No. _____

In the Supreme Court of the United States

SALINE PARENTS, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Attorney General of the United States has weaponized the vast law enforcement resources of the federal government to target parents, including Petitioners, who publicly and vehemently object to certain policies being forced upon their children in various school districts across the country, specifically including school districts located in Loudoun County, Virginia, and Saline, Michigan. The Attorney General has pejoratively designated these parents as "threats" and "domestic terrorists," deeming them worthy of investigation and surveillance by the federal government.

1. Do Petitioners, who were the intended targets of the challenged policy directive, have standing to advance this ripe legal challenge when they have alleged a chilling effect on their right to freedom of speech and reputational harm caused by the directive?

PARTIES TO THE PROCEEDING

Petitioners are Saline Parents, Raelyn Davis, Xi Van Fleet, Joseph Carey Mobley, Michael Rivera, Shawntel Cooper, and Elicia Brand (collectively referred to as "Petitioners").

Respondent is Merrick Garland, the Attorney General of the United States ("Respondent" or "Attorney General").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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The opinion of the court of appeals appears at App. 1 and is available at 88 F.4th 298. The opinion of the district court appears at App. 20-31 and is available at 630 F. Supp. 3d 201.

JURISDICTION

The opinion of the court of appeals was entered on December 15, 2023. App. 1. The order denying Petitioners' petition for rehearing en banc was entered on January 18, 2024. App. 33. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III provides, in relevant part, "The judicial power shall extend to all Cases [and] Controversies . . . ." U.S. Const. art. III.

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

On October 4, 2021, the Attorney General of the United States publicly announced that the Department of Justice would be employing its vast law

enforcement resources to investigate parents who protest certain policies being implemented and enforced by various school boards across the country. Petitioners are parents and a parent organization that are at the epicenter of these protests in Loudoun County, Virginia, and Saline, Michigan.

I. Procedural Background.

On October 19, 2021, Petitioners filed their Complaint challenging the Attorney General's policy directive on federal constitutional grounds. R-1. On January 17, 2022, Petitioners filed a First Amended Complaint, which added additional and newly discovered facts and a federal statutory claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et. seq* ("RFRA"). R-8.

The Attorney General moved to dismiss the First Amended Complaint under Rules12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim. R-10. Petitioners responded. R-12.

On September 23, 2022, the District Court issued an Order, App. 32, and Memorandum Opinion, App. 20-31, granting the motion and dismissing the First Amended Complaint on standing grounds. On September 26, 2022, Petitioners timely filed a Notice of Appeal. R-17.

On December 15, 2023, the U.S. Court of Appeals for the D.C. Circuit issued its opinion, dismissing the

"action for lack of Article III standing and want of ripeness." App. 1-19.

On January 9, 2024, Petitioners filed a petition for rehearing en banc, which the court denied on January 18, 2024. App. 33-34.

This timely petition follows.

II. Statement of Facts.

With great public fanfare, the Attorney General announced on October 4, 2021, that the Department of Justice would be employing its vast law enforcement resources to investigate parents who allegedly harass and intimidate school board members during public protests at school board meetings. The protesting parents oppose certain "progressive" policies being implemented by these school boards across the country. Petitioners are parents and a parent organization that are at the epicenter of these protests in Loudoun County, Virginia, and Saline, Michigan. *See* R-8.

The Attorney General considers these parent protestors to be "threats," and his "Department of Justice 'is committed to using its authority and resources to *discourage* these threats . . . and *other forms of intimidation and harassment*.'" R-8, ¶ 71 (emphasis added). As the Attorney General acknowledges, the focus of his law enforcement efforts is not limited to "true threats"; it is much broader, and it includes the very protests engaged in by Petitioners (protests deemed intimidating and harassing, yet

protected by the First Amendment and thus the reason why Petitioners are alleging that these investigative efforts are unlawful).

Pursuant to the challenged policy directive, the Attorney General directed the FBI's *Criminal* Investigation Division and *Counterterrorism* Division to create specific "threat tags" for the investigations authorized by the directive.

The challenged policy directive is the direct result of *collusion* between the Biden administration and the "progressive" members of the National School Boards Association ("NSBA"), which submitted a letter to the White House on which the Attorney General relied in creating the policy directive. The Biden administration (including the Attorney General) orchestrated the creation of this letter in order to develop and adopt the challenged policy directive. R-8, ¶ 73. That is, the NSBA letter was drafted *in cooperation and conjunction* with the Biden administration in order *to create the pretext for the policy directive*. R-8, ¶¶ 73-81. The NSBA letter was the *sole basis* for the directive and for the issuance of the infamous October 4 memorandum. R-8, ¶ 76.

The NSBA letter referred to the parent protestors as "domestic terrorists"—the jurisdictional hook for the Attorney General.[1] And the only reasonable

[1] If the Attorney General does not consider these parent protestors to be "domestic terrorists," then how is it that the federal government has *any* jurisdiction for meddling in local school board matters? The panel seemed to care little about this important fact.

inference one could draw from the fact that the investigations were being conducted by the FBI's *Criminal* Division and *Counterterrorism* Division was that the Attorney General agreed that these parents were criminal threats and domestic terrorists. This fact was so plainly and patently obvious to the general public (but apparently not the panel) that the *New York Post* wrote that the Attorney General "owe[s] America's 'domestic terrorist' parents an apology."[2] As reported by *The Federalist*, "AG Merrick Garland admitted that the basis for targeting parents concerned about what their children are learning in schools was a letter from the NSBA."[3] And the *Washington Examiner* published an article titled, "House GOP calls on Garland to withdraw DOJ schools memo after NSBA apologized for 'domestic terrorism' letter."[4] This article states, in relevant part, "Because the NSBA letter was the basis for your memorandum and *given that your memorandum has been and will continue to be read as threatening parents and chilling their protected First Amendment rights*, the only responsible course of action is for you to fully and unequivocally withdraw your memorandum immediately." *Id.* (emphasis added).

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[2] https://nypost.com/2021/10/25/ag-merrick-garland-white-house-owe-americas-domestic-terrorist-parents-an-apology-and-an-explanation/.

[3] https://thefederalist.com/2021/10/21/ag-merrick-garland-admits-federal-war-on-parentssprang-from-school-boards-letter-not-evidence.

[4] https://www.washingtonexaminer.com/news/house-gop-calls-on-garland-to-withdraw-doj-schools-memo-after-nsba-apologized-for-domestic-terrorism-letter.

All of this is amply supported by the factual allegations in the First Amended Complaint. Yet, the panel affirmed the dismissal of the case on standing and ripeness grounds. App. 8-17. The panel's decision not only ignores the factual allegations in the First Amended Complaint and thus violates the appropriate standard of review, it conflicts with this Court's precedent and the precedent of United States Courts of Appeals.

III. Decision Below.

The D.C. Circuit rejected Petitioners' factual allegations and held that Petitioners lacked standing, relying principally on this Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972). Per the court:

> As in *Laird*, Appellants here claim only that their lawful activities are being chilled by the mere existence of governmental investigation, and at most indicate a fear that the Government, armed with the fruits of their data gathering, may take action against them in the future. This is insufficient to show injury in support of standing.

App. 11.

Similarly, the court rejected Petitioners' claim of reputational harm, concluding as follows:

> Ultimately, [Petitioners] have not offered anything to show that the Government labeled them in any way, let alone impugned their reputations. Any reputational injury

> Appellants believe they have suffered is therefore insufficient to satisfy Article III.

App. 14.

Finally, the court held that Petitioners' claims were not ripe, concluding as follows:

> At bottom, [Petitioners'] pre-enforcement claim rests on hypotheticals that are too remote, speculative, and abstract for judicial review. . . . Given the uncertainty with how events may play out, the matter raised by [Petitioners] is not currently fit for our review, and withholding consideration will not impose hardship on [Petitioners].

App. 18-19.

REASONS FOR GRANTING THE PETITION

The alleged facts, taken together, present a "plausible" narrative of a rogue policy designed to intimidate and silence parent protestors at school board meetings. Accordingly, this case presents important questions involving the right of private citizens to be free from government investigations and surveillance designed to chill their right to freedom of speech. It also raises the fundamental question regarding who has standing to challenge such governmental overreach.

The D.C. Circuit effectively immunized the policy directive from legal challenge by dismissing this case

on standing and ripeness grounds at the pleading stage even though Petitioners are the very target of the law enforcement action. In addition to alleging a chilling effect on their speech, Petitioners have alleged reputational harm as a result of the government's "criminal threat" and "domestic terrorist" designations.

The D.C. Circuit's decision permits a dangerous precedent, and one that is contrary to the decisions of this Court and those of the Sixth and Ninth Circuits. Those cases specifically include *Meese v. Keene*, 481 U.S. 465 (1987), *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015), and *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989). *See* Sup. Ct. R. 10(a) & (c). Review is warranted.

ARGUMENT

I. Government Investigations and Surveillance Chill First Amendment Rights.

By threatening intrusive and coercive investigations and surveillance on account of Petitioners' political and religious views, the Attorney General has chilled the exercise of Petitioners' First Amendment rights. This Court has repeatedly affirmed the constitutional infirmities associated with government investigations and surveillance that threaten to dampen the exercise of First Amendment freedoms. *DeGregory v. N.H. Atty. Gen.*, 383 U.S. 825, 829 (1966) ("Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy."); *Gibson v. Fla.*

Legislative Comm., 372 U.S. 539, 560-61 (1963) ("We deal here with the authority of a State to investigate people, their ideas, their activities. . . . When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it.") (Douglas, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("The provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) (noting the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights").

Ninth Circuit precedent also makes clear that Petitioners have standing to advance this challenge, which is ripe for review. In *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), the plaintiff churches brought an action against federal officials for violating their constitutional rights by conducting covert surveillance on members of their congregations. The Ninth Circuit allowed the case to proceed, stating, in relevant part:

> When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance, all as alleged in the complaint, we think a church suffers organizational injury because its ability to carry out its ministries has been impaired. . . . A judicial determination that the INS surveillance of the churches' religious services

> violated the First Amendment would reassure members that they could freely participate in the services without having their religious expression being recorded by the government and becoming part of official records.

Id. at 522-23. The same is true in this case. As alleged in the First Amended Complaint:

> A judicial determination that the [challenged policy directive] violates the Constitution and federal statutory law as set forth in this First Amended Complaint would reassure [Petitioners] (as well as other similarly situated parents and concerned citizens) that they can freely participate in their constitutionally protected activities without being denigrated and labeled as a criminal threat or domestic terrorist by the government, appearing in government records as criminal threats or domestic terrorists, or being threatened by the government with investigation because their constitutionally protected activity is deemed threatening, harassing, or intimidating simply because public officials oppose the content and viewpoint of [Petitioners'] message.

R-8, ¶ 107.

As Petitioners argued throughout, and as set forth further below, this case is not *Laird v. Tatum*, 408 U.S. 1 (1972), as the challenged policy has caused a chilling effect on the right to freedom of speech <u>*and*</u> reputational harm. As noted by the Sixth Circuit,

"where claims of a chilling effect are accompanied by concrete allegations of reputational harm, the plaintiff has shown injury in fact." *Parsons v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir. 2015) (citing *Meese v. Keene*, 481 U.S. 465 (1987), and distinguishing *Laird v. Tatum*, which "reject[ed the] argument that the plaintiffs' First Amendment rights were being 'chilled by the mere existence, *without more*, of [the Army's] investigative and data-gathering activity'").

Additionally, it is important to highlight that the Attorney General's directive and related communications never use the term "*true* threats"; it is purposefully much broader. "True threats," which are not constitutionally protected, are narrowly defined to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Va. v. Black*, 538 U.S. 343, 359 (2003). Here, as alleged in the First Amended Complaint, the Attorney General is not focused on investigating "*true* threats"—he is focused on targeting certain *viewpoints*. Indeed, he is focused on speech that some might consider "intimidating" or "harassing" at contentious school board meetings—the target of the policy directive. Consequently, it is error to conclude, as the panel did, App. 11, that the challenged directive does not reach constitutionally protected conduct. Speech that might be deemed "intimidating" or "harassing" is protected by the First Amendment. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (noting that only contextually *credible* threats to engage in acts of violence may be

proscribed and confirming that "debate on public issues should be uninhibited, robust, and wide open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Bradenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled into dulcet phrases. An advocate must be free to stimulate [] his audience . . . ."); *McCullen v. Coakley*, 573 U.S. 464, 491 n.8 (2014) (noting the "term 'harassment' [must be] authoritatively construed to avoid vagueness and overbreadth . . . .").

II. The Challenged Policy Directive Has Caused a Chilling Effect on Free Speech and Reputational Harm.

Like the challenger in *Meese v. Keene*, 481 U.S. 465 (1987), Petitioners face a "Hobson's choice" between forgoing protected activity (speaking out at school board meetings in opposition to certain policies and curricula—the very activity the Attorney General claims is threatening, harassing, and intimidating) and suffering not only injury to reputation as they are now deemed "domestic terrorists" and "criminal threats" for engaging in such activity, but also subjecting themselves to federal investigation,

surveillance, and record keeping on account of this activity.

In *Meese*, the challenger (Keene) simply wanted to exhibit films that the government labeled as "political propaganda." No one was forcing him to show the films. No one was preventing him from showing the films. No one was subjecting him to federal investigation and surveillance for showing the films. And the "political propaganda" label was, as this Court ultimately concluded, rather innocuous.[5] Consequently, there was nothing in *Meese* that was "regulatory, proscriptive, or compulsory in nature." *Compare* App. 9-10. There was nothing that Keene intended to do (showing the films at issue) that was "proscribed" by any law (and thus no imminent arrest, prosecution, or enforcement action). *Nothing*. Yet, this Court found that Keene had standing to advance his challenge (despite ultimately ruling against him on the merits). *Meese*, 481 U.S. at 472-77.

Keene chose to enter into the rough and tumble world of politics where labels such as "political propaganda" are prevalent. In comparison, Petitioners are simply concerned parents who care about their children and who now find themselves in the cross-hairs of the Attorney General and his

[5] Because the Court believed that the term "political propaganda" was "neutral," "evenhanded," and without any "pejorative connotation," it concluded that the act placed "no burden on protected expression" and was thus constitutional. *Meese*, 481 U.S. at 480. The same cannot be said about being designated a "criminal threat" or "domestic terrorist."

Department of Justice because of it. The panel's decision cannot square with *Meese*.

Moreover, as noted previously, courts readily find standing when a challenger is subject to law enforcement actions such as investigations and surveillance that dampen free speech rights even though the actions are not *per se* "regulatory, proscriptive, or compulsory." Being the target of government law enforcement actions such as investigations and surveillance on account of protected speech activity is in fact compulsory by its very nature. *Presbyterian Church*, 870 F.2d 518; *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("[The Supreme Court has] long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *NAACP v. Ala.*, 357 U.S. 449, 460-61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

Petitioners are not simply private citizens observing government action with which they disagree. In other words, this is not an abstract or theoretical disagreement; Petitioners are the very targets of the government action they are challenging. *C.f. Laird,* 408 U.S. 1; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454

U.S. 464, 482-83 (1982) (stating that "standing [is] not satisfied by the abstract injury in nonobservance of the Constitution asserted by . . . citizens" in general) (internal quotations and citation omitted).

The chilling effect of the challenged policy directive on Petitioners' constitutional rights causes an injury in fact that is redressable by a court order. Petitioners need not wait for an actual arrest or prosecution to occur to be injured by government action that deters protected speech. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

In addition to the injury to Petitioners' right to freedom of speech, Petitioners have alleged reputational harm. "As a matter of law, reputational harm is a cognizable injury in fact." *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (citing *Meese*).

Remarkably, in *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003), the D.C. Circuit, in an opinion written by Circuit Judge Edwards, the author of the panel opinion in this case, stated that "[c]ase law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action." In *Foretich*, the plaintiff challenged the Elizabeth Morgan Act. The D.C. Circuit found that the challenger, Dr. Foretich, had standing to advance his claims based on reputational harm even though the Act did not expressly name him nor did it expressly assert that he engaged in any criminal acts. The court cited the Act and stated that "it is clear from the terms of subsection (b) that 'the party' to whom the Act refers is Dr. Foretich and 'the child' is his daughter Hilary." *Id.* at 1204. Citing *Meese*, the D.C. Circuit agreed that the Act "directly damages [Dr. Foretich's] reputation and standing in the community by effectively branding him a child abuser and an unfit parent." *Id.* at 1214. Here, the Attorney General is "effectively" branding Petitioners "domestic terrorists" and "criminal threats"—in addition to subjecting them to law enforcement action. *Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes.").

As the facts and all reasonable inferences drawn from those facts show, the Attorney General has labeled (or designated, identified, declared, adjudged, *etc.*—choose the verb as they all convey the same message to the public, *see supra* nn.2, 3, 4) Petitioners as "criminal threats" and "domestic terrorists." Why

else would the FBI's Criminal Investigation Division and Counterterrorism Division be involved? Indeed, why is the Attorney General involved at all if this has nothing to do with federal crimes, including domestic terrorism? To claim that there is no reputational harm here is false. And this harm is sufficient to establish Petitioners' standing. *See supra; see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (holding that charitable organizations designated as "Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage [to] the reputation of those organizations in their respective communities").

III. This Challenge Is Ripe.

The doctrines of ripeness and standing "originate" from the same Article III limitation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). Quite often, Article III standing and ripeness issues "boil down to the same question." *MedImmune, Inc.*, 549 U.S. at 128 n.8. For the reasons that Petitioners have standing in this case, the ripeness requirement is satisfied as well.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for

judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. We begin with the hardship prong.

As *Meese, et al.,* make plain, the injury to Petitioners' reputations has already occurred, and it will continue without relief from this Court. Moreover, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). The hardship prong is met.

This case is also fit for judicial review. "In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997). Given the posture of this case (motion to dismiss at the pleading stage), the record, as set forth in the detailed First Amended Complaint, is more than sufficient for a court to render an informed decision on standing and ripeness.

Finally, justiciability requirements, such as ripeness, are properly relaxed in the First Amendment context. *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("We note that the doctrine of ripeness is more loosely applied in the First Amendment

context."); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033 n.18 (5th Cir. 1981) (relaxing the injury-in-fact requirement for standing in First Amendment challenges); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (same).

The claims are ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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