No. 124107

IN THE SUPREME COURT OF ILLINOIS

MARY LEWIS and TASHSWAN BANKS, individually and on behalf of all others similarly situated,	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-2894
Plaintiffs-Appellees.	)	
v.	)	There heard on appeal from the Circuit Court of Cook
LEAD INDUSTRIES ASSOCIATION, INC.; ATLANTIC RICHFIELD COMPANY; CONAGRA GROCERY PRODUCTS COMPANY; NL INDUSTRIES, INC.; and THE SHERWIN-WILLIAMS COMPANY,	)	County, Illinois, County Department, Chancery Division, No. 00-CH-9800
Defendants-Appellants.	)	The Honorable Peter Flynn, *Judge Presiding*.

BRIEF OF *AMICI CURIAE* ILLINOIS MANUFACTURERS' ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF THE AMICI CURIAE

The Illinois Manufacturers' Association (the IMA) is an Illinois not-for-profit corporation founded in 1893 and is the oldest and largest state-wide manufacturing association in the United States. More than 4,000 Illinois manufacturing companies currently hold IMA membership. The IMA's members, which include businesses of all sizes, employ over seventy-five percent of the total Illinois manufacturing workforce. The IMA's mission is to preserve and strengthen the Illinois manufacturing base by providing information and advocacy on behalf of member companies in areas such as industrial relations, federal and state regulations, insurance, public affairs and environmental matters, and judicial and economic issues as they relate to the Illinois business climate. The IMA works actively in the legislative arena in furtherance of this objective and has filed amicus briefs in other important cases affecting manufacturing and the interests of Illinois commerce.

The National Association of Manufacturers (the NAM) is the Nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and all fifty states. Manufacturing employs over 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the

global economy and create jobs across the United States. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

ARGUMENT

I. Introduction

This appeal presents an issue of great importance to the *amici*'s members—Illinois and nationwide manufacturers of all manner of products used every day. The holding below threatens manufacturers with a vast expansion of their potential liability in actions brought not just under product liability theories, but consumer fraud and many other actions as well. That is because the appellate court permitted plaintiff class members Lewis and Banks to maintain their action where their only asserted injury is an economic one for the cost of lead testing, even though neither Lewis nor Banks were, or could be, liable for the cost of the testing. The appellate court's decision creates a windfall for plaintiffs with no legally cognizable injury.

The ruling thus upsets several longstanding and fundamental rules regarding judicial authority and the very nature of tort law. And of great concern to *amici*'s members, the principle announced by the appellate court has no natural stopping point, exposing manufacturers to an infinite universe of potential actions seeking economic damages on behalf of plaintiffs with no

injuries. Manufacturers and, ultimately, consumers would bear the needless cost of such a rule.

II. The Appellate Court's Decision Should Be Reversed Because It Rewrites Illinois Standing And Tort Law And Exposes Product Manufacturers To Significant Liability In Cases Where The Plaintiffs Suffered No Damages.

A. Relevant statutory and factual background

The Lead Poisoning Prevention Act, 410 ILCS 45/1 *et seq*. (2016), requires the testing of children and pregnant women for lead poisoning, 410 ILCS 45/6.2 (2016). Under § 6.2 of the Act, any licensed physician or health care provider treating children six years of age or younger must test those children for lead poisoning if the child resides in an area defined as high risk by the Illinois Department of Public Health (Department). 410 ILCS 45/6.2(a) (2016). Health care providers must evaluate children residing in low risk areas using the Childhood Lead Risk Questionnaire and must test those children if the questionnaire so indicates. *Id.* The Prevention Act requires licensed child care facilities to obtain from each parent or legal guardian of children between one and seven a statement from a physician or health care provider that the child has been assessed for lead poisoning. 410 ILCS 45/7.1 (2016). Violators of the Act are subject to a criminal or civil penalty, and the Department may administratively discipline licensees who do not comply with the statute. 410 ILCS 45/12.2 (2016).

The Prevention Act also permits the Department to establish a fee "to cover the cost of providing a testing service for laboratory analysis of blood lead

tests and any necessary follow-up." 410 ILCS 45/7.2(a) (2016). The Department is required to certify to the Department of Healthcare and Family Services non-reimbursed public expenditures for lead testing activities for Medicaid-eligible children expended by the Department, and Healthcare and Family Services is required to claim federal financial participation for such properly certified expenses. 410 ILCS 45/7.2(b) (2016).

The Family Expense Act provides that the "expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." 750 ILCS 65/15(a)(1) (2016).

Plaintiffs are parents and guardians of children who allegedly were exposed to lead paint and have undergone medical screening for lead poisoning or latent diseases associated with lead poisoning. See *Lewis v. Lead Indus. Ass'n*, 342 Ill. App. 3d 95, 98 (1st Dist. 2003). They brought this action against manufacturers, distributors, and marketers of lead paint. *Id*. Plaintiffs "sued to recover only the cost of children's lead paint screening." App. to Pet'n for Leave to Appeal (Pet. App.) at A8. Plaintiffs claimed that defendants' underlying wrongful conduct and the Prevention Act, which itself was the result of defendant's conduct, proximately caused the screening cost. *Id*.

After dismissing the majority of plaintiffs' claims, see *Lewis*, 342 Ill. App. 3d at 108, the circuit court eventually certified a plaintiff class of "parents

or legal guardians of children who, between August 18, 1995 and February 19, 2008, were between six months and six years of age and during that age bracket lived in zip codes identified by Illinois Department of Public Health as 'high risk' areas" and who "had a venous or capillary blood test for lead toxicity." Pet. App. at A2. The class excluded parents and legal guardians "who incurred no expense, obligation or liability for the lead toxicity testing of their children." *Id.*

Defendants subsequently moved for summary judgment with regard to the three named plaintiffs. *Id.* at A10. Defendants argued that two of the plaintiffs, Mary Lewis and Tashswan Banks, incurred no liability for lead testing because Medicaid covered the costs of their children's tests, and Lewis and Banks could not be liable for those costs. *Id.* Therefore, because these parents bore no expense, obligation, or liability for the lead testing, they were not included in the class. *Id.*

The circuit court agreed. *Id.* at A13. The court explained that "the imposition of the screening cost [is] central to the plaintiffs' claim. It is the basis and linchpin of their cause of action. Without it, the plaintiffs here have suffered no actionable injury." *Id.* at A9. Even if plaintiffs did not actually pay the screening cost, therefore, they "must at least have some present or contingent obligation or liability" for that cost. *Id.* But Banks and Lewis neither paid for the tests, nor could they be liable for the tests, because the

State could exercise any right of recoupment only against the tortfeasor. *Id.* at A13.

The court also rejected plaintiffs' argument that the collateral source rule applied to "overcome their lack of a present 'expense, obligation or liability.'" *Id.* at A16. The court held that when an economic tort is at issue, "dollars are not just damages; they are the claim itself." *Id.* at A9 (emphasis in original). Accordingly, if a plaintiff "has incurred no actual economic loss due to defendants' conduct," the plaintiff "has no claim at all." *Id.* This meant the collateral source rule could not save plaintiffs' claim, for "[i]n an economic tort context, where, as here, the wrongful payment is the claim, who actually paid it matters." *Id.* at A10 (emphasis in original). Thus, the court concluded, Lewis and Banks were not members of the certified class. *Id.* at A16-A17.

The appellate court reversed. *Id.* at A2. As that court framed the issue, the question was "whether the parents of minor children who underwent lead toxicity testing that was paid for entirely by Medicaid incurred an 'expense, obligation or liability' for the cost of the testing." *Id.* at A3. The court held that Illinois' Family Expense Act codified the common-law rule that parents are liable for expenses incurred by their minor children. *Id.* at A5. The parents had a right to recover medical expenses that they were obligated to pay, and that right was "not affected by the fact that a third party paid those expenses." *Id.* (citing *Estate of Hammond v. Aetna Cas.*, 141 Ill. App. 3d 963, 965 (1st Dist. 1986)). The court continued that the collateral source rule supported its

decision, and that the justification for the rule "is no less compelling in a case involving a purely economic injury than in a case involving personal injury." *Id*. Because Lewis and Banks "were statutorily liable for the cost of [the] testing," they "have a cause of action for the reasonable value of the testing services, without regard to the fact that Medicaid paid the entire cost." *Id*. at A6.

B. The appellate court's holding and underlying rationale undo basic tenets of Illinois jurisprudence and threaten manufacturers and the economy.

The appellate court's decision permits a plaintiff class action to proceed for purely economic injuries notwithstanding that plaintiffs suffered no injury at all. Lewis and Banks never paid for the lead testing, and federal law prohibits them from ever being liable for the costs of that testing. Allowing them to sue defendants to recover those costs is simply a windfall to plaintiffs, at defendants' expense.

This holding has serious implications far beyond the present case. Product liability law has evolved along carefully demarcated lines, balancing plaintiffs' right to recover for injuries with the need to fairly allocate the duty to cover those costs. The appellate court's novel ruling upsets that balance, allowing plaintiffs to recover from companies whose products neither physically nor economically injured those plaintiffs. *Amici* represent thousands of manufacturers, and the appellate court's ruling exposes their members to open-ended tort liability in Illinois and, if embraced by this Court, potentially other States as well.

1. Lewis and Banks are excluded from the class definition.

To start, the appellate court incorrectly held that Lewis and Banks were members of the class certified by the circuit court. The class definition requires a parent or legal guardian to have "incurred" an expense, obligation, or liability. To "incur" means to "become liable or subject to." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/incur (last visited April 7, 2019). Lewis and Banks did not become liable or subject to any expense, obligation, or liability for lead testing because Medicaid covered the costs of those tests.

To be sure, as a general matter the Family Expense Act makes parents or legal guardians liable for the medical expenses of their minor children. See 750 ILCS 65/15(a)(1) (2016). But that simply means that a creditor has the right to seek payment for expenses from the parents or legal guardian. The creditor is not required to do so, and when Medicaid pays for the testing, the creditor is prohibited from doing so. 42 U.S.C. § 1396p(b)(1); see Pet. App. at A12. That is to say, while there may have been a moment when Lewis and Banks incurred a future liability for the cost of the tests, that future liability disappeared when Medicaid paid for them.

As such, Lewis and Banks did not incur any present or future obligation to pay for the testing. The class definition specifically excludes such individuals, so the appellate court's decision should be reversed on that basis alone.

2. The appellate court decision undermines the elemental requirement of an injury-in-fact for standing and justiciability purposes.

Beyond the class definition used in this case, however, the appellate court's decision permits plaintiffs who have not suffered any injury-in-fact to maintain an action. That holding is impossible to square with Illinois standing doctrine. Standing "is not simply a procedural technicality, but rather is an aspect or a component of justiciability." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996) (internal quotation marks omitted). The doctrine "assures that issues are raised only by those parties with a real interest in the outcome of the controversy." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). And "[t]here is universal agreement that one component of standing—injury in fact—genuinely narrows the class of potential plaintiffs to those whose grievances may be redressed by such decisions." *Greer v. Ill. Housing Dev. Auth.*, 122 Ill. 2d 462, 488 (1988). Where a plaintiff suffers no actual or threatened injury, there is no grievance for judicial action to redress.

The circuit court recognized this fundamental concept of justiciability, but the appellate court did not. The "essence of the inquiry regarding standing is whether the litigant . . . is entitled to have the court decide the merits of a dispute or a particular issue," and "[t]his court has repeatedly held that standing requires some injury in fact to a legally recognized interest." *Estate of Wellman*, 174 Ill. 2d at 345 (internal citations omitted). This requires a "distinct injury to the complaining party." *Cedarhurst of Bethalto Real Estate, LLC v. Vill. Of Bethalto*, 2018 IL App (5th) 170309, ¶ 20. The claimed injury

may be "actual or threatened" and "must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the requested relief." *Martini v. Netsch*, 272 Ill. App. 3d 693, 695 (1st Dist. 1995) (citing *Greer*, 122 Ill. 2d at 492-93). In this case, the claimed injury was neither actual nor threatened; in fact, it never occurred.

Under these standing rules, then, plaintiffs seeking to recover for economic injuries when they have not suffered, and are in no danger of suffering, any economic harm present at most a hypothetical dispute that is not justiciable in Illinois. *See Messenger v. Edgar*, 157 Ill. 2d 162, 170 (1993). By limiting justiciability to concrete disputes where parties have alleged an injury—actual or threatened—to a legally cognizable interest, the standing doctrine preserves courts' proper role and prevents them from being overrun with abstract and speculative claims. *See Greer*, 122 Ill. 2d at 488 ("[T]he standing doctrine is one of the devices by which courts attempt to cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision."). Where there has been no actual or threatened injury, a party may not invoke the court's authority.

3. Tort law, by definition, requires an injury.

The appellate court's decision also ignores fundamental rules of tort law. A tort is "a private wrong or civil injury." *Keller v. Indus. Comm'n*, 350 Ill. 390, 397 (1932). One hundred and thirty years ago, this Court defined a tort as "an

injury or wrong committed, with or without force, to the person or property of another, and such injury may arise by either the non-feasance, malfeasance, or misfeasance of the wrong-doer." *Gindele v. Corrigan*, 129 Ill. 582, 587 (1889); *see also Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). Further, the longstanding rule is that to recover for medical expenses in tort, the plaintiff must show that he or she "has paid or become liable to pay a medical bill." Alan Jacobs, 15 Ill. Law & Prac. Damages § 22 (Feb. 2019 Update). These rules apply to this case because a product liability action is "an action for damages based upon tort law." *Elke v. Zimmer, Inc.*, 231 Ill. App. 3d 597, 600 (1st Dist. 1992) (citing *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965)).

Here, the appellate court's decision removes the injury element from tort liability. Lewis and Banks suffered no injury and have no potential future injury. By permitting them to maintain their action nonetheless, the decision below redefines "tort" under Illinois law.

Contrary to the decision below, moreover, the collateral source rule may not be used to contrive a cause of action for plaintiffs where the only injury is economic. While under this rule "benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor," *Arthur v. Catour*, 216 Ill. 2d 72, 78 (2005), the rule does not define who is an "injured party." And where

an economic-injury plaintiff incurs no economic injury, that plaintiff is not "injured."

That understanding is consistent with general principles underlying so-called "economic torts," which require an actual economic injury as an element of the cause of action. Dan B. Dobbs, *et al.*, The Law of Torts § 609 (2d ed. June 2018 Update). These torts "deal with stand-alone economic harms or losses, that is, with financial costs to the plaintiff that do not arise from personal injury to the plaintiff or damage to tangible property in which the plaintiff has a legally recognized possessory or ownership interest." *Id*. at § 605. As distinct from "personal torts," for economic torts the economic harm itself is the tort, rather than a measure of the damages. *Id*. And while the collateral source rule governs the amount of damages to be awarded, it does not determine whether a plaintiff has satisfied the economic-harm element of an economic-tort claim.

4. The appellate court's rule poses significant risks to the manufacturing industry.

The appellate court's rule requires manufacturers and other economic-tort defendants to incur substantial liability and needless litigation costs, all to fund a windfall for injury-free plaintiffs. Indeed, claims like the ones in this case generally will proceed in class action lawsuits. And the costs of defending such suits is monumental, even when ultimately they are unsuccessful. A recent survey found that companies spend around $2 billion per year defending against class actions. *See* Nat'l Ass'n of Legal Fee Analysis, Study: $2 Billion in Defense Costs for Class Action Litigation in U.S., March 18, 2015,

www.thenalfa.org/blog/study-2-billion-in-defense-costs-for-class-action-litigation-in-u-s (last visited April 11, 2019). In 2018, class action spending across industries reached $2.46 billion, the highest level since the recession. Carlton Fields, 2018 Class Action Survey, https://classactionsurvey.com/2018-survey (last visited April 11, 2019). Labor and employment, consumer fraud, product liability, and antitrust accounted for 75% of that spending. *Id*. Meaningful limitations on causes of action, such as requiring an injury-in-fact to the class plaintiffs, are essential to prevent those already-rising costs from skyrocketing.

The threat posed to amici's members is therefore very real and may arise in a variety of contexts. For instance, Illinois statutory consumer fraud actions allow for claims of purely economic injury. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (1st Dist. 2009). But such actions require "actual damages" that "must be calculable and measured by the plaintiff's loss." *Id*. (internal quotation marks omitted). Where a consumer fraud plaintiff does not allege "actual damages in the form of specific economic injuries," the claim fails. *Id*. Under the rule announced by the appellate court in this case, however, a plaintiff can allege an "economic injury" without incurring any "actual damage." That rule would significantly expand the number of permissible consumer fraud actions under Illinois law by allowing consumers to recover damages based solely on speculative economic injuries. In fact, if adopted by

this Court, prospective plaintiffs could rely on that rule to bring diminution-in-value claims for products they never even paid for.

Likewise, amici's members face widespread exposure to claims for medical monitoring under the appellate court's rule, even if the plaintiffs will never bear the costs of that monitoring. It is unclear whether Illinois law recognizes a claim for medical monitoring without present personal injury. *Compare Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 692 (1st Dist. 2007) (explaining it is unclear whether medical monitoring claims without prior physical injury may be brought in Illinois), *with Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954 (N.D. Ill. 2008) (predicting that Illinois would allow medical monitoring claim without present injury); *see also Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005) (rejecting medical monitoring claim without present injury). But if Illinois does choose to recognize such a claim, the appellate court's rule would make defendants liable even if plaintiffs paid nothing for the monitoring. And the appellate court's ruling—if embraced by this Court—could be used by plaintiffs in other States that do recognize such claims to expand the potential liability of amici's members.

These examples are illustrative and not exhaustive. Manufacturers face a very real threat of liability exposure from cases that, until now, were not judicially cognizable. This Court should reverse that decision and preserve Illinois' well-settled doctrines of standing and tort law.

CONCLUSION

For these reasons and those set forth by Defendants-Appellants, the appellate court's decision should be reversed.

Dated: April 11, 2019

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I, Michael A. Scodro, certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of filing and service, and those matters to be appended to the brief under Rule 342(a), is 3,515 words.

/s/ Michael A. Scodro
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No. 124107

IN THE SUPREME COURT OF ILLINOIS

MARY LEWIS and TASHSWAN BANKS, individually and on behalf of all others similarly situated, Plaintiffs-Appellees. v. LEAD INDUSTRIES ASSOCIATION, INC.; ATLANTIC RICHFIELD COMPANY; CONAGRA GROCERY PRODUCTS COMPANY; NL INDUSTRIES, INC.; and THE SHERWIN-WILLIAMS COMPANY, Defendants-Appellants.	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-2894 There heard on appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 00-CH-9800 The Honorable Peter Flynn, *Judge Presiding*.

[PROPOSED] ORDER

This cause having come to be heard on the motion of the Illinois Manufacturers' Association and the National Association of Manufacturers for leave to file a brief as *amici curiae* in support of Defendants-Appellants, proper notice having been served, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT the motion for leave to file amicus brief is ALLOWED / DENIED.

ENTER:_____

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No. 124107

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MARY LEWIS and TASHSWAN BANKS, individually and on behalf of all others similarly situated,	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-2894
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LEAD INDUSTRIES ASSOCIATION, INC.; ATLANTIC RICHFIELD COMPANY; CONAGRA GROCERY PRODUCTS COMPANY; NL INDUSTRIES, INC.; and THE SHERWIN-WILLIAMS COMPANY,	)	County, Illinois, County Department, Chancery Division, No. 00-CH-9800
Defendants-Appellants.	)	The Honorable Peter Flynn, *Judge Presiding*.

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that on April 11, 2018, we electronically filed the foregoing MOTION OF ILLINOIS MANUFACTURERS' ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS, proposed BRIEF OF *AMICI CURIAE* ILLINOIS MANUFACTURERS' ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLANTS, and PROPOSED ORDER with the Clerk of the Illinois Supreme Court, copies of which are hereby served upon you.

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Dated: April 11, 2019

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that on April 11, 2019, he caused the Notice of Filing, Motion of Illinois Manufacturers' Association and National Association of Manufacturers for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellants, the proposed Brief of *Amici Curiae* Illinois Manufacturers' Association and National Association of Manufacturers in Support of Defendants-Appellants, and a proposed order in compliance with Supreme Court Rule 361(b)(3) to be filed electronically with the Clerk, Illinois Supreme Court using the Odyssey eFile system.

The undersigned further hereby certifies that he caused to be served the foregoing Notice of Filing, Motion of Illinois Manufacturers' Association and National Association of Manufacturers for Leave to File Brief as *Amici Curiae* in Support of Defendants-Appellants, proposed brief, and proposed order on all counsel of record by causing a copy thereof to be sent via email on April 11, 2019, to counsel of record at the following email addresses listed on the attached service list.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Michael A. Scodro
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