Nos. 21-1086, 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL, ET AL.,
Appellants,

v.

EVAN MULLIGAN, ET AL.,
Appellees.

JOHN H. MERRILL, ET AL.,
Petitioners,

v.

MARCUS CASTER, ET AL.,
Respondents.

On Appeal from and on Writ of Certiorari to the United States District Court for the Northern District of Alabama

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BRIEF OF AMICUS CURIAE THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLANTS/PETITIONERS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The Republican National Committee ("RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the business of the Republican Party (the "Party") at the national level, including developing and promoting the Party's national platform; supporting Republican candidates for public office at all levels of government throughout the country; developing and implementing electoral strategies; educating, assisting, and mobilizing freedom-minded voters; and raising funds to support Party operations and candidates. The RNC is national in scope with committee members from all fifty States, five territories, and the District of Columbia.

The RNC has an acute interest in redistricting. Redistricting directly impacts Republican candidates at every level, from national congressional districts down to local school board races. How district lines are drawn directly impacts who gets elected, how campaigns are run, and ultimately what policies are enacted. In addition, once the party's candidates are

[1] No counsel for any party authored this amicus brief in whole or in part, and no other entity or person, other than the RNC or its counsel, made any monetary contribution toward the preparation and submission of this brief. Consistent with Rule 37.2, on March 30, 2022, Respondents Marcus Caster, et al. and Appellees Evan Milligan, et al., granted blanket consent to the filing of amicus curiae briefs in these cases. On March 31, 2022, the Appellants in *Merrill v. Milligan*, No. 21-1086 and Petitioners in *Merrill v. Caster*, No. 21-1087, likewise granted blanket consent to the filing of amicus curiae briefs in these cases.

elected to State legislatures and governors' mansions across the country, they need to know the rules of the road for redistricting. Too often, the Party, its candidates, and its officeholders are forced to spend valuable time and resources engaging in interminable litigation and adjusting to ever-changing standards and electoral boundaries that could be used elsewhere to advance the Party's policies and priorities.

The RNC submits this brief in support of the Appellants/Petitioners and respectfully asks this Court to articulate a clear standard that gives full effect to the text of the Voting Rights Act of 1965, as amended (the "Act"), and comports with this Court's jurisprudence that the *Gingles* preconditions are necessary but not sufficient conditions for a Section 2 claim, that race neutral line drawing is the default, that deviations from a race neutral approach must be reconciled with the Equal Protection Clause, and that States should enjoy substantial deference when they adhere to traditional redistricting principles, act in good faith, and do not hinder a minority group's ability to participate in the political process.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he right to vote is the crown jewel of American liberties, and we will not see its luster diminished," President Ronald Reagan declared from the East Room of the White House before signing the 1982 amendments to the Voting Rights Act. *Remarks on Signing the Voting Rights Act Amendments of 1982*,

Ronald Reagan Presidential Library and Museum (June 29, 1982)[2]

As was said when Congress reauthorized the Act in 2006, "[w]e must remember that we are reauthorizing the Voting Rights Act, not creating a 'gerrymandering rights act.' The bipartisan support for this bill indicates that both Republicans and Democrats do not expect or intend it to be interpreted to advantage one party or the other." 152 Cong. Rec. 87987 (daily ed. July 20, 2006) (statement of Sen. Sessions).

Since Congress passed the Voting Rights Act in 1965, Republicans have been indispensable in ensuring the renewal of the Act and its subsequent amendments. In 1965, when Congress enacted the Voting Rights Act, nearly 85% of voting Republican Congressmen and nearly 97% of voting Republican Senators voted in favor. *See To Agree to Conference Report on S. 1564, The Voting Rights Act (Aug. 3, 1965)*, GovTrack;[3] *To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965 (Aug. 4, 1965)*, GovTrack.[4] For the decades that followed, Republicans not only voted for amendments to and renewals of the Voting Rights Act, they championed the efforts in Congress and from the Oval Office. When renewed in 1982, the Act was championed by Republicans including Senator Bob Dole and signed into law by President Reagan. *See generally Remarks*

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[2] https://www.reaganlibrary.gov/archives/speech/remarks-signing-voting-rights-act-amendments-1982.

[3] https://www.govtrack.us/congress/votes/89-1965/h107.

[4] https://www.govtrack.us/congress/votes/89-1965/s178.

on Signing the Voting Rights Act Amendments of 1982, Ronald Reagan Presidential Library and Museum (June 29, 1982).[5] When sections of the Act were renewed in 2006, a Republican-controlled Congress passed the legislation and President George W. Bush signed it into law. *See generally President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006*, The White House (July 27, 2006).[6]

The interpretation of Section 2 of the Voting Rights Act by the lower court would be unrecognizable to the Republicans who championed the Act and its subsequent amendments, and for good reason. It was never their intent to obligate States to divide their populations by race to achieve some form of mandatory proportionality or to license plaintiffs to use race as a pretext for Democrats to achieve through the courts what they could not through the ballot box. No Republican would have supported the Act or its subsequent amendments if this was the intended result.

An interpretation that commands that if a majority-minority district *can* be drawn, then it *must* be drawn — and that traditional and race-neutral redistricting criteria are to be dismissed as afterthoughts — directly contradicts the Constitution, the Court's jurisprudence, the Act's text, and the history of the Act.

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[5] https://www.reaganlibrary.gov/archives/speech/remarks-signing-voting-rights-act-amendments-1982

[6] https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html

Unfortunately, misinterpretations of what Section 2 requires have become all too common. This Court now has the opportunity to prevent future misinterpretations by clarifying four points: that satisfying the *Gingles* preconditions is a necessary but not sufficient step to asserting a Section 2 claim, that race neutral line-drawing is the default, how to reconcile consideration of race for Section 2 purposes with the Equal Protection Clause, and that States have substantial leeway to rely on traditional redistricting criteria.

Amici believe that anything less than a reversal of the lower court's holding and an articulation of a clear standard that grants States substantial deference when they use traditional redistricting criteria, act in good faith, and do not hinder a minority group's ability to "participate in the political process", will result in further confusion, erode confidence in our election system, and continue the endless barrage of disruptive litigation at the taxpayers' expense.

ARGUMENT

"Redistricting is never easy," *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018), in no small part because "the Court's case law in this area is notoriously unclear and confusing." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). States have been placed in an untenable position. They must consider race enough to not run afoul of Section 2 of the Voting Rights Act, but not so much that they run afoul of the Equal Protection Clause. Anything less than a reversal of the lower court's holding and an

articulation of a clear standard that grants States substantial deference when they use traditional redistricting criteria, act in good faith, and do not hinder a minority group's ability to "participate in the political process," will result in further confusion, erode confidence in election integrity, and continue the endless barrage of disruptive litigation at the taxpayers' expense. 52 U.S.C. § 10301(b).

The lower court's misapplication of *Gingles* has created a *de facto* proportionality mandate by starting with an assumption that there should be two majority-minority districts and shifting the burden to States to prove that there is no "reasonable" way to achieve this proportional outcome. This approach is fundamentally inconsistent with the text and history of the Act and this Court's jurisprudence. This Court now has the opportunity to correct this misapplication and provide much needed clarity to the States and lower courts.

I. The Voting Rights Act Requires Equality of Opportunity, Not Proportionality of Outcomes

The Voting Rights Act is about ensuring all Americans have an equal opportunity to vote, not guaranteeing proportional outcomes. The interpretation presented by the Plaintiffs and adopted by the lower court directly contradicts the text of Section 2 and the history of the Voting Rights Act.

The text of Section 2 could not be any clearer: "nothing in this section establishes a right to have

members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). *See Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in judgment) ("[Section] 2 unequivocally disclaims the creation of a right to proportional representation.").

Moreover, the history of the Voting Rights Act clearly evidences a rejection of any proportionality requirement. There is no serious debate about what Congress intended to accomplish through the Voting Rights Act of 1965: Congress' objective was to achieve "an end to the denial of the right to vote based on race." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). Congress was determined to end repugnant "practices that had been used to suppress black voting," such as "poll taxes" and white primaries. *Id*. at 2330-31. These practices included making voter registration contingent upon being able to read and write at a time when more than two-thirds of the adult Black Americans "were illiterate while less than one-quarter of the adult whites were unable to read or write" and adopting "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter" as ways to selectively deprive minority citizens of the franchise. *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966). These tactics had their intended effect, resulting in registration rates for of voting-age whites running roughly 50 percentage points or more ahead of black Americans in places like Alabama, Louisiana, and Mississippi. *Id*. at 313.

After its enactment in 1965, the Act made substantial improvement in achieving Congress' objectives: "The Act was immediately and notably successful in removing barriers to registration and ensuring access to the ballot," with "black registration levels skyrocket[ing] from 6.7% to 59.8% in a mere two years" in Mississippi and from 19.3% to 51.6% in Alabama over the same period. *Holder v. Hall*, 512 U.S. 874, 895 (1994) (Thomas, J., concurring in judgment).

In the early 1970s, the Court considered two cases concerning allegations of vote dilution: *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973). In both cases, the Court unequivocally rejected the idea that proportionality was mandated by law, holding that "the fact that the number of [minority] residents who were legislators was not in proportion to [minority] population [does not] satisfactorily prove invidious discrimination absent evidence and findings that [minority] residents had less opportunity than did other [county] residents to participate in the political processes and to elect legislators of their choice" and that "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," respectively. *Whitcomb*, 403 U.S. at 150; *White*, 412 U.S. at 765-766.

In 1982, Congress amended Section 2 in response to the ruling by the Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *See Brnovich*, 141 S. Ct. at 2332. As President Ronald Reagan proclaimed before the signing the 1982 Amendment, the intent of the

amendment was to "securely protect the right to vote while strengthening the safeguards against representation by forced quota." *See generally Remarks on Signing the Voting Rights Act Amendments of 1982*, Ronald Reagan Presidential Library and Museum (June 29, 1982).[7]

The net effect of the amendment to Section 2 was to firmly reject theories of proportional representation and to codify the "results" test from *White*. "This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. The new subsection also states that the section does not establish a right to proportional representation." S. REP. NO. 97-417, at 2 (1982).

Following the adoption of Section 2, the Court has maintained its skepticism of proportional mandates, even as the lower courts have strayed. Thus, in *Johnson v. De Grandy*, the Court held that "[f]ailure to maximize cannot be the measure of § 2." 512 U.S. 997, 1017 (1994). The Court went on to reject the use of proportionality as a safe harbor, stating "we reject the safe harbor rule [for proportionality] because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 1019-20.

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[7] https://www.reaganlibrary.gov/archives/speech/remarks-signing-voting-rights-act-amendments-1982

The fact that a litigant in *De Grandy* would advance the claim that Section 2 requires maximization illustrates the immense drift of Section 2 litigation from the text and purpose of the Act. This drift that has repeated itself in this case. The Voting Rights Act was designed to ensure a fair opportunity to participate in the political process for people who had been consistently excluded from it. There is nothing in the Voting Rights Act or the Court's prior jurisprudence that requires proportional outcomes, let alone a mandate that States maximize the number of winning minority candidates of choice, just as there is no constitutional guarantee that Republicans have seats in the legislature roughly equal to the number of their voters. *See Whitcomb*, 403 U.S. at 160 ("The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.").

The text and history of the Voting Rights Act are abundantly clear: nothing in Section 2 mandates proportionality.

II. Courts Have Misapplied the *Thornburg v. Gingles* Preconditions

The Voting Rights Act was designed to ensure a fair opportunity to participate in the political process for people who had been consistently excluded from it. It was not designed as an invitation to overturn state

maps whenever a plaintiff can plausibly allege a "reasonable" alternative.

The Court had its first major opportunity to review the revised Section 2 following the enactment of the 1982 Amendment in *Gingles*. In *Gingles*, the Court created a three-part test, ostensibly to serve as a screening mechanism before moving to the Act's totality of the circumstances analysis. The *Gingles* factors to be considered are:

> (1) The minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district, (2) the minority group must be politically cohesive, and (3) a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority groups' preferred candidate.

Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S. Ct. 1245, 1248 (2022); *see also Gingles*, 478 U.S. at 50-51 ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate.").

This new standard was a departure from the pre-1980 results standard that the 1982 Amendments explicitly sought to restore. As Justice O'Connor observed at the time, the Court "disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White*." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring in judgment). As Justice O'Connor accurately predicted, the Court's opinion in *Gingles* effectively reduced the analysis to the following:

> If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out . . . .

Id. at 93.

The lower court's analysis is a perfect example of how the *Gingles* factors have subsumed the "totality of the circumstances" analysis. While the three-judge panel purported to engage in a totality of the circumstances analysis, its introductory paragraph demonstrates this was done in name only:

> We begin our analysis of the totality of the circumstances aware that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances."

Singleton v. Merrill, 2022 WL 265001 at *68 (quoting *Ga. St. Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs.*, 775 F.3d 1336, 1342 (11th Cir. 2015).

Moreover, the exclusive focus on the three *Gingles* preconditions led the lower court to inappropriately shift the burden from the Plaintiffs proving a violation occurred to the State proving that one did not. For example, in looking at compactness, the Plaintiffs/Appellees' experts credited by the court "explained that they prioritized race only as necessary to answer the essential question asked of them as *Gingles I* experts: Is it possible to draw two reasonably compact majority-black districts?" *Singleton*, 2022 WL 265001 at *77 (N.D. Ala. 2022). One of the experts further testified "that she considered two majority-Black districts as 'non-negotiable.'" *Id.*

As in *Wisconsin Legislature*, "[t]he question that [the Court's] VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a[n additional] majority-black district would deny black voters equal political opportunity." 142 S. Ct. at 1250-1251. Taken together, the expert testimony shows how the *Gingles* test is being misapplied: by only looking at what is possible, the

lower court uses the evaluation of the *Gingles* criteria subtly resets the baseline of the inquiry away from what the State has actually done and toward what the State could have done. This shifts the burden onto States to prove a violation did not occur. *See generally Abbott*, 138 S. Ct. at 2324 ("The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. '[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" (quoting *Bolden*, 446 U.S. at 74)).

Likewise, the lower court's analysis of compactness also reflects the misapplication of the *Gingles* criteria to engage in burden shifting. In order to assess the first *Gingles* factor, the three-judge panel compared several of the expert maps with the State plan, stating "our comparison is for the limited purpose of evaluating whether the plaintiffs have satisfied the first *Gingles* requirement: a § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles, need not also defeat a rival compact district in a beauty contest.'" *Id.* at *18 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)) (emphasis in the original). In other words, the Plaintiffs did not need to show a particular defect in the State's map, only that their own map was also "reasonable."

This flips the Court's ruling in *Vera* on its head in order to shift the burden from the Plaintiffs onto the State. In *Vera*, the Court concluded that the *State's* map only needed to be reasonable. The whole point of

this standard was to provide a degree of deference to States to "adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan." *Vera*, 517 U.S. at 978. *Vera* is properly read as a reminder that there are many ways for States to comply with Section 2. It is not an invitation to overturn State maps whenever the Plaintiffs can plausibly allege a "reasonable" alternative.

III. In Misapplying the *Gingles* Preconditions, Lower Courts Have Ignored this Court's Rulings Articulating the Appropriate Standard that Gives States Substantial Deference to Rely on Traditional Redistricting Criteria

The Court's recent ruling in in *Wisconsin Legislature* distilled and reaffirmed some basic principles misunderstood by courts when evaluating Section 2 redistricting challenges. First, the Court reemphasized that "satisfying the *Gingles* preconditions is necessary but not sufficient to show a § 2 violation" and that the courts "must examine other evidence in the totality of circumstances." *Wisconsin Legislature,* 142 S. Ct. at 1248-49. Second, the court reemphasized the suspect nature of race-based districting, by noting its past rejection of "uncritical majority-minority district maximization . . . ." Courts must ask and answer "whether a race-neutral alternative…would deny black voters equal political opportunity." *Id*. at 1249. Third, the Court noted the high standard by which courts should evaluate satisfaction of the *Gingles* preconditions. *Id*. at 1250.

Fourth, while acknowledging the relevance of proportionality, the court admonished the tendency for lower courts to "reduce[] *Gingles'* totality-of-circumstances analysis to [that] single factor." *Id.*

Moreover, "[i]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Id.*; *see also Abbott*, 138 S. Ct. at 2333 ("In any event, if even the District Court remains unsure how to draw these districts to comply with § 2 (after six years of litigation, almost a dozen trials, and numerous opinions), the Legislature surely had the 'broad discretion' to comply as it reasonably saw fit in 2013.").

These basic guideposts, which have been similarly articulated in several of *Gingles'* progeny, would have pointed the lower court to a ruling that Alabama was not required and, under the court's strict scrutiny standard for Equal Protection, not permitted to gerrymander a second majority-minority congressional district.

IV. The Court has the Opportunity to Provide Needed Clarity to States for Section 2 Map Drawing

The Case before the Court arises out of clearly erroneous interpretation of what the Section 2 of the Voting Right Act demands. The lower court interprets Section 2 as requiring a second majority-minority district, when it does not. The below court's flawed interpretation is erroneous for many reasons, including under every analysis set out by this Court addressing the Voting Rights Act, the Equal Protection Clause, and this Court's jurisprudence interpreting both, it fails.

States need clarity to alleviate the confusion that has placed them in the untenable position of considering race sufficiently to not run afoul of Section 2 of the Voting Rights Act, but not so much that they run afoul of the Equal Protection Clause. To add to this confusion, there is a lack of clarity of when Section 2 requires the creation of majority-minority districts. There is no safe harbor or deference to a state that follows traditional redistricting criteria and acts in good faith.

The consequences of this uncertainty are real. Without a safe harbor or clear standards from this Court, States will continue to face the onslaught of disruptive litigation at the taxpayers' expense. Further, maps held up in litigation impact candidates, political committees, election administrators, and voters. Without knowing the district boundaries, candidates are unable to determine where to collect

ballot petitions, where to fundraise, or if they are even qualified to run in that district. This litigation creates uncertainty leading to an increase in voter confusion and decline in the confidence in the integrity of our elections.

Unfortunately, misinterpretations of what Section 2 requires have become all too common. This Court now has the opportunity to provide this much needed clarity to the States. In doing so:

- The Court should reemphasize the importance and necessity of evaluating *Gingles*' preconditions and then conducting the totality of the circumstances. This means disabusing lower courts of the notion that satisfying the three *Gingles* preconditions is sufficient to establish a Section 2 violation. The text of Section 2 is clear: the appropriate method for assessing a violation is the totality of the circumstances test. It is not solely the three-factor analysis employed by *Gingles*.

- The Court should reemphasize that race-neutral line drawing as the default and reconcile that principle with Gingles' preconditions, particularly *Gingles'* requirement for a plaintiff to demonstrate that a majority-minority district be "reasonably configured" which as the Court has ruled on multiple occasions is not racially gerrymandered.

- The Court should also articulate a clear standard for how a court should evaluate the standards for strict scrutiny when a state has or a plaintiff is asking a court to evaluate maps on the basis of racial considerations. By disregarding the totality of the circumstances analysis, lower courts have too often disregarded the threats to Equal Protection rights when approving racially gerrymandered maps.

- The Court should give States substantial leeway to rely on traditional redistricting criteria while properly assigning plaintiffs the burden of proving either that States engaged in intentional discrimination or that the results are so manifestly "uncouth" as to operate as a denial of opportunity for minority citizens to participate in the political process. *See generally Gomillion v. Lightfoot*, 364 U.S. 339, 340, 341 (1960) (Ruling against an act that "alter[ed] the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure," and in doing so "remove[d] from the city all save four or five of its 400 [minority] voters while not removing a single white voter or resident.").

The focus on opportunities to participate in the political process provides breathing room for States to draw maps. Providing clarity as described above would have the practical effect of returning the burden to plaintiffs to show that district lines have actually abridged their right to vote and participate in the political process, not just show that there is a plausible

alternative map that might enhance their relative electoral power. It would also provide greater respect to the constitutional commitment of redistricting to the States by according substantial latitude to States to use traditional redistricting criteria to draw legislative maps, provided those maps do not intentionally discriminate and do not have results that are so beyond the normal give and take of the political process as to be "uncouth."

CONCLUSION

For the forgoing reasons, we respectfully ask this Court to reverse the ruling of the lower court and remand this case for proceedings consistent with the test described above.

Respectfully submitted,

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