* at 2.[1]

Removing registrants who are dead or are now living in other jurisdictions simply does not affect the protectable interests of *eligible* registrants. No law guarantees a registrant who is no longer eligible to vote in Colorado a protected right to stay registered there. Further, the interests Movants claim relate to their efforts to *register* voters. Nothing about this litigation will impair Movants' current or future efforts (whatever they may be) to register voters in Colorado.

[1] In fact, there could never be a massive and immediate purge ordered pursuant to the NVRA, because it requires states to send an address confirmation notice *and* wait two federal elections with no response or voting activity before removing a registration. 52 U.S.C. § 20507(d)(1).

It was not clearly erroneous for the Magistrate Judge to find that "Movants do not offer factual support for how the removal of eligible registrants would occur." MJR at 8. To the contrary, this finding was clearly correct.

In an effort to create a factual basis for a protectable interest, Movants cite to internet articles concerning various risks that eligible voters have faced at different times in different states. Doc. 49 at 5-6. These are not government websites, nor are they fit subjects for judicial notice, nor are they party admissions. Movants have the burden of establishing their right to intervene, and these internet citations are not admissible evidence. That said, the situations referred to in these sources have nothing to do with the allegations in this lawsuit. The dispute here has nothing to do with the old Crosscheck database used in Virginia in 2013;[2] or criminal convictions as in Arkansas;[3] or the outright violation in New York in 2015 of the NVRA's waiting period;[4] or the "citizenship review" in Texas or Colorado (*id.* at 6, 6-7). Plaintiffs have asked for none of these measures as remedies. Further, Wisconsin is one of six states not covered by the NVRA so any dispute there is irrelevant. *Id.* at 6. Even if evidence about all of these events were submitted in admissible form it would not establish Movants' right to intervene.

In the same vein, cases Movants cite where intervention was granted had very different facts. In *Bellitto v. Snipes*, No. 16-cv-61474, 2016 U.S. Dist. LEXIS 128840, at *6 (S.D. Fla. Sept. 21, 2016), the intervenors' argument that "court-ordered 'voter list maintenance' sought by Plaintiffs … could itself violate the NVRA," was more than speculation, given that the plaintiffs

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[2] Johnathan Brater, et al., *Purges: A Growing Threat to the Right to Vote*, Brennan Center, 8 (July 20, 2018), https://www.brennancenter.org/our-work/research-reports/purges-growingthreat-right-vote; Doc. No. 49 at 5.

[3] Brater, supra note 2, at 5.

[4] *Id.*

argued that the defendants must use jury recusal forms to conduct list maintenance. *Bellitto v. Snipes*, No. 16-cv-61474-Bloom/Valle, 2018 U.S. Dist. LEXIS 103617, *54 (S.D. Fla. Mar. 30, 2018). The court found that this was not required by the NVRA. *Id.* at *56-58. *Pub. Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020) is inapposite because the court there granted permissive intervention, and also because the allegations were so different. The plaintiffs' complaint specified, by name, 4,887 Detroit voters who were alleged to be dead or duplicate registrations that should be removed from the rolls. *See* Complaint, *Pub. Interest Legal Found., Inc. v. Winfrey*, No. 2:19-cv-13638 (E.D. Mich. Dec. 10, 2019), Doc. No. 1 at 14, ¶¶ 40-42 & 16, ¶ 47; *see id*. Ex. D, Doc. No. 1-5 at 2-3 and at 4-6 (discussing registrations alleged to be ineligible). Such allegations might well lead a court to find "an elevated risk of removal of legitimate registrations." *Winfrey*, 463 F. Supp. 3d at 799. Finally, *Kobach v. U.S. Election Ass. Comm'n*, No. 13-cv-4095, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013) also concerned a grant of permissive intervention. There was, moreover, an *actual* adversity of interests. The plaintiff was a vocal supporter of the documentary proof-of-citizenship requirement at issue who sued the U.S. Election Assistance Commission (EAC) when its director denied Kansas' request to include a citizenship requirement on the federal form. *Id*. at *5-6. Two of the four EAC Commissioners voted in favor of the request. *See Kobach v. U.S. Election Ass. Comm'n*, 772 F.3d 1183, 1188 (10th Cir. 2014). Movants, who opposed the citizenship requirement, could clearly show an adversity of interest with those defendants.

For the reasons set forth, the Magistrate Judge's finding that Movants have failed to state

a significantly protectable interest is not clearly erroneous.[5]

B. Movants Have Not Overcome the Presumption of Adequate Representation by the Government Defendants.[6]

Rule 24(a)(2)'s requirement of a showing of inadequacy of representation is generally satisfied "where the applicant 'shows that representation of his interest *may* be inadequate'–a 'minimal' showing." *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015) (citations omitted). The "divergence of interest 'need not be great.'" *Id.*, quoting *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978).

But this minimal showing is not the standard where, as here, Movants seek to intervene alongside government agencies with the same ultimate objective. *Tri-State*, 787 F.3d at 1072, citing *City of Stillwell, Okla. v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). In such circumstances, courts "presume representation is adequate." *Id.*, citing *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986). To overcome this presumption, movants must make "a concrete showing of circumstances" of inadequate representation, such as "collusion between the representative and an opposing party," adversity of interests between the representative and movant, or "that the representative failed to represent" the movant's interest.

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[5] Movants must also show that denial of intervention "may as a practical matter impair or impede their ability to protect their interest." *Utah Ass'n of Counties*, 255 F.3d at 1253. However, by its nature "the question of impairment is not separate from" interest. *Id.* (citation omitted). Just as Movants cannot show a protectable interest, they cannot show that one has been impaired.

[6] Although the MJR did not deny intervention of right on this basis, it was argued below (Doc. No. 36 at 7). "A district court may affirm a magistrate judge on any ground supported by the record." *O'Mara v. Gov't Emples. Ins. Co.*, No. 09-CV-229-GKF-FHM, 2010 U.S. Dist. LEXIS 152859, at *3 (N.D. Okla. May 4, 2010) (citation omitted).

Bottoms, 797 F.2d at 872-73 (citations omitted). Movants show none of these things.

To the contrary, as the Magistrate Judge noted, Movants "simply side with Defendants, in that they contend that Colorado state officials are fully enforcing, and complying with, the NVRA as written." MJR at 10. This fact is enough to show adequate representation. Although parties seeking intervention "may have different 'ultimate motivation[s]' from the governmental agency, where its objectives are the same, we presume representation is adequate." *Tri-State*, 787 F.3d at 1072, citing *Ozarks*, 79 F.3d at 1042; *see also Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013) (intervenors' "stronger, more specific interests" do not establish adversity to rebut the presumption of adequacy of representation "since would-be intervenors will nearly always have intense desires that are more particular than the state's"). Both Movants and Defendants have the same ultimate objective in defending current list maintenance practices. Defendants have shown no reluctance to defend this action. *See Tri-State*, 787 F.3d at 1074 (finding adequacy of representation where movants presented no evidence Attorney General was reluctant to defend the action).

No doubt, Movants have preferences as to how the NVRA should be enforced, but these cannot justify intervention. *See Texas v. U.S.*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological … reasons; that would-be intervenor merely *prefers* one outcome to the other.") (citations omitted). Nor is it justified by the mere fact that Movants engage in voter registration; otherwise, dozens of organizations and individuals would have automatic access to every NVRA Section 8 lawsuit alleging state failures to remove ineligible voters. If the court permits one ideological organization to intervene, "it may need to let others similarly situated intervene." *Herrera*, 257 F.R.D. at 259.

Nor is this a case where Movants possess unique knowledge or expertise beyond that of

the defendant government officials. *See, e.g.*, *Nat'l Farm Lines v. Interstate Commerce Com.*, 564 F.2d 381, 383 (10th Cir. 1977). In fact, Movants possess no expertise as defendants regarding the issues in this case. The removal of ineligible voters by reason of death or change of address pursuant to Section 8 of the NVRA is the exclusive province of state and county officials. Private citizens and advocacy organizations, such as Movants, have no authority or responsibility under state or federal law to perform list maintenance.

In short, Movants here have not identified a single point of adversity between them and Defendants that would rebut the presumption of adequacy. This failing alone is sufficient grounds for denying Movants' motion to intervene as of right.

II. The Court Should Deny Movants' Request for Permissive Intervention.

In the alternative, Movants seek to intervene permissively. Doc. No. 17 at 13-15. A court may allow such intervention provided the applicant demonstrates "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

As the Magistrate Judge correctly held, Movants' request for permissive intervention fails at the threshold inquiry. "Movants do not raise sufficiently common issues of law and fact … so as to support permissive intervention," because preventing the improper removal of eligible voters "is not the subject matter of the case." MJR at 10. Indeed, as private parties, it is unclear what defenses Movants could share with Defendants. Movants neither have nor are subject to any claims relating to Colorado's list maintenance practices. Rather, Movants believe that Defendants are complying with federal law.

Movants' latest version of the common issue of law or fact that supposedly warrants permissive intervention could hardly be more vague: "Here, Proposed Intervenors' interests raise

questions about the legality, sufficiency, and impact of Colorado's current and future list maintenance schemes, all of which are directly at issue in this suit." Doc. No. 49 at 14. Which "interests" are they referring to—the "protectable interests" they alleged when seeking intervention as of right? More critically for this inquiry, what "questions" are raised? Movants must specify what these questions are to warrant permissive intervention. Yet they studiously avoid doing so. And what are "Colorado's current and future list maintenance schemes"? (Why are they characterized as "schemes"?) Once again, Movants seem content to provide descriptive words and phrases, implicitly inviting the Court and parties to discern the common question of law and fact. The burden for this showing, however, is on Movants. They have not met this burden.

Even if this threshold is met, the decision to allow or deny intervention lies within the court's discretion. *Herrera*, 257 F.R.D. at 259, citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). In exercising this discretion, the court is required by Rule 24(b)(3) "to consider whether the intervention will 'unduly delay or prejudice' the adjudication of the rights of existing litigants." *DeJulius v. New Eng. Health Care Empls. Pension Fund*, 429 F.3d 935, 943 (10th Cir. 2005), quoting Rule 24(b). A court may also consider "whether the would-be intervenor's input adds value to the existing litigation; [] whether the petitioner's interests are adequately represented by the existing parties; and [] the availability of an adequate remedy in another action." *Lower Ark Valley Water Conservancy Dist. v. U.S.*, 252 F.R.D. 687, 691 (D. Colo. 2008) (citation omitted).

As the Magistrate Judge found, "the addition of intervening parties here 'would only clutter the action unnecessarily,' without adding any corresponding benefit to the litigation." MJR at 10, citing *Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992). Movants cannot assist with the

factual exposition of liability in this case. Movants do not claim any firsthand knowledge about how Colorado conducts its list maintenance program. Instead, Movants simply claim a generalized interest in defending Colorado's existing list maintenance program. On this record, Movants will contribute nothing to the development of the underlying factual issues in this case, especially during the liability stage. In this posture, it is impossible to see how they would provide any "value to the existing litigation." *Lower Ark Valley Water Conservancy Dist.*, 252 F.R.D. at 691.

Moreover, any delay caused by Movants' addition to the litigation would be *undue* delay, because Movants "are adequately represented, given that they share the same ultimate interests and objectives as the current parties." MJR at 10-11. *See Tri-State*, 787 F.3d at 1075 (affirming denial of permissive intervention where intervenor was adequately represented); *Herrera*, 257 F.R.D. at 259 ("[g]iven that the Court finds that the Defendant is adequately representing" prospective intervenors' interests, "it would be inappropriate to allow them to intervene permissively, with the delays to the resolution of the case such intervention would entail"), citing *Ozarks*, 79 F.3d at 1043.

Equitable considerations also counsel against permissive intervention. If the court permits one ideological organization to intervene, "it may need to let others similarly situated intervene." *Herrera*, 257 F.R.D. at 259. Given Movants' political positions regarding this case, as well as countless other voter advocacy organizations that share this exact interest, and their admitted lack of knowledge about the relevant facts and adequate representation by existing parties, Movants' participation would unduly delay and prejudice the parties and proceedings.

As a final point, Plaintiffs respectfully submit that a grant of permissive intervention is not a minor matter and should not be routinely granted. There is an important constitutional issue

involved. Granting intervention in the absence of a sufficient stake in the proceedings risks having the Court issue orders in response to parties who are essentially strangers to the litigation. Such orders would be advisory opinions, which the Court has no constitutional authority to issue. *See generally Town of Chester, N.Y. v. Laroe Estates, Inc*., 137 S. Ct. 1645 (2017).

CONCLUSION

For the foregoing reasons, the Court should deny the Movants' objections and adopt the Magistrate Judge's recommendation to deny the motion to intervene.

May 26, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I served a true and complete copy of the foregoing **Plaintiffs' Response to Objections of Proposed Intervenors Voto Latino and Vote.Org to Recommendation of U.S. Magistrate Judge That Their Motion to Intervene Be Denied** upon all parties through ECF:

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