No. 10-1147

In The Supreme Court of the United States

WHITE & CASE LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER, WHITE & CASE LLP

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the nation's preeminent professional bar association of criminal defense attorneys. Founded in 1958, NACDL is a non-profit organization with more than 10,000 members nationwide, joined by 90 state, local, and international affiliate organizations with another 30,000 members. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness for those accused of committing crimes.

NACDL actively participates in matters addressing the legal and practical implications of criminal procedure. NACDL frequently appears before this Court as *amicus curiae* in cases that present issues of national importance to criminal defendants and their lawyers. This Court has referenced NACDL's views on several occasions. *See, e.g.*, *Kennedy v. Louisiana*, 544 U.S. 407, 443, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) (citing NACDL brief); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 n.2, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006) (same); *Brigham City v. Stuart*,

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation of submission. Counsel of record for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (same); *Blakely v. Washington*, 542 U.S. 296, 312, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (noting NACDL's participation as *amicus*).

The Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is the primary organized voice for the criminal defense bar in New Jersey. Its mission includes protecting and insuring individual rights guaranteed by the New Jersey and United States Constitutions, confronting issues arising from the honest, ethical and zealous defense of the accused, and encouraging cooperation among criminal defense lawyers engaged in the furtherance of those objectives.

Because the majority of NACDL's and ACDL-NJ's members are active criminal defense attorneys, we believe that we can assist the Court in understanding the implications of this case on criminal defense counsel and their clients as well as the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

White & Case's petition addresses a question of great significance to companies and individuals in parallel civil and criminal cases – whether a federal grand jury subpoena trumps a protective order issued by a federal judge in a civil case. The six Circuit Courts of Appeals that have addressed this issue have adopted three conflicting positions.

The Second Circuit has held that a civil protective order cannot be overridden by a grand jury subpoena absent improvidence in the grant of the order or extraordinary circumstance or compelling need. *See In re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991), citing *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979).

By contrast, the Ninth Circuit has adopted a "*per se* rule," which requires that civil protective orders be ignored if a grand jury subpoena is issued, divesting the court of its discretion under Rule 17(c)(2) of the Federal Rules of Criminal Procedure to quash unreasonable or oppressive grand jury subpoenas. *See In re Grand Jury Subpoenas*, 627 F.3d 1143, 1144 (9th Cir. 2010). The Ninth Circuit's ruling was based on its prior decision in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226-27 (9th Cir. 1995), which in turn was based on prior rulings by the Fourth and Eleventh Circuits. *See In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013 (11th Cir. 1993); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240, 108 S. Ct. 2914, 101 L. Ed. 2d 945 (1988).

The First and Third Circuits have adopted a third approach. In those circuits, a grand jury subpoena is presumed to override a protective order unless exceptional circumstances are demonstrated. *See In re Grand Jury Subpoena (Roach),* 138 F.3d 442, 445 (1st Cir. 1998); *In re: Grand Jury*, 286 F.3d 153, 157-58 (3d Cir. 2002).

The current Circuit split has created uncertainty that is likely to cause individuals and corporations to compromise or jeopardize significant rights in reliance on civil protective orders issued by federal courts. In addition, the current state of the law permits the Department of Justice ("DOJ") to obtain information to which it would not otherwise have access by luring litigants into a false sense of security afforded by a protective order issued by a federal court.

Significantly, none of these other Courts has considered a critical issue in the present case: whether a *per se* rule in favor of a grand jury subpoena is appropriate with respect to documents that would have been beyond the reach of the grand jury's subpoena, but for reliance on the protective order and the broad latitude afforded by the mandates of civil discovery. Allowing a grand jury to reach such information broadens its reach well beyond territorial limits.

Finally, the *per se* rule raises the very real potential for grand jury abuse in those Circuits following it. Under the *per se* rule, federal courts are stripped of their authority under Rule 17(c) of the Federal Rules of Criminal Procedure to evaluate grand jury requests and prevent abuses. Instead, a federal court confronted with a grand jury subpoena for information produced under a civil protective order must automatically approve it, without the opportunity to evaluate whether it is reasonable or oppressive. This removes a critical check on prosecutorial power,

contrary to established precedent and the clear language of Rule 17.

Such wide disparity among the Circuits on these important issues should be resolved with a single rule, which only this Court can provide. NACDL and ACDL-NJ respectfully urge this Court to grant review to resolve the conflict among the Circuits as to whether grand jury subpoenas override civil protective orders entered by federal judges.

ARGUMENT

I. THE THREE-WAY CONFLICT AMONG SIX CIRCUITS CREATES UNCERTAINTY AND CONFUSION THAT JEOPARDIZE SIGNIFICANT LEGAL RIGHTS.

It is not unusual for civil cases and criminal investigations to be conducted simultaneously, particularly in significant or high profile business disputes. As a result, a demand for information in a civil matter can have serious consequences in a related criminal case. Providing the information could lead to criminal exposure if it may be used as evidence in a criminal case or even made available to prosecutors. Refusal to provide discovery, however, might lead to an adverse inference or other negative consequence in a civil case. Faced with a demand for information, litigants often must wrestle with whether to provide the requested documents or testimony, or refuse, perhaps invoking their rights under the Fifth

Amendment to the Constitution. This decision is one that is often complex and weighty and is of great importance to the criminal defense bar in that it goes to the heart of the attorney-client relationship in the criminal context.

In order to address this tension between criminal exposure and civil discovery, and thereby facilitate the resolution of civil disputes, federal district courts often enter protective orders to permit the exchange of information among parties, but limit its distribution, including to law enforcement authorities. Sometimes, as in this case, DOJ intervenes in civil litigation to weigh in on the extent to which civil discovery should take place when there is a corresponding grand jury investigation. If the court then grants an enforceable protective order, this process naturally induces individuals and businesses to provide information that will assist in the resolution of the civil case in the belief that discovery will proceed with DOJ's blessing in accordance with the terms of the protective order.

Given the current uncertainty about whether a grand jury subpoena trumps a protective order, however, any such reliance may be misplaced. In reality, a litigant has no way of knowing if, upon receipt of a grand jury subpoena, a protective order issued by a federal court will be viewed as presumptively valid and enforceable (Second Circuit), a protective order always will be trumped and nullified by a grand jury subpoena (Fourth, Ninth and Eleventh Circuits), a court will presume supremacy of the

grand jury subpoena absent a showing of extraordinary circumstances (First and Third Circuits), or a court will create some other approach.[2]

A litigant is therefore left to guess whether DOJ, through the use of a grand jury subpoena, will be able to force a federal judge to ignore an order issued by a federal court. An individual or business in this position cannot make an informed decision – and a

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[2] To date, there is no controlling law in the remaining Circuit Courts of Appeals. Recently, however, the Tenth Circuit followed the rationale of the Second Circuit rule in *Martindell* when it reversed a district judge's modification of a protective order. *S.E.C. v. Merrill Scott & Associates, Ltd.*, 600 F.3d 1262, 1273 (10th Cir. 2010). In *Merrill Scott*, the district judge had modified a protective order to allow the SEC to disclose documents produced in reliance on the protective order to other government agencies, including DOJ and the IRS. In reversing the modification, the Court employed *Martindell's* rationale:

> Unless protective orders are fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. Witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

(Internal quotation marks and citation omitted.) *Id.*, at 1272, quoting *Martindell v. Int'l Tel. & Tel. Corp.*, *supra*, 594 F.2d at 295-96. The Court went on to hold that, under the circumstances presented, in which the Government seeks to overcome a protective order, a very high standard of "*unusual*" or "*extraordinary circumstances*" must be demonstrated. *Merrill Scott*, *supra*, 600 F.3d at 1272-73.

criminal defense attorney cannot adequately advise a client – about whether to forgo rights and defenses that could be invoked to prevent production of the information at issue. Only this Court, by granting this petition for certiorari, can put an end to this confusion.

II. THE CURRENT STATE OF THE LAW PERMITS DOJ TO MANIPULATE THE DISCOVERY PROCESS, WHETHER INTENTIONALLY OR OTHERWISE, TO OBTAIN INFORMATION TO WHICH IT WOULD OTHERWISE NOT HAVE ACCESS.

Given the current three-way, six Circuit split, a litigant may be lured, intentionally or otherwise, into a false sense of security provided by a protective order issued by a federal court, only to find the order invalid if DOJ causes a grand jury subpoena to issue. This is particularly true where, as here, DOJ intervened in the civil action and participated in the civil discovery process, which ultimately led to the issuance of the protective order.

Because it has broad discretion to determine the federal district in which a grand jury subpoena is issued, DOJ can often exercise substantial control over the process. In fact, DOJ instructs prosecutors to consider "potential difficulties in conducting grand juries in particular jurisdictions" when they determine where to empanel a grand jury. United States Department of Justice, Antitrust Division, *Antitrust Division Manual* III-88 (4th ed. 2008), available

at http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf (last visited Apr. 18, 2011). In a matter of national or international scope, such as certain antitrust investigations, DOJ might have virtually unlimited discretion in terms of where to convene a grand jury and thus the Circuit in which a challenge to a grand jury subpoena would be heard. In other words, faced with a civil protective order, DOJ could convene a grand jury in the Fourth, Ninth or Eleventh Circuit to take advantage of the favorable *per se* rule in those circuits.

The facts of this case starkly illustrate the potential mischief that is possible under the current state of the law. Here, DOJ intervened in the civil case to protect its interest in a parallel grand jury investigation. DOJ actively participated in the civil litigation in which the protective order was crafted and entered. In direct response to its motion, the District Court entered a protective order permitting DOJ to review discovery but prohibiting it from obtaining copies. DOJ abided by and accepted the fruits of this order for years. After the parties had relied on the protective order by producing documents pursuant to it, DOJ sought relief from the protective order, fully litigating before the District Court its desire for copies of civil discovery. The District Court denied the DOJ's efforts to amend the protective order. Only then did DOJ cause a grand jury subpoena to be issued in an attempt to end-run the District Court's protective order.

It should not be permissible for DOJ to participate in the civil discovery process, including the issuance of a civil protective order, by a federal court, and then, after the parties and the court rely on the protective order, seek to trump its effect through the issuance of a grand jury subpoena. Were this acceptable, DOJ could manipulate parties, their counsel and the court into sanctioning the production of discovery, falsely confident in the belief that the discovery could be used only in the civil litigation. Then, it could issue a grand jury subpoena to obtain information to which it would not otherwise be entitled.

It is respectfully submitted that the Court should grant certiorari so that the law may be clarified to prevent such manipulation, intentional or otherwise.

III. THE NINTH CIRCUIT DECISION IMPERMISSIBLY EXPANDS THE POWER OF THE GRAND JURY BEYOND TERRITORIAL LIMITS.

The Ninth Circuit's decision represents a sea change from current legal norms because it places documents and testimony that previously had been beyond the jurisdiction of the grand jury within the grand jury's reach. Specifically, the Ninth Circuit's decision placed foreign documents and testimony ordinarily out of reach of the grand jury directly into its hands – once those documents were produced in

this country pursuant to a civil protective order. *See In re Grand Jury Subpoenas*, *supra*, 627 F.3d at 1144.

In a conclusory statement, the Ninth Circuit held "[b]y a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury." *Id.* That the documents were "within its grasp" is hardly a foregone conclusion.

In each of the other Circuit Court decisions giving rise to the present Circuit split on the interplay between a grand jury subpoena and a civil protective order, the underlying information sought always had resided within the territorial limits of the United States. Thus, there was no question that it could have been obtained directly by a grand jury subpoena, rather than through subpoena of the fruits of civil discovery. *See In re: Grand Jury*, *supra*, 286 F.3d at 160 [3d Cir. 2002] ("the grand jury may obtain evidence by means other than subpoenaing civil discovery materials. . . . it may subpoena witnesses directly, and the Government could grant these witnesses immunity if they refuse to testify"); *In re Grand Jury Subpoena (Roach)*, *supra*, 138 F.3d at 443 [1st Cir. 1998] (seeking deposition transcripts of deponent intervenor); *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes, supra*, 62 F.3d at 1226 [9th Cir. 1995] (noting "the historical investigative powers of the grand jury," when allowing subpoena of documents from civil lawsuit by medical insurance companies against United States weight-loss

clinics for fraudulent billing scheme); *In re Grand Jury Proceedings*, *supra*, 995 F.2d at 1016 [11th Cir. 1993] (noting that any *citizen* may be subpoenaed to provide testimony before a grand jury); *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, *supra*, 945 F.2d at 1223 [2d Cir. 1991] (seeking transcripts from depositions of employees of various United States airline companies and unions); *In re Grand Jury Subpoena*, *supra*, 836 F.2d at 1480 (*Sprouse, J.*, *dissenting*) [4th Cir. 1988] ("[t]he government remains free to call the deponents before the grand jury to explore their fifth amendment claims and to prosecute or grant immunity"); *Martindell v. Int'l Tel. & Tel. Corp.*, *supra*, 594 F.2d at 296 [2d Cir. 1979] ("the Government may institute . . . a grand jury proceeding and . . . subpoena witnesses to testify, regardless of whether they have already testified or furnished documentary evidence in civil litigation"). None of these other decisions contemplated a subpoena of information originating outside of the grand jury's jurisdiction and produced in the United States only in response to a civil court order.

This distinction is critical. Rule 17(e) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 1783 expressly limit the service of a grand jury subpoena for witness testimony either to the United States or, if the subpoena is to be served abroad, to a "*national or resident of the United States* who is in a foreign country." (Emphasis added.) 28 U.S.C. § 1783. In other words, a federal grand jury may subpoena testimony or documents from witnesses in a foreign

country only if the court has "*in personam* jurisdiction of the person in possession or control of the material." *United States v. First Nat. City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968). *See, e.g., First Nat. City Bank of N.Y. v. I.R.S. of U.S. Treasury Dept.*, 271 F.2d 616, 618 (2d Cir. 1959) (requiring U.S. bank to produce records from bank's Panamanian branch because U.S. branch officer could request those documents from foreign branch).

In contrast, Rule 34 of the Federal Rules of Civil Procedure permits discovery of any document over which a party has "control," irrespective of the document's location. Control in this context simply means the legal right to obtain a document on demand. *Gerling Intern. Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988). *See also* Wright & Miller, Fed. Prac. & Proc. Civ. § 2210 (3d ed.). Thus, in contrast to a grand jury subpoena, a court in a civil case may compel the production of documents located in a foreign country whenever it determines that a party may obtain the documents from abroad, even if the foreign party is an unrelated entity. *See, e.g., Super Film of America, Inc. v. UCB Films, Inc.*, 219 F.R.D. 649 (D. Kan. 2004) (court compelled production of documents located in Turkey held by unrelated legal entity that had entered a business relationship with U.S. entity).

The reach of civil discovery, therefore, is broader than that permitted in the criminal context. In fact, it is beyond dispute that the foreign documents and testimony sought here were beyond the reach of the grand jury's subpoena power. If the Ninth Circuit's

rule stands, however, grand jury power may be expanded whenever used in concert with civil discovery. This opens up possibilities of civil discovery abuse that did not exist before the decision below and constitutes an impermissible expansion of grand jury subpoena power beyond territorial limits.

This expansion of grand jury subpoena power over foreign documents and witnesses has far-reaching consequences. Various methods of obtaining foreign information already are in place, through negotiated mutual legal assistance treaties ("MLATs"),[3] letters rogatory and such other diplomatic means. Under this rule, however, one member of the Executive Branch – the prosecution – may circumvent these carefully negotiated arrangements by another member of the Executive Branch – the State Department – as a matter of law, simply by issuing a

[3] The United States is a party to at least twenty MLATs. *United States v. Balsys*, 524 U.S. 666, 715, 118 S. Ct. 2218, 141 L. Ed. 2d 575 (1998). Two agreements with Japan that are relevant here are the Treaty between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters, available at http://www.mofa.go.jp/region/n-america/us/treaty0308.pdf (last visited Apr. 18, 2011) and the Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, available at http://www.justice.gov/atr/public/international/docs/3740.htm (last visited Apr. 18, 2011). *See also* Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_documents&docid=f:td001.pdf (last visited Apr. 18, 2011).

grand jury subpoena to cover such information. This prosecutorial end-run invites retaliatory conduct by other countries.

One example of such conduct is the enactment of "blocking" statutes, frequently prompted by United States antitrust litigation such as the present case.[4] A second example of a retaliatory risk that could have a significant effect on *amici* and their clients is that foreign countries may subsequently adopt similarly expansive interpretations of their ability to compel the production of evidence to their tribunals that would normally be beyond their jurisdictional reach or that could only be obtained through the invocation of the MLAT provisions to seek assistance from the United States. Entities from the United States would thus be subjected to demands for disclosure of information in foreign tribunals whether or not such information would otherwise be available. Not only would such a consequence vitiate the MLATs and other diplomatic agreements negotiated by the Executive Branch, the result would have adverse consequences for many United States citizens and entities

[4] *See* R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad,* 28 GEO WASH. J. INT'L L. & ECON. 315, 315-17 (1995) ("[a]ttempts to enforce aggressive U.S. antitrust laws against anticompetitive behavior abroad have caused some foreign governments to claim that their sovereignty has been violated. To protect this sovereignty from outside incursion, many of these governments enacted blocking statutes to prevent compliance with U.S. discovery orders within their borders.").

who are not a party to this proceeding. Clients of the *amici* might well be forced to turn over domestic material to foreign criminal investigators in sovereign nations that have taken similarly broad views of their investigatory power.

It is respectfully submitted that this Court should grant certiorari to clarify whether such an extraterritorial expansion of grand jury power is permitted in light of the many diplomatic channels available.

IV. THE *PER SE* RULE SEEMINGLY ELIMINATES A FEDERAL COURT'S AUTHORITY PURSUANT TO RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE TO PREVENT GRAND JURY ABUSES.

Most troubling about the *per se* rule as applied by the Ninth Circuit is the fact that it apparently allows a prosecutor to usurp the discretion given to federal judges under Rule 17(c)(2) of the Federal Rules of Criminal Procedure. This removes a critical check on prosecutorial power.

This Court has held that, although a grand jury is entrusted with substantial investigatory powers, these powers are not unlimited and are, in fact, subject to judicial supervision. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299, 111 S. Ct. 722, 727, 112 L. Ed. 2d 795 (1991). The mechanism for restraining the power of an overzealous grand jury is found in Rule 17(c)(2), which permits a federal judge

to quash a grand jury subpoena if compliance would be "unreasonable or oppressive." *Id.*, *quoting* F. R. Crim. P. R. 17(c)(2). This requires a fact-specific and context-sensitive inquiry into the circumstances surrounding the demand for information. *See id*.

Federal judges therefore are afforded a critical role in evaluating and, if appropriate, limiting the investigatory power of the grand jury. Indeed, courts are often called upon to review and quash grand jury subpoenas. *See, e.g., In re Grand Jury Proceeding*, 455 F. Supp. 2d 1281, 1286 (D.N.M. 2006) (quashing grand jury subpoena for saliva sample without warrant); *In re Grand Jury Subpoena*, 463 F. Supp. 2d 573, 576 (W.D. Va. 2006) (quashing subpoena of criminal defense attorney regarding conversations with former client and third-party as privileged under work produce doctrine); *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd*, 751 F.2d 13 (1st Cir. 1984) (quashing subpoenas of criminal defense attorneys regarding clients with pending criminal cases); *In re Stolar*, 397 F. Supp. 520, 525 (S.D.N.Y. 1975) (quashing subpoena requiring address and telephone number of criminal client from his attorney). Nowhere does Rule 17 limit the contexts or circumstances in which district courts review grand jury subpoenas.

Under the *per se* rule, however, a federal court loses its ability to evaluate a grand jury subpoena in one context. A judge faced with a grand jury subpoena for information previously produced pursuant to a civil protective order may not, under the *per se* rule,

determine whether the circumstances in which a civil protective order was issued would make it unreasonable to enforce the grand jury subpoena. Instead, the court is required to give automatic judicial benediction to the requests of the grand jury. This effectively strips the court of the authority provided by Congress under Rule 17 and long recognized as critical by this Court.

The absence of a chance for judicial review leaves the very real potential for grand jury abuse. Indeed, both the Second and Tenth Circuits have articulated concerns about grand jury impropriety under the *per se* rule. *S.E.C. v. Merrill Scott & Associates, Ltd.*, *supra*, 600 F.3d at 1272-73 ("Given the government's vast investigatorial resources and power for oppression . . . courts have required a showing of unusual circumstances . . . or even extraordinary circumstances . . . before permitting the government to benefit from access to confidential information provided pursuant to a protective order. . . ." [Internal quotation marks and citations omitted.]); *Martindell*, *supra*, 594 F.2d at 296 ("the Government as investigator has awesome powers which render unnecessary its exploitation of the fruits of private litigation." [Internal quotation marks omitted]).

It is respectfully submitted that this Court should grant certiorari to clarify whether the court may be stripped of its important judicial balancing function under the *per se* rule.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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