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RECENT DEVELOPMENTS IN SEXUAL ORIENTATION & GENDER IDENTITY LAW

MARRIAGE

Cherokee High Court Rejects Legislators' Challenge to Couple's Marriage. On Dec. 22, 2005, the Judicial Appeals Tribunal of the Cherokee Nation, the highest Cherokee court, rejected an attempt by several members of the nation's Legislature, the Tribal Council, to invalidate the May 2004 marriage of Cherokee citizens Kathy Reynolds and Dawn McKinley. The court held that the council members lacked standing to seek a court order invalidating the couple's marriage because they could not show that they were individually harmed or affected by the marriage in any way. This is the second time the tribunal has rejected a challenge to the couple's marriage. On June 16, 2004, a member of the Cherokee tribe, Todd Hembree, filed a petition seeking to have the couple's marriage invalidated. On Aug. 3, 2005, the tribunal found that Hembree lacked standing to bring suit challenging the validity of the marriage because he also had failed to show individualized harm. On June 14, 2004, the Tribal Council adopted a law barring same-sex couples from marrying. *Baker v. McKinley and Reynolds*, No. JAT-05-11 (Jud. App. Trib. Dec. 22, 2005), *In re the Marriage Licenses of McKinley and Reynolds*, No. JAT-04-15 (Jud. App. Trib. Aug. 3, 2005).

California Court Rules San Jose's Recognition of Marriage Equality Unlawful. On Dec. 19, 2005, a trial court judge in Superior Court for Santa Clara County ruled that San Jose's policy of recognizing the marriages of all city employees, including those between same-sex couples from other jurisdictions, was invalid as contrary to California law. The San Jose City Council adopted the policy in March 2004 and plaintiffs, two advocacy groups advocating against marriage equality, filed suit seeking a declaratory judgment in May of that year. *Proposition 22 Legal Defense and Education Fund and Values Advocacy Council v. Gonzales*, No. 1-04-CV-019549 (Cal. Super. Ct. Dec. 19, 2005).

New York Appeals Court Reverses Marriage Equality Ruling. On Dec. 8, 2005, an intermediate appellate court in New York reversed a lower court ruling that excluding same-sex couples from the right to marry violated the equal protection and due process provisions

of the New York Constitution. In a 4-1 decision, the First Department of the New York Supreme Court, Appellate Division, criticized the trial court judge for intruding on the province of the state Legislature and concluded that the state's marriage laws are "not primarily about adult needs for official recognition and support, but about the well-being of children and society," and that this could justify the exclusion of same-sex couples. Marriage cases are pending before two other departments of the Appellate Division, and it is assumed that a final resolution on the constitutionality of the denial of marriage equality in New York will come from the Court of Appeals (New York's highest court). *Hernandez v. Robles*, 2005 NY Slip Op 9436, 2005 N.Y. App. Div. LEXIS 13892 (N.Y. App. Div. 2005).

Wisconsin Senate Approves Discriminatory Marriage Amendment. On Dec. 14, 2005, the Wisconsin Senate voted along party lines to reapprove a state constitutional amendment purporting to bar marriage and other forms of relationship recognition for same-sex couples. The proposed amendment passed both houses of the Wisconsin Legislature last year, but the Wisconsin Constitution requires that the measure be approved again in a subsequent legislative session before it is presented to voters. The measure now goes to the Assembly for consideration; if passed, it will likely appear on the ballot in November 2006. *S.J. Res. 53, Reg. Sess. (Wis. 2005)*.

Senate Subcommittee Approves Discriminatory Marriage Amendment. On Nov. 9, 2005, the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights approved the so-called "Marriage Protection Amendment," a constitutional amendment that would define marriage as between a man and a woman and prevent states from affording benefits and obligations to same-sex couples. The subcommittee split evenly along party lines, with Judiciary Committee Chairman Sen. Arlen Specter, R-Pa., casting the deciding vote to advance the amendment to the full committee. Specter has indicated that he disagrees with the amendment, but would let it pass out of committee. *S.J. Res. 1, 109th Cong. (2005)*.

Texas Voters Adopt Discriminatory Marriage Amendment. On Nov. 8, 2005, more than three-quarters of Texans voting approved Proposition Two, a constitutional amendment purporting to ban marriage and other forms of relationship recognition for same-sex couples. While Texas had already restricted marriage to the union of a man and a woman by statute, conservative advocates expressed concern that a constitutional amendment was necessary to ensure that a court would not find the state's statutory prohibition unconstitutional, and successfully saw such a measure through the Texas Legislature. Texas is the 18th state to adopt a discriminatory marriage amendment. *Tex. Const. art. I, § 32*.

RELATIONSHIP RECOGNITION

Louisiana Appeals Court Rejects Challenge to New Orleans Domestic Partner Benefits. In an opinion released on Dec. 20, 2005, the Court of Appeal for the Fourth Circuit of Louisiana upheld a lower court ruling that plaintiffs, a group of taxpayers, did not have standing to challenge the validity of New Orleans' ordinances establishing a domestic partnership registry and benefits for city employees. Plaintiffs alleged that the city had exceeded its powers under the Louisiana Constitution by creating the registry and extending

health insurance to the registered domestic partners of municipal workers. *Ralph v. City of New Orleans*, No. 2004-CA-1270 (La. Ct. App. Dec. 14, 2005).

Local Governments in New Jersey Extend Domestic Partner Benefits. In response to the decision of the Ocean County Board of Freeholders to deny pension benefits to the domestic partner of a dying county employee, several New Jersey governments have chosen to extend benefits to the domestic partners of their employees. On Oct. 17, 2005, the Jersey City Council approved extending pension benefits to the domestic partners of city employees. On Nov. 23, the Mercer County Board of Freeholders voted to extend health and pension benefits to the partners of county employees. Union County followed suit on Dec. 2. Finally, on Dec. 22, the Monmouth County Freeholders voted to extend only employees' pension benefits to domestic partners.

Hennepin County, Minnesota Extends Domestic Partner Benefits. On Nov. 1, 2005, the Hennepin County Board of Commissioners adopted a resolution expanding eligibility for long-term care and life insurance to domestic partners of county employees. Both benefits are optional and are paid by employees.

Alaska Supreme Court Declares Denial of Domestic Partner Benefits Unconstitutional. On Oct. 28, 2005, the Alaska Supreme Court held that the denial of benefits to same-sex domestic partners of public employees violates the equal protection provisions of the Alaska Constitution. The plaintiff employees filed suit against the state of Alaska and the city of Anchorage for offering employment benefits to the spouses of their married employees but not to the same-sex partners of employees. The court concluded that the denial of benefits was not substantially related to the state's purported interests of cost control, administrative efficiency and promotion of marriage. The court also reasoned that the programs were facially discriminatory because Alaska's discriminatory marriage amendment prohibits same-sex couples from marrying, automatically excluding them from benefits provided solely to "spouses." In divergent responses, the city of Anchorage announced that it would extend benefits to comply with the ruling and Republican Gov. Frank Murkowski vowed to see the decision overturned by an amendment to the state constitution. *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005).

Miami Beach Adopts Equal Benefits Ordinance. On Oct. 20, 2005, the city of Miami Beach, Fla., adopted an ordinance requiring vendors contracting with the city to provide domestic partner benefits equal to those benefits provided to the spouses of their married employees. Miami Beach is the 11th state or local government in the United States to adopt legislation requiring city vendors to offer equal benefits. *Miami Beach, Fla., Ordinance 2005-3494* (Oct. 19, 2005).

Palm Beach County, Fla., Approves Domestic Partner Benefits. On Oct. 18, 2005, the Palm Beach County Commission approved a plan providing health benefits for same-sex and opposite-sex domestic partners of county employees. The plan makes health, dental and life insurance available to the employee's domestic partners, as well as including those partners in the county's sick and bereavement policies. However, unlike married spouses, employees with domestic partners must pay a share of the county's monthly insurance premium.

New York Court Reverses Recognition of Civil Union in Wrongful Death Action. On Oct. 11, 2005, a New York intermediate appellate court overturned a lower court ruling that permitted a surviving same-sex partner in a civil union to sue for wrongful death. John Langan and his partner Neil Conrad Spicehandler entered into a Vermont civil union in 2000. In February 2002, Spicehandler was struck by a car and subsequently died at St. Vincent's Hospital. Langan filed suit against the hospital for wrongful death, arguing that because he and Spicehandler had entered into a civil union in Vermont, making them spouses under Vermont law, comity required that New York allow him to sue under New York's wrongful death statute. The appellate court concluded that the state Legislature did not contemplate protecting same-sex couples when it enacted the wrongful death statute and that Langan had failed to demonstrate that there was no legitimate purpose for the statute's exclusion of same-sex couples. *Langan v. St. Vincent's Hospital*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

DISCRIMINATION

Northampton, Mass., Adopts Transgender Protections. On Dec. 16, 2005, Mayor Clare Higgins signed into law an anti-discrimination ordinance adopted unanimously by the Northampton City Council. The ordinance extends protections from discrimination to transgender people in employment, housing, education and public accommodations.

Virginia Governor Issues Executive Order Barring Sexual Orientation Discrimination. On Dec. 16, 2005, Democratic Gov. Mark Warner amended an executive order barring discrimination in state employment to include protections for gay, lesbian and bisexual employees. Democratic Governor-Elect Tim Kaine announced that he would continue the order upon taking office on Jan. 14, 2006. Warner also included sexual orientation in the non-discrimination language in his budget proposal, which must be approved the state Legislature; passage of the budget with the language would codify the protections for gay, lesbian and bisexual state employees in state statute. Opponents in the General Assembly have vowed to overturn the governor's actions. *Exec. Order No. 1* (Jan. 12, 2002).

Indianapolis Extends Protections to Gay, Lesbian, Bisexual and Transgender Citizens. On Dec. 19, 2005, the Indianapolis-Marion County Council voted 15-14 to approve an ordinance barring discrimination based on sexual orientation or gender identity in employment, education, housing and public accommodations. In April, the same ordinance failed by a large margin. The measure went into effect immediately upon being signed into law by Mayor Bart Petersen. *Indianapolis-Marion County, Ind., Prop. 622* (Dec. 19, 2005).

Federal Agency Relents on "Dykes on Bikes" Trademark. On Dec. 5, 2005, the U.S. Patent and Trademark Office reversed itself, after two prior refusals, and permitted an application by the San Francisco Women's Motorcycle Contingent to trademark the name "Dykes on Bikes." PTO had previously rejected the application on the ground that the name was disparaging of lesbians. After the Motorcycle Contingent and its attorneys mustered ample evidence that the term "dyke" had evolved to become a positive one, PTO reversed its position and approved the application. After a brief public comment period, the trademark can proceed to registration.

Sexual Orientation Discrimination Claim Against Salvation Army Moves Forward. On Nov. 16, 2005, a New York Supreme Court judge rejected the Salvation Army's motion to dismiss a discrimination suit brought by Zachary Logan, a gay Jewish social worker. Logan alleges that the Salvation Army, his former employer, violated the New York City Human Rights Law by discharging him because of his sexual orientation and his religion. The Salvation Army had argued that the case should be dismissed because, as a religious organization, it is exempt from religion and sexual orientation bias claims. In rejecting that argument, the trial court concluded that city ordinance merely permits religious organizations to express an employment preference to individuals of their religion and does not provide a carte blanche for such organizations to discriminate. *Logan v. Salvation Army*, No. 100456, 2005 N.Y. Misc. LEXIS 2542 (N.Y. Sup. Ct. Nov. 16, 2005).

Maine Voters Defeat Referendum on Anti-Discrimination Law. On Nov. 8, 2005, 55 percent of voting Mainers chose to preserve a measure, passed by the state Legislature and signed by the governor earlier in 2005, which protects gay, lesbian, bisexual and transgender individuals from discrimination. The law, which went into effect on Dec. 28, 2005, prohibits discrimination on the basis of sexual orientation and gender identity in employment, housing, credit, public accommodations and education. Similar anti-discrimination bills had been repealed by Maine voters twice before, once in 1998 and again in 2000. *L.D. 1196, 122d Leg., Reg. Sess. (Me. 2005)*.

Kansas Supreme Court Strikes Down Discriminatory "Romeo and Juliet" Law. On Oct. 21, 2005, the Kansas Supreme Court struck down a discriminatory criminal law that punished underage sexual activities between same-sex couples more harshly than the same activities between opposite-sex couples. Kansas has a so-called "Romeo and Juliet" law, which makes the punishment for statutory rape less severe when the case involves two teenagers of different sexes. The defendant, Matthew Limon, a young developmentally impaired man, was convicted under Kansas' sodomy law for, at age 18, engaging in consensual oral sex with a 14-year-old boy. Limon was sentenced to more than 17 years in prison; if either party had been female, Limon's maximum sentence under the "Romeo and Juliet" law could have been only 15 months. The Kansas Supreme Court held that the statute violated the equal protection provisions of the United States and Kansas constitutions. The court concluded that the state's purported legitimate interests in the discriminatory law, including the preservation of traditional sexual mores and the promotion of parental responsibility and procreation, failed to satisfy rational basis review. *State v. Limon*, 122 P.3d 22 (Kan. 2005).

Office of Personnel Management Opens Investigation Into Special Counsel Scott Bloch. On Oct. 18, 2005, the Office of Personnel Management announced that its inspector general, Patrick McFarland, would investigate a complaint filed in March 2005 with the President's Council on Integrity and Efficiency alleging improper conduct by Scott Bloch, head of the Office of Special Counsel. The complaint, filed by anonymous OSC employees and a number of watchdog organizations, contends that Bloch has engaged in numerous unlawful personnel practices in the wake of the ongoing controversy over OSC's failure under his leadership to fully investigate claims of sexual orientation-based discrimination in the federal workforce. OSC is the federal agency responsible for investigating and prosecuting claims of prohibited personnel practices in much of the federal civilian workforce and longstanding interpretation of federal law has included discrimination against

gay, lesbian and bisexual employees under OSC's jurisdiction. Since taking office in January 2004, Bloch has repeatedly claimed that OSC does not have the jurisdiction to investigate claims of discrimination against gay, lesbian and bisexual employees based purely on an employee's sexual orientation, rather than conduct.

Dearborn Heights, Mich., Adopts Civil Rights Ordinance. On Oct. 11, 2005, the Dearborn Heights City Council approved an ordinance creating a community relations commission and including protections for gay, lesbian, bisexual and transgender citizens under its authority. *Dearborn Heights, Mich., Ordinance H-05-03 (Oct. 11, 2005).*

PARENTING

California Court Agrees to Vacate Adverse Ruling in Health Care Discrimination Case. On Dec. 30, 2005, an intermediate appellate court in California agreed to vacate its Dec. 2 decision overturning a lower court's ruling on summary judgment that a medical practice could not rely on a religious freedom defense to deny assisted reproduction services to a lesbian couple. In its initial ruling, the Court of Appeals concluded that the doctors may have discriminated against the plaintiff based on marital status rather than sexual orientation; the former, at the time of the denial of services in this case, was not explicitly prohibited by the state's public accommodations law. The court will now request additional briefs and issue a new decision. *North Coast Women's Care Medical Group, Inc. v. Superior Court of San Diego, 2005 Cal. App. LEXIS 1860 (Cal. Ct. App. 2005)(superseded by grant of rehearing).*

Washington Supreme Court Holds That Lesbian Co-Parent Is De Facto Parent. On Nov. 3, 2005, the Washington Supreme Court upheld a lower-court ruling that a partner in a same-sex couple, without legal or biological relation to a child raised by that couple, has standing as a de facto parent to seek parental rights and responsibilities. After five years together, Sue Ellen Carvin and Page Britain decided to have a child together using assisted reproduction. When the relationship ended, Britain limited and then cut off Carvin's contact with their daughter. Carvin, who is not legally or biologically related to the child, sought a determination of parentage in Washington courts. The Court of Appeals held that Carvin could present evidence to establish herself as a de facto parent and seek parental rights and responsibilities, including custody and visitation. The Supreme Court upheld this conclusion, holding that an adult who has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in a child's life is a de facto parent and stands in legal parity with the child's other parent. *In re L.B. (Carvin v. Britain), 122 P.3d 161 (Wash. 2005).*

HATE CRIMES

Man Convicted of Hate Murder in Santa Ana. On Nov. 19, 2005, a Santa Ana, Calif., jury found Gregory Michael Pisarcik guilty of first degree murder in the death of Narciso Leggs Jr., a retired immigration officer. Pisarcik and Leggs met in Laguna Beach and the two men returned to the victim's apartment, where he beat Leggs to death, then mutilated his body and wrote "Fags Die" on his body. Pisarcik was arrested after leading police on a lengthy chase in the victim's car during which he fired the victim's gun repeatedly at the pursuing

officers. Although Pisarcik's anti-gay statements and confession were excluded from trial, the jury still convicted him of higher charge of first-degree hate crime murder. Pisarcik faces a possible life sentence without parole when he appears before the sentencing judge in February 2006.

Illinois Man Sentenced for Hate Crime Assault. On Nov. 16, 2005, self-described white supremacist Patrick Langballe pled guilty in a Lake County, Ill., court to attacking two women camping at a state park on Lake Michigan in June 2004. Along with fellow neo-Nazi Aaron Rush, Langballe assaulted the women, burned their belongings and threatened them with a knife after they rebuffed Rush's sexual advances by informing him that they were a lesbian couple. Langballe was sentenced to two and half years in prison. Rush pleaded guilty in September 2005 and received a three-year sentence.

MILITARY

San Franciscans Adopt Measure Opposing Presence of Military Recruiters in Schools. On Nov. 8, 2005, voters in the city of San Francisco approved Proposition I, which opposes the presence of military recruiters in public high schools and colleges. Although the city cannot ban military recruiters from campuses because it will lose federal funding, Proposition I encourages city and school officials to exclude military recruiters. Moreover, Proposition I supports the creation of scholarships and training programs that reduce the military's appeal to young adults.

Federal Court Upholds Anti-Gay Discrimination by Military, Protects Pension. On Nov. 7, 2005, a U.S. Court of Federal Claims judge overturned the denial of a military pension to a gay officer discharged from the Army under the "Don't Ask, Don't Tell" policy, but refused to invalidate either the military's sodomy statute or the policy excluding gay, lesbian and bisexual people from serving openly in the armed forces. Lt. Col. Steve Loomis was discharged days before he reached 20 years of service when a sexual encounter between Loomis and a male Army private came to light. The court found that the Army had violated its own regulations regarding the timing of Loomis' discharge and remanded the case to the secretary of the Army to determine back pay and pension eligibility. However, the court concluded that the basis of Loomis' discharge, a violation of the military's sodomy statute and the "Don't Ask, Don't Tell" policy, was not unconstitutional, even taking into account the U.S. Supreme Court's decision in *Lawrence v. Texas*. *Loomis v. United States*, No. 03-1653C, 2005 WL 2995372 (Ct. Fed. Cl., Nov. 7, 2005).

SCHOOLS

New Jersey Court Upholds Award to Student Victim of Anti-Gay Harassment. On Dec. 7, 2005, a New Jersey appeals court upheld the final determination of the director of the Division of Civil Rights that granted a former student, L.W., a \$50,000 award for emotional distress due to ongoing harassment because of his perceived sexual orientation. The court agreed that under New Jersey's anti-discrimination law a student may sue his or school district for failure to prevent peer harassment based on actual or perceived sexual orientation. However, the court overturned an additional award granted to the victim's mother because

she was not an “aggrieved party” who might be entitled to damages under the statute. *L.W., et al. v. Toms River Regional Schools Board of Education*, 2005 N.J. Super. LEXIS 353 (N.J. Super. Ct. App. Div. Dec. 7, 2005).

Suit Against School District for Forced Outing Proceeds. On Nov. 28, 2005, a federal district court in Orange County, Calif., rejected the school district’s motion to dismiss a federal civil rights suit based on the harassment and forced outing of C.N., a 17-year-old lesbian student at Santiago High School in Garden Grove. C.N. alleges that school officials violated a number of her state and federal constitutional rights, including her right to privacy, by harassing her for public displays of affection with her girlfriend and by disclosing her sexual orientation to her parents without her knowledge or permission. The court rejected the school district’s argument that the outing could not be the basis of a claim for invasion of privacy because C.N. was openly gay at school. *C.N. v. Wolf*, No. 05-868 (C.D. Cal. Nov. 28, 2005)(order granting in part and denying in part motion to dismiss).

FIRST AMENDMENT

Federal Appeals Court Dismisses First Amendment Claim of Anti-Gay Preacher. On Oct. 25, 2005, the U.S. Court of Appeals for the Third Circuit upheld the dismissal of a lawsuit filed by two evangelical Christians who claimed that police officers and school officials violated their First Amendment rights. In an incident in October 2001, James Gilles was preaching in a public area on the campus of the Indiana University of Pennsylvania, berating passing students for sinfulness including homosexual behavior, while Timothy Petit taped his speech. When a young woman confronted Gilles about his statements, identifying herself as a Christian lesbian, he responded by attacking her personally with anti-gay epithets. The campus police arrived and arrested Gilles for disorderly conduct, along with other charges. After a Court of Common Pleas judge dismissed all charges against him, Gilles filed a civil rights action in federal district court, alleging that the campus police violated his First Amendment rights. The Third Circuit upheld the district court’s conclusion that at least part of Gilles’ speech constituted “fighting words” not protected by the First Amendment and that the officers were entitled to qualified immunity because arresting Gilles was a reasonable police action. *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005).

TRANSGENDER

Supreme Court Declines to Review Decision Protecting Transgender Employees. On Nov. 7, 2005, the U.S. Supreme Court declined to review a U.S. Court of Appeals for the Sixth Circuit decision finding that the city of Cincinnati violated the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 by discriminating against a transgender employee. Philecia Barnes, a pre-operative transsexual woman, served as a Cincinnati police officer and presented as a man at work but as woman while off duty. Despite an exemplary record for 18 years on the force, she was demoted from the rank of sergeant in 1999. The U.S. District Court for the Southern District of Ohio held, and the Sixth Circuit Court of Appeals affirmed, that the city of Cincinnati intentionally discriminated against Barnes because she did not conform to sex stereotypes. The city was ordered to pay \$320,000 in damages and \$550,000 in attorney fees. *Barnes v. City of*

Cincinnati, 401 F. 3d 729 (6th Cir. 2005), cert. denied, 74 U.S.L.W. 3288 (U.S. Nov. 7, 2005) (No. 05-292).

Indianapolis Mayor Expands Hiring Policy to Protect Transgender City Workers. On Nov. 4, 2005, Mayor Bart Peterson issued an executive order amending the consolidated city of Indianapolis and Marion County's hiring policy to prohibit discrimination based on gender identity. This action brings the city government's personnel policy in line with that adopted by the state of Indiana through executive order in 2004. *Exec. Order No. 2, 2005* (Nov. 4, 2005).

INTERNATIONAL

United Kingdom Civil Partnership Law Goes into Effect. On Dec. 21, 2005, same-sex couples throughout the United Kingdom became eligible to register under the civil partnership law adopted in November 2004. The law grants registered same-sex couples the same rights, benefits and responsibilities as married opposite-sex couples. *Civil Partnership Act, 2004*, c.33 (Eng.).

Latvia Becomes First European Nation to Bar Marriage Equality. On Dec. 15, 2005, the Latvian Parliament voted to amend the country's constitution to restrict marriage to opposite-sex couples. GLBT activists in the country have already expressed intent to protest the new amendment before the European Court of Human Rights.

South African Constitutional Court Rules for Marriage Equality. On Dec. 1, 2005, the country's highest court on constitutional issues ruled that the denial of marriage equality to same-sex couples violates South Africa's post-apartheid constitution, which specifically bars discrimination based on sexual orientation. The court gave Parliament one year to amend the marriage statutes to include same-sex couples. *Minister of Home Affairs v. Fourie*, No. CCT 60/04 (CC)(S. Afr. Dec. 1, 2005).

Malaysian Government Voids Transgender Marriage. On Nov. 12, 2005, Jessie Chung and Joshua Beh had a wedding ceremony in Bernama, but the validity of that union was quickly called into question by the Malaysian government. Beh is male and Chung is a male-to-female transsexual. Malaysia does not allow its citizens to change the sex designation on birth certificates and other identity documents. Malaysia also forbids marriage for same-sex couples. The government reasoned that Chung is legally male and the marriage was thus an illicit union between two people of the same sex.

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