No. 18-814

In The Supreme Court of the United States

MAURICE WALKER, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Petitioner,

v.

THE CITY OF CALHOUN, GEORGIA,

Respondent.

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

BRIEF IN OPPOSITION

GEORGE P. GOVIGNON
City Attorney,
City of Calhoun, Ga.
109 North Wall Street
Calhoun, Georgia 30701
(706) 629-7070
Application Pending

J. ANDERSON DAVIS
Counsel of Record
A. FRANKLIN BEACHAM III
SAMUEL L. LUCAS
BRINSON, ASKEW, BERRY, SEIGLER, RICHARDSON & DAVIS, LLP
615 West 1st Street
Post Office Box 5007
Rome, Georgia 30162-5007
(706) 291-8853
(706) 234-3574 Fax
adavis@brinson-askew.com

Counsel for Respondent

February 27, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

"This Court decided some four decades ago that a claim challenging pretrial detention fell within the scope of the Fourth Amendment." *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 917 (2017) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). Over 25 years ago, a plurality of this Court wrote that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright v. Oliver*, 510 U.S. 266, 274 (1994). And three years before deciding *Albright*, this Court held that a probable-cause hearing held within 48 hours of arrest was presumptively prompt, and thus satisfied the Fourth Amendment and immunized a governmental entity from a systemic challenge to a policy providing for such a hearing. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Here, Walker facially challenged Calhoun's Standing Bail Order—which prescribes a bail-review hearing to be held within 48 hours of arrest—arguing that it would lead to unconstitutional pretrial deprivations of liberty.

The question presented is:

Did the Eleventh Circuit, in following the Fifth Circuit's lead, properly apply *McLaughlin*'s 48-hour rule to a systemic, facial Equal Protection claim about pretrial deprivations of liberty?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTE

INTRODUCTION

Contrary to Walker's representations to this Court, there is no circuit split. Both the Eleventh Circuit and Fifth Circuit agree that claims of Walker's type—a wealth-based challenge to a pretrial-detention scheme that guarantees a counseled judicial bail-review hearing within 48 hours of arrest—do not trigger heightened scrutiny. In fact, the Eleventh Circuit explicitly agreed with the Fifth Circuit's integration of *McLaughlin*'s 48-hour rule and held that a bail-review hearing within 48 hours of arrest is presumptively constitutional. And both Circuit courts agree that a city or county can constitutionally employ a master bail schedule if it provides three procedures for those unable to make the monetary amounts in the schedule: (1) notice, (2) an opportunity to be heard and present evidence within 48 hours of arrest, and (3) a reasoned decision by an impartial decisionmaker.

The Standing Bail Order at issue here exceeds those three requirements, and thus the Eleventh Circuit correctly found that the Standing Bail Order is facially constitutional. Further, the Fifth Circuit's *ODonnell* trilogy addressing the same type of issue shows that it would reach the same conclusion.

Walker complains that *McLaughlin*'s reasoning should not be applied to his case because he did not bring a claim under the Fourth Amendment. But *McLaughlin* addressed pretrial deprivations of liberty, which is the exact issue that Walker challenges here. The Eleventh Circuit found that the rationale behind

McLaughlin's 48-hour rule applies with even greater force when it is applied, as here, to bail-review hearings. The Eleventh Circuit is correct.

This Court should decline Walker's request to review this case at this time because: (1) there is no circuit split; (2) the Eleventh and Fifth Circuits were correct about what the Constitution requires and in their application of *McLaughlin*'s 48-hour rule to bail-review hearings; and (3) this case, which involves a facial challenge at the preliminary-injunction stage, is not well-suited to decide the outer boundaries of what the Constitution requires in bail-review hearings, which boundaries the Eleventh Circuit explicitly declined to set below.

STATEMENT OF THE CASE

A. Factual Background.

While Walker spends considerable time in his Petition telling the story of his arrest and pretrial detention, none of that background is relevant to the Petition because Walker was never incarcerated under the Standing Bail Order. The Standing Bail Order went into effect over two months after Walker was released from jail. *See* Pet.App.2a, 86a. The matter presented in the Petition is Walker's facial challenge to the City of Calhoun's Municipal Court's use of the Standing Bail Order going forward. *See* Pet.4-5.

The Standing Bail Order provides that all arrestees, if they do not obtain release under a statutorily-authorized master bail schedule, O.C.G.A. § 17-6-1(f)(1), will be provided with a first appearance before a judge within 48 hours of arrest, with court-appointed counsel, at which time the judge will review the arrestee's financial means and review bail. Pet.App.84a-86a. If the arrestee is determined to be indigent, then the judge is authorized under the Standing Bail Order to release the arrestee on his own recognizance. Pet.App.85a.

The District Court found that the Standing Bail Order does not comply with the Constitution and ordered the City to implement a new system—based on affidavits and nonjudicial determinations of eligibility of release that must be completed within 24 hours of arrest. Pet.App.75a-78a. The Eleventh Circuit reversed the District Court and, agreeing with the Fifth Circuit, held that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest." Pet.App.33a-34a.

B. Proceedings Below.

Walker filed his Petition for Certiorari after the Eleventh Circuit—in this case's second appearance before it—vacated the District Court's grant of Plaintiff's renewed Motion for Preliminary Injunction. *See* Pet.App.45a.

(1) District Court proceedings prior to First Appeal.

In his Complaint, Walker alleged that he was wrongfully detained in violation of his constitutional rights as the result of the City's bail practice. Pet.App.2a. Specifically, Walker filed his Complaint on September 8, 2015, challenging the City of Calhoun's use of a master bail schedule, which is authorized by and complies with O.C.G.A. § 17-6-1(f)(1). Pet.App.2a, C. The same day, Walker alternatively moved for a temporary restraining order or a preliminary injunction. *See Walker v. City of Calhoun, Ga.*, No. 4:15-CV-170-HLM, 2016 WL 361612, at *6 (N.D. Ga. Jan. 28, 2016) (first order granting preliminary injunction). The next day, Walker moved to certify a declaratory and injunctive relief class. *See Walker v. City of Calhoun, Ga.*, No. 4:15-CV-170-HLM, 2016 WL 361580, at *2 (N.D. Ga. Jan. 28, 2016) (certifying declaratory and injunction class). On November 11, 2015, the City moved to dismiss for failure to state a claim, or in the alternative, for a more definite statement, which the District Court later denied. *See Walker v. City of Calhoun, Ga.*, No. 4:15-CV-170-HLM, 2015 WL 13547012, at *1, *4 (N.D. Ga. Dec. 2, 2015) (denying motion to dismiss or for more definite statement).

One month after denying the City's motion, the District Court entered separate Orders granting Walker's Motion for Preliminary Injunction and Motion to Certify Class. *See* Pet.App.5a; *see Walker*, 2016 WL 361580, at *4 (certifying declaratory and

injunction class). The City appealed. *See Walker v. City of Calhoun, Ga.*, 682 Fed. Appx. 721 (11th Cir. 2017).

(2) The First Appeal.

In the First Appeal, after briefing and oral argument, the Eleventh Circuit found that the first Order Granting Walker's Motion for a Preliminary Injunction failed to satisfy Rule 65's specificity requirements. *See* Pet.App.5a-6a; *Walker v. City of Calhoun, Ga.*, 682 Fed. Appx. 721. Thus, the Eleventh Circuit vacated the District Court's issuance of the first preliminary injunction and remanded the case for further proceedings. *Id.*

(3) District Court proceedings after remand.

After remand and further briefing, the District Court granted Walker's renewed request for a preliminary injunction, ordered the City to adopt a new bail procedure for its Municipal Court requiring indigency determinations to be made within 24 hours of arrest and based on an affidavit procedure proposed by Walker's counsel. *See* Pet.App.5a-6a.

(4) The Second Appeal.

After briefing and oral argument, the Eleventh Circuit reversed the District Court and, agreeing with the Fifth Circuit, held that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours

of arrest." Pet.App.33a-34a. The Eleventh Circuit found that by not honoring "such presumption and insisting instead on a 24-hour window, the district court committed legal error and so abused its discretion." Pet.App.34a.

In reaching its holding, the Eleventh Circuit rejected the District Court's heightened-scrutiny analysis. Pet.App.24a. ("the district court was correct to apply the *Bearden/Rainwater* style of analysis for cases in which '[d]ue process and equal protection principles converge,' *Bearden*, 461 U.S. at 665, yet it was wrong to apply heightened scrutiny from traditional equal protection analysis.").

REASONS FOR DENYING THE PETITION

I. There is no split between the Eleventh Circuit and the Fifth Circuit.

There is no circuit split: the Eleventh Circuit and the Fifth Circuit are of one accord in four important respects: (1) heightened scrutiny does not apply to a claim such as Walker's; (2) *McLaughlin*'s 48-hour rule can be properly incorporated to the "bail determination context"; (3) a bail policy that combines a master bail schedule with meaningful consideration of other alternatives—providing notice, an opportunity to be heard and present evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker—satisfies the Constitution; and (4) an injunction requiring that a bail-review hearing must be held within 24 hours of arrest—as opposed to 48

hours—must be vacated. *See Walker v. City of Calhoun, Ga.*, 901 F.3d 1245, Pet.App.A (11th Cir. Aug. 22, 2018); *see ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. Aug. 14, 2018) ("*ODonnell II*"); *ODonnell v. Harris County, Texas*, 892 F.3d 147 (5th Cir. June 1, 2018) ("*ODonnell I*"). Applying these four concurring principles, the Fifth Circuit would have likewise found the Standing Bail Order to be constitutional.

A. Both Circuits agree that heightened scrutiny does not apply.

Walker asserts to this Court that "[t]he Fifth Circuit has repeatedly held that violations of the right against wealth-based incarceration incur heightened scrutiny." Pet.12. In support, he cites *ODonnell I*. *See* Pet.12-13. But while *ODonnell I* did apply heightened or intermediate scrutiny, Walker fails to mention the Fifth Circuit's "last statement on the matter"—*ODonnell II*—which was provided eight days before the Eleventh Circuit's decision in *Walker*. *See ODonnell v. Salgado*, 913 F.3d 479, 482 (5th Cir. Jan. 14, 2019) ("*ODonnell III*") (refusing to vacate the opinion in *ODonnell II*).[1] And Part II.A.2. of *ODonnell II* refutes Judge Martin's concern, *see* Pet.App.51a, n.5, that *Walker* had created a circuit split.

[1] The *ODonnell* cases presented similar arguments to those that Walker has presented in this case, which is not surprising since the challengers in both share counsel.

The difference between the representation made by Walker's counsel and the Fifth Circuit's "last statement on the matter" is startling:

Petitioner's Representation of Fifth Circuit Law	Fifth Circuit's Own Statements
"The Fifth Circuit has repeatedly held that violations of the right against wealth-based incarceration incur heightened scrutiny." Pet.12.	"An Equal Protection Claim that an indigent person spends more time incarcerated than a wealthier person is reviewed for a rational basis." *ODonnell II*, 900 F.3d at 226 (internal quotation omitted). "Now that the requirement of a hearing is in place, the only remaining contention about the 48-hour window concerns only the inability to afford bail. And that is an equal protection claim consistently rejected on rational-basis review." *Id.* at 227.

In *ODonnell II*, the Fifth Circuit stayed a second injunction and stated that rational basis is the proper standard of review: "[a]n Equal Protection Claim that an indigent person spends more time incarcerated than a wealthier person is reviewed for a rational

basis." *ODonnell II*, 900 F.3d at 226 (internal quotation omitted). The court thoroughly explained in Part II.A.2. of its opinion why heightened scrutiny applied in *ODonnell I* but rational-basis review applied in *ODonnell II*. *See id.* at 226-28. The difference is the presence of a bail-review hearing within 48 hours of arrest. *See id.* The Fifth Circuit reasoned that the claim in *ODonnell I* fell within the exception in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), because there was no meaningful hearing to consider the alternatives to monetary bail. *See ODonnell II*, 900 F.3d at 226. But once the meaningful hearing was incorporated into Harris County's pretrial process, then rational-basis review applied:

> The *ODonnell I* panel found the exception in *San Antonio Independent School District v. Rodriguez*, to be applicable such that heightened scrutiny applied to the bail schedule. The release under Section 7, however, presents a narrower concern that is subject only to rational basis review because it is premised solely on inability to afford bail, as distinguished from inability to afford bail *plus* the absence of meaningful consideration of other possible alternatives.

ODonnell II, 900 F.3d at 226 (emphasis in original, internal citation omitted). The court then explained that "[n]ow that the requirement of a hearing is in place, the only remaining contention about the 48-hour window concerns only the inability to afford bail. And that is an equal protection claim consistently rejected on rational-basis review." *Id.* at 227.

In *Walker*, the Eleventh Circuit rejected an identical prayer for heightened scrutiny. The court found that "[s]uch scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence." Pet.App.23a. The court explicitly found that "[t]he district court was wrong to apply heightened scrutiny under the Equal Protection Clause." *Id.* at 24a. This is the same conclusion as *ODonnell II*.

After the stay was granted in *ODonnell II*, the appellants—elected judges—were defeated in the November election. *See ODonnell III*, 913 F.3d at 481. The newly-elected judges did not wish to pursue the appeal and therefore dismissed the pending appeal before it reached a merits panel. *Id.* Presumably sensing an opportunity to resurrect Judge Martin's impression of a circuit split between *ODonnell I* and *Walker*, the appellees "present[ed] an unopposed motion to vacate [*ODonnell II*]." *Id.* In another published opinion, the Fifth Circuit definitively rejected that transparent attempt and affirmed that *ODonnell II* was binding precedent: "the published opinion granting the stay is this court's last statement on the matter and, like all published opinions, binds the district courts in this circuit." *Id.* at 482.

Comparing *ODonnell II* and *Walker*—decided eight days apart—shows that there is no split between the Eleventh Circuit and the Fifth Circuit. And Walker's representation to this Court is wrong. Both Circuits that have addressed the issue presented in this Petition agree that heightened scrutiny does not apply.

B. Both Circuits agree that McLaughlin's 48-hour rule can be applied to the bail context.

In *ODonnell I*, the Fifth Circuit held that "the federal due process right entitles detainees to a hearing within 48 hours. Our review of the due process right at issue here counsels against an expansion of the right already afforded detainees under the Fourth Amendment by *McLaughlin*." *ODonnell I*, 892 F.3d at 160. In *Walker*, the Eleventh Circuit observed that "the Fifth Circuit in *ODonnell* recently imported the *McLaughlin* 48-hour rule to the bail determination context." Pet.App.33a. After noting the Fifth Circuit's adoption of the *McLaughlin* 48-hour rule, the Eleventh Circuit stated: "[w]e agree with the Fifth Circuit; indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest." *Id.* Thus, both Circuits agree that *McLaughlin*'s 48-hour rule can be properly applied to the bail determination context.

C. Both Circuits agree that the procedures employed by the Standing Bail Order are constitutional.

In *ODonnell I*, the Fifth Circuit held that the constitutionally-required "procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *ODonnell I*, 892 F.3d at 163. The Standing Bail Order in this case provides each requirement. *See* Pet.App.A, C. Therefore, both

Circuits have found that the procedures employed by the Standing Bail Order are constitutional.

D. Both Circuits vacated injunctions that required bail-review hearings to be held in a time period less than 48 hours.

In *ODonnell I*, the Fifth Circuit vacated the district court's injunction that required a bail-review hearing to be held within 24 hours of arrest. *ODonnell I*, 892 F.3d at 163-64.[2] Likewise, the Eleventh Circuit did the same in *Walker*. Pet.App.33a-34a. ("[b]y failing to honor [the 48-hour presumption] and insisting instead on a 24-hour window, the district court committed legal error and so abused its discretion."). Thus, both Circuits are in harmony about the 48-hour period.

II. The Eleventh Circuit's opinion is correct.

In the opinion below, the Eleventh Circuit identified two matters of contention between the City of Calhoun and the District Court's second preliminary injunction. *See* Pet.App.31a. "First, whether the City must make an indigency determination within 24 hours or 48 hours. Second, whether the City may use a judicial hearing to determine indigency or must use

[2] "*ODonnell* held a 24-hour rule too burdensome even though the defendant in that case was Harris County, Texas—home to Houston—which presumably could much more easily provide frequent bail hearings than can the City [of Calhoun's] one-judge municipal court." Pet.App.33a n.12.

the affidavit-based system required by the preliminary injunction." *Id.* The Eleventh Circuit decided both questions in the City's favor: an indigency determination made within 48 hours is presumptively constitutional and a judicial hearing is a constitutional method of determining indigency. *See id.* at 33a-34a, 37a.

As to the first issue, the court held that "[w]e agree with the Fifth Circuit; indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest. By failing to honor such presumption and insisting instead on a 24-hour window, the district court committed legal error and so abused its discretion." *Id.* at 33a-34a (internal footnote omitted).

As to the second issue, the court held that "[w]hatever limits may exist on a jurisdiction's flexibility to craft procedures for setting bail, it is clear that a judicial hearing with court-appointed counsel is well within the range of constitutionally permissible options. The district court's unjustified contrary conclusion was legal error and hence an abuse of discretion." *Id.* at 37a.

Both the Eleventh Circuit and the Fifth Circuit addressed the claims under the Former Fifth Circuit's decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978). In *Pugh v. Rainwater*, the Former Fifth Circuit provided that "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements. The incarceration of those who cannot, without meaningful

consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057. But the Former Fifth Circuit did not address how soon the "meaningful consideration of other possible alternatives" must occur. *See id.* And no Eleventh Circuit case has provided any direction as to timing.

With no specific direction on when the "meaningful consideration" must occur, the Standing Bail Order took the general substantive direction from *Pugh v. Rainwater*, and combined it with the timing direction given in *McLaughlin* and Georgia law about probable cause determinations, to provide that the "meaningful consideration of other possible alternatives" will occur within 48 hours of arrest. *See* Pet.App.C. Specifically, the Standing Bail Order provides an individualized, sua sponte, hearing to review bail for all incarcerated arrestees within 48 hours of arrest. *See* Pet.App.C. The Standing Bail Order therefore provides "meaningful consideration of other possible alternatives" to release based on the master bail schedule, within a time period that this Court has held to be presumptively "prompt" under the Fourth Amendment. *Compare* Pet.App.C. *with Pugh v. Rainwater*, 572 F.2d 1053 *and McLaughlin*, 500 U.S. 44. The Eleventh Circuit correctly found that to require an immediate bail hearing (as Walker has previously argued for) or to shorten the time frame from 48 hours to 24 hours and require an affidavit-based procedure (as the District Court ordered) runs contrary to this Court's precedent and disregards the

"demands of federalism." *See* Pet.App.33a-34a, 36a-37a.

Applying the guiding principles from *McLaughlin*, the Standing Bail Order is facially constitutional because it properly addresses the competing interests—the rights of individuals and the realities of law enforcement—and adopts a presumptively "prompt" constitutional time frame. *See* Pet.App.31a.-34a. The Eleventh Circuit's decision finding the Standing Bail Order to be facially constitutional was correct and does not warrant review.

III. This case, in its current posture, would be a poor choice for review of the issues presented.

In the opinion below, the Eleventh Circuit vacated a preliminary injunction and held that the Standing Bail Order was facially constitutional. *See* Pet.App.34a-35a n.13, 45a. A failed facial challenge in an interlocutory posture is hardly the ideal test case for determining the outer boundaries of the Constitution. Plus, the breadth, or lack thereof, of the Eleventh Circuit's holding makes this case a poor choice for this Court's review. *See* Pet.App.A.

The Eleventh Circuit did not decide the boundaries of what the Constitution requires regarding the intersection of indigents and monetary bail schedules. Pet.App.34a-35a n.13. Instead, it explicitly left that question for another day:

> Nor do we decide whether a jurisdiction could adopt a system that allows a longer period of time than 48 hours to make a bail determination, because the City does not seek to take longer than 48 hours. . . . Whether such lengths of delay are permissible is not a question before us. We are satisfied that *McLaughlin* establishes at least a 48-hour presumptive safe harbor for making bail determinations without deciding if that safe harbor extends longer.

Id. As this Court has repeated many times, "[t]his Court . . . is one of final review, 'not of first view.'" *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

A better case for this Court to review would be one that either finds a policy to be facially unconstitutional, is an as-applied challenge to a bail procedure, or that rules on the outer boundaries of what the Constitution requires in this area. This case presents none of those scenarios. It simply establishes that whatever boundaries the Constitution requires regarding indigents and master bail schedules, the Standing Bail Order is within those boundaries. *See* Pet.App.34a-35a n.13.

As discussed above, the Eleventh Circuit and the Fifth Circuit both found that the combination of the use of a master bail schedule and a timely and meaningful hearing to consider alternatives to monetary bail satisfies the Constitution. There simply

is no disagreement between circuits for this Court to resolve. *See* discussion *supra* Part I. Moreover, both Circuits addressed similar procedures. *See id.* And the Eleventh Circuit explicitly held that these procedures were not the mandated ones and that, in accordance with this Court's direction in *McLaughlin* and *Gerstein*, other cities and counties were free to experiment with what worked best for them. *See* Pet.App.34a-35a n.13, 35a-37a.

Furthermore, many state legislatures have recently taken up bail reform, which may lead to constitutional challenges to statutes—instead of challenges to an order of a municipal court judge, as here. For example, while this case was pending before the Eleventh Circuit, the Georgia legislature amended its statute governing misdemeanor bail, which prompted the court to ask counsel to be prepared to discuss the impact of that statutory change on the issues in the appeal. *See* Memo. to Counsel (11th Cir. May 10, 2018). This Court should wait on other legislatures, and any challenges to those acts, to see where the real differences lie.

Since the only two circuit courts to address this issue dealt with the same procedural safeguards and came to the same conclusion, this Court should wait until other circuits either rule on different procedures or come to a different conclusion than the Eleventh Circuit and the Fifth Circuit have. Those would be better cases for this Court to establish the outer boundaries of what the Constitution requires.

CONCLUSION

There is no circuit split and this case, in its current posture, would be a poor choice for review. But more importantly, this Court need not review the Eleventh Circuit's decision to follow the Fifth Circuit's lead and apply *McLaughlin*'s 48-hour rule to a systemic, facial Equal Protection claim about pretrial deprivations of liberty, because that decision is correct. This Court should therefore deny the Petition.

Respectfully submitted,

GEORGE P. GOVIGNON
City Attorney,
City of Calhoun, Ga.
109 North Wall Street
Calhoun, Georgia 30701
(706) 629-7070
Application Pending

J. ANDERSON DAVIS
Counsel of Record
A. FRANKLIN BEACHAM III
SAMUEL L. LUCAS
BRINSON, ASKEW, BERRY,
SEIGLER, RICHARDSON &
DAVIS, LLP
615 West 1st Street
Post Office Box 5007
Rome, Georgia 30162-5007
(706) 291-8853
(706) 234-3574 Fax
adavis@brinson-askew.com

Counsel for Respondent

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