No. 19-1301

IN THE

Supreme Court of the United States

CLYDE S. BOVAT,

Petitioner,

v.

VERMONT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

Thomas M. Bondy
Counsel of Record
Tiffany R. Wright
Upnit K. Bhatti
James Anglin Flynn
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Association for Public Defense (NAPD) is an organization of more than 21,000 practitioners dedicated to the effective legal representation of persons accused of crimes who cannot afford to retain private counsel. The Association's membership includes all categories of professionals necessary to providing a robust public defense: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, researchers, and legislative advocates. These professionals often represent the interests of the most marginalized and stigmatized communities in the United States. NAPD aims to de-stigmatize poverty and to eradicate racial disparities in the justice system. The Association files numerous amicus briefs each year in state and federal cases involving constitutional principles critical to the fair administration of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because the "house protects and privileges *all* its branches and appurtenants," the Amendment's protection extends to the curtilage—"the area

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

immediately surrounding and associated with the home." *Florida v. Jardines*, 569 U.S. 1, 6-7 (2013) (emphasis added) (internal quotation marks and citations omitted). In *Florida v. Jardines*, this Court held that without a warrant, government officers may only enter the curtilage through an "implicit license" that permits visitors "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id*. at 8. In other words, police encroaching upon the curtilage without a warrant may do "no more than any private citizen might do." *Id*. (citation omitted). The Vermont Supreme Court's decision in this case permits far more. It stands in direct opposition to this Court's holding and rationale in *Jardines*.

This case began in the early morning hours of Thanksgiving 2017, when Vermont game wardens were investigating Petitioner Clyde Bovat as a suspect in the illegal shooting of a deer. The wardens arrived at Mr. Bovat's home without a warrant and proceeded up his driveway. They then deviated from the path to the front door of the house and instead peered through the small window of a garage where they observed deer hair and blood on Mr. Bovat's truck. Under *Jardines*, these actions plainly violate the Fourth Amendment. Yet the Vermont Supreme Court held that "[w]hen state officials restrict their movement to semiprivate areas"— such as "a driveway, steps and a walkway"—"to conduct an investigation, observations made from such vantage points are not covered by the Fourth Amendment." Pet. App. 10a-11a (internal quotation marks and citations omitted). This "is not the law." *Jardines*, 569

U.S. at 9 n.3. *Jardines* flatly rejected the proposition that police may do "whatever they want by way of gathering evidence so long as they … stick to the path that is typically used to approach a front door, such as a paved walkway" from which "they can presumably peer into the house … with impunity," much less if they depart from that path. *Id.* (internal quotation marks and citation omitted). The Vermont Supreme Court's decision reaching a contrary conclusion warrants action from this Court—either summary reversal or full review to clarify the scope of the so-called "knock-and-talk" exception to the Fourth Amendment's warrant requirement.

This Court's attention is necessary not only to resolve the clear conflict with *Jardines* and with other courts on the scope of the knock-and-talk exception, *see* Pet. 23-25, but also to put an end to an abusive and constitutionally fraught practice: warrantless searches of curtilage and homes performed under the guise of knock-and-talk visits. This practice—which threatens the Fourth Amendment rights of all Americans—is increasingly prevalent, and it also disproportionately harms those living in homes with limited curtilage, particularly in poor and minority communities.

This Court should grant review and reverse the decision of the Vermont Supreme Court.

ARGUMENT

I. The Vermont Supreme Court's Decision Is Irreconcilable With *Florida v. Jardines*.

At its "very core," the Fourth Amendment protects the right "to retreat into [one's] own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Florida v. Jardines*, this Court concluded that constitutional protection of the home "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." 569 U.S. 1, 6 (2013). The Court therefore classified the areas "immediately surrounding and associated with the home," known as the curtilage, as "part of the home itself for Fourth Amendment purposes." *Id.* (citation omitted). Thus, "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred" and is "presumptively unreasonable absent a warrant." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018).

As an exception to the Fourth Amendment's warrant requirement, *Jardines* recognized an "implicit license" that permits officers to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8. Under this "knock-and-talk" exception, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any

private citizen might do.'" *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

The Vermont Supreme Court's decision in this case permits much more. The ruling below grants law enforcement authority to encroach upon areas of the curtilage for investigative purposes. The court's holding and rationale contravene *Jardines* in several fundamental ways.

First, although the Vermont Supreme Court rightly identified Mr. Bovat's garage as curtilage, the court labeled a subsection of curtilage—including "driveways or walkways"—as "semiprivate" and undeserving of full Fourth Amendment protection. Pet. App. 10a. The court found "a significant difference between private areas within the curtilage of the home, and semiprivate areas, such as a driveway, steps and a walkway." Pet. App. 10a (quoting *State v. Libbey*, 577 A.2d 279, 280 (Vt. 1990)). And because the officers who encroached upon Mr. Bovat's property "restrict[ed] their movement to semiprivate areas," the court found that the officers did not violate the Fourth Amendment. Pet. App. 10a-11a. *Jardines* leaves no room for such a distinction.

Jardines makes clear that, for Fourth Amendment purposes, "the 'house protects and privileges *all* its branches and appurtenants.'" *Jardines*, 569 U.S. at 6-7 (emphasis added) (quoting 4 William Blackstone, *Commentaries* *223, *225). The Court in *Jardines* expressly rejected the proposition that police may "do whatever they want by way of gathering evidence … so long as they stick to the path that is typically used to approach a front door, such as a

paved walkway." *Id.* at 9 n.3 (internal quotation marks and citation omitted). Areas such as "the front porch, side garden, … [the] area outside the front window, [and] the driveway enclosure" are part of the curtilage. *Collins*, 138 S. Ct. at 1671 (internal quotation marks and citation omitted); *see also Jardines*, 569 U.S. at 6 (internal quotation marks and citation omitted) (defining curtilage as "the area immediately surrounding and associated with the home"). The areas classified as "semiprivate" by the court below—*e.g.*, driveways and walkways, *see* Pet. App. 10a—therefore fall squarely within this Court's definition of curtilage. Contrary to the Vermont Supreme Court's decision, there is nothing "semi" about the privacy of these curtilage areas—these areas enjoy the *same* Fourth Amendment protection as the home itself. *Jardines*, 569 U.S. at 6.

In classifying some parts of the curtilage as less deserving of Fourth Amendment protection, the Vermont Supreme Court robbed this constitutional protection of the "practical value" *Jardines* guarantees. *Id.* The court below diminished both the sanctity of the home and the right to be free from unreasonable governmental intrusion, which are both fundamental to the Fourth Amendment.

Second, the Vermont Supreme Court held that state officials may enter "semiprivate" areas within the curtilage in order "to conduct an investigation," and "observations made from such vantage points are not covered by the Fourth Amendment." Pet. App. 10a-11a (citation omitted). That holding too cannot be squared with *Jardines*. This Court in *Jardines* stressed that officers without a search war-

rant may not "obtain[] information by physically intruding on … houses" and their curtilage without an implicit or explicit license from the residents. *Jardines*, 569 U.S. at 5 (citation omitted). The "implicit license" underlying the "knock-and-talk" exception to the warrant requirement extends only to what "any private citizen might do" when visiting a home. *Id.* at 8 (citation omitted). "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police." *Id.* at 9.

Although officers can enter residential property, including parts of the curtilage, Pet. App. 10a, they must recognize their boundaries as visitors. "[T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Jardines*, 569 U.S. at 9; *see also United States v. Richmond*, 924 F.3d 404, 421 (7th Cir. 2019) (Wood, C.J., dissenting) (If an "officer takes actions beyond those that a homeowner has authorized for all visitors—*Jardines* holds that it is immaterial that the officer might be lawfully *present* while conducting those unauthorized actions."), *cert. denied*, 140 S. Ct. 1136 (2020).

Contrary to these principles, the Vermont Supreme Court allowed the wardens to exceed the limits of any "implicit license" and sanctioned the officers' decision to deviate from the path from the driveway to the house and look through a small window in the garage door to investigate alleged wrong-

doing. Because this is far "more than any private citizen might do," *Jardines*, 569 U.S. at 8 (citation omitted), the wardens' actions were unconstitutional under *Jardines*.

Finally, and relatedly, the Vermont Supreme Court failed to consider the purpose for which the officers entered Mr. Bovat's property. In determining whether an "officer's conduct was an objectively reasonable search," *Jardines* requires an assessment of "the purpose for which [the officer] entered" the property. *Id.* at 10. In *Jardines* itself, for instance, the officers brought a trained police dog to sniff around Mr. Jardines's front porch. This conduct clearly revealed the officer's purpose—"to conduct a search, which is not what anyone would think he had license to do." *Id.*

The Vermont Supreme Court's decision in this case did not properly take this factor into consideration. Just like in *Jardines*, the wardens' conduct here revealed their purpose for intruding on Mr. Bovat's property—to conduct a warrantless search to look for possible evidence of unlawful activity. As *Jardines* holds, this search was not objectively reasonable, and it was not permissible under the Fourth Amendment without a warrant.

The Vermont Supreme Court looked to the plain-view doctrine to salvage its erroneous analysis. But that doctrine is inapplicable here. The Fourth Amendment protects the "owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 822-23 (1982). The plain-view exception encompasses what "a person

knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). Here, Mr. Bovat did not expose his pickup truck to the public, as it was not viewable from any place where the public had a license to be.

Moreover, the plain-view doctrine is only applicable where an officer first "*lawfully* make[s] an 'initial intrusion' or [is] *properly* … in a position from which he can view a particular area." *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality op.) (emphasis added) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465-68 (1971) (plurality op.)). Here, the wardens were not lawfully on Mr. Bovat's property in the relevant sense. They strayed from the most natural path to the house and improperly proceeded to a vantage point from which they then peeped into the garage door window "in hopes of discovering incriminating evidence," *Jardines*, 569 U.S. at 9, making the plain-view doctrine inapplicable. The Vermont court's expansion of this doctrine to this case improperly dilutes the protections afforded by the Fourth Amendment.

In sum, under a proper and direct application of *Jardines*, this case—like *Jardines* itself—is "a straightforward one." *Id.* at 5. The wardens were gathering information in the curtilage of Mr. Bovat's home, which this Court has held "enjoys protection as part of the home itself." *Id.* at 6. Over the course of fifteen minutes, rather than proceeding directly to the house to knock on Mr. Bovat's front door, they investigated the curtilage. They gathered information by entering Mr. Bovat's property, veering off the straightforward path to his front door, and peer-

ing through a small window into his garage, all acts that are not expected of a visitor and that were neither explicitly nor implicitly authorized by the Bovats. *See id.* Because the wardens did this without a warrant, the search of Mr. Bovat's property was plainly unconstitutional. The Vermont Supreme Court's decision reaching a contrary conclusion warrants action from this Court—either summary reversal, *see* Pet. 25-29, or full review to clarify the scope of the Fourth Amendment's "knock-and-talk" exception, *see* Pet. 23-25. Guarding the parameters of the exceptions to the Fourth Amendment's warrant requirement is important to all Americans, including the marginalized communities served by NAPD.

II. Abuse Of The Knock-And-Talk Exception To Conduct Unlicensed And Warrantless Investigations Is An Important And Recurring Issue.

The Fourth Amendment protects curtilage to the same extent as the home itself. *Jardines*, 569 U.S. at 6. This precept, reiterated in *Jardines*, is "as old as the common law." *Id.* (quoting *Hester v. United States*, 265 U.S. 57, 59 (1924); and citing 4 William Blackstone, *Commentaries* *223, *225). The Vermont Supreme Court cast aside this long-standing rule and opened the door for law enforcement to encroach upon curtilage to conduct extended, pre-knock investigations that no reasonable visitor would think within her implied license.

This Court's attention is necessary not only because of the clear contravention of *Jardines*, but also because the rule announced by the court below lends

credence to an abusive and constitutionally fraught practice: warrantless searches of curtilage and homes performed under the guise of knock-and-talk visits. This abusive practice violates Americans' property rights and our shared expectations of privacy in our homes. Moreover, broadening investigatory powers at the expense of curtilage protections will cause disproportionate harm to those living in homes with limited curtilage—and those in poor and minority communities most of all.

A. Abuse Of The Knock-And-Talk Exception Is A Widespread Problem That Demands This Court's Review.

In recent years, this Court has repeatedly recognized the importance of clearly defining Fourth Amendment protections for the home and its surroundings. *See, e.g.*, *Collins*, 138 S. Ct. 1663; *Fernandez v. California*, 571 U.S. 292 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Jardines*, 569 U.S. 1; *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *King*, 563 U.S. 452. The Court should intervene here to ensure that these protections, as embodied in *Jardines* and other decisions, *e.g.*, *Collins*, properly serve their intended purpose of safeguarding Americans' privacy and security in their homes.

Multiple, interconnected issues, including the warrant requirement, the curtilage doctrine, the knock-and-talk exception, and the plain-view exception affect whether the Fourth Amendment offers meaningful protection for the home. As these principles intersect in new and unexpected ways, law en-

forcement and courts have struggled to define the limits of police authority in the zone around the home. From drug-sniffing dogs and garbage searches to drones and digital surveillance, the legality of investigation around the home has become an increasingly complex question in need of clear, authoritative answers. *See, e.g.*, Stephen Grego, Comment, State v. Edstron*: No Warrant Needed for Minnesota Police to Conduct a Dog Sniff Outside Your Apartment*, 16 U. St. Thomas L.J. 297 (2020); Matthew Tokson, Lecture, *The Next Wave of Fourth Amendment Challenges After* Carpenter, 59 Washburn L.J. 1 (2020); Matthew Tokson, *The Normative Fourth Amendment*, 104 Minn. L. Rev. 741 (2019); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 Mich. L. Rev. 233 (2019); Tanner M. Russo, Note, *Garbage Pulls Under the Physical Trespass Test*, 105 Va. L. Rev. 1217 (2019).

The lack of constitutional clarity when it comes to the knock-and-talk technique has given rise to widespread abuse. In light of "the unrestrained nature of knock-and-talks, police departments throughout the nation have begun utilizing the tactic as a way around the Fourth Amendment." Quiwana N. Chaney, Comment, United States v. Carloss*: An Unclear and Dangerous Threat to Fourth Amendment Protections of the Home and Curtilage*, 95 Denv. L. Rev. 519, 525 (2018). As Petitioner notes, Pet. 20-21, some departments have even instituted dedicated knock-and-talk squads, *e.g.*, Jamesa J. Drake, *Knock and Talk No More*, 67 Me. L. Rev. 25, 34-42 (2014). In Orlando, for example, local reporting revealed that the county sheriff's dedicated squad performed roughly ten knock-and-talk visits

per day. *Id.* at 35. One local officer admitted that he resorts to the technique when he cannot persuade a neutral magistrate to issue a warrant: "[Y]ou go for broke." William Dean Hinton, *Knock and Talk*, Orlando Weekly (Jan. 9, 2003), https://www.orlandoweekly.com/orlando/knock-and-talk/Content?oid=2260977. In doing so, "officers sometimes use knock and talks in ways that test the boundaries of the consent on which they depend." *United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting).

The Vermont Supreme Court's decision here illustrates that the boundaries of the curtilage doctrine and of the knock-and-talk exception are easily blurred. Just two years ago in *Collins*, this Court refused to "creat[e] a carveout to the general rule that curtilage receives Fourth Amendment protection, such that certain types of curtilage would receive [that] protection only for some purposes but not for others." 138 S. Ct. at 1675. The Vermont Supreme Court did precisely that here: carving out portions of the curtilage as semi-private space open to police investigations of unknown dimension and duration. As the *Collins* Court recognized, allowing ill-defined gradations and exceptions to the curtilage doctrine "seems far more likely to create confusion than does uniform application of the Court's doctrine." *Id.* Indeed, as Petitioner points out, decisions like the one below also provide unwarranted cover for plainly unconstitutional police action under the shield of qualified immunity. Pet. 21 n.4. A definitive reiteration that *Jardines* applies here would reaffirm for citizens, officers, and courts the proper limits of government investigations around the home.

B. Abuse Of The Knock-And-Talk Exception Disproportionately Harms Marginalized Communities.

The harms arising from police abuse of the knock-and-talk facility are not evenly distributed. The officers here trespassed through Mr. Bovat's curtilage and improperly searched an enclosed structure set back from the road on his private property. That was fundamentally wrong, and this Court should say so.

But for the many Americans living in multi-unit dwellings like apartments, condominiums, and public-housing units, protections like the curtilage doctrine are often illusory at best, and knock-and-talk techniques can run rampant. Poor and minority communities are disproportionately likely to reside in multi-unit housing and, as a result, feel the brunt of investigative searches conducted under the guise of the knock-and-talk technique. *See United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016); Jeremy J. Justice, Note, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections…?*, 62 Wayne L. Rev. 305, 329-30 (2017).

Families living in multi-unit dwellings suffer a constitutional disadvantage: the areas surrounding their homes (such as common hallways and shared garages) are much less likely to receive Fourth Amendment protection than the surroundings of single-family homes (such as yards and gardens). "Simply because of their living arrangement, poor individuals," for example, may "have little to no space designated as curtilage." Amelia L. Diedrich,

Note, *Secure in Their Yards?*, 39 Hastings Const. L.Q. 297, 315 (2011). Similarly, the law governing knock-and-talk visits like the one purportedly conducted on Mr. Bovat's property "unequally protect[s] wealthier individuals and families living in suburban and rural areas." Ian Dooley, *Fighting for Equal Protection Under the Fourth Amendment*, 40 Nova L. Rev. 213, 214 (2016); *see also* Andrew Eppich, Note, *Wolf at the Door*, 32 B.C. J.L. & Soc. Just. 119, 133 (2012). Restrictions on curtilage and the expansion of knock-and-talk techniques are a "particularly acute" problem in public-housing units, which are already often subject to roving police patrols. Dooley, *supra*, at 227.

Some courts have questioned whether the curtilage doctrine affords any protection at all to residents of multi-unit dwellings. Justice, *supra*, at 321; Eppich, *supra*, at 131-32. The First Circuit, for example, has indicated that the Fourth Amendment's protections do not extend beyond the four corners of an apartment. *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). Whatever property interests a resident may have in common spaces, the First Circuit observed, are simply "not … relevant" to the resident's Fourth Amendment rights. *Id.* Other courts have recognized only narrow curtilage spaces in multi-unit residences. *See, e.g.*, *United States v. Carriger*, 541 F.2d 545, 551 (6th Cir. 1976); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974).

In a multi-unit setting, therefore, searches conducted under the guise of the knock-and-talk technique are especially invasive and constitutionally dubious. In many cases, without the curtilage pro-

tections of a single-family home, officers have been permitted to conduct *Jardines*-style searches at residents' doors with no warrant, no suspicion, and no consent.

In *People v. Burns*, for example, police followed an anonymous tip to the defendant's apartment. 50 N.E.3d 610, 613-14 (Ill. 2016). Once there, they conducted a successful dog-sniff for drugs. *Id.* at 614. Noting a confluence of factors including the building's locked entrance, the officers' middle-of-the-night approach, and the use of a drug-sniffing dog, the Illinois Supreme Court applied *Jardines* and excluded the fruits of the search. *Id.* at 622. However, the Court was powerless to vindicate the rights of the residents other than the defendant. As the Court observed, once inside the complex, the officers conducted a sniff-search of *three other apartments* with no connection to the defendant's. *Id.* at 614 ("Officer Cervantes did not explain why he swept these other apartments' doors for drugs."); *id.* at 622 (noting that the officers "conduct[ed] an open-air sweep of other apartment doors in the building, for some unknown reason"). This was not an isolated incident. Courts around the country have been confronted with officers who searched not only suspects' apartments *but also their neighbors'*, in a manner that would never be tolerated for single-family homes under *Jardines*. *See, e.g.*, *Whitaker*, 820 F.3d at 851 (search of suspect's apartment and at least five of his neighbors'); *State v. Williams*, 862 N.W.2d 831, 832 (N.D. 2015) (search of suspect's condo and his neighbor's).

This case presents an easy example of officers overstepping the implicit license granted them to

approach a home and inquire of its residents. Like the dogs roaming apartment hallways and sniffing neighbors' doors without suspicion, the officers here abused their license to approach and knock at the Bovats' door by instead investigating through a small garage window off the prescribed path to the house. Rules that permit officers to deviate from their implied licenses and to trespass in order to investigate should worry all Americans and will also play out in ways that disproportionately disadvantage poor and minority communities. *See, e.g.*, *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from the denial of rehearing en banc) (noting benefits of modern curtilage rulings for the "very rich" whereas "the vast majority … will see their privacy materially diminished"); *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (en banc) (Posner, C.J., dissenting) (observing that a narrowed curtilage doctrine benefits "wealthy suburbanites and exurbanites"); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 Fla. L. Rev. 391, 401 (2003). This Court should grant Mr. Bovat's petition and make clear that the implied license to knock and talk is not a license to search through the curtilage. It should instead reaffirm a robust curtilage doctrine that protects the rights of all Americans in the privacy of their homes.

CONCLUSION

This Court should grant certiorari and reverse the judgment of the Vermont Supreme Court.

Respectfully submitted,

Thomas M. Bondy
Counsel of Record
Tiffany R. Wright
Upnit K. Bhatti
James Anglin Flynn
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
tbondy@orrick.com

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