IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY AND GEORGINA STUART Petitioners, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, Respondent. and STEVE EGGLESTON, an individual, Real Party-In-Interest.	Electronically Filed Jan 17 2024 05:00 PM Elizabeth A. Brown Clerk of Supreme Court CASE NO. DISTRICT COURT CASE NO. A-16-748919-C

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock: Defendant Clark County is a political subdivision of the State of Nevada with no shareholders.

2. GEORGINA STUART, now Georgina Anderson, is an individual and at all times relevant an employee of Clark County.

3. Names of all law firms whose attorneys have appeared for the parties in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Olson Cannon Gormley & Stoberski.

4. If litigant is using a pseudonym, the litigant's true name: Not applicable.

DATED this 17th day of January, 2024.

OLSON CANNON GORMLEY & STOBERSKI

/s/ *Felicia Galati, Esq.*

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

EMERGENCY PETITION FOR WRIT OF MANDAMUS

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA

Pursuant to NRAP 21, Defendants/Petitioners CLARK COUNTY and GEORGINA STUART ("Defendants"), by and through their undersigned counsel, hereby submit this emergency petition for an extraordinary writ of mandamus: (1) compelling the District Court to issue an order granting Defendants qualified immunity; (2) compelling the District Court to issue an order granting Defendants summary judgment on Plaintiff's §1983 substantive due process claim alleging a violation of his parental rights; and (3) compelling the District Court to issue an order granting Defendants discretionary-act immunity on Plaintiff's intentional infliction of emotional distress claim.

Trial is set to begin 1/22/2017. On 1/15/2024, at 3:52 p.m., a mere four business days before the scheduled 1/22/2024 trial date, and more than 90 days after Defendants' Motion for Summary Judgment was argued on 11/7/2023, the District Court entered the Findings of Fact, Conclusions of Law and Order (Order) (Appendix, WRIT240-261)denying Defendants' Motion for Summary Judgment as to Plaintiff's causes of action alleging Substantive Due Process Civil Rights Violation (42 U.S.C. §1983), and Intentional Infliction of Emotional Distress (IIED). In so doing, the District Court denied protections of qualified and discretionary-act immunity afforded to Defendants.

This Emergency Petition is based upon the grounds that the District Court's 1/15/2024 Order denying qualified and discretionary-act immunity violates well-established federal qualified immunity case law, and well-established federal and state case law concerning discretionary-act immunity afforded by N.R.S. 41.032(2). The Court's order relied in substantial part on the allegations of Plaintiff's Complaint, (seemingly conducting an NRCP 12(b)(5) analysis), without consideration of the factual record provided in support of and in opposition to the Motion for Summary Judgment, and thus determined there are disputed issues of fact. The Order thereby constitutes a clearly erroneous decision and an abuse of discretion. The issue of qualified immunity from litigation is a question of law for the Court. Therefore, Petitioners have no plain, speedy and adequate remedy in the ordinary course of law, because once the trial begins, qualified immunity is effectively lost forever. In addition, this Emergency Petition raises important issues of law that require clarification concerning application of clearly established federal law creating an immediate/automatic appellate right as to a denial of qualified immunity. Considerations of sound judicial economy and administration militate in favor of granting the Emergency Petition.

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I. JURISDICTION

This Court has jurisdiction to receive and consider this Emergency Petition and to grant relief based upon N.R.S. §34.160 through N.R.S. 34.310, N.R.S. 2.130(2), and the Nevada Constitution, Article 6, Section 4.

II. ROUTING STATEMENT

Pursuant to NRAP 17(a)(12) and NRAP 21(a)(3)(A)(11) and (12), this matter is presumptively retained by the Supreme Court because it raises, as a principal issue, a question of first impression involving federal case law establishing that a denial of qualified immunity under 42 U.S.C. §1983 is immediately appealable, and raises a question of statewide public importance that is not within the original jurisdiction of the Court of Appeals pursuant to NRAP 17(b). As such, jurisdiction over this matter is retained by the Nevada Supreme Court.

III. PARTIES TO THE LAWSUIT

Petitioners, CLARK COUNTY and GEORGINA STUART, are the named Defendants in Eighth Judicial District Court Case No. A-16-748919-C, Dept. 22, Steve Eggleston v. Clark County, et al. Respondent is the Honorable Susan J. Johnson, District Court Judge, Department 22 of the Eighth Judicial District Court, County of Clark, State of Nevada.

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IV. STANDARD FOR A WRIT OF MANDAMUS

N.R.S. 34.160 sets forth when a writ of mandamus may be properly issued. More specifically, N.R.S. 34.160 states:

> The writ may be issued by the supreme court, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.

N.R.S. 34.160 is qualified by N.R.S. 34.170 which states:

> This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

"A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion." Brewery Arts Center v. State Bd. of Examiners, 108 Nev. 1050, 1053, 843 P.2d 369, 372 (1992). The Court "may issue a writ of mandamus . . . where discretion has been manifestly abused or exercised arbitrarily or capriciously." Scarbo v. Eighth Judicial Dist. Court, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009) (internal quotation marks omitted). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (internal quotation marks omitted). "Mandamus is a proper remedy to compel performance of a judicial act when there is no plain, speedy, and adequate remedy at law in order to compel

performance of an act which the law requires as a duty resulting from office." Smith v. Eighth Judicial District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); see, e.g., Sunrise Hospital v. Eight Judicial District Court, 110 Nev. 52, 866 P.2d 1143 (1994) perpetuation of testimony pursuant to N.R.C.P. 27.); Floyd v. District Court of the Sixth Judicial District, 36 Nev. 349, 135 P. 922 (1913) (determination of jurisdiction).

The denial of summary judgment is reviewable by proceedings in mandamus. Lapica v. Eight Judicial District Court, 97 Nev. 86, 624 P.2d 1003 (1980); Sorenson v. Pavlikowski, 94 Nev. 440, 581 P.2d 851 (1978); Dzack v. Marshall, 80 Nev. 345, 393 P.2d 610 (1964); N.R.A.P. 3A(b)(5). Thus, this Court has exercised its "constitutional prerogative" and entertained a writ of mandamus when a district court failed to grant summary judgment where no material issue of fact remained. Ash Springs Development Corp. v. O'Donnell, 95 Nev. 846, 603 P.2d 698, 699 (1979). Mandamus will lie only where there remains no genuine issues of fact to be resolved and where it is compelled as a matter of law. Berryman v. Int'l. Bhd. of Elec. Workers, 85 Nev. 13, 449 P.2d 250 (1969). While reaffirming the decision in State ex rel. Department of Transportation v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983), this Court stated:

> Nevertheless, we have allowed a very few exceptions where considerations of sound judicial economy and administration militated in favor of granting such petitions. Although we reaffirm the general rule of Thompson, this court will continue to exercise its discretion

> with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss and action. Additionally, we may exercise our discretion where, as here, an important issue of law requires clarification. The interest of judicial economy, which inspired the Thompson rule, will remain the primary standard by which this court exercises its discretion.

Smith, 950 P.2d at 281.

This case qualifies as one of the extraordinary cases deserving mandamus relief. Understanding the standard set forth above, CLARK COUNTY and GEORGINA STUART submit that mandamus should be issued, ordering the lower court to apply the law as decided by the U.S. Supreme Court and grant summary judgment for the 42 U.S.C. §1983 claim based on the absence of a Constitutional violation, and on qualified immunity. The District Court is enjoined to do so by its responsibility to follow the law and the prohibitive cost of preparing this case for trial as well as the sacrifice of the immunity afforded to Defendants. The importance of immunity from suit in the federal courts is demonstrated by the availability of an immediate appeal right in these circumstances.

1. The denial of qualified immunity, to the extent that it turns on issues of law, is immediately appealable under federal law. Behrens v. Pelletier, 516 U.S. 299, 306 (1996). Stated alternatively, an immediate appeal on denial of qualified immunity is afforded because of the scope of the final order requirement of 28 U.S.C. §1291. Johnson v. Fankell, 520 U.S. 911, 915 (1997) (holding states are not bound

to follow the federal approach with respect to the collateral order doctrine in §1983 cases). Still, sound appellate practice and the importance of the qualified immunity doctrine is cause for courts to interpret the appellate rules final judgment requirement of F.R.A.P. 3(b)(1) consistent with the federal approach in §1983 cases. See e.g., Furlong v. Gardner, 956 P.2d 545, 550 (Colo. 1998); Richardson v. Cheverefils, 552 A.2d 89, 92 (N.H. 1988); Murray v. White, 587 A.2d 975, 977-78 (Vt. 1991); Park County v. Cooney, 845 P.2d 346, 349 (Wyo. 1992).

2. The federal cases in support of Defendants'/Petitioners' Motion for Summary Judgment make it clear that violation of a Constitutional right to parent can only established where the public official defendants remove a child from the home and/or terminate a parent's parental rights. There is no factual dispute that Defendants'/Petitioners' did NOT remove Plaintiff's children from his home, nor did they terminate his parental rights. Therefore, Plaintiff did not meet their burden in opposition to Defendants'/Petitioners' Motion for Summary Judgment to establish Defendants violated Plaintiff's substantive due process rights on the facts of this case, in the face of "clearly established" law.

Absent any binding Nevada precedent, this Court must consider all relevant precedents including decisions from the United States Supreme Court, all federal circuits, federal district courts, and state courts. In addition, this Court should consider the likelihood that the United States Supreme Court or the Ninth Circuit

would decide the issue in favor of the person asserting the right. Savage v Child Welfare Division, 2005 WL 8165383, at *9 citing Elder v. Holloway, 510 U.S. 510, 512 (1994). In light of the lower court's order and these compelling interests, Appellants are left with no plain, speedy and adequate remedy in the ordinary course of law other than a mandamus petition.

V. STATEMENT OF THE ISSUES

Whether the district court erred in denying Defendants summary judgment on the § 1983 claim, erred in denying Defendants qualified immunity, and erred in denying Defendants discretionary-act immunity on the Plaintiffs' state law claim for Intentional Infliction of Emotional Distress.

VI. ARGUMENT

A. The District Court Erred in Denying Defendants Qualified Immunity and Denying Defendants Summary Judgment on the §1983 Claim

Petitioners partially moved for summary judgment on Plaintiff's 42 U.S.C. §1983 parental rights claim on the basis of qualified immunity. In ruling on a qualified immunity defense the federal law analysis is two-fold. The court must consider whether the evidence viewed in the light most favorable to the plaintiff shows the defendants' conduct violated a constitutional right. Sorrels v. McKee, 290 F.3d 965, 969 (9th Cir. 2002). If so, then it determines whether the defendants' conduct violated clearly established law. Id. This two-step inquiry may be done in

any order. Pearson v. Callahan, 555 U.S. 223, 236 (2009). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). The plaintiff must identify a case where "existing precedent must have placed the statutory or constitutional question beyond debate." Id. The second inquiry is made "in light of the specific context of the case, not as a broad general proposition." Saucier v. Katz, 533 U.S. 194, 201 (2001). The plaintiff bears the burden of showing the rights at issue were clearly established at the time of the defendants' actions. Robinson v. York, 566 F.3d 817, 826 (9th Cir. 2009). Momox-Caselis, 2018 WL 6795556, at *3–4.

At issue in this proceeding, Plaintiff alleges violation of his fundamental Constitutional right to parent his children. In addressing the first question, the District Court wholly ignored the undisputed fact that the County Defendants did not remove Plaintiff's children from his home and the children were not taken into County custody. Instead, Plaintiff was given the option in lieu of removal, to handle protection of the children within the family by assigning a temporary guardianship to a maternal aunt who had a protective history with a sibling of Plaintiff's children. These facts are not disputed in the record. Moving to the second question, if the Court considered the provision of protective options to be the violation of a

Constitutional right, Defendants retained qualified immunity unless there was clearly established case law on 1/7/2015, that presentation of a temporary guardianship option, in lieu of removal, constituted violation of a constitutional right. There simply is no case law to support that position. Ergo, Defendants are entitled to qualified immunity.

In recent years, the United States Supreme Court has: (1) expressed "frustration with [appellate court] failures to heed its [qualified immunity] holdings." Burr, 2023 WL 5940017, at *5 citing S.B. v. Cnty. of San Diego, 864 F.3d 1010, 1015 (9th Cir. 2017) and White v. Pauly, —– U.S. ——, 137 S.Ct. 548, 551 (2017) (*per curiam*) (citation omitted). "The Court has found this necessary both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.' " Id. (citations omitted); and (2) consistently advised lower courts construing claims of qualified immunity not to define clearly established law at a high level of generality, since doing so avoids the crucial question of whether the official acted reasonably in the particular circumstances. Id. citing Plumhoff v. Rickard, 575 U.S. 765, 778-79 (2014); see also Momox-Caselis v. Donohue, 2018 WL 6795556, at *3 and 6-8 (D. Nev.), Hoy v. Clark County, Case No. 2:20:cv-103-CDS-VCF, ECF No. 145, pp. 1, 15-17 and 23, and Burr v Clark Cnty. Dep't of Fam. Servs., 2023 WL 5940017, at *5-6 – all finding qualified immunity.

The District Court failed to determine the legal question of whether Stuart's conduct violated clearly established law at the time of the challenged conduct, such that at the time of the subject events in 2015, were the contours of a Constitutional right sufficiently clear so that every reasonable official in Defendants' position would have understood that the challenged conduct violated a Constitutional right. Instead, the lower court relied on conflicting allegations as pled b Plaintiff, not supported by the factual record, and, thus, abdicated its legal responsibility to determine this issue.

Also, Plaintiff failed to cite any persuasive or binding authority supporting his assertion that he has a constitutional right to have been forewarned of possible removal, and or forewarned that a temporary guardianship was an option to avoid that removal, or even more broadly that he would be offered options concerning safety of the children. Thus, Plaintiff failed to meet his burden of identifying any "existing precedent [that] must have placed the statutory or constitutional question beyond debate," (see Robinson and Momox, both *supra*) requiring a finding of qualified immunity.

Also, removal of children in need of protection is at Defendants' discretion and does not require advance notice to a parent (NRS 432B.340 and 432B.330). Plaintiff has no constitutionally protected interest in that discretionary decision. Morimoto v. Whitley, 2018 WL 5621855, at *5–6 (D. Nev.) citing Olim v.

Wakinekona, 461 U.S. 238, 249 (1983); Town of Castle Rock, Colo., 545 U.S. 748, 756 (stating a plaintiff does not have a constitutionally protected interest in a benefit "if government officials may grant or deny it in their discretion"). NRS 432B.340 and 432B.330 provide that DFS "may" remove the child from the home and, thus, DFS has clear discretion to do so.

Finally, *res judicata* also required the District Court to find Defendants are entitled to qualified immunity because, on October 13, 2023, in consideration of Plaintiff's Petition for Judicial Review regarding Defendants' substantiation of "Physical Injury Physical Risk" by Plaintiff, the First Judicial District Court entered a finding "that Plaintiff's constitutional and statutory rights were not violated by the presentation of the subject options offered to Plaintiff, or by the absence of forewarning of those options." The Eighth Judicial District Court's failure to exercise comity and apply the findings entered in the First Judicial District Court, on the same facts at issue in this litigation, was plain error.

The District Court's failure to apply controlling law regarding Constitutional rights and application of qualified immunity contravened the duties imposed upon lower court judges by the Nevada Constitution and the Nevada Legislature. As a direct result, the lower court failed to perform acts required of the office, trust, and station as a Nevada District Court Judge.

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B. The District Court Erred In Denying Defendants Discretionary-Act Immunity As To Plaintiff's State Law Claim

The remaining state law claim is intentional infliction of emotional distress. Defendants are entitled to statutory discretionary-act immunity on this state law claim under NRS 41.032(2), which immunizes municipal agencies and their employees against actions:

> [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

Henry A. v. Willden, 2014 WL 1809634, at *12 (D. Nev.). To fall within the scope of discretionary-act immunity, a decision must: (1) involve an element of individual judgment or choice; and (2) be based on considerations of social, economic, or political policy. Id. citing Martinez v. Marascas, 123 Nev. 433, 168 P.3d 720, 722 (Nev. 2007). Decisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity if the decisions require analysis of government policy concerns. Id. Under this standard, a court does not ask whether the official abused his or her discretion, but only whether the acts concerned a matter in which the official had discretion. Id. Once it is determined that the acts at issue were within the breadth of the statute, i.e., that they involved judgment or choice on social, economic, or political policy considerations, the

immunity then applies even to abuses of discretion. Id. It encompasses acts that are completely outside the authority of an official.

By law, DFS is vested with broad discretion in carrying out its duties to protect children. When it receives a report of possible abuse/neglect, it must determine within three days whether an investigation is warranted. NRS 432B.260(3). If an investigation is required, DFS must make certain determinations, including who makes up the household, whether there is reasonable cause to believe there is abuse or neglect, the risk to the child, treatment and services that are necessary, and whether the report of abuse is substantiated. NRS 432B.300. The results of an investigation must be reported to the Central Registry. NRS 432B.310. Decisions regarding removal from a home and the placement of wards of the state into foster homes clearly involve personal deliberation and judgment, and Defendants' choices are grounded on public policy concerns as expressed in the Nevada Revised Statutes. Henry A., 2014 WL 1809634 at *12-14; Henry A. v. Willden, 2013 WL 759479, at *15 (D. Nev.); Nelson v Willden, 2015 WL 4937939, at *6 (D. Nev.). An investigation into alleged child abuse "involves 'personal deliberation, decision and judgment' and cannot be construed as ministerial." Johnson v. Clayton, 2009 WL 10693589, at *4 (D.Nev.). The same is true as to any supervisory acts or a failure to act. Nelson, supra citing Neal-Lomax v. Las Vegas Metropolitan Police Dept., 574 F.Supp.2d 1170, 1192 (D. Nev. 2008). Thus, the district court erred in

denying Defendants discretionary act immunity on the intentional infliction of emotional distress.

VII. PRAYER FOR RELIEF

Wherefore, Petitioners pray that a Writ of Mandamus issues from this Court compelling Respondent, the Honorable Susan J. Johnson, judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to apply the law established by the U.S. Supreme Court, and 1) grant Defendants qualified immunity; (2) grant Defendants summary judgment on Plaintiff's §1983 substantive due process claim alleging a violation of his parental rights; and (3) grant Defendants discretionary-act immunity on Plaintiff's intentional infliction of emotional distress claim.

RESPECTFULLY SUBMITTED this 17th day of January, 2024.

OLSON CANNON GORMLEY & STOBERSKI

/s/ *Felicia Galati, Esq.*

_____

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STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

Felicia Galati, being first duly sworn, deposes and says:

That she is an attorney at law duly licensed in the State of Nevada and the attorney for Defendants Clark County and Georgina Stuart in the above-entitled matter; that she makes this Verification pursuant to NRS 15.010 and NRAP 21(a)(5) for the reason that the facts are within the knowledge of affiant; that she has read the above and foregoing EMERGENCY PETITION FOR WRIT OF MANDAMUS, knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes them to be true; and she further states that the exhibits contained in the required Appendix accompanying this Petition are true, correct and accurate copies of those papers filed with the Eighth Judicial District Court in Case A-16-748919-C.

Felicia Galati

FELICIA GALATI

SUBSCRIBED and SWORN to before
me on this 17th day of January, 2024.

AUDRIANNA CLICK
Notary Public-State of Nevada
APPT. NO. 21-8076-01
My Appt. Expires November 24, 2025

Notary Public in and for said
County and State

AUDRIANNA CLICK
Notary Public-State of Nevada
APPT. NO. 21-8076-01
My Appt. Expires November 24, 2025

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), the type style requirements of NRAP 32(a)(6), and the caption form requirements of NRAP 32(c). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 font.

2. I further certify that this Emergency Petition complies with the page- or type-volume limitations of NRAP 21(d), and NRAP 32(a)(4)-(6) and (7)(A)&(C) because although it exceeds 15 pages, it is 4,925 words.

3. Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of January, 2024.

OLSON CANNON GORMLEY & STOBERSKI

/s/ *Felicia Galati, Esq.*

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2024, I sent via e-mail a true and correct copy of the above and foregoing **EMERGENCY PETITION FOR WRIT OF MANDAMUS** by electronic service through the Nevada Supreme Court's website, (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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/s/ Lisa Rico
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