

IN THE
Supreme Court of the United States

SHANNON KING, *et al.*,

Petitioners,

v.

LANA FOSTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
BOARD OF PUBLIC EDUCATION FOR
THE CITY OF SAVANNAH AND
THE COUNTY OF CHATHAM
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

Whether the plaintiff may assert contract-impairment claims under 42 U.S.C. § 1981 against board members and superintendents who are not parties to the allegedly impaired contracts.

Whether the defendant board members and superintendents are entitled to the dismissal of the plaintiff's section 1981 claims based on qualified immunity.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	2
I. Status, Role and Authority of Petitioners	3
A. Local Board of Education Members.....	3
B. School District Superintendents.....	5
II. Applying United States Supreme Court Precedent to 11th Circuit Decisions	6
A. The Supreme Court Standard.....	6
B. The Eleventh Circuit’s Exceptional Jurisprudence of Exceptions	7
C. The Challenge of “Obvious Clarity” in Race-Based and DEI-Based Commitments.....	9

Table of Contents

	<i>Page</i>
D. A Lack of Legal Objectivity.....	11
E. Tort-Based Principles Should be Applied at the Dismissal Phase.....	13
CONCLUSION	14

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Acevedo v. City of Miami</i> , No. 24-12650, 2026 WL 2508872 (11th Cir. Aug. 26, 2026)	8
<i>Ames v. Ohio Department of Youth Services</i> , 505 U.S. 303 (2025)	11
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).	6
<i>Butts v. County of Volusia</i> , 222 F.3d 891 (11th Cir. 2000).	4
<i>C.W. by & through Doe v. Smith</i> , 127 F.4th 1278 (11th Cir. 2025)	8
<i>Cantu v. City of Dothan, Ala.</i> , 974 F.3d 1217 (11th Cir. 2020)	8
<i>Castro-Reyes v. City of Opa-Locka</i> , 166 F.4th 886 (11th Cir. 2026)	8
<i>Comcast Corp. v. National Association of African-American Owned Media</i> , 589 U.S. 327 (2020).	12, 13
<i>Crocker v. Beatty</i> , 995 F.3d 1232 (11th Cir. 2021).	7

Cited Authorities

	<i>Page</i>
<i>Domino's Pizza, Inc. v. McDonald,</i> 546 U.S. 470 (2006).....	2, 12
<i>Edwards v. Grubbs,</i> 179 F.4th 909 (11th Cir. 2026)	8
<i>Fisher v. University of Texas at Austin,</i> 570 U.S. 297 (2013).....	10, 11
<i>Fisher v. University of Texas at Austin,</i> 579 U.S. 365 (2016).....	10, 11
<i>Foster v. Echols Cnty. Sch. Dist.,</i> 169 F.4th 1291 (11th Cir. 2026)	8
<i>Gaines v. Wardynski,</i> 871 F.3d 1203 (11th Cir. 2017).....	7
<i>Griffin v. Aden,</i> No. 25-10929, 2026 WL 1819128 (11th Cir. June 24, 2026)	8
<i>Grutter v. Bollinger,</i> 539 U.S. 306 (2003).....	10
<i>Jarvis v. City of Daytona Beach,</i> No. 24-13456, 2026 WL 323259 (11th Cir. Feb. 6, 2026).....	8
<i>Joyner v. City of Atlanta,</i> 170 F.4th 1320 (11th Cir. 2026)	8

Cited Authorities

	<i>Page</i>
<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	11
<i>Martin v. Miami Dade Cnty.</i> , No. 25-10957, 2026 WL 1706894 (11th Cir. June 12, 2026)	8
<i>Muhammad v. Sec’y, Fla. Dep’t of Corr.</i> , No. 24-12479, 2026 WL 1895930 (11th Cir. July 1, 2026)	8
<i>Nat’l Educ. Ass’n v. United States Dep’t of Educ.</i> , 779 F.Supp.3d 149 (D.N.H. Apr. 24, 2025)	10
<i>Pears v. Franklin</i> , No. 25-10782, 2026 WL 308201 (11th Cir. Feb. 5, 2026)	8
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	5
<i>Shullaw v. McMullen</i> , No. 25-11491, 2026 WL 617759 (11th Cir. Mar. 5, 2026)	8
<i>Students for Fair Admissions, Inc. v.</i> <i>President & Fellows of Harvard College</i> , 600 U.S. 181 (2023)	10, 11

Cited Authorities

	<i>Page</i>
<i>Vinyard v. Wilson</i> , 311 F.3d 1340 (11th Cir. 2002).....	7
<i>White v. Pauly</i> , 580 U.S. 73 (2017).....	6
 Statutes and Rules	
Federal	
42 U.S.C. § 1981	1-7, 9, 11-14
Sup. Ct. Rule 37.2	1
 State (Georgia)	
O.C.G.A. § 20-2-61	3, 4, 5
O.C.G.A. § 20-2-109	5
 Scholarly Articles	
William R. Corbett, <i>Into the Twilight Zone: Reserve Citizenship Discrimination, Damage Caps, and Escalating Incoherence</i> , 90 Brook. L. Rev. 1059 (2025)	2, 3
Richard J. Grad, <i>DEI Under Scrutiny: Doctrinal Shifts, Litigation Risk and Emerging Threats to Civil Rights Use After SFFA</i> , 21 DUKECLPP 11 (2026)	9, 10

*Cited Authorities**Page***Other Authorities**

Bd. of Pub. Ed. for the City of Savannah and the County of Chatham (SCCPSS), Policy DJE available at https://simbli.eboardsolutions.com/ Policy/PolicyListing.aspx?S=4140	4
Off. for C.R., U.S. Dep’t of Educ., <i>Dear Colleague Letter: Title VI and Equal Protection in Light of Students for Fair Admissions</i> (Feb. 14, 2025) . . .	10
Off. for C.R., U.S. Dep’t of Educ., <i>Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act</i> (Feb. 28, 2025)	10
U.S. Dep’t of Educ., <i>Reminder of Legal Obligations Undertaken in Exchange for Receiving Federal Financial Assistance and Request for Certification Under Title VI and SFFA v. Harvard</i> (Apr. 3, 2025)	10

INTEREST OF AMICUS CURIAE¹

The Board of Public Education for the City of Savannah and the County of Chatham is a county-wide school district in the State of Georgia operating as the Savannah-Chatham County Public School System or SCCPSS. The Board is vested with the management and control of the operation of the public schools in Chatham County. The Board is a body politic and corporate. The Board is managed by the elected members of the board of education. The Board of Public Education.

SCCPSS is one of the ten largest school systems in the State of Georgia with approximately 34,000 thousand students and in excess of 5,000 employees.

Amicus has a profound interest in protecting officials and staff from personal liability under section 1981 based on the school district's performance of contractual obligations. Qualified immunity provides an important protection to staff from entanglement in litigation based on the roles they serve for the school district. Personal liability adds to the stress of staff and increases the cost of legal defense. Unwarranted exposure to personal liability is a disincentive to public service. In addition, uncapped exposure and the failure to dismiss unwarranted claims results in increased settlement costs for risk averse school districts and their risk management funds. The exposure

1. No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than amicus, and its counsel made a contribution to costs. All counsel of record received timely notice of this filing pursuant to Supreme Court Rule 37.2.

to personal liability claims is especially problematic in the context of agreements that pertain to capricious legal landscapes such as affirmative measures directed at addressing diversity, equity and inclusion.

SUMMARY OF ARGUMENT

This argument emphasizes points that were not addressed or fully unpacked in the Petition for Certiorari. Points of emphasis include: 1) the status, role and authority of school Georgia board members and superintendents in relation to qualified immunity considerations; 2) the recent 11th Circuit trend line in applying exceptions for piercing qualified immunity section 1981 that run askew of United States Supreme Court precedent; 3) the impracticality of qualifying DEI informed and race-based contractual commitments as grounds for section 1981 liability; and 4) the necessity of robust objective hurdles for overcoming dismissal in section 1981 cases.

ARGUMENT

In *Domino's Pizza Inc. v McDonald* Justice Scalia noted his concern over “the potential of satellite section 1981 litigation of of immense scope.” 546 U.S. 470, 479 (2006).

Current case law is trending in a boundless and ironic direction. Recent developments in section 1981 jurisprudence caused one commentator to reflect on the “bizarre asymmetries in federal employment discrimination law created by section 1981.” William R. Corbett, *Into the Twilight Zone: Reserve Citizenship Discrimination, Damage Caps, and Escalating*

Incoherence, 90 Brook. L. Rev. 1059, 1061 (2025). The legal standards applicable to the pre-evidentiary dismissal of Section 1981 claims are inconsistent and increasingly unmoored. There is a need for legal clarity and judicial alignment.

The case below demonstrates the potential of section 1981 to turn school board members and superintendents acting in their official capacity into contractual guarantors with uncapped liability if left unchecked.

I. Status, Role and Authority of Petitioners

This Amicus Brief provides the opportunity to unpack the roles and authority of board of education members and school district superintendents. This unpacking pertains to the right application of qualified immunity and contractual privity in section 1981 litigation.

A. Local Board of Education Members

Per O.C.G.A. § 20-2-61 “(l)ocal board of education members should work together with the entire local board of education and shall not have authority as independent elected officials but shall only be authorized to take official action as members of the board as a whole.” Local school board members are statutorily unable to act on their own. Instead, they act as a collective body. Making individual school board members subject to direct liability for actions they cannot take in their individual capacity is unwarranted.

Local school board members also act within a limited operative scope. Per O.C.G.A. § 20-2-61 “The fundamental

role of a local board of education shall be to establish policy for the local school system with the focus on student achievement.” In addition, “(i)t shall not be the role of the local board of education or individual members of such board to micromanage the superintendent in executing his or her duties, but it shall be the duty of the local board to hold the local school superintendent accountable in the performance of his or her duties; provided, however, that requesting and reviewing financial data and documents shall not constitute micromanaging.” *Id.* Moreover, the powers of the board are specifically limited when it comes to personnel matters. *Id.*

The Board of Education for the County of Chatham and City of Savannah has policies limiting the role of Board Members in the context of contracting. From a monetary standpoint, the Board is required to approve contracts exceeding \$100,000 in value. (SCCPSS Policy DJE)

Making school board members accountable for the exercise of duties that are statutorily excepted from their locus of action and authority is unjust. Based on their status, school board members should have immunity protections as the governmental body they comprise. See *Butts v. Cnty. of Volusia*, 222 F.3d 891 (11th Cir. 2000) (providing that section 1981 does not provide cause of action against state actor.)

The statutorily established power and function of school board members should be integrated into the applicable immunity analysis as well as the privity requirement for such liability.

B. School District Superintendents

A school district superintendent has broad executive-level administrative authority over the operations of their district. O.C.G.A. § 20-2-61 and O.C.G.A. § 20-2-109. However, it is unreasonable to make the superintendent subject to direct Section 1981 claims based on all of the district's contractual obligations. Applying a catchall “the buck stops here” approach to any chief executive officer in their personal capacity is an overreach in terms of section 1981 liability.

The Savannah-Chatham County Public School System manages an extensive menagerie of contractual agreements. It is not possible for our superintendent to actively tend to the obligations arising under these agreements. Operation at this scale requires systems and delegation.

While ignorance of the law is no a defense, personal awareness and engagement with all of a school district's contractual terms is effectively impossible. The critical role of superintendent would entail boundless personal liability if every contractual term served as the potential basis for a claim under section 1981. If legal holdings cajole Superintendents into micromanaging all contractual obligations upon pain of uncapped personal liability, courts will be directing risk-averse superintendents away from performing other critical tasks. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (Reaffirming that traditional tort and contract damages—both pecuniary and nonpecuniary—are available under Section 1981 without an administrative or statutory ceiling).

The demanding vocational plight of superintendents demands a fair application of qualified immunity under Section 1981. Claims that based personal liability on the superintendent's status as chief executive officer should be no more tenable than claims against the entity itself. As with board members, the status and role of a superintendent should be integrated into the applicable immunity and privity analysis to protect against an unjust expansion of section 1981 litigation.

II. Applying United States Supreme Court Precedent to 11th Circuit Decisions

A. The Supreme Court Standard

This Court has rightly pronounced that “clearly established law should not be defined at a high level of generality.” *White v. Pauly*, 580 U.S. 73, 79 (2017). Instead, clearly established law should be “particularized” to the facts of the case. *Id.* “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Otherwise, “(p)laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.* Moreover, qualified immunity “would be transformed from a guarantee of immunity into a rule of pleading.” *Id.* In the case below we see the sort of slippage that converts government officers into personal contractual guarantors under section 1981.

B. The Eleventh Circuit’s Exceptional Jurisprudence of Exceptions

The Eleventh Circuit has interpreted this Court’s jurisprudence on qualified immunity under Section 1981 as providing three paths to viable claims. *Gaines v. Wardynski*, 871 F.3d 1203, 1208 (11th Cir. 2017). First, the plaintiff may point to a “materially similar” case from the U.S. Supreme Court, Eleventh Circuit, or state supreme court holding the defendant’s exact conduct to be unlawful. *Id.* at 1208-10. Second, the plaintiff “point[s] to a broader, clearly established principle that should control the novel facts of the situation.” *Id.* at 1208. Third, “the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary.” *Id.*

The Eleventh Circuit refers the later two paths as “obvious clarity” cases. *Id.* at 1209. These types of cases are officially depicted as rare. *Id.* at 1209-10. They “exist where the words of the federal statute or constitutional provision at issue are ‘so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful,’ or where existing case law is so clear and broad (and ‘not tied to particularized facts’) that ‘every objectively reasonable government official facing the circumstances would know that the official’s conduct did violate federal law when the official acted.’” *Id.* at 1209 (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1350-51 (11th Cir. 2002)).

Officially, the “obvious clarity” paths are the exception to the rule. *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021). They obviate the core requirement of identifying a materially similar case to pierce qualified

immunity. *Cantu v. City of Dothan, Ala.*, 974 F.3d 1217, 1232 (11th Cir. 2020).

The two-headed exception is emerging as commonplace in the 11th Circuit. In eleven out of twelve identified cases where the 11th Circuit has denied qualified immunity since January 1, 2026, (including this case) the court relied on a general principle of law without identifying materially similar precedent. *Muhammad v. Sec’y, Fla. Dep’t of Corr.*, No. 24-12479, 2026 WL 1895930, at 10 (11th Cir. July 1, 2026); *Edwards v. Grubbs*, 179 F.4th 909, 928 (11th Cir. 2026); *Griffin v. Aden*, No. 25-10929, 2026 WL 1819128, at 7 (11th Cir. June 24, 2026); *C. W. by & through Doe v. Smith*, 178 F.4th 1278, 1293 (11th Cir. 2026); *Martin v. Miami Dade Cnty.*, No. 25-10957, 2026 WL 1706894, at 4 (11th Cir. June 12, 2026); *Joyner v. City of Atlanta*, 170 F.4th 1320, 1340 (11th Cir. 2026); *Foster v. Echols Cnty. Sch. Dist.*, 169 F.4th 1291, 1298 (11th Cir. 2026); *Shullaw v. McMullen*, No. 25-11491, 2026 WL 617759, at 9 (11th Cir. Mar. 5, 2026); *Jarvis v. City of Daytona Beach*, No. 24-13456, 2026 WL 323259, at 7 (11th Cir. Feb. 6, 2026); *Castro-Reyes v. City of Opa-Locka*, 166 F.4th 886, 902 (11th Cir. 2026); *Pears v. Franklin*, No. 25-10782, 2026 WL 308201, at 3 (11th Cir. Feb. 5, 2026). There was only one of the twelve cases where the court denied qualified immunity based on materially similar precedent. *Acevedo v. City of Miami*, No. 24-12650, 2026 WL 2508872, at 12 (11th Cir. Aug. 26, 2026).

This pending case demonstrates how a recipe of contract provisions, plus official role, plus allegations of racially motivated conduct can get a litigant past dismissal without bringing a particularized claim and without specifically pleading actual notice of a legal binding

requirement or linking actual conduct to the claimed harm. This effectively treats allegedly racist superintendents or board members at the pleading stage as the personal guarantors of an party's contractual provisions is a gross overextension of section 1981 liability—especially for state government officials.

C. The Challenge of “Obvious Clarity” in Race-Based and DEI-Based Commitments

The underlying claims against the Petitioners include allegations that the Petitioners prevented the school district from honoring its contractual commitments to conduct race-targeted recruitment and diversity-related training were not implemented with fidelity. These contractual claims do not meet the standard of clear legal obligation that allows for a viable section 1981 claim.

The Petitioners' contention that there is no clearly established right under section 1981 to enforce a race-conscious agreement was not addressed by the 11th Circuit and was left largely unaddressed in the Petition for Certiorari. (Petition for Certiorari at page 9). Yet, even if a race-conscious agreement does not facially nullify a cause of action, the unsettled legal landscape pertaining to race-conscious activity makes those obligations untenable grounds for section 1981 liability. Specifically, even the 11th Circuit's overly generous “obvious clarity” paths should not overcome the dismissal of contractual requirements that are not race neutral.

Legal authority regarding racial preferences is in a heightened state of flux. See e.g. Richard J. Grad, *DEI Under Scrutiny: Doctrinal Shifts, Litigation Risk and*

Emerging Threats to Civil Rights Use After SFFA, 21 DUKECLPP 11 (2026). Today entities are facing claims for their diversity, equity and inclusion (DEI) initiatives and affirmative race-based policies. *Id.* at 30.

The particular uncertainty for public schools is exemplified by certain high profile actions taken by Executive branch including a *Dear Colleague Letter: Title VI and Equal Protection in Light of Students for Fair Admissions* (February 14, 2025), *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act* (February 28, 2025), and *Reminder of Legal Obligations Undertaken in Exchange for Receiving Federal Financial Assistance and Request for Certification Under Title VI and SFFA v. Harvard* (April 3, 2025). Subsequently a court order was issued that called the legitimacy of these executive directives into question in terms of applicability and authority. See, *Nat’l Educ. Ass’n v. United States Dep’t of Educ.*, 779 F.Supp.3d 149 (D.N.H. Apr. 24, 2025).

One might say that the only thing that is clear is the lack of clarity. In fairness, this uncertainty is not new to the Trump administration. This Court has long been shepherding shifts in race-conscious requirements with all deliberate speed. Decisions such as O’Connor’s opinion in *Grutter v. Bollinger* gave affirmative action an uncertain future with an impending end point. 539 U.S. 306, 336-37 (2003) (upholding a holistic process affording “individualized consideration,” not quotas, while cautioning preferences should not persist indefinitely). Subsequent signpost cases (*Fisher I* and *Fisher II*) tracked a path that led to the *SFFA v. Harvard* decision, and the wider implications of that decision are unsettled.

Student for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 230-31 (2023). *Fisher v. University of Texas*, 570 U.S. 297 (2013), *Fisher v. University of Texas*, 579 U.S. 365, 380-83 (2016).

The practical, administrative, and compliance implications of *SFFA v. Harvard* on wider DEI initiatives and actives is uncertain. When there are contractual obligations that call for the implementation of DEI initiatives, then the legal authority to implement these initiative are also uncertain.

This unsettled legal domain does not warrant direct claims against board members and staff for failing to comply with an established legal obligation. The failure to perform race-conscious obligations is not the sort of contractual obligation that should be treated as a ministerial and perfunctory obligation that warrants jettisoning qualified immunity.

D. A Lack of Legal Objectivity

In his above-cited article Professor Grad posits that the potency of anti-DEI claims under section 1981 should be tempered by statutory and historic lineage of Section 1981. *Supra.* at 64-65. However, this loose suggestion is difficult to reconcile with the application of the equal standard of proof in *Ames v. Ohio Department of Youth Services*, 505 U.S. 303 (2025) and the long-standing expansion of Section 1981 beyond the protection of non-white people *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87, 96 S. Ct. 2574, 2582, 49 L. Ed. 2d 493 (1976).

Similarly, the district and circuit court below reference the historic and racial legacy of the claimant's experience in Echols County to bolster the decision not to dismiss the claims against Petitioners. They outline a history of slow racial integration, individual trailblazing, and instances of settled discrimination claims. Yet such matters of context should not sway this Court from granting certiorari.

Given the tendency to contextualize, there is a need to firmly apply the objective requirements for bringing a section 1981 claim that survives dismissal. For his part, Professor Grad notes that courts interpreting Section 1981 have long required proof of intentional discrimination and a contractual nexus, limiting its reach to purposeful exclusion rather than mere acknowledgment of race. (*Id.* at 65 citing *Domino's Pizza, Inc.*, 546 U.S. at 476-80 (requiring a § 1981 plaintiff to identify an impaired contractual relationship—existing or proposed—in which he has rights); *Comcast Corp. v. National Association of African-American Owned Media*, 589 U.S. 327 at 333-35 (requiring but-for causation under § 1981) along with other authority.) Per Grad, Section 1981 itself (1) requires proof of intentional discrimination, (2) expressly protects contract rights, and (3) requires an injury to the plaintiff's own contract rights. *Id.* at 65. The consistent application of objective standards is required to keep the constellation of Satellite 1981 litigation in matters of race. To do otherwise is to punish current office holders for the alleged sins of their forebears in office.

E. Tort-Based Principles Should be Applied at the Dismissal Phase

As a statutory tort, Section 1981 should be subject to legal doctrine that limits tort liability at the dismissal stage. For example, in the *Comcast Corp.* case referenced above, this Court ruled that a plaintiff who alleges race discrimination under 42 U.S.C. § 1981 must plead—and has the ultimate burden of showing—that race was a but-for cause of the plaintiffs’ injury, and that burden remains constant over the life of the lawsuit. A Section 1981 plaintiff must show, even at the pleadings stage, that race was the but-for cause of the injury, meaning the defendant would have acted differently if it were not for the plaintiffs’ race.

Here the claimant cannot make the case for “but for” causation with respect to the petitioners. Simply holding an office of leadership during the timeline of possible contractual performance does not create an actionable causal link, nor does asserting that an office holder has demonstrated beliefs or biases regarding people of different races.

The protection of qualified immunity under section 1981 should not be dropped when the claim is actually against the institution and not the officers. 1981 claims against a state actor are barred by sovereign immunity and claims against the officers and employees of the state action should be barred by qualified immunity if their actions are not distinguishable and distinct from the state actor.

CONCLUSION

Wherefore the United States Supreme Court should grant certiorari in this case to restore the essential protection of qualified immunity and privity requirements to school board leaders from section 1981 claims based on the contractual obligations of the state actors these leaders serve. School board members and superintendents should be entitled to the dismissal of section 1981 contract claims that are merely based on their leadership status and generalized assertions of racial bias a cause for alleged contractual breaches. This is particularly true when the contractual provision at issue has questionable legal status.

Respectfully submitted,

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