No. 20-330

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,
Petitioner,

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, ET AL.
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

After January 20, 2021, the question presented will be:

Before this case became moot on Inauguration Day, would the plaintiffs have had Article III standing to pursue claims under the Constitution's Emoluments Clauses against the former President of the United States based on the Second Circuit's factbound, case-specific application of the competitor-standing doctrine?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTRODUCTION

As this case comes to the Court, it stands on the brink of becoming moot. The only relief the plaintiffs seek on their claims under the Emoluments Clauses is prospective relief against President Donald Trump, in his official capacity, related to his receipt of payments from foreign and domestic governments while serving as President of the United States. But on January 20, 2021—twelve days after this Court is set to consider the government's petition for certiorari—President Trump's term in office will come to an end. At that point, there will be no further relief that any court can grant on the plaintiffs' claims, and no basis to further litigate the question the government asks this Court to consider—namely, whether the plaintiffs had Article III standing to bring their claims. That alone justifies denial of the petition.

Even if this case were not about to become moot, it would present no issue worthy of review. Contrary to the government's claim, there is no circuit split. The Second Circuit below applied the well-established test for Article III injury by requiring the plaintiffs to show a likelihood of competitive injury from the challenged conduct. That is the same standard applied by the decisions on which the government bases its claimed split. And the court's application of that test is factbound and case-specific, raising none of the important separation-of-powers issues that the government claims require this Court's intervention.

The petition, in short, meets none of this Court's basic criteria for review: There is no split in authority or issue of sufficient importance to merit this Court's attention. And soon, there will not even be a live case left to resolve. The petition should be denied.

STATEMENT

1. The Framers foresaw the danger of an Executive who exploits his office for profit at the expense of the citizenry, making him susceptible to those who would "corrupt his integrity by appealing to his avarice." *The Federalist* No. 73 (Hamilton). To guard against foreign corruption, the Constitution's Foreign Emoluments Clause bars the President from accepting any "Emolument" from a foreign state unless Congress consents. U.S. Const. art. I, § 9, cl. 8. And to prevent domestic corruption, the Domestic Emoluments Clause bars the President from accepting, beyond his fixed compensation, "any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl 7.

Although hardly the most famous part of the Constitution, the Emoluments Clauses have long been a routine part of federal administration. The rule against accepting emoluments is fleshed out by a body of practice and precedent from the Justice Department's Office of Legal Counsel and the Comptroller General. *See* Chong, *Reading the Office of Legal Counsel on Emoluments*, Lawfare, July 1, 2017, https://perma.cc/LQ6D-V5AM. As those offices have recognized, the Foreign Emoluments Clause is "a prophylactic provision," 10 Op. O.L.C. 96, 98 (1986), that protects against the possibility of "undue influence and corruption by foreign governments." 18 Op. O.L.C. 13, 15 (1994). For that reason, its "drafters intended the prohibition to have the broadest possible scope and applicability." 49 Comp. Gen. 819, 821 (1970). Its domestic counterpart has likewise been given a broad reading to prevent "Congress or any of the states from attempting to influence the President through financial awards or penalties." 5 Op. O.L.C. 187, 189 (1981).

Flouting that longstanding understanding and tradition, President Trump has used his office as a platform to promote his businesses and to "solicit[] the patronage of government officials." Pet. App. 6a. The President even announced that when governments spend millions of dollars on his services, he "like[s] them very much." *Id.* And the President's efforts have been successful. *See id.* at 6a–7a. "[F]oreign governments have taken note of, and been influenced by, the message that enriching the President by giving patronage to his establishments earns his favor." *Id.* at 6a. As one foreign diplomat said: "Why wouldn't I stay at his hotel blocks from the White House[?] … Isn't it rude to come to his city and say, 'I am staying at your competitor?'" *Id.* The President's continuing ownership stake in his businesses creates a direct link between the President's private bank account and the success of the businesses that bear his name. *Id.* at 3a–4a.

2. The plaintiffs in this case include high-end hotels and restaurants in New York and Washington, D.C. *Id.* at 2a–3a. One is an association of hundreds of restaurants—including some of the most highly rated establishments in each city. *Id.* at 3a. Another owns several of New York's most celebrated hotels and restaurants. *Id.* at 2a–3a. These establishments cater to high-end clientele, including foreign and domestic government officials. *Id.* at 3a.

After President Trump took office, the plaintiffs found themselves in the unenviable position of having to compete with businesses owned by the President of the United States. *Id.* at 3a. Detailed factual allegations, declarations, and testimony by experts in the restaurant and hospitality industries all confirm that the plaintiffs'

businesses "compete directly with roughly half a dozen Trump establishments over the same customer base, including foreign and domestic government customers." *Id.* at 5a; *see id.* at 4a–7a. As one expert concluded, the plaintiffs' hotels and restaurants are "[p]rimary competitors" with Trump establishments because they "market to and attract customers from essentially the same pool" given their "similar … location, facilities, services, amenities, class, image, and price." *Id.* at 5a.

The President's conduct puts the plaintiffs at a distinct disadvantage in competing for foreign and domestic government clientele: While they can offer the finest hospitality, they cannot offer the ability to curry favor with the President. *See id.* at 14a. As a consequence, the plaintiffs have shown, they experienced "loss of government patronage … after the presidential election" and "suffered injury due to lost business, wages, and tips." *Id.* at 5a–6a.

3. The plaintiffs filed this suit against President Trump in his official capacity, seeking declaratory and injunctive relief to redress the competitive harm they are suffering due to the President's unlawful acceptance of foreign and domestic emoluments. *Id.* at 4a.

The district court granted the President's motion to dismiss for lack of jurisdiction under Rule 12(b)(1) on the ground that the plaintiffs lack Article III standing. *Id.* at 9a. It did not question the plaintiffs' showing that they compete with the President's properties for government clientele. *See id.* Instead, without citing any allegations, evidence, or competitor-standing precedents, it opined that the plaintiffs failed to adequately allege that Mr. Trump's conduct "caused [their] competitive injury." *Id.* at 93a. The court also held that the plaintiffs lacked

standing because their claims fall outside the "zone of interests" that the Emoluments Clauses protect. *Id.* at 97a–100a.

Having concluded that it lacked subject-matter jurisdiction, the court did not decide whether the plaintiffs stated a claim under the Emoluments Clauses. *Id.* at 81a n.1.

4. The Second Circuit vacated and remanded, concluding that the district court erred in holding that the plaintiffs lacked Article III standing. Pet. App. 1a–79a. Because this case was resolved on a Rule 12(b)(1) motion that offered evidence beyond the complaint, the court "consider[ed] not only the allegations in the complaint but also the expert affidavits submitted in response to Defendant's fact-based motion to dismiss." *Id.* at 4a–5a n.5. Those allegations and affidavits, it held, satisfied "the well-established Article III threshold for economic competitors who allege that, because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace." *Id.* at 13a.

Specifically, the court held that the plaintiffs had shown that they "compete directly with Trump establishments and that the President's allegedly illegal acts favor [their] competitors." *Id.* at 14a. The resulting "unlawful market skew," it wrote, has caused the plaintiffs "economic harm in the form of lost patronage from government entities." *Id.* "Every dollar of government patronage drawn to Trump establishments by the hope of currying favor with the President is a lost dollar of revenue that might otherwise have gone to" the plaintiffs. *Id.* at 15a. "For competitor standing," the court concluded, "that is sufficient." *Id.* at 14a.

The panel also initially held that the district court erred in its zone-of-interests analysis because "[p]laintiffs who are injured by the defendant's alleged violation of a limiting law may sue to enforce the limitation." *Id.* at 44a. But the panel later amended its opinion to eliminate that analysis and to instead rest solely on the conclusion that the district court erred in treating the zone-of-interests test as a question of subject-matter jurisdiction. *Id.* at 77a–79a.

The Second Circuit denied the President's petition for rehearing en banc. *Id.* at 115a–116a.

5. While President Trump's petition for certiorari in this case was pending, the President lost his bid for reelection. On December 14, 2020—the day this brief is filed—Electors will meet in each state to cast their votes, and will elect Joseph Biden as the next President of the United States. On January 20, 2021—twelve days after this Court is set to consider the petition—President-Elect Biden will be inaugurated, and President Trump's term in office will come to an end.

REASONS FOR DENYING THE WRIT

I. This case's impending mootness justifies denial of certiorari.

A. This case is an exceptionally poor vehicle for this Court's review because the case will become moot on January 20, 2021, when President-Elect Biden is inaugurated as President. If granted, the petition would thus be subject to almost immediate dismissal. *See Aikens v. California*, 406 U.S. 813, 814 (1972) (dismissing writ of certiorari where the issue on which certiorari was granted had become moot). That alone is reason to deny the petition. *See, e.g., In re T.W.P.*, 388 U.S. 912 (1967)

(petition for writ of certiorari denied on mootness grounds); *Hayes v. Hornbuckle*, 341 U.S. 941 (1951) (same); *Spurlock v. Steer,* 324 U.S. 868 (1945) (same).

It is fundamental to Article III jurisdiction that federal courts may decide "only … *ongoing* cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (emphasis added). "It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). This Court thus lacks power under Article III to adjudicate a case that no longer presents an actual, ongoing dispute between the plaintiffs and the defendant. *See Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 546 (1976).

Here, the sole defendant is President Trump. The complaint names the President in his official capacity and seeks relief that "pertains only to the President's personal behavior" during his time in office—that is, his "personal receipt of revenues from his hotel businesses" that come from foreign and domestic governments. Pet. App. 176a–77a. Because the plaintiffs seek only prospective declaratory and injunctive relief to stop President Trump, while he is in office, from receiving such payments from businesses in which he has an ownership interest, the inauguration of President-Elect Biden—who has no such ownership interests—will leave nothing for this Court to do. "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *see also United Pub. Workers of Am. v. Mitchell,* 330 U.S. 75, 89–90 (1947) (a federal court may not issue a declaratory judgment on a claim that has become moot).

Because there is no reasonable expectation that this "same controversy" will persist once President Trump leaves office, the government's petition here amounts to a request for an advisory opinion on the standing of plaintiffs to bring Emoluments Clause challenges to future presidents. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). This Court, however, does not decide hypothetical questions based on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Lewis*, 494 U.S. at 477, 479–80. Even if an opinion here could be instructive in future Emoluments Clause cases, gaining "a useful precedent to brandish in disputes with other[s]" is not a sufficient interest to avoid mootness. *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 571–74 (7th Cir. 1987).

Even if there were some doubt about the case's impending mootness—and there is not—the imminent inauguration of a new president would render this case a very poor candidate for review of the question presented. All of the allegations and evidence on which the Second Circuit based the plaintiffs' standing relates to President Trump's ownership of businesses with which the plaintiffs compete. And any consideration of relief for President Trump's alleged violations of the Emoluments Clauses would, once he has left office, "be hypothetical, and to no effect." *Padilla v. Hanft*, 547 U.S. 1062 (2006) (Kennedy, J., concurring in denial of certiorari).

There is no sense in this Court's imagining, and then deciding, such a hypothetical case against President-Elect Biden or any future president. This Court's review in such a future case would depend on factual circumstances radically different from those on which the decision below relied. *See Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 224–

25 (1970) (dismissing writ of certiorari where, "[w]hile the changed circumstances do not necessarily make the controversy moot, they are such that, if known at the time the petition for a writ of certiorari was acted upon, [the Court] would not have granted it"). Thus, "[w]hatever the ultimate merits of the parties' mootness arguments," there are "strong prudential considerations disfavoring the exercise of the Court's certiorari power." *Padilla*, 547 U.S. 1062 (Kennedy, J., concurring in denial of certiorari).

B. The Acting Solicitor General may argue that, rather than denying certiorari, the Court should instead address the case's impending mootness by granting certiorari and vacating the decision below. Although this Court ordinarily has discretion to do so, "not every moot case will warrant vacatur." *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018). Because the "practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case." *Id.* at 1792. "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate … equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). For two reasons, the government cannot meet that burden here.

First, this case is not yet moot, and will not become moot, until President-Elect Biden is inaugurated on January 20. As this Court considers the petition, the case thus still presents an active case or controversy for Article III purposes, and the fundamental prerequisite for vacatur is, for that reason, not satisfied here. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (vacatur justified where the case "has become moot while on its way here or pending our decision on the merits"). It

is not the fact that the case is *currently* moot, but that it will imminently become so, that renders it a poor vehicle for this Court's review. Accordingly, denial of the petition is the proper resolution of this case.[1]

Second, there would be no justification for vacatur here even if the case were already moot. This is not a case where "mootness results from unilateral action of the party who prevailed below." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25. The impending mootness here is attributable not to the plaintiffs, but to President Trump's loss of the presidential election.

Nor do other equitable considerations support the extraordinary remedy of vacating the decision below. "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by … a 'preliminary' adjudication." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear,* 340 U.S. at 40–41). Because the plaintiffs here have sued President Trump in his official capacity, however, there is no possibility that the decision below could "spawn[] any legal consequences" for him after he leaves office. *Munsingwear,* 340 U.S. at 41; *see also Camreta*, 563 U.S. at 714 n.11 (vacatur is proper where mootness would prevent review of a decision that "has prospective effects"). The Second Circuit's decision on

[1] There is no basis for deferring consideration of the petition until after the case has become moot on January 20. Nor has the government even requested such a deferral. On the contrary, the government has expressly waived the fourteen-day waiting period for distribution of this case to the Court so that the petition can be considered—before Inauguration Day—at the Court's January 8, 2021 conference. *See* Ltr. of Acting Solicitor General Jeffrey B. Wall (Dec. 8, 2020).

standing does not even affect the rights of future presidents. The decision is not about the rights or liabilities of President Trump or any other president—it is about the right of these particular *plaintiffs* to have their claims against President Trump, arising out of their competition with his businesses while he holds federal office, heard in federal court. The government has thus no "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 26.

Indeed, it has "been the consistent position of the United States that the Court should ordinarily deny review of cases … that have become moot after the court of appeals entered its judgment, but before this Court has acted on the petition, when such cases … do not present any question that would independently be worthy of this Court's review." *See*, *e.g.*, Gov't Br. in Opp. at 7, *Elec. Privacy Info. Ctr. v. Dep't of Com.*, 140 S. Ct. 2718 (2020). In this scenario, the government has explained, "there is no unfairness in leaving the lower court's decision intact." Gov't Br. in Opp. at 11, *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 516 U.S. 913 (1995).

II. The case does not satisfy this Court's traditional criteria for granting certiorari.

Even if this case were not on the verge of becoming moot, the decision below would not warrant this Court's intervention. The Second Circuit's factbound application of this Court's established standing precedent implicates neither a real split in authority nor an important issue justifying certiorari.

A. There is no split in authority warranting this Court's review. The government claims (at 24) that the Second Circuit's decision is inconsistent with decisions of the First, D.C., and Federal Circuits, holding that, to

demonstrate a competitive injury sufficient for Article III standing, plaintiffs must show that they "will suffer a concrete injury." But the decision below did not hold otherwise. Far from it: The court's standing analysis is dedicated to the question whether the plaintiffs adequately alleged a "concrete" injury in this case. *See, e.g.*, Pet. App. 12a (holding that the plaintiffs must show an injury that is "concrete and particularized" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And the plaintiffs, the court held, satisfied that standard at the pleading stage. The plaintiffs, as the court noted, alleged that they "are losing, and will continue to lose, business from government patrons based on the patrons' belief that they can obtain official Presidential favor by spending their money in a manner that enriches the President"—allegations backed up with declarations and expert testimony. Pet. App. 16a; *see id.* at 4a–7a. That alleged injury, the court held, is both "clear and concrete." *Id.* at 16a.

The government nevertheless argues that, to satisfy the requirements of Article III, the plaintiffs must show that their lost business is "certainly impending" by identifying *particular customers* that they have lost as a result of the President's unlawful competition. Pet. 16. But that is not the standing test. This Court does not "require plaintiffs to demonstrate that it is *literally certain* that the harms they identify will come about." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Rather, it has repeatedly held that Article III standing is satisfied where the plaintiff shows a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) ("sufficient likelihood" of injury); *Clapper*, 568 U.S. at 414 n.5 ("substantial risk" of harm).

The decision below "simply appl[ied] [this] well established Supreme Court precedent to the facts alleged in the complaint," concluding that those facts "persuasively show a very substantial likelihood of injury to the" plaintiffs. Pet. App. 183a, 203a.

The First, D.C., and Federal Circuit decisions on which the government relies for its claimed split are not to the contrary. They, too, hold that a plaintiff need only show "a sufficient likelihood" of injury. *Adams v. Watson*, 10 F.3d 915, 923–24 (1st Cir. 1993); *see also Canadian Lumber Trade All.* v. *United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) ("plaintiff will likely suffer an injury-in-fact"); *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 24 (D.C. Cir. 1995) ("likelihood of imminent injury"). And none require that plaintiffs identify particular customers they lost. Indeed, the Second Circuit relied on the same purportedly conflicting decisions in support of its decision below. *See* Pet. App. 30a (relying on *Adams*, 10 F.3d 915); *id.* at 13a–14a (relying on *Canadian Lumber Trade All.*, 517 F.3d 1319).

Those decisions, like the decision below, are based on the "well-established Article III threshold for economic competitors who allege that, because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace." Pet. App. 13a. That competitor-standing doctrine emanates from this Court's decisions and is of unquestioned validity. *See Clinton v. City of New York*, 524 U.S. 417, 433 (1998) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement."); *see also, e.g.*, *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The

doctrine has consistently been applied by the federal courts in a range of contexts, most commonly in cases where businesses challenge agency regulations putting them at a competitive disadvantage. *See XY Planning Network, LLC v. U.S. Sec. & Exch. Comm'n*, 963 F.3d 244, 251 (2d Cir. 2020) (concluding that a financial-planning trade group had standing to challenge an SEC regulation that conferred an advantage on competitors); *see also, e.g.*, *Am. Inst. of Certified Pub. Accts. v. IRS*, 804 F.3d 1193, 1197–98 (D.C. Cir. 2015).

The government also argues that the Second Circuit's decision conflicts with the decision of the Fourth Circuit panel in *In re Trump*, 928 F.3d 360, 377 (4th Cir. 2019). As the government acknowledges, however, the en banc Fourth Circuit later vacated the panel's decision. *See In re Trump*, 958 F.3d 274, 282–85 (4th Cir. 2020). The panel decision is therefore no longer controlling precedent in the Fourth Circuit. And in any event, that case—which involves claims by Maryland and the District of Columbia—involves different plaintiffs, different claimed injuries, and consequently very different allegations and evidence, than this one. Its holding sheds no light on whether the plaintiffs demonstrated an Article III injury here.

B. This case does not, as the government claims, present "serious separation-of-powers concerns" warranting review. Pet. 10. Although the plaintiffs' complaint did present important and novel issues under the Constitution's Foreign and Domestic Emoluments Clauses, neither the district court nor the court of appeals reached those issues. Rather, "the litigation has been entirely consumed with whether it may be heard by the court"—that is, whether the plaintiffs have established

standing under the particular facts of this case. Pet. App. 182a n.9. As the case reaches this Court, the only question is whether the plaintiffs had standing, before Inauguration Day, to *bring* their emoluments claims in federal court. The important question whether the plaintiffs may actually *obtain relief* against the President on those claims is, in the context of the government's petition, not presented.

Although the government devotes much of its petition to the question of the "zone of interests" that the Emoluments Clauses protect, the Second Circuit did not decide that question. The decision below, as amended, simply holds that the district court erred in treating the zone-of-interests test as a matter of subject-matter jurisdiction. Pet. App. 78a (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014)). The government acknowledges the correctness of the decision on that point. Pet. 27–28. And it acknowledges that the district court would have been free to consider the issue on remand. *Id.* But neither the district court nor the court of appeals ever ruled on that issue, and—given the case's impending mootness—they never will. Accordingly, the issue is not presented.

Nor is the Second Circuit's standing analysis particular to the Emoluments Clauses or to suits against the President. As already explained, the decision below follows the commonplace doctrine of competitor standing—a doctrine that, the Second Circuit stressed, applies equally to a wide range of federal claims, including antitrust violations, false advertising, false designations of origin, and unfair competition. Pet. App. 29a. The decision simply applies that established standing doctrine to the allegations and evidence in this case. The government's

challenge to the court's conclusion amounts to nothing more than a claim that the court, under the unique facts of the case, reached a result that the government believes was incorrect.

Any importance that narrow, factbound question may otherwise have had is eliminated by the case's impending mootness. Because President Trump's term will soon come to an end, there is no longer any risk that he will face liability that might raise separation-of-powers concerns, or that he will suffer the "intrusive discovery" that the government fears. Pet. 28.

Indeed, far from supporting review, the fact that the plaintiffs' claims under the Emoluments Clauses may "raise fundamental issues respecting the separation of powers" instead "counsels against addressing those claims when the course of legal proceedings has made them … hypothetical." *Padilla*, 547 U.S. 1062 (Kennedy, J., concurring in denial of certiorari). "Matters of great public interest" of the sort the government identifies "are precisely the kinds of issues that demand the federal courts to be most vigilant" in ensuring that they exercise their limited jurisdiction only over live disputes. *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 715 (6th Cir. 2011). There is no reason for this Court to take up such issues in a case that will soon become moot.

CONCLUSION

This Court should deny the petitioner's petition for a writ of certiorari.

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