No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

SUPPLEMENTAL BRIEF OF AMICI CURIAE LARRY D. THOMPSON, WILLIAM SESSIONS, et al., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of numerous former federal and state law enforcement officers, prosecutors, and judges who believe that *Michigan v. Jackson*, 475 U.S. 625 (1986), provides bright-line guidance for post-arraignment custodial interrogations, that the decision promotes fair, effective law enforcement, and that overturning it would sow confusion and undermine our criminal justice system.[1]

SUMMARY OF ARGUMENT

Twenty-three years ago, this Court in *Jackson* held that if police initiate interrogation after attachment of the right to counsel, where the defendant has a lawyer or has requested a lawyer, waiver of the right to counsel for that interrogation is invalid. Since then, this rule -- like the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966) -- "has become embedded in routine police practice." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Under the most basic precepts of *stare decisis*,

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[1] The Appendix includes a list of the *amici* filing this brief. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

overruling *Jackson*, and departing radically from well-settled precedent, requires "special justification." *Id.* (citations omitted). As the Court has observed, a constitutional decision, particularly one that enforces fundamental liberties, should stand unless it has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration" for "articulable reasons." *See Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

The *amici* advocating that *Jackson* be overturned did not mention *stare decisis* in their brief.[2] When measured against the high threshold for discarding well-established precedent, their arguments are unpersuasive. There is no justification for discarding this longstanding precedent.

As experienced law enforcement officials, former prosecutors, and judges who have, respectively, apprehended and interrogated, prosecuted, and tried criminal defendants, and who have addressed issues of law enforcement policy, *amici* have special insights on the rule of *Jackson*. In particular, *amici* have had the opportunity to assess whether the rule has proved unworkable or, to the contrary, has become routine ingrained practice for law enforcement officers, and whether it has undermined law enforcement and the criminal justice system or, to the contrary, has avoided

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[2] *See* Brief for The State of New Mexico et al. as Amici Curiae Supporting Respondent, *Montejo v. Louisiana* (No. 07-1529).

confusion, controversy, and unfairness. Our experience convinces us that *Jackson* should not be overruled and that the negative consequences of doing so would far outweigh any benefits.

First, the *amici* who are former law enforcement officers and prosecutors believe that, far from being impractical or destructive, *Jackson* provides an easily enforceable rule governing post-arraignment custodial interrogations. The simplicity and clarity of the rule facilitate the training of police officers. It enables prosecutors easily to assess the legality of confessions. And it provides judges a straightforward, objective standard to determine whether those confessions are admissible. If a defendant is appointed counsel or requested a lawyer, the police may not initiate questioning without counsel present. If a defendant who neither is represented nor has requested counsel makes a statement after being advised of and waiving *Miranda* rights, the statement will likely be admissible.

Absent such a clear test, law enforcement personnel, prosecutors, and trial judges will have to start anew in developing a common law from particularized decisions reflecting inherently subjective assessments of the tactics as well as the intent of investigators, the timing as well as the content of interrogations, and the understanding as well as the free will of defendants.

Second, the *amici* who are former law enforcement officers or prosecutors believe the rule

of *Jackson* "has become embedded in routine police practice." *Dickerson*, 530 U.S. at 430. Hundreds of thousands of law enforcement personnel have been trained to comply, and do comply, with it. The decision has not slowed the dramatic improvements in law enforcement practices.

Third, *Jackson* links two key criminal procedural rights -- the Sixth Amendment right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the Fifth Amendment rights of an accused under *Miranda* -- which are fundamental to the adversary process and maintain public confidence in our criminal justice system. Discarding *Jackson* would undermine both rights. Allowing the police to initiate interrogation of a represented defendant and to use any resulting statements would strip away protections the attorney can provide, interfere with the relationship between counsel and client, and undercut the integrity of criminal trials. It would also contradict the commitment made to defendants through *Miranda* warnings. These Fifth and Sixth Amendment rights, and the procedures for securing them, "have become part of our national culture." *Dickerson*, 530 U.S. at 443. To abandon a rule that safeguards them would erode the public confidence they foster. It would signal that enduring legal principles and important constitutional rights are no longer so enduring nor so important.

ARGUMENT

I. THE LONG-ESTABLISHED RULE OF *JACKSON* PROMOTES EFFECTIVE LAW ENFORCEMENT.

As this Court has repeatedly affirmed, *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez*, 474 U.S. at 265-66. Overruling well-established precedent is justifiable only if it has proved "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Id.* at 266. *See also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *California v. Acevedo*, 500 U.S. 565, 579 (1991) ("[T]his Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or has been a derelict or led to anomalous results.").

Jackson is neither "ill-founded" nor "unworkable." For more than two decades, it has provided a clear, easily followed rule governing interrogations of an accused once the right to counsel has attached. Not only does *Jackson* safeguard the

Sixth Amendment right to counsel, it also facilitates the allocation of prosecutorial resources and informs the exercise of prosecutorial discretion by providing prosecutors a comprehensible standard for assessing the admissibility of an interrogation and for determining the strength of their case. Further, it avoids the burden on judicial, prosecutorial, and law enforcement resources that would result from intensely fact-bound, case-by-case adjudications, in suppression hearings and collateral proceedings, of the voluntariness and constitutionality of confessions.

Undoubtedly, *Jackson* reduces opportunities to interrogate defendants. And it may require exclusion of evidence that could support a criminal conviction. Based on our experience, however, we believe that it is a rare case where this rule lets a guilty defendant go free. In our view, *Jackson* has done far more to promote effective law enforcement than to undermine it.

Jackson did not establish, and overruling it will not eliminate, the obligation of law enforcement personnel to respect defendants' constitutional rights. But abandoning *Jackson's* bright-line standard will make fulfillment of that obligation by law enforcement officials more uncertain, and enforcement of it by judges more cumbersome and unpredictable. In our experience, a clear rule defining in advance the appropriate circumstances for interrogation is inherently more workable, and ultimately more just, than relying on *post-hoc* judicial evaluation of the voluntariness of a

confession and the propriety of the conduct of law enforcement personnel.

A. *Jackson* Provides Clear Guidance For Law Enforcement Officers.

The *amici* who are former law enforcement officers or prosecutors recognize the significant role confessions play in investigating and prosecuting crimes. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . ."). But *amici* also recognize the importance of ensuring that confessions are obtained in a manner consistent with defendants' constitutional rights.

For 23 years, *Jackson* has provided clear guidance to law enforcement officials, prosecutors, and courts.[3] The rule does not preclude the admissibility of all confessions after the right to counsel attaches; for example, where the defendant initiates contact with law enforcement personnel, the Sixth Amendment would not bar admission of the statement. *Jackson*, 475 U.S. at 636. Similarly, the presence of defense counsel ensures that any incriminating statement by a defendant is "truly . . .

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[3] Decisions following *Jackson* confirm that its clear, bright-line rule has proven easy to apply. *See, e.g., Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986); *Murphy v. Holland*, 845 F.2d 83 (4th Cir. 1988); *West Virginia v. Crouch*, 358 S.E.2d 782, 783 (W. Va. 1987) ("The law on this issue is set out clearly in *Michigan v. Jackson . . .*").

the product of . . . free choice." *Miranda,* 384 U.S. at 458. But in precluding the use of post-attachment responses to questioning initiated by law enforcement personnel, *Jackson* safeguards the defendant's Sixth Amendment right to assistance of counsel at all critical stages of the proceedings, including interrogation. It also prevents erosion of the right to counsel by preventing impairment of the attorney-client relationship or intrusions into counsel's advice and tactical decisions. That, in turn, safeguards defendants' other rights, including their Fifth Amendment rights against self-incrimination and coercive interrogation. In all these ways, *Jackson* protects the integrity of criminal trials and thereby enhances the credibility and effectiveness of law enforcement and the criminal justice system.

1. Bright-line Rules Facilitate Efficient Law Enforcement.

This Court, as well as other federal and state courts, has long recognized the value of bright-line rules like the rule in *Jackson*. In particular, this Court has articulated a series of clear tests to guide custodial interrogations: whether the suspect is in custody, *Oregon v. Mathiason*, 429 U.S. 492 (1977); whether the suspect has been advised of his or her rights, *Miranda*, 384 U.S. 436; whether the suspect has requested counsel, *Edwards v. Arizona*, 451 U.S. 477 (1981), or otherwise has not waived *Miranda* rights, s*ee generally Miranda*, 384 U.S. 436; and whether the police have conducted "interrogation," *Rhode Island v. Innis*, 446 U.S. 291 (1980). These

straightforward rules protect the constitutional rights of defendants, ensure appropriate law enforcement practices, and avoid wasting law enforcement resources in collateral constitutional challenges. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (bright-line rules "guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); *Michigan v. Tucker*, 417 U.S. 433, 443 (1974) (bright-line rules "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost").

Jackson fits squarely within this approach. Police officers know that if they initiate interrogation of a defendant who has been assigned or requested counsel, any purported waiver of Sixth Amendment rights will be invalid, and the evidence will be inadmissible.

The clear standard of *Jackson* has additional benefits. For example, it allows law enforcement officers to focus on investigating and preventing crimes, without having to calculate the evidentiary consequences of their conduct in unpredictable and fast-paced situations. *See, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 316 (1985) ("Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions . . ."). The rule in *Jackson* also reduces the need for judicial re-examination of the complex decisions law

enforcement agents must make in investigating a case and interrogating suspects.

Overruling *Jackson* would eliminate clear guidance to law enforcement officers as lower courts consider case-by-case the voluntariness of a confession obtained after a defendant has been assigned or requested counsel, or the propriety of the interrogation on other Sixth Amendment grounds. Proponents of overturning the rule in *Jackson* have not specified any replacement; necessarily, though, any substitute would be more subjective, ranging toward an open-ended, totality-of-the-circumstances inquiry. Case law before *Jackson* reflects that the determinations could encompass many different factors, including:

- whether the interrogation occurred before arraignment or after, *see, e.g., United States v. Mohabir*, 624 F.2d 1140, 1145 (2d Cir. 1980);

- whether law enforcement personnel knew that the suspect was represented by counsel, *see, e.g., State v. Norgaard*, 653 P.2d 483, 487 (Mont. 1982);

- whether law enforcement personnel deliberately sought to keep the lawyer and the client apart, *see, e.g.*, *Massiah v. United States*, 377 U.S. 201, 206 (1964);

- whether the interrogation -- purposefully or not -- extracted privileged information or trial strategy, and whether the interrogation otherwise thwarted or tainted the attorney-client relationship, *see, e.g., Massiah*, 377 U.S. at 209 (White, J., dissenting); and

- whether the interrogation undermined the fairness of the trial and compromised the adversarial system, *see, e.g., Estelle v. Smith*, 451 U.S. 454, 470-71 (1981).

Moreover, as is evident in the pre-*Jackson* cases, the uncertainty resulting from abandoning the bright-line rule of *Jackson* would yield disparities not only in conduct by police, but also in standards adopted by courts,[4] and in applications of those standards within and between jurisdictions.

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[4] *Compare Mohabir*, 624 F.2d at 1153 (waiver valid only if "preceded by a federal judicial officer's explanation of the content and significance of this right") *with United States v. Shaw*, 701 F.2d 367, 380 (5th Cir. 1983) (waiver valid only if right was "knowingly and intelligently relinquished") *with People v. Superior Court of Fresno County*, 145 Cal. App. 3d 581, 593 (Cal. Ct. App. 1983) ("police-initiated interrogation is barred" unless counsel has been notified) *with Norgaard*, 653 P.2d at 487 (waiver valid if "written or oral [*Miranda*] warnings have been given").

The ambiguity inherent in such an approach would impose significant costs. Law enforcement personnel would have to make on-the-spot judgments about essentially legal issues; prosecutors would have to review and defend such judgments; and courts would have to delve into the defendant's and officer's mental states. The ensuing litigation would consume scarce law enforcement resources by increasing the demands on officers for testimony, as well as on prosecutorial and judicial resources to adjudicate challenges. Uncertainty, unpredictability, burden, and expense are not only problematic in themselves. They also increase the risk of constitutional violations that would render any evidence obtained (or its fruits) inadmissible, potentially imperiling otherwise prosecutable cases.

2. Law Enforcement Authorities Have Implemented Procedures Complying With *Jackson*

After *Jackson*, participants in the criminal justice system understood that once a defendant had been appointed or requested counsel, police could not initiate an interrogation without counsel present. In the experience of the law enforcement *amici*, far from finding *Jackson* "unworkable," the law enforcement community has had no difficulty in implementing it. Generations of police officers have been trained to the rule of *Jackson*. For example, the Federal Bureau of Investigation Legal Handbook for Special Agents explains:

(7) Request for Legal Representation at a Court Proceeding - If an accused, during the course of an initial appearance or other court proceeding, requests to be represented by legal counsel or accepts the court appointment of counsel, no interview of the accused may take place concerning the charge(s) for which the accused has appeared in court unless:

(a) the accused's counsel is present; or

(b) the accused initiates the contact with the Agents and is expressly advised that he/she has the right to be represented by separate counsel; or

(c) contact is necessary to acquire information critical to life and the presence of counsel will delay or impede the receipt of the needed information; or

(d) the contact has been approved by the United States Attorney's Office or other Department of Justice official based on extenuating circumstances such as defense counsel's involvement in the criminal offense or other serious conflict of interest.

FBI LEGAL HANDBOOK FOR SPECIAL AGENTS, § 7-4.1(7), Eff. Date 7/26/99 (2003). *See also* Kenneth A. Myers, *Avoiding Sixth Amendment Suppression: An Overview and Update,* FBI LAW ENFORCEMENT BULLETIN 23 (Mar. 1, 2009), *available at 2001 WLNR 4701493* (post-attachment confession admissible only if "defendant initiated the contact (and was properly warned of and waived these rights) or the defendant's attorney was present for the interrogation").[5]

There is no evidence that law enforcement has suffered under this rule. Police periodicals discussing the decision rarely, if ever, complain that it impedes investigations or prosecutions.[6] But

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[5] *See also* John C. Klotter, *Legal Guide for Police: Constitutional Issues* 201 (6th ed. 2002) ("[O]nce a criminal defendant invokes his or her Sixth Amendment right to counsel, a subsequent waiver of that right, even if voluntary, knowing, and intelligent under traditional standards, is presumed invalid if secured pursuant to a police-initiated conversation."); UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY MANUAL § 6641.31(J) (2002) ("Once an attorney has been obtained or appointed for the defendant, any subsequent contact with the defendant must be made through or with the concurrence of his attorney."); Kimberly A. Crawford, *The Sixth Amendment Right to Counsel: Application and Limitations*, FBI LAW ENFORCEMENT BULLETIN 27 (July 31, 2001), *available at* 2001 WLNR 4701493 (explaining this Court's holding in *Michigan v. Jackson* and how it impacts law enforcement).

[6] *See, e.g.,* Ralph B. Means, *Interrogation Law . . . Reloaded: The Two Rights to Counsel*, THE POLICE CHIEF, Dec. 2003, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=171&issue_id=122003; Devallis Rutledge, *Pinpointing the Right to Counsel:*

eliminating the bright-line rule could have that effect. At the very least, it would complicate efforts to train law enforcement officers on how to conduct interrogations for at least two reasons.

First, custodial interrogations are, by and large, governed by bright-line tests. Overturning *Jackson* would introduce a subjective test to assess whether a defendant's response without counsel to questioning initiated by an officer constitutes a knowing and intelligent waiver of constitutional rights. Displacing an objective inquiry with such a subjective, case-specific appraisal would force trainers to teach judgment, significantly increasing the complexity and indeterminacy of interrogation training.

Second, eliminating the bright-line rule would result in potentially conflicting directives to law enforcement officers, given the requirement of *Edwards v. Arizona* that "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Solem v. Stumes*, 465 U.S. 638, 638 (1984) (citing *Edwards*, 451 U.S. at 484-85). Training law enforcement officers to follow

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When Does a Suspect's Sixth Amendment Right Arise?, POLICE: THE LAW ENFORCEMENT MAGAZINE, Aug. 2008, available at http://www.policemag.com/Articles/ 2008/08/Pinpointing-the-Right-to-Counsel.aspx. *See generally* Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 898 (1997) ("Because the Sixth Amendment right to counsel applies only to charged crimes, it does not create a great obstacle for officials investigating crimes.").

one standard for custodial interrogation when the suspect invokes the right to counsel and a separate, subjective standard when counsel is appointed at arraignment will sow confusion and error.[7]

B. The Clear Guidance Of *Jackson* Aids Prosecutors In Fulfilling Their Duties.

The former prosecutor *amici* believe that the bright-line rule of *Jackson* aids prosecutors in performing their role in the criminal justice system in at least three ways.

First, it facilitates efficient evaluation of cases and informs the exercise of prosecutorial discretion. Applying unambiguous constitutional standards, prosecutors can better determine whether confessions or other evidence are vulnerable to suppression. The inquiry need focus on relatively few and essentially objective facts -- whether the defendant had been assigned or requested counsel at the time of the confession, whether counsel was present, and if not, whether the defendant initiated the contact with law enforcement.

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[7] Overruling *Jackson* would potentially create uncertainty concerning the attachment of the right to counsel. This Court has recognized that the Sixth Amendment provides protections beyond those of the Fifth Amendment. *See, e.g, Fellers v. United States*, 540 U.S. 519, 524 (2004) (post-indictment statements during noncustodial interrogation violated Sixth Amendment even though they would have satisfied Fifth Amendment). Any ruling that blurs the line demarcating the attachment of the Sixth Amendment right risks confusion and violations of the right.

Abandoning *Jackson* would hamper this sort of evaluation. Prosecutors would need to consider numerous subjective factors relevant to the effectiveness of a waiver and the integrity of the impending trial. Moreover, given the number and elusiveness of these factors, and the difficulty of ascertaining all the relevant facts early in the proceedings (usually without access to the defendant's version of the facts surrounding the statement), prosecutors may lack confidence regarding the admissibility of the evidence, which in turn could affect the charging decision.

Second, as noted, the clarity of the *Jackson* rule helps conserve prosecutorial resources by reducing judicial proceedings. A defendant who knows that the police complied with *Jackson* is less likely to waste time disputing the issue.

Third, the ability of both the prosecutor and defense counsel to use a simple, objective standard to evaluate the admissibility of statements facilitates plea bargaining. Overruling *Jackson* would introduce additional uncertainty, leading to disparate evaluations of the outcome of a suppression hearing.

II. SETTLED COMMUNITY EXPECTATIONS WEIGH HEAVILY AGAINST OVERRULING *JACKSON*

Discarding *Jackson* would confound settled expectations regarding the criminal justice system. It would nullify decades of practice and require development and implementation of entirely new procedures. Such changes in settled rules are not only disruptive for law enforcement officials. They are also inimical to public confidence in the courts and law enforcement, particularly when, as here, the change appears to undermine the right to counsel that every schoolchild appreciates from the *Miranda* warnings. Ultimately, the legitimacy of the criminal justice system, the effectiveness of juries, and the public's support for law enforcement depend upon confidence in the justice system's fairness, consistency, predictability, and stewardship of our most basic rights. The Court should not put that confidence at risk.

This Court has cautioned that public confidence in the legal system depends upon consistent application of law, including the Court's consistent application of its own prior decisions. *See Payne*, 501 U.S. at 827; *Vasquez*, 474 U.S. at 265-66. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). *Stare decisis* "thereby avoids the instability and unfairness that accompany disruption of settled legal

expectations." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006).

Because *Jackson* lies at the intersection of two important criminal procedural rights -- the right to counsel under *Gideon* and the *Miranda* rights of an accused -- overruling *Jackson* would erode the Court's legitimacy, disrupt established legal expectations, and thus undercut "the legal stability . . . upon which the rule of law depends." *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008).

Both *Gideon* and *Miranda* protect the vitality of our adversary process while also promoting public support for our criminal justice system. Repudiating *Jackson* would undermine the Fifth and Sixth Amendment rights those cases have enshrined in the public consciousness. Allowing the police to initiate conversations with certain represented defendants to obtain evidence against them could spur practices that undermine the defendant's relationship with defense counsel or otherwise render hollow the commitment made to defendants through *Miranda* warnings. The right to counsel and *Miranda* "have become part of our national culture." *Dickerson*, 530 U.S. at 443. Renouncing a decision that established a rule to preserve and protect those rights would damage public confidence in the criminal justice system.

Disapproving *Jackson* would potentially cast doubt on the fairness of our legal system. Ultimately, such doubts could also hurt law enforcement efforts by undermining the relationship between law enforcement officers and the

communities they protect. Officers across the country depend on citizens to aid in investigations, testify as witnesses, and serve as jurors. Much of this cooperation is rooted in the respect of individual citizens for the legal system and law enforcement and public faith that officers are not arbitrary or coercive. Abandoning this Court's precedents -- particularly in a way that could be perceived as a step back from *Gideon* and *Miranda* -- could reduce the cooperation law enforcement officers receive from the public.

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the Supreme Court of Louisiana.

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