No. 24-38

In the
Supreme Court of the United States

BRADLEY LITTLE, in his official capacity as Governor of the State of Idaho; MADISON KENYON; MARY MARSHALL, *et al.*,
Petitioners,

v.

LINDSAY HECOX; JANE DOE, with her next friends Jean Doe and John Doe,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THOMAS HARTLEY, M.D., PACIFIC JUSTICE INSTITUTE, NATIONAL LEGAL FOUNDATION, and ILLINOIS FAMILY INSTITUTE *in Support of Petitioners*

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STATEMENTS OF INTEREST[1]

Thomas Hartley, M.D., is licensed medical doctor in the state of Idaho who is fellowship trained in sports medicine and certified by the American Board of Orthopaedic Surgery. He has interest and expertise in human anatomy and physiology, and his patients include both males and females who participate in competitive sports. Through his education, training, and experience, he knows the differences in male and female anatomy and physiology and how these differences affect athletic performance. He understands that requiring biological men and women to participate in sex-specific, competitive sports teams protects both fairness and safety in female sports. He files this brief in order to bring his expert analysis, and that of his peers, to this Court's attention.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment and parental rights. PJI often represents teachers, parents, and their children to vindicate their constitutional rights in public schools. As such, PJI has a strong interest in the development of the law in this area.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of fundamental parental rights and First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Idaho, are vitally concerned with the outcome of this case because of its effect on the fundamental rights of parents and their minor children.

The **Illinois Family Institute** (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. Core values of IFI include upholding parental rights and championing religious freedom and conscience rights for all individuals and organizations.

SUMMARY OF ARGUMENT

Transgenderism is this generation's phrenology, only it does more immediate harm. It is based on incorrect philosophical assumptions and pseudo-science. This Court's unfortunate opinion in *Bostock v. Clayton County*, 590 U.S. 644 (2020), committed the cardinal logical error of assuming its conclusion. This Court in *United States v. Skrmetti*, 145 S. Ct. 1816 (2005), distinguished *Bostock*, and *Bostock*'s reasoning should continue to be cabined, if not disclaimed. It should certainly not be extended to the Equal Protection Clause. Application to that constitutional area would actually undercut the clause's protections

established for sex in appropriate circumstances. Ample medical professionals are sounding the tocsin, and this Court should heed the alarm.

ARGUMENT

I. *Bostock* Was Based on a Logical Fallacy, and Its Pernicious Effect Should Be Cabined, If Not Disclaimed

The Ninth Circuit below relied on this Court's reasoning in *Bostock* to extend equal protection guarantees to transgender individuals. *Bostock*, however, committed the fundamental logical error of assuming its conclusion,[2] resulting in an interpretation that would have astounded the enactors of Title VII in 1964. *See* 590 U.S. at 683-99 (Alito, J., dissenting); *id.* at 780-81, 804 (Kavanaugh, J., dissenting). This case affords this Court the opportunity to continue to cabin the error of *Bostock*, as it began to do in *Skrmetti*, and to reason logically and in conformity with the adopters of the Fourteenth Amendment.

At issue in this case (and the West Virginia petition like it (W. Va. Secondary School Activities Comm'n v. B. P. J., No. 24-43 (cert. granted July 3, 2025)) are two philosophical views of reality. What Justice Blacklock of the Texas Supreme Court called the "Transgender Vision" claims that all of us have a "sex assigned at birth" that may deviate from our inwardly felt "gender

[2] This logical error is an example of circular reasoning and is also termed "begging the question" and, in Latin, "*petitio principii*."

identity." When a person's biological sex and gender identity diverge, the Transgender Vision holds that a person should normally give "gender identity" priority and, when that person does so, it would be "unfair" and "unjust" not to recognize the person as the gender they have selected, as if they had been born that way. Conversely, what Justice Blacklock termed the "Traditional Vision" sees things quite differently. Sex is not "assigned at birth," but is an innate and immutable characteristic that cannot be altered by a mental desire or inclination. Thus, we as individuals do not decide whether to "identify" as male or female; we *are* male or female, whatever we feel about the matter.[3] The petitioner refers to this as a difference between subjective and objective visions of reality. E.g., Petition for Writ of Certiorari at 10-15, No. 24-23 (cert. granted July 3, 2025).

In a key passage in *Bostock*, this Court stated as follows:

> Or take an employer who fires a transgender person who was identified as a *male* at birth but who now identifies as a *female*. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.

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[3] *State v. Loe*, 692 S.W.3d 215, 239-40 (Tex. 2024) (Blacklock, J., concurring).

590 U.S. at 660. The problem with this argument is that it assumes the reality and veracity of the Transgender Vision, i.e., that a *male* who "identifies" as a woman is "identical" to a *female* who "identifies" as a woman. From this starting point, the *Bostock* majority reasoned that, taking two similarly situated employees, one a male at birth now identifying as a female and the other a female at birth who still identifies as female, if the employer fires only the former, biological "sex plays an unmistakable and impermissible role" in the action. *Id.*

If the only thing that mattered was how persons "identify" themselves subjectively, then a male who identifies as female and a female who does the same would be similarly situated. But to charge an employer with discrimination based on *sex* (rather than gender) discrimination because it fired the male who identifies as a female, one has to switch back to that person really being male (his biological *sex*) while presenting as female (his preferred *gender*). For there to be a true correlation, the female similarly situated has to be presenting as the male gender. If the employer fired males presenting as females but did not fire females presenting as males, then you would have sex discrimination.[4] *See id.* at 697-98 (Alito, J.,

[4] Of course, this reflects the underlying philosophical tension in transgenderism. It holds that physical sex is not the "real" person but then defines the "real" person as the other physical sex. And there is no reason that a subjective "gender" feeling cannot change, as detransitioners show. The

dissenting) (demonstrating majority's illogical "battle of labels"). It does not follow, as the *Bostock* majority held, that an employee proves discrimination simply by showing that an employer took biological sex into account when firing him, *see id.* at 657-58, or that he was fired "for traits or actions [the employer] would not have questioned in members of a different sex [who presented in accord with their sex]." *Id.* at 652.

Logical fallacies often have unintended repercussions, and the Ninth Circuit proved that to be true. *See Bostock*, 590 U.S. at 804 (Kavanaugh, J., dissenting) (prognosticating that the majority decision will "likely reverberate in unpredictable ways for years to come"). A simple example shows the error of *Bostock*'s reasoning.

Suppose a male employee, Bob, who does *not* identify as female, is discharged because he repeatedly enters the women's restroom and locker room. Using the reasoning of *Bostock*, his firing violates Title VII: because women are not fired for entering the women's restroom and locker room, but only he as a man, is fired biological "sex plays an unmistakable and impermissible role" in his discharge. *Id.* at 660. And taking the *Bostock* rationale further, it does no good for the employer to argue that it also fired Heather, who is a female who identifies as such, because she repeatedly entered the men's restroom and locker room, as her discharge, too, necessarily made reference to her biological sex. Bob invading the women's room and Heather invading the men's room

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philosophical tension generated by transgenderism is discussed further in part II, *infra.*

would each have been disciplined taking into account their sex, or, to use *Bostock*'s formulation, because of "actions [the employer] would not have questioned in members of a different sex." 590 U.S. at 652. That their employer applied a rule forbidding all employees to go into the other sex's restroom and locker room does not cure the problem, because, as *Bostock* instructs, Title VII protects an individual. *Id.* at 659. "Instead of avoiding Title VII exposure, this employer doubles it." *Id.* Unless one wants to indulge the preposterous presumption that Congress, whether it knew it at the time or not, was mandating open-sex restrooms and locker rooms by all covered employers, the *Bostock* rationale doesn't work.

The proper comparison for "sex" discrimination is between male and female, not between those who present as male (no matter their sex) and those who do not. Thus, *Bostock* was wrongly reasoned because the employers did not discriminate on the basis of sex: they took action against both men and women equally when they presented as transgender. *See* 590 U.S. at 698-99 (Alito, J., dissenting). As Justice Blacklock observed, "*Bostock*'s logic cannot stand if a person's declaration of a transgender identity is understood as a misguided break from reality, as it was by nearly everyone in 1964—rather than as a revelation of reality, as it is by some people today."[5]

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[5] *State v. Loe*, 692 S.W.3d at 244 n.12 (Blacklock, J., concurring). The majority of the Texas Supreme Court in *Loe* refused to extend *Bostock*'s reasoning to the Equal Protection Clause and held that the Texas statute prohibiting certain transgender-related surgeries on minors did not violate the clause. *Id.* at 237-38 (finding that *transgenderism* is neither the equivalent of *sex* nor a protected class).

This Court refused the invitation to extend the reasoning of *Bostock* to the Equal Protection Clause in *Skrmetti*. *See also Dep't of Educ. v. La.*, 603 U.S. 866, 867 (2024) (per curiam) (unanimously holding that preliminary injunctive relief was warranted to enjoin a rule extending *Bostock*'s reasoning to Title IX). This was a positive development that this Court should in this case adhere to and extend. The various opinions in *Skrmetti* demonstrate the importance of doing so.

In the majority opinion in *Skrmetti*, this Court noted that it had not yet considered whether the reasoning of *Bostock* operated outside the Title VII context and found no reason to do so there because the statute in question operated not on the basis of sex or transgender status, but on the basis of medical diagnosis common to both sexes. 145 S. Ct. at 1833-35. However, in distinguishing *Bostock* by describing what it held, the majority opinion necessarily displayed its shifting, "first you consider the person as this and next you consider the same person as that" type of reasoning. It explained the rationale of *Bostock* as "the homosexual male employee['s] . . . sexuality automatically switches to straight when his sex is changed from male to female . . . ." *Id.* at 1835. By the same token, *Bostock* held that the transgender male employee's sexuality automatically switches to straight when his sex is changed from male to female. This type of "first it's this and then it's that" reasoning, to the extent it is understandable, is practically

the opposite of the analysis required for equal protection challenges.

Justice Thomas in his concurring opinion in *Skrmetti* adhered to his view that *Bostock* was wrongly decided, but he also noted the different phraseology used in Title VII and the Equal Protection Clause. *Id.* at 1837-39; *see also id.* at 1859 (Alito, J., concurring) (same). He wrote that applying *Bostock*'s misguided rationale "would depart dramatically from this Court's Equal Protection Clause jurisprudence." *Id.* at 1838 (Thomas, J., concurring). Both Justice Thomas and Justice Alito would not consider *Bostock*'s "incorrect reasoning" "at all" when adjudicating constitutional issues. *Id.* at 1839 (Thomas, J., concurring); *id.* at 1855, 1859 (Alito, J., concurring).

Justice Sotomayor in her dissenting opinion in *Skrmetti* relies on *Bostock*'s faulty analysis, pointing out that whether a person can get a medical procedure to remove "an unwanted (but medically benign) buildup of breast gland tissue" depends on their sex and, thus, is the "basis of" the differentiation. *Id.* at 1873-75 (Sotomayor, J., dissenting). She relies on the fact that "[p]hysicians in Tennessee [may] prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl." *Id.* at 1873 (Sotomayor, J., dissenting). Like in *Bostock*, this type of reasoning is based on the assumption of the equivalence of a female, on the one hand, and a male who wants to appear as a female, on the other, i.e., an acceptance of the Transgender

Vision.[6] But this ignores reality. The buildup of mammary glands in a female is not just "medically benign"; it is the normal, healthy development of the female of our species. It is abnormal and not "medically benign" in a male.

The issue of whether a male identifying as female is in the same position as a biological female for Equal Protection Clause purposes cannot be answered simply by assuming the accuracy of the Transgender Vision, i.e., that people actually are who they subjectively claim they are. Those who adopted the Fourteenth Amendment certainly did not make any such assumption. They unquestionably held to the Traditional Vision, that boys are boys and girls are girls, whatever they might feel, think, or desire. Thus, transgender "girls" and real girls are not in the same class on a philosophical or logical basis. And, as sports results cited by the petitioner show, see, e.g., Pet'r's Br. at 4-6, No. 24-38 (cert. granted July 3, 2025), and any person with common sense knows, boys presenting as transgender "girls" and biological females are not in the same class physically, either. This Court should not infect its Equal Protection Clause jurisprudence with the misguided, circular reasoning it used in *Bostock*.

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[6] Justice Sotomayor uses the phrase "sex identified at birth" or its equivalent over twenty times in her opinion, further indicating her acceptance of the Transgender Vision. *See* 145 S. Ct. at 1868-70, 1873, 1875 (quoting *Bostock*), 1878 (same) (Sotomayor, J., dissenting).

II. Accepting the "Transgender Vision" Would Undercut Equal Protection for Women

The Transgender Vision as a philosophy is at war with itself, as well as with reality. If sex is fluid, then, at the end of the day, there is no such thing as an immutable sex characteristic and no common ground on which to describe and differentiate the sexes. For this reason, some in the homosexual rights movement have spoken against the transgender movement.

Referring to the common LGBTQ+ acronym, Professor Carl Trueman describes the present cultural phenomenon as "The Triumph of the T." Carl Trueman, *The Rise and Triumph of the Modern Self* 339-78 (2020). He points out that "both transgenderism and queer theory are predicated on a basic denial of the fixed nature of gender, something that the L and the G by contrast assume." *Id.* at 340-41. While those encompassed by LGBTQ+ have forged a political coalition based on victimhood, *id.* at 353-57, Trueman also reports that "the status of transgender people is today a matter of acrimonious dispute among those who have campaigned for women's rights." *Id.* at 357. Trueman summarizes the work of feminist Janice Raymond as follows:

> though what constitutes female identity (gender) in different times and different cultures may vary greatly, these various identities are connected to common forms of bodily

> experience. To reject that, as transgenderism does, is to move gender entirely into the realm of the psychological and to deny, in a quasi-gnostic fashion, any significance to the body.
>
> . . . . Being a woman is now something that can be produced by a technique—literally prescribed by a doctor. The pain, the struggle, and the history of oppression that shape what it means to be a woman in society are thus trivialized and rendered irrelevant.

Trueman puts the point succinctly: "as soon as biology is discounted as being one decisive factor of significance for identity, the L, the G, and the B are also destabilized as meaningful categories." *Id.* at 362. And again, "If gender is completely psychologized and severed from biological sex, then categories built on the old male-female binary cease to be relevant . . . ." *Id.* at 365. Taken to its logical extreme, transgenderism makes distinctions based on the binary of male-female sex meaningless.

This Court has recognized that, for many purposes (although not all), the sex of an individual is not of consequence and the government may not distinguish among individuals on the basis of sex without violating the Equal Protection Clause. *See Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("the sex characteristic frequently bears no relation to ability to perform or contribute to society"). That precedent is based on the (accurate) assumptions that sex is not a personal

selection, but immutable. *See id.*; *see also Nguyen v. INS*, 533 U.S. 53, 73 (2001); *United States v. Va.*, 518 U.S. 515, 533 (1996). If the Transgender Vision is correct, that foundational premise about sex is inaccurate, and protection of sex as a classification for equal protection must fall. If there is no immutable version of sex, but only an infinitely modulating sense of gender identity, then there is no fixed sex to protect for Equal Protection Clause purposes and no traits and attributes that can be attributed to one sex versus the other on which to base a claim of discrimination.

III. The State's Legislative Findings Regarding the Physiological Differences Between Biological Males and Females Are Fully Supported and Fully Observable

The Ninth Circuit incredibly found that Idaho "failed to adduce any evidence" to support its statute. (App. 12a.) To the contrary, the edifice of separate groupings of men and women for sports is built on the knowledge that biological men and women have different physiologies that almost always give men a competitive advantage, as sports normally advantage the faster, quicker, and stronger. These advantages of males, demonstrated throughout history, are not somehow negated in the current day by males claiming to be females. As example after example shows (including those provided by the petitioner), and as Idaho determined in its legislative findings, *see*, *infra* 18, n.16, males who "identify" as females quickly move to the top of the class in "girls'" or "women's" competitions, while the opposite does not occur.

The recent "Consensus Statement" of the American College of Sports Medicine explains and illustrates these basic, physiological truths over and over. It provides this illustrative example:

> [T]he advantages of men over women in athletic performance that require muscle power and endurance are illustrated in the comparison of the best times of men 400-m runners and the top 3 women running times in 2019 where motivation does not differ between sexes. . . . Over 10,000 men (including boys <18 yr) ran faster than the three fastest recorded women in that year (2019), illustrating no overlap in the performance of men and women at the top level. These numbers underscore the historical and current rationale for biological sex–based categories in many athletic events because the top adult males almost always outperform the top females in events that rely on muscle power, strength, speed, and/or endurance.[7]

These differences are not, and cannot be, undone by emasculation, hormonal manipulation, and other treatments. First and foremost, every cell of the billions in a person's body (except red blood cells) contains either XX or XY chromosomes, and will always do so.[8] Moreover, male-female differences begin

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[7] Sandra K. Hunter, Siddhartha S. Angadi, Aditi Bhargava, *et al.: The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 8 Translational J. of the ACSM, vol. 4, 1-33 (2023) (hereinafter "Consensus Statement").

during early embryogenesis[9] and accelerate as children mature.[10] Females on average start puberty earlier than boys and transition through puberty faster, while boys grow more slowly for a longer period.[11] The process results in important physiological differences:

> Males have: larger and denser muscle mass, and stiffer connective tissue, with associated capacity to exert greater muscular force more rapidly and efficiently; reduced fat mass, and different distribution of body fat and lean muscle mass, which increases power to weight ratios and upper to lower limb strength in sports where this may be a crucial determinant of success; longer and larger skeletal structure,

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[8] David Woodall, "Identity Checkup," 68 *Salvo* (Spring 2024), *available at* https://salvomag.com/article/salvo68/identity-checkup.

[9] Emma Hilton and Tommy Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage,* Sports Medicine 51(2), 199-214 at 2 (internet pagination) (2021) (hereinafter "Hilton and Lundberg").

[10] *Id.* at 4. At the age of 9, the average male was almost 10% faster than an average female, could finish a mile 16.6% faster, could jump 9.5% further from a standing stop, and could do one-third more push-ups in a 30-second span.

[11] Jonathan C.K. Wells, "Sexual dimorphism of body composition," *Best Practice and Research: Clinical Endocrinology and Metabolism* 21 (2007): 415.

> which creates advantages in sports where levers influence force application, where longer limb/digit length is favorable, and where height, mass and proportions are directly responsible for performance capacity; superior cardiovascular and respiratory function, with larger blood and heart volumes, higher hemoglobin concentration, greater cross-sectional area of the trachea and lower oxygen cost of respiration.[12]

For example, by the time they are 17, an untrained, average boy throws a ball farther than 99% of his female counterparts.[13]

The American College of Sports Medicine in its Consensus Statement reports that these physiological differences result in male advantage in various sports that range from a low of 10% (rowing) to over 50% (field hockey), as illustrated in the following chart:[14]

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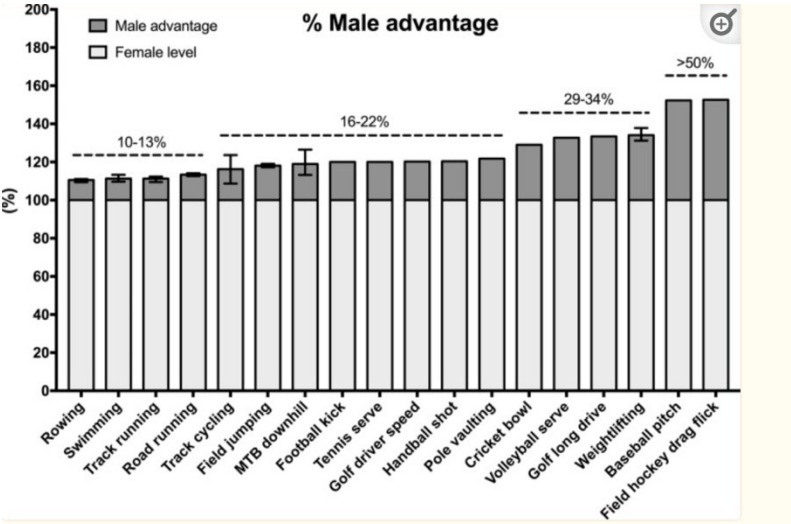
[12] Hilton and Lundberg at 4-5.

[13] *Id.; see also* Consensus Statement at 9 (female arm muscle strength ranges from 50-60% of males, and about 60% to 80% in the lower limb muscles).

[14] *Id.* at 7.



The Consensus Statement concludes from this as follows:

> These data overwhelmingly confirm that testosterone-driven puberty, as the driving force of development of male secondary sex characteristics, underpins sporting advantages that are so large no female could reasonably hope to succeed without sex segregation in most sporting competitions.[15]

The elected representatives of Idaho when enacting the Fairness in Women's Sports Act relied on such data when making their findings that males and females have "inherent differences" related to chromosomal, hormonal, and other physiological factors, including that men have higher natural levels of testosterone that develop during puberty and give men "categorically [higher] strength, speed, and endurance" that are "most important for success in sport."[16]

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[15] *Id.* at 10.

These findings are eminently reasonable, as they are confirmed by both science and common observation. The physiological differences in males and females are innate and immutable.

For the Equal Protection Clause to operate, the parties have to be "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The simple, unalterable fact is that a person who presents as male but has female reproductive organs and chromosomes is not "in all relevant respects alike" to a person who presents as male and has the reproductive organs and chromosomes to match. That difference is the *very reason* that the former person is called "*trans*gender" and the latter is not. By definition, those who exhibit as transgender and those who do not are in that very respect not "in all respects alike." *Id.* Biological males and females are "not fungible." *Ballard v. United States,* 329 U.S. 187, 193 (1946). Neither are females fungible with biological males presenting as females.

CONCLUSION

"Transgenderism" and "gender identity" discrimination are not the same as "sex" discrimination, and they have no protected status under the Equal

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[16] Idaho Code § 33-6202(a) (App. 263a-264a), quoting Doriane Lambelet Coleman, "Sex in Sport," 80 Law and Contemporary Problems 63, 74 (2017); *see also* Consensus Statement at 2 ("The sex differences in athletic performance involving strength, power, and endurance are related to the potent effects of testosterone, which is ~15-fold higher in adult males than females."), 8-9.

Protection Clause. This Court should reverse the Ninth Circuit.

Respectfully submitted this
19th day of September 2025,

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