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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Jeanne M. McEvoy, Objector

vs.

Blake Harrison & John Grayson Robinson, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2015-2016 #61

Jeanne M. McEvoy, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2015-16 #61 ("Food Store License").

I. The Title Board set a title for Initiative 2015-16 #61 on January 6, 2016.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

> Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption?

II. Initiative #61 contains multiple subjects, contrary to Colo. Const., art. V, sec. 1(5.5).

#61 adds to #60 the element of eliminating any licenses – ***any*** – that would allow the sale of 3.2% beer for purposes of off-premises consumption. The two statutory changes fail the test for single subject: a "necessary connection exist(s)" between the two provisions, a connection "so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it." *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 25*, 974 P.2d 458, 462 (Colo.1999).

No such connection can be found. Proponents did suggest at the December 2 hearing that the two provisions would ensure that customers did not have to be unduly attentive to the alcohol contents of competing beers when making their purchases. It is anomalous that they would think

that customers in a food store are unused to check food labels when they do so routinely – for allergenic food components, caloric and fat content, and even labels indicating that the foodstuff was not made from genetically modified organisms. It is simply not credible to think that label comparison is a task beyond someone shopping for groceries. Or beer. In fact, the United States Supreme Court has invalidated regulations that prohibited the disclosure of alcohol content on beer labels. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-88 (1995) (invalidating federal ban on disclosure of alcohol content on beer labels).

The distinct nature of the two very different elements of #61 is clear. For example, *The Denver Business Journal* ran a story that contained the headline, "Grocery stores submit Colorado ballot language seeking sales of beer and wine – but not spirits," whereas *The Denver Post*'s headline read, "Campaign files ballot initiatives to end Colorado's 3.2 beer law." (*See* Exhibit A-1.) The reports both dealt with the submission of #60 and #61, and the *Journal* even noted that one measure also repealed authority for the lower strength beer. But the topics were clearly distinct. And proponents expressed their own concern in the *Journal* story that #61 might comprise two subjects. "Organizers hope to ask the Legislative Council whether they can repeal the Prohibition-era law at the same time they enact a new statute, or whether that would have to be done in separate actions."

It is certainly conceivable that voters would be forced to weigh a "yes" vote on one aspect of this measure as against a "no" vote on the other. "The single subject requirement eliminates 'the practice of combining several unrelated subjects in a single measure for the purpose of enlisting support from advocates of each subject and thus securing the enactment of measures which might not otherwise be approved by voters on the basis of the merits of those discrete measures.'" *In re Proposed Initiative 1996-4*, 916 P.2d 528, 531 (Colo. 1996). Voters who want to do away with 3.2% beer might not be in favor of the proliferation of liquor licenses, authorized by this measure. And voters who want beer and wine sales in supermarkets and convenience stores might not want to do away with one of their product options for off-premises consumption. Neither voter should have to accept the policy trade-off implicated by this multi-subject initiative.

The title itself establishes that the conclusion that there is a single subject is erroneous. The title reads, "Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption…" But there is not "a change" to the statutes; there are multiple "changes" that affect separate provisions and areas of interest relating to alcohol regulation. The title's misstatement establishes the vulnerability of this measure on single subject grounds.

The Board should thus reverse its decision that #61 contains a single subject.

III. The title set for #61 is misleading and prejudicial.

A. The title should not include the phrase, "full-strength beer and wine."

1. "Full-strength beer and wine" is a contrived phrase.

For the title setting process, the Proponents invented the phrase "full-strength beer and wine." The Board erred in agreeing to use of this phrase anywhere in the titles.

This phrase has no specific meaning. It is not used in the initiative itself. The titles' statement that full-strength beer and wine "commonly refer[]" to malt and vinous liquors is without foundation. As such, it undermines voter understanding and should be excluded from the title.

2. "Full-strength beer and wine" is a political catch phrase.

"Full-strength beer and wine" is a political catch phrase and is thus prohibited from being included in the title. A catch phrase consists of "words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment." *In the Matter of the Proposed Initiative on Casino Gaming*, 649 P.2d 303, 308 (Colo.1982). Evaluating whether particular words constitute a slogan or catch phrase must be made "in the context of contemporary public debate." *In the Matter of the Proposed Initiative on Workers Compensation*, 850 P.2d 144, 147 (Colo.1993).

When Proponents announced this measure last year, their speakers appeared before two oversized campaign banners that read:

- "42 States Sell Full-Strength Beer or Wine in Grocery Stores. Why Not Colorado?" (*see* Exhibit A) (emphasis added); and

- "Want to Buy Wine and Full-Strength Beer?" (*see* Exhibit B) (emphasis added).

The two were placed so that they could be displayed in news stories, and they were. (See Exhibit C.) There can be no question that Proponents seek to make "full-strength beer and wine" a prominent part of contemporary political discourse over this issue.

Literally and figuratively, this invented phrase is the backdrop of the Proponents' campaign, and now they seek to intertwine their political rhetoric with the ballot title. As the Supreme Court found in connection with other phrases deemed to be prohibited political catch phrases in ballot titles, "We have little difficulty concluding that [the challenged wording] could form the basis of a slogan for use by those campaigning in favor of the Initiative." *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to an Initiative Designated "Governmental Business,"* 875 P.2d 761, 876 (Colo. 1994). Clearly, "full-strength beer and wine" is ***already*** the "basis of a slogan" to be used by those who are conducting ***this campaign***. A phrase that does not even exist in the initiative itself, "full-strength beer and wine" should not be part of the ballot title because it functions as a political catch phrase for Proponents.

In *Coors Brewing Co. v. Rubin, supra*, the Court addressed whether several phrases – including "full-strength" – could be used for purposes of marketing beer. 514 U.S. at 481 (citing 27 C.F.R. § 7.29(f) (1994)). The use of such phrases in advertising was deemed to be even "more influential" than its use on product labels placed on products at the point of sale. *Id.* at 488. Likewise, the use of this phrase in the ballot title is intended to influence voters without regard for its contribution to substantive understanding of the initiative. Thus, it violates the prohibition on the inclusion of political catch phrases in ballot titles.

3. The Board is inconsistent in using non-textual references in the titles.

The Board approved the use of the phrase "full-strength beer and wine" but does not provide the clarity needed to explain "food stores," other than to state the minimum percentage of food sales for such an entity to qualify for this status. If it was consistent in using non-textual descriptors, the Board would include in the 25% food sales clause, "which includes but is not limited to all grocery stores and most convenience stores." Both types of stores qualify for a food store license, based on the express statements of the Proponents' counsel during Title Board hearings on Initiatives #51 and #52. If the Board is, in fact, going to substantively deviate from the text of the measure, it should at least be consistent in doing so, as long as such non-textual references reflect the announced intent of the Proponents.

B. The phrase "allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses" is confusing and misleading.

A variety of licenses granted under the Colorado Liquor Code are referred to as "retail" establishments. For instance, brew pubs, distillery pubs, gaming taverns, liquor stores, and vintner's restaurants are all "retail" operations as a matter of law. C.R.S. §§ 12-47-103(4) ("'brew pub' means a retail establishment...."), (7.3)("'distillery pub' means a retail establishment...."), (31)("'Retail liquor store' means an establishment...."), (39.5)("'vintner's restaurant' means a retail establishment...."); -414("A retail gaming tavern license shall be issued to persons who are licensed pursuant to section 12-47.1-501(1)(c)...."). Yet, none of these "retail" licenses is covered by the provisions in this initiative.

Instead, this measure applies solely to multiple ownership interests in "retail businesses licensed pursuant to this section." Proposed C.R.S. § 12-47-425(3). The vagueness of the title's terminology by referring to "certain retail liquor licenses" does not communicate the specific exception for multiple ownership interests only by commonly owned operations such as Walmart, Costco, King Soopers, Safeway, 7-11, or any of a variety of oil company owned or other multi-outlet convenience stores.

C. The title fails to state that food store licensees must establish needs and desires of local inhabitants only if local licensing authorities require it.

Petitioning to determine whether a community wants the licensed premises to offer regulated products is the most commonly understood aspect of the liquor licensing process. To affected neighborhoods often sign petitions to indicate their support of or opposition to the proposed license. *See, e.g., Kornfeld v. Yost,* 519 P.2d 219, 220 (Colo. App. 1976) (1,300 signatures on petitions in favor of and opposed to license), rev'd on other grounds, 567 P.2d 383 (Colo. 1977); *Bd. of Cty. Com'rs v. Whale*, 154 Colo. 271, 272 (1964) (969 signatures on petitions in favor of and opposed to license); *Schooley v. Steinberg*, 365 P.2d 245, 246 (Colo. 1961) (1,210 signatures on petitions in favor and opposed to license).

Such a showing of the needs and desires of the neighborhood can be sufficient to make a *prima facie* case for the granting of a liquor license. *Bd. of Cty. Com'rs of Adams Cty. v. Nat'l Tea Co.*, 367 P.2d 909, 910 (Colo. 1961) (granting of license was warranted where 1,230 residents, business owners, and employees of the neighborhood signed petitions in support of the

license, as did 227 non-residents; one competitor opposed the license). Thus, the recognized legal impact of such a demonstration establishes that the ability of a local licensing authority to bypass such requirement is a central feature that must be addressed in the title.

Voters would likely be surprised to discover that a routine requirement for new licenses, applicable across the various categories of licenses to be granted, will become optional for this new class of license. Given the wide breadth of licensing activity (all grocery stores and all convenience stores are eligible licensees, as stated by proponents at the December 2, 2015 hearing), the significance of this change is statewide, affecting every neighborhood that has such a retail outlet in its midst. As a result, the citizens' voice in the licensing process could be silenced if permitted at the local level. Where a ballot initiative deprives citizens of the right to engage in a central democratic right such as the petitioning of government, it is certainly a notable aspect of the measure that requires voter awareness. *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.1993).

This conclusion is supported by the Supreme Court's decision on a comparable measure. There, where grocery stores were to operate under the same requirement for a demonstration of needs and wants of the neighborhood as applied to other liquor licensees, the ballot title stated that the new class of license was subject to those requirements. *Table Wine in Grocery Stores, supra*, 646 P.2d at 922. However, here, there is a deviation from those requirements, and the title is silent on the issue. That silence is error that can be corrected by a plain statement that food store licensees may not be required to make such showings, based on the decision of the local licensing authority.

D. The title fails to state that the measure sets a presumptive and conclusive test for a licensee's reputation/character/record if the applicant has an unexpired fermented malt beverage retailer license.

For the reasons stated above, the initiative creates a new – and lesser – standard for establishing a licensee's reputation, character, and record, namely by referring only to its existing fermented malt beverage retailer license and the absence of an administrative or criminal prosecution against the applicant. This change in the law deserves mention in the ballot title.

Currently, there is no such limitation in the law. C.R.S. § 12-47-307(1(a)(II)-(V). The law requires that an applicant be "of good character and reputation satisfactory to the respective licensing authorities." *Id.* The ability of local officials to exercise discretion in determining whether to license persons who acquire and resell alcoholic beverages is an important element of current law. That discretion is eliminated by the provision in question. A title that informs voters that their licensing officials will be unable to make character and reputation assessments themselves is a central feature of the measure and should be disclosed in the titles.

For instance, the failure to be truthful in an application is sufficient reason for a licensing authority to deny a license on this ground. *See Fueston v. City of Colo. Springs*, 713 P.2d 1323, 1326 (Colo. App. 1985) (misstatements made to licensing officials in other states were adequate grounds for license denial); *see also MacLarty v. Whiteford*, 496 P.2d 1071, 1072-73 (Colo. App. 1972) (police chief made inquiries for licensing authority about applicant's character and reputation). The local authority's total inability to consider the veracity and licensing record of

companies that seek licenses in various jurisdictions is central to this measure. The Board should correct the title to reflect this aspect of the measure.

E. The title should reflect the imposition of a fee for this license.

Where a new license is created, it is appropriate to inform voters of the fee associated with such license. Where the Supreme Court has rewritten ballot titles regarding licensed activities, it included specific reference to such fees and did so of its own accord. *Dye v. Baker*, 354 P.2d 498, 460-61 (Colo. 1960) (to titles for measure legalizing certain gambling activities and licensing in connection therewith, adding language about "fees for the licenses provided for and disposition of the fees realized from licensed operations"). The Board should follow the Court's lead on this issue and add language to reflect the imposition of the fee on food store licensees.

F. The title's reference to "annual gross income" in the definition of "food store" is incomplete and incorrect.

The title states that a food store is defined "as an establishment that earns at least 25% of its annual gross income from the sale of food." The measure states that an establishment is a "food store" if it derives "a minimum of 25% of the gross annual income from its total sales, **excluding fuel products as defined at section 8-20-201(2) and lottery ticket sales from such total**." Proposed C.R.S. § 12-47-103(8.5) (emphasis added). These statements are inconsistent and misleading.

The most recent industry statistics indicate that fuel sales account for 69.2% of convenience store income. Of the remaining 30.8% of sales, tobacco accounted for 35.9% and various forms of "food" accounted for 45.4%.[1]

Thus, once fuel sales are excluded, food sales are about 14% of convenience store gross revenue (30.8% x 45.4% = 13.98%). However, the relatively minor nature of food sales to a convenience store (i.e., a potential food store licensee) is hidden from voters, due to the existing inaccurate wording of the title, which therefore must be corrected.

WHEREFORE, the titles set January 6, 2016 should be reversed or modified to account for the legal insufficiencies highlighted in this Motion for Rehearing.

[1] http://tinyurl.com/2014cstore (last viewed Jan. 13, 2016).

RESPECTFULLY SUBMITTED this 13th day of January, 2016.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2015-2016 #61** was sent this day, January 13, 2016 via first class U.S. mail, postage pre-paid to the proponents and their counsel at:

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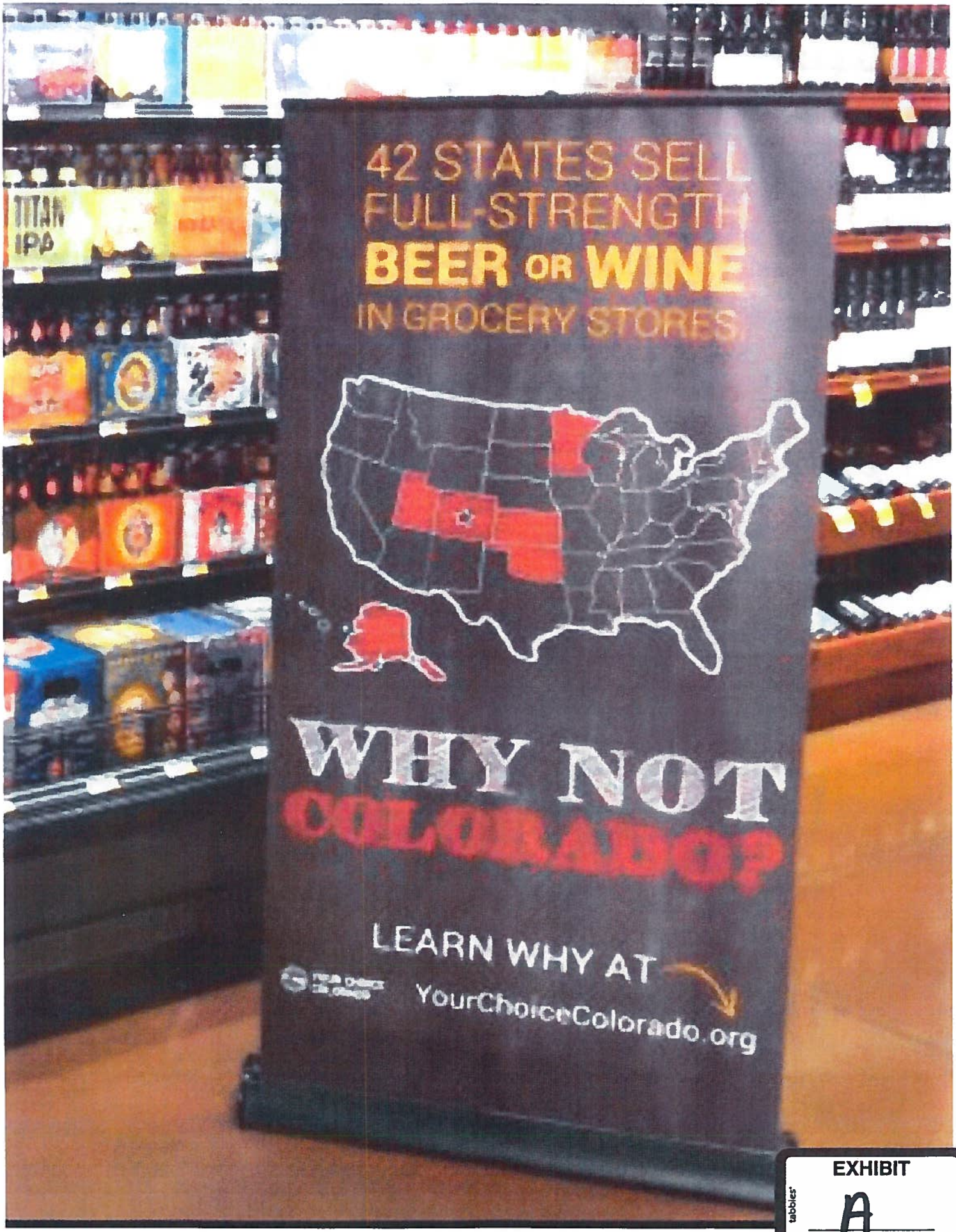
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