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SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY,

Petitioner

v.

JILMA MENESES,

Respondent.

**BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS
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OF WASHINGTON, and WASHINGTON DEFENDER
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Nat'l Judicial Task Force to Examine State Courts' Response to Mental Illness, *Leading Reform: Competence to Stand Trial Systems, A Resource for State Courts*, August 2021 2

I. IDENTITY AND INTERESTS OF AMICI CURIAE

The identity and interests of Disability Rights Washington, the American Civil Liberties Union of Washington, and the Washington Defender Association are set forth in the Motion for Leave to File Brief of *Amici Curiae* filed concurrently with this brief.

II. INTRODUCTION

In Washington, as in many other states, demand for competency restoration services has grown exponentially over the past decade.¹ The majority of state hospitals in the United States maintain a bed wait list of individuals who have been court-ordered for competency evaluation and restoration

¹ Dep't of Soc. & Health Servs., *Table 1: Statewide Court Orders to DSHS for Competency Services among clients waiting in jail by Order Type*, State Fiscal Year 2013-2022, <https://www.dshs.wa.gov/bha/trueblood-et-al-v-washington-state-dshs>

services.² The waits far exceed 30 days in some states.³ Those waiting are the most vulnerable among us—largely people who are unhoused, poor, disconnected from outpatient treatment, disproportionately Black and Indigenous, and cycling repeatedly through arrest and competency restoration, often on low-level charges. *Trueblood v. Wash. State Dep't of Social & Health Servs.*, 101 F. Supp. 3d 1010 (W.D. Wash. 2015), No. 14-cv-01178 Updated Stipulation re Evidentiary Hearing Ex. D, ECF# 992-4.

National stakeholders and experts have thoroughly considered this problem and made recommendations to address it.⁴ They have recognized the futility of investing exponentially

² Nat'l Judicial Task Force to Examine State Courts' Response to Mental Illness, *Leading Reform: Competence to Stand Trial Systems, A Resource for State Courts*, August 2021, at 1, https://www.ncsc.org/_data/assets/pdf_file/0019/66304/Leading_Reform-Competence_to_Stand_Trial.pdf. (hereinafter “Competence to Stand Trial Systems A Resource for State Courts”)

³ *Id.*

⁴ See, e.g., *Competence to Stand Trial Systems A Resource for State Courts*; Council for State Governments Justice Ctr, *Just*

into the competency restoration system, since demand continues to outpace these investments.⁵ Instead, the solution is to rethink the use of competency restoration for lower-level cases and to expand opportunities for diversion from criminal prosecution—essentially to reduce demand.⁶

Washington has vastly expanded its available diversion programs and resources, but these programs require the buy-in of local law enforcement, prosecutors, and judges to be successful. It is up to local jurisdictions, including prosecutors in Spokane County, to use their vast discretion to avoid competency restoration services in favor of more successful and stabilizing alternatives. Prosecutors must be a proactive part of the solution to the current crisis in our competency restoration system.

III. STATEMENT OF THE CASE

and Well: Rethinking How States Approach Competency to Stand Trial, October 2020 <https://csgjusticecenter.org/wp-content/uploads/2020/10/Just-and-Well27OCT2020.pdf>;

⁵ *Id.*

⁶ *Id.*

Amici adopt the Counterstatement of the Case as stated in the Department of Social and Health Services' (DSHS) Answer to Petition for Writ of Mandamus.

IV. ARGUMENT

A. Prosecutors Bear Significant Responsibility For Competency Delays.

As the most powerful actors in the criminal legal system, prosecutors have unparalleled and nearly unfettered discretion, subject to little judicial oversight, throughout the pendency of a case. They not only serve as the exclusive decision maker as to whether someone is charged with a crime, but if so, what crime. They request whether someone is held in custody following their arrest and have some say regarding the amount for which bail is set. Prosecutors have the power to decide whether charges will be dropped against a person, whether or not to offer a plea bargain, and what type of sentence a person will receive. Not only do prosecutors' decisions often predetermine the outcome of a criminal case, but their choices also control the operation of

the system at large. One such power prosecutors possess that most dramatically affects how the criminal legal system operates is the ability to challenge an accused person's competency under chapter 10.77 RCW. Once a question of competency is raised, the criminal case is stayed until the person is evaluated by a mental health professional. If the individual is found to be incompetent, a process of restoration generally commences.

Competency delays are exacerbated by prosecutors' decisions to not only overcharge low-level misdemeanor offenses generally, but to predominantly request competency services for people accused of misdemeanors. This choice exhausts increasingly limited resources pursuing competency services on individuals previously deemed incompetent, further overloading a system that is well beyond its breaking point. Within the 2022 fiscal year, nearly one-third of all statewide competency requests involved people previously deemed incompetent. *Trueblood*, No. 14-cv-01178, Updated Stipulation re Evidentiary Hearing, Ex D., ECF# 992-4. It is imperative for

prosecutors to acknowledge the role they continue to play in this crisis and take accountability for the choices they make. This is particularly important in Spokane County, where the state actor responsible for jail-based competency evaluations, Eastern State Hospital, had a striking 22 percent compliance rate for completing competency evaluations within the court ordered time limits for individuals who were held in jail last year.⁷

When prosecutors do not use diversion programs, they miss important opportunities to reduce the number of people in their jails who are referred and waiting for competency restoration services. For example, Spokane County has lagged well behind the other regions in the state in enrolling individuals into the outpatient competency restoration program. *Trueblood*, No. 14-cv-01178, Semi-Annual Report September 2023, ECF# 1063-2 at 80. This means that Spokane County has chosen

⁷ DSHS, *Behavioral Health Administration Update to Senate Ways and Means Comm.*, January 26, 2023; <https://app.leg.wa.gov/committeeschedules/Home/Document/249750>

instead to keep many people in jail awaiting inpatient restoration bed admission. Others charged with minor offenses in Spokane County await competency services out of jail, which is less harmful than waiting in jail, but still harmful.

Spokane County's argument here—that local jurisdictions should continue to arrest more and more people with serious behavioral health conditions and have the state restore them to competency in a timely fashion so that they can be prosecuted and punished—is short-sighted. It does not acknowledge the harm, costs, and ineffectiveness of these actions. In order to effectively address the long delays in access to treatment, prosecutors must understand how the decisions they make adversely impact the criminal legal and forensic competency systems. Unless and until this occurs, we can only expect the competency services system in Washington State to further deteriorate.

B. People Waiting For Competency Services Are In Need Of Outpatient Supports And Are Disproportionately Black, Indigenous, And People Of Color.

People waiting for competency services in Washington are very ill and living in deep poverty.⁸ *Trueblood*, No. 14-cv-01178, Updated Stipulation re Evidentiary Hearing Ex. D, ECF# 992-4. Over half (50.6 percent) of them are homeless or unstably housed. *Id.* at 13-14. To make matters worse, the majority of them need treatment for substance use disorder, and the majority of those who need it are not getting it. *Id.*

They are also not getting adequate outpatient medical treatment. Nearly 40 percent of this population also have indicators of other chronic disease. *Id.* However, if they receive outpatient medical care at all, it is largely through extremely expensive emergency department visits. *Id.*

⁸ Unless otherwise specified, data cited for the competency services population is for state fiscal year (“SFY”) 2022, though it should be noted that the data for this population is remarkably consistent across SFY 2019-2022.

It likely comes as no surprise that this struggling population is disproportionately Black, Indigenous, and People of Color (BIPOC). *Id.* In state fiscal year 2022, people for whom competency services were ordered were 21.1 percent Black, even though Washington's population is only 4.6 percent Black. *Id.* American Indian/Alaska Natives (13.9 percent vs. 2.0 percent) are even more dramatically overrepresented. *Id.* White people, by contrast, made up only 46.8 percent of the competency services population in 2022, even though they are 65.1 percent of the population of the state. *Id.*

Approximately 30 percent of the statewide competency services population has fallen off the Medicaid rolls and is not receiving Medicaid services of any kind, likely because of a past jail stay exceeding 29 days. *Id.*; RCW 74.09.670; *Trueblood*, No. 14-cv-01178, Official Transcript, ECF# 1015 at 301. Including all statewide competency services recipients, nearly half⁹

⁹ Statewide, 2471 out of 5006 *Trueblood* class members (49.3 percent) received no outpatient mental health care in SFY 2022.

received no outpatient mental health care of any kind in state fiscal year 2022. *Trueblood*, No. 14-cv-01178, Updated Stipulation re Evidentiary Hearing Ex. D, ECF# 992-4, at 13-14. Even those who did received on average only 2.7 days of outpatient mental health treatment for the entire year. *Id.* Dr. Thomas Kinlen, Director of the Office of Forensic Mental Health Services, has testified that this amount of outpatient treatment is inadequate to keep competency services recipients stable in the community, resulting in a wasteful and traumatic cycle of re-arrest. *Trueblood*, No. 14-cv-01178, Official Transcript, ECF# 1015 at 298.

Competency evaluation and restoration are not behavioral health treatment, and do not help break cycles of frequent arrest and hospitalization. *Id.* at 304-05. In state fiscal year 2022, 80.8 percent of people for whom competency services were ordered had been arrested before in the 12 months prior to their latest competency services order. *Trueblood*, No. 14-cv-01178, Updated Stipulation re Evidentiary Hearing Ex. D, ECF# 992-4

at 14. Each member of the population had been arrested an average of 2.5 times in that period. *Id.* Receiving competency services accomplished nothing to break the cycle of repeated arrest; each member had previously been evaluated for competency an average of 2.9 times, leading to an average of 2.0 prior competency restoration orders per person awaiting competency services. *Id.* In other words, people being ordered into competency services are cycling repeatedly through jails and the state hospitals, to no useful end.

C. The Demand For Competency Services Is Unsustainable.

The State of Washington has been subject to a permanent injunction since 2015 and has never come into compliance with constitutional deadlines for providing competency services to people waiting in jail. Significant delays also occur for people awaiting competency services out of custody. This is, in part, due to the surging demand for competency services in Washington, which has nearly tripled in the last decade. In the 2022 fiscal

year, DSHS received over 8,500 requests for competency services statewide, as illustrated by table 1 below.¹⁰

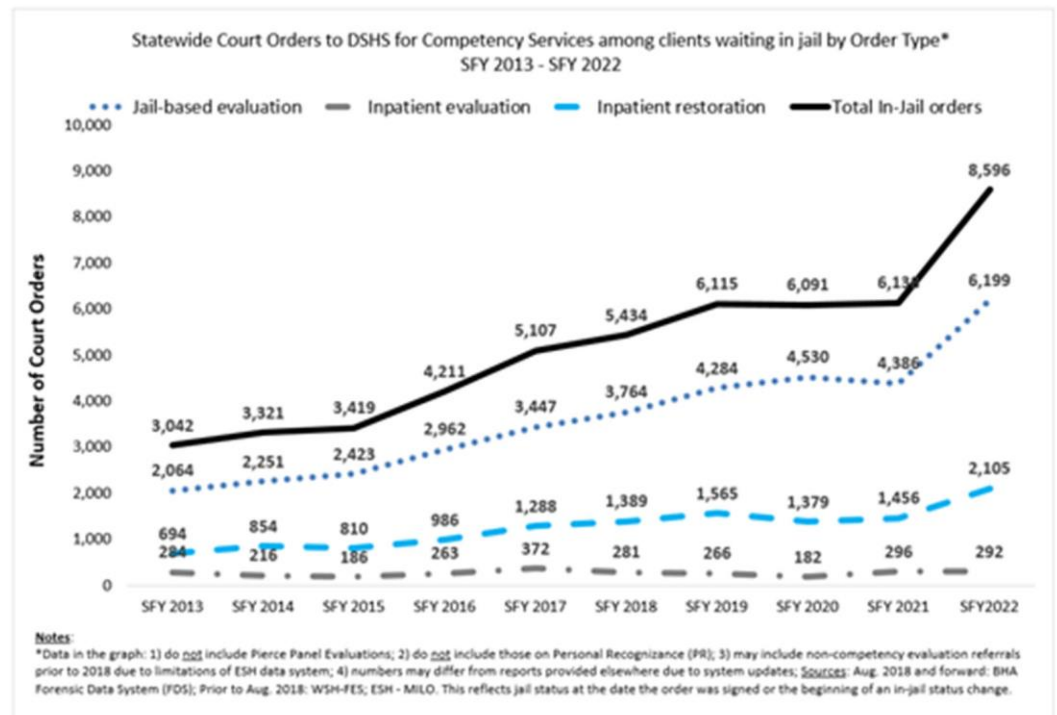


Table 1.

Usage of the competency services system between 2013 and the present has dramatically skewed toward lower-level offenses. Statewide, 73.6 percent of people waiting out of jail for

¹⁰ DSHS, *Table 1: Statewide Court Orders to DSHS for Competency Services among clients waiting in jail by Order Type*, State Fiscal Year 2013-2022, <https://www.dshs.wa.gov/bha/trueblood-et-al-v-washington-state-dshs>

competency evaluations in state fiscal year 2022 were facing misdemeanor charges only. *Trueblood*, No. 14-cv-01178, Updated Stipulation re Evidentiary Hearing Ex. D, ECF# 992-4 at 14.

Spokane County shares some responsibility for this unsustainable surge in demand. Spokane County's misdemeanor competency evaluation referrals have grown by 173 percent during 2013-2018, a trend that has not changed.¹¹ Some of the lower-level offenses the State insists on prosecuting stem from the accused's mental illness. For example, according to one public defender, a person charged in Spokane District Court with the misdemeanor of violating a no contact order after sending letters to the protected party believed that they were possessed by a devil who compelled them to mail the letters. The prosecutor

¹¹ DSHS, *Felony and Misdemeanor Competency Orders Presentation to Senate Behavioral Health Subcommittee*, September 23, 2019, at 16, <https://app.leg.wa.gov/committeeschedules/Home/Document/207313>.

refused to dismiss the charge for over a year before the court dismissed it, while the accused awaited out of custody competency services.

D. People Referred For Competency Services Wait A Harmfully Long Time.

1. A federal court has ordered shorter wait times for people in jail who have been referred for competency services, but harmfully long wait times continue.

The case of *Trueblood v. DSHS* was brought in 2014 in federal court seeking relief for individuals held in Washington jails for prolonged periods waiting to receive competency restoration services from the State. The Court certified the class as: “All persons who are now, or will be in the future, charged with a crime in the State of Washington and: (a) who are ordered by a court to receive competency evaluation or restoration services through the Washington State Department of Social and Health Services (“DSHS”); (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order.”

Trueblood v. Washington State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010, 1014 (W.D. Wash. 2015).

On April 2, 2015, the Court entered a permanent injunction against the State after an evidentiary hearing, finding:

Incarceration, generally, is bad for class members for several reasons. While waiting for long periods of time in local jails, class members are not receiving the mental health treatment they need. Their conditions worsen not only because of lack of treatment, but because prolonged incarceration exacerbates mental illness, making symptoms more intense and more permanent, and reducing the likelihood the person's competency can ever be restored. Incarceration increases the likelihood of suicide. Incarceration also unnecessarily exposes class members to harmful conditions such as jail overcrowding, which leads to increased violence among inmates and to the targeting of individuals perceived as weak. Because class members are stigmatized for what others perceive as erratic and unpredictable behavior, they are less likely to find a social support network within the jail and therefore are less successful than others at navigating the jail environment, increasing their feelings of isolation, terror, and despair.

Id. at 117-118.

The permanent injunction requires that DSHS cease violating the constitutional rights of people awaiting competency

services in jail by providing those services in a timely manner. *Id.* The order requires DSHS to provide in-jail competency evaluations within 14 days and admission for inpatient evaluation or restoration services within seven days. Nearly nine years later, the State has made some gains but has never been in substantial compliance with these timelines. *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, C14-1178 MJP, 2023 WL 4407539, at *2 (W.D. Wash. July 7, 2023). The federal district court found DSHS in contempt in 2016 (*Id.*, 2016 WL 3632486, at *1 (W.D. Wash. July 7, 2016)) and 2023 (*Id.*, 2023 WL 4407539, at *2 (W.D. Wash. July 7, 2023)) due to their failure to comply with the court's orders, resulting in many millions of dollars in contempt fines paid by the State. The court ordered these fines be used to pay for diversion services for class members. *Id.*

In late 2022 and early 2023, as Spokane County commenced the instant case, people in jail faced significantly longer wait times for state hospital admission than in years

prior.¹² This was a result of a growing backlog of civil commitment patients being held in state hospital forensic beds. *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, C14-1178 MJP, 2023 WL 4407539, at *17 (W.D. Wash. July 7, 2023)). Since then, the *Trueblood* court ordered the State to clear these civil patients out of the forensic beds and make those beds immediately available to people awaiting competency services in jail. *Id.* As a result, wait times for state hospital admission have significantly lessened in the past few months for people held in jail.¹³

The 2023 *Trueblood* court order has been effective at reducing the more recent growth in wait times related to the 2022

¹² DSHS, *Behavioral Health Administration, Competency Services Update to Senate Law and Justice Committee*, at 5 (“Current Wait Times (February 2023)”), February 2, 2023, <https://app.leg.wa.gov/committeeschedules/Home/Document/251076>.

¹³ DSHS, *Trueblood Monthly Report to the Court Appointed Monitor*, October 30, 2023, at 24, <https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2023Trueblood/October-Trueblood-Report-2023-10.pdf>.

civil patient backlog, but the *Trueblood* parties' broader joint strategy for reducing the wait times began five years ago. In 2018, the parties entered into a settlement agreement that reflected the understanding that given the explosion in demand for competency restoration services, focusing solely on opening more state hospital beds would merely result in an endless cycle of having to build ever more hospital beds. *Trueblood*, No. 14-cv-01178, Joint Submission of Second Revised Proposed Agreement Ex. A, ECF #535-1 at 8-9; Amended Joint Motion for Preliminary Approval Ex. A, ECF #599-1; and *Trueblood v. Washington State Dep't of Soc. & Health Servs.*, C14-1178 MJP, 2017 WL 1488479 (W.D. Wash. Apr. 26, 2017). Instead, the parties agreed that a better way to gain long-term sustainable compliance would be to stem the demand for competency restoration services by creating ways to divert the cases of people charged with low-level offenses. *Id.*

2. Harmfully long wait times continue for people who have been referred for out of custody competency services.

There is no lawsuit regarding people awaiting competency services out of custody, but delays continue for them as well as for people awaiting services in jail. While not as harmful as waiting for competency restoration in jail, waiting out of custody takes a considerable toll on the accused and sometimes their family. The stress of outstanding charges can worsen the mental health of people waiting for out of custody competency evaluations. People awaiting competency services often do not fully understand the nature of proceedings to begin with, making the lack of a set date when the case will move forward especially confusing and upsetting.

Among the most harmful results of out of custody competency delays are longstanding no contact orders prohibiting people from any interaction with their caregivers, who are at times also alleged victims. The lack of contact with a caregiver can cause the accused's mental health to deteriorate further, especially if the caregiver is a family member upon whom the accused has depended for many years. Compounding

the damage of no contact orders with caregivers is the fact that people awaiting out of custody competency evaluations often lived with their caregivers prior to the criminal charge. No contact orders can force families to find alternate housing arrangements for their loved one or can force the accused into homelessness. Even when a court is willing to lift a no contact order at the protected party's request, delays in scheduling hearings can mean the court does not lift the order immediately. One public defender reported that it can take up to a month and a half for Spokane District Court to lift a no contact order.

E. Prosecutors Can Divert Charges Instead Of Requesting Competency Services.

In response to the excessively long delays in access to competency services, the Washington State Legislature has enacted urgent reforms to the State's competency restoration system over the last several years. Some of these reforms have included the removal of the presumption for restoration on misdemeanor offenses (RCW 10.77.088), the expansion of

pathways to meaningful treatment options, the creation of diversion programs out of the criminal legal system for people with dementia or developmental or intellectual disabilities (RCW 10.77.202), and a call to reduce the flow of competency referrals coming from municipal, district, and superior courts, particularly for low-level, misdemeanor offenses.¹⁴

The 2018 settlement agreement in the *Trueblood* case also expanded ways to divert low-level offenses. It required DSHS to make large investments in diversion services and other reforms to the state’s forensic mental health system. *Trueblood*, No. 14-cv-01178 Amended Joint Motion for Preliminary Approval Ex. A, ECF #599-1. The goal is to stop the growing flow of people awaiting competency services in jail by instead offering alternative means for cities and counties to provide treatment and supports to people. These interventions help avoid arrest,

¹⁴ See RCW 10.77.088, 10.77.060 (“The legislature further finds that despite these investments there is a need for everyone to come together to find solutions to both reduce demand for forensic services and to increase their supply.”)

prosecution, or competency restoration services. The specific programs created under the *Trueblood* parties' agreement include but are not limited to: outpatient competency restoration programs to free up inpatient beds; intensive case management programs that target class members who have repeated experiences in the competency restoration system; generous rent subsidies, global leasing programs, and housing case management for class members, the majority of whom are homeless or unstably housed; and investments in crisis stabilization facilities and mental health/law enforcement co-responder teams. *Trueblood*, No. 14-cv-01178, Declaration of Nicholas Williamson re Final Implementation Plan Ex. A, ECF #679-1.

In addition to the state-funded programs, the *Trueblood* contempt fines paid by the state have funded 17 separate diversion program providers statewide since 2017. *Trueblood*, No. 14-cv-01178 Declaration of Kimberly Mosolf for Submission of Fines Distribution Plan Ex. A, ECF #1059-1. This

includes a \$22 million grant made to five programs in 2021 to provide transitional and permanent supportive housing to class members. *Id.* Years of monitoring and working with these diversion programs has demonstrated housing is key to preventing recidivism and repeated referrals for competency restoration services. *Id.* Spokane County’s Frontier Behavioral Health received one of these 2021 grants and has recently opened a 24-unit permanent supportive housing building for class members.¹⁵

The programs the parties in the *Trueblood* case agreed on are available in Spokane County and ten other counties in the state.¹⁶ State law does not require city and county prosecutors actually use these programs, however. They are entirely

¹⁵ Frontier Behavioral Health, *Supportive Housing*, <https://fbhwa.org/programs/trueblood/supportive-housing>.

¹⁶ Wash. State Dep’t of Social & Health Servs., *Trueblood et al v. Washington State DSHS: Trueblood Settlement Agreement Regions*, <https://www.dshs.wa.gov/bha/trueblood-et-al-v-washington-state-dshs>.

discretionary and generally require buy-in and consent of prosecutors. *See, e.g.*, RCW 10.77.088(1) (describing the role of prosecutorial discretion in diverting a misdemeanor case in which the defendant is found not competent).

V. CONCLUSION

Washington's competency services system harms the most vulnerable among us. The 5,006 people statewide who were ordered to receive competency services in state fiscal year 2022 struggled with psychiatric disorders, substance use disorders, and chronic physical diseases. They are disproportionately BIPOC, and they are living in desperate poverty, if not chronically homeless. This very vulnerable group received services essentially *only* through the most restrictive, most expensive modalities and during times of acute crisis. They were otherwise largely neglected, receiving effectively *no* outpatient treatment or supports to keep them stable between crises. It's no wonder

that under these circumstances, their lives are dominated by cycling through one crisis and arrest after another.

Continuing to force people through the competency services system will accomplish nothing for either their well-being or public safety. The efforts of the Spokane County Prosecutor's Office would be much more productively spent working to divert people away from competency services and into services designed to address the woefully inadequate outpatient supports they have received.

Pursuant to RAP 18.17, I certify that the word count for this Brief excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 3,711 words.

Respectfully submitted this 4th day of December, 2023.

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CERTIFICATE OF SERVICE

I certify that on December 4, 2023, the foregoing document was electronically filed with the Clerk of the Court using the Washington State Appellate Courts' Secure eFiling Portal which caused it to be served on the following electronic filing system participant as follows:

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DISABILITY RIGHTS WASHINGTON

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