No. 16-1015

In The Supreme Court of the United States

THE STATE OF MISSOURI, EX REL.
JOSHUA D. HAWLEY, ATTORNEY GENERAL, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *et al.*,

Respondents.

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

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners adequately pleaded standing to sue as *parens patriae* when their complaint alleged injury to no more than an identifiable group of individual businesses.

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STATEMENT

1. Section 25996 of the California Health and Safety Code, enacted in 2010 in Assembly Bill 1437, provides that, effective January 1, 2015, "a shelled egg shall not be sold or contracted for sale for human consumption in California if the seller knows or should have known that the egg is the product of an egg-laying hen that was confined on a farm or place that is not in compliance with animal care standards set forth in" the state code. Those standards, adopted by California voters in 2008 in Proposition 2, forbid a person in California "from tether[ing] or confin[ing]" certain animals, including egg-laying hens, on a farm, "for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely." Cal. Health & Safety Code §§ 25990, 25991(b).

Both Proposition 2 and AB 1437 address activities occurring within California. Proposition 2 regulates hen-confinement practices on California farms, while AB 1437 applies to the sale of eggs within the State. Cal. Health & Safety Code § 25996. The regulation of what type of eggs may be sold within the State applies uniformly (and only) to in-state sales, wherever the eggs may have been produced. *See id.*

In passing AB 1437, the state Legislature sought to "protect California consumers from the deleterious, health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are

exposed to significant stress and may result in increased exposure to disease pathogens including salmonella." Cal. Health & Safety Code § 25995(e). Citing reports by the Pew Commission on Industrial Farm Production and the World Health Organization and Food and Agriculture Organization of the United Nations, the Legislature declared that "[s]almonella is the most commonly diagnosed food-borne illness in the United States," and that "[e]gg-laying hens subjected to stress are more likely to have higher levels of pathogens in their intestines." *Id.* § 25995(c)-(d). The Legislature further found that "reducing flock prevalence [i.e., crowding] results in a directly proportional reduction in human health risk," and that "food animals that are treated well and provided with at least minimum accommodation of their natural behaviors and physical needs are healthier and safer for human consumption." *Id.* § 25995(a)-(b). The food-safety provisions of AB 1437 are "in addition to, and not in lieu of, any other laws protecting animal welfare." *Id*. § 25996.3.

Following passage of AB 1437, the California Department of Food and Agriculture promulgated shell egg food safety regulations. *See* Cal. Code Regs. tit. 3, § 1350. These regulations require egg producers and handlers registered in California to take specified measures to combat salmonella contamination, including implementing environmental-monitoring, vaccination, and other infection-prevention programs. *Id*. § 1350(b)-(c). They also prohibit the sale in California of shelled eggs from hens that are kept in cages or

other enclosures that fail to provide a specified minimum amount of floor space per bird. *Id*. § 1350(d).

Like AB 1437, § 1350(d) was designed to address "ongoing concerns" about salmonella contamination, prompted in part by nationwide food safety recalls in 2010 that involved more than 500 million eggs. Cal. Dept. of Food & Agric., Meat, Poultry and Egg Safety Branch, Initial Statement of Reasons, July 9, 2012, pp. 2-3. Among other things, the Department determined that "establishing minimum enclosure-size requirements is a necessary component in a proactive, uniform shell egg safety program that is administered in accordance with existing state and federal standards." *Id*. at 13.

2. In February 2014, about eleven months before AB 1437 and § 1350(d) took effect, petitioner the State of Missouri initiated this action. *See* Pet. App. 22. One month later, Missouri amended its complaint to add as plaintiffs the States of Nebraska, Oklahoma, and Alabama, the Commonwealth of Kentucky, and the Governor of Iowa. *Id.* at 66-96 (first amended complaint). Petitioners' amended complaint alleged that AB 1437 and § 1350(d) violated the dormant Commerce Clause or, alternatively, were preempted by the federal Egg Products Inspection Act, 21 U.S.C. § 1031 et seq. Pet. App. 90-92.

Each petitioner alleged that it had standing to bring its claims as *parens patriae* "because it has

quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system." Pet. App. 69-73 (¶¶ 10, 17, 22, 27, 32); *see also id.* at 73 (¶ 36) (Iowa has "quasi-sovereign interests in regulating agricultural activity within its own borders and preserving Iowa's rightful status within the federal system"). Petitioners claimed that they would suffer harm from the implementation of AB 1437 because it would require private egg producers within their jurisdictions to modify their operations and incur significant costs if they wished to continue selling eggs in California, thereby "eliminating the competitive advantage our farmers would enjoy once Prop 2 becomes effective." *Id.* at 91 (¶ 97). According to the complaint, the "people most directly affected" would be the "farmers in our states" who "face a difficult choice regarding AB 1437." *Id*. at 68, 69 (¶¶ 6, 7). "[T]hey can incur massive capital improvement costs to build larger habitats . . . or they can walk away from the largest egg market in the country." *Id*. at 69 (¶ 6); *see also id.* at 89-90 (¶¶ 91, 93) (claimed uncertainty surrounding validity of AB 1437 "forces [petitioners'] egg producers to literally bet the farm on the outcome of this law suit," causing them either to "price[ ] themselves out of business" or "lose months of business"); *id.* at 89 (¶ 92) ("incorrect choice spells doom for their businesses"); *id.* at 68, 74, 79, 87 (¶¶ 6, 41, 66, 86) (additional alleged cost effects on producers in petitioner States). Petitioners alleged that the "sole effect of AB 1437" would be "the extraterritorial regulation of egg production." *Id.* at 86 (¶ 83).

The complaint further alleged that, due to AB 1437, "higher production costs [would] increase the price of eggs outside of California as well as in." Pet. App. 87 (¶ 85). If, however, farmers "ch[ose] to forgo the California market," supply "would outpace demand by half a billion eggs, causing the price of eggs – as well as farmers' margins – to fall throughout the Midwest and potentially forcing" producers in the petitioner States "out of business." *Id.* at 88 (¶ 88).

The district court dismissed petitioners' complaint with prejudice, holding that it failed to allege facts sufficient to establish *parens patriae* standing. The court explained that "[o]ther than [petitioners'] conclusory allegation that each [petitioner] State 'has quasi-sovereign interests in protecting its citizens' economic health and constitutional rights as well as preserving its own rightful status within the federal system,' [petitioners] fail to set forth any allegations that support a finding they are bringing this action to protect their citizens' economic health or the well-being of each state's populace. Rather, the allegations throughout the first amended complaint specifically focus on the impact of AB 1437 on [petitioners'] egg farmers." Pet. App. 43 (quoting first amended complaint, citation omitted). Accordingly, the court concluded that petitioners "have not brought this action on behalf of their interest in the physical or economic well-being of their residents in general, but rather on behalf of a discrete

group of egg farmers whose businesses will allegedly be impacted by AB 1437." *Id*. at 44-45.[1]

3. The court of appeals affirmed, but remanded with instructions to dismiss the case without prejudice. Pet. App. 1-20.

The court of appeals explained that, under this Court's decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), a State seeking to bring suit as *parens patriae* "'must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party,'" and "'must express a quasi-sovereign interest.'" Pet. App. 7 (quoting *Snapp*, 458 U.S. at 607). A State must allege an injury to a "'sufficiently substantial segment of its population,'" taking into account both the direct and indirect effects of the injury. *Id.* at 8. In this case, the court reasoned, petitioners failed to allege interests distinct from those of the discrete, identifiable group of egg producers that they claimed would be affected by California's law. *Id.* at 9-10.

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[1] The district court separately held that petitioners' complaint was not ripe, reasoning that petitioners' pre-effective-date challenge failed to allege any concrete plan to violate AB 1437 or any genuine threat of imminent prosecution. Pet. App. 52; *id*. at 53 (first amended complaint "allege[s] nothing to indicate any of their egg farmers will or intend to continue to export their eggs to California as they have done in the past or that their enclosures do not currently comply with California's shell egg laws"). The court of appeals declined to address this independent basis for dismissal. *Id.* at 8.

The court explained that petitioners' "complaint alleges the importance of the California market *to egg farmers* in the [petitioner] States and the difficult choice that *egg farmers* face in deciding whether to comply with" AB 1437's regulation of the California market. Pet. App. 9. "The complaint contains no specific allegations about the statewide magnitude of these difficulties or the extent to which they affect more than just an 'identifiable group of individual' egg farmers." *Id*. at 9-10 (quoting *Snapp*, 458 U.S. at 607) (footnote omitted). Accordingly, petitioners failed to allege that they were anything more than nominal parties to the action. *See id.* In light of this conclusion, the court declined to address separately whether petitioners had articulated any cognizable quasi-sovereign interest. *Id.* at 7-8.

The court rejected the three theories petitioners advanced to demonstrate a state interest apart from the interests of particular private parties and an effect on a sufficiently substantial segment of their populations. Pet. App. 10-17. First, the court explained that petitioners' allegation of harm to egg farmers within their jurisdictions was insufficient because those farmers, whom the complaint alleged would be most directly affected by California's law, were capable of pursuing their own interests and could obtain complete relief were they to file a complaint on their own behalf. *Id*. at 10-12. Second, petitioners' contention that increases in the price of eggs would broadly harm consumers in their States was inconsistent with their allegation that prices would fall and in any event too

speculative to support standing. *Id.* at 12, 13. Because petitioners filed their amended complaint before AB 1437 took effect, the "unavoidable uncertainty of the alleged future changes in price makes the alleged injury insufficient for Article III standing." *Id.* at 13. Among other things, any possible effect on egg prices in the petitioner States was "remote, speculative, and contingent upon the decisions of many independent actors in the causal chain in response to California laws that have no direct effect on either price or supply." *Id.* at 14-15.

Third, the court rejected petitioners' reliance on decisions involving various forms of alleged discrimination, such as *Snapp*, which held that Puerto Rico could sue as *parens patriae* to challenge employment practices in the apple industry on the ground that they discriminated against workers of Puerto Rican origin. 458 U.S. at 608-610; *see* Pet. App. 16-17. *Snapp* was inapposite here, the court of appeals concluded, because California law applies equally to anyone who sells eggs in California. Pet. App. 16.

Based on these conclusions, the court of appeals affirmed the district court's dismissal for lack of standing. Pet. App. 20. It remanded, however, with instructions to dismiss the action without prejudice. *Id.* at 19-20. Because "[i]n theory, [petitioners] could allege post-effective-date facts that might support standing," petitioners were entitled to attempt to re-plead their claims in a new case. *Id*. at 19.

ARGUMENT

The court of appeals correctly applied this Court's precedents in holding that petitioners failed to allege facts sufficient to establish *parens patriae* standing in this case. Contrary to petitioners' submissions, the decision below does not depart from this Court's teachings, adopt any rule precluding States from bringing dormant Commerce Clause challenges under appropriate circumstances, or conflict with a decision of the Second Circuit. There is no reason for further review – particularly in light of the court of appeals' direction that petitioners are free to file a new suit if they believe that new or additional facts allow them to establish standing.

1. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982), this Court explained that to bring suit in its *parens patriae* capacity, a "State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *See also Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1975) (State may not "litigat[e] as a volunteer the personal claims of its citizens"); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (State may not "enter a controversy as a nominal party in order to forward the claims of individual citizens"). A State may, "for a variety of reasons, attempt to pursue the interests of a private party," but such interests, taken by themselves, are not "sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement." *Snapp*, 458 U.S. at 602.

Rather, to bring suit as *parens patriae*, a State must "express a quasi-sovereign interest," such as an interest in the "health and well-being – both physical and economic – of its residents in general," or an interest in "not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607. Critically, "more must be alleged than injury to an identifiable group of individual residents." *Id.*; *see also State of Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938) (*parens patriae* standing not available when a State sues in its name "but in reality for the benefit of particular individuals"). *Parens patriae* standing requires a State to allege not only a special sort of injury, but one affecting a "sufficiently substantial segment of its population." *Snapp*, 458 U.S. at 607.

As the court below recognized, petitioners' complaint alleged injuries to a discrete, concentrated group of private egg producers, and contained "no specific allegations about the statewide magnitude of these difficulties. . . ." Pet. App. 9-10, 10 n.2, 11-12. The gravamen of petitioners' suit was that California law allegedly inflicted harm by requiring egg producers within petitioners' jurisdictions to modify their operations and incur additional cost if they wished to sell, or keep selling, eggs in California. *E.g.*, *id.* at 68-69 (¶¶ 6-7). The court of appeals properly concluded that the allegations did not establish petitioners as more than "nominal" parties, seeking to advance the interests of a discrete, identifiable group of private businesses within their States. *See id.* at 7.

This Court's decisions in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439 (1945), support that conclusion. *Compare* Pet. 12-13. In those cases, unlike here, the plaintiff States alleged concrete, widespread, and diffuse injuries to their residents and the broader economies of their States.

In *Pennsylvania v. West Virginia*, two States had *parens patriae* standing as "representative[s] of the consuming public" to challenge a West Virginia law that threatened to "largely curtail or cut off the supply of natural gas" to all state residents and businesses. 262 U.S. at 581; *see also id*. at 584-585 (gas curtailments would "imperil the health and comfort of thousands of [plaintiff States'] people who use the gas in their homes," and "halt or curtail many industries which seasonally use great quantities of the gas and wherein thousands of persons are employed and millions of taxable wealth are invested"). Similarly, in *Georgia v. Pennsylvania Railroad Company*, Georgia had *parens patriae* standing to sue a group of railroads for price-fixing where "the economy of Georgia and the welfare of her citizens have seriously suffered as the result of [the] alleged conspiracy." 324 U.S. at 450; *see also id*. at 451 (alleged conduct "limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States").

In light of the widespread, concrete injuries alleged in those cases, the plaintiff States could not be said to be pressing only private or abstract harms.

Pennsylvania, 262 U.S. at 591 (plaintiff States were not attempting to "redress purely private grievances," or litigating as "mere volunteers, attempting to vindicate the freedom of interstate commerce"); *Georgia*, 324 U.S. at 452 (because allegations of injury ran "far beyond the claim of damage to individual shippers," State was not a "mere nominal plaintiff"); *see also Louisiana v. Texas*, 176 U.S. 1, 4, 19 (1900) (Louisiana could sue in *parens patriae* under the Commerce Clause where Texas officials imposed an "absolute prohibition of all interstate commerce between the city of New Orleans and the state of Texas," and the "matters complained of affect[ed] [Louisiana's] citizens at large"). In contrast, it is just this sort of widely diffused public injury that the complaint in this case failed to allege.

2. Petitioners argue principally that the court of appeals misinterpreted *Snapp* and this Court's cases allowing *parens patriae* standing in some suits involving claimed restraints on interstate trade. Pet. 9, 10-15. That is incorrect. In *Snapp*, this Court recognized a State's quasi-sovereign interest in "ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system." 458 U.S. at 608; *see also id*. (noting a State's interest in "the removal of barriers to participation by its residents in the free flow of interstate commerce"). But the Court made clear that in order to establish standing to vindicate such interests in federal court, a State must be "more than a nominal party." *Id*. This requires an alleged "injury to a sufficiently substantial segment of its population." *Id*. at 607. The State must

plead an injury that is "sufficiently concrete" to create an "actual controversy" between the State itself and the defendant. *Id*. at 602; *see also id*. at 608 (State's quasi-sovereign interest lies in "assuring that the benefits of the federal system are not denied to its general population"). That is what petitioners failed to do here.

Petitioners' reliance on *Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439, and *Pennsylvania v. West Virginia*, 262 U.S. 553, is similarly misplaced. *See* Pet. 12-13. As explained above, the States in those cases alleged injury to broad sectors of the public; they did not seek redress for alleged harms affecting only a discrete group of private businesses, or litigate as "mere volunteers, attempting to vindicate the freedom of interstate commerce." *Pennsylvania*, 262 U.S. at 591; *see also Georgia*, 324 U.S. at 450-451 (State alleged harm to its overall economy); *Maryland v. Louisiana*, 451 U.S. at 737 (requiring alleged injury that affects the "general population of a State in a substantial way"). Nothing in either case supports petitioners' contention that "[t]he State's interest in the free flow of interstate commerce," by itself, "gave the State *parens patriae* standing" in those cases. *See* Pet. 12.[2]

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[2] Petitioners' reliance on *Great Atlantic & Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366 (1976), is also misplaced. *See* Pet. 12. In the cited passage, the Court said that Mississippi could not justify violating the dormant Commerce Clause by pointing to a reciprocal violation by Louisiana. 424 U.S. at 379. The Court's further comment that the way to seek redress for any such violation would instead be for "Mississippi and its [milk] producers" to bring suit "in state or federal courts," *id*., is not a holding that Mississippi would have *parens patriae* standing to maintain such

Petitioners are also wrong in suggesting that the decision below somehow demeans States' interests in the free flow of commerce. *See*, *e.g.*, Pet. 7, 13-16, 21-23. The court of appeals did not address whether petitioners had alleged a quasi-sovereign interest. Pet. App. 8. Moreover, nothing in the court of appeals' opinion calls into question States' interest in securing the benefits of the federal system for their residents, including through litigation against another State where an appropriate showing can be made. Here, the court of appeals simply concluded that petitioners' complaint was defective because it alleged injuries to only a discrete, identifiable group of private businesses. That application of existing law is unremarkable. The court of appeals also remanded with instructions to dismiss the complaint without prejudice, and noted that petitioners could potentially allege sufficient "post-effective-date facts" to establish *parens patriae* standing in a new lawsuit. *Id.* at 19. There is accordingly no basis for petitioners' suggestion that the court of appeals "deprive[d] States of a judicial forum in which to resolve their commercial disputes." Pet. 21.

Nor did the decision below establish a general rule precluding state standing if a private party is able to pursue litigation on its own. *See* Pet. 9, 13-16. The fact that affected egg producers here could file their own action, seeking all the same relief, supported the court's determination – based on the allegations of the complaint – that petitioners had failed to allege an

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a suit without further analysis – particularly if (as here) no affected producer actually joined the litigation.

interest "apart from the interests of particular private parties," and thus were merely "nominal part[ies]" in this particular litigation. *Snapp*, 458 U.S. at 600, 607; *see* Pet. App. 9-10 (complaint "contains no specific allegations about the statewide magnitude of these difficulties or the extent to which they affect more than just an 'identifiable group of individual' egg farmers") (quoting *Snapp*, 458 U.S. at 607). That is, again, unremarkable. Whether or not private parties can seek relief on their own is a factor that both this Court and others have frequently considered in *parens patriae* cases. *See* Pet. App. 11-12 (discussing *Missouri v. Illinois*, 180 U.S. 208 (1901), and *Maryland v. Louisiana*, 451 U.S. 725)); *id*. at 10 (citing *New York ex rel. Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983); *Connecticut v. Physicians Health Servs. of Conn*., 103 F. Supp. 2d 495, 504 (D. Conn. 2000)).

Wyoming v. Oklahoma, 502 U.S. 437 (1992), on which petitioners rely, Pet. 17, does not suggest otherwise. That case did not involve *parens patriae* standing. The alleged injury there was a loss of tax revenues, i.e., a "direct injury to the State itself," not an injury to residents or consumers. *Wyoming*, 502 U.S. at 449. Further, even if private parties had filed their own action, "Wyoming's interests would not [have been] directly represented." *Id*. at 452. Here, the opposite is true, as the only interests and injuries alleged by petitioners' complaint are those of a discrete group of private businesses.

Finally, petitioners incorrectly suggest that the court of appeals erred in rejecting their reliance on cases allowing *parens patriae* suits to challenge "discriminatory treatment." Pet. 7, 16 (discussing *Snapp*, 458 U.S. 592, and *Georgia*, 324 U.S. 439). *Snapp* involved claims that Virginia apple growers discriminated against Puerto Rican migrant farmworkers based on their ethnicity – a form of invidious discrimination that carried a "'universal sting'" and threatened to "'stigmatize'" and disadvantage all Puerto Ricans, precisely because of their status as such. 458 U.S. at 609 ("[r]egardless of the possibly limited effect of the alleged financial loss at issue," the "political, social, and moral damage of discrimination" means the challenged conduct affects a sufficiently substantial segment of Puerto Rico's population). In *Georgia v. Pennsylvania Railroad Company*, the plaintiff State alleged a discriminatory price-fixing scheme that threatened its entire economy. 324 U.S. at 451. As explained above, petitioners' complaint in this case contained no similar allegations of broad-based injury to the State or its residents as such.[3]

3. The decision below does not conflict with the Second Circuit's decision in *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000). *See* Pet. 18-21. In *Cahill*, the

[3] Although the merits of petitioners' claims are not before the Court, the petition repeatedly asserts that California law discriminates against out-of-state producers and improperly regulates beyond the State's borders. Pet. 3-5, 19. That, too, is wrong. As explained above, *supra* at 1, AB 1437 regulates only sales within California, and it applies even-handedly to those sales, without regard to where the eggs may have been produced.

parties did not dispute that Connecticut had *parens patriae* standing, and the Second Circuit did not rule on that issue. The question before the court was whether Connecticut's suit was one between two States, vesting exclusive jurisdiction in this Court. *See Cahill*, 217 F.3d at 96. In considering that question, the Second Circuit alluded to "the interests that plaintiff-States have sought to protect" in the federal courts, *id*. at 97, but it did not announce, as petitioners contend, that States automatically have *parens patriae* standing any time they allege a violation of the dormant Commerce Clause. *See* Pet. 9. To the contrary, the court noted that a State suing in *parens patriae* must allege an "'actual controversy between the State and the defendant.'" *Cahill*, 217 F.3d at 97 (quoting *Snapp*, 458 U.S. at 602). That is what the Ninth Circuit correctly held was lacking here.

4. The court of appeals' application of settled law to the particular way that petitioners chose to frame their complaint in this case does not warrant review by this Court. That is especially true in light of the court's decision (which petitioners do not mention) to direct the district court to dismiss petitioners' present complaint – which was filed well before the effective date of the challenged laws – without prejudice. *See* Pet. App. 19-20. If petitioners have now gathered "'additional information'" based on actual experience, *see id.* at 17 (quoting petitioners), or otherwise have more to allege about injuries to themselves as States rather than to a discrete group of private business interests, the decision below allows them the opportunity to

frame a new complaint. In the meantime, there is no need for further review of the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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