No.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCISCO GUTIERREZ-LOPEZ,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

II. Whether this Court should hold this petition for certiorari pending a decision in *Sessions v. Dimaya*, No. 15-1498, argued January 17, 2017?

PARTIES

Francisco Gutierrez-Lopez is the petitioner, who was the defendant-appellant below. The United States of America is the respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Francisco Gutierrez-Lopez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished order of summary affirmance of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Francisco Gutierrez-Lopez*, No. 16-11469, 694 Fed. Appx. 965 (5th Cir. August 10, 2017), and is provided in the Appendix to the Petition. [Appx. A]. No petitions for rehearing were filed. The judgement and sentence of the district court is attached and marked as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and order of the United States Court of Appeals for the Fifth Circuit were filed on August 10, 2017. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

8 U.S.C. § 1326 provides in part:

> (a) In general. Subject to subsection (b), any alien who--
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act,
>
> shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.
>
> (b) Criminal penalties for reentry of certain removed aliens. Notwithstanding subsection (a), in the case of any alien described in such subsection--
> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or

both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;
(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;
(3) who has been excluded from the United States pursuant to section 235(c) [8 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[;] or
(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 USCS § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

18 U.S.C. § 16 provides the following:

§ 16. Crime of violence defined

The term “crime of violence” means –
(b) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by it’s nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> Rights of the accused.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Facts and Proceedings Below

This is a criminal case on direct appeal. On January 5, 2016, Francisco Gutierrez-Lopez (Gutierrez-Lopez) was indicted for one count of illegal re-entry after removal, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). (ROA.25-26).[1] On May 24, 2016, Gutierrez-Lopez entered a guilty plea without a written plea agreement (ROA.49-55,72-92) and stipulated to the following facts as a part of his factual resume:

> On or about December 1, 2015, in the Dallas Division of the Northern District of Texas, Francisco Gutierrez-Lopez, an alien, was found in the United States of America, (after having previously been removed therefrom on or about April 17, 2015), without having received the express consent of the Attorney General of the United States of America or the Secretary of the Department of Homeland Security to reapply for admission since the time of his previous removal. Mr. Gutierrez-Lopez's conduct violates 8 U.S.C. § 1326(a).

(ROA.52).

After the guilty plea, the probation officer prepared a pre-sentence investigation report (PSR). In the PSR, the probation officer found that Gutierrez-Lopez's base offense level was 8 pursuant to U.S.S.G. § 2L1.2. The probation officer recommended

[1] For the Convenience of the Court and the parties, Petitioner has cited to the page number of the record on appeal.

a 4-level enhancement for the defendant previously being deported following a felony conviction. (ROA.125). With a two level reduction for acceptance of responsibility, Gutierrez-Lopez's total offense level was a 10. (ROA.125). With a criminal history category VI, he had an advisory Guideline imprisonment range of 24-30 months. (ROA.140).

The government filed an objection to the PSR arguing that Gutierrez-Lopez should have received a 8-level enhancement for being previously convicted of an aggravated felony, pursuant to U.S.S.G. §2L1.2(b)(1)(C), specifically, a prior Texas conviction for evading arrest with a motor vehicle. (ROA.143). With this 8-level enhancement, Gutierrez-Lopez's total offense level would have been a 13. At a criminal history category VI, his advisory imprisonment range would have been 33-41 months. (ROA.138). The probation officer filed an addendum in which the government's objection was rejected. (ROA.147). The government filed a response to the addendum persisting in its objection. (ROA.150).

In its objections to the PSR and addendum, the government was essentially arguing that under this Court's opinion in *United States v. Sanchez-Ledezma*, 630 F.3d 447, 451 (5th Cir. 2011), a conviction for a Texas evading arrest with a motor vehicle is a "Crime of violence" under the residual clause of 18 U.S.C. § 16(b). Although the residual clause in ACCA (18 U.S.C. § 924(e)) has been found to be unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551(2015), this Court has found that *Johnson* does not apply to the residual clause in 18 U.S.C. § 16(b). *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 676 (5th Cir. 2016). Accordingly, the government argued that *Sanchez-Ledezma* remained good law despite the Supreme Court's ruling in *Johnson*. (ROA. 156-160). Gutierrez-Lopez filed a notice accepting the findings and conclusions of the PSR and addendum. (ROA.165).

At sentencing, the government persisted in its objection to the PSR and

Gutierrez-Lopez persisted in agreeing with the findings and conclusions of the PSR. (ROA.94-99). The district court granted the government's objection and found that the offense level was a level 13, the criminal history category was a VI and the advisory imprisonment range was 33-41 months. (ROA.100).[2] After that ruling, Mr. Gutierrez-Lopez's attorney made sure the record reflected that he was preserving an objection to the district court's ruling under the *Dimaya* case now pending in the Supreme Court. (ROA.101-102).

The district court sentenced Gutierrez-Lopez to 35 months imprisonment and a two-year term of supervised release. (ROA.62-67,107-111). A timely notice of appeal was filed. (ROA. 59).

B. Proceedings on Direct Appeal

Petitioner appealed his sentence, arguing, that the district court's sentence exceeded the statutory maximum authorized by 8 U.S.C. § 1326(a), and also arguing that his prior conviction for evading arrest with a motor vehicle was not a crime of violence and, therefore, did not qualify for an 8-level increase for being an aggravated felony, relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Petitioner also argued this Court's decision in *Dimaya*, pending before this Court, would be controlling on this issue. The court of appeals affirmed his sentence in an order granting motion for summary affirmance. *See* [Appendix A].

[2] The district court stated "I'm going to overrule the objection," but it is clear from her explanation and the entire context of her ruling that she was sustaining the government's objection. (ROA.100).

REASONS FOR GRANTING THE PETITION

I. Whether all facts – including the fact of a prior conviction – that increase a defendant's statutory maximum must be pleaded in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt?

Petitioner was subjected to an enhanced statutory maximum under 8 U.S.C. §1326(b) because the removal charged in the indictment followed a prior felony or aggravated felony conviction. Petitioner's sentence thus depends on the judge's ability to find the existence and date of a prior conviction, and to use that date to increase the statutory maximum. This power was affirmed in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the enhanced maximums of 8 U.S.C.§ 1326 represent sentencing factors rather than elements of an offense, and that they may be constitutionally determined by judges rather than juries. *See Almendarez-Torres*, 523 U.S. at 244.

This Court, however, has repeatedly limited *Almendarez-Torres*. *See Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 (2013) (characterizing *Almendarez-Torres* as a narrow exception to the general rule that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013)(Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (stressing that *Almendarez-Torres* represented "a narrow exception" to the prohibition on judicial fact-finding to increase a defendant's sentence); *Shepard v. United States*, 544 U.S. 13 (2005) (Souter, J., controlling plurality opinion)("While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."); *Dretke v. Haley*, 541 U.S. 386, 395-396

(2004) (concluding that the application of *Almendarez-Torres* to the *sequence* of a defendant's prior convictions represented a difficult constitutional question to be avoided if possible); *Nijhawan v. Holder*, 129 S.Ct. 2294, 2302 (2009) (agreeing with the Solicitor General that the loss amount of a prior offense would represent an element of an 8 U.S.C. §1326(b) offense, to the extent that it boosted the defendant's statutory maximum).

Further, any number of opinions, some authored by Justices among the *Almendarez-Torres* majority, have expressed doubt about whether it was correctly decided. *See Apprendi*, 530 U.S. at 490; *Haley*, 541 U.S. at 395-396; *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1201 (2006)(Stevens, J., concurring in denial of certiorari); *Rangel-Reyes*, 547 U.S. at 1202-1203 (Thomas, J., dissenting from denial of certiorari); *James v. United States*, 550 U.S. 192, 231-232 (2007)(Thomas, J., dissenting). And this Court has also repeatedly cited authorities as exemplary of the original meaning of the constitution that do not recognize a distinction between prior convictions and facts about the instant offense. *See Blakely v. Washington*, 542 U.S. 296, 301-302 (2004)(quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769),1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)); *Apprendi*, 530 U.S. at 478-479 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) , 4 Blackstone 369-370).

In *Alleyne*, this Court applied *Apprendi*'s rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be proved to a jury beyond a reasonable doubt. 133 S. Ct. at 2162–63. In its opinion, the Court apparently recognized that *Almendarez-Torres*'s holding remains subject to Fifth and Sixth Amendment attack. *Alleyne* characterized *AlmendarezTorres* as a "narrow exception to the general rule"

that all facts that increase punishment must be alleged in the indictment and proved to a jury beyond a reasonable doubt. *Id.* at 2160 n.1. But because the parties in *Alleyne* did not challenge *Almendarez-Torres*, this Court said that it would "not revisit it for purposes of [its] decision today." *Id*.

The Court's reasoning nevertheless demonstrates that *Almendarez-Torres*'s recidivism exception may be overturned. *Alleyne* traced the treatment of the relationship between crime and punishment, beginning in the Eighteenth Century, repeatedly noting how "[the] linkage of facts with particular sentence ranges . . . reflects the intimate connection between crime and punishment." *Id.* at 2159 ("[i]f a fact was by law essential to the penalty, it was an element of the offense"); *see id*. (historically, crimes were defined as "the whole of the wrong to which the law affixes [ ] punishment … include[ing] any fact that annexes a higher degree of punishment") (internal quotation marks and citations omitted); *id.* at 2160 ("the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted") (internal quotation marks and citation omitted). This Court concluded that, because "the whole of the" crime and its punishment cannot be separated, the elements of a crime must include any facts that increase the penalty. The Court recognized no limitations or exceptions to this principle.

Alleyne's emphasis that the elements of a crime include the "whole" of the facts for which a defendant is punished seriously undercuts the view, expressed in *Almendarez-Torres*, that recidivism is different from other sentencing facts. *See Almendarez-Torres*, 523 U.S. at 243–44; *see also Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") *Apprendi* tried to explain this difference by pointing out that, unlike other facts, recidivism "'does not relate to the commission of the offense'

itself[.]" 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). But this Court did not appear committed to that distinction; it acknowledged that *Almendarez-Torres* might have been "incorrectly decided." *Id.* at 489; *see also Shepard v. United States*, 544 U.S. 13, 26 n.5 (2005) (acknowledging that Court's holding in that case undermined *Almendarez-Torres*); *Cunningham v. California*, 549 U.S. 270, 291 n.14 (2007) (rejecting invitation to distinguish between "facts concerning the offense, where *Apprendi* would apply, and facts [like recidivism] concerning the offender, where it would not," because "*Apprendi* itself … leaves no room for the bifurcated approach"). Three concurring justices in *Alleyne* provide additional reason to believe that the time is ripe to revisit *Almendarez-Torres*. *See Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, Kagan, J.J., concurring). Those justices noted that the viability of the Sixth Amendment principle set forth in *Apprendi* was initially subject to some doubt, and some justices believed the Court "might retreat" from it. *Id.* at 2165. Instead, *Apprendi*'s rule "has become even more firmly rooted in the Court's Sixth Amendment jurisprudence." *Id*. Reversal of precedent is warranted when "the reasoning of [that precedent] has been thoroughly undermined by intervening decisions." *Id.* at 2166. The validity of *Almendarez-Torres* is accordingly subject to reasonable doubt. If *Almendarez-Torres* is overruled in another case, the result will obviously undermine the use of Petitioner's prior conviction to increase his statutory maximum. Indeed, any *limitation* on the scope of this decision in another case will undercut the decision below. Petitioner's sentence depends on the district court's ability to find not merely that he was previously convicted, but that the date of his prior conviction preceded the deportation admitted by the plea of guilty. *See* 8 U.S.C. §1326(b)(requiring that the defendant's prior felony conviction precede his removal).

This issue was raised in the appeals court below. If this Court were to determine that the Constitution limits Gutierrez-Lopez's statutory range of

imprisonment to not more than two years, then clearly such constitutional error substantially prejudiced Gutierrez-Lopez as evidenced by his current 35 month sentence, 11 months more than what should have been the statutory maximum. Also, Gutierrez-Lopez's 2-year term of supervised release would exceed the statutory maximum of one year.

This issue was not raised in the trial court, and any error must therefore meet the requirements of Federal Rule of Criminal Procedure 52(b) to merit relief. Unpreserved error may be reversed only where it is plain, where the defendant's substantial rights have been affected, and where the error affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). But the plain-ness of error is determined at the time of appeal, not at the time of trial proceedings. *See Henderson v. United States*, __ U.S. __, 133 S.Ct. 1121, 1124-1125 (2013).

In any case, GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001); *accord State Tax Commission v. Van Cott*, 306 U.S. 511, 515-516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(*per curiam*)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983)(*per curiam*)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual*

Auto Ins. Co. v. Duel, 324 U.S. 154, 161 (1945)(remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

II. This Court should hold this petition for certiorari pending its decision in *Sessions v. Dimaya*, No. 15-1498, argued on January 17, 2017.

U.S.S.G. §2L1.2(b)(1)(B) provides for an 8 level enhancement to the base offense level for a deportation or removal that occurs after a conviction for an "aggravated felony". The term "aggravated felony" has the same meaning given that term in 8 U.S.C. § 1101(a)(43). See U.S.S.G. §2L1.2, application note 3(A).

8 U.S.C. 1101(a)(43)(F) defines an "aggravated felony" as "a crime of violence (as defined by Section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment (sic) at least one year."

Title 18 U.S.C. § 16 defines a crime of violence to include, *inter alia*, "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This language is referred to as the "residual clause" in the definition for "crime of violence."

In Gutierrez's case, the probation officer found that the defendant's prior conviction for evading arrest with a motor vehicle was a "crime of violence" and, therefore an "aggravated felony," relying on *Sykes v. United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the Supreme Court found that the Indiana statute making it a crime to flee from law enforcement with a vehicle was a "crime of violence" under the "residual clause" of the definition of "violent felony" in 18 U.S..C. § 924(e).

After *Sykes*, in *United States v. Johnson*, 135 S. Ct. 2551 (2015), this Court held that the "residual clause" in 18 U.S.C. § 924(e) was unconstitutionally vague.

Petitioner now objects to the similar residual clause in 18 U.SC. § 16 as also unconstitutionally vague on the same grounds as in *Johnson* and objects to the use of this clause in determining that his prior conviction for evading arrest with a motor vehicle qualifies as an "aggravated felony" for the purposes of the 8 level enhancement in U.S.S.G. §2L1.2(b)(1)(B).

This argument was previously foreclosed by the Court of Appeals for the Fifth Circuit's decision in *United States* v *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc). Petitioner raised this issue in the trial court and on direct appeal to preserve it for further appellate review. On February 21, 2017, the Fifth Circuit summarily affirmed Petitioner's sentence.

Every circuit to consider the issue—other than the Fifth Circuit—has held that 18 U.S.C. § 16(b) is unconstitutionally vague. *See Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) ("Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA's residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*").

On January 17, 2017, this precise issue was argued to this Court in *Sessions v. Dimaya*, No. 15-1498, a case out of the Ninth Circuit. That case still awaits this Court's adjudication. Petitioner asks this Court to hold its evaluation of his petition pending *Dimaya*, because that decision will, in part, directly affect Petitioner's petition.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of any relevant forthcoming authority.

Respectfully submitted this 8th day of November, 2017.

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FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 8th day of November, 2017.

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PROOF OF SERVICE

I, Christopher Curtis, do certify that on this date, November 8, 2017, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via Federal Express, Overnight. The Solicitor General, Assistant United States Attorney Wes Hendrix, and the Petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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