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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EVAN MILLIGAN, et al., *Plaintiffs*, v. WES ALLEN, et al., *Defendants*.	No. 2:21-cv-01530-AMM
Marcus Caster, et al., *Plaintiffs*, v. WES ALLEN, *Defendant*.	No. 2:21-cv-01536-AMM

OPPOSITION TO REDSTATE STRATEGIES' MOTION TO QUASH

Both the motions of Redstate Strategies, LLC ("RedState") and the non-party Legislators (the "Legislators")[1] are meritless. Neither RedState, nor the Legislators have presented a valid claim for legislative privilege. Plaintiffs seek documents from RedState—a third-party non-legislator, foreign to the deliberative process, that was

[1] Senator Dan Roberts (Senate District ["SD"] 15); Senator Will Barfoot (SD-25); Former Senator Clay Scofield (SD-9); Representative Jim Carns (House District ["HD"] 48); Representative Jamie Kiel (HD-18); Representative Arnold Mooney (HD-43); Representative Ernie Yarbrough (HD-7); Representative Mack Butler (HD-28); Representative Rick Rehm (HD-85).

neither employed as legislative staff nor consultant. Precedent and the commonsense purpose of the privilege requires the Court to deny their motions.

In 2023, the Alabama legislature enacted Senate Bill 5 ("SB5"), a redistricting plan that included only one congressional district in which Black voters would have an opportunity to elect their candidate of choice, *despite* directives from the U.S. Supreme Court and this Court that such a plan violated Section 2 of the Voting Rights Act ("VRA"). RedState contacted members of the Alabama legislature to advocate for SB5 and other dilutive congressional maps. Text messages produced by RedState show that Christopher Brown, RedState's proprietor, communicated with Senator Steve Livingston, the chair of the Senate redistricting committee. Brown advised Senator Livingston on the specific Black voting age populations ("BVAP") of potential alternative maps, offered alternative maps that deliberately lowered the BVAP in proposed new districts, and made negative remarks about Joe Reed, the Black leader of the Alabama Democratic Conference, the Black caucus of the Alabama Democratic Party. Ex. A. It is likely that RedState communicated similar information and opinions to other members of the legislature or other people or groups outside of the legislature. These communications between RedState and others are not subject to a claim of legislative privilege. But these communications can be important evidence of a constitutional or VRA violation. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461-62 (1982); *Clerveaux v. E.*

Ramapo Cent. Sch. Dist., 984 F.3d 213, 243-44 (2d Cir. 2021); *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1007 (11th Cir. 2018); *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1047-48 (D.S.D. 2005), *aff'd*, 461 F.3d 1011 (8th Cir. 2006); *cf. also South Carolina v. United States*, 898 F. Supp. 2d 30, 45 (D.D.C. 2012) (three-judge court) (Kavanaugh, J.) (considering a "troubl[ing]" email exchange between a legislator and constituent).

There is no basis for RedState, as a non-legislator, to invoke legislative privilege. Although RedState also seeks to invoke legislative privilege on behalf of non-party legislators, legislative privilege is a personal defense held by legislators and their staff, not third parties. While the Legislators also invoke the privilege, Doc. 346 at 1, any privilege is waived by disclosing information to RedState—a nonlegislative third-party. Even if RedState could assert legislative privilege (which it cannot), the privilege must yield given the important federal interest at stake—a violation of the Fourteenth Amendment in blatant defiance of a ruling from the Supreme Court.

BACKGROUND

RedState is a political election consulting business that provided comments to legislators and likely others prior to the enactment of SB5. Plaintiffs subpoenaed RedState for documents and communications related to SB5 and predecessor

redistricting plans, as well as any relevant communications between RedState and others. Doc. 346-1.

Several non-party Alabama legislators and RedState subsequently filed motions to quash the subpoena. Doc. 346 at 1; Doc. 347. The Legislators assert legislative privilege alongside RedState with respect to documents and communications they had with RedState during the development and passage of SB5 and its predecessors "because [RedState] was involved in the formulation and passage of SB5." Doc. 346 at 3.

ARGUMENT

I. Documents in RedState's Possession are not Protected from Disclosure by Legislative Privilege.

RedState cannot invoke legislative privilege to prevent disclosure of *its* communications with legislators.

RedState purports to have aided in "the proposal, formulation, and passage of SB5 and alternative or predecessor plans developed in June/July 2023" alongside the Legislators. Doc. 346 at 2. Yet nowhere does RedState argue or demonstrate that the Legislators actually brought RedState into the deliberative process through, for example, an invitation from the Legislators, a consulting agreement, or any other process indicative of RedState's involvement in the deliberative process. See Legis. Privilege Correspondence, Doc. 346-2. As a non-legislative third-party, RedState is

not entitled to claim legislative privilege over such communications, particularly where, as here, there is no indication they were brought into the deliberative process by legislators. Nor can the non-party legislators invoke the privilege to try and shield their communications with third parties like RedState. Because the privilege is inapplicable under these circumstances, the Court should deny these motions to quash.

A. Legislative Privilege is Inapplicable to Communications Between Third Parties and Legislators.

"Communications between legislators or staff members and third parties consulted during the redistricting process are not protected by the legislative privilege." *League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 WL 2335805, at *6 (E.D. Mich. May 23, 2018) (three-judge court); *see, e.g.*, *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 261 (N.D. Fla. 1995) (legislative privilege did not apply to information gleaned by legislators serving on a nonlegislative Conference); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101–03 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) (three-judge court) (non-legislators' presence on a redistricting task force foreclosed a claim of legislative privilege). The privilege does not extend to "legislative consultant and independent contractor paid by political group" to assist with

redistricting. *Page v. Va. State Bd. of Elects.*, 15 F. Supp. 3d 657, 664 (E.D. Va. 2014) (three-judge court).

This is because the fundamental purpose of the legislative privilege is to protect "candor in the internal exchanges . . . [between] state legislators," *United States v. Gillock*, 445 U.S. 360, 373 (1980), and to encourage "frank and honest discussion *among lawmakers*." *Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections*, No. 11C5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) (emphasis added). The privilege "extends to discovery requests . . . [which] detracts from the performance of official duties." *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015). In other words, "the privilege serves to prevent parties from harassing legislators [] for actions those legislators take in their legislative capacity." *League of Women Voters of Fla. v. Lee,* 340 F.R.D. 446, 454 (N.D. Fla. 2021). Communications with third parties, who neither deliberate over nor vote on legislation, are not the kind of "internal exchanges" protected by the privilege. *Gillock*, 445 U.S. at 373. Because RedState is a *private* third party not tasked with the performance of any "official duties," *In re Hubbard*, 803 F.3d at 1310, RedState cannot be extended the benefit of the legislative privilege.

RedState relies on *Pernell* and *Hubbard* to try to squeeze under the privilege umbrella, but those cases stand only for the proposition that *lawmakers themselves* may assert the privilege to quash subpoenas that inquire into their motivations. *See*

Pernell v. Fla. Bd. of Governors of State Univ., 84 F.4th 1339, 1343–44 (11th Cir. 2023); *In re Hubbard*, 803 F. 3d at 1311. Neither case provides a basis to extend that holding to subpoenas served on third parties who, while they may seek to influence the law, are not charged or empowered to make it.

RedState itself cites a number of cases that agree that subpoenaing a third party (rather than legislators themselves) is a valid means of discovering relevant information, despite the assertion of privilege. *See, e.g.*, Mem. Op. & Order, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Mar. 3, 2017) (Coogler, J.), Doc. 158 at 17, 24 (noting that the plaintiffs were "free to obtain" evidence about legislators' statements from other non-privileged sources); *League of Women Voters Fla.*, 340 F.R.D. at 454 n.2 (recognizing that the "privilege would not prevent Plaintiffs from asking the third parties" about their communications with legislators).

The cases RedState cites for the proposition that "legislative privilege extends to the exchange of information or communications between the Nonparty Legislators and RSS," Doc. 346 at 3, are inapposite. First, RedState attempts to claim privilege over documents and communications between itself and *non-legislators*. RedState concedes it potentially possesses relevant nonpublic communications, specifically, "information about private political meetings of the members of the Jefferson County Alabama Republican Party" and "discussions among Party members [that]

may relate to the litigation or the 2023 Congressional district plan or a predecessor plan." Doc. 347 at 3. This information clearly is not subject to any possible claim of legislative privilege insofar as it does not even involve documents or communications with legislators.

Second, the Supreme Court's holding in *Gravel v. U.S.* was only "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 407 U.S. 606, 618 (1972). This same proposition is reiterated in *Ellis v. Coffee Cnty Bd. of Registrars*, where the Eleventh Circuit agreed that "[t]he test for applicability of this derivative legislative immunity is whether the legislator, counsel or aide was engaged within a legitimate sphere of legislative activity." 981 F.2d 1185, 1192 (11th Cir. 1993) (internal citations omitted). Legislative acts must be "'an integral part of the deliberative and communicative processes' regarding the consideration and action of a legislative body for matters statutorily placed within its jurisdiction." *Id.*

Here, the subpoenas at issue are not to legislators or their staff or aides, but instead are addressed to and seek information "from non-legislator third parties who may not invoke any legislative privilege." *In re Ga. Senate Bill 202*, No. 1:21-MI-55555-JPB, 2023 WL 3137982, at *7 (N.D. Ga. Apr. 27, 2023). This distinction is important here, as Plaintiffs simply do not know the basis for RedState's claim of

privilege or even the manner or extent to which it was involved in the process. Contrary to the federal rules, RedState has failed to provide this Court with a privilege log or any other documentation that contains a description of the nature of documents, communications, or things not produced for this Court or Plaintiffs to evaluate the validity of its assertion of privilege. Fed. R. Civ. P. 26(b)(5)(A). Neither *Hubbard* nor *Pernell* granted third party non-legislators legislative immunity, much less blanket immunity from compliance with the Federal Rules. And even where district courts have found some non-legislators (aides and other staff) entitled to claim legislative privilege, those courts required the third parties to be properly acting in a legislative capacity. *See, e.g.*, *League of Women Voters Fla.*, 340 F.R.D. at 454 n.2. RedState has offered no evidence that it was part of the deliberative or communicative process in the Alabama legislature – they have presented no evidence that they were acting as aids or other staff members, that the Legislators contacted them as a part of an information gathering process, or that RedState was otherwise acting as agents of legislators. *See* Doc. 346-2. As a non-legislative entity, RedState's documents and communications with legislators cannot be protected by the legislative privilege.

B. The Non-Party Legislators Waived any Claim of Privilege by their Disclosures to Third Parties Outside of the Deliberative Process.

When legislators disclose information to third-party groups like RedState, they waive the legislative privilege that would otherwise attach to their deliberative process. *See, e.g.*, *Baldus v. Brennan*, Nos. 11-CV-562, 11-CV-1011, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relie[s] on . . . outside experts for consulting services.") (citation omitted); *League of Women Voters Mich.*, 2018 WL 2335805, at *6 ("Communications between legislators or staff members and third parties consulted during the redistricting process are not protected by the legislative privilege."); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (privilege waived where legislators relied on outside consultants to draft map). As with the disclosure of information to third-parties in other contexts, legislators "effectively waive[] the privilege" by disclosing information to "non-legislators" who "were not within the scope of the privilege." *Page*, 15 F. Supp. 3d at 662 n.3. Legislative privilege only entitles legislators "not to divulge" their reasons for supporting legislation with outsiders, and so legislators waive their ability to invoke the privilege when they

"discuss those matters with . . . outsiders." *Almonte v. City of Long Beach*, No. 04-cv-4192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005).

The leading case on this issue is *Rodriguez*, where a court ordered the production of documents from an advisory task force on redistricting because the taskforce included non-legislators, which made the communications "more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists." 280 F.Supp.2d 89, 101-03 (S.D.N.Y. 2003), *aff'd*, 293 F.Supp.2d 302; *see also Fla. Ass'n of Rehab. Facilities*, 164 F.R.D. at 267 (declining to grant privilege to governmental group that provided information to the legislature, and requiring the depositions of legislative staffers). "Communications between [state legislators] and outsiders to the legislative process . . . includ[ing] lobbyists, members of Congress" and political campaign committees are simply not within the privilege. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6, 10. Indeed, "[a] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *ACORN v. Cnty. of Nassau*, No. 05–2301, 2007 WL 2815810, at *6 (E.D.N.Y. Sept. 25, 2007) (explaining that communications between legislators and outside consultants are discoverable because they are "more like conversations between legislators and knowledgeable outsiders").

Here, RedState is a third-party, political election consulting business that communicated with members of the legislature during and leading up to the 2023 Special Session. *See* Doc. 346 at 2. Unlike legislators or aids who are directly involved in the legislative process, RedState did not engage in any legislative acts. Rather, in RedState's communications with non-party legislators notifying them of *Milligan* plaintiffs' subpoena, RedState only states "given your relationship with RedState, and the work its president Chris Brown does for you" documents and communications may be protected by legislative privilege if so asserted. Doc. 346-2 at 29. At best, RedState might be an acquaintance to non-party legislators. As a non-party to the legislative process, granting RedState legislative privilege to prevent disclosure of any documents or communications in its possession would improperly extend the privilege beyond its intended limited coverage of legislators and their staff. In contradiction of the preference of the federal rules for broad disclosure, RedState's position would serve to immunize from production all communications between legislators and any person or entity, contravening precedent and the purpose of the legislative privilege.

C. Even if the Privilege Did Attach Here, it Should Give Way to Discovery of Documents in this Redistricting Case.

There is no question that "state officials' legislative privilege is not absolute." *Florida v. Byrd,* 674 F. Supp. 3d 1097, 1103 (N.D. Fla. 2023). And where, as here,

"important federal interests are at stake," *Gillock*, 445 U.S. at 373, the privilege must give way. *See, e.g.*, *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015) (collecting cases involving "constitutional challenges premised on the right to vote" where the privilege did not preclude disclosure). Even if legislative privilege could apply to RedState (and it does not), this Court should nonetheless require RedState to produce the relevant documents in its possession, including documents or communications that were shared with non-legislators.

Contrary to RedState's assertion otherwise, it is *primarily* in redistricting cases that the legislative privilege has yielded. *Compare* Doc. 346 at 16-20, *with Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (the reason redistricting cases are "extraordinary" is because the "natural corrective mechanisms built into our republic system of government offer little check upon the very real threat of legislative self-entrenchment") (internal quotations omitted). "[T]here is little to no threat to the 'public good' of legislative independence when a legislator is not threatened with individual liability" and the "distraction interest" in these cases is not sufficient to justify "an absolute legislative privilege in instances where a state legislator is not personally threatened with liability and an exercise of the privilege would frustrate the execution of federal laws protecting vital public rights." *Id*. at 334-35; *see also*, *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6 ("Given the federal interests at stake in redistricting cases, this court

concludes that common law legislative immunity does not entirely shield Non–Part[y Legislators] here . . . .Voting rights cases, although brought by private parties, seek to vindicate public rights."). Because "the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of 'legislative self-entrenchment,'" redistricting cases present the courts with an "extraordinary instance" where the privilege must yield. *Bethune-Hill*, 114 F.Supp.3d at 337.

The cases RedState cites are plainly distinguishable. To start, *w*hile the Court in *Pernell* determined that an exception has "never [been] expanded . . . beyond criminal cases," it also acknowledged "the possibility of further extension" to other types of cases. 84 F.4th at 1344. *Pernell* thus left open the possibility that certain challenges are of sufficient importance to pierce the privilege; it simply declined to establish a brightline rule that "the privilege must give way when the claim depends on proof of legislative intent." *Id.* at 1345. The same is true for the other Circuit cases, which did not arise in the context of intentional discrimination claims in redistricting. *See, e.g, La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023) (declining to find that circumstances warranted an exception in challenge to election administration rules); *In re N.D. Legis. Assembly*, 70 F.4th 460, 464-65 (8th Cir. 2023) (recognizing the "potential for 'extraordinary instances' in which

testimony might be compelled from a legislator about legitimate legislative acts" but declining to do so in a statutory case where legislative intent was irrelevant).

And while *Lee v. City of Los Angeles* involved a racial gerrymandering claim, the holding is inapplicable to the facts here. 908 F.3d 1175, 1188 (9th Cir. 2018). There, the court found that the plaintiffs claim lacked merit because the "factual record" in that case fell "short of justifying the 'substantial intrusion' into the legislative process." *Id*. at 1188. Here, in contrast, this Court already recognized the "extraordinary circumstances" of this case—where the legislature openly refused to comply with the directives of the Supreme Court and VRA—and where this Court has already "infer[red] from the Legislature's decision not to create an additional opportunity district that the Legislature was unwilling to respond to the well-documented needs of Black Alabamians in that way." *Singleton v. Allen*, No. 2:21-CV-1291, 2023 WL 5691156, at *4, *70 (N.D. Ala. Sept. 5, 2023) (three-judge court).

In redistricting cases, courts use a balancing test to determine whether and to what extent the privilege should apply. *See, e.g., Rodriguez*, 280 F. Supp. 2d at 100. This involves considering (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the

possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *See id.* at 100–01. (citation omitted).

First, Plaintiffs' subpoena seeks evidence directly relevant to their allegations of discriminatory purpose or motive in enacting SB 5. Moreover, information gleaned from these requests may also be relevant to the Court's analysis of the Senate Factors for Plaintiffs' Section 2 claims, and particularly Senate Factors 8 and 9. This Court has already determined that the State's passage of SB 5 demonstrates unresponsiveness to the needs of Black Alabamians. *See Singleton*, 2023 WL 5691156, at *70. Understanding why and how the legislature chose to pass SB5 will provide further support for Senate Factors 8 and 9.

Second, the non-party legislators' assertion that Plaintiffs have "abundant sources" outside the scope of the document requests to establish discriminatory motive and purpose, also fails. Public statements alone are often insufficient to prove discriminatory intent. "Outright admissions of impermissible racial motivation are infrequent." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014) (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). Plaintiffs' document requests are specifically tailored to cover communications and documents relevant to several

Arlington Heights factors and are necessary because "assessing a jurisdiction's motivation [] is a complex task" that requires "sensitive inquiry into such circumstantial and direct evidence as may be available." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488 (1997) (*quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Third, Plaintiffs' need for the information outweighs any purported interests on behalf of RedState or the legislature in protecting these documents from disclosure. After fighting for nearly two years to establish Black Alabamians' right to an additional congressional district in which they can elect their preferred candidates, Plaintiffs won relief and the State was ordered to adopt a remedial plan providing them that opportunity. That relief was short-lived, however, because Alabama adopted a plan it "readily admits does not provide the remedy we said federal law requires." *Singleton*, 2023 WL 5691156, at *3.

The circumstances of this case are "extraordinary." *Id.* at *4. As the Court previously said, "[w]e are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district." *Id.* What motivated adoption of a plan the State knew did not comply with the Court's order is critically important to demonstrate discriminatory purpose—that the State

was, in this instance specifically unresponsive to the needs of Black voters, and that justifications asserted for SB5 were pretextual. Because the State apparently intends to continue defending its openly defiant map at trial, Plaintiffs should be entitled to inquire into the legislators' motivations for the map's adoption.

The matters at issue in this case are no doubt serious. Courts have readily recognized the "seriousness of the litigation" in redistricting cases. *Page*, 15 F.Supp.3d at 667 ("The right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance."); *Favors v, Cuomo*, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) (observing that the third factor is "intended to give due consideration to some of the most invidious forms of government malfeasance"); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 ("There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process[.]").

Here, the factual record is unlike any ordinary redistricting challenge. This Court preliminarily found a Section 2 violation, which the U.S. Supreme Court affirmed. This Court then provided clear guidance to the legislature as to an appropriate remedy. And the legislature knowingly and openly enacted a map that contravened the Court's directive, requiring the Court to step in and order a special master to draw a legal map since the legislature failed in its responsibility to do so.

Likewise, the role of the government, the fourth factor in the balancing analysis, weighs in Plaintiff's favor. "[W]here the legislature—rather than the legislators—are the target of the remedy and legislative immunity is not under threat, application of the legislative privilege may be tempered." *Bethune-Hill*, 114 F. Supp. 3d at 341. Here, the "decision-making process remains at the core of the plaintiffs' claims . . . . [and] the legislature's direct role in the litigation supports overcoming the privilege." *Favors*, 285 F.R.D. at 220.

Moreover "there is little to no threat to the 'public good' of legislative independence when a legislator is not threatened with individual liability" and the "distraction interest" in these cases is not sufficient to justify "an absolute legislative privilege in instances where a state legislator is not personally threatened with liability and an exercise of the privilege would frustrate the execution of federal laws protecting vital public rights." *Bethune-Hill*, 114 F. Supp. 3d at 334-35.

Fifth and finally, communication between third-parties and legislators is relevant where their efforts translate into official policy. *See Stout*, 882 F.3d at 1007. These kinds of communications bear upon this Court's ability to determine what kind of role racial discrimination played in relation to the other districting criteria, and the privilege should yield, to the extent it even applies, in these circumstances.

CONCLUSION

For these reasons, Plaintiffs respectfully request this Court deny RedState and the non-party Legislators' motions to quash in full.

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