COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-09684

JOHANNA SCHULMAN,
Plaintiff-Appellant

v.

THOMAS REILLY,in his official capacity as Attorney General,
WILLIAM F. GALVIN, in his official capacity as Secretary of the Commonwealth,
Defendants-Appellees

and

HON. RAYMOND FLYNN, HON. PHILIP TRAVIS, *et al*.,
Defendants-Interveners

ON A RESERVATION AND REPORT FROM A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF *AMICI CURIAE* FORMER ATTORNEY GENERAL OF THE COMMONWEALTH ROBERT H. QUINN, AND LAW PROFESSORS PHILIP CLEARY, DWIGHT G. DUNCAN, SCOTT FITZGIBBON, HON. JOSEPH R. NOLAN (RET.), AND RICHARD D. PARKER IN SUPPORT OF DEFENDANTS AND INTERVENERS

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INTEREST OF THE AMICI

The case raises the issue of whether Initiative 05-02, dealing with the prospective definition of marriage in the Commonwealth, should be excluded from the ballot because it relates to "the reversal of a judicial decision" within the meaning of the exclusions of Massachusetts Constitution Article 48. It is an issue that legal scholars and professors of law in the Commonwealth are vitally interested in.

Robert H. Quinn was Attorney General of the Commonwealth of Massachusetts from 1969 to 1975. He was formerly the Chairman of the Board of Trustees of the University of Massachusetts and is currently a partner at Quinn and Morris.

Philip Cleary and Dwight G. Duncan are both professors at Southern New England School of Law.* Professor Duncan teaches Constitutional Law. They are both members of the Massachusetts Bar.

Professor Scott FitzGibbon is a professor at Boston College Law School.* He obtained his J.D. from

* Institutional affiliation is listed for purposes of identification only and is not intended to indicate in any way that the position of the law school is the same as that of amici on the issue in this case.

Harvard, and B.C.L. from Oxford. He is a member of the Massachusetts Bar.

Honorable Joseph R. Nolan (Ret.) is a professor at Suffolk University Law School.* He is well-known to the Court, as a retired Justice of the Supreme Judicial Court.

Professor Richard D. Parker is the Williams Professor of Law at Harvard Law School.* He received his J.D. from Harvard and is a member of the Massachusetts Bar.

The law professors and former Attorney General who seek to file an amicus brief in support of the Defendants and Interveners in this case believe that the Plaintiff's position would make the Constitution of the Commonwealth unamendable by initiative of the citizens for most practical purposes, since all provisions of any importance receive judicial glosses from time to time; and only when the provision, as the courts have interpreted it, means something the public wishes to change are they likely to use the initiative provision.

Further, the rights the people have to amend the Constitution are about as basic as rights can be in a

republican form of government and should be construed broadly so as to promote rather than to constrict those powers. Conversely, the "reversal of judicial decision" exclusion should be interpreted narrowly, as this Court has previously recognized.

This case poses very fundamental questions regarding popular sovereignty in the Commonwealth. In such a case, it is wise for the Court to allow interested persons, particularly those with expertise, to make their positions known to the Court before judgment.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case and the Statement of Facts in the brief of the defendant.

SUMMARY OF THE ARGUMENT

The Attorney General correctly certified Initiative 05-02 consistent with this Court's interpretation of the "reversal of a judicial decision" exclusion. This Court has unequivocally stated that "The initiative process permits the people to petition for a constitutional amendment that overrules a court decision when the court has declared a statute to be in violation of our Constitution."

Albano v. Atty. Gen., 437 Mass. 156, 160 (2002). In reaching this conclusion, this Court emphasized that the delegates at the constitutional convention of 1917-18 intended, by passing the "reversal of a judicial decision" exclusion, to do "no more than to prevent a statute, declared unconstitutional by a State court, from being submitted to the people directly and thereby reenacted notwithstanding the court's decision." Mazzone v. Atty. Gen., 432 Mass. 515, 527 (2000). (pp. 5-7).

This determination is consistent with the transcript of the debates at the constitutional convention, where it is clear that the delegates' "reversal of a judicial decision" exclusion was a response to Roosevelt's "recall of judicial decisions" proposal. The process proposed by Roosevelt and excluded by the delegates did not encompass constitutional amendments such as Initiative 05-02. (pp. 7-12).

Further, it is evident from the debates that the delegates expressly reserved the power to amend the constitution by popular initiative following a court decision declaring a law unconstitutional, thereby effectively overruling that decision. The delegates

allowed constitutional amendments through initiative petitions while prohibiting the reversal of judicial decisions because they felt the latter was more likely to engender hostility and distrust toward the judiciary and to invite the judiciary into the political process. (pp. 12-20).

In addition, Initiative 05-02 is not a "reversal of a judicial decision" because the initiative is prospective and does not reverse the Court's decision with respect to the parties in Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003). Nor does it change the result of that decision for any parties married after Goodridge and before the amendment is adopted. Furthermore, Initiative 05-02 does not seek to re-interpret the law, but rather attempts to amend the underlying substantive law. Finally, broadening the scope of the exclusion would render the popular initiative effectively meaningless. (pp. 20-23).

ARGUMENT

I. THE ATTORNEY GENERAL CORRECTLY CERTIFIED INITIATIVE 05-02 CONSISTENT WITH THIS COURT'S HOLDINGS IN MAZZONE AND ALBANO.

Article 48 of the Massachusetts State Constitution states in relevant part that, "[n]o measure that relates. . . to the appointment,

qualification, tenure, removal, recall or compensation of judges; or *to the reversal of a judicial decision*; or to the powers, creation or abolition of courts . . . shall be proposed by an initiative petition[.]" Art. 48, Init. pt. 2, § 2 (emphasis added).

This Court has stated that the language of Article 48 should be interpreted "in a sense most obvious to the common understanding at the time of its adoption." Opinion of the Justices to the Senate, 413 Mass. 1201, 1204 (1992) (quoting Atty Gen. v. Methuen, 236 Mass. 564, 573 (1921)) (emphasis added). This Court has consistently looked to the Debates on the Massachusetts Constitutional Convention of 1917-18 ("Debates") to determine the common understanding at the time Article 48 was adopted and for direction on the proper subject matter and scope of Article 48. Mazzone, 432 Mass. 515, 526. See also, Bates v. Dir. Of Office of Campaign and Political Fin., 436 Mass. 144 (2002); Collins v. Sec'y of Commonwealth, 407 Mass. 837 (1990); Cohen v. Atty. Gen., 357 Mass. 564 (1970).

After a careful review of the Debates, this Court in Mazzone determined that the delegates intended the reversal of a judicial decision exception to be read very narrowly. "By excluding from the

initiative process those petitions that 'relate[ ] . . . to the reversal of . . . judicial decision[s],' the constitutional convention intended no more than to prevent a statute, declared unconstitutional by a State court, from being submitted to the people directly and thereby reenacted notwithstanding the court's decision." 432 Mass. 515, 527. The Mazzone opinion was clear to differentiate between the reenactment of a statute previously declared unconstitutional, and an initiative that would amend the constitution thereby making the statute valid. The latter was permissible, even though it would, in effect, overrule the court's decision. "Citizens could, effectively, overrule a decision based on State constitutional grounds, but they could do so only by constitutional amendment." Id.

The Court repeated this conclusion in Albano, stating that, "[t]he initiative process permits the people to petition for a constitutional amendment that overrules a court decision when the court has declared a statute to be in violation of our Constitution." 437 Mass. 160.

Hence, even if the "effect" of Petition 05-02 is to "overrule" Goodridge, this Court has twice sanctioned such an action.

II. MAZZONE AND ALBANO CORRECTLY INTERPRETED THE "REVERSAL OF A JUDICIAL DECISION" EXCLUSION IN ARTICLE 48.

The issue of whether to allow individuals to amend the constitution by an initiative and referendum was the focal point of the 1917-18 Constitutional Convention. Bates, 436 Mass. at 156. The main proponent for the initiative and referendum, Mr. Walker, succinctly stated its purpose: "It is time that the people when they pass a law . . . and it is declared unconstitutional, – it is time that the people have the right to amend their Constitution, and not come to the Legislature and see their will blocked year after year by those who can exercise undue influence in the halls of legislation."[1] Debates in the Massachusetts Constitutional Convention 1917-1918, Vol. II ("2 Debates") at 26. See also Id. at 739.

[1] This comment is particularly apropos given that in 2002 the Legislature prevented a similar constitutional amendment from going on the ballot, not by a ¾ opposition as Article 48 requires, but by adjourning early and refusing to reconvene to vote on the initiative.

Many delegates to the convention were ardently opposed to the initiative and referendum, preferring instead to limit constitutional amendments to Constitutional Conventions and amendments proposed by the legislature.[2] See, e.g., Id. at 8-9 (Minority Report of the Committee on the Initiative and Referendum); Id. at 57 (remarks of Charles F. Choate). The proponents of the initiative, however, eventually prevailed. After several amendments, the final draft of the Article 48 excluded from the initiative measures relating to religion; certain provisions of the Declaration of Rights; and aspects of the judiciary including the appointment and removal of judges, the powers, creation and abolition of courts, the compensation of judges, and the reversal of judicial decisions. Art. 48, Init. pt. 2, § 2. But it did not prohibit the use of the initiative for otherwise amending the constitution.

The impetus for the judiciary exclusions came in part from fears that the initiative and referendum as originally presented would resurrect Roosevelt's

[2] Although the initiative could be used to enact laws or constitutional amendments, it was the latter that was of greatest concern to the opponents of the initiative and was the predominant focus of the debates. See, e.g., 2 Debates at 270.

failed "recall of judicial decisions" proposition and, even worse, allow for a recall of judges as well. 2 Debates at 191. Mr. Cummings presented an amendment to the initiative addressing these concerns by specifically excluding from the initiative "reversal of judicial decisions" and "recall of judges." 2 Debates at 789. Mr. Cummings and other delegates understood that the exception for reversal of judicial decisions referred specifically to Roosevelt's proposal in 1912 and had no application to constitutional amendments.

A. The Delegates Understanding of the "Reversal of a Judicial Decision" Exclusion Specifically Addressed Roosevelt's "Recall" Proposal and Did Not Preclude Constitutional Amendments Such as Initiative 05-02.

As this Court has rightly concluded, it is "clear that the delegates understood the phrase [recall of a judicial decision] to refer to Theodore Roosevelt's controversial 1912 proposal by that name." Mazzone, 432 Mass. at 528. This is substantiated throughout the debates. Mr. Youngman, in opposition to the initiative and referendum explained:

> [The] proposition to initiate with a few petitioners . . . a question of whether the decision of the highest court shall stand in interpreting the written Constitution [is] absolutely nothing more than the old

> proposition . . . of the recall of judicial decisions[.] Did we not hear a lot of that in the presidential election of 1912?

2 Debates at 191. See also 2 Debates at 228 (Mr. Kinney) ("They want, as was suggested this morning, a system which in effect is the old system that was advocated in 1912, in the Presidential election, this system of the recall of judicial decisions.") It was these criticisms that were addressed by excluding from the initiative the recall of judicial decisions.

Furthermore, Roosevelt's proposal was narrowly drawn and referred specifically to a process whereby voters could take a statute that was struck down by a state supreme court on constitutional grounds and reinstate the same statute notwithstanding the court's decision. At an address to the Ohio constitutional convention on February 21, 1911, Roosevelt stated, "When the Supreme Court of [a] State declares a given statute unconstitutional, because in conflict with the State or National Constitution, its opinion should be subject to revision by the people themselves. [The people] have the right to recall that decision if they think it wrong." William G. Ross, A Muted Fury 135 (1954). Roosevelt gave an example of how this process would work:

> If any considerable number of the people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at some subsequent election . . . the question whether or not the judge's interpretation of the constitution is to be sustained . . . If [the judge's interpretation is not sustained], then the popular verdict is to be accepted as final, the decision is to be treated as reversed, and the construction of the Constitution definitely decided[.]

Id. See also William L. Ransom, Majority Rule and the Judiciary 117 (1912) (giving an example of a ballot provision asking the people if a Workman's Compensation Law declared unconstitutional should be "reinstated and continue[] in full force and effect as law, the decision of the Court of Appeals . . . to the contrary notwithstanding?").

The scope of Roosevelt's proposal is demonstrated by a Colorado constitutional amendment that provided for the recall of judicial decisions. Under this provision, a decision by the Colorado Supreme Court holding a law unconstitutional was "not binding" for sixty days. During the time the decision was held in abeyance, a referendum petition signed by at least 5% of the "qualified electors" could be submitted to the Secretary of State asking that the law previously declared unconstitutional be submitted to the people

"for adoption or rejection." If the majority of the electors approved the law, it continued as "the law of the state notwithstanding the decision of the supreme court." People v. Western Union Telegraph Co., 70 Colo. 90, 96 (1921).

In view of Roosevelt's example of a recall of a judicial decision and the implementation of his proposal in Colorado, it is virtually impossible to see how Petition 05-02 could "look[] exactly like the type of action envisioned by Roosevelt's proposal." Brief for the Plaintiff at 43. First, Initiative 05-02 does not request a reenactment of any statute that has been deemed unconstitutional. Second, the initiative does not seek to reverse a decision of the Court. Goodridge remains intact insofar as it relates to the parties of that case, and the amendment is entirely prospective in nature. And third, the initiative does not require the people to sustain or reject the Court's interpretation of the constitution in Goodridge. The Amendment instead would change the underlying constitutional law, not the interpretation of that law. Initiative 05-02 is thus quite different in nature than was Roosevelt's direct recall proposal.

B. The Delegates Understood That Excluding Recalls of Judicial Decisions Did Not Restrict the Ability of Initiatives to Amend the Constitution to Overrule a Court Decision.

The delegates to the Convention recognized the distinction between directly reversing a judicial decision by popular initiative and effectively overturning that decision by a constitutional amendment.[3] They also intended for the "reversal of judicial decisions" exclusion to preclude the former, not the latter.

The remarks of Mr. Cummings are especially significant in this respect, as he was the author of the judiciary exclusion amendment to the initiative, 2 Debates at 789, and the Chairman of the Initiative and Referendum Committee. Id. at 2. He stated:

> Under the initiative and referendum, if the courts declare a law unconstitutional we have the power to expand the Constitution and reenact the law and make it constitutional. If the law that is invoked does not fit the case we have the power under the initiative and referendum to pass a new law that will fit the case.

Id. at 791 (emphasis added). Thus, according to the actual author of the exclusion provision, the

[3] It bears mentioning that Roosevelt, too, was careful to distinguish the two processes. Ross, A Muted Fury 140 (citing Roosevelt's letter to Frank B. Kellog, March 25, 1912, Roosevelt Papers, Series 3A, Reel 375).

judiciary exclusion would still permit the people to effectively overturn a court decision by changing the constitution and reenacting the law.[4]

That the delegates did not intend the "reversal of . . . a judicial decision" exclusion to restrict the ability of an initiative to amend the Constitution to effectively overturn a court decision declaring a law unconstitutional is further demonstrated by Mr. Walker's comments: "Under the initiative and referendum, if the court declares the law . . . unconstitutional, the people have the remedy in their own hands, and they may change their own Constitution so as to permit the passage of that law." Id. at 414. Significantly, Mr. Walker supported a constitutional amendment that could overturn a SJC decision and

[4] It is important to note that the Delegates almost universally anticipated that the initiative and referendum would be used to change the Constitution after a Court had ruled and struck down a statute. This is clear by Mr. Cummings remarks just cited, and by Mr. Walker's statement that, "If we vote for a law and the SJC decides that it is unconstitutional, it becomes necessary to amend the Constitution in order that we my have that law. That is why we wish the constitutional initiative." Id. at 739. Accordingly, any suggestion that the initiative and referendum can be used to amend the constitution before the court has declared a statute unconstitutional but not after contradicts the explicit intent of the initiative and referendum as understood by delegates. See also Id. at 26; Id. at 414.

reenact a law declared unconstitutional, while opposing the recall of judicial decisions. Id. at 229 ("I am not in favor of the recall of judicial decisions, and never have been").

Because the effect of either the recall of a judicial decision or amending the Constitution and reenacting a statute may be similar, some of the delegates, like the plaintiff in this case, confused the two processes. Mr. Kilbon addressed the point as follows:

> Two gentlemen from Boston have risen . . . to tell us that if we put into the Constitution the constitutional initiative we practically are putting in the recall of judicial decisions; because, they say, a judge declaring certain laws to be unconstitutional is by and by face to face with the fact that the people have voted to amend the Constitution so that those laws shall be constitutional, and that is the recall of judicial decisions. Well Mr. Chairman, if that is the recall of judicial decisions, the Commonwealth of Massachusetts has been engaged for the last half dozen years in recalling judicial decisions, for the last four amendments to our Constitution have arisen just exactly that way.

Id. at 560. Proponents of the initiative understood that the effect of either process was very similar; however, they were careful to distinguish between the two - rejecting the

recall of decisions while embracing constitutional amendments.

Finally, after the Cummings amendment excluding the recall of judicial decisions was adopted, Mr. Churchill proposed an amendment that would exclude the Declaration of Rights from amendment by initiative and referendum. Id. at 992. Opponents of this particular amendment were fearful that such an amendment would prevent the people from reenacting social welfare legislation by excluding "liberty" and certain "property" rights. Id. at 737-38 (Mr. Walker) (addressing the Churchill amendment the first time it was proposed). See also Id. at 995-996. Mr. Washburn, for example, illustrated this by referencing Ives v. South B. R. Co., 201 N.Y. 271 (1911), a case where the New York Court of Appeals invalidated a workers compensation statute. 2 Debates at 996. After the statute was invalidated, the constitution was amended to make the workers compensation law legal, and in a subsequent case "the court said that under the amended provision the statute there construed was a valid exercise

of the police power."[5] Id. In this way, the delegates demonstrated that they did not intend for the "reversal of a judicial decision" exclusion to prevent the citizens from using the initiative to amend the constitution in order to make a previously unconstitutional statute constitutional.

This Court's conclusion in Mazzone, reaffirmed in Albano, that "[c]itizens could, effectively, overrule a decision based on State constitutional grounds, but they could do so only by constitutional amendment" is thus consistent with the delegates' understanding of the exclusion provision. Mazzone, 423 Mass. at 528. Albano, 437 Mass. at 160.

1. The delegates allowed constitutional amendments through initiative petitions while prohibiting the reversal of judicial decisions because the latter was more likely to engender hostility and distrust toward the judiciary and invite them into the political process.

Plaintiff concedes that there is a difference between the process of effectively overturning a

[5] The NY constitution was amended by the legislature and not by an initiative referendum. However, Mr. Washburn's opposition to the amendment excluding the Declaration of Rights only makes sense in the context of an initiative petition. There was no suggestion that the Declaration of Rights be excluded from an amendment by the legislature. See also Id. at 413.

decision through a constitutional amendment and overturning it directly through a "reversal of a judicial decision," but argues that the delegates would not sanction one and preclude the other. Plaintiff's Brief at 44. The Debates, however, supply at least one reason why the delegates would have treated the two processes differently.

Mr. Cummings, for example, in proposing his amendment, recognized that there was often disappointment among people when a court declared a law unconstitutional. 2 Debates at 789-90. This disappointment, however, was not generally accompanied by a distrust of the judiciary or by a belief that the judges acted according to anything but the "very highest of motives." Id. 790. Maintaining this respect for the judiciary while keeping it removed from politics and from "intemperate and unwise criticism" was an important consideration that Mr. Cummings felt mandated the exclusion of the judiciary from the initiative process. Id. 790, 792.

Allowing citizens to directly recall judicial decisions engenders hostility and distrust toward the judiciary. Citizens that want to preserve a statute are required to say that the judge's interpretation of

the constitution was wrong and needs to be replaced. Constitutional amendments, however, allow citizens to say that the constitution itself, and not the interpretation thereof, needs revision. The latter recognizes that the Court is acting with the "highest of motives" but is constrained by the Constitution. See Id. 789-90. The former requires a judgment that the judiciary was wrong and not only invites hostility toward the judiciary, but simultaneously "draw[s] [the judiciary] into politics to defend themselves or their decisions." Id. at 790.

In seeking to avoid this hostility and political entanglement, the delegates ultimately struck a wise balance by allowing the citizens to effectively overturn a decision by means of a prospective amendment, while at the same prohibiting the direct recall of judicial decisions.

III. INITIATIVE 05-02 IS NOT A REVERSAL OF A JUDICIAL DECISION.

A. Initiative 05-02 is Prospective and Does Not Affect the Parties in Goodridge.

Initiative 05-02 does not reverse the decision of this court in Goodridge. The language of the amendment clearly states that it will only affect those marriages entered into "after the adoption of

this amendment." Proposed Initiative 05-02. Accordingly, the amendment will not affect the outcome for the parties in Goodridge, nor will it affect parties who have been married since the Goodridge decision.[6] The proposed initiative is prospective and thus is not a recall or reversal of this Court's decision in Goodridge.

B. Initiative 05-02 Seeks to Make a Change to the Language of the Constitution and Would Not Affect the Judicial Independence of the Courts.

Initiative 05-02 would not alter, modify or adversely affect in any way the independence of the courts. Instead, Initiative 05-02 seeks to change the underlying law that the courts will look to in the future. The initiative does not attempt to tell the court what the constitution requires, which is the sole and independent domain of the courts, but rather endeavors to modify the constitution the court is required to apply. The "integrity and independence" of the courts is thus not changed in any way by such an initiative. 2 Debates at 795.

[6] The Attorney General's summary makes this point plain by explaining that the amendment "would allow continued recognition of [marriages] entered into before the adoption of the proposed amendment." Summary of Amendment 05-02.

IV. A BROAD INTERPRETATION OF ARTICLE 48 WOULD EVISCERATE THE POPULAR INITIATIVE

As determined by this court, the intent of the "reversal of a judicial decision" exclusion in Article 48 was "no more than to prevent a statute, declared unconstitutional by a State court, from being submitted to the people directly and thereby reenacted notwithstanding the court's decision." Mazzone, 423 Mass. at 528. Not restricting the exclusion in such a manner would make the popular initiative virtually meaningless and could result in the "exclu[sion of] all petitions relating to statutes that a court had already applied if enactment might result in a different decision," leading to a situation that "effectively eviscerate the popular initiative." Id. Initiative 05-02 is not an attempt to directly submit a statute to the people for re-enactment; instead it seeks to change underlying constitutional law. Therefore, it should not be included in the exclusion as defined by this court in Mazzone.

A. The Judicial Decision Exclusion Should Be Construed Narrowly, and the Rights of the People to Enact Law Should Be Construed Broadly.

The people's right to amend their constitution is basic to a Republican form of government. Interpreting

Article 48's judicial recall exclusion broadly will seriously undermine this right. As Mr. Walsh argued at the Convention, the "right of the people to petition for the enactment of laws or to change their Constitution as they see fit" is consistent with a belief "in the common-sense, the fairness and the sense of justice of the common people." Id. This Court should accordingly construe the judicial recall exception narrowly, and "trust the protection of our institutions to the fairness, the honesty, the integrity of the judgment of a majority of our fellow-citizens." Id.

CONCLUSION

For the foregoing reasons, this Court should uphold the Attorney General's certification of Initiative Petition 05-02.

Respectfully Submitted,

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16, 20.

_____

CERTIFICATE OF SERVICE

I, Luke Stanton, attorney for *Amici Curiae* Former Attorney General of the Commonwealth Robert H. Quinn *et al*., hereby certify that on April 7, 2006, I served the foregoing Brief of *Amici Curiae* Former Attorney General of the Commonwealth Robert H. Quinn *et al*. by causing two copies each to be mailed, first-class postage prepaid, to counsel for the plaintiff, Gary D. Buseck, Esq., Gay and Lesbian Advocates and Defenders, 30 Winter Street, Suite 800, Boston, Massachusetts 02108, and counsel for the defendants, Peter A. Sacks, Assistant Attorney General, One Ashburton Place, Room 2019,Boston, Massachusetts 02108-1698, and counsel for Interveners Philip D. Moran, 265 Essex Street, Suite 202, Salem, Massachusetts 01970.

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Luke Stanton