No. 22-15916

In the United States Court of Appeals
for the Ninth Circuit

DZ RESERVE and CAIN MAXWELL d/b/a MAX MARTIALIS,

Plaintiffs-Appellees,

v.

META PLATFORMS, INC., f/k/a FACEBOOK, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, Case No. 3:18-cv-04978-JD
The Honorable James Donato

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: November 7, 2022

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STATEMENT OF IDENTITY AND INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include technology companies and other businesses that are often sued in class actions. The Chamber is thus familiar with class-action litigation, both from the perspective of individual defendants and more generally. The Chamber has a keen interest in this case because the district court's dilution of class-certification standards for fraud claims misunderstands Rule 23 and

[1] All parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

state law. The proper application of those standards is of vast importance for the Chamber's members and for the customers, employees, and other businesses that count on those members.

SUMMARY OF ARGUMENT

Since the current version of Rule 23 was adopted in 1966, the settled understanding has been that class actions are difficult to certify in fraud cases. The main stumbling block for the certification of fraud classes is Rule 23(b)(3)'s predominance requirement, a vital restraint on class-action litigation. Fraud claims usually fail the predominance requirement because key elements of common-law fraud require individualized inquiries that overwhelm class-wide questions. Those individualized elements include whether the defendant made a material misrepresentation to each class member and whether each class member relied on a misrepresentation to its detriment.

This case is a textbook example. Meta showed individualized Potential Reach estimates to each of the more than three million class members, and each class member in turn placed its own individualized degree of weight on Meta's estimates. Deciding whether Meta made material misrepresentations to each class member and whether each

class member relied on those alleged misrepresentations would thus require millions of individualized inquiries. Those particularized questions dwarf any common ones, defeating predominance and precluding class certification.

The district court nevertheless certified plaintiffs' fraud claims for class treatment. In so doing, the court turned the settled understanding about class certification in fraud cases on its head, adopting a diluted approach to predominance that would make certification in fraud cases the norm. Under that approach, fraud plaintiffs would almost always be deemed to have class-wide evidence of material misrepresentations and reliance that would meet the predominance requirement and trigger class certification.

Left uncorrected, the district court's dilution of the predominance requirement in fraud cases would harm American businesses and the national economy. The certification of large class actions creates hydraulic pressure for defendants to settle, even if the plaintiffs' claims have no merit. That is particularly true in fraud cases, where plaintiffs can inflate their damages demands with threats of punitive damages. Neutering the predominance requirement in fraud cases would thus

impose massive costs on defendant businesses—costs that these businesses would then pass along to consumers, employees, and the rest of the business community.

This case presents a stark illustration of these reverberating harms. Many small companies depend on technology platforms like Facebook to advertise their products and services. The district court's overly permissive approach for certifying fraud class actions against technology platforms would increase the costs of advertising on these platforms. The end result would be to cut off the lifeblood of small businesses across the country.

ARGUMENT

I. The district court watered down Rule 23's predominance requirement when it certified plaintiffs' fraud claims for class treatment.

A. The predominance requirement is a critical limitation on class actions.

The predominance requirement imposes a crucial restraint on class-action litigation. Under that requirement, a damages class may be certified only if the district court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This rule bars

certification unless the class is "sufficiently cohesive to warrant adjudication by representation." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). The predominance requirement thus limits class treatment to cases in which it will achieve judicial economy while maintaining procedural fairness. *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment ("1966 Advisory Committee Note"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009).

Consistent with its critical nature, the predominance requirement is a demanding one. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Plaintiffs seeking class certification must prove, not merely plead, that their claims satisfy Rule 23(b)(3). *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) (en banc). To that end, the plaintiffs must show—by a preponderance of the evidence—that their claims' essential elements "are capable of being established through a common body of evidence, applicable to the whole class." *Id.* at 665-66. When deciding whether the plaintiffs have met

that burden, the district court must conduct a "rigorous analysis," *id.* at 664, and "take[ ] into consideration all factors that militate in favor of, or against, class certification," *Vinole*, 571 F.3d at 946.

B. Fraud claims usually flunk the predominance requirement.

When the predominance requirement is rigorously applied, common-law-fraud claims typically cannot satisfy it. That point has been the subject of widespread agreement since the predominance requirement was adopted in the 1966 amendments to Rule 23.

As the Advisory Committee observed at that time, even when fraud claims have "some common core," those claims may not be suited for class treatment if there was "material variation" in either "the representations made" or "the kinds or degrees of [class members'] reliance." 1966 Advisory Committee Note. Courts have followed this guidance and been reluctant to certify class actions in fraud cases ever since. *See* 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §§ 4:58 to 4:59 (6th ed. 2022); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 5:54 (18th ed. 2021).

The Advisory Committee's guidance reflects that individualized inquiries can often predominate over common questions on two key elements of a fraud claim.

The first is that the defendant must have made a material misrepresentation to the plaintiff. *See, e.g.*, *Graham v. Bank of Am., N.A.*, 172 Cal. Rptr. 3d 218, 227-28 (Ct. App. 2014). If the defendant made different representations to different class members, the class cannot use class-wide evidence to satisfy this element. Rather, each class member will need to make an individualized showing that the defendant said something to that class member that was materially misleading. Those individualized showings will ordinarily swamp any common questions and bar class certification. *See, e.g.*, *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1066, 1069 (9th Cir. 2014); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012).

The second key element of a fraud claim that often precludes class certification is that the plaintiff must have detrimentally relied on the defendant's alleged misrepresentation. *See, e.g.*, *Graham*, 172 Cal. Rptr. 3d at 228. Class members usually act based on their own individual tastes, motivations, and knowledge. As a result, individual

inquiries are typically needed to judge why each class member acted as she did—and thus to determine whether each class member relied on the defendant's alleged misrepresentation in taking that action. *See, e.g.*, *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-66 (9th Cir. 2004); *Mazza*, 666 F.3d at 596. Indeed, unless the alleged misrepresentation was the class members' *only* conceivable basis for acting as they did, particularized reliance inquiries will ordinarily predominate. *See* 1 McLaughlin § 5:54.

The Supreme Court's approach to securities-fraud claims confirms that the reliance element usually defeats predominance in common-law-fraud cases. In securities-fraud cases, the Supreme Court allows plaintiffs to show class-wide reliance through the fraud-on-the-market theory. *See, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461 (2013). Otherwise, the Court has explained, the reliance element "would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class." *Id.* at 462-63. In common-law cases, in contrast, the fraud-on-the-market theory does not apply. *See, e.g.*, *Mirkin v. Wasserman*, 858 P.2d 568, 584 (Cal. 1993). Thus, in

these cases, individual reliance issues *do* typically overwhelm questions common to the class and preclude certification of a class action.

C. This case exemplifies the difficulties of meeting the predominance requirement in fraud cases.

Under the principles described above, class certification is improper in this case. Plaintiffs' fraud claims trigger both of the concerns that the Advisory Committee highlighted when the predominance requirement was adopted and that courts have treated as barring class certification in the decades since.

1. This case involves "material variation in the representations made." 1966 Advisory Committee Note. The representations at issue are Meta's Potential Reach estimates, which varied for each proposed advertisement. *See generally* Class Action Compl., Dkt. 1; *see also* 2-ER-79, 89, 92 (operative complaint); 2-ER-71. Plaintiffs allege that those estimates were inflated. *See* 2-ER-79–80, 82–88. But the level of alleged inflation varied widely across the class. 1-ER-11–13; Meta Br. 10-11. Indeed, plaintiffs assert that the inflation levels ranged from 10% to 50%. Meta Br. 11. Meta's alleged misrepresentations therefore differed from class member to class member.

Meta's representations to class members also varied in additional ways. Meta displayed other metrics, such as Estimated Daily Results, alongside Potential Reach. *See* 2-ER-79, 150. For many advertisers, those other metrics mattered more than Potential Reach did. *See* 2-ER-97.

Meta also made disclosures about Potential Reach that changed over time. *See* 2-ER-176–79, 183; *see also* 2-ER-82, 181. The later disclosures clarified that Potential Reach estimates could be affected by the exact issues that plaintiffs emphasize, such as fake accounts and multiple accounts. *See* 2-ER-177–79, 183. In *Berger*, this Court held that analogous disclosures, such as statements posted on signs or made orally to customers, gave rise to individualized issues. *See* 741 F.3d at 1069.

In light of these variations in Meta's representations, the question whether Meta made a material misrepresentation to each class member cannot be answered through class-wide evidence. Rather, that question must be answered individually for each class member.

An example illustrates the point. One class member might be an advertiser whose estimate of Potential Reach was inflated by only 10%,

who cares far more about Estimated Daily Results than about Potential Reach, and who advertised after Meta made disclosures about fake accounts and multiple accounts. Another class member might be an advertiser whose Potential Reach was inflated by 50%, who cares only about Potential Reach, and who advertised before Meta made its more precise disclosures. The question whether Meta made a material misrepresentation to the first class member is far different from the question whether Meta made a material misrepresentation to the second class member.

This example is only the tip of the iceberg. The millions of class members vary in countless ways along each of the three axes described above: alleged inflation, other metrics, and disclosures. As a result, the number of individualized permutations that bear on the material-misrepresentation element in this case is astronomical.

2. The predominance problems get worse from there. That is because this case also involves "material variation" in class members' "kinds or degrees of reliance." 1966 Advisory Committee Note.

Not every advertiser relies on Potential Reach to the same extent—or at all—when making decisions about ads. Different

advertisers have different objectives for their ad campaigns, and those objectives need not depend on Potential Reach. *See* 2-ER-152–153; *see also, e.g.*, 2-ER-97, 103, 113–114. For instance, some advertisers care how many users actually click on their ads, not how many users might see those ads. *See, e.g.*, 2-ER-97, 113–14. Those advertisers would not rely on alleged misstatements about Potential Reach when they make their advertising decisions.

Analysis from plaintiffs' own expert confirms that many advertisers did not rely on Meta's alleged misstatements about Potential Reach. Plaintiffs' expert found that 21% of advertisers set *lower* budgets when Potential Reach was *higher*. 2-ER-54. These advertisers' reactions to Potential Reach estimates were *the opposite* of the reactions predicted by plaintiffs' reliance theory.

For these reasons, plaintiffs cannot show reliance through class-wide evidence. Each class member must instead show reliance through individualized evidence about its own decision-making process. Resolving the class's fraud claim will therefore require millions of mini-trials on reliance issues. Any other approach would improperly relieve plaintiffs of their burden and deprive Meta of its due-process rights.

In sum, this case confirms that the Advisory Committee was right when it observed that material variations in alleged misstatements and reliance produce individualized questions that make class treatment improper for fraud claims.

D. The district court's predominance analysis would make fraud classes too easy to certify improperly.

The district court failed to heed the longstanding recognition that classes are difficult to certify in fraud cases. The court instead adopted the opposite approach—one that would make the certification of fraud classes the rule, not the exception. Under that approach, fraud plaintiffs would almost always be deemed to have class-wide evidence of material misrepresentations and reliance, allowing the predominance requirement to be satisfied in fraud cases with ease.

1. The district court reasoned that plaintiffs have class-wide evidence of material misrepresentations because "Potential Reach estimates were shown to all advertisers in the Ads Manager," and because "Meta has acknowledged that Potential Reach is an important number for advertisers." 1-ER-12. That reasoning is flawed.

Evidence that Meta *showed* Potential Reach estimates to all advertisers is not class-wide evidence of a material misrepresentation.

Plaintiffs must go further and prove that those Potential Reach estimates *were materially misleading*. As discussed above, to make that showing, plaintiffs must present individualized evidence about levels of inflation, other metrics, and Meta's disclosures. *See supra* pp 9-11.

The district court fared no better when it reasoned that "Potential Reach is an important number for advertisers." 1-ER-12. Evidence that Potential Reach is important "for advertisers" is not evidence that Potential Reach is important for *all* advertisers. The latter could be class-wide evidence; the former is not. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Olean*, 31 F.4th at 663.

In any event, evidence that Potential Reach is important to advertisers goes to the wrong question. As the court acknowledged, to win on their fraud claims, class members must show that Meta's alleged misrepresentations were material. *See* 1-ER-12; *see also, e.g.*, *Graham*, 172 Cal. Rptr. 3d at 227-28. The question for predominance purposes is thus whether plaintiffs have class-wide evidence that Meta's alleged *misstatements* about Potential Reach were important. The district court instead cited evidence that *Potential Reach* was important. In other words, the court cited evidence that the *topic* of Meta's alleged

misstatements was material, as opposed to evidence that the alleged misstatements themselves were material. That difference matters, both in this case and more generally.

In this case, even if Potential Reach was material, it does not follow that any particular misstatement about Potential Reach was material. For example, even an advertiser that put great weight on Potential Reach might not have been materially misled by a Potential Reach estimate that was only marginally inflated and that was accompanied by a precise disclosure. The district court thus erred in equating the materiality of Potential Reach with the materiality of Meta's alleged misstatements.

More generally, the district court's focus on the materiality of a topic rather than on the materiality of a misstatement would largely do away with the predominance requirement in fraud cases. Class-action plaintiffs could almost always cite evidence that, at some level of abstraction, the topic of a defendant's alleged misrepresentations is material to all class members, even if the materiality of the alleged misrepresentations on that topic varied across the class. That would

make the predominance requirement a formality and produce results inconsistent with existing precedent. For example:

- Plaintiffs claiming that a car company made misstatements about the brakes in its cars could cite class-wide evidence that brakes are important to drivers, even if the company made different statements about the brakes to different drivers. *But see Mazza*, 666 F.3d at 596 (holding that class certification was improper in this scenario).
- Plaintiffs claiming that a home-improvement retailer made misstatements about surcharges in tool-rental contracts could cite class-wide evidence that surcharges are important to customers, even if the retailer made different statements about the surcharges to different customers. *But see Berger*, 741 F.3d at 1069 (same).
- Plaintiffs claiming that an internet service provider made misstatements about its internet speeds could cite class-wide evidence that internet speeds are important to consumers, even if the provider made different statements about its internet speeds to different consumers. *But see Newman v.*

RCN Telecom Servs., Inc., 238 F.R.D. 57, 75 (S.D.N.Y. 2006) (same).

Plaintiffs have also argued that they have class-wide evidence of material misstatements because their evidence purportedly shows that all class members' Potential Reach estimates were inflated by at least 10%. Pl. Rule 23(f) Opp. 14. But plaintiffs have no basis for asserting that 10% inflation is always material. The district court did not find that 10% inflation is material for every advertiser. Nor could it have made such a finding, particularly in light of the many variations among class members along other dimensions, including other metrics and disclosures provided by Meta. *See supra* pp 9-11.

Like the district court's approach, plaintiffs' "at least 10%" approach would make the certification of fraud classes routine even when the defendant made different alleged misstatements to different class members. Under plaintiffs' approach, a proposed class could simply assert that misstatements exceeding some threshold level were material, define the class to include only members who saw misstatements exceeding that threshold, and thus assert that it has class-wide evidence of materiality. That approach would upset the

settled understanding that the predominance requirement bars certification in fraud cases when the defendants' alleged misstatements varied across the class.

2. The district court also reasoned that plaintiffs have class-wide evidence of reliance because "[a] majority of advertisers rely on Potential Reach as a metric for their advertisements," and because plaintiffs can invoke a presumption of reliance under California law. 1-ER-12. The court erred on both points.

When it deemed evidence of reliance by "[a] majority of advertisers" to be class-wide evidence, the district court again made the mistake of treating evidence about *some* class members as evidence about *all* class members. *See supra* p 14.

Moreover, by pointing to evidence that advertisers rely on Potential Reach as "a metric for their advertisements," the court again analyzed the wrong question. The question on reliance is whether class members relied on Meta's alleged misstatements about Potential Reach to their detriment, not whether they relied on Potential Reach in the abstract. *See* 1-ER-10; *see, e.g.*, *Graham*, 172 Cal. Rptr. 3d at 227-28. Like the court's approach on materiality, its approach on reliance would

dilute the predominance requirement by allowing plaintiffs to cite purported class-wide evidence on an issue that is framed at the wrong level of generality.

The district court was also mistaken when it reasoned that plaintiffs can satisfy the predominance requirement through a presumption of reliance. Both California law and the Rules Enabling Act bar any presumption of reliance here. Meta Br. 33-37. Under California law, the presumption of reliance does not apply "where the record will not permit it." *Tucker v. Pac. Bell Mobile Servs.*, 145 Cal. Rptr. 3d 340, 362 (Ct. App. 2012). Plus, this Court and others refuse to presume class-wide reliance when there are potential explanations for class members' conduct *other than* reliance on the defendant's alleged misrepresentations. *See, e.g.*, *Poulos*, 379 F.3d at 665-66; *see also* 1 McLaughlin § 5:55. For the reasons discussed above, many class members did not rely on Meta's alleged misstatements to their detriment. Thus, the record does not permit a class-wide presumption of reliance, and there are many explanations for class members' advertising decisions other than Meta's alleged inflation of Potential Reach.

The district court nevertheless applied the presumption of reliance on the theory that Meta's alleged misrepresentations were material. *See* 1-ER-12. As shown above, however, the court's materiality analysis was flawed. *See supra* pp 13-18. A flawed materiality analysis cannot trigger a presumption of reliance. And even if a proper materiality analysis could trigger a presumption of reliance, that effect would underscore the need to conduct a rigorous inquiry on the materiality question—an inquiry that the court here did not undertake.

In sum, the district court's reasoning would erode the predominance requirement and allow classes to be certified in the mine run of fraud cases, upending the settled view that has prevailed for more than half a century.

II. Watered-down standards for class certification hurt American businesses and the national economy.

Left intact, the district court's overly permissive approach to class certification would impose serious harms on the business community and the public.

Class actions are expensive to defend. American companies' total spending on class-action defense swelled to more than $3 billion in 2021, and that figure is expected to grow again in 2022. *See* Carlton

Fields, *2022 Carlton Fields Class Action Survey* 4-6 (2022), available at https://bit.ly/3gX6AZo. Class actions can be litigated for years before the court even addresses the question of class certification. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (2013), https://bit.ly/3DNmpuA. Indeed, a defendant can spend more than $100 million to fight even a *single* class action. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (2011).

These extraordinary defense costs, together with massive damages exposure when a class is certified, often compel defendants to settle even meritless claims. As the Advisory Committee observed in 1998 when it allowed for immediate appeals of class-certification decisions under Rule 23(f), the grant of class certification may "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. The Supreme Court has agreed that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he

may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). In other words, "even a small chance of a devastating loss" creates "the risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also, e.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). These settlement pressures have grown in recent years: Companies settled 73.1% of class actions in 2021, up from 58.5% and 60.3% in the two previous years. *See* Carlton Fields at 26.

These settlement dynamics are especially pronounced in fraud cases. Fraud claims come with the threat of punitive damages, exposing defendants to massive risks of liability even for marginal claims. *See Mirkin*, 858 P.2d at 583. "When deciding whether to go to trial or settle a case and, if so, how much is a reasonable settlement amount, businesses must consider the worst-case scenario." U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* 8 (2022), https://bit.ly/3sMfUBY. Because the risk of punitive damages "increase[s] the unpredictability of the result in the event of a class-wide trial," the availability of

punitive damages creates another powerful incentive for defendants to settle for inflated amounts. Nagareda at 161 n.249.

The costs of defending and settling class actions directly harm the businesses that pay them. But those businesses pass along at least some of these costs to others in the form of higher prices and lower wages. *See Nuclear Verdicts* at 34-38. The result is that defense and settlement costs are ultimately borne by consumers, employees, other businesses, and the economy as a whole. *See id.*

This case highlights the widespread harms that result when class-certification standards are watered down. Advertising on technology platforms like Facebook is essential for many small businesses. In a recent survey, the Chamber found that:

- 93% of small businesses use at least one technology platform.
- 41% of small businesses use digital marketing platforms in particular.
- 77% of small businesses "would struggle to survive without access to their technology platforms."

U.S. Chamber of Commerce Technology Engagement Center, *Empowering Small Business, The Impact of Technology on U.S. Small Businesses* 4-5 (2022), https://bit.ly/3DNJ5ec. If class actions become too easy to certify against technology platforms, small businesses that rely on those platforms for their survival—along with those businesses' employees and customers—will pay the price.

To prevent that result, this Court should reverse the decision below and reaffirm the deeply rooted understanding that the predominance requirement makes class actions difficult to certify in fraud cases.

CONCLUSION

The Court should reverse the grant of class certification.

Dated: November 7, 2022

Respectfully submitted,

s/ Erik R. Zimmerman

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I am an attorney for Amicus Curiae Chamber of Commerce of the United States of America.

This brief contains 4,255 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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