STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

In the matter of
RICH AMEDURE, GARTH SNIDE, ROBERT SMULLEN, EDWARD COX, THE NEW YORK STATE REPUBLICAN PARTY, GERARD KASSAR, THE NEW YORK STATE CONSERVATIVE PARTY, JOSEPH WHALEN, THE SARATOGA COUNTY REPUBLICAN PARTY, RALPH M. MOHR, ERIK HAIGHT, and JOHN QUIGLEY,

Petitioners/Plaintiffs,

Index No.: 20232399

-against-

STATE OF NEW YORK, BOARD OF ELECTIONS OF THE STATE OF NEW YORK, GOVERNOR OF THE STATE OF NEW YORK, SENATE OF THE STATE OF NEW YORK, MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, ASSEMBLY OF THE STATE OF NEW YORK, MAJORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK,

Respondents/Defendants.

REPLY MEMORANDUM OF LAW

BY RESPONDENTS/DEFENDANTS NYS SENATE AND SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE

In Further Support of Motion to Change Venue

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PRELIMINARY STATEMENT

The Senate Movants respectfully submit this Reply Memorandum of Law in further support of their motion to change venue.

REPLY ARGUMENT

POINT I

THE MOTION IS TIMELY.

A. The Motion is Timely Because it Was Brought Before the Senate Movants Answered.

A motion for change of venue based on improper venue (like this one) is timely if the movant demands that the plaintiff change venue "with the answer or before the answer is served," and proceeds to move for change of venue within fifteen days after serving that demand. CPLR 511(a) and (b). An extension of a defendant's time to answer extends that defendant's time to demand that the plaintiff change venue (and move for change of venue). American Tax Funding v. Druckman Law Group, 175 A.D.3d 1055 (4th Dep't 2019); *see also* Valley Psychological P.C. v. Government Employees Ins. Co., 95 A.D.3d 1546 (3d Dep't 2012)(defendant's demand for change of venue at the time of an amended answer was timely even though the defendant did not demand change of venue with initial answer). In this case, the Senate Movants' pre-answer motion to dismiss has extended their time to answer (and they have not yet answered) pursuant to CPLR 3211(f). For that reason alone, the motion is timely.[1] North Country Communications v. Verizon, N.Y., 196 Misc.2d 149 (S. Ct. Albany Co. 2003)(motion to change venue was timely because defendant had not yet answered, even though defendant was in default).

[1] The Assembly majority Respondents have also tolled their time to answer with a pre-answer motion to dismiss.

The Senate Minority apparently suggests the motion is untimely because another defendant, the Board of Elections, has filed an Answer: "the motion is made well after the Respondents New York State Board of Elections submitted its answer." (Docket #125, pg. 5.) The short answer to that is NYS Board of Elections is not the movant. The movants for change of venue are the Senate majority and Senate President Pro Tempore, who have *not* answered. CPLR 511(a)'s language about the change of venue demand being made "with the answer or before the answer is served" plainly refers to the answer of *the defendant objecting to venue*, not some co-defendant who may have happened to file its answer earlier. The rule is *not* that the "first" defendant to plead speaks for everyone—each defendant speaks for itself in its own pleading.[2] This should not require explaining.

B. Even if the Motion Were Not Absolutely Timely Under CPLR 511(a) (Which It Is), The Opposition Demonstrates No Prejudice.

Change of venue motions made for reasons other than "improper venue" (such as discretionary change for the convenience of the witnesses, etc.) are subject to a different time standard: they must be brought "within a reasonable time." CPLR 511(a)(last sentence). Even though this case is absolutely timely under the first portion of CPLR 511(a) because it *is* based on "improper" venue and was brought before the movants answered (and need not satisfy a "reasonable time" standard), Petitioners do not even establish that this was an unreasonable time. The touchstone of the "reasonable time" standard is prejudice. Discretionary changes of venue are commonly granted many months after commencement of the action if opponents cannot demonstrate prejudice. *See* Gissen v. Boy Scouts of America, 26 A.D.3d 289 (1st Dep't 2006);

[2] Further illustrating the point, in American Tax Funding v. Druckman Law Group, 175 A.D.3d 1055 (4th Dep't 2019), the court held that a defendant's venue objection was timely when raised in its *amended* answer (even though it served no objection with, or prior to, its *initial* answer). If a defendant's venue objection with an amended answer is not barred by the service of its *own* prior answer, then surely a defendant's venue objection cannot not be barred by some *co-defendant's* earlier service of an answer.

McLaughlin v. City of Buffalo, 259 A.D.2d 1014 (4th Dep't 1999); Ryan v. Great Atlantic & Pacific Tea Co., 30 A.D.2d 549 (2d Dep't 1968); Bonilla v. Tishman Interiors Corp., 100 A.D.3d 673 (2d Dep't 2012); LMV v. Cazenovia College, 58 A.D.3d 451 (1st Dep't 2009); Arbel v. Turgeon Restaurants of Niagara Falls, 124 A.D.2d 769 (2d Dep't 1986).

Here, the oppositions consist of bare statements that "the submission of a change of venue motion after the matter is fully submitted to the Court is patently late and improper," (Docket #121 pg. 7) or "With [the] June 25th, 2024 Primary Elections less than four months away, The 're-set' of this case advanced by the Movants would likely mean that this matter would not be decided before the primaries." (Docket #121 pg. 11.) These claims are specious. For one thing, the "matter" is not "fully submitted." This is a hybrid declaratory judgment/Article 78 case. Petitioners have not moved for summary judgment on their declaratory claim and, in fact, the Senate and Assembly Majority Respondents each have pre-answer motions to dismiss pending. What is "fully submitted" are those dismissal motions, and Petitioners' motion for a preliminary injunction—classic "early period" motions in a litigation.

Furthermore, there is no reason why a successor judge in Albany County could not decide the pending preliminary injunction motion before the primary elections—and no reason to suppose that a successor judge in Albany County would be any less capable of timely deciding that motion than a judge in Saratoga County. The fact that there is to be a successor judge at all is inevitable: it became so when Justice Freestone was disqualified. The question now is which venue is to supply the successor judge. The opponents have not articulated any reason why an Albany judge represents prejudice and a Saratoga County judge does not.[3]

[3] It is also boldly ironic for Petitioners to claim that "the Primary Elections less than four months away" are a barrier to changing venue at this "late" stage when, two years in a row (2022 and 2023) they have brought these very claims in *September* court filings, merely *two months* before the general election. The September 2022 case expressly sought to enjoin the absentee ballot canvassing procedures for the

POINT II

ELECTION LAW §16-101 MUST BE APPLIED RETROACTIVELY.

Election Law §16-101 *is* a remedial statute. The Senate Minority posits an artificially narrow definition of "remedial statute" in its brief:[4] "A statute may be remedial when it corrects an unintended judicial interpretation." (Docket #125 pg. 4.) That is only a sliver of the category. Remedial statutes more broadly include laws that are "designed to correct imperfections in prior laws" (Posillico v. Southold Town Zoning Bd. of Appeals, 219 A.D.3d at 885, 888 [2d Dep't 2023]), and are often procedural in nature—typically remedial statutes "neither enlarge nor impair … substantive rights or obligations," but instead often have to do with defining the "forum to enforce whatever substantive rights [a plaintiff] might have against a defendant." Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 453 (1965):

In Loginis-Wittnauer, for example, the Court of Appeals found that CPLR 302—the long-arm-statute—was remedial, and held that it could be applied retroactively to cases in which in which the subject transactions occurred before the effective date of the statute. Id. at 454. The Court found that CPLR 302 was "clearly of a procedural and remedial nature," because its purpose was to modernize access to New York courts in cases against out-of-state defendants. Id. at 453.

November 2022 election. In the present case (filed September 2023), Petitioners were only slightly more abashed, stating on the one hand that the canvassing procedures for the *2024* election cycle should be enjoined, while also urging that perhaps they could also be enjoined for the November *2023* election if "the court determines that the relief may be applied immediately." (Docket #5, ¶5.) (At the October 2023 oral argument in this case, Petitioners ultimately withdrew their prayer for relief as to the November 2023 general election.) An Albany judge in this case still has more time to decide the injunction motion that Petitioners gave the Court in the 2022 case, and more time than Petitioners initially tried to give the Court in this case.

[4] Petitioners' brief, on the other hand, does not take a position on whether it is a remedial statute. Their brief more broadly argues against the application of the statute based on the *Majewski* and *VIP Pet Grooming Cases*, discussed below.

The law was procedurally remedial because it did not "create a right of action which did not previously exist," but instead modified the rules pertaining to *where and how* litigants could bring pre-existing rights of action supplied by the substantive law. Id.

The Court of Appeals retroactively applied another "remedial and procedural" statute in Gleason v. Michael Vee Ltd., 96 N.Y.2d 117 (2001). In that case, the legislature amended CPLR Article 75 to streamline the procedures for special proceedings to compel arbitrations and confirm arbitration awards. Under the old law an application to compel arbitration and a subsequent application to confirm an arbitration award had to be brought in two different special proceedings. The amendment streamlined this, and provided, essentially, that a special proceeding to compel arbitration remains open through the conduct of the arbitration hearing, and the winner can later make an application to confirm the award in that same special proceeding. In Gleason, the Court held that the new rule should be applied retroactively in pending cases that were commenced before the amendment was made.

"[W]hen legislation is remedial, i.e. designed to correct injustices, and relates to procedure, it should be applied retrospectively to fact patterns arising prior to the enactment of the statute." Ponterio v. Regan, 137 Misc.2d 587 (S. Ct. Albany Co. 1987). In Ponterio, a claimant commenced an administrative proceeding to appeal a school district's denial of his retirement benefits. The district argued that the claim was barred, because the claimant filed his claim after the statutory filing deadline in effect at the time. However, while the administrative proceeding was pending, the State amended the law and enlarged the filing deadline. If given the benefit of the new filing parameters, the benefits claim would timely. The administrative law judge applied the old law and dismissed the claim. On appeal to Supreme Court, however, the court reversed:

> The fact that section 19 is a procedural, remedial statute effective immediately upon the Governor's signature, leads the court to

> conclude that it is to be applied in proceedings not yet finally determined, to fact patterns that occurred prior to its enactment.

Id. at 589-90. *See also* Kevin McC v. Mary A, 123 Misc.2d 148, 151 (Family Ct. Kings Co. 1984)("It is also the general rule that a remedial statute, which is designed to correct an imperfection in the prior law, will be applied to cases which have not reached final judgment when the remedial statute becomes effective."), *citing* People v. Taizeira, 87 A.D.2d 895 (2d Dep't 1982); Puig v City of Middletown, 71 Misc.3d 1098, 1106-07 (S. Ct. Orange Co. 2021)("remedial legislation, or statutes governing procedural matters, should be applied retroactively effect in order to effectuate its beneficial purpose").

Like the laws applied retroactively in those cases, Election Law §16-101 is procedural and remedial. It does not enlarge or impair substantive rights and obligations. The substantive right to challenge the constitutionality of an Election Law statute emanates from the Constitution itself. But the statute streamlines the procedural forums in which those rights are tried. Just as the long-arm statute in Loginis-Wittnauer modernized access to the courts in cases against out-of-state defendants, and just as the arbitration rules in Gleason modernized and streamlined access to the courts in arbitration-related proceedings in service of judicial economy, Election Law §16-101 was adopted to correct an imperfection in the prior law: "The bill attempts to reduce partisan gamesmanship that occurs in election law related litigation." (Docket #116.) "This bill aims to reduce that and prevent the forum shopping seen recently by designating one court in each judicial department in the state as the appropriate venue for challenges to the election law." (Id.) The Legislature passed the law and directed that it go into effect immediately on September 20, 2023, shortly before the November general election, which plainly signifies a sense of urgency that it should be applied retroactively. *See* Gleason, 96 N.Y.2d at 122 (noting that immediate effective

date weighed in favor of retroactive application); Pacheco v. PVE Co, LLC, 80 Misc.3d 1109 (S. Ct. Kings Co. 2023)(same).

In opposition, Petitioners rely on Majewski v. Braodalbin-Perth Cent. School Dist., 91 N.Y.2d 577 (1998), Regina Metro Co. v. NYDHCR, 35 N.Y.3d 332 (2020), and VIP Pet Grooming Studio v. Sproule, 2024 NY Slip. Op. 00205 (2d Dep't 2024). But each of those cases involved non-procedural statutory amendments, which would have eliminated substantive rights if applied retroactively.

Majewski was about an amendment to the Worker's Compensation Law, which henceforth barred third-party contribution or indemnification claims against employers for workplace injuries, unless the employee's injury fit within a statutory definition of "grave injury." In that case, a third-party plaintiff brought a contribution claim against an injured employee's employer before the law was amended to include the "grave injury" requirement (the employee's injury was not a "grave injury"). Thus, applying the law retroactively would have eliminated the third-party plaintiff's substantive cause of action altogether. Indeed, the trial court did apply the law retroactively and dismissed the claim, until the Appellate Division reversed and reinstated it. Id. at 967. Thus, retroactive application of the law at issue in Majewski plainly would impair a substantive right of action. In contrast, in the present case Election Law §16-101 does not impair any substantive cause of action, it only prescribes the procedure of where the cause of action is to be heard.

Similarly, in Regina Metro, the statutory amendments were substantive, significantly altering the defendant's potential liability. That case involved amendments to the rent stabilization laws which imposed new obligations on landlords, and added treble damages for landlord violations. Id. at 364. In an action against a landlord commenced before the amendments were adopted, the court held that it would be improper to apply the amendments retroactively, because

they affect substantive rights. The court noted that a statute should not be applied retroactively if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting 'substantive' rights." Id. at 365-66. "On the other hand, a statute that affects only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect." Id. In the present case, Election Law §16-101 is non-substantive, and merely "and governs the procedure for the adjudication" of Election Law constitutional challenges. Therefore, under the *reasoning* of Regina Metro, this is a case where retroactive application is appropriate.

Likewise, in VIP Pet Grooming the amendments at issue significantly affected a substantive cause of action. That case involved the so-called "Anti-SLAPP statute," which began as a law that prohibits applicants for public permits (such zoning permit applicants) from suing members of the public from expressing opposition to the application (under the guise of a defamation suit). In 2020 the legislature heavily amended the statute to bar suits by many other types of plaintiffs (beyond permit applicants), and greatly expanded the kinds of speech by defendants that was protected by the statute. In short, under the old law the Anti-SLAPP statute would not have barred the plaintiff's claim in VIP Pet Grooming, but the new law would. The court found that "[a] retroactive application of the anti-SLAPP amendments to the pre-amendment complaint in this action could negatively impact *substantive rights* that VIP possessed at the time the action was commenced," and thus found that retroactive application was improper. Here again, the contrast is plain: Election Law §16-101 has no impact on Petitioners' substantive rights, it only directs where they may litigate their substantive rights.[5]

[5] The Senate Minority also cites several cases that involved changes in law in which retroactive effect would have had dispositive effects on the viability of substantive causes of action, as opposed to

POINT III

IN ANY EVENT THIS CASE SHOULD HAVE BEEN SUED IN ALBANY COUNTY PURSUANT TO CPLR §506(b).

Even if Election Law §16-101(c) does not apply retroactively, this case should have been sued in Albany County (or at least the Third Judicial District) pursuant to CPLR §506(b) because that is where the Respondents "made the determination complained of," "where the material events … took place" or will take place, and "where the principal office of the respondent[s] [are] located." The Petition/Complaint itself states that this is a "hybrid" proceeding seeking both declaratory and Article 78 relief. (Docket #5, ¶1.) As an Article 78 proceeding, it seeks to enjoin the "administrative agencies" responsible for enforcing the challenged Election Law statute. That agency is, of course, the NYS Board of Elections, which has its principal office in, and enforces the Election Law from, Albany. (Docket #5, ¶¶20-21.) Other Respondents/Defendants—the Senate, the President Pro Tempore of the Senate, the Assembly, the Speaker—also have their offices in Albany. That is also where they adopted the Election Law statute that is in controversy in this case.

Petitioners claim that that the Court cannot apply CPLR §506(b) because doing so would be tantamount to "requir[ing] all constitutional cases to be brought in Albany County." (Docket

predominantly procedural remedial laws. *See* Coane v. American Distilling Co., 298 N.Y. 197 (1948)(declined retroactive application of a shortened statute of limitations, which would have resulted in dismissal of pending claims); Marrerro v. Crystal Nails, 114 A.D.3d 101 (2d Dep't 2013)(declined retroactive application of savings provision that would have retroactively restored stale causes of action against defendant); Spitzer v. Caicel Chemical Indus., 42 A.D.3d 301 (1st Dep't 2007)("remedial statutes are applied ***prospectively where they establish new rights***, or ***where retroactive application would impair a previously available defense***. We view the amendment of § 340(6) as having created new rights for indirect purchasers to sue for antitrust violation…"); Franz v. Dregella, 94 A.D. 963 (4th Dep't 1983)(declined to retroactively apply a Labor Law immunity statute that would have extinguished plaintiff's cause of action: "The subsequent amendment of the statute … cannot work to impede the antecedent rights of plaintiff").

#121 pg. 12.) Not so. A hybrid declaratory judgment/Article 78 case challenging the constitutionality of a local or county law in Saratoga County and seeking to annul the enforcement of that law by Saratoga County administrative authorities, could (and should) be brought in Saratoga County under CPLR §506(b) because, in such a case, that is where the respondents would have "made the determination complained of," "where the material events took place," and where the respondents have their principal offices. Moreover, constitutional tort cases seeking damages against municipalities for injury to person or property are properly brought in the county where the defendants are located. CPLR §504. But where, as here, a petitioner includes prayers for Article 78 relief against a "body or officer" located in Albany County, which has implemented the challenged law from Albany County, and enforces the challenged law in Albany County (*i.e.*, the NYS Board of Elections), the proper venue is in Albany County (or, failing that, the Third Judicial District). CPLR §506(b).

Petitioners' reliance on CPLR §502 is also misplaced. (Docket #121 pg. 12.) That section provides that when "there is a conflict of [venue] provisions" in a particular case, resulting in multiple eligible venues, the court can choose which of the eligible venues shall hear the case. Petitioners suggest that there is a "conflict" between CPLR §503 ("Venue based on residence") and CPLR §506 ("Where special proceedings commenced"), and the Court should simply choose to apply §503. The problem with that argument is that there is no conflict—the venue based on residence rules in §503 are expressly subordinate to any other venue provisions:

> ***Except where otherwise prescribed by law***, the place of trial shall be in the county in which one of the parties resided when it was commenced…

CPLR §503(a) (emphasis added). One of those provisions of law that "prescribe" something contrary to venue based on residence is CPLR §506(b), which is unmistakably mandatory:

> A proceeding against a body or officer ***shall be*** commenced in any county within the judicial district where the respondent made the determination complained of… [etc.]

(Emphasis added.) This is reinforced by CPLR §7804(b), which provides: "A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 []."

The case of Hurst v. Board of Education for Ithaca City School Dist., 242 A.D.2d 130 (3d Dep't 1998), relied on by the Senate Minority, does not suggest otherwise. Hurst was not a straight conflict between "residence" venue "and "body or officer" venue. Rather, the various parties were arguing *three* different venue statutes: the petitioner urged venue in Orange County based on her residence there, one respondent (a school district) argued that venue should be in Tomkins County where the school district was located pursuant to CPLR §504(2), and the other respondent (the NYS Teacher's Retirement System) argued that venue should be in Albany County where it had its offices, pursuant to the "proceeding against a body or officer" rule in CPLR §506(b). There was a genuine conflict between the school district statute, CPLR §504(2), which provided that actions against school districts "***shall*** be [commenced] … in the county in which [it] is situated" (emphasis added), and the standard "body or officer" rule in CPLR §506(b), which provides that the "proceeding ***shall*** be commenced" (emphasis added) where the body or officer's principal office is or where it made the determination complained of, etc. The "school district rule" and the "body or officer rule" were both facially absolute and, therefore, posed an actual conflict for the Court to resolve under CPLR §502 (the court chose Albany County). In the present case, in contrast, the only alternative to the "body or officer" rule of §506(b) put forth by Petitioners is CPLR §503(a) which, by its terms, does not apply when venue is "otherwise prescribed by law." Therefore, §503(a) yields to §506(b), and there is no conflict.

The Senate Minority also relies on New York Central R. Co. v. Lefkowitz, 12 N.Y.2d 305 (1963) for the proposition that straight declaratory judgment actions asserting constitutional challenges to a state law are not "proceedings against bodies or officers" pursuant to CPLR §506(b). But Lefkowitz involved a true, straight declaratory judgment claim. Unlike Lefkowitz, the present case is explicitly a plenary action and Article 78 proceeding, seeking Article 78 relief. (Docket #5, ¶¶1, 6.) In conclusory fashion, the Senate Minority self-servingly argues that the Article 78 relief is merely "incidental" (which is not a view expressed by Petitioners). Even if that *ipse dixit* were true there is no "incidental" exception to CPLR §506(b).

POINT IV

PETITIONERS' ANECDOTE ABOUT AN INDIVIDUAL CHARGED WITH VOTER FRAUD IN QUEENS IS IRRELEVANT, IMPROPER AND UNPERSUASIVE.

Finally, Petitioners' opposition includes a press release from the Queens County District Attorney's office from December 2023, announcing that the District Attorney had indicted a Queens man for delivering fraudulent absentee ballot applications to the Queens County Board of Elections. (Docket #122.) This submission is inappropriate and pointless for two reasons.

First, it is completely irrelevant to the issue currently before the Court, which where this case should be venued. Patently, Petitioners are attempting to use part of their briefing space on the instant motion to give themselves a sur-sur reply on the merits arguments involved in the pending motions to dismiss and motion for preliminary injunction. The press release—which is also hearsay—should be disregarded out of hand.

Second, even if the Court were to consider this Queens story on the merits (which it should not), it falls leagues short of supporting Petitioners' claim that "Chapter 763 is Unconstitutional as Applied." (Docket #121 pg. 12.) The press release actually undermines Petitioners' arguments

because the individual's attempted fraud was detected and the perpetrator was caught—indeed, the story bolsters Respondents' arguments that the absentee ballot structures built into the Election Law have ample protections to check fraud. Moreover, the story does not indicate that the attempted fraud was enabled by any features of the absentee ballot *canvassing* statute that is the target of Petitioners' challenge (Election Law §9-209). The story does not indicate whether the perpetrator ever completed and submitted the 32 fraudulent absentee ballots he is accused of procuring, whether any of them were canvassed and, if so, whether there were any party or candidate objections to any of those ballots that were purportedly thwarted by the procedures of Election Law §9-209. At most the Queens story tells us that a lone actor unsuccessfully tried to break the Election Laws there and was caught. It should go without saying that a criminal's attempt to break the Election Law does not make any provision of it unconstitutional.

CONCLUSION

For the foregoing reasons, the Petition should be dismissed in its entirety and the motion for injunctive relief must be denied.

Dated: Schenectady, New York
March 1, 2024

Respectfully submitted,

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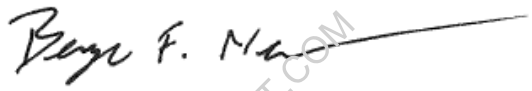
CERTIFICATION PURSUANT TO RULE 202.8-B

I Benjamin F. Neidl hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Courts, that the length of this Memorandum of Law, exclusive of the cover page, the tables of contents and authorities, the signature block, and exclusive of this certification itself, is **4,181 words**. In making this certification, I have relied on the word count tool in the word processing program that I used to compose this document, Microsoft Word.

Dated: Schenectady, New York
March 1, 2024

Respectfully submitted,

E. STEWART JONES HACKER MURPHY LLP



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