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IN THE
SUPREME COURT OF MISSOURI

SC92203

STAN McCLATCHEY, ET AL.,

Appellants,

v.

ROBIN CARNAHAN, ET AL.,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Daniel Green

BRIEF OF THE ATTORNEY GENERAL

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STATEMENT OF FACTS

The key facts are that on May 4, 2011, the General Assembly passed H.B. 193, establishing new congressional districts, over the Governor's veto. The vote was 109-44 in the House of Representatives and 28-6 in the Senate. L.F. at 11; 2011 House Journal pp. 1806-07, 1862; 2011 Senate Journal 1326. All Senators and Representatives elected as Republicans, plus a few elected as Democrats, voted in favor of the bill.

After the Plaintiff/Appellants sued the Secretary of State (presumably solely because of her role in administering elections – thus she took no position on the questions posed in the trial court, nor in this appeal), the Attorney General appeared pursuant to Rule 87.04 to defend the constitutionality of H.B. 193.

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ARGUMENT

Introduction

The Plaintiffs in this appeal take a position that largely overlaps with that taken by the plaintiffs in *Pearson v. Koster*, No. SC92200. But these Plaintiffs argue that the purpose of H.B. 193 was not to promote a particular partisan agenda, but to preserve the position of incumbent members of Congress. And these Plaintiffs limit their claims to compactness and equal protection. To decide this case, the Court must nonetheless answer most of the questions posed in *Pearson*:

The first is: What is the standard for review of the legislature's compliance with the constitutional mandate that it draw congressional districts that are "compact"? (See I below.) This Court, recognizing that the Missouri Constitution assigns responsibility for congressional redistricting specifically to the General Assembly, has said that a redistricting law will be upheld unless the General Assembly "wholly ignores" its constitutional obligation. These Plaintiffs say that they agree, App. Br. at 9-10, though later they use the wording of the less deferential "substantial compliance" standard urged by the *Pearson* plaintiffs, App. Br. at 14.

That is closely tied to the second question: What considerations do the Missouri Constitution permit the General assembly to use in drawing a redistricting plan? (See I below.) At one point, Plaintiffs say that the

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constitution imposes "only three limits" on legislative authority, App. Br. at 7, but elsewhere Plaintiffs claim that the legislature cannot use any criteria except population equality, contiguity, and compactness, App. Br. at 10. Their first statement is the correct one.

The third question here is the second question in *Pearson*: What kind of allegation is sufficiently specific and plausible so as to demand acceptance in response to a motion for judgment on the pleadings, or to state a claim under Missouri's "fact pleading" requirement? (See I below.) "Fact pleading" does not permit plaintiffs to merely state broad, conclusory, and largely implausible, claims. These Plaintiffs, like those in *Pearson*, point only to such conclusory statements when they assert that the General Assembly "wholly ignored" its responsibility to draw "compact" districts. But at least as important is their concession that redistricting cases are to be decided based upon the maps on their face (App. Br. at 10), an implicit (at least) concession that this case was appropriately decided without an evidentiary hearing.

The fourth question here – the third question in *Pearson* – is: What is the meaning of the "right to vote" under the Missouri Constitution? (See II.A. below.) These Plaintiffs do not assert a "right to vote" claim independent of their "equal protection" claim. But they, too, argue that "vote dilution" violates the "right to vote" as found in the Missouri Constitution. They, also, then assert that H.B. 193 must be given heightened scrutiny because it

implicates the “fundamental” “right to vote” because although the plan gives every eligible citizen a single vote and sets out districts of equal population, it diminishes the opportunity of some voters to elect the representatives they want (which is true, of course, of every possible plan).

And fifth, their claim, implicates the fourth question in *Pearson*, a variation on the second: Is a broad, conclusory statement that there is no “rational basis” for H.B. 193 other than partisan advantage sufficient to state a claim or to fend off a motion for judgment on the pleadings? (See II.B. below.)

These Plaintiffs do not invoke Article I, § 1 or 2 as the basis for an independent claim, so here the Court does not need not address the fifth question in *Pearson*.

That leaves two ultimate questions, one for each “point relied on” in Plaintiffs’ brief. In response to the first, compactness, as we explain below, the districts drawn by the General Assembly in H.B. 193 are sufficiently compact, when compared to those upheld by this Court previously. As to the second, equal protection, having drawn lines to precisely divide the population of the State into eight districts, the General Assembly had a rational basis for H.B. 193 – regardless of whether, in doing so, it also accomplished what may have been a goal of some legislators, to protect 8 of the 9 congressional incumbents.

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I. Plaintiffs fail to state a claim that H.B. 193 is invalid because the plan it enacts ignores "compactness." (Responds to Appellants' Point I.)

Our state constitution specifically assigns to the General Assembly the authority and responsibility to redraw congressional districts:

> When the number of representatives to which the state is entitled in the House of the Congress of the United States … is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

Art. III, § 45. [1] The mandatory criteria are: the number of districts must conform to the federal allocation of members of Congress to Missouri (in 2011, eight rather than nine); the districts must be "contiguous"; they must

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[1] Because the constitution assigned the task to the legislature, it would be inappropriate for a court to draw new districts even if the first set enacted were found to be unconstitutional and the old ones were no longer permitted as a result of federal law.

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be "as compact … as may be"; and they must be "as nearly equal in population as may be." These Plaintiffs do not claim that the General Assembly erred in defining eight districts rather than nine, nor that the districts are not equal in population. Nor do they attack contiguity. That leaves just one basis for a complaint grounded in Art. III § 45: compactness.

Twice, this Court has addressed compactness. The first time was fifty years ago, in response to a challenge to congressional districts enacted pursuant to Art. III, § 45. *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962) (*Preisler I*). There, the Court found that "[a]ll of the districts established by the 1961 Act [were] reasonably compact except the Tenth," although others "could have been improved in that respect." *Id.* at 557.[2] Despite the problem with the Tenth, the Court upheld the statute. In doing so, it set out a test for evaluating a redistricting plan enacted by the legislature – and held that the plan was entitled to a level of deference that defeats the Plaintiffs' claim here.

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[2] The Court did not include with its 1962 opinion a map showing the districts that were enacted. For the convenience of this Court, we have attached in the Appendix in *Pearson* the map printed in THE OFFICIAL MANUAL, STATE OF MISSOURI, 1963-64 ("The Blue Book").

In *Preisler I*, the Court observed that courts should not readily interfere with the exercise by the General Assembly of its constitutional authority to define congressional districts. Indeed, the Court held that the courts should become involved only when the legislature "wholly ignores" constitutional requirements:

> [T]he courts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis.

Id. at 555. In *Preisler I*, the Court held that despite some problematic districts, the plan as a whole showed that the legislature did not "wholly ignore" the compactness requirement. Thus, the Court upheld the new districts.

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After the 1970 census, the same plaintiff brought a challenge to new districts for the State Senate – and he lost again, in the same fashion. *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975) (*Preisler II*). The Court reaffirmed the standard that it articulated in *Preisler I*, quoting with approval the statement that "only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void." *Preisler I*, 362 S.W.2d at 555, *quoted in Preisler II*, 528 S.W.2d at 425.

Before the Court was the 1971 plan filed by the Senate Redistricting Commission, pursuant to the then-newly revised Art. III, § 7. That section does not use the word "compact"; instead, it requires that "no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population." But the amendment of Art. III §7 did not eliminate the portion of Art. III, § 5 that contains a requirement parallel to that required of congressional districts under § 45: "For the election of senators, the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal in population as may be."

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As it had 13 years before, the Court agreed with plaintiff Preisler that some districts did "not meet the compactness requirement": District 6 in the City of St. Louis, which stretched from the north nearly to the south end of the city (perhaps more the shape of a snake than the *Pearson* plaintiffs' "three-headed toad"); and District 33, which "thrust[] a narrow appendage from the middle of its body into the heart of Greene county." 528 S.W.2d at 427.[3] But "considering the overall, state-wide plan developed by the Commission the districts established substantially comply with the compactness requirement of § 5 of Article III."

Unlike the *Pearson* plaintiffs, the Plaintiffs here agree that the "wholly ignored" standard is the one that this Court has adopted to evaluate the compactness of congressional districts (App. Br. at 9) – though they also at times use the "substantial compliance" language (App. Br. at 14). But at one point in their brief, these Plaintiffs seem to go beyond the *Pearson* plaintiffs in their interpretation of what the Missouri Constitution requires or permits. Although on page 7 they say that the constitution imposes "only three limits" on the legislative prerogative, elsewhere they suggest that the constitution

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[3] The Court included with its opinion maps showing the district boundaries. We have attached copies of those maps in our Appendix in *Pearson*.

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actually permits the General Assembly to consider *only* those three things – population, contiguity, and compactness: "… while some lack of compactness is acceptable where it is necessary to satisfy a competing constitutional mandate (such as to create districts of equal population), it is not permissible to satisfy some other purpose." App. Br. at 10. Combine that statement with the recognition that "even a perfect circle or square [is possible] when splitting precincts and wards" (App. Br. at 12), and it appears that these Plaintiffs claim that the constitution requires a level of compactness that no redistricting plan in Missouri has ever achieved. Their reading of the constitution would mean abandoning all other criteria – not just ones like use of county boundaries, which explains most of the lines defined in H.B. 193, but even ones like "communities of interest," municipal boundaries, and historic districts that the Plaintiffs criticize the General Assembly for allegedly ignoring. Plaintiffs are right, not when they impose unprecedented compactness demands, but when they read compactness as a mandatory but non-exclusive criteria for the legislature to use.

These Plaintiffs do not object to the carving out of Districts 1 and 2, comprising the most urban parts of the St. Louis area, from what is otherwise a fairly rectangular District 3. They object only to District 5 (and the appendage on District 6). Perhaps that is why they go beyond the arguments made by the *Pearson* plaintiffs in another respect: they claim that a single

district can be so defective that it fatally afflicts the whole plan. Yet, every plan that has come before this Court has had at least one district that is problematic. That has never doomed a plan when considered as a whole. Nor, logically, could it, if "wholly ignoring" compactness is the standard.

If the legislature really had "wholly ignored" compactness, the districts would certainly look quite different than they do. It makes no sense (in others words, it is not plausible) to suggest that a single appendage from District 6 into District 5 in Jackson County is sufficient to show that the legislature "wholly ignored" compactness. The districts established by H.B. 193 do not wander across the state, but are relatively compact, albeit with an appendage of District 6 into District 5 and the carving out of Districts 1 and 2 from District 3. The districts are largely rectangular (though sometimes with areas carved out) to the extent that is feasible while following county lines. From the face of the map showing the new districts, then, it is apparent that a claim that the General Assembly "wholly ignored" compactness is not plausible.

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II. Plaintiffs fail to state a claim that H.B. 193 violates their right to be treated equally with other voters. (Responds to Appellants' Point II.)

A. H.B. 193 is subject to "rational basis" review, not to heightened scrutiny.

Like the *Pearson* plaintiffs, these Plaintiffs invoke the "right to vote" as the basis for demanding heightened scrutiny. Of course, the claims here, based on the assertion that the General Assembly sought only to protect incumbents, is no more aimed at protecting a "suspect class" than is the claim in *Pearson*. So the equal protection claim here, too, is subject to "rational basis" review unless the "dilution" of the votes of those who prefer a particular political party is a violation of a "fundamental right," here the "right to vote." It is not.

This Court did recognize "dilution" in a "right to vote" case that Plaintiffs cite multiple times in their brief, *Armentrout v. Schooler*, 409 S.W. 2d 138 (Mo. 1966). Nothing in *Armentrout*, however, provides support for the aspect of a "right to vote" that Plaintiffs assert. In *Armentrout*, the state courts were reacting to the line of federal cases that began with *Baker v. Carr*, 369 U.S. 186 (1962). Those cases required, applying the U.S. Constitution, that districts be equal in population – a rule that required immediate changes in how Missouri and other states drew districts not just

for Congress, or even for the state legislature, but for local governments as well. This Court, addressing the division of the City of Louisiana into wards, cited *Reynolds v. Sims*, 377 U.S. 533 (1964), as holding:

> that state legislative districting schemes which give the same number of representatives to unequal numbers of constituents have the effect of dilution and undervaluation of the votes of those living in the overweighted and overvalued districts, thus resulting in discrimination against those living in disfavored areas, and that *diluting* the weight of votes because of place of residence 'impairs basic constitutional rights under the Fourteenth Amendment, just as much as invidious discrimination based on factors such as race.'

Armentrout, 409 S.W.2d at 142 (emphasis added). The Court then reiterated "the principle that in a representative government the people are entitled to equal representation." *Id*. at 143. And it demanded that because "the members of the City Council … perform primarily legislative functions importantly affecting the people, the wards from which they are elected must be substantially equal in population, under the equal protection of the laws

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clauses of the constitutions of the United States and of the State of Missouri." *Id*.

The entire discussion in *Armentrout* – and in the cases on which the Court there relied – was on population equality. Nowhere in the decision was there a hint that the City of Louisiana had to consider or was barred from considering any other factor – neighborhood boundaries, economic status, nor even partisan or other voting patterns – in dividing the city into four wards. Other than population equality, the only requirements the court imposed were those imposed on the General Assembly by Art. III, § 25: "that the wards newly created shall be composed of contiguous territory as compact as possible." 409 S.W.2d at 144.

As noted above, these Plaintiffs never challenged the population equality of the districts created in H.B. 193. The kind of "dilution" at issue in *Armentrout* is simply not at issue here.

The other facet of the "right to vote" this Court has recognized is the right to actually cast a ballot. The most recent precedent on that point is another case that Plaintiffs cite more than once, *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006). But *Weinschenk*, like *Armentrout*, does not endorse the expansive reading of the "right to vote" that Plaintiffs articulate.

In *Weinschenk*, the question was the constitutionality of statutory provisions addressing the prerequisites for voting. Nowhere in that case was

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there a hint that an individual voter is entitled to anything more than the ability to actually appear at the polls and cast a ballot. The court held that the law at issue "creates a heavy burden on the right to vote and is not narrowly tailored to meet a compelling state interest." *Id.* at 221-22. H.B. 193 does not impose a burden on anyone's ability to vote. Rather, it ensures, consistent with *Armentrout* and *Baker v. Carr*, that every eligible citizen can vote, and that each vote will have precisely the same value.

The concept of "dilution" as applying to a particular class of voters comes not from the Missouri Constitution, nor from this Court's precedents, but from the federal Voting Rights Act. Section 2 of that Act articulates the concept; it bars "political processes leading to nomination or election in the State or political subdivision [that] are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A. § 1973(b). Applying only to "protected" "classes of citizens"– those defined by "race or color" (§ 1973(a) and (b)) – this prevents states and local governments from changing election procedures, including drawing new district boundaries, so as to dilute or diminish the ability of members of those classes to assert power in elections.

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As a practical matter, the Voting Rights Act concept of dilution works because it is limited to very few, very limited, defined classes – those created by "race or color." It is possible to evaluate what a particular change – including a new district boundary – does to a single, objectively defined group. But the concept becomes impractical the more groups are involved, and when they are defined by changeable, self-declared preferences rather than immutable characteristics. Already, there are difficulties in applying the Voting Rights Act standard where members of two racial groups live side-by-side. But what the Plaintiffs propose here is an application of the standard that goes well beyond that problem. They propose that "dilution" be applied without limits.

Explicitly, these Plaintiffs propose that the Court treat some self-defined group of voters as the Voting Rights Act treats racial minorities. It is unclear just what group that is. At times, it seems that Plaintiffs are saying that those who want to throw out incumbents are not being treated equally with those who want to retain them. *See*, *e.g.*, App. Br. at 17, 19. Elsewhere, it seems that Plaintiffs are concerned about whether residents of neighboring areas can vote in the same elections – Blue Springs with Independence, or those in Ray County with those in Carroll County. *See*, *e.g.*, App. Br. at 3, 21-22. But they never even pretend to give constitutional significance to any of those groups – nor, significantly, to state any kind of constitutionally-

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sound definition that would tell courts what groups to consider in deciding whether citizens have been treated equally. Thus their analysis, like the analysis of the *Pearson* plaintiffs, would, if accepted, apply to each and every group – or to every "community of interest," to use a term often used but not clearly defined in the district-drawing context. And it would immediately result in conflicts: every district line that can be drawn advantages those in one "community of interest" at the expense of those in another – particularly when the "communities" or groups are subjectively self-defined, consisting, for example, of people who today claim to vote with one political party, or those who today want to defeat incumbents.

Every line makes some candidate or potential candidate less likely to win, and thus makes those favoring that candidate less likely to obtain what they want in the election. Thus, under the Plaintiffs' proposed rule, those who want to be represented by a member of their Catholic parish could claim that their right to vote is violated by a line that divides the parish. Those who want to be represented by a member of their elementary school community could claim that their right to vote is violated by a line that places them into a district dominated by those served by the adjoining school. And residents of a city who want to be represented by a resident of their city, rather than someone who lives in the unincorporated portion of the county,

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could claim that their right to vote is violated by a district line that does not precisely follow the municipal boundary.

But there is no authority, in the Missouri Constitution nor in this Court's decisions interpreting and applying that Constitution, for the proposition that any of those claims would be valid. Again, the "right to vote" is limited to the ability to cast a ballot, and to have that ballot count as one vote, equal to the vote of one's neighbor or that of a cousin across the state, regardless of whether the neighbor or the cousin desires to elect the same candidate or someone from a different political party. And no district line violates that right – except for one that places more residents in one district than in another. So H.B. 193 is subject to rational basis review, not to heightened scrutiny.

B. Plaintiffs cannot show that H.B. 193 as a whole, nor that the line dividing Districts 5 and 6, lacks a "rational basis."

It is the Plaintiffs' burden to plead and prove, then, that there is no rational basis for the plan enacted in H.B. 193. Here again, these Plaintiffs look myopically at a single part of a line between just two districts: where the line between Districts 5 and 6 dips into Jackson County. They assert that the line there can be justified only by incumbent protection, and because, they say, that is not a rational basis for a line, the entire plan must fail. *See* App. Br. at 21-23.

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We do not address the evidence that might be presented regarding motive were a court to take up the specifics of the line in Jackson County – nor, to a great extent, could we, because we are constitutionally barred from compelling legislators to testify regarding their reasons for that or other legislation. Art. III, § 19. We agree with Plaintiffs that "[p]rior decisions striking down legislative redistricting efforts rest solely on the appearance of the districts as evidenced by district maps." App. Br. at 9. The same is true, in fact, of decisions *upholding* redistricting efforts. *See Preisler I*, 362 S.W.2d at 557, and *Preisler II*, 528 S.W.2d at 426-27. But a claim based on one departure from the ideal, even one that is evident on the face of the maps, is insufficient. Nothing in this Court's precedents suggests that an equal protection claim can focus on a small portion of one line between two districts and its impact on a few voters, rather than looking at the plan as a whole and its impact on voters across the state.

Indeed, Plaintiffs cite no case in which a court has been willing to focus on one small segment of one line and consider whether that particular segment has a rational basis. Districts are a bit like a balloon: when pressed in one place, they bulge in another. At the point of the bulge the cause may not be evident, but we know that it is the result of pressure at an entirely different place. Thus, even Plaintiffs implicitly recognize that when drawing district lines, a change made for whatever reason – even one that these

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Plaintiffs might concede is not only rational but laudable – can result in a line elsewhere that does not, were it considered in isolation, seem to make sense.

Plaintiffs note that even "[a] small change of boundary in or around suburban Kansas City would require the adjustment of multiple rural counties to offset the population." App. Br. at 13. That necessarily diminishes the strength of their argument about the size and shape of the "teardrop," for it confirms that if more wards or precincts in Jackson County were kept intact (*see* App. Br. at 12), other lines would have to change – and quite likely among those lines would be those that follow the boundaries of what these Plaintiffs call "rural counties," Ray, Lafayette, and Saline. Similarly, were legislators to decide that the common interests of the people of Saline and Carroll counties merited putting them together, either Ray County would have to be moved from District 5, or the portion of District 6 in Jackson County would have to be enlarged – even though a change in Jackson County was not the object of those legislators at all.

There are certainly rational bases for keeping Lafayette, Saline, and Ray counties together. Business, educational, athletic, and social connections may tie together citizens across the bridge that leads from Richmond to Lexington, or along the highway that connects Odessa with Concordia. And there are rational bases for putting three of what plaintiffs call "rural

counties" in the Fifth District, rather than just Ray or Lafayette County, with the more rural Eastern parts of Jackson County: were the eastern edge of the district the Jackson County line, the district would be left with very few "rural" residents – not enough to demand attention at all from their member of Congress. The alternative, "rational" plan that these Plaintiffs propose may place the residents of Saline County in a district with more allegedly like-minded voters, but at the expense of further isolating those left on the fringes of the reconstituted District 5.

Ultimately, these Plaintiffs have failed to plead anything more than an implausible conclusory statement that there is no legitimate reason for the line in Jackson County that offends them. And that is simply not enough to justify interfering with the legislative branch's constitutionally assigned task of redrawing districts to account for the results of the 2010 Census.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be affirmed and the challenge to H.B. 193 rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on January 3, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,853 words.

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