UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, NANCY MARASHIO, JAMES FIESEHER, AND PATRICIA GINGRICH, *Plaintiffs*, v. STEVE KRAMER, LINGO TELECOM, LLC, VOICE BROADCASTING CORPORATION, and LIFE CORPORATION, *Defendants*.	No. 1:24-cv-73-SM-TSM

AMICUS CURIAE COOLIDGE REAGAN FOUNDATION'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS

Amicus curiae Coolidge Reagan Foundation ("CRF") respectfully submits this proposed Response to Plaintiffs' Objections to Magistrate Judge's Report and Recommendations, D.E. #104 (Oct. 3, 2024) [hereinafter, "*Objections*"]. Each of the Magistrate Judge's recommendations are correct, *see Report and Recommendation*, D.E. #99 (Sept. 19, 2024) [hereinafter, "*Report*"]. ***First***, Plaintiffs lack standing to pursue their claims (particularly for alleged violations of § 11(b) of the Voting Rights Act ("VRA"), 52 U.S.C. § 30107(b)). ***Second***, they have failed to establish injunctive relief is necessary to prevent irreparable injury. ***Third***, the injunction they have requested violates Federal Rule of Civil Procedure 65(d).

Finally, even if this Court rejects the Magistrate Judge's conclusions on these issues, it should still adopt the Magistrate Judge's recommendation and deny Plaintiffs' Amended Motion for a Preliminary Injunction, D.E. #71 (June 7, 2024)—at least as to Count I—on the alternate grounds Plaintiffs are unlikely to succeed as a matter of law on the merits of their claim under

§ 11(b) of the VRA. This Court should soundly reject Plaintiffs' baseless attempt to twist a provision of the Voting Rights Act aimed at preventing racist political violence into a bludgeon against their partisan opponents' political expression.

I. THE MAGISTRATE JUDGE PROPERLY CONCLUDED PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS

This Court should adopt the Magistrate Judge's recommendation and deny Plaintiff's motion for a preliminary injunction on the grounds Plaintiffs lack standing to pursue their claims and seek prospective relief. The Magistrate Judge analyzed the standing of the individual New Hampshire voters separately from the New Hampshire and national League of Women Voters ("LWV" or "the League") plaintiffs. The report and recommendation properly recognized the individual plaintiffs lack standing for two reasons. ***First***, they provided no evidence to suggest a reasonable likelihood existed they would receive any pre-recorded, spoofed calls from Defendants in the future. *Report*, *supra* at 8. ***Second***, even if Plaintiffs did receive such calls from Defendants in the future, they provided no evidence they were likely to be coerced, threatened, intimidated, or even misled by them. *Id.* at 9. Moreover, Plaintiffs completely failed to adduce evidence any such hypothetical, purely speculative future calls would interfere with their right to vote. *Id.*

Plaintiffs' main response is that the Magistrate Judge did not place enough weight on Defendants' lengthy history of business operations and overemphasized the importance of subsequent developments such as the Government's prosecution of Defendant Kramer and recent FCC enforcement actions against both Kramer and Lingo. *See Objections*, *supra* at 13-14. Even putting aside such subsequent developments, however, Plaintiffs point to no tangible evidence the Defendants are likely to target illegal phone calls to them in the future. Their allegations center on the Defendants' past call, from nearly a year ago, but such "past exposure to [alleged] harm will not, in and of itself, confer standing on a litigant to obtain equitable relief absent a sufficient

likelihood that he will again be wronged in a similar way." *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992) (quotation marks omitted). Plaintiffs here have made no such showing they are likely to suffer future harm. Nor do they provide reason to believe, beyond pure speculation, the FCC's enforcement actions are insufficient to alleviate any potential future risk.

The Magistrate Judge likewise correctly concluded the League Plaintiffs similarly lack standing, explaining, "[H]arm arising from actions or costs incurred to oppose the defendants' actions do[] not support standing." *Report*, *supra* at 10 (citing *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 374 (2024)). The Magistrate Judge further noted the League "failed to show the defendants' action interfered with their core mission." *Id.* at 11. In response, the League claims its core mission is to "encourag[e] citizens to register to vote, participate in elections, and engage with the democratic process." *Objections*, *supra* at 6. The League allegedly diverted time and resources from its voter registration efforts to update a webpage to respond to Defendants' message and train staff how to respond to voters who may have been confused by it. *Id.*

The League's argument ultimately boils down to the notion it has been harmed because it may have to provide somewhat different information to the public concerning the electoral process *if* misleading or otherwise illegal calls occur in the future. Such continuation of the League's current, ongoing public education efforts does not constitute injury-in-fact sufficient to give rise to a justiciable claim. *Citizens Proj. v. City of Colo. Springs*, 2024 U.S. Dist. LEXIS 120393, at *13 (D. Colo. July 9, 2024). More broadly, A group cannot voluntarily "spend its way into standing" through "public education" efforts. *Alliance for Hippocratic Med.*, 602 U.S. at 370, 394.

Moreover, the League expressly acknowledges the technology to spoof telephone numbers and generate scripted recordings using prominent people's voices is widespread and nationally available. *Objections*, *supra* at 9-10 ("Regardless of whether [Defendant] Kramer is involved in a

future robocall campaign or not, the country is now on notice that companies like Defendants traffic in illegal robocalls, and they can be counted on to generate and disseminate these types of calls . . . ."). The League's decision to reallocate its resources to responding to future possible AI-generated telephone calls is a response to the development and availability of this new technology, and would likely exist regardless of Defendants' conduct.

Thus, this Court should adopt the Magistrate Judge's conclusion Plaintiffs have failed to establish standing.

II. THE MAGISTRATE JUDGE PROPERLY CONCLUDED DEFENDANTS' POLITICAL EXPRESSION DOES NOT CONSTITUTE IRREPARABLE INJURY

The Magistrate Judge further recognized Plaintiffs have failed to establish irreparable harm. *Report*, *supra* at 12. The Supreme Court has held a federal court may not issue either a preliminary injunction, *Winter v. Natural Res. Defense Coun.*, 555 U.S. 7, 20 (2008), or permanent injunction, *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006), unless the plaintiff demonstrates by a preponderance of the evidence such relief is necessary to prevent "irreparable harm" to them. The League has failed to meet this requirement for three reasons.

First, the "irreparable harm" Plaintiffs seek to alleviate is the possibility of future phone calls discouraging people from voting which, in Plaintiffs' view, might mislead voters who are unaware of the most fundamental, elementary aspects of the electoral process.[1] Such calls, Plaintiffs complain, may lead the League to engage in its own political expression to attempt to counteract Defendants' political message. *Objections*, *supra* at 16-17 (arguing the League will be

[1] The Magistrate Judge also properly noted, as discussed above, Plaintiffs failed to provide a shred of proof that New Hampshire voters would again be subject to allegedly illegal calls. *Report*, *supra* at 12 (noting the potential for "harm in the future . . . is questionable under the current circumstances").

"forced to divert resources away from its mission to defend against Defendants' robocall campaign" and "combat the misinformation from Defendants' robocall campaign").

Choosing to respond to political expression, however, is not a legally cognizable harm, however, much less "irreparable" injury. To the contrary, the U.S. Supreme Court has expressly recognized political speech is the constitutionally mandated remedy for another person's expression of potentially misleading or incorrect political speech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *see also Citizens United v. FEC,* 558 U.S. 310, 360 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."); *accord Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977). The First Amendment protects Americans from the League's attempts to treat political expression as a harm subject to prior restraint for the League's protection.

More broadly, a plaintiff cannot establish irreparable injury based on "self-inflicted" harm. *San Francisco Real Estate Investors v. Real Estate Inv. Trust*, 692 F.2d 814, 818 (1st Cir. 1982). Here, Plaintiffs cannot point to a single person who Defendants intimidated, coerced, or prevented from voting. Accordingly, any diversion of resources to engage in political speech in response to the possibility of future robocalls is a voluntary choice that cannot form the basis of judicial relief. In *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 72 (3d Cir. 1998), for example, a nonprofit anti-discrimination advocacy group ran a public education campaign in response to allegedly discriminatory advertisements which it claimed violated the Fair Housing Act. The Third Circuit held the group's decision to reallocate its resources to engage in a public education campaign in response to those ads did not constitute judicially cognizable harm. *Id.* at 76-77. It

explained the plaintiff organization "was unable to establish any connection between the allegedly discriminatory advertisements underlying this suit and the need for or implementation of a remedial educational campaign. The [plaintiff] was unable to verify that any member of the public had been denied housing or was deterred from seeking housing based on the advertisements." *Id.* at 77.

Likewise, here, the League cannot claim it has suffered irreparable harm based on its unilateral decision to reallocate resources in response to the Defendants' political expression, particularly in the absence of any evidence that expression impacted anyone's right to vote. *See also City of S. Miami v. Gov. of Fla.*, 65 F.4th 631, 640 (11th Cir. 2023) (rejecting claim of harm in the justiciability context because "[a]lthough the organizations diverted resources, they failed to produce concrete evidence that S.B. 168 is an imminent threat to their members or the immigrant community"); *Our Watch with Tim Thompson v. Bonta*, 682 F. Supp. 838, 852 (E.D. Cal. 2023).

Second, the League cannot credibly contend Defendants' political expression discouraging people from participating in the New Hampshire Democratic Party's January 2024 event caused irreparable harm when the Democratic Party itself publicly propagated that same message. The DNC's Rules & Bylaws Committee declared the event "meaningless," threatened the event would "disenfranchise" participants, and demanded people "take all steps possible not to participate." Letter from DNC Rules & Bylaws Comm. to New Hampshire Democratic Party Chair, https://www.politico.com/f/?id=0000018c-e037-ddd0-a79f-e7778fe50000 [hereinafter, "*DNC Letter*"]. The League, of course, has declined to sue its ideological allies in the Democratic Party for alleged violations of § 11(b) of the Voting Rights Act. It cannot credibly claim to have suffered irreparable harm from Defendants' decision to echo the Democratic Party's official position about the January 2024 non-election.

Third, the League cannot credibly contend the injunction it seeks will redress the injury of which it complains. The League complains it is suffering irreparable harm because it has "allocated its limited resources to guard against the substantial threat posed by Defendants." *Objections*, *supra* at 17. Yet the League does not and cannot credibly contend that, should Defendants be enjoined, it will simply terminate its programs to identify and respond to purported "voter-suppression calls." *Amended Complaint*, D.E. #1, ¶¶ 79-81. To the contrary, the League's decision to allocate resources to monitoring and responding to AI-generated robocalls featuring digitally created or altered voices is not a response to Defendants' conduct in particular, but the emergence of these new technologies more broadly. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm. on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017) (holding the plaintiff group had not suffered harm from its decision to establish a "law fellow" to file FOIA requests, because it "offer[ed] no 'specific facts'" to show the defendants' challenged violations "*caused*" plaintiff to establish the fellowship to submit those requests). In short, the preponderance of the evidence does not support Plaintiffs' claim that Defendants have irreparable harmed the League by forcing it to reallocate resources to further its institutional public education mission in different ways. *Citizens Proj. v. City of Colo. Springs*, No. 1:22-cv-1365-SKC, 2024 U.S. Dist. LEXIS 120393, at *13 (D. Colo. July 9, 2024).

III. THE MAGISTRATE JUDGE PROPERLY CONCLUDED THE LEAGUE'S PROPOSED INJUNCTION IS IMPERMISSIBLY OVERBROAD

Finally, the Magistrate Judge properly recognized the Preliminary Injunction Plaintiffs requested violates Federal Rule of Civil Procedure 65(d). *Report*, *supra* at 14. Rule 65(d)(1)(B)-(C) provides, "Every order granting an injunction . . . must . . . state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B)-

(C). An order which fails to comply with the prerequisites of Rule 65(d) should be set aside." *Sanchez v. Esso Std. Oil Co.*, 572 F.3d 1, 15 (1st Cir. 2009).

Plaintiffs seek an order providing, among other things, "Defendants are enjoined until further order of this Court from distributing telephone calls, text messages, or other mass communications that do not ***fully comply with all applicable state and federal laws*** or that are made for an ***unlawful purpose***." *[Proposed] Order Granting Plaintiffs' Motion for a Preliminary Injunction*, D.E. #71-31, at 2, ¶ 3 (June 7, 2024) [hereinafter, "*[Proposed] Order*"] (emphasis added). The Magistrate Judge properly rejected this request, declaring Plaintiffs' proposed language "does not meet the specificity and detail requirements of Rule 65(d)(1)." *Report*, *supra* at 14.

Plaintiffs nevertheless contend, "Under the circumstances of this case . . . the proposed injunction against Defendants is justified." *Objections*, *supra* at 21. They make no effort to demonstrate their requested relief is consistent with Rule 65, however. The U.S. Supreme Court has long held, "[W]e equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). The Court has a "duty to avoid" a "sweeping injunction to obey the law." *Id.* at 401; *accord Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945); *see also NLRB v. Express Pub. Co.*, 312 U.S. 426, 437 (1941).

Plaintiffs cite only a single case in support of their sweeping, unlimited relief: *SEC v. McLellan*, No. 16-cv-10874, 2024 WL 3030421, at *5 (D. Mass. June 17, 2024) (quoted in *Objections*, *supra* at 21). They claim courts issue "'obey-the-law' injunctions" under "appropriate circumstances." *Id.* (quoting *McLellan*, 2024 WL 3030421, at *5). *McLellan*, however, involved a

consent decree. *Id.* Moreover, the injunction in that case barred the defendant only from violating four specified federal provisions governing securities: § 10(b) of the Exchange Act, Rule 10b-5, and § 17(a)(1), (a)(3) of the Securities Act. *Id.* at *19. The injunction Plaintiffs seek here, in contrast, does not identify any particular statutes Defendants would be enjoined from violating. *See* "*[Proposed] Order*," D.E. #71-31, at 2, ¶ 3. Indeed, the requested injunction would not even bar Defendants from violating the law of any particular jurisdiction. To the contrary, the proposed order would apparently eliminate Defendants' right to a jury trial for any phone call, text message, or "mass communication" anywhere, to anyone, which allegedly violates any state or federal law in any field throughout the nation. *Id.*

The proposed injunction's prohibition on any communications made for an "unlawful purpose" is similarly overbroad. *Id.* This terse, vague allusion fails to provide "the elementary due process requirement of notice," and is not "framed so that those enjoined will know what conduct the court has prohibited." *Axia NetMedia Corp. v. Mass. Tech. Park Corp.*, 889 F.3d 1, 12 (1st Cir. 2018) (quotation marks omitted). Thus, the Magistrate Judge's conclusion that the Preliminary Injunction which Plaintiffs requested would violate Rule 65(d) is correct.

IV. THE MAGISTRATE JUDGE'S RECOMMENDATION MAY BE UPHELD ON ALTERNATE GROUNDS

Even if this Court disagrees with the Magistrate Judge's threshold determinations concerning standing and the requirements for injunctive relief, it should still adopt the Magistrate Judge's ultimate recommendation of denying a preliminary injunction—at least as to Count I (alleging violations of § 11(b) of the Voting Rights Act ("VRA")) due to the Plaintiffs' failure to establish a likelihood of success on the merits. These arguments are laid out in greater detail in CRF's earlier proposed amicus brief, *see* D.E. #97-1 (Sept. 6, 2024).

First, § 11(b) of the VRA is not enforceable through an implied private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The plain language of § 11(b) does not "contain[] 'rights-creating,' individual-centric language," but instead simply sets forth a prohibition on certain conduct. *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)); *see, e.g.*, *Schilling v. Washburne*, 592 F. Supp. 3d 492, 498 (W.D. Va. 2022) (holding § 11(b) "is directed to the regulated party, not the party to be protected," and does not "confer any new right on voters"). Indeed, § 11(b) is not among the VRA provisions which the Act ***itself*** recognizes as establishing individual rights. *See* 52 U.S.C. § 10308(a), (c)-(d). And the VRA's express authorization for the Attorney General to enforce its provisions through civil litigation, *see* 52 U.S.C. § 10308(c), strongly weighs against recognition of implied private remedies. *See Sandoval*, 532 U.S. at 289-90; *accord Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004); *see, e.g.*, *Schilling*, 592 F. Supp. 3d at 498 (holding § 11(b)'s "express delegat[ion]" of "enforcement authority to the Attorney General while making no mention of a private right of action" suggests Congress did not intend to implicitly create a private remedy); *Andrews v. D'Souza*, 696 F. Supp. 3d 1332, 1351 (N.D. Ga. 2023) ("[T]here exists no private right of action under Section 11(b) of the VRA."). The absence of an implied right of action under § 11(b) dooms Count I.

Second, even assuming private plaintiffs may sue for alleged § 11(b) violations, the League has failed to establish a likelihood of success on the merits of its § 11(b) claim. Plaintiffs' entire case against Defendants rests on a single sentence from an automated phone call which was ambiguous at best, conveyed a political message, and is not alleged to have actually made anyone feel intimidated, threatened or coerced. *Amended Complaint*, ¶ 65 (explaining the challenged call urged voters to "save your vote for the November election," when it will "make[] a difference").

The VRA's prohibition on threats, coercion, and intimidation must be read against the backdrop of the First Amendment and construed narrowly to avoid impermissibly chilling political speech and debate. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988); *Watts v. United States*, 394 U.S. 705, 708 (1969). Speech must be construed objectively, *see New York v. Operation Rescue Nat'l*, 273 F.3d 184, 196-97 (2d Cir. 2001), from the perspective of a reasonable person, to determine whether it violates § 11(b)'s restrictions, *Fair Fight, Inc. v. True the Vote*, 2024 U.S. Dist. LEXIS 22, at *118, *123 (N.D. Ga. Jan. 2, 2024); *Nat'l Conf. on Black Civil Part. v. Wohl*, 498 F. Supp. 3d 457, 477 (S.D.N.Y. 2020). A mere possibility that someone, somewhere "could" or "might" find the speech potentially intimidating is not sufficient to establish a statutory violation. *Pa. Democratic Party v. Republican Party of Pa.*, 2016 U.S. Dist. LEXIS 153944, at *21 (E.D. Pa. Nov. 7, 2016); *Ariz. Dem. Party v. Ariz. Rep. Party*, 2016 U.S. Dist. LEXIS 154086, at *21, *29-30, *35 (D. Ariz. Nov. 4, 2016). Likewise, deceptive or misleading speech does not violate § 11(b). *Willoughby v. County of Albany*, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006).

Against this backdrop, Plaintiffs are unlikely to succeed on the merits of their VRA claim. The challenged telephone message is reasonably susceptible of a valid, non-threatening interpretation: Democrats should not bother participating in the state party's January 2024 event, *see infra* p. 13, and it is much more important that they vote in the general election in November, when those votes will have a much more substantial potential impact.

In *Delegates to the Republican National Convention ("RNC") v. Republican National Convention*, No. SACV 12-927, 2012 U.S. Dist. LEXIS 110681, at *40 (C.D. Cal. Aug. 7, 2012), the court rejected a similarly insubstantial § 11(b) claim, cautioning the statute's language—"intimidate, threaten or coerce"—should not be construed broadly. The court invoked *United States* by *Katzenbach v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 355 (E.D. La.

1965), as exemplary of the phrase's meaning. That earlier case, decided contemporaneously with the VRA's adoption, involved a "six man . . . wrecking crew" which, among other things, went to a restaurant "brandishing clubs, ordered the Negroes to leave and threatened to kill . . . a member of the Bogalusa Voters League." *Id.* at 341.

Based on its careful examination of *Ku Klux Klan*, the district court in *Delegates to the Republican National Convention* concluded § 11(b) prohibits "acts of economic coercion, intimidation, and violence," particularly those aimed at "Negro citizens . . . for the purpose of deterring their registering to vote." *Delegates to the Republican Nat'l Convention*, 2012 U.S. Dist. LEXIS 110681, at *40 (quoting *Ku Klux Klan*, 250 F. Supp. at 340). While the court noted such extreme conduct was not "the only definition[] of the phrase 'intimidate, threaten or coerce,'" it dismissed the plaintiffs' claims because they had not alleged "any acts akin to those done by defendants in cases" such as *Ku Klux Klan*. *Republican Nat'l Convention*, 2012 U.S. Dist. LEXIS 110681, at *41.

The court later emphasized its holding should not be used to "prolong the blight of racial discrimination in voting.'" *Id.* at *43 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Nevertheless, it concluded by reiterating a plaintiff cannot bring a successful § 11(b) claim without alleging racial discrimination, a "disparate impact on minority voters," "abuse of government officials' authority," or "violence or economic coercion." *Id.* at *44. The automated phone call at issue here evokes none of these concerns.

Third, § 11(b) is inapplicable to the New Hampshire Democratic Party's January 2024 event since it was not an "election" and did not involve "vote[s]" for purposes of the VRA. 52 U.S.C. § 10307(b), 10310(c)(1). The DNC publicly warned ahead of time the January event was "detrimental," "non-binding," "meaningless," and risked "disenfranchis[ing]" voters. *DNC Letter*,

supra. It urged the New Hampshire Democratic Party "not to participate," and declared no delegates or alternate delegates to the Democratic National Convention would be chosen as a result of those proceedings. *Id.* Neither President Joe Biden nor Vice President Kamala Harris appeared on the ballot or otherwise participated in the event. The state party ultimately chose its delegates to the national convention several months later in a backroom meeting of party elites.[2] Those delegates cast their votes at the Convention to nominate Kamala Harris, who had not received even a single vote in New Hampshire's January 2024 event. Thus, that event was a complete legal nullity: a charade from which the DNC itself sought to prevent people from participating.

Thus, this Court could adopt the Magistrate Judge's recommendation of denying injunctive relief, at least as to Count I, on any of these alternative grounds.

CONCLUSION

For these reasons, Amicus curiae CRF respectfully urges this Court to accept the Magistrate Judge's Report and Recommendations and deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: October 30, 2024

Respectfully submitted,

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[2] *See* New Hampshire Democratic Party, Press Release, *Granite State Delegates to Be Seated at the Democratic National Convention*, https://www.nhdp.org/post/granite-state-delegates-to-be-seated-at-democratic-national-convention.

CERTIFICATION

I hereby certify that a copy of this pleading was forwarded to counsel of record via the court's ECF system.

Dated: October 30, 2024

/s/Richard J. Lehmann
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