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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DONALD J. TRUMP FOR
PRESIDENT, INC., REPUBLICAN
NATIONAL COMMITTEE, NEW
JERSEY REPUBLICAN STATE
COMMITTEE,

Plaintiffs,

v.

PHILIP D. MURPHY, in his official
capacity as Governor of New Jersey,
TAHESHA WAY, in her official
Capacity as Secretary of State of New
Jersey,

Defendants.

No. 3:20-cv-10753-MAS-
ZNQ

**NOTICE OF MOTION FOR
LEAVE TO APPEAR AND FILE A
BRIEF AS *AMICI CURIAE***

Motion Date: September 29, 2020

PLEASE TAKE NOTICE that pursuant to the rules of this Court and the Court's discretion, the Labor and Employment Committee of the National Lawyers Guild and the International Committee of the National Lawyers Guild move this Court to for leave to participate as amici curiae in this litigation; and

PLEASE TAKE FURTHER NOTICE that Amici in this case are the NLG's Labor and Employment Committee and the International Committee. The Labor and Employment Committee seeks to preserve workers' rights and recognizes that labor rights are human rights. For many years many members of the Labor & Employment Committee have been concerned about voter suppression and obstacles to workers and other marginalized groups to exercise their fundamental right to vote. Members of the International Committee have similar concerns. In addition, among the issues that the International Committee has worked on is bringing to domestic courts an understanding of International Human Rights Instruments. The fundamental right to vote is one of rights which have been central to all Human Rights instruments which address political rights. Amici seek to participate in this litigation to bring to the Court's attention arguments which are relevant to protecting the fundamental right to vote and which provides a framework in which the Court can realize that the Plaintiffs' arguments against the New Jersey law are aimed at restricting the vote and thus, run contrary to States' obligations to take effective measures to allow people to vote, especially during this pandemic.

PLEASE TAKE FURTHER NOTICE that Plaintiffs in this case seek to prevent the New Jersey Legislature and Governor from implementing changes in the voting laws of New Jersey which expand registered voters' access to exercise the franchise and to have their votes counted. While COVID-19 is the backdrop for the

legislative changes, Your Amici believe that all states have a legal duty to take effective measures to ensure those who are eligible to vote can vote and the New Jersey law furthers that goal. Your Amici seek to bring to the Court's attention arguments not made by either party but which form a framework for evaluating the law. Your Amici have sought to provide this brief to the Court at a time when the briefing on the Plaintiffs' request for a Preliminary Injunction is fully submitted.

WHEREFORE, Amici request this court grant leave to file this amicus brief.

Dated: September 29, 2020

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**DONALD J. TRUMP FOR
PRESIDENT, INC., REPUBLICAN
NATIONAL COMMITTEE, NEW
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COMMITTEE,**

Plaintiffs,

v.

PHILIP D. MURPHY, in his official
capacity as Governor of New Jersey,
TAHESHA WAY, in her official
Capacity as Secretary of State of New
Jersey,

Defendants.

DOCKET NO. 3:20-cv-10753

**BRIEF OF LAW OF NATIONAL
LAWYERS GUILD LABOR AND
EMPLOYMENT COMMITTEE
AND INTERNATIONAL
COMMITTEE
AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS'
OPPOSITIONS TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

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<https://www.state.nj.us/state/elections/assets/pdf/election-results/2016/2016-summary-registered-voters-general-election-0131.pdf>5

STATEMENT OF INTEREST OF AMICI

The National Lawyers Guild (NLG) was founded in 1937 as a progressive bar association. The NLG at its founding was a multi-racial association when other bar associations were racially segregated. One of the important goals of the NLG at the time of its founding was to defend the laws passed to support the New Deal. In 1945, the NLG had observer status at the San Francisco conference which developed the United Nations Charter (Charter) and was among the non-governmental organizations seeking to enshrine human rights in the forefront of the Charter. Throughout its 83-year history, the NLG has consistently sought to promote human rights, especially of those in marginalized communities and those subject to discrimination or oppression. The NLG has consistently acted to promote human rights, including the right to vote.

The NLG acts through its national committees, projects, and chapters. Amici in this case are the NLG's Labor and Employment Committee and the International Committee. The Labor and Employment Committee seeks to preserve workers' rights and recognizes that labor rights are human rights. For many years, many members of the Labor & Employment Committee have been concerned about voter suppression and obstacles to workers and other marginalized groups to exercise their fundamental right to vote. Members of the International Committee have similar concerns.

In addition, among the issues that the International Committee has worked on is bringing to domestic courts an understanding of International Human Rights Instruments. The fundamental right to vote is one of rights which have been central to all Human Rights instruments which address political rights. Amici seek to participate in this litigation to bring to the Court's attention arguments which are relevant to protecting the fundamental right to vote and which provide a framework for the court to evaluate that the Plaintiffs' arguments against the New Jersey law are aimed at restricting the vote, thus, running contrary to States obligations to take effective measures to allow people to vote, especially during this pandemic.

PRELIMINARY STATEMENT¹

The New Jersey law challenged by the Plaintiffs in this action allow all registered voters to receive and cast a ballot without having to expose themselves to people who could spread COVID-19. This law facilitates all New Jersey residents who want to vote in this election to exercise their fundamental right to vote. While the current briefing is in connection with Plaintiffs' motion for preliminary injunction to enjoin the parts of the law that allow votes to be counted before election day and those ballots received 48 hours after election day, the

¹ Parties' counsel did not author this brief, nor did the party or the party's counsel contribute money intended to fund the preparation or submission of the brief. No person other than the amicus curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

lawsuit challenges the full gamut of the New Jersey law which includes mailing ballots to all registered voters and providing a variety of ways for these ballots to be returned, so as to overcome obstacles to voting during a pandemic. Your Amici contend that States such as New Jersey have a legal obligation to take all effective measures to ensure that all persons entitled to vote, can vote. This legal obligation, explained more fully in this brief, must be fulfilled especially at this time when many voters' health requires the State provide alternatives to standing in line at crowded polling places on election day.

As of September 2020, New Jersey has 6,245,885 registered voters.² Given the large number of registered voters, the law not only gives New Jersey voters reasonable options for voting, it also provides mechanisms for ensuring that the voter who signed the mailed ballot is a registered voter. In 2016, New Jersey had 5,808,260 registered voters.³ Sixty-eight percent of registered voters or 3,957,303 voted in 2016.⁴ New Jersey voters turned out to vote at a percentage higher than the

² *Statewide Voter Registration Summary*, State of New Jersey (Sept. 1, 2020), <https://www.state.nj.us/state/elections/assets/pdf/svrs-reports/2020/2020-09-voter-registration-by-congressional-district.pdf>.

³ *Total Number of Registered Voters, Ballots Cast, Ballots Rejected, Percentage of Ballots Cast and the Total Number of Election Districts in New Jersey*, State of New Jersey (Jan. 31, 2017), <https://www.state.nj.us/state/elections/assets/pdf/election-results/2016/2016-summary-registered-voters-general-election-0131.pdf>.

⁴ 23,728 ballots were rejected for various reasons. *Id.*

national average of 61.4 percent in 2016.⁵ Given the demonstrated interest of New Jersey residents to exercise their right to vote and the danger in-person voting poses to suppress the vote, it was and remains imperative that the New Jersey legislature broadened the mechanisms for New Jersey residents to exercise their fundamental right to vote.

In this brief, Your Amici raise arguments based in International Human Rights Treaties which the United States has ratified. It is posited that under these treaties, in particular the International Covenant on Civil and Political Rights, States like New Jersey have a legal obligation to implement “**effective measures**” to ensure that all persons entitled to vote, can vote. In passing the law challenged in this case New Jersey’s action is consistent with the need for such effective measures, especially in light of the COVI-19 pandemic.

Because these Human Rights Instruments are ratified “treaties” under Article VI Section 2 of the U.S. Constitution, the Supremacy Clause dictates that such treaties become part of the supreme domestic law, binding on the courts. Thus, to rule in Plaintiffs’ favor and strike down A4475 would be contrary to New Jersey’s obligation to take effective measures to implement the right to vote. Further, the Supreme Court has directed that courts “should apply the well-established *Charming*

⁵ Thom File, *Voting in America: A Look at the 2016 Presidential Election*, United States Census (May 10, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

Betsy rule of statutory construction which requires that [courts] generally construe Congressional legislation to avoid violating international law.” *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (citing *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)). These arguments set more forth more fully herein support Your Amici’s position that this Court should deny Plaintiffs Motion for Injunctive relief and the challenge to this law. Thus, Your Amici make arguments in this brief not made by others. These arguments provide the Court a different and/or additional framework by which the Court should reject Plaintiffs’ efforts to strike down a law that makes it easier for eligible voters to exercise their fundamental right to vote.

THE NEW JERSEY LAW

On August 27, 2020, the New Jersey Legislature adopted Assembly Bill No. 4475 (“A4475”), which was signed into law on August 28, 2020, by Governor Phil Murphy. P.L. 2020, C. 72. This legislation codified in large measure the provisions of the Executive Order 177. The legislation provided inter alia, for:

- A vote-by-mail election where all active registered voters will be sent a mail-in ballot for the November 3, 2020, General Election at least 29 days before the election in a manner to ensure the ballot’s timely receipt and return. N.J. Stat. Ann. § 19:63-31(a) (2020).
- Ballots will also contain return envelopes with prepaid First-Class postage. § 19:63-31(b). In-person voting by provisional ballot will be

allowed for anyone who so chooses, subject to health and safety standards, and the law requires that accommodations be made for voters with disabilities. §§ 19:63-31(e), (g).

- Each county is to open a specific number of polling places on Election Day. § 19:63-31(e). Voters can return their mail-in ballots at polling places that day. § 19:63-31(h). Voters may return ballots to drop boxes established by the Boards of Elections. § 19:63-31(z). These drop boxes are to be secured at locations equipped with surveillance cameras, and made available 24 hours a day. § 19:63-16.1b(2)(a). The statute requires that each county have no fewer than 10 secure drop boxes. §§ 19:63-16.1b(2)(b)-(c).
- All voters are required to cast their vote by November 3, 2020. They may do so by submitting their mail-in ballot in person or by placing their ballot into a designated drop box, and they must do so by 8:00 p.m. on November 3, 2020. N.J. Stat. Ann. § 19:15-2.
- All votes submitted in the mail on or before November 3, 2020, will be viewed as valid ballots. N.J. Stat. Ann. § 19:63-31(m). Those ballots received by the county boards of elections from the United States Postal Service within 48 hours of the closing of polls on November 3, 2020,

shall be considered valid and shall be canvassed, assuming the ballot meets all other statutory requirements.

- “The Secretary of State shall establish guidelines concerning the early canvassing process,” and any county which begins canvassing ballots before November 3, 2020, “shall implement the measures necessary to ensure the security and secrecy of the mail-in ballots.” § 19:63-31(m).

Plaintiffs filed this lawsuit before the law was passed and made claims against the Executive Order. The same claims are in the Amended Complaint, but not directed against the governor. Plaintiffs reiterate their claim that New Jersey is violating the Fourteenth Amendment by sending mail-in ballots to active voters and further claim that the New Jersey law violates the Equal Protection Clause by allegedly resulting in counties using different procedures for canvassing provisional ballots.

ARGUMENT

I. THE HISTORY OF THE FIRST TUESDAY AFTER THE FIRST MONDAY BEING SET AS ELECTION DAY.

In 1845⁶, the first Tuesday after the first Monday in November was established as the national election day for presidential elections.⁷ The rationale for

⁶ Of course, 1845 was before the end of slavery and before women could vote in the United States.

⁷ This same Tuesday date was applied to elections for House of Representatives in 1875 and to the election of Senators in 1914, a time when women still could not vote and the freed slaves and their descendants were effectively denied their right to vote either through intimidation or such

setting this date was based in the agrarian and religious nature of the population at the time. It was convenient for farmers, as November was between planting seasons, allowing people time to travel to polling stations. Weekends were rejected primarily because it was presumed most people would be in church on Sundays.⁸

The United States stands almost alone in requiring people to vote only on one day and on a week day which is not a holiday. Unlike the overwhelming majority of countries which hold their elections over a few days and/or on weekend days, the United States is still operating with an election day on a weekday in November, which no longer has any rationale for convenience of the population.⁹ Having to vote on a weekday which is not a national holiday and where most employers do not give their workers time off to vote, often puts eligible voters in the position of having to choose between their pay or voting because voting can only occur in limited hours before or after the regular workday, where long lines can prevent people from actually casting a ballot. It also accounts for the fact that almost 40 percent of the population did not vote in 2016. Prior to the 2020 year when the COVID-19 crisis moved many legislatures including New Jersey to act, unless a person lived in a State

practices as literacy tests or poll taxes which put the franchise out of reach for many African Americans or other persons of color.

⁸ Domenico Montanaro, *Why Do We Vote on Tuesdays?*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500208500/why-do-we-vote-on-tuesdays>.

⁹ See Drew Desilver, *Weekday elections set the U.S. apart from many other advanced democracies*, Pew Research Center (Nov. 6, 2018), <https://www.pewresearch.org/fact-tank/2018/11/06/weekday-elections-set-the-u-s-apart-from-many-other-advanced-democracies/>.

where early voting, either through filing a no-excuse absentee ballot or voting at an early voting station is allowed, voters must vote on the Tuesday election day.¹⁰

II. NEW JERSEY’S LAW WHICH MAKES IT POSSIBLE FOR ALL ELIGIBLE VOTERS TO EXERCISE THEIR RIGHT TO VOTE IS IN FACT REQUIRED BY LAW.

A. Human Rights Law Is the Proper Framework Within Which to Evaluate New Jersey’s Law

International Human Rights Law is a body of internationally recognized law which provides elevated status to certain Human Rights Instruments, which have been universally accepted or ratified by the overwhelming number of states. Human Rights Instruments start by identifying rights which all people, or citizens of a country have which must be protected.

The United States has ratified three of the most critical Human Rights Instruments relating to the rights of people to vote, participate in, and benefit from public service. These are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Article 21 of the UDHR provides, “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.” ICCPR article 25 declares that every citizen shall have the right and opportunity “to

¹⁰ There is a wide variation among states as to how much early voting is allowed, and most states still require some type of excuse like illness or infirmity to file an absentee ballot.

take part in the conduct of public affairs . . . to vote and be elected at genuine periodic elections.” International Covenant on Civil and Political Rights, Mar. 23, 1976, 138 Cong. Rec. S4781-01. Most notably, the rights guaranteed in Article 25 of the ICCPR are to be enjoyed without distinctions set forth in Article 2 of the ICCPR and without unreasonable distinctions or discrimination. The distinctions in article 2 include race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Equality of access to these political rights based on race and national origin is guaranteed by the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5).¹¹

The Treaty Body which interprets and issues pronouncements on the meaning of the ICCPR is the Human Rights Committee. The Human Rights Committee in the General Comment on Article 25 stated that Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant. States must take **effective measures** to ensure that all persons entitled to vote are able to exercise that right. (General Comment 25 Paragraph 1). Further, General Comment 25 states: “Whatever form of constitution or government is in force, the **Covenant requires States to adopt such legislative**

¹¹ Similar rights are protected by article 23 of the American Convention on Human Rights to which the United States is also a party.

and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.” *Id.*

B. The Duty of the States to Take Effective measures to ensure all who want to vote can vote is required by law through the Supremacy Clause.

Under the United States Constitution’s Supremacy Clause, treaties made, or under the Authority of the United States, “shall be the supreme Law of the Land . . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, § 2. Judicial decisions inconsistent with treaty obligations put the United States in breach of its international law obligations. 3 Restatement (Fourth) of Foreign Relations Law § 301(3) (Am. Law Inst. 2018).

When the United States ratified the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992), the provisions were not deemed self-executing, however, when submitting human rights treaties to the Senate for its advice and consent, the Executive Branch repeatedly assured the Senate that the United States could and would fulfill its treaty commitments by applying existing federal constitutional and statutory law in such a manner. *See* International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, 5, 19, 26-27 (1992) (noting that existing laws obviated the need for further implementing legislation)

Nonetheless, with respect to the right to vote in Article 25 of the ICCPR, the United States in 1993 passed legislation that explicitly invigorated the right to vote in the ICCPR by animating the obligation for States to take “effective measures” to ensure people can exercise their right to vote. This legislation, the National Voter Registration Act (NVRA), 52 U.S.C. §§ 20501 et seq. was based on some key congressional findings, to wit (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

Based on these findings, the main purposes of the NVRA are: (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; and (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office. National Voter Registration Act of 1993, 1993 Enacted H.R. 2, 103 Enacted H.R. 2, 107 Stat. 77, 78, 103 P.L. 31, 1993 Enacted H.R. 2, 103 Enacted H.R. 2.

Your Amici posit that as a ratified treaty, the ICCPR has the status of domestic law which through the Supremacy Clause requires judges to implement its

provisions by interpreting state or federal law consistently with its requirements and interpretations by the Human Rights Committee. Your Amici posit that the findings and purposes of the NVRA implement and reinforce the commands of ICCPR Article 25 to require State parties, including the United States, (and all its constituent states) to take effective measures ensuring all eligible voters can vote. New Jersey's law is an example of an effort to bring voting rights into compliance with the "effective measures" command by removing obstacles to voters to obtain a ballot and providing many options to return that ballot. While the precipitating reason for complying with the commands of Article 25 is the COVID-19 virus, this Court should decline Plaintiffs' attempt to have New Jersey reverse course and again place obstacles in the path of citizens to vote.

C. To Reverse the Will of the New Jersey Legislature in this Case Would be Inconsistent with the Supremacy Clause and The Requirement to Interpret U.S. Law Consistently with International Obligations

Regardless whether the ICCPR is self-executing (i.e., providing a private right of action in domestic courts), the provisions of the ICCPR nonetheless "bind the United States as a matter of international law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004); *see also* Restatement (Third) of Foreign Relations, § 111 cmt. h (1987); Restatement (Fourth) of Foreign Relations Law § 310(1) (Am. Law Inst. 2018) (non-self-executing treaties enforceable in courts through "judicial application of preexisting or newly enacted law"). Accordingly, they are a source

of binding obligations when construing a federal law. *See Chew Heong v. United States*, 112 U.S. 536, 548-50 (1884); *Ma v. Ashcroft*, 257 F.3d 1095, 1114-15 (9th Cir. 2001) (construing 8 U.S.C. § 1231(a)(6) as requiring a reasonable time limitation on immigration detention to avoid conflict with International Covenant on Civil and Political Rights). Further, for over two hundred years, the Supreme Court has admonished that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. 1, 43 (1801). This doctrine has been consistently and recently reaffirmed by the Supreme Court, including in the context of immigration. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 561-63 (2006); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-41 (1987).

Thus, whether this Court agrees with Your Amici that the dictates of Article 25 of the ICCPR as a ratified treaty has the status of domestic law which is binding on this Court through the Supremacy Clause, or if the Court considers the requirements of Article 25 of the ICCPR as part of binding international law which obligates the Court not to interpret laws so as to conflict with the obligations under international human rights law, the Court should not to strike down the challenged provisions of the New Jersey law which include effective measures allowing eligible New Jersey voters to exercise their right to vote.

CONCLUSION

Based on the foregoing, Your Amici urge this Court to consider the arguments made in this brief when ruling on the Plaintiffs' case. Your Amici urge the Court to deny the motion for injunctive relief and to preserve the law as passed by the New Jersey Legislature.

Dated: September 29, 2020

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
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Capacity as Secretary of State of New
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Defendants.

NO. 3:20-cv-10753-MAS-ZNQ

**PROPOSED ORDER GRANTING
LEAVE TO APPEAR AND FILE A
BRIEF AS *AMICI CURIAE***

Having considered the motion of the Labor and Employment Committee of the National Lawyers Guild and the International Committee of the National Lawyers Guild, by and through its attorney, Ryan P. McCarthy, for leave to appear and file a brief as amici curiae, and all parties, by and through their counsel, having received due notice of the motion and having the opportunity to be heard; and for good cause shown,

IT IS on this _____ day of _____, 20____. **ORDERED:**

1. The Motion for Leave to Appear and File a Brief as Amici Curiae of the Labor and Employment Committee of the National Lawyers Guild and International Committee of the National Lawyers Guild is hereby **GRANTED**;

2. Labor and Employment Committee of the National Lawyers Guild and International Committee of the National Lawyers Guild's proposed amicus brief is hereby deemed **FILED**.

Hon. Michael A. Shipp, J.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DONALD J. TRUMP FOR
PRESIDENT, INC., REPUBLICAN
NATIONAL COMMITTEE, NEW
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capacity as Governor of New Jersey,
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Defendants.

NO. 3:20-cv-10753-MAS-ZNQ

CERTIFICATE OF SERVICE

I, Ryan P. McCarthy, an attorney admitted to practice in the State of New Jersey, hereby certify that on September 29, 2020, I caused a true and correct copy of the (1) Notice of Motion to Appear and File a Brief as Amici Curiae; (2) Proposed Brief of Law of Amici Curiae; and (3) Proposed Order, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

Dated: September 28, 2020

/s/ Ryan P. McCarthy

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