No. 06-1595

In The
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In order to come under the scope of the "opposition clause" in a Title VII retaliation claim, does a plaintiff have to actively "oppose" what she perceives to be an unlawful employment practice? The answer is an unqualified "yes."

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STATEMENT OF THE CASE

Respondent, the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government") adopts and incorporates by reference the Sixth Circuit's recitation of the facts. (Crawford App. 4a-6a).[1] Additional salient facts are as follows.

Ms. Crawford was interviewed by the Metropolitan Government's Human Resources Department in-house sexual harassment investigators on July 22, 2002, in connection with a sexual harassment complaint made by someone else. App. 5-6. Prior to that meeting with investigators, Ms. Crawford did not even know that a sexual harassment investigation was underway. App. 6. She had no idea why she was summoned to Human Resources. *Id.*

The sexual harassment investigation was concluded by September 13, 2002, the date that investigator Veronica Frazier issued her Fact-Finding Report. App. 8.

As a result of information obtained during the course of the sexual harassment investigation, Ms. Frazier sent a September 13, 2002 letter to Kim McDoniel, the head of the Internal Audit Division of the Department of Finance of the Metropolitan Government. App. 18. This letter outlined some concerns regarding the business practices of the school system's Payroll Division, headed by Ms. Crawford, about which Ms. Frazier had learned during the sexual harassment investigation.

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[1] Ms. Crawford was actually terminated on January 6, 2003, not in November 2002. App. 26. Also, Veronica Frazier interviewed Ms. Crawford at the Human Resources Department, not the Legal Department. App. 4-5.

Based on this letter and other complaints about the operation of the Payroll Division, an investigation of the Payroll Division was commenced which resulted in Ms. Crawford being placed on administrative leave on November 7, 2002, and being charged with numerous instances of misconduct. The charges are described in a December 4, 2002 letter to Ms. Crawford. App. 20. The problems included the mishandling of employee contributions to retirement plans and payments to insurance companies, mishandling of court garnishments, and failure to timely file federal tax returns for the school system. *Id.*

A hearing was conducted by Chris Henson, the Assistant Superintendent for Business and Facility Services, on December 12, 2004, at which Ms. Crawford appeared and was represented by counsel. App. 25. Ms. Crawford presented little defense or explanation to the charges. *Id.* As a result, Mr. Henson decided to terminate Ms. Crawford's employment on January 6, 2003. App. 26.

Ms. Crawford appealed Mr. Henson's decision to the Director of Schools, Dr. Pedro Garcia. Dr. Garcia held a hearing on February 6, 2003, at which Ms. Crawford appeared and was represented by counsel. App. 40. After hearing evidence put on by the school administration and by Ms. Crawford, on March 31, 2003 Dr. Garcia issued his 13-page decision finding Mr. Henson's termination of Ms. Crawford's employment to be justified. App. 40-41.

Nearly three months later, Ms. Crawford filed her EEOC Charge of Discrimination, on June 24, 2003. App. 42-43. In this document she claims she was retaliated against because she "participat[ed] in a sexual harassment

investigation" in June 2002.[2] *Id.* On September 10, 2003, the EEOC concluded its investigation and it issued a "Dismissal and Notice of Right to Sue" letter, indicating it was unable to conclude that any of Ms. Crawford's rights under Title VII had been violated. App. 44-46.

These facts provide the "big picture" of the events which led to the termination of Ms. Crawford's employment. It is easy to lose sight of the fact that she was terminated for multiple instances of serious neglect of duty, if the discussion focuses on the policy arguments and the salacious facts she presents in her Petition (this case never progressed to the point where the Metropolitan Government was required to controvert Ms. Crawford's attention-grabbing facts).

SUMMARY OF ARGUMENT

The leadoff section of Ms. Crawford's petition contains an "extrastatutory policy argument" urging the Court to give deference to the EEOC's interpretation of Title VII as contained in its Compliance Manual, in its pronouncements of Policy Guidance, and in two briefs the EEOC filed in a single Eleventh Circuit case which it lost.[3] *See*, *Ledbetter v. Goodyear Tire and Rubber, Co., Inc.*, 127 S.Ct. 2162, 2176 (2007) (rejecting "extrastatutory policy arguments" in a Title VII case). However, in

[2] Ms. Crawford was off by a month. At her deposition she agreed the date of her interview was July 22, 2002. App. 5-6.

[3] The case the EEOC lost which holds against Ms. Crawford but upon which she has relied both here and below is *EEOC v. Total System Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), *reh. en banc den.*, 240 F.3d 899 (2001)

numerous decisions this Court has declined to defer to the EEOC's interpretations of Title VII, noting that administrative agencies have no special claim to deference in their interpretation of statutes or this Court's decisions.

Alternatively, Ms. Crawford's suggestion that the Court defer to the EEOC's policy pronouncements and adjudicatory positions is a path fraught with peril for her. Assuming *arguendo* this Court were to defer to the EEOC, presumably such deference would also extend to agency decisions unfavorable to Ms. Crawford, like the EEOC's finding in this very case. After thoroughly investigating the very claims that are the subject of this case, the EEOC was unable to conclude that Ms. Crawford's Title VII rights had been violated. App. 44-46. Surely Ms. Crawford's "deference" argument applies equally to the EEOC's finding of no discrimination in this case. What is good for the goose is good for the gander.

Ms. Crawford next attempts to show a conflict between the circuits regarding the type of conduct required to constitute protected "opposition activity" under Title VII. However, she overstates the holdings of the cases she cites, in an attempt to manufacture a conflict between the circuits. The law cited by the District Court and the Sixth Circuit is clear: participation in an in-house sexual harassment investigation prior to the commencement of an EEOC proceeding is not a protected activity under Title VII's "participation clause." Further, Ms. Crawford's conduct in this case does not rise to the level of "opposition" activity under Title VII.

The third section of Ms. Crawford's petition repeats the policy arguments of the first section, in an overly dramatic prognostication of supposedly dire implications

of the Sixth Circuit's decision. The hyperbole riddling this section undercuts its impact. The doomsday scenario Ms. Crawford paints emanates from a worldview in which all employees are victims, and all employers are intent on retaliation. The Court should give short shrift to these arguments.

REASONS FOR DENYING REVIEW

I. THE COURT SHOULD DECLINE TO DEFER TO THE EEOC'S POLICY PRONOUNCMENTS AND ADJUDICATORY POSITIONS

In a recent Title VII case, the Court reiterated the point that it is not bound by an administrative agency's interpretations of federal law, nor is it bound by the agency's adjudicatory positions taken in prior litigation. *Ledbetter*, 127 S.Ct. at 2177, n.11; *See National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 111, n.6 (2002). Administrative agencies have no special claim to deference in their interpretations of Supreme Court decisions. *Ledbetter*, 127 S.Ct. at 2177, n.11; *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 336 n.5 (2000). In *Ledbetter*, the Court did not find any ambiguity in the statute itself. This is significant because Ms. Ledbetter argued that purported ambiguity in the statute is what called for deference to the EEOC's Compliance Manual in the first place. *Ledbetter*, 127 S.Ct. at 2177, n.11.

There is no ambiguity in this case either. This case involves the same statute at issue in *Ledbetter* (Title VII). The key language is found at 42 U.S.C. § 2000e-3(a) which provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has **opposed** any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted or **participated** in any manner in an investigation, proceeding or hearing **under this subchapter**. (Emphasis added).

The circuits are unanimous that participation in an in-house sexual harassment investigation, not undertaken while any EEOC charge is pending, is not a "protected activity" under Title VII. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003); *EEOC v. Total System Services, Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1005-06 (8th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). All circuit courts which have directly considered the issue have concluded that the protected activity of "participation in an investigation . . . under this subchapter" means just what it says – that the federal remedies afforded by Title VII only protect participation in an investigation if it was conducted pursuant to federal law (i.e. – pursuant to an investigation, proceeding or hearing prompted by a complainant invoking Title VII rights).

Since day one, when she filed her EEOC Charge of Discrimination, Ms. Crawford has contended that the alleged retaliation resulted from her **participation** in an in-house sexual harassment investigation, which had long since concluded by the time she filed her EEOC charge. App. 43. It was only after receiving the Metropolitan Government's summary judgment motion raising this issue that Ms. Crawford had the revelation that her

statements during her July 22, 2002 interview had magically become "opposition" activity under Title VII.

Ms. Crawford asks the Court to give "deference" to the EEOC's pronouncements in its Compliance Manual, its statements of Policy Guidance, and the positions it has advocated in appellate briefs. However, this "deference" is a two-edged sword for Ms. Crawford. Surely Ms. Crawford would agree that any such deference should be accorded equally across the entire spectrum of EEOC activity. Assuming *arguendo* the Court was to give deference to the EEOC's policy pronouncements, then the Court should also give deference to the EEOC's specific finding in this very case that, after a thorough investigation, it was unable to conclude that Ms. Crawford's Title VII rights had been violated. App. 45. In fact, one could argue that specific agency findings in a given case – made after a thorough agency investigation – should be accorded **more** deference than broad agency pronouncements of policy or agency interpretations of statutes.

If Ms. Crawford really wants deference, then that deference should apply to agency pronouncements both favorable and unfavorable to her.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

As set forth above, the circuits are unanimous in holding that participation in an in-house sexual harassment investigation, not undertaken while any EEOC charge is pending, is not a "protected activity" under Title VII. *Abbott*, 348 F.3d at 543; *Total System Services, Inc.*, 221 F.3d at 1174; *Brower*, 178 F.3d at 1005-06; *Vasconcelos*, 907 F.2d at 113.

Since the case law prevents her from proceeding under Title VII's "participation clause," Ms. Crawford argues her interview with the Human Resources investigators on July 22, 2002 was really "opposition" conduct. "Opposition" conduct includes making informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support for co-workers who have filed formal charges. *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135 (3rd Cir. 2006).

Under the "opposition clause," by "opposing" or "protesting" an alleged discriminatory employment practice, and by claiming retaliation resulted from such opposition, Ms. Crawford may invoke the protections of Title VII. *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989). However, "opposition" activity, by definition, consists of taking the initiative to report what the complainant perceives as conduct violating Title VII. An aggrieved party has to consciously take the initiative to **do** something which can reasonably be interpreted as "opposing" an unlawful employment practice.

To "oppose" something is "to place over against something so as to provide resistance, counterbalance or contrast; to place opposite or against something; to offer resistance to." Merriam-Webster Online Dictionary (2006-07 Ed.). The common thread in these definitions is the person doing the "opposing" has to actually do something to indicate "resistance."

The appellate decisions bear this out. In *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 96-97 (1st Cir. 2006), plaintiff was found to have engaged in protected "opposition activity" by affirmatively complaining about sexual harassment to her direct superior and to the designated equal opportunity officer for a municipal police department. In *Moore v. City of Philadelphia,* 461 F.3d 331, 343 (3rd Cir. 2006), plaintiffs were found to have engaged in "opposition" conduct by making numerous complaints about racially derogatory remarks to the offending supervisor and officers up the chain of command. In *Worth v. Tyer*, 276 F.3d 249, 265 (7th Cir. 2001), the court found when plaintiff reported to the local police that defendant had touched her breast, she was engaging in protected "opposition" activity. Similarly, in *EEOC v. Dinuba Medical Clinic,* 222 F.3d 580, 586 (9th Cir. 2000), the court found that a sexual harassment victim's filing of a criminal complaint for assault and battery qualified as "opposition conduct" because the complainant reasonably believed she was subject to the battery because of her gender. In *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002) (*en banc*) the court found the complainant engaged in "opposition" activity when she reported to her company's EEO manager that she was raped by a potential client of the firm. Finally, in *Trent v. Valley Electric Assoc. Inc.*, 41 F.3d 524, 525 (9th Cir. 1994) the court found plaintiff had engaged in "opposition" conduct when she reported sexually offensive comments to her office manager, and 30 days later she reduced her complaint to writing.

All these cases have one thing in common: plaintiffs engaged in "opposition" conduct because they consciously took affirmative steps to report conduct they reasonably

thought was unlawful under Title VII. This type of conduct is in marked contrast to Ms. Crawford's single interview with investigators on July 22, 2002, which she has contended all along was the "protected activity" upon which her retaliation claim rests. Similar to the plaintiff in *Booker*, 879 F.2d at 1313, at her interview Ms. Crawford was not "opposing" an "unlawful employment practice." She was requested to come to Human Resources. She did not know the subject of the meeting in advance. App. 4-6.

In response to questioning, she told the investigators that a fellow employee (Gene Hughes) had behaved in a sexually inappropriate manner.[4] (See *Booker*, 879 F.2d at 1313, where the allegation was that an employee had a racial intolerance). When viewed objectively, in context, such statements made in a single interview in an investigation initiated by someone else are not protected by the opposition clause. It is the objective message conveyed – not the subjective intent of the person sending the message – which determines whether true "opposition" activity has taken place. *Curay-Cramer*, 145 F.3d at 137. In answering the investigators' questions, Ms. Crawford was not "opposing" an employment practice she considered unlawful.

On pages 16-19 of her Petition, Ms. Crawford contorts the holdings of a number of cases trying to shoehorn them to support her position. In citing to *Cardenas v. Massey*, 269 F.3d 251 (3rd Cir. 2001), Ms. Crawford makes certain

[4] Gene Hughes was the Director of Employee Relations in the Human Resources Department of the school system. Ms. Crawford was the Payroll Supervisor in the Business and Facility Services Department of the school system. They had different supervisors and different chains of command.

assumptions based on the recitation of facts and she presumes an inference drawn therefrom is the "holding" of the case. Without going into detail regarding each of the three alleged protected activities, it is enough to say that from the descriptions provided in the opinion, whether or not they occurred pursuant to a proceeding under Title VII is unclear at best. *Id.* at 260. What **is** clear is that the defendant never raised the issue, and that nowhere in the opinion is there any discussion whether these three alleged protected activities occurred pursuant to a proceeding initiated under Title VII. The court merely assumed that they did. *Id.* at 263.

The case of *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001) is easily distinguishable. In *Evans*, the grievance hearing at which Ms. Evans testified concerned her co-employee's Title VII claims of racial discrimination. 246 F.3d at 352. From the recitation of the facts, it is unclear exactly when Ms. Evans' co-employee actually filed an EEOC charge, but the Court assumed the grievance hearing concerned Title VII claims. *Id.*

In citing to *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), Ms. Crawford again makes certain assumptions based on the recitation of facts and she presumes an inference drawn therefrom is the "holding" of the case. Whether or not Mr. Scott's conduct constituted true "opposition" activity was never discussed. The county apparently assumed he engaged in a protected activity when he was ordered to participate in a sexual harassment investigation. *Id.* at 916. *Scott* involved a question as to the sufficiency of the evidence to support a jury verdict, and the propriety of a condonation jury instruction. 180 F.3d at 917-18. The court never discussed whether Mr.

Scott's participation in a sexual harassment investigation was a protected activity.[5]

On page 17 of her Petition Ms. Crawford cites to *Hoffman v. Rubin*, 193 F.3d 959, 963-64 (8th Cir. 1999), for the proposition that answering questions from internal affairs investigators concerning sexual harassment, and "responding to questions from the press," constitute protected activities. However, a close reading of *Hoffman* reveals the court never specifically held that Mr. Hoffman's statements to the investigators were protected activity. *Id.* at 963. On the other hand, the court had no trouble concluding that Mr. Hoffman's completely self-initiated appearance on the television show "60 Minutes" to discuss sexual harassment was indeed protected. *Id.* In this case, however, Ms. Crawford made no television appearances.

Paradoxically, Ms. Crawford cites to *Total System Services*, a case upon which the Sixth Circuit relied in ruling against her. Crawford App. 8a. This case stands for the proposition that if no formal charge of discrimination has been filed with the EEOC, an employee's participation in an in-house investigation is not a protected activity. 221 F.3d. at 1174, n.2. Ms. Crawford quotes from a subsequent opinion denying a petition for rehearing *en banc*, but the fact that only one judge (out of eleven) dissented from the denial of *en banc* review illustrates how uncontroversial

[5] In fact, the sexual harassment claim which sparked the internal investigation may have been filed pursuant to Title VII. The recitation of facts in the opinion is unclear on this point. 180 F.3d at 916. In any event, the issue was not raised by the defendant and was not discussed by the court.

the panel's holding is. *EEOC v. Total System Services, Inc.*, 240 F.3d 899, 904 (11th Cir. 2001).

Finally, Ms. Crawford cites to *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) as a case which "emphatically rejects" the Sixth Circuit's holding in this case. Once again, Ms. Crawford's argument falls victim to hyperbole. *McDonnell* was decided in 1996, ten years prior to the Sixth Circuit's decision in this case. It is difficult to argue that an antecedent case can "emphatically reject" the holding of a subsequent case. Petition, p. 19.

Ms. Crawford focuses on Judge Posner's use of the term "passive resistance" to describe conduct which fell under the "opposition" clause. However, the conduct of the supervisor at issue consisted of "failing to carry out his employer's desire that he prevent his subordinates from filing discrimination complaints." *Id.* at 262. With apologies to Judge Posner, there is nothing "passive" about this. This describes a conscious decision made by a supervisor to refuse to obey an order because he thought it unlawful under Title VII. Factually, there is no comparison to Ms. Crawford's situation.

Ms. Crawford seeks to expand the reach of the "opposition clause" to include conduct she characterizes as "passive opposition." This stands the concept on its head. No matter how one characterizes the term, true "opposition" conduct implies some type of affirmative action by the complainant. As the supervisor did in *McDonnell*, failing to carry out his employer's desire to prevent his subordinates from filing discrimination complaints reflects a conscious decision to embark on a course of action. Ms. Crawford never made a similar decision. She was summoned to a Human Resources interview in which she had

no idea the topic was going to be allegations of sexual harassment made by a co-worker.

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually, actively initiate a complaint mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998). In *Faragher*, this Court noted that the "primary objective" of Title VII is not to provide redress but to avoid harm in the first place. *Id.* at 806. To that end, Title VII encourages employers to establish a complaint procedure "designed to encourage victims of harassment to come forward . . . " to let their complaints be known. *Id.* The Court recognized that a perceived victim of discrimination has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Id.* (Internal citations omitted). The Court crafted the two-part affirmative defense now applicable in supervisory hostile environment cases based in part on the recognition of the employee's "corresponding obligation of reasonable care to avoid harm." *Id.* at 807.

Requiring the allegedly victimized employee to actually initiate a complaint in order to "oppose" an allegedly unlawful workplace practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher*. In order to avail oneself of the opposition clause, an employee has to actually, actively "oppose" something.

In contrast, Ms. Crawford complained to no one, until she was summoned to an interview. She did not complain to her boss (Bob Bohnensteil) since she felt "at the time, I did not feel like [he] was very responsive to that nature."

App. 1-2. She also chose not to complain to Mr. Bohnensteil's boss (John Dietz) or the Assistant Superintendent for Human Resources, Graciella Escobedo (a woman). *Id.*

Ms. Crawford did not engage in "opposition conduct." She cannot avail herself of the opposition clause.

III. THE "FOREBODING SCENARIO" MS. CRAWFORD PREDICTS IS UNLIKELY TO OCCUR

The final section of Ms. Crawford's petition is another "extrastatutory policy argument." She draws from the opinion of Judge Barkett dissenting from the denial of rehearing in *Total System Services*, 240 F.3d at 899, *et seq.* Ms. Crawford argues that employers will be emboldened by the Sixth Circuit's ruling in this case. She contends employers will aggressively pursue retaliation of employees who participate in internal investigations, and then hide behind the shield of the *Faragher* "affirmative defense" of showing the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the employee failed to take advantage of any preventative or corrective opportunities provided. Crawford App. 8a-9a. However, the Sixth Circuit succinctly disposed of this argument. *Id.*

The response to this "foreboding scenario" (Crawford App. 9a) is that the availability of the *Faragher* affirmative defense is predicated on the reasonableness of the employer's efforts to prevent or correct harassment, and the unreasonableness of an employee's efforts to take advantage of such opportunities. Crawford App. 9a. As the court pointed out, a policy of firing witnesses who speak negatively during internal investigations would constitute bad faith, thus leaving the employer ineligible to assert

the *Faragher* affirmative defense. *Id.* at 9a-10a. This simple truth completely undercuts Ms. Crawford's argument.

Ms. Crawford further argues that as a result of the Sixth Circuit's decision, in the Sixth Circuit right now a "well defined window of opportunity" exists in which an employer "is free to retaliate against witnesses" in internal investigations – from the time a witness participates in such an investigation until the actual filing of an EEOC charge by that witness or someone else. Petition, p. 22-23. However, if employers were as bent on retaliation as they are in plaintiff's imaginary world, they have been able to "freely retaliate" for years under these circumstances not only in the Sixth Circuit (*Abbot v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)), but also in the Eighth (*Brower*, 178 F.3d at 1005-6), the Ninth (*Vasconcelos*, 907 F.2d at 113), and the Eleventh Circuits (*Total System Services*, 221 F.3d at 1174). Ms. Crawford's effort to ring the alarm bells on this issue falls flat, because the legal proposition which disposed of this case has been long accepted by every circuit that has squarely considered the issue.

Finally, Ms. Crawford complains that the EEOC might have to update the information on its website if the Sixth Circuit's decision is allowed to stand. Petition, p. 23. Ms. Crawford perversely argues that this Court should alter the state of the law because the state of the law calls into question certain information made publicly available by the EEOC.

The fact that the EEOC's website is visited ten million times a year is a wonderful thing. However, if the EEOC has posted content on its website which conceivably

conflicts with established law, perhaps the EEOC should consider changing the content of its website. Ms. Crawford's suggestion that the Sixth Circuit (and the Eighth, Ninth and Eleventh) have ruled in a manner conflicting with EEOC policy positions – and that the law should be changed to comport with content on the EEOC's website – is specious. She has it backwards. If anything, the EEOC should consider revising its website so it comports with the law.

CONCLUSION

For the foregoing reasons, Ms. Crawford's petition should be denied.

Respectfully submitted,

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