81-3476

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLIFFORD EUGENE DAVIS, JR., et al.,
Plaintiffs-Appellees

and

DR. D'ORSAY BRYANT, et al.,
Plaintiffs-Intervenors-Appellees
and Cross-Appellants

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, et al.,
Defendants-Appellants and
Cross-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the issues presented in these appeals are adequately addressed in the briefs. We do not, however, oppose oral argument.

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in rejecting the school board's desegregation plan.

2. Whether the district court abused its discretion in fashioning its own desegregation plan for the school system.

STATEMENT

1. Procedural history

The procedural history of this school desegregation suit, begun in 1956, is described in detail in the brief for the United States as appellee in the companion case, No. 80-3922, now pending before this Court. See Brief for the United States at 2-6. Accordingly, we include here only the procedural history that is relevant to the issue presented by this appeal: the propriety of the relief ordered by the district court in this case.

On September 11, 1980, the district court granted partial summary judgment on the issue of the school board's liability for failing to dismantle its dual school system. Davis v. East Baton Rouge Parish School Board, 498 F. Supp. 580 (M.D. La. 1980). The court ordered the school board to submit a desegregation plan (R. 1329-1344).[1/] It later extended the deadline for filing the board's plan (R. 1368), and on October 8, 1980, the court ordered the board to submit progress reports every ten days until the plan was completed (R. 1369). On January 9, 1981, the school board filed its proposed desegregation plan;[2/] the United States had submitted a plan in May, 1980 (R. 1088-1181). The court conducted hearings on the proposed remedies on March 4-6, 9-10, 1981 (R. 1522-1526).

1/ The designation "R." followed by a page number refers to the consecutively paginated sixteen-volume record.

2/ The school board's plan is discussed in detail infra, at 7-9.

On March 4, 1981, prior to commencement of the remedy hearings, the district court urged the parties to negotiate a desegregation plan themselves (Tr. XI, 8B-13),[3/] and it ordered them to meet from March 11, 1981, at least through March 20, 1981 (Tr. XI, 13-14). On April 15, 1981, the parties advised the court that they could not agree on a desegregation plan, and on April 16, 1981, the court terminated the settlement discussions. The court ordered a desegregation plan of its own design on May 1, 1981 (R. 1555-1607).[4/] The school board and the private plaintiff intervenors appeal that order.[5/]

The district court ordered the school board to implement the court's desegregation plan for elementary schools in August, 1981, and to implement the court's plan for secondary schools the following year. Davis v. East Baton Rouge Parish School Board, 514 F. Supp. 869, 874 (M.D. La. 1981). The district court (R. 2010-2011), and this Court denied the school board's applications to stay implementation of the plan, and this Court consolidated the school board's appeal from the liability finding with the appeals by the board and the private plaintiff intervenors from the district court's remedial order.

3/ The designation "Tr." followed by a Roman numeral and page number refers to the five-volume transcript of the remedy trial, conducted March 4-6, 9-10, 1981, and one volume of post-trial proceedings conducted July 30-31, 1981.

4/ The district court's remedy order is reported at 514 F. Supp. 869 and is discussed in detail infra, at 9-10.

5/ The United States has not appealed the district court's decision not to order implementation of the plan proposed by the government.

Approximately one year after implementation of the elementary school plan, the United States, on August 6, 1982, filed in this Court a motion to stay further proceedings in this appeal to afford the district court an opportunity to reevaluate and modify its plan in light of actual experience. On August 30, 1982, this Court granted that motion, and on September 15, 1982, this Court entered an order deferring for sixty days action on a motion to reconsider its August 30 order, by which time the parties were to advise this Court "concerning the steps actually taken toward seeking modification of the District Court's desegregation orders and such further facts and circumstances on why the appeal should be or should not be further delayed." 6/

In August, 1982, the United States retained a school desegregation expert, Professor Christine Rossell of Boston University, to undertake a study of the East Baton Rouge Parish school system and the operation of the court-ordered desegregation plan. Of particular concern was the board's assertion that the court's plan had caused a large number of students to leave the system. 7/ Professor Rossell

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6/ The school board sought a stay of the district court's secondary school plan on August 11, 1982 and we opposed the stay. The board's motion was denied on August 16, and its request to this Court for a stay (also opposed by the United States) was denied on August 30, 1982.

7/ In its brief filed in this Court in this appeal, the board asserted that implementation of the district court's plan for elementary schools had caused some 4,000 students to leave the system (Brief for Appellant at 11, 33, 36). Professor Rossell's study concluded that 4,244 students at all grade levels had left the system since the year before the court's plan went into effect.

compiled substantial data on enrollment, individual school characteristics, and student transportation in East Baton Rouge Parish, with the goal of identifying the extent of enrollment loss due to desegregation and the factors that contribute to or detract from interracial contact on a school-by-school basis. Based on her analysis, Professor Rossell prepared and the United States presented to the school board, the parties and the district court on December 10, 1982, the framework of an alternative plan for East Baton Rouge Parish designed to desegregate the public schools in a more effective manner. Rather than relying on mandatory assignment techniques, the Rossell Plan employed educational incentives to attract departing students back to the system and achieve a level of desegregation comparable to that sought by the district court. Under the Rossell Plan desegregation was to be accomplished by court-ordered school closings, by encouraging the use of majority transfers and by magnet schools.[8/]

8/ The Rossell Plan, as submitted in final form to the district court in February, 1983, was attached to our motion filed February 28, 1983, to lift this Court's stay. Although copies of the Rossell Plan were filed with the district court and this Court, it was not formally proposed to the court and it has not been the subject of hearings because the board declined to endorse it.

The location of each magnet in the Rossell Plan was based on an evaluation of its desegregative impact and the plan proposed various measures to minimize racial identifiability of the magnet schools and to stimulate "non-resident" race enrollment. Admission of students to the magnets would be in the ratio of 55% white and 45% black plus or minus some percentage points.

On January 7, 1983, under the auspices of the district court, representatives of the Department of Justice met with members of the school board to explain the plan, to discuss a phased transition from the court plan to the Rossell Plan, and to receive the board members' general reaction to the proposal. Department representatives and Professor Rossell subsequently met with members of the school board staff on January 10-11, 1983, for a more detailed discussion and to explore implementation techniques and obtain specific information about the school system's operation since the effective date of the court's order.

Because it was apparent that orderly implementation of the Rossell Plan would require a "phasing" schedule, calling for a staged withdrawal from the existing plan, the Justice Department and Professor Rossell prepared a comprehensive implementation procedure lodged with the district court and presented to the board for its consideration.

On February 7, 1983, Justice Department representatives met with the school board in a specially-called public meeting to make a formal presentation of the Rossell Plan and to answer questions about its implementation. Following that session, and a separate meeting with NAACP representatives, the school board on February 10, 1983, voted not to endorse the United States' proposal at the present time. Because of our belief that the success of the Rossell Plan depends on the full and complete support of the school board, we informed the district court on February 17, 1983, that until

such time as an agreement can be reached and brought to that court jointly with the board, it is premature for us to press for alternative remedial action by the district court. For that reason, we asked this Court to lift the stay entered in this appeal at our request on August 30, 1982, and adjudicate on the merits the issues presented.[9/] In response to our motion, this Court lifted the stay on March 18, 1983.

2. The school board's desegregation plan

On January 9, 1981, the East Baton Rouge Parish School Board submitted to the district court its proposal to dismantle the dual system -- a plan described by the district court as "basically a neighborhood school-voluntary magnet plan." Davis v. East Baton Rouge Parish School Board, supra, 514 F. Supp. at 871.

The board's plan would have established three "magnet zones" running east-west across the parish. Id. at 872. In each zone certain high schools, middle schools, and elementary schools were designated as magnet or special focus schools.[10/] Id. at 872. However, most magnet programs were to be separate from the existing

9/ On November 15, 1982, we filed a memorandum with this Court in response to its order of September 15, in which we described our efforts to prepare an alternative plan for the district court's consideration, and requested this Court to continue its stay for an additional sixty days to enable us to complete that process. This Court has not acted on that request as of this date.

10/ East Baton Rouge already had one magnet high school and two magnet middle schools in operation in 1980. Id. at 873. After several years of operation, the magnet high school had only a 16% black enrollment; black enrollment was somewhat higher at the middle schools, Istrouma and Glasgow. Ibid.

school programs, many of which would continue one-race.[11] The district court found that the magnet "school within a school" itself provided insufficient assurances that it would actually desegregate.[12] Ibid.

The board believed that the magnet programs would be so attractive to parents that they would voluntarily enroll their children thereby desegregating the system without mandatory student reassignments. Ibid. The school board projected that it would require three years before the magnet schools would have enrollments of 25% of the other race, and the board conceded that until the schools were actually set up and operating it would be unable to determine which magnets would be successful at attracting students and which would not.[13] Ibid.

11/ Of the 21 magnets proposed by the board, 20 were "add on" programs at one-race schools where there would be little or no interaction between the magnet students and the regular school students, and magnets would occupy only the excess capacity in any school (Tr. XIV, 9-212 to 9-214). The disadvantages of that approach are discussed infra, at note 20.

12/ The board refused to consider using school closings in its plan. Id. at 871. In contrast, the court's plan used school closings to further desegregation.

13/ In determining that magnet schools would succeed in desegregating the system, the school board relied on the results of a parent survey in which parents were asked to identify what special programs would interest them. The survey gave no specific information as to the principal, faculty, or location of the program, however, notwithstanding that nearly two-thirds of the parents who responded to the survey stated that the most important factor in their decision to enroll their child in a magnet program would be the location of the program, or the principal, or the faculty (Tr. XIV, 9-229 to 9-234). Moreover, there was nothing in the board's plan reflecting an effort to place particular magnet programs at particular schools with a view toward attracting students of the non-resident race -- obviously a key factor in using magnets effectively as tools for

The district court found that the net effect of the plan was to leave nearly half the elementary students in one-race schools "with no serious indication that the ratio will improve in the future." Id. at 873. For this reason,[14/] the court rejected the the school board's proposal. Ibid.

3. The district court's remedial plan

Like the school board's plan, the district court's desegregation plan divided the system into three east-west zones. Davis v. East Baton Rouge Parish School Board, supra, 514 F. Supp. at 875-876. The court's plan used mandatory student reassignment, clustering or pairings and school closings to achieve desegregation. Id. at 874. Substantial numbers of students in noncontiguous pairings were assigned to schools away from their neighborhood. In addition, the court ordered the board to continue the majority to minority transfer policy and to utilize magnets "to the fullest extent practicable, considering its resources in both funding and personnel." Id. at 873. Another feature of the court's plan called for termination of the use of temporary buildings "which the Board has utilized to perpetuate all-white schools" (id. at 875), and the closing of selected schools where the court concluded that continued operation

14/ Because the board's proposal for secondary schools was based on the use of feeder schools from the elementary level, the board's plan left substantial segregation at the secondary level (Tr. XII, 5-161 to 5-163). In this brief, however, our discussion is confined primarily to the elementary school plan. See infra, note 21.

was educationally and economically unsound. Id. at 876. The court projected that under its plan 82.5% of the elementary students would be in desegregated schools, and the remaining 17.5% would move into desegregated schools at the secondary level. Id. at 883.

Capitol High School, racially isolated in the inner city, remained 100% black and Woodlawn High School, 87% white under the court's plan. Id. at 883. The court proposed to make these two schools "sister school[s]" with joint meetings of faculty and students and periodic rotation of faculty and administrative staff. Id. at 881. The court also approved installation of a magnet at Capitol.[15/] Ibid.

The court ordered implementation of its plan for elementary schools in the 1981-1982 school year (id. at 880), and implementation of the plan for secondary schools the following year. Ibid. The court also ordered the school board to prepare and submit a faculty staff employment and assignment policy consistent with this Court's decision in Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir.) (en banc), cert. denied, 396 U.S. 1032 (1970).

15/ Fifteen percent of the total high school enrollment would attend Capitol and Woodlawn under the district court's plan. Id. at 883. The court concluded there was no practical and effective means of completely desegregating Capitol because of its location. Id. at 881.

INTRODUCTION AND SUMMARY OF ARGUMENT

Once a constitutional violation is found, it is in the first instance the responsibility of local school officials to remedy that violation. The district court here recognized that fact, and encouraged the board to devise an acceptable desegregation plan. The board's preference for voluntary student transfers triggered by educational incentives was well founded. But the record demonstrates that the particular proposal it submitted did not promise to dismantle the dual system, and lacked the essential underpinnings of success. Faced with that fact, the district court had no recourse but to devise its own plan.

Where local officials default in their obligation to develop a plan for dismantling a dual school system, the court must formulate its own remedy. All too often what results in such circumstances is the imposition of a plan, like the one here, that relies to an unfortunate degree on mandatory transportation, with adverse and counterproductive consequences for the school system.[16/] However, the place to repair that damage is not in this Court, but in the district court. It was with that understanding that the United States sought and was granted by this Court the opportunity to prepare and present an alternative to the court's plan.[17/]

16/ The school board has advised this Court that more than 4,000 students have left the public school system of East Baton Rouge Parish in the first year of implementation of the court's plan, with every indication that enrollment losses will continue, perhaps at accelerated rates, throughout the current school year. Brief for Appellant at 11, 33, 36.

17/ See discussion supra, at 4-7.

The appellate courts are in no position to fashion desegregation plans ab initio. That responsibility falls to the local district courts when school boards fail to provide a viable remedial option. Moreover, the court-ordered relief is entitled on review to considerable deference based on the district court's greater familiarity with the record and with local conditions. Brown v. Board of Education, 349 U.S. 294, 299-300 (1955).

Under controlling case law, the sole issue before the Court in the instant case is whether the remedial decision of the court below was an abuse of discretion. Despite grave reservations about the mandatory student assignment aspects of the district court's plan and the plan's continued draining effect on white enrollment in the East Baton Rouge public schools, we cannot say that there is a record basis for finding such an abuse in this instance. The current court-ordered plan is an interim measure that the district court has clearly indicated is not set in concrete. It thus can be subject to substantial modification, or even wholesale replacement, in the event that a constitutionally acceptable alternative is forthcoming from local school authorities. Until that occurs, however, the district court's plan is entitled to remain in effect.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE SCHOOL BOARD'S DESEGREGATION PLAN THAT DID NOT PROMISE TO DISMANTLE THE DUAL EDUCATIONAL SYSTEM

The school board urges this Court to reverse the district court's remedial order of May 1, 1981, on the ground that the court should have accepted the school board's desegregation plan instead of formulating a plan of its own. That argument cannot prevail in the circumstances of this case.

The task confronting the district court was to select a remedy "that promises realistically to work * * * now." Green v. County School Board, 391 U.S. 430, 439 (1968) (emphasis in original). Such a plan must reconcile "the competing interests involved," Swann v. Board of Education, 402 U.S. 1, 26 (1971), and must take "into account the practicalities of the situation." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). Where, as here, the board does not claim that the court applied an incorrect legal standard in formulating a remedy, the standard of review on appeal is whether the district court abused its discretion in rejecting the board's plan.

The main component of the school board's desegregation proposal was the use of special focus or magnet programs to attract students of the other race voluntarily to attend otherwise one-race schools. That concept is a sound one. Indeed, the court stated that it was "impressed with the magnet or special focus school as

a concept for improving the quality of education." Davis v. East Baton Rouge Parish School Board, supra, 514 F. Supp. 869, 875 (M.D. La. 1981). It also recognized that the three magnet schools already operating in the system were "clearly successful educationally." Id. at 873. Far from rejecting the magnet concept, the court urged the board to develop magnets "to the fullest extent practicable, considering its resources in both funding and personnel." Ibid.

But to label a plan a magnet school plan is alone not enough. Like any desegregation proposal, a magnet plan must be accompanied by sufficient supporting details to demonstrate its likelihood of success. Here such details were lacking. The court concluded that the nature of the outstanding constitutional violation required a remedy providing more promise of dismantling the dual system than the board's sketchy and amorphous proposal provided. 514 F. Supp. at 871. The bases for that conclusion were factual findings that cannot be shown to be clearly erroneous.

The board proposed to use magnet schools exclusively to dismantle East Baton Rouge's dual system.[18/] The board paired some adjacent schools, but it declined to close schools or to eliminate the use of temporary classrooms, against the recommendation of its

18/ No consideration was given to including with the proposed magnet programs the additional desegregative techniques of an expanded program of majority to minority transfers and a judicious selection of school closings.

own superintendent who proposed closing several schools to further desegregation (Tr. XIV, 9-215 to 9-217; Tr. XV, 10-49). The record establishes that the board had taken no steps to ensure that the plan would be a desegregation tool that "promises realistically to work * * * now." Green v. County School Board, supra.[19/]

The board proposed to place the magnet programs primarily in unused classroom space separated from students enrolled in the schools' regular programs which would continue to serve one race.[20/] Facts essential to the district court's assessment of the potential success of the program were totally lacking in the board's proposal. For example, the board did not explain how it would fund the program, although it conceded that the program would entail substantial additional costs for recruitment, transportation, staff, and equipment (Tr. XII, 5-166 to 5-167, Tr. XIV, 9-146). There was no plan for implementing the board's

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19/ The board's plan made no effort to utilize a variety of measures that could facilitate the magnet's usefulness as a desegregation device, including designation of programs designed to reduce a school's racial identifiability and to attract students of the nonresident race, and specific racial percentage goals for admitting students to the programs.

20/ There are two obvious reasons why this use of magnets as "add-on" programs undermines their desegregative potential. First, because the school remains basically racially identifiable, it is even more difficult to recruit the nonresident race to the school than usual. Second, because there is a segregated enclave, intergroup hostility is always a problem. Thus, it is generally recognized that magnets are most effective when they completely replace the program that previously existed in the schools designated as magnets.

proposal. The superintendent could not state whether the system had a sufficient number of qualified principals and teachers to staff the proposed magnets, and there was no training program to prepare them to work in magnet schools (Tr. XIV, 9-79, 9-171 to 9-172). Because the board had not established admissions policies for the magnet schools, it could not estimate the size of the available pool of students for any of the special programs (Tr. XIV, 9-115 to 9-116, 9-171). And the board had not developed a recruitment plan, (Tr. XIV, 9-143), although all the witnesses agreed that aggressive recruitment was indispensable to a successful magnet program.

Given the deficiencies in the school board's proposal, the court below did not abuse its discretion in rejecting it. This conclusion in no way detracts from what other courts are now acknowledging about the remedial approach in this area for large urban school systems: the use of educational incentives instead of busing to produce stably desegregated schools is a permissible and desirable option for school authorities. See Clark v. Board of Education of Little Rock School District, No. 82-1834 (8th Cir. Mar. 31, 1983); United States v. Board of Education of Chicago, 554 F. Supp. 912, 924-925 (N.D. Ill. 1983). Particularly where a mandatory busing program would accelerate declining white enrollment, thereby leading to resegregation, school authorities and

courts have reason to look to alternative desegregation tools. As the court pointed out in Chicago, supra, 554 F. Supp. at 925:

> Once within the range of constitutionally permissible desegregation plans, * * * the Board was free to choose one calculated to minimize parent resistance and thereby serve its larger goal.

Here, however, the board's proposal, as submitted, was not within the range of "constitutionally permissible desegregation plans." It thus received proper treatment below.

II

THE DISTRICT COURT'S PLAN SHOULD CONTINUE IN EFFECT UNTIL IT CAN BE MODIFIED OR REPLACED WITH A DESEGREGATION PLAN WITH A REALISTIC PROSPECT OF COMMUNITY SUPPORT AND SUCCESS

In 1979, the Attorney General certified that this case was of general public importance, and the United States intervened in order to help bring an end to the long history of de jure segregation of the East Baton Rouge schools. In 1980, the district court found --- correctly, in our view --- that de jure segregation continued in the school system. Accordingly, the court established a procedure for developing a remedy. That procedure properly relied in the first instance on efforts of the parties to devise an acceptable desegregation plan. Unfortunately, the plan developed by the school board was inadequate, and the plan developed by Dr. Foster, the expert retained by the United States, relied too heavily on busing. In light of the inadequacies of those plans, the lack of any other proposal from private plaintiffs and the failure of negotiations, the district court had little choice but to devise

The district court's task was to devise a desegregation plan that would be effective, both in ensuring a truly nondiscriminatory education and in preserving quality public education. Milliken v. Bradley, 433 U.S. 267, 280-281 (1977); Swann, supra, 402 U.S. at 25; Green v. County School Board, supra, 391 U.S. at 439. To this end the court's objective must be the establishment of a unitary non-racial system, not the attainment of an artificial racial balance. Swann, supra, 402 U.S. at 24. Appellate court review of the district court's plan is limited, under the Supreme Court's decisions in Brown II and Swann, where the district court has adhered to these principles. Given their lack of familiarity with local conditions, appellate courts by their nature are less well-equipped than district courts to devise school desegregation plans.

Even where the district court has utilized undesirable and counterproductive techniques, such as mandatory busing, the Supreme Court has held that "the remedial techniques used in the District Court's order were within that court's power to provide equitable relief." Swann, supra, 402 U.S. at 30. Had the school board presented a viable alternative as its own plan -- one that promised to establish a unitary school system free of discrimination -- the district court would in all likelihood have been obliged to have adopted it. As already pointed out, however, the board's magnet plan fell far short of the constitutional standard and thus, the district court's plan, even with all its flaws, must stand.

Nor do the post hoc attacks on the district court's plan by both the school board and the private plaintiffs alter the outcome. The board's challenge rests largely on the alleged massive enrollment losses suffered by the parish system due to the court order (Brief for Appellant at 11, 33, 36); the private plaintiff intervenors argue that the court plan has unfairly burdened black students without accomplishing its remedial goal (Brief for Appellees-Cross-Appellants at 19-29). Both of these claims appear to have some merit, but they are arguments properly addressed to the district court in the first instance, not here on appeal. If such infirmities do indeed exist -- and we suspect they might -- review must take place in the context of proposed alternatives for seeking meaningful desegregation, and that can only be accomplished below. This Court can ill afford to disapprove a desegregation plan on the basis of post hoc attacks if there is no substitute to put into effect. The resulting vacuum would invariably lead to further delay in the vindication of constitutional rights, a situation that is not looked upon with favor. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969). Accordingly, we see no basis in law or fact for reversal of the district court's remedial order of May 1, 1981.[21/]

21/ Presently pending before this Court in Nos. 82-3298 and 82-3412 are the school board's appeals from the district court's remedial orders of March 8, 1982, April 30, 1982, May 7, 1982, May 21, 1982, June 2, 1982, June 7, 1982, and June 24, 1982. On November 23, 1982, this Court granted the board's motion to stay further proceedings in those appeals until the stay in this appeal and No. 80-3922 is lifted.

This does not, in our judgment, mean that the current desegregation plan for the East Baton Rouge schools should be considered by this or any other court as final. In Swann, supra, the Supreme Court stated that if school authorities fail in their affirmative obligation to dismantle a dual school system, judicial authority may be invoked. 402 U.S. at 15. The converse of that proposition is also true: the authority of a court to impose its own desegregation remedy exists only in the absence of a constitutionally acceptable plan from school authorities.

Court-ordered plans are not engraved in stone; they are interim measures that rarely, if ever, survive the vicissitudes of implementation without need for change. As school officials observe deficiencies and come forward in response with an alternative desegregation plan that is within the range of constitutional permissibility, courts should readily defer to the educators in this area where the judiciary has such limited expertise. See Clark v. Board of Education of the Little Rock School District, supra. Until that time, however, the court's plan must continue in effect.

CONCLUSION

For the foregoing reasons, the judgment of the district court entered May 1, 1981, should be affirmed.

Respectfully submitted,

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