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February, 25, 2013

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Hawaii State Senate  
Committee on Judiciary and Labor  
Senator Clayton Hee, Chair  
Senator Maile Shimabukuro, Vice Chair

Tuesday, February 26, 2013  
10:00 a.m.  
State Capitol Room 016

Testimony IN SUPPORT of S.B. 286.

Chair Hee, Vice Chair Shimabukuro and members of the Judiciary and Labor  
Committee:

## I. INTRODUCTION

We are testifying in strong support of S.B. 286, which amends Hawaii Revised Statutes § 25-2 to define “permanent resident” for purposes of state reapportionment and redistricting as any person counted as a “usual resident” of Hawaii by the U.S. Census.

We represent the plaintiffs in *Kostick v. Nago*, Civ. No. 12-00184, a case now pending before a three-judge U.S. District Court. In that case, the plaintiffs—a coalition of active-duty military, military family members, retired servicemembers, and others—are challenging the State of Hawaii’s 2012 Reapportionment Plan (“2012 Plan”) as unconstitutional because it “extracted” 108,767 persons who were counted as “usual residents” of Hawaii by the 2010 Census, because they were determined by the Reapportionment Commission (“Commission”) to not qualify as “permanent residents.” These 108,767 persons are military servicemembers, their families, and university students who do not qualify to pay in-state tuition.

We urge adoption of S.B. 286 for the following reasons: (1) Equal Protection requires that all persons are counted; (2) “Domicile” (physical presence plus an intent to remain) is impossible to determine for a class of people; (3) Hawaii is the sole state that does not use Census population (with

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the exception of Kansas, which conducts its own survey of servicemembers' residence); and (4) federal and county districting use Census population, and doing so for statewide reapportionment would be more cost-effective and efficient.

Our testimony begins with a background on how the Census counts "usual residents," and how Hawaii has counted its population for state reapportionment purposes.

## II. BACKGROUND

### A. The Census Counts "Usual Residents," and Already Excludes Transients

Every other state but Hawaii and Kansas uses the Census count of "usual residents" as its reapportionment population. The U.S. Census counts people who are physically present in Hawaii on Census Day, and have "an element of allegiance or enduring tie" to the state. *See Franklin v. Massachusetts*, 505 U.S. 788, 789 (1992) (Census counts any person who is a "usual resident"). The Census defines "usual residence" as the "the place where a person lives and sleeps most of the time. It is not the same as the person's voting residence or legal residence." It is the place where "they live and sleep most of the time." For military personnel stationed within the United States, they are counted as "usual residents" of the state in which they are stationed. For military personnel and federal employees deployed or assigned outside the country, they are counted as "overseas population" and are attributed to a state through a different mechanism than Census Day live counts.

Thus, the 2010 Census resident population of Hawaii included servicemembers, their families, university students, federal civilian workers "stationed" in Hawaii, legal and illegal aliens, children, and prisoners incarcerated here, all irrespective of whether they pay state taxes, their eligibility to vote in Hawaii, or actual registration to vote. Hawaii's Census count also included deployed servicemembers whose "home of record" is Hawaii. A person counted as a "usual resident" of Hawaii by the Census is counted nowhere else.

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The 2010 Census count excluded “transients” such as tourists, military who are not stationed here, and those simply passing through. These people were counted in their state of “usual residence.”

Hawaii’s 2010 Census population was 1,360,301.

**B. Equal Protection Requires All to be Represented in the Legislature, No Exclusion of Servicemembers**

The Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment requires states to apportion their legislatures so that the population of each district is roughly equal to other districts across the state. In addition to the right to equal voting power (the “one person one vote” principle), the Equal Protection Clause also insures that all persons are equally represented in the state legislature, regardless of their voting eligibility. *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (“the [Supreme] Court recognized that the people, including those who are ineligible to vote, form the basis for representative government”). Thus, nonvoters and even non-citizens have a right to be represented in the state legislature and petition their representatives.

The U.S. Supreme Court has held that Equal Protection does not require a state to “count aliens, transients, short-term or temporary residents, or persons denied the vote.” *Burns v. Richardson*, 384 U.S. 73, 92 (1966). What this means is that a state is not compelled to use the Census count, but if it chooses some other method, it has the burden of proving that the resulting reapportionment plan is not “substantially different” than one based on a “permissible population basis” such as total population, state citizens, or U.S. citizens. *Id.* Moreover, a state cannot discriminate against military personnel, and may not deny them legislative representation merely because they are in the military. Thus, it is unconstitutional for a state to expressly exclude servicemembers from its population counts. *Davis v. Mann*, 377 U.S. 678, 691 (1964) (states may not refuse to count servicemembers merely because of their occupation). Nor is counting only “civilians” permissible. *Travis v. King*, 552 F. Supp. 554, 558 & n.13 (D. Haw. 1982) (“civilian population is not a permissible population base”).

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**C. From “Registered Voters” to “Permanent Residents,” and the Changed Nature of Military Service**

**1. High Voter Registration, and a “Transient” Vietnam-era Military**

Originally, Hawaii counted “registered voters” in its decennial reapportionment and redistricting plans. This made sense at a time when voter registration was very high, so a count of registered voters approximated a count of state citizens. Shortly after statehood, 87.1% of those eligible were registered to vote, perhaps the highest in the nation.

In *Burns*, the U.S. Supreme Court upheld Hawaii’s count of registered voters, concluding that it was an accurate substitute for counting state citizens, which the Court held was a “permissible population basis.” The Court allowed exclusion of large numbers of servicemembers, because it concluded that the military personnel then passing through Hawaii on their way to “Asiatic spots of trouble” were transients. *Burns*, 384 U.S. at 94-95 (“Hawaii’s special population problems, including large concentrations of military and other transients centered on Oahu, suggest that state citizen population, rather than total population, is the appropriate comparative guide.”). The Court did not endorse excluding servicemembers, and did not hold that Hawaii’s choice to use a population basis that had the effect of excluding the military would always be constitutional; the Court rejected the challenge only because there was no evidence the plan varied from one based on a “permissible population basis.” Indeed, in *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982), the court applied *Burns* and held that a plan based on registered voters was unconstitutional because it resulted in a plan that was materially different from one based on a permissible population basis.

*Burns* noted that “the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear.” *Id.* at 94; *see also id.* at 94 n.24 (“For example, at one point during World War II, the military population of Oahu constituted about one-half the population of the Territory.”). The 25 years prior to *Burns* decision saw massive swings in military populations as draftees flowed into military bases to fight World War II, Korea and the beginnings of the Vietnam conflict. At the peak of World War II, 400,000

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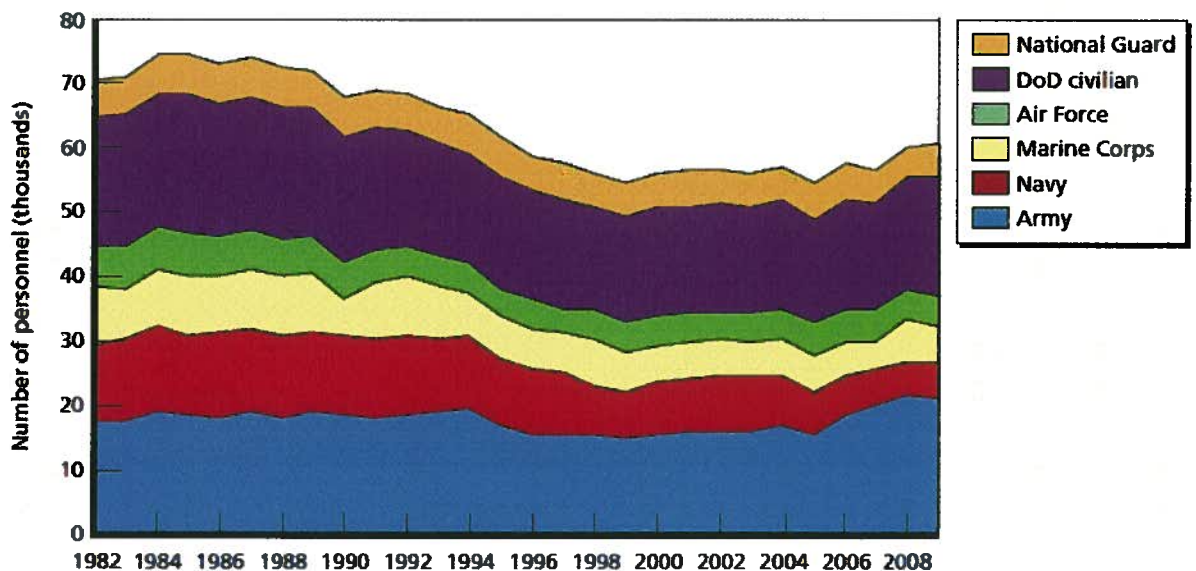
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military personnel comprised nearly 50% of the population of the Territory of Hawaii. With post-war demobilization, that number shriveled nearly twenty-fold to 21,000 by 1950. It then swelled again during the Korean War. See THOMAS KEMPER HITCH, ISLANDS IN TRANSITION: THE PAST, PRESENT AND FUTURE OF HAWAII'S ECONOMY 199 (Robert M. Kamins ed. 1993).

**2. The Military is no Longer “Transient” but is an Integrated Part of Hawaii’s Communities**

In the intervening half-century since *Burns*, this dynamic has changed, and our “special population problems” no longer exist. Today’s military is vastly different, and not “transient.” In contrast to the period preceding the *Burns* decision, the post-Vietnam all-volunteer military has fought in Grenada, Lebanon, Kuwait, Bosnia, Somalia, Afghanistan, Iraq, and several other conflicts with no surge in Hawaii military populations even remotely comparable to the 20-fold population shifts which confronted the *Burns* court.

**Figure 2.1**  
**Defense Personnel in Hawaii, 1982–2009**



SOURCE: State of Hawaii, “State of Hawaii Data Book,” 2009, Tables 10.03, 10.11, 10.14.

RAND TR996-2.1

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Moreover, servicemembers and their families use (and pay for) roads and schools. They pay Hawaii General Excise Tax. Many pay property taxes. They serve on Neighborhood Boards. They live, work, rent, own homes, and patronize businesses in Hawaii. A study prepared for the Secretary of Defense estimated the presence of the military is responsible for injecting \$12 billion into the state, or up to 18% of Hawaii's economy. *See James Hosek, et al., HOW MUCH DOES MILITARY SPENDING ADD TO HAWAII'S ECONOMY 21 (RAND 2011).* Local politicians run on platforms built on the promise of keeping the military presence in Hawaii strong, and keeping the federal dollars to support them flowing from Washington. Yet, even as we keep aggressively pursuing the massive benefits the presence of the military brings, we keep finding ways to exclude them. We cannot choose to exclude persons who are admittedly "usual residents" and who are not transients, and whom no one disputes have substantial physical and continuing presences here.

**3. Voter Registration Plummeted, Hawaii Now Counts  
"Permanent Residents"**

At the same time that the military has integrated itself into the community, Hawaii's voting participation level has plummeted dramatically from the levels at the time of *Burns*. Unfortunately, Hawaii has gone from having the highest percentage of registered voters in the nation, to the lowest. *See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 Table 400: Persons Reported Registered and Voted by State: 2010* (only 48.3% of Hawaii's voting-age population is registered to vote). *See also* John D. Sutter, *Here's the list: Hawaii has the lowest voter turnout rate in the United States*, <http://cnnchangethelist.tumblr.com/post/31526477522/heres-the-list-hawaii-has-the-lowest-voter-turnout>; John D. Sutter, *Hawaii: The state that doesn't vote* (Oct. 24, 2012), <http://www.cnn.com/2012/10/21/opinion/change-the-list-voter-turnout-hawaii/index.html?iref=allsearch> ("I came to the Aloha State not for the beaches, volcanoes and helicopter tours but because Hawaii has the lowest voter turnout rate in the nation. ... This is all the more shocking when you consider that more than 90% of registered voters in Hawaii participated in elections for several years after statehood in 1959. People cared about what

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their newborn state would turn into. Somewhere along the way, enthusiasm died.”).

As a result of this decline in registration, counting “registered voters” no longer is an accurate substitute for counting state citizens. Thus, in 1992, Hawaii ceased used of “registered voters” and instead began counted “permanent residents.” Article IV, section 4 of the Hawaii Constitution now requires that reapportionment be made on the basis of “the total number of permanent residents in each of the basic island units [counties].” Similarly, section 6 requires that districting within each “island unit” be on the basis of “permanent residents.”

The Hawaii Constitution, however, does not define “permanent resident.” Nor do the Hawaii Revised Statutes.

**D. Hawaii Supreme Court Defined “Permanent Resident” As Presence Plus “Intent to Remain”**

On August 3, 2011, the Commission proposed a reapportionment plan that used as the population basis all persons determined to be usual residents of Hawaii by the 2010 Census. This plan included maps with district lines, but was not adopted. The following month, the Commission adopted and filed the 2011 Final Report and Reapportionment Plan (“2011 Plan”) that “extracted” 16,458 active duty military and university students from the 2010 Census population who were deemed not to be permanent residents, resulting in a “permanent resident” population basis of 1,343,843.

On October 10, 2011, an original action was filed in the Hawaii Supreme Court to compel extraction of more servicemembers, their families, and university students from the population basis. *Solomon v. Abercrombie*, No. SCPW-11-0000732. The action sought to move an Oahu Senate seat to Hawaii. A nearly identical action was filed the following day. *Matsukawa v. State of Hawaii 2011 Reapportionment Comm’n*, No. SCPW-11-0000741. On January 4, 2012 in an unsigned opinion, the Hawaii Supreme Court concluded the 2011 Plan violated the Hawaii Constitution because the Commission’s 2011 Plan had not extracted enough people. *Solomon v. Abercrombie*, 126 Haw. 283, 270 P.3d 1013 (2012). The court ordered the Commission to count only “permanent residents.”

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The court defined “permanent resident” as “domiciliary,” which under Hawaii law means a person who has both: (1) a substantial physical presence in Hawaii, and (2) has demonstrated an intent to remain here. The court’s decision was not a matter of constitutional interpretation, but an application of common (judge-made) law, and thus can be overruled by the Legislature. The court ordered the Commission to extract additional servicemembers, families, and university students who pay non-resident tuition from the 2010 Census population. The court did not require removal of aliens, institutionalized persons, federal civilian workers who were “stationed” in Hawaii, or others who were similarly situated, or even an inquiry into their states of mind.

**E. 2012 Reapportionment Plan “Extracted” 8% of the Population on the Basis of Assumed “Intent”**

There was no question that all servicemembers, families, and students counted by the Census were physically present in Hawaii, and thus the first part of the court’s “domicile” test was satisfied. However, the court’s opinion did not provide guidance how the Commission was to determine whether someone had demonstrated the requisite “intent to remain” in Hawaii. After public hearings, the Commission decided to make “extractions” based on three assumptions:

- Its assumed servicemembers counted by the Census as “usual residents” of Hawaii, but who designated a different state to withhold taxes from their pay on a military tax form (DD2058) have no intent to remain and may be treated as transients. In effect, this imposes a poll tax on servicemembers, by tying their representation in the Hawaii legislature to their willingness to pay Hawaii income taxes.
- It assumed military spouses and dependents of servicemembers have the same intent as their military sponsors, an unwarranted assumption in this day and age.
- It assumed students who did not qualify to pay in-state tuition (which is generally based on a one-year durational residency requirement) have no intent to remain.

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A summary of how they were extracted is described in more detail in the *Non-Permanent Population Extraction for 2011 Reapportionment and Redistricting—Addendum* (Mar. 2012).

Applying the above criteria, the 2012 Plan “extracted” 42,332 servicemembers, 53,115 military family members, and 13,320 university students. The 2012 Plan essentially treated 8% of Hawaii’s population as if it did not exist.

### III. REASONS FOR ADOPTING S.B. 286

There are many reasons, both legal and practical, to define by statute “permanent residents” as persons counted by the U.S. Census as “usual residents” of Hawaii.

#### A. Equal Protection Requires That All Persons Are Entitled to Representation

The Equal Protection Clause of the Fourteenth Amendment requires that all “persons” be counted to insure representational equality in the Hawaii Legislature. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (court held that a reapportionment plan must include all persons, including illegal aliens).

Hawaii’s attempts to determine which of its “usual residents” should be counted and which should not has resulted in a seemingly endless slew of legal challenges. In the fifty years since statehood, only one Hawaii reapportionment plan has been adopted without being challenged in court (the 1992 plan). In addition to the pending *Kostick v. Nago* challenge, see *Travis v. King*, 552 F. Supp. 554, 556 n.2 (D. Haw. 1982) for a history of the “numerous attacks in both state and federal courts” to Hawaii’s reapportionment. Adopting a practical and workable definition of “permanent resident” that conforms to the Equal Protection Clause’s requirements would obviate the need for such challenges, and save the State, the Commission, and the courts from dealing with this issue repeatedly in the future. For example, the *Kostick* lawsuit, which is likely to end up in the U.S. Supreme Court, has prompted the State to hire outside lawyers to advise it, despite the fact that the State Office of the

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Attorney General has a “Solicitor General” whose duties are limited to representing the State in appellate cases such as these. The State has already unnecessarily spent \$50,000 of taxpayer money to hire big-firm lawyers from Washington, D.C. to assist the AGs with this case.

In addition to Equal Protection concerns, it is also a matter of fundamental fairness to include the men and women in our Armed Forces, their families, and university students in our population. The exclusion of servicemembers and families is a holdover from an earlier time when they were not as integrated into our community as they are today. In the 2012 Plan, these people were “extracted” and thus denied representation, while the following were automatically included as “permanent residents” of Hawaii:

- legal aliens (non U.S. Citizens authorized to be in Hawaii)
- illegal aliens (non U.S. Citizens not authorized to be in Hawaii)
- prisoners incarcerated in Hawaii (who cannot vote)
- minors (who are not eligible to vote, and most of whom do not pay taxes)
- non-taxpayers (adults who pay no Hawaii taxes)

In the *Kostick* lawsuit, the State has even taken the position that the 2012 Plan counted “state citizens” (although that term is nowhere defined), meaning that legal and illegal aliens are *included* as Hawaii Citizens, while U.S. Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen are not!

The State asserts that servicemembers and their families have chosen to opt out of being counted because the servicemembers have elected to have another state withhold taxes from their military pay, and may choose to be included by registering to vote here. But the State imposes this requirement on no one else: it *automatically* counts those who are registered to vote elsewhere or indeed, not registered or even eligible to vote; it counts those who do not pay Hawaii state taxes. *Everyone* but servicemembers, their families, and university students who pay nonresident tuition are automatically included, and no attempt is made to determine whether they are similarly situated to those excluded.

Servicemembers and their families are essential and integrated members of Hawaii’s community and body politic, yet since statehood, we have

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always found a way to count nearly everyone but the men and women serving in the armed forces who live here, even while we counts aliens, minors, prisoners, those who don't vote, and those who pay no taxes. By treating servicemembers, military families, and students as invisible, Hawaii's plan unconstitutionally dilutes their rights to equal representation and to petition their government on equal terms. The Hawaii legislature represents everyone present in Hawaii, not just those who vote, or who register, or who pay state income taxes. Excluding servicemembers and their families who serve our country is simply not right.

**B. "Domicile" (Presence Plus Intent) is Impossible to Determine for a Class of People**

The present court-made definition of "domicile" as determined in *Solomon* (physical presence plus intent to remain) is an inherently unworkable and impractical standard when applied to large classes of people, since by its own terms it focuses on *individual* behavior and state of mind. The domicile standard is based on the specific facts of a person's location and mental state. *See Dupree v. Hiraga*, 121 Haw. 297, 219 P.2d 1084 (2009) (applying the domicile test to measure whether a Maui County Councilperson was a resident of Lanai for voter registration purposes, the court examined the evidence related to that person and concluded that he had not shown both physical presence and an intent to remain).

To be constitutionally applied, an "intent" test cannot make broad assumptions, and the State has a high burden of justifying it. When forced by *Solomon* to try and determine the intent of a large cross-section of the population, the Commission was forced to make unwarranted assumptions: (1) servicemembers who elect to pay state taxes elsewhere do not have an intent to remain in Hawaii, (2) military family members have the same intent as their military sponsors, and (3) students who have not been in the state for one year (to qualify to pay in-state tuition) have no intent to remain here. When the Commission classifies people using vague and imprecise standards based on assumptions, and applies these standards only to select persons, it opens itself up to Equal Protection lawsuits as in the pending *Kostick v. Nago* case. Until

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less arbitrary standards are adopted, we can expect the legal challenges to Hawaii's reapportionment plans to continue.

Moreover, it is very unlikely that in the future, the military will provide information contained on servicemembers' DD2058 forms to the State. This form is used to designate which state should withhold taxes from servicemembers' military pay. Servicemembers are informed that the information they provide may be disclosed to *tax authorities* in the tax withholding state, but they are not informed that the data will be provided to Hawaii to determine "permanent residency" for apportionment purposes, and disclosure to the State may have violated the Privacy Act, 5 U.S.C. § 552a *et seq.* There may be little correlation between the place where a servicemember pays state taxes and where she is actually located, or where she intends to remain. Consequently, the military does not provide Kansas with data on servicemembers stationed there, and it is likely that in the future, the military will take the same approach with Hawaii. This means that in the future, Hawaii, like Kansas, will likely have to commission its own survey of military personnel, with likely similar results (very few of the Kansas surveys are actually returned by servicemembers, resulting in a statistically insignificant "extraction" of military personnel). This is just a waste of time and money.

**C. Hawaii is an Outlier in Not Using Census Population**

Presently, only Hawaii and Kansas measure populations different than the Census count for purposes of state reapportionment. Although Kansas extracts non-resident military, it does not do so on the basis of their taxpaying status: it produces a survey which asks servicemembers whether they are permanent residents of the state. On the basis of that survey less than 1,000 are "extracted" as nonresidents, a statistically insignificant number. Other states with even higher percentages of military—Alaska, for example—do not exclude them from representation.

Thus, Hawaii remains the sole outlier in its removal of a large number of servicemembers and their families from the reapportionment population. By barring military, their families, and students from representation in the legislature, Hawaii has insured they are represented *nowhere*: because they are

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counted by the Census only as usual residents of Hawaii—and other states base their apportionments on the Census population—they are not counted or represented anywhere else.

**D. Federal and County Districting Use Census Population**

Moreover, Census population with no extractions is used in Hawaii's Congressional and county districting:

- When redistricting for purposes of the U.S. House of Representatives, the State is required by the U.S. Constitution to use total Census population. Under federal law, no one can be “extracted.”
- The two counties in Hawaii that do not rely on at-large county elections (the City and County of Honolulu, and the County of Hawaii) use the total Census population as the basis for districting, and do not attempt to identify or “extract” nonresidents.

S.B 286 would bring the State's reapportionment process into the mainstream.

**IV. CONCLUSION**

In sum, we respectfully urge this Committee to adopt SB 286 as presently drafted.

Very truly yours,

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