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UNITED STATES DISTRICT COURT

EASTERN DISTRICT CALIFORNIA

THE STATE OF MISSOURI, ex rel., Chris Koster, Attorney General; THE STATE OF NEBRASKA, ex rel. Jon Bruning, Attorney General; THE STATE OF OKLAHOMA, ex rel. E. Scott Pruitt, Attorney General; THE STATE OF ALABAMA, ex rel. Luther Strange, Attorney General; THE COMMONWEALTH OF KENTUCKY, ex rel. Jack Conway, Attorney General; and TERRY E. BRANSTAD, Governor of the State of Iowa,

Plaintiffs,

v.

KAMALA D. HARRIS, solely in her official capacity as Attorney General of California; KAREN ROSS, solely in her official capacity as Secretary of the California Department of Food and Agriculture,

Defendants.

Case No. 2:14-cv-00341-KJM-KJN

CERTAIN PLAINTIFFS'[1] MEMORANDUM OF LAW IN OPPOSTION TO PROPOSED DEFENDANT-INTERVENORS HSUS AND ACEF'S MOTIONS TO INTERVENE

Courtroom: 3, 15th floor
Judge: Hon. Kimberly J. Mueller
Action Filed: 02/03/2014

[1] Proposed Defendant-Intervenor HSUS's Motion to Intervene is opposed by Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Governor Branstad. Proposed Defendant Intervenor ACEF's Motion to Intervene is opposed by Missouri, Nebraska, Oklahoma, and Governor Branstad. Kentucky and Alabama do not object to ACEF's Motion to Intervene.

Introduction

This case is *not* about California's inherent authority to regulate egg production or animal welfare within its borders. Nor is this a case about California's police power to inspect imported food and other goods for contamination and disease. Rather, this case concerns a narrow question of federal constitutional law: May one state close its markets to goods imported from its sister states because of the methods by which those goods were produced in those sister states? Specifically, may California prohibit the sale within its borders of more than 4 billion out-of-state eggs based solely on the size of the chicken coops *in other states* where those eggs were laid? That controversy exists only between the defendant California officials and the six plaintiff states suing to protect their quasi-sovereign interest in free trade between the states in our federal system.

The Humane Society of the United States (HSUS) and the Association of California Egg Farmers (ACEF) move to intervene in this case under Fed. R. Civ. P. 24, either as a matter of right or with the court's permission. Both organizations claim concern that the Attorney General of California and the Secretary of the California Department of Food and Agriculture may not adequately defend the constitutionality of AB1437 because California may not want to assert the same arguments as proposed Defendant-Intervenors.

Yet, in its motion to dismiss, California argues that animal welfare and the prevention of salmonella contamination—the *only* issues championed by HSUS and ACEF, respectively, in their motions to intervene—are the very state interests AB1437 was enacted to protect. Permitting HSUS and ACEF to intervene just to make the same arguments that have already been advanced by California will give rise to duplicative discovery and repetitive motion practice, all while delaying resolution of the *constitutional* dispute between the states themselves. Both motions to intervene should be denied.

Argument

HSUS and ACEF move separately to intervene in this case either by right or with the Court's permission. To intervene by right in a case already pending, a third-party must satisfy the four requirements of Fed. R. Civ. P. 24(a)(2):

> (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009). The burden to satisfy all four requirements falls on the third-party seeking to intervene. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (internal citations omitted). "Failure to satisfy any one of the requirements is fatal to the application." *Id.*

If a third-party cannot meet all of the requirements to intervene by right under Rule 24(a)(2), the court has discretion to grant permissive intervention under rule 24(b) if the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P 24(b)(2)(B). When exercising its discretion over permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P 24(b)(3). The court may also consider additional factors, "including the nature and extent of the intervenors' interests and whether the intervenors' interests are adequately represented by other parties." *Perry*, 587 F.3d at 955.

I. HSUS has not satisfied all of the requirements Fed. R. Civ. P. 24(a)(2).

Expressing concern that the Attorney General of California will not adequately defend the constitutionality of AB1437, HSUS asserts a right to intervene in this case to defend the statute itself. Its motion to intervene should be denied, however, because HSUS has not identified any "significantly protectable interest" in the subject matter of this case that might be impaired or impeded by its disposition. Moreover, any interest HSUS might have in this case is adequately represented by the State of California.

A. HSUS has not identified a "significantly protectable interest" in the subject matter of this case that might be impaired if the Plaintiffs prevail.

"An applicant has a 'significant[ly] protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Id.* at 410. Thus, "a prospective intervenor has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (internal quotations omitted). In this case, HSUS claims to have two interests that may be impaired if Plaintiffs prevail: (1) its support for AB1437, and (2) its mission to prevent cruelty to egg-laying hens. HSUS Br. at 7. Neither is sufficient to satisfy Rule 24(a)(2).

HSUS first argues that its support for AB1437 should be considered a significantly protectable interest *per se*; however, none of the Ninth Circuit cases cited in HSUS's motion stands for such a categorical rule. In *Prete v. Bradbury*, the Ninth Circuit observed that "a public interest group *may* have a protectable interest in defending the legality of a measure it had supported." 438 F.3d 949, 954 (9th Cir. 2006)(emphasis added). But even that tentative language was not part of the court's holding because the plaintiffs had not disputed the protectable interest element of the intervenors' motion. *Id.* There would have been no point in disputing it because the intervenor—the president of the Oregon chapter of the AFL-CIO—was

the "chief petitioner" behind the challenged initiative petition. *Id.* at 955; *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397–98 (9th Cir. 1995) (holding environmental group, which previously sued to compel the Fish and Wildlife Service to list a snail as endangered species, had a protectable interest to intervene in subsequent challenge *to that listing*); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir.1983) (holding that National Audubon Society had protectable interest in case challenging the interior secretary's creation of a conservation area for birds of prey, which the society had lobbied for). Unlike the chief petitioner who intervened to defend his own ballot initiative in *Prete*, the environmental group that intervened to defend an endangered species listing it has sued to procure in *Babbitt*, and the Audubon Society's intervention to defend the creation of the conservation area it had championed in *Sagebrush*, HSUS was not the "architect" or even a "sponsor" of AB1437, as it had been for Prop 2.

Nor has HSUS shown that it will "suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc.*, 630 F.3d at 1179. While it claims that "an adverse judgment in this constitutional challenge to the measure would clearly impair or impede HSUS's interest in the law's continued viability," HSUS Br. [Docket #27] at 8, that argument is circular. A successful challenge to the constitutionality of the Clean Air Act necessarily impairs *everyone's* interest in the CAA's continued viability, but surely that doesn't permit *everyone* to intervene in *every* case challenging the CAA. Similarly, HSUS claims that a judgment holding AB1437 unconstitutional "would leave HSUS with 'no other avenue' to protect its interest in AB1437." HSUS Br. 8. Not only is this argument equally circular, it is also incorrect. To the extent HSUS has any interest in AB1437, it's to discourage egg producers in other states from housing their hens in cages HSUS finds objectionable. The same interest could be furthered much more directly through the enactment of Prop 2-like legislation in all 50 states. That might be a much harder sell, but just because HSUS has elected an easier path does not mean there is "no other avenue" it could take. The only "practical impairment" threatened by Plaintiffs' lawsuit is the curtailment of one state legislature's power to dictate agricultural policy in another state by selectively closing its markets.

Next, HSUS asserts a protectable interest in defending AB1437 due to its mission "to prevent cruelty to animals, including cruelty to egg-laying hens." HSUS Br. at 8. Plaintiffs do not dispute that an animal welfare group like HSUS may have a significantly protectable interest in upholding the animal welfare provisions *of Prop 2*. Nor do Plaintiffs dispute that Prop 2 was a proper use of California's police power. But this case is about AB1437, not Prop 2. The California Legislature's stated purpose for enacting AB1437 was to protect *the health of California consumers*, not the welfare of California *animals*. And unlike Prop 2, AB1437 places no restrictions on the treatment of animals in California—or anywhere else for that matter. It does not require egg producers to house hens in any particular way nor prohibit them from housing hens in any particular way. It merely proscribes the sale *in California* of a subset of otherwise indistinguishable goods based on production methods that are already illegal *in California*. Thus, whatever the outcome of Plaintiffs' challenge to AB1437, HSUS mission to prevent animal cruelty faces no practical impairment. HSUS's mission to prevent animal cruelty does not create a significantly protectable interest in a statute that does not directly regulate animal welfare.

Finally, HSUS argues that its California members "have an interest in eating eggs that are humanely produced and safe from pathogens." HSUS Br. at 8. But none of the relief sought by Plaintiffs in this case would *require* anyone in California to purchase eggs from conventional cages; it merely permits them to if they so choose. *C.f. Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 306 (E.D. Cal. 2011) (granting intervention to group whose members "live near transportation corridors where vehicles covered by the Regulation travel . . . [and] will be affected the most by the localized increase in emissions that will result from a finding that the regulation is preempted"); *Tucson Women's Ctr. v. Ariz. Med. Bd.*, No. CV–09–1909–PHX–DGC, 2009 WL 4438933, at *3 (D. Ariz. Nov. 24, 2009) (holding that group promoting alternatives to abortion had interest in statute requiring doctors to make women seeking abortions aware of intervenor's services). Presumably, HSUS's 1.4 million California members have no interest in purchasing eggs produced in conventional cases. Thus, the only California

consumers whose interests may be impaired by the disposition of this case are those who would prefer to by eggs produced in conventional cages because they are less expensive.

B. Any interests HSUS might have in the subject matter of this case are adequately represented by the State of California.

Even if HSUS had a protectable interest in AB1437 that might be impaired by the disposition of Plaintiffs' constitutional challenge, HSUS has not overcome the presumption that its interests are "adequately represented" by the Attorney General of California and the Secretary of the CDFA.

"The most important factor to determine whether a proposed intervenor is adequately represented by a present party to the action is how the [intervenor's] interest compares with the interests of existing parties." *Perry*, 587 F.3d at 950–51. "Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary." *Id.* "This presumption of adequacy is nowhere more applicable than in a case where the Department of Justice deploys its formidable resources to defend the constitutionality" of a statute. *Freedom from Religion*, 644 F.3d at 841 (internal quotations omitted); *see, e.g.*, *Prete*, 438 F.3d at 957 (holding that a public interest organization seeking intervention to defend a state constitutional ballot initiative failed to defeat the presumption of adequate representation when the ultimate objective of both the organization and the defendant party was to uphold the measure's validity).

To determine whether a proposed intervenor has overcome the presumption of adequate representation, the Ninth Circuit considers three factors:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry, 587 F.3d 952.

There is no question that California and HSUS share the same "ultimate goal" of defending the constitutionality of AB1437. Nonetheless, HSUS speculates that California *may* not raise all of HSUS's arguments because "California has much broader interests that HSUS, and must balance animal welfare concerns with economic, political, and resources constraints." HSUS Br. at 10. By way of example, HSUS suggests that "California represents large numbers of egg retailers and wholesalers, who may oppose implementation of AB1437." *Id.* HSUS further speculates that California is itself a large purchaser of eggs and "may perceive a financial incentive in restricting the implementation of AB1437." *Id.* Given these "competing interests," HSUS worries that "government actors cannot necessarily be counted on to make the same arguments as private advocates unbridled by the same concerns." HSUS Br. at 10.

HSUS cannot rely on conjecture and possibility to overcome the presumption of adequate representation; rather, it "must demonstrate a *likelihood* that the government will abandon or concede a potentially meritorious position." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 443–44 (9th Cir. 2006) (emphasis added). As this Court held in *Pickup v. Brown*, "differences in strategy are not enough to allow intervention as of right. A strategic difference includes when an existing party does not make a particular argument that the proposed intervenor wishes to make." No. 2:12–CV–02497–KJM–EFB, 2012 WL 6024387, at *3 (E.D. Cal. Dec. 4, 2012) (internal citations omitted); *see also Daggett v. Comm'n on Governmental Ethics and Election Practices,* 172 F.3d 104, 112 (1st Cir.1999) ("Of course, the use of different arguments as a matter of litigation judgment is not inadequate representation *per se*"); *Idaho Bldg. and Constr. Trades Council, AFL–CIO v. Wasden,* No. 1: 11–CV–00253–BLW, 2011 WL 5154286, at *3 (D. Idaho Oct.28, 2011) ("[S]imply because [proposed intervenor] would make slightly different arguments from the Attorney General does not amount to a 'compelling showing' of inadequacy, or that it offers a 'necessary element' to the litigation.")

Moreover, the only argument HSUS identifies in its motion as one that it would raise but California might not is that "selling eggs from hens confined in battery cages is inherently unsafe or cruel." HSUS Br. at 11. HSUS's concern has since proven to be unfounded: In its

subsequently filed Motion to Dismiss, California asserts both "protection of animal welfare" and "protection of public health and safety" to justify the enactment of AB1437. Cal. Mot. to Dismiss [Docket # 36] at 11. California has also filed a Request for Judicial Notice [Docket # 42] of certain documents in the legislative history for AB1437, including a copy of "An HSUS Report: A Comparison of the Welfare of Hens in Battery Cages and Alternative Systems," as well as numerous letters of support for AB1437 from various animal welfare groups, including HSUS. Given California's apparent reliance on HSUS's own arguments and research to support the state's animal welfare argument, HSUS has failed to demonstrate "a likelihood that the government will abandon or concede a potentially meritorious position." *Lockyer*, 450 F.3d at 444.

HSUS also speculates that California's competing interests might lead the state to accept a narrower construction of AB1437 than HSUS would be willing to accept. The Ninth Circuit has repeatedly rejected this very argument. In *Prete*, for example, proposed intervenor argued its interests were not adequately represented by the state defendants because the state "may be inclined [to] give an unnecessarily narrow construction of Measure 26 in the face of legal attacks on the measure." 438 F.3d at 958. In *Freedom from Religion*, the proposed intervenor argued that the "federal defendants might, in an attempt to save the parsonage exemption from being declared unconstitutional, urge the court to construe the statutes in a narrow way that would reduce the value of the exemption." 644 F.3d at 841–42. In both cases, the Ninth Circuit denied intervention in the absence of evidence that any of the defendants had actually advanced a narrow interpretation of the law. *Freedom from Religion*, 644 F.3d at 842; *Prete*, 438 F.3d at 958 ("neither plaintiffs nor defendant have argued for a narrowing construction of Measure 26").

Finally, HSUS argues that it has a "unique and deep knowledge of the facts, history, and science surrounding and supporting the legislation at issue in this case," "a greater interest than California in the hen welfare issues underlying this dispute," and "a greater motivation to commit the time and the funds necessary" to defend AB1437. HSUS Br. at 11. Virtually the same argument was raised in *Prete* by intervenors who claimed to have "direct knowledge and

experience in how well a signature gathering campaign staffed by hourly circulators can run" whereas the Oregon Secretary of State lacked "the breadth of knowledge regarding the signature-gathering process to fully develop the record and respond to plaintiff's factual allegations." 438 F.3d at 958. The Ninth Circuit rejected that argument as well, noting that the secretary of state "is undoubtedly familiar with the initiative process and the requisite signature-gathering; indeed, defendant is the government party responsible for counting the signatures." *Id.* "Although intervenor-defendants may have some specialized knowledge into the signature gathering process, they provided no evidence to support their speculation that the Secretary of State lacks comparable expertise." *Id.* As in *Prete*, HSUS has offered no reason to assume that the California Secretary of Food and Agriculture lacks the expertise to make arguments about the welfare of laying hens or that the California Attorney General lacks the expertise to defend the constitutionality of a California statute. Consequently, HSUS has not provided "the 'compelling showing' necessary to overcome the presumption of adequate representation." *Id.* Its motion to intervene by right should be denied.

II. HSUS offers no compelling reason why the Court should permit it to intervene.

HSUS has satisfied the three threshold requirements for permissive intervention, so whether to grant or deny its request is committed to the sound discretion of the Court. In the exercise of its discretion, the Court *must* "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *Perry*, 587 F.3d at 955. The Court *may* also consider other factors including "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." *Spangler v. Pasadena City Bd. of Educ.,* 552 F.2d 1326, 1329 (9th Cir.1977).

In its motion to intervene, HSUS asserts two bases for permissive intervention. First, its "substantial expertise in animal welfare" and "extensive research on hen housing" will "help ensure a complete consideration of the issues raised in this case and the best opportunity to serve the ends of justice." HSUS Br. at 13. Second, having been "a defendant in three lawsuits over Prop 2"—a law Plaintiffs *do not* challenge in this case—HSUS claims to possess "knowledge of the legal and factual issues unique to this litigation." *Id.* What is clear from these

arguments is that HSUS intends to remake this case into a referendum on the confinement of egg-laying hens, a strategy that is likely to cause undue delay while the parties conduct irrelevant discovery and engage in unnecessary motions practice.

Most of the arguments HSUS wants to make are collateral to the constitutional questions raised in Plaintiffs' Amended Complaint. While the statute Plaintiffs have asked this Court to invalidate happens to deal (indirectly) with the size of chicken coops, the legal issues at the heart of this case concern the power of states to restrain trade based on conduct that occurs beyond their borders. No amount of research on hen housing or expertise in animal welfare will help the Court determine the proper scope of the dormant Commerce Clause. Permitting HSUS to intervene in this case to argue that modern farming practices are cruel makes about as much sense as permitting the AFL-CIO to intervene in *International Shoe Co. v. Washington* to argue that traveling shoe salesmen should be allowed to unionize.

Moreover, HSUS's suggestion that it possesses special "knowledge of the legal and factual issues unique to this litigation" due to its participation in three suits challenging Prop 2 overlooks the obvious fact that the State of California participated in each of those cases as well. And, as noted above, California has requested the Court take judicial notice of many of HSUS's research articles on hen housing and animal welfare. HSUS's interests are more than adequately represented by the State. Permissive intervention should be denied.

III. ACEF has not overcome the presumption that its interests will be adequately represented by California.

In its motion to intervene, ACEF articulates its "significantly protectable interests" in defending the constitutionality of AB1437 as follows:

> ACEF's members constitute a significant portion of the California egg industry. Any disruptions to the market that decrease consumption of eggs has a direct and significant impact on ACEF's members. The 2010 *Salmonella* recall of eggs—which arose from contamination at facilities in Iowa—had a significant impact on the California market, causing a decrease in demand for eggs. That decrease in demand for eggs directly injured ACEF and its members. The hen enclosure

> requirements of AB1437 are designed to help mitigate the health risks associated with eggs such as *Salmonella*, the spread of which has been a particular concern of ACEF. AB 1437 provides "an important layer of protection against" the possibility of future egg-based *Salmonella* outbreaks in California—outbreaks that ACEF has worked to prevent and that would cause consumers to purchase fewer eggs from ACEF's members.

ACEF Br. at 8 (internal citations omitted).

ACEF claims that its interests differ from California's, but its motion fails to explain how. Like California, ACEF's "ultimate goal" is defending AB1437. Like California, ACEF argues that AB1437 was enacted to protect food safety and animal welfare. *Compare* ACEF's Motion to Intervene [Docket #33] at 1 ("The challenged provisions ensure that egg-laying hens are not confined in overly restrictive cages and are designed to reduce the likelihood that contaminated eggs will be sold in California."), *with* California's Motion to Dismiss [Docket #36] at 1 ("The state had two main goals in passing [AB1437]: protection of farm animal welfare and protection of public health and safety through the prevention of salmonella.").

ACEF also quotes from several cases in which courts have held that a proposed intervenor's interests diverged from those of a government defendant, but once again ACEF fails to explain how any of those cases are remotely similar to this one. At best, ACEF makes the same speculative arguments advanced by HSUS. *Compare* ACEF Br. at 10-11 (arguing that California "must take into account its relationship with the Plaintiff states and the views of in-state business groups that might oppose AB1437"), *with* HSUS Br. at 10 ("California has much broader interests that HSUS, and must balance animal welfare concerns with economic, political, and resources constraints."). At one point, ACEF claims that it will bring a "necessary element to the proceeding that is otherwise missing." ACEF Br. at 11. These "otherwise missing" elements turn out to be "the perspective of private businesses that are well-versed in the need for food safety" and "experience developing food safety solutions to protect consumer confidence in eggs." ACEF Br. at 11. In short, ACEF makes no "compelling showing" to

overcome the presumption that its interests in this case will be adequately represented by California.

The truly remarkable thing about ACEF's motion to intervene is the argument that it doesn't make. ACEF could have made a rock-solid argument for intervention by right in this case based on its members' obvious financial interests in AB1437. Starting in January 2015, ACEF's members must comply with Prop 2's behavior-based spatial requirements for hen-houses. There is no serious dispute that complying with Prop 2 will increase California egg producers' ongoing production costs and require expensive capital improvements. Ordinarily, that would mean that out-of-state egg farmers—whose home states still permit them to use their existing (and much less expensive) conventional cage systems—would soon be able to export their eggs to California at a fraction of the prices California's own egg producers must now charge.

Fortunately for those California farmers who have already invested in the upgrades necessary to comply with Prop 2, AB1437 "levels the playing field" by imposing Prop 2's spatial requirements on out-of-state egg producers as well if they want to continue selling her eggs in California after January 1, 2015. If Plaintiffs prevail in this case, however, and AB 1437 is struck down for violating the Commerce Clause, the playing field will no longer be level and California egg farmers will be forced to compete against less expensive eggs imported from out of state. Curiously, ACEF does not rely on—or even acknowledge the existence of—its members' obvious financial interest in "leveling the playing field" as to their out-of-state competitors.

IV. The Court should deny ACEF's request for permissive intervention.

In the alternative, ACEF claims to have satisfied the requirements for permissive intervention under Rule 24(b). As with HSUS, Plaintiffs do not dispute that ACEF's motion was timely filed or that it shares a common legal issue—the constitutionality of AB1437—with California. But these are merely threshold requirements. ACEF fails to address the other factors courts may consider, like "the nature and extent of the intervenors' interest" and "whether the intervenors' interests are adequately represented by other parties." *See Spangler,* 552 F.2d at

1329. As explained above, both of those factors cut strongly against granting ACEF permissive intervention in this case.

* * *

WHEREFORE, Plaintiffs State Missouri, Nebraska, Oklahoma, Alabama, Kentucky, and Governor Branstad respectfully request that HSUS's Motion to Intervene be denied; and Plaintiffs Missouri, Nebraska, Oklahoma, and Governor Branstad respectfully request that ACEF's Motion to Intervene be denied as well.

April 25, 2014

Respectfully submitted,

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