No. 16-894

In the
Supreme Court of the United States

EDWARD PERUTA, ET AL.,
Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA AND 25 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment entitles ordinary, law-abiding citizens to carry handguns outside the home for self-defense in some manner, including concealed carry when open carry is forbidden by state law.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* States—Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming—have a profound interest in protecting the fundamental constitutional rights of their citizens. Among these fundamental rights is the Second Amendment right to keep and bear arms. The San Diego County sheriff's prohibition on the possession of a handgun outside the home, with limited exceptions, "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010).

The *amici* States also have an interest in choosing how to regulate the bearing of arms outside the home. California has expressed a statutory "preference for concealed rather than open carry." *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014) (footnote omitted). But, because the en banc panel held that there is no constitutional right to concealed carry, residents of San Diego County are forced to challenge California's prohibition on open carry to exercise their right to bear arms in public. *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc). If the Ninth Circuit later concludes that the Second Amendment protects the right to carry arms in public, States in that circuit

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

may not be able to allow concealed, instead of open, carry. While "the enshrinement of constitutional rights necessarily takes certain policy choices"—such as prohibiting both open and concealed carry—"off the table," *Heller*, 554 U.S. at 636, the States have an interest in choosing whether to accommodate their citizens' constitutional rights through open carry, concealed carry, or both.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Ninth Circuit incorrectly narrowed the constitutional question in this case. The petitioners sought to be permitted to exercise their right to bear arms outside their home by the only means permitted under California law—concealed carry. The Ninth Circuit refused to answer whether the Second Amendment right to bear arms existed beyond the home. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc). Instead, it tried to avoid that question by holding that there was no constitutional right to *concealed* carry outside the home. *Id.* The Court should grant certiorari to address the important constitutional question that this case squarely presents: whether the right to bear arms extends beyond the home.

The *amici* States believe that the fundamental constitutional right to keep and bear arms extends beyond the home. The natural meaning of the word "bear," as this Court explained in *Heller*, means "carry." *Heller*, 554 U.S. at 584. And the prefatory clause's focus on preventing the elimination of the militia emphasizes that the right could not accomplish that purpose if it did not extend beyond the home. Moreover, the historical examples upon

which this Court relied in *Heller* emphasize that the right to bear arms is a right to guard "against both public and private violence." *Id.* at 594. Finally, because the need for self-defense exists outside the home, the Second Amendment right must as well.

The San Diego County sheriff's licensing scheme effectively bans the core right to bear arms for ordinary, law-abiding citizens and, consequently, violates the Second Amendment. The experience of the *amici* States demonstrates that the restrictions on bearing arms in San Diego County cannot withstand any level of scrutiny. Although the *amici* States share the same compelling interests in protecting the health and safety of their citizens, they have been able to do so without curtailing the fundamental right of their citizens to bear arms in public.

ARGUMENT

This Court should grant certiorari on the question of whether the fundamental right to bear arms for self-defense extends beyond the home. And it should conclude that the plain meaning of the text, the history of the right, and its central component of self-defense demonstrate that it does. The combination of California's statutory scheme and the San Diego County sheriff's licensing scheme effectively bans any public carrying of arms by ordinary, law-abiding citizens for the purpose of self-defense. Thus, the combination of these policies violates the Second Amendment.

I. The court of appeals' slice-and-dice approach to the Second Amendment makes no sense and unjustifiably interferes with state policy choices.

The en banc opinion for the Ninth Circuit incorrectly reframed the constitutional question at issue in this case. The constitutional infirmity in the San Diego County sheriff's scheme is not that it outlaws *concealed* carry. It is that is outlaws *all* carry.

The State of California has a statutory scheme that almost entirely prohibits open carry, but allows county sheriffs to issue concealed carry permits when its citizens meet certain requirements, including "good cause." CAL. PENAL CODE §§ 25850, 26150, 26155, 26350. The San Diego County sheriff has a policy that prevents ordinary citizens from meeting the "good cause" requirement. Pet. for Cert. at 6–7. Here, the petitioners sought to exercise their constitutional right to bear arms in the only manner permitted under California law. *See id.* at 27. But the lower court recast the claim as one about concealed carry by itself. In doing so, the lower court ignored California's near total prohibition on open carry.

The lower court's analysis suffers from at least three serious flaws.

First, it is inconsistent with the state court cases that this Court relied on in *Heller*. For instance, in *State v. Reid*, which this Court cited in *Heller*, the Supreme Court of Alabama upheld a prohibition on

concealed carry against a state constitutional challenge. 1 Ala. 612, 616 (1840). But, although that court upheld the prohibition as a "regulat[ion of] the manner of bearing arms," it noted that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616–17. As the panel noted in this case, "this passage suggests that to forbid nearly all forms of public arms bearing would be to destroy the right to bear arms entirely." *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1158 (9th Cir. 2014) (footnote omitted). This is precisely what the sheriff has done.

Second, the court of appeals' slice-and-dice treatment of the Second Amendment right is inconsistent with the approach this Court has taken in analyzing other constitutional rights. Open carry and concealed carry are not two distinct rights. Rather, they are two distinct means of exercising the same right. In the First Amendment context, the constitutionally important question is not whether a State allows a specific type of speech in a specific place. Instead, the question is whether the State "leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations and internal quotation marks omitted). Similarly, here, the constitutionally important question is not whether the State allows a *particular* way to exercise the right to bear arms—the question is whether state

law allows a *meaningful* way to exercise the right to bear arms.

Third, the lower court's reframing of the constitutional right at issue unjustifiably interferes with California's preference for concealed carry over open carry. Although States cannot preclude law-abiding citizens from bearing arms, States can impose appropriate regulations on the exercise of that right. To that end, California's statutory scheme generally forbids open carry while permitting concealed carry. *See* CAL. PENAL CODE §§ 25850, 26150, 26155, 26350. Other States have likewise chosen to favor concealed carry over open carry. *See*, *e.g.*, FLA. STAT. ANN. § 790.053(1) (generally prohibiting open carry); FLA. STAT. ANN. § 790.06(1) (authorizing a department to issue licenses for the concealed carry of weapons). But the court of appeals' decision negates California's policy choice. By treating the right to bear arms as if it were two separate rights—to bear arms *concealed* and to bear arms *openly*—the lower court would coerce California into allowing the latter while banning the former. It would, anomalously, promote the San Diego County sheriff's practice over California's considered policy choice.

Properly construed, the right at stake in this litigation is the right to bear arms outside the home. As explained below, the lower court's decision erroneously denies the existence of that right. Because the petition raises this important question of federal law, it deserves this Court's review.

II. Both the text and history of the Second Amendment demonstrate that the right to keep and bear arms does not stop at the front door of the home.

This Court's opinion in *Heller* establishes that the right to bear arms extends beyond the home. Following this Court's approach in *Heller* and *McDonald,* the panel opinion in this case conducted a thorough analysis of the scope of this right. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1153–67 (9th Cir. 2014). It held that the right to bear arms extends outside the home. The court of appeals' contrary ruling flouts the Second Amendment's text and history.

A. The text of the Second Amendment extends beyond the home.

As in *Heller*, the analysis begins with the text of the Second Amendment itself. The Second Amendment protects "the right of the people to keep and bear Arms." U.S. CONST. amend. II. Although the Court in *Heller* focused on the right to keep arms in the home, it also defined what it means to bear arms. The Court explained that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" 554 U.S. at 584. It then endorsed Justice Ginsburg's analysis in *Muscarello v. United States* of what it means to carry a firearm. *Id.* In *Muscarello*, Justice Ginsburg wrote, "Surely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" 524 U.S.

125, 143 (1998) (dissenting opinion) (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1998)).

This broad definition extends beyond the home. As the Seventh Circuit noted, "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Such an awkward interpretation of the Second Amendment would run afoul of this Court's admonition to evaluate constitutional provisions as they would have been "understood by the voters." *Heller*, 554 U.S. at 576 (citations omitted). Taken in that context, the natural language of the Second Amendment "implies a right to carry a loaded gun outside the home." *Moore*, 702 F.3d at 936.

Moreover, an interpretation of the right to bear arms that did not extend beyond the home would undermine the prefatory clause of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II. In *Heller*, the Court explained that the prefatory clause in no way weakens the underlying right to bear arms. Rather, it "announces the purpose for which the right was codified: to prevent elimination of the militia." *Heller*, 554 U.S. at 599. And this Court has instructed that the scope of the right should be "consistent with the announced purpose." *Id.* at 578 (footnote omitted); *see also United States v. Miller*, 307 U.S. 174, 178 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and

applied with that end in view."). It is difficult to imagine how the right could accomplish that objective if it were limited to the confines of the home.

B. The history of the Second Amendment confirms that the right extends beyond the home.

This interpretation of the plain text of the Second Amendment is bolstered by a historical review of the right.

The historical examples that the Court invoked in *Heller* confirm that the right to bear arms extends beyond the home. In *Heller*, the Court explained that, by the time of the founding, the historical experiences of the English had led to an understanding of the right as "protecting against both *public* and private violence." 554 U.S. at 594 (emphasis added). The Court quoted from Charles Sumner's Bleeding Kansas speech, in which he proclaimed, "The rifle has ever been the companion of the pioneer . . . . Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached." *Id.* at 609 (quoting *The Crime Against Kansas*, May 19–20, 1856, in American Speeches: Political Oratory from the Revolution to the Civil War 553, 606–07 (T. Widmer ed. 2006)).

Even the historical examples the Court pointed to as limitations on the right to bear arms nevertheless confirm its general breadth. The Court stated that *Heller* "should [not] be taken to cast doubt on

longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27 (emphasis added). These examples assume that the right extends to the public carrying of arms, which may not be exercised in certain public places.

C. The "central component" of the right, self-defense, extends beyond the home.

Finally, the Court's focus on the purpose of this Amendment—ensuring the means to self-defense—underscores that the right to bear arms extends beyond the home. In *Heller*, this Court confirmed that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. The Court reiterated in *McDonald* that the "possession of firearms," which is "essential for self-defense," is constitutionally protected in the United States because "self-defense" is the "central component" of the Second Amendment right. 561 U.S. at 787.

And the Court has not limited this constitutional right or its purpose to the home. In *Heller*, the Court dealt with the right to keep arms within the home where the need for self-defense is "most acute," 554 U.S. at 628, but it did not do so at the expense of the right to bear arms in public. The Court's opening line in *McDonald* is instructive: "Two years ago . . . this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ." 561 U.S. at 742. The need for self-defense does not end at the front door of the home.

Neither does the right. *See, e.g.*, *Moore*, 702 F.3d at 937 ("Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.").

III. Because the San Diego County sheriff's licensing scheme effectively destroys the fundamental right to bear arms outside the home, it violates the Second Amendment.

There is an active circuit split over the correct way to analyze laws that burden the right to bear arms. *Compare Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) (intermediate scrutiny); *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013) (same); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (same) *with Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."). That split, in itself, warrants the grant of certiorari. *See* Pet. for Cert. at 17. But no matter how that split is resolved, a policy that effectively destroys the Second Amendment right—such as the one in place in San Diego County—would fail *any* level of scrutiny. *Cf. Heller*, 554 U.S. at 628–29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family would fail constitutional muster.") (footnote, internal quotation marks, and citation omitted).

A. San Diego's licensing scheme substantially burdens and effectively bans the core right to bear arms.

By barring both open carry and concealed carry, the combination of California's statutory scheme and San Diego's licensing scheme effectively renders the Second Amendment a nullity outside the home.

Open carry in California is all but illegal, whether the handgun in question is loaded or unloaded. *See* CAL. PENAL CODE § 25850. California has exceptions to this rule, but they are so narrow as to reach the point of absurdity. For example, the relevant self-defense exception allows for the possession of a firearm if a citizen "reasonably believes that any person or the property of any person is in immediate, grave danger," and only then during the "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." *Id.* § 26045. Where an otherwise unarmed civilian would obtain a weapon in such a circumstance is, as the panel noted, "left to Providence." *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1147 n.1 (9th Cir. 2014).

Thus, a citizen who wishes to exercise his or her right to bear arms must apply for a concealed carry permit. A California resident may receive a concealed carry permit if the applicant has "good moral character," completes a training course, and can establish "good cause." CAL. PENAL CODE §§ 26150, 26155. The San Diego County sheriff has interpreted this "good cause" requirement to prevent an ordinary citizen from qualifying for a permit. Instead, an applicant must specifically demonstrate

"a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone is not considered good cause." Pet. App. 252–53. Under this scheme, bearing arms in self-defense is not a right, but a privilege granted by the government to those it deems most in danger from a specific, previously documented threat.

B. A law that effectively prohibits the Second Amendment outside the home is necessarily unconstitutional.

Because the San Diego County sheriff's policy "amounts to a destruction of the right" to bear arms outside the home for the purpose of self-defense rather than a mere regulation of the manner of its exercise, it is "clearly unconstitutional." *Reid*, 1 Ala. at 616–17 (quoted in *Heller*, 554 U.S. at 629).

In the same way *Heller* concerned a near prohibition on the right to *keep* arms, the San Diego County sheriff's licensing scheme is a near prohibition on the right to *bear* arms. The Court in *Heller* noted that such severe restrictions are few, and that "some of those few have been struck down." *Heller*, 554 U.S. at 629. Those "few" the Court cited as analogous to the unconstitutional prohibition in *Heller* were all cases in which state courts struck down prohibitions on carrying firearms for self-defense. *See Heller*, 554 U.S. at 629 (citing *State v. Reid*, 1 Ala. 612 (1840), *Nunn v. State*, 1 Ga. 243 (1846), and *Andrews v. State*, 50 Tenn. 165 (1871)).

Because the regulation at issue here leaves *no* legal means for most individuals to exercise their right to bear arms for self-defense outside of the

home, it is per se unconstitutional. In *Heller*, this Court did not engage in a balancing test. *See Heller*, 554 U.S. at 634–35 (criticizing the "interest-balancing inquiry" proposed by Justice Breyer in dissent). Rather, based on its analysis of the text of the Second Amendment and the historical scope of the right, it simply concluded that "a complete prohibition of [the] use [of handguns] is invalid." *Heller*, 554 U.S. at 629. Likewise, here the combination of California's statutory scheme and the San Diego County sheriff's licensing scheme creates a complete prohibition on the carrying of handguns outside the home by ordinary, law-abiding citizens.

C. The experience of other States shows that the San Diego County sheriff's licensing scheme cannot survive any level of scrutiny.

The experience of other States demonstrates that the near total ban cannot stand up to any level of scrutiny. All States share the compelling interest in protecting the health and safety of their citizens. Yet very few States have found it necessary to eliminate their citizens' constitutional rights to achieve that interest.

In examining the reasonableness of laws that burden fundamental rights, the Court regularly looks to the views of the several States for guidance. States should have the freedom to adopt different laws than their sisters. But, even though other States' laws should not be controlling, they can nonetheless "provide testimony to the unreasonableness" of a single State's law "and to the ease with which the State can adopt less burdensome means" to accomplish its objectives. *Hodgson v.*

Minnesota, 497 U.S. 417, 455 (1990). Such reasoning is in keeping with the way this Court has evaluated similar constitutional questions. *See Tennessee v. Garner*, 471 U.S. 1, 15 (1985); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 n.4 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

The emerging trend here is toward a robust protection of Second Amendment rights. As of last count, forty-one States have tailored their licensing procedures to both secure the constitutional rights of their citizens and protect public safety.[2] These so-

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[2] There are forty "shall issue" States. ALA. CODE § 13A-11-75; ALASKA STAT. ANN. § 18.65.700; ARIZ. REV. STAT. ANN. § 13-3112; ARK. CODE ANN. § 5-73-309; COLO. REV. STAT. § 18-12-203; FLA. STAT. ANN. § 790.06; GA. CODE ANN. § 16-11-129; IDAHO CODE ANN. § 18-3302; 430 ILL. COMP. STAT. ANN. 66 / 10; IND. CODE § 35-47-2-3; IOWA CODE ANN. § 724.7; KAN. STAT. ANN. § 75-7c05; KY. REV. STAT. ANN. § 237.110; LA. STAT. ANN. § 40:1379.3; ME. REV. STAT. ANN. tit. 25, § 2003; MICH. COMP. LAWS ANN. § 28.422(3); MINN. STAT. ANN. § 624.714; MISS. CODE ANN. § 45-9-101; MO. ANN. STAT. § 571.101; MONT. CODE ANN. § 45-8-321; NEB. REV. STAT. ANN. § 69-2430; NEV. REV. STAT. ANN. § 202.3657; N.H. REV. STAT. ANN. § 159:6; N.M. STAT. ANN. § 29-19-4; N.C. GEN. STAT. ANN. § 14-415.12; N.D. CENT. CODE ANN. § 62.1-04-03; OHIO REV. CODE ANN. § 2923.125; OKLA. STAT. ANN. tit. 21, § 1290.5; OR. REV. STAT. ANN. § 166.291; 18 PA. STAT. AND CONS. STAT. ANN. § 6109; S.C. CODE ANN. § 23-31-215; S.D. CODIFIED LAWS § 23-7-7; TENN. CODE ANN. § 39-17-1351; TEX. GOV'T CODE ANN. § 411.177; UTAH CODE ANN. § 53-5-704; VA. CODE ANN. §§ 18.2-308.04(C), 18.2-308.08(A); WASH. REV. CODE ANN. § 9.41.070; W. VA. CODE. ANN. § 61-7-4; WIS. STAT. ANN. § 175.60; WYO. STAT. ANN. § 6-8-104. Additionally, Vermont does not issue gun permits, because none are required under state law. *Vermont Gun Laws*, NRA-ILA (Nov. 12, 2014), https://www.nraila.org/gun-laws/state-gun-laws/vermont/ (last visited Feb. 9, 2017).

called "shall issue" States grant concealed carry licenses to all law-abiding citizens who can show reasonable proficiency with a firearm. John R. Lott, Jr., *What A Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205, 1207 (2012). The laws of these States "provide testimony to the unreasonableness" of San Diego County's licensing procedure and to "the ease with which" the sheriff "can adopt less burdensome means" to accomplish its ends. *Hodgson*, 497 U.S. at 455. Forty-one States have managed to enact regulations that both respect the right to bear arms and further their compelling interest in protecting the health and safety of their citizens. The San Diego County sheriff should be able to do the same.

Even if the sheriff were to argue that San Diego is meaningfully different from counties in States like Washington, Oregon, and Nevada, there is surely some middle ground between the thoroughgoing protection of Second Amendment rights that other governments provide and the absolute denial of those rights in San Diego County. It is striking that a resident of Alabama, upon moving to San Diego County, would find such a stark difference in the treatment of a fundamental right protected by the United States Constitution. Although some differences in the law are expected—and even welcomed—in our federalist system, it offends basic notions of ordered liberty to have a constitutionally enshrined right robustly protected in one jurisdiction—or in this case forty-one States—and extinguished elsewhere. And the split over the scope of this constitutional right among federal and state

courts, *see* Pet. for Writ of Cert. at 15–20, which the en banc decision of the Ninth Circuit deepened, exaggerates the difference of treatment of this right throughout the States.

* * *

Although increasing safety and reducing crime are compelling government interests, the Court has made clear that "the very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. Because the combination of California's statutory scheme and the San Diego County sheriff's licensing scheme extinguishes the core Second Amendment right of law-abiding citizens to keep and bear arms for lawful purposes, it violates the Second Amendment. The vast majority of States—who share the San Diego County sheriff's compelling interests in public safety and preventing crime—have not found the elimination of the Second Amendment right to bear arms necessary to achieve it. The licensing regime cannot pass constitutional muster.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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