NO. 06-17328

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; RICHARD SONNENSHEIN, DR.; VALERIE MEEHAN,

Plaintiffs-Appellants,

VS.

CITY AND COUNTY OF SAN FRANCISCO; AARON PESKIN, IN HIS OFFICIAL CAPACITY AS PRESIDENT, BOARD OF SUPERVISORS, CITY AND COUNTY OF SAN FRANCISCO; TOM AMMIANO, IN HIS OFFICIAL CAPACITY AS A SUPERVISOR, BOARD OF SUPERVISORS, CITY AND COUNTY OF SAN FRANCISCO,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA HONORABLE MARILYN HALL PATEL Civil Case No. C 06-2351 MHP

PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Plaintiffs-Appellants Catholic League for Religious and Civil Rights, Richard Sonnenshein, and Valerie Meehan ("Plaintiffs"), through counsel, seek a rehearing and a rehearing en banc in this important Establishment Clause case challenging the constitutionality of Defendants' *official* government resolution that *expressly* targets the Catholic religion for criticism and disfavored treatment.[1] The

[1] In March 2006, Defendants passed Resolution No. 168-06, which states:

> Resolution urging Cardinal William Levada, *in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican*, to withdraw his *discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco* stop placing children in need of adoption with homosexual households.
>
> WHEREAS, It is an *insult* to *all San Franciscans* when a foreign country, like the Vatican, meddles with and attempts to *negatively influence* this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and
>
> WHEREAS, The statement of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are *absolutely unacceptable* to the *citizenry of San Francisco*; and,
>
> WHEREAS, Such *hateful and discriminatory rhetoric* is both *insulting and callous*, and *shows a level of insensitivity and ignorance* which has seldom been encountered by this Board of Supervisors; and
>
> WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and
>
> WHEREAS, Cardinal Levada is a *decidedly unqualified representative* of his former home city, and *of the people of San Francisco and the values they hold dear*; and
>
> WHEREAS, The Board of Supervisors *urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San*

evenhanded application of Establishment Clause principles to the facts of this case compels a reversal of the panel's opinion. Indeed, the panel's opinion turns the First Amendment on its head: the amendment was not written to protect the people from religion; it was written to protect religion from government tyranny. Consequently, in counsel's judgment, a rehearing is necessary for the following reasons.

1. Purpose for Rehearing.

The panel's decision overlooks both material points of fact and material points of law. And despite its claim to the contrary (*see* Op. at 6586), the panel failed to *apply* the proper standard of review for a dismissal of the complaint under Fed. R. Civ. P. 12(b)(6). Instead of accepting as true the material allegations in Plaintiffs' complaint, as well as reasonable inferences drawn from them, the panel improperly dismissed Plaintiffs' allegations in favor of Defendants' contrary assertions. By doing so, the panel deprived Plaintiffs the opportunity to prove and

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Francisco to *defy* all *discriminatory directives* of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, *in his capacity as head of the Congregation of the Doctrine of Faith at the Vatican* (formerly known as Holy Office of the Inquisition), to *withdraw* his *discriminatory and defamatory directive* that *Catholic Charities of the Archdiocese of San Francisco* stop placing children in need of adoption with homosexual households.
(R-1; ER-8-10) (R-28; ER-34-36) (emphasis added).

further develop their allegations through discovery and thereby defend the merits of the case on a complete record.

Judge Berzon's concurring opinion highlights the problem with the panel's decision. Noting that this case was "near—if not at—the line that separates" a valid policy from one that establishes a policy condemning religious beliefs in violation of the Constitution, Judge Berzon identifies several considerations that, in her view, would have changed the outcome of this case. (Op. at 6604-05) ("If any of these circumstances were different, I would think that the notion that there was an establishment of religion rather than the predominant pursuit of a secular purpose with a predominantly secular effect would have considerably more force, and the result might be otherwise."). First, she claims that "no regulation at all was attached to the resolutions—they were purely speech, albeit government speech." (Op. at 6604). As an initial matter, this is unavailing in light of this Circuit's precedent since this is not a Free Exercise claim, but an Establishment Clause claim. *See American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that a non-binding governmental resolution was subject to an Establishment Clause challenge). However, as alleged in the complaint, Defendants "threatened to withhold funding from Catholic Charities of the Archdiocese of San Francisco if they do not violate Church teaching and oppose Church authority." (R-1; ER-10). Certainly, this threatened action is a

form of government coercion and regulation that the panel simply dismissed. (*See* Op. at 6602, n. 15). Second, Judge Berzon claims "that the speech was broadcast to the public, *as far as appears in the opinion*, only by the enactment of the resolution itself, and not in any other, more intrusive and permanent way . . . ."[2] (Op. at 6604) (emphasis added). Contrary to this claim, the challenged resolution was and continues to be broadcast to the general public through the public board meeting that was held on the matter and the official website of the City and County of San Francisco (www.sfgov.org), and perhaps through other "more intrusive and permanent ways" that would be uncovered through discovery. Finally, Judge Berzon states that the challenged resolution, "*as far as the record shows*, was passed but then left dormant, and so did not pervade public perception of Catholicism or Catholics as would a public advertisement campaign." (Op. at 6605) (emphasis added). Contrary to this claim, there was *nothing* in the record indicating that the resolution was "left dormant" or that it "did not pervade public perception of Catholicism or Catholics."[3] As alleged in the complaint, this resolution did pervade public perception and it did have detrimental effects on

[2] This comment is also remarkable in light of this Circuit's decision in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), which held that a single cross located in the middle of the desert on federal land violated the Establishment Clause.

[3] Even a cursory review of the widely published media reveals that this resolution drew much public attention, and it was publicly discussed, promoted, and commented upon by the government officials who drafted, endorsed, and passed it.

Catholics and the Catholic religion. (*See* R-1; ER-10-11) ("Defendants have publicly vilified, criticized, and attacked the Catholic Church, fundamental Catholic religious beliefs and teachings, and Catholic leaders as an official act of government, thus abusing their governmental authority by establishing an official policy condemning the Catholic faith."). Indeed, the challenged resolution was a reflection of Defendants' policy and practice of discrimination against Catholics. (*See* R-1; ER-10-11).

By dismissing this case at the pleading stage, the panel not only ignored the inconvenient allegations in the complaint but it deprived Plaintiffs of the ability to present a complete record, which would demonstrate more fully and thoroughly the pernicious effect of the challenged resolution.[4] Weighing evidence and competing inferences in favor of Defendants at this stage of the litigation was improper.[5] At a

[4] Judge Berzon's third consideration was that the resolution was "not repeated or pervasive, but discrete." (Op. at 6604). As an initial matter, it is unclear to Plaintiffs exactly what Judge Berzon is referring to here, since this—nor any of the other considerations she highlights for that matter—is not required for alleging an Establishment Clause violation. Nonetheless, this consideration, like the others, is a matter that Plaintiffs should be allowed to explore and develop through discovery.

[5] A Rule 12(b)(6) dismissal is only proper where there is a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). When reviewing the motion to dismiss, the panel was required to read the complaint in the light most favorable to Plaintiffs and accept as true all material allegations in the complaint, as well as reasonable inferences drawn from them.

minimum, Judge Berzon's concurring opinion demonstrates that the complaint has alleged a legally cognizable claim and should not have been dismissed at this stage of the litigation.

2. Purpose for Rehearing En Banc.

Consideration by the full court is necessary to secure and maintain uniformity of its decisions, and this appeal presents a question of exceptional importance regarding the proper application of the Establishment Clause in the context of a claim of government disapproval of religion. Upon close inspection, the panel's decision conflicts with U.S. Supreme Court precedent and with this Circuit's decision in *American Family Ass'n*. Consequently, it is imperative that the full court hear and reverse this case in order to ensure the evenhanded application of Establishment Clause principles within this Circuit.

ARGUMENT

I. The Panel's Decision Conflicts with U.S. Supreme Court Precedent.

The "line" between permissible and impermissible official government acts that Judge Berzon refers to in her concurring opinion (Op. at 6604-05) is apparently no measure in this Circuit since it shifts further in the direction of finding no constitutional violation for "disapproval of religion" claims as the

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Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). Instead, the panel improperly weighed evidence and competing inferences in Defendants' favor.

alleged facts become more egregious. This shifting standard inevitably leads to a view of the law that is disapproving of religion.

In its decision, the panel acknowledged that a "hostility to religion" claim is viable under the Establishment Clause (Op. at 6587), thereby acknowledging that Plaintiffs have advanced a "cognizable legal theory." *See Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) ("The government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion."). The panel also rightfully acknowledged that "the Establishment Clause's neutrality mandate applies . . . with equal force" to claims alleging disapproval of religion. (Op. at 6587). Despite acknowledging these applicable principles of law, the panel failed to apply them, resulting in a decision that is disapproving of religion.

When the plain language of the challenged resolution is read in its proper context (i.e., as alleged in the complaint, it was drafted by government officials who oppose the Catholic Church and its teaching on sexual morality, particularly homosexuality, and who used the resolution as a way to officially attack those religious beliefs), with all inferences drawn from the language and the context weighed in favor of Plaintiffs, it is implausible to conclude that the challenged resolution was simply a religiously-neutral pronouncement by the government on the issue of discrimination. (*Compare* Op. at 6590 (claiming that "[i]t is apparent

that the Resolution is about non-discrimination in adoption," thereby crediting Defendants' assertion, which was contrary to the complaint's allegations)). Remarkably, the panel concludes that "an objective observer would conclude that the Board's purpose was to champion needy children, gays, lesbians, and same-sex couples within its jurisdiction; not to officially disapprove of the Catholic faith or its religious tenets." (Op. at 6591). However, in order to reach this conclusion, the panel had to ignore the actual language of the resolution and the context alleged in the complaint. Consequently, the decision reads as if the panel was considering some religiously-neutral statement on gay adoptions that was not before the court.

Indeed, it is undisputed that the "directive" that the resolution condemns was a directive based solely on *Catholic* religious beliefs issued by a *Catholic* leader—who is a Church official that is responsible for ensuring compliance with such beliefs—to a *Catholic* organization telling the organization that it must stop engaging in activity that is contrary to those *Catholic* beliefs. This has nothing to do with the City and County of San Francisco. San Francisco can and will continue to permit homosexual adults to adopt children under its laws. Consequently, Defendants' actual purpose was to use this opportunity to condemn, criticize, and ridicule the deeply-held religious convictions of Catholics and to call on local Catholics to defy Church leaders and to defy the religious beliefs professed by the Church. There is *nothing* secular about this.

According to the Supreme Court, "Government in our democracy, state and national, must be *neutral* in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

"When the government acts with the ostensible and predominant purpose of [disapproving] religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the *government's ostensible object is to take sides*." *McCreary County v. A.C.L.U.*, 545 U.S. 844, 860 (2005) (emphasis added). As emphatically noted by the Court, "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Indeed, "[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society." *McCreary County*, 545 U.S. at 876 (internal citation omitted). Thus, "the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality *in statements* acknowledging religion." *Id.* at 878 (emphasis added).

Here, there is no question that Defendants' ostensible objective in passing the resolution was to take sides on a question of Christian morality and Catholic Church teaching. There was nothing neutral about Defendants' statements—Defendants officially attacked and criticized the Church as a matter of government policy in clear violation of the Establishment Clause.

Throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" a particular religion, *see, e.g., County of Allegheny v. A.C.L.U.,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove," "inhibit," or evince "hostility" toward a particular religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) (stating that the Constitution "forbids hostility toward any" religion); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). Government endorsement of a particular religion is prohibited because the endorsement of one religious faith acts as a tacit disapproval of other faiths. Thus, an overt, government-sponsored message of disapproval of the religious beliefs and practices of one faith cannot pass constitutional muster any more than the implied condemnation resulting from the endorsement of another. As Justice O'Connor explained in *Lynch*:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying

> message to adherents that they are insiders, favored members of the political community. *Disapproval sends the opposite message*.

Lynch, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993), the Court noted, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." Defendants' anti-Catholic resolution violates this principle.

A government-sponsored message of disapproval of the Catholic Church, Catholic religious leaders, and Catholic moral teaching and religious beliefs, as evidenced by Defendants' resolution, sends a message to Plaintiffs and other Catholics that their religion and religious beliefs are disfavored in the community. *See County of Allegheny,* 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520. Furthermore, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 307 n.21 (2000) (internal quotations and citations omitted).

By weighing competing inferences drawn from the factual allegations in the pleadings, accepting Defendants' contrary evidence and inferences, and dismissing

the complaint, the panel disregarded the controlling substantive law and the standard governing motions to dismiss.

A. The Actual Purpose of the Resolution Was Unlawful.

Despite its claims to the contrary, the panel engaged in a truncated approach to the "purpose" inquiry that is contrary to Supreme Court precedent. In *McCreary County v. A.C.L.U.*, 545 U.S. 844 (2005), the Court harshly criticized such an approach, stating, "The Counties would read the cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it . . . ." *Id.* at 864-65 (emphasis added). As the case law demonstrates, courts should scrutinize the actual purpose of the challenged act based on a well-developed record and not merely accept the self-serving statements of the government. *See, e.g., Edwards*, 482 U.S. at 578. "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act." *McCreary County*, 545 U.S. at 862 (internal quotations and citation omitted).

As alleged in the complaint, the "traditional external signs that show up in the text" of the resolution (*e.g.,* referring to the Vatican as a "foreign country" "meddl[ing]" in government affairs and describing the Congregation for the Doctrine of the Faith as the former "Holy Office of the Inquisition") are plain examples of anti-Catholic bigotry. (*See* R-1; ER-2).

Also alleged in the complaint is the fact that the challenged resolution was drafted by political activists who have taken very public positions opposing the Catholic Church's teaching on the morality of homosexuality. These government activists see the Catholic Church and its religious beliefs as an obstacle to promoting their political and personal agendas. (R-1; ER-10-11). Consequently, these activists are now misusing the instruments of government to promote their political agenda against the Church by seeking to undermine the Church's authority on a matter of religious beliefs, doctrine, and teaching. An informed, objective observer would consider this further evidence of the anti-Catholic message conveyed by the resolution.

Thus, the panel's narrow and biased "purpose" analysis, in light of the Rule 12(b)(6) standard, was error as a matter of law.

B. The Effect of the Resolution Was Unlawful.

The panel's truncated approach to analyzing the "effects" prong under *Lemon* fairs no better. As the Supreme Court explained, when evaluating the effect of government action under the Establishment Clause, courts must ascertain whether the challenged action is "sufficiently likely to be perceived" as a disapproval of the plaintiff's religion. *County of Allegheny,* 492 U.S. at 597 (citations omitted) (emphasis added); *see also Lynch,* 465 U.S. at 690 (O'Connor J., concurring). This inquiry is from the perspective of an informed reasonable

observer. *See County of Allegheny*, 492 U.S. at 630 (concurring opinion) (stating that the "endorsement test" is "highly context specific").

In its decision, the panel disregards Plaintiffs' allegations based on its dubious inference that "the Resolution's primary message" was to promote "same-sex adoption" and "any hostility conveyed towards particular Catholic tenets by those statements was secondary at best." (Op. at 6599). Any fair-minded, objective reader of the resolution would find this conclusion erroneous, "at best."

In the final analysis, the panel essentially allowed Defendants to rebut Plaintiffs' *prima facie* case of disapproval of religion based on contrary factual assertions and inferences the panel drew from a record that does not yet fully exist.

II. The Panel's Decision Conflicts with Ninth Circuit Precedent.

The panel's decision also conflicts with a close reading of *American Family Ass'n, Inc. v. City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002). Contrary to the panel's conclusion, the sharply divided Circuit decision and its rationale demonstrate the constitutional violation at issue here. The majority in *American Family Ass'n* stated, without qualification, that the Establishment Clause "applies not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility toward religion." *Id.* at 1120-21. Thus, the majority acknowledged that the Constitution assures private citizens, such as Plaintiffs, that the government will not take official positions that amount

to establishing a policy of criticizing their religion and its beliefs, as Defendants have done in this case.

Moreover, a comparison of the "resolution and the letter" to the plaintiffs in *American Family Ass'n*—which, according to this Circuit, "present[ed] a closer question" than "the resolution urging Alabama lawmakers to adopt hate crimes legislation," which was also at issue in that case, *see id.* at 1122—with the resolution at issue here, plainly reveals that Resolution No. 168-06 is an "official disapproval or hostility toward" the Catholic Church in violation of the Establishment Clause. In *American Family Ass'n*, the court specifically noted that the documents at issue "read in context as a whole, are primarily geared toward promoting equality for gays and discouraging violence against them. A number of the Defendants' statements are merely rebuttals of medical and psychological evidence cited by the Plaintiffs in their advertisement *and not criticisms of the Plaintiffs' underlying religious beliefs*." *Id.* (emphasis added). In this case, Defendants' resolution is an ***explicit criticism*** of the Catholic Church, Catholic leaders, and Catholic religious beliefs. Resolution No. 168-06 states that Cardinal Levada, in his official capacity as the head of the Congregation for the Doctrine of the Faith, is "decidedly unqualified." It states that Catholic religious beliefs are "absolutely unacceptable to the citizenry of San Francisco." It describes these religious beliefs as "hateful and discriminatory," "insulting and callous,"

"show[ing] a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors." And it calls on local Catholic leaders and Catholic organizations "to defy" Church teaching and Catholic religious beliefs. (R-1; ER-9-10) (R-28; ER-34-36) (emphasis added). If *American Family Ass'n* stands for anything, it stands for the proposition that such governmental "disapproval" of religion is a violation of the Constitution.

Remarkably, even the district court below, which ultimately dismissed the case for failure to state a claim, found that "unlike the government actions at issue in . . . *American Family Ass'n*, the language in Resolution 168-06 *can be interpreted as explicitly hostile* toward the Congregation's views regarding homosexuality and adoption by same-sex couples. *No inference is necessary to conclude that the Resolution espouses opposition to a religious view* as expressed in the Considerations document." (R-34; ER-242) (emphasis). And this obvious finding is sufficient to demonstrate the panel's error here. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). Because Resolution No. 168-06 *in fact* conveys a message of "hostility" toward religion, as the district court candidly acknowledged, it violates the Establishment Clause. No further finding is necessary.

As Judge Noonan stated in his dissent in *American Family Ass'n*,

> A comprehensive statement of our constitutional commitment to the freedom of ideas from official censorship, correction, or condemnation was made by Robert Jackson writing for the Supreme Court in [*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)]: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . ." The plaintiffs have alleged a case where the fixed star has been obscured and an official orthodoxy prescribed.

American Family Ass'n, Inc., 277 F.3d at 1127-28 (Noonan, J., dissenting).

In the final analysis, the panel's decision is contrary to this Circuit's decision in *American Family Ass'n*, and it essentially undermines a plethora of case law prohibiting government disapproval of religion. Accordingly, it must be reviewed and reversed, allowing, at a minimum, Plaintiffs to develop and present a full record supporting their claims.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request rehearing and en banc review.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Robert J. Muise
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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 4,049 words.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
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