No. 11-1322

In The

Supreme Court of the United States

SAMICA ENTERPRISES, LLC, ET AL., PETITIONERS

v.

MAIL BOXES ETC., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant, vacate, and remand the decision below in light of an unpublished, non-precedential intermediate state court ruling that overrules no precedent on which the court of appeals relied and merely reflects the application of different, fact-specific legal theories not preserved by petitioners in the Ninth Circuit to different alleged facts.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Mail Boxes Etc., Inc. and United Parcel Service, Inc. (OH) are each wholly owned indirect subsidiaries of United Parcel Service, Inc. (DE), a publicly held company. United Parcel Service, Inc. (NY), formerly an indirect subsidiary of United Parcel Service, Inc. (DE), has merged with United Parcel Service, Inc. (OH).

No publicly held company owns 10% or more of United Parcel Service, Inc. (DE).

BSG Holdings, Inc. and BSG Holdings Subsidiary, Inc., which were formerly known as Mail Boxes Etc. and Mail Boxes Etc. USA, Inc., respectively, were dissolved on or about July 15, 2011, in connection with bankruptcy proceedings concerning BRM Holdings, Inc., f/k/a U.S. Office Products Company, which is the former corporate parent of BSG Holdings, Inc.

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INTRODUCTION

Petitioners request the Court to grant, vacate, and remand (GVR) in light of a supposedly intervening state court ruling—an extraordinary remedy this Court has granted only in a handful of cases over the past 75 years. Such extraordinary relief is not warranted here. Petitioners contend that "[s]hortly after the Ninth Circuit denied petitioners' petition for rehearing en banc, the California Court of Appeal issued its decision" on which petitioners base their petition in this Court. Pet. 2. They further contend that the state court decision "reached the opposite conclusion, on the basis of an interpretation of state law that was irreconcilable with that adopted by the district court, and affirmed by the Ninth Circuit, in this case." Pet. 2.

Those contentions, and the petition more generally, are based on numerous faulty premises that should preclude relief. First, the state court ruling issued *before* the Ninth Circuit denied rehearing en banc, but petitioners did not bring that decision to the court of appeals' attention until after the Ninth Circuit had denied rehearing.

Second, the state court ruling has no precedential value. It is an unpublished, non-binding intermediate state court decision that *no* California court is required to follow. And the decision itself involves nothing more than the application of basic state law principles (what constitutes reasonable reliance) in different cases. Thus, the petition bears no resemblance

to the limited circumstances where this Court has GVRed in the past—where the federal court of appeals had relied on a principle of state law, or a state court decision, that later was repudiated by a state court of last resort in a published, binding decision.

Finally, the petition presents a particularly poor vehicle for a GVR. Even if the unpublished, intermediate state court ruling were correctly decided and stated some new principle of law that could be applied to this case (it does not and cannot), petitioners did not press before the Ninth Circuit the specific theory that was the basis for relief in the state court until after the Ninth Circuit denied rehearing. In light of that failure, the Ninth Circuit's waiver rules preclude relief, such that the Ninth Circuit would not provide relief even if the Court were to grant the extraordinary relief requested. Petitioners, having chosen their litigation strategy, are not entitled to a "do over." The petition should be denied.

STATEMENT

A. Factual Background

Respondent Mail Boxes Etc., Inc., a wholly owned subsidiary of respondent United Parcel Service, Inc. (UPS), is the franchisor of The UPS Store centers. Pet. App. 10a. Petitioners are current or former owners of approximately 200 The UPS Store franchises. Pet. App. 8a. About half of petitioners operated Mail Boxes Etc. centers that they chose to convert to The UPS Store brand in 2003 (Converting Franchisees); the remainder purchased The UPS

Stores franchises in the first instance (New Franchisees). Pet. 3.

New Franchisees received Franchise Offering Circulars, which included Acknowledgments Regarding Risk Factors (Risk Factor Acknowledgements) signed by the franchisee. Pet. App. 10a, 16a. The Franchise Offering Circulars disclosed extensive information about The UPS Store business, including the maximum price that The UPS Stores would be able to charge for UPS shipping and the discount or incentive that UPS would provide to franchisees for UPS shipping. Pet. App. 10a-11a. They also informed New Franchisees, and required New Franchisees to acknowledge, that Mail Boxes Etc. could not provide any assurance that a franchisee would be profitable. Pet. App. 16a-17a.

Converting Franchisees, by contrast, received oral presentations and a variety of written materials regarding the Gold Shield Amendment to their franchise agreements (which the New Franchisees did not receive). Like the New Franchisees, the Converting Franchisees received fulsome disclosures about The UPS Store business and pricing. Pet. App. 10a-11a.

B. Proceedings Below

1. District Court

This action was filed in California Superior Court and removed to federal district court under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The operative Fourth Amended Complaint asserted fourteen

claims for relief. As relevant here, New Franchisee petitioners alleged two common law fraud claims and one statutory fraud claim under the California Franchise Investment Law, Cal. Corp. Code §§ 31000, et seq. These fraud claims all were based on alleged misrepresentations and omissions in the Franchise Offering Circulars, including the Risk Factor Acknowledgements contained in the circulars.

Converting Franchisee petitioners alleged their own common law and California statutory fraud claims based on alleged misrepresentations and omissions in oral presentations and written materials distributed in connection with the Gold Shield Amendment.[1]

The district court directed each side to select for trial two Converting Franchisees and two New Franchisees. Respondents filed motions for summary judgment against those bellwether plaintiffs, which the district court granted.

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[1] New Franchisee petitioners also asserted a claim for breach of their franchise agreements with Mail Boxes Etc. and the carrier agreements they entered into with UPS. Converting Franchisees asserted a separate claim for breach of the Gold Shield Amendment and their carrier agreements with UPS. New and Converting Franchisees asserted separate claims under the California Unfair Competition Law and for declaratory relief, and joined in claims under other States' franchise and competition laws and for rescission. None of these claims are at issue in the petition to this Court. *See* Pet. 9.

As relevant here, the district court ruled that four alleged misrepresentations in the Franchise Offering Circulars (which New Franchisee petitioners received before buying a The UPS Store franchise) could not support fraud claims. Pet. App. 33a-35a; *see infra* at 16. Three of those purported misrepresentations were forward-looking statements in the Risk Factor Acknowledgements, such as "the success or failure of your business will depend primarily on your local marketing efforts." Pet. App. 33a. The district court concluded that, "to the extent the [Risk Factor Acknowledgments] could be read as providing (as opposed to disavowing) any representation regarding profitability, the challenged language merely concerns future events." Pet. App. 33a. These statements thus were not actionable. Pet. App. 33a. The court further held that reliance on these statements, which were petitioners' own acknowledgements of risk and served as respondents' "disclaimer of liability," was "patently unreasonable." Pet. App. 34a.

The court also ruled that a challenged statement in the circulars regarding the "core underlying business" was not a misrepresentation of fact. Pet. App. 35a-36a.

Mail Boxes Etc. and UPS then filed motions for summary judgment against the remaining New Franchisees and the remaining Converting Franchisees, which the court granted. The court noted that the remaining franchisees had asserted the same claims as the bellwethers, relied on the same evidence and

theories, and failed to identify any differences that would warrant a different result. Pet. App. 47a-49a.

2. Court of Appeals

Petitioners appealed. With respect to their fraud claims, petitioners limited their argument to only four statements as misrepresentations: the three statements in the Risk Factor Acknowledgements and the statement in the Franchise Offering Circular concerning "'the core underlying business.'" Pet. CA9 Br. 42-44; *see* Pet. App. 33a, 35a (quoting same statements in discussing New Franchisees' misrepresentation claims); *see also* Pet. CA9 Reply Br. 12-13. Petitioners made no argument on appeal with regard to any materials provided or statements made in connection with the Gold Shield Amendment.[2]

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[2] In the factual statement of their Ninth Circuit opening brief, petitioners quoted some language from the written materials and oral presentations provided to the Converting Franchisees (including just one of the four statements in the Summary of New Gold Shield Program on which petitioners rely in this Court), but made no legal argument in their opening brief with regard to any of that language. Pet. CA9 Br. 15-21, 42-45. Petitioners thus did not argue how those particular Gold Shield Amendment statements given to Converting Franchisees—which were distinct from the materials and information provided to New Franchisees—could form the basis for a fraud claim. Similarly, their Ninth Circuit reply brief's discussion of the Converting Franchisees' misrepresentation claims neither referenced any of the four statements they rely on in this Court nor cited the portion of the factual statement in their opening brief that quoted one of those statements. Pet. CA9 Reply Br. 12-13 (citing Pet. CA9 Br. 26-39, 42-55).

The Ninth Circuit affirmed. Pet. App. 1a. As to the fraud claims, the court of appeals held that reasonable reliance was required to prove common law and statutory fraud, and that petitioners failed to present evidence "that they reasonably relied on any untrue or misleading statement." Pet. App. 2a-3a.

Petitioners filed a petition for rehearing and rehearing en banc, which the court of appeals denied on January 17, 2012. Pet. App. 61a. On January 19, 2012, petitioners filed a second petition for rehearing and rehearing en banc, based on an unpublished decision from the California Court of Appeal: *D.T. Woodard, Inc. v. Mail Boxes Etc., Inc.*, No. B228990, 2012 WL 90084 (Cal. Ct. App. Jan. 12, 2012) (unpublished). That decision had issued on January 12, 2012, five days *before* the Ninth Circuit denied petitioners' first petition for rehearing. In *D.T. Woodard*, an intermediate state appellate court concluded that the plaintiff in that case had stated a triable issue of fact as to reasonable reliance on four particular statements in connection with the Gold Shield Amendment. In an unpublished decision, the intermediate appellate court reversed the state trial court. Pet. App. 63a-85a.

The Ninth Circuit construed petitioners' second petition for rehearing as a motion to file an untimely second petition, which the Ninth Circuit denied. Pet. App. 62a.

REASONS FOR DENYING THE PETITION

A. The Unpublished Intermediate State Court Ruling Provides No Basis To Grant, Vacate, And Remand

1. In rare cases, this Court has issued a GVR order in light of an intervening state court decision that significantly clarifies or revisits "a point of state law." *Thomas v. American Home Prods., Inc.*, 519 U.S. 913, 913 (1996) (Scalia, J., concurring). This occurs where a state court of last resort has "overruled" state law precedent that "was the basis for" the federal court's ruling. *Id.* at 914. In such circumstances, there may exist "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lords Landing Vill. Condo. Council v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997).

This Court thus has GVRed where a state court that is the final arbiter of state law has expressed "explicit disapproval of the cases on which the [federal] Court of Appeals based its decision." *Ibid.* For example, in *Lords Landing*, the Court GVRed a Fourth Circuit ruling based on "a recent decision of the Maryland Court of Appeals—the highest court in Maryland." *Id.* at 895. There, the Maryland high court had "expressly disapproved [of] * * * two decisions on which the [Fourth Circuit] had primarily relied." *Ibid.* (citations omitted).

Likewise, in *Thomas*, the Georgia Supreme Court decision made "clear that the Eleventh Circuit's

interpretation of Georgia law was incorrect." 519 U.S. at 914 (Scalia, J., concurring). Concurring in the GVR order, Justice Scalia explained:

> [W]e are vacating the decision below to allow the Court of Appeals to consider an intervening decision of the Court that is the final expositor of a particular body of law—with federal questions, the Supreme Court of the United States, and with questions of Georgia law, the Supreme Court of Georgia.

Id. at 915.

The petition comes nowhere near meeting this exacting standard. Petitioners identify no principle of state law or judicial decision on which the Ninth Circuit relied that has been repudiated, overruled, or even called into doubt by a California state court. To the contrary, both the Ninth Circuit's unpublished decision and the California Court of Appeal's unpublished decision are in accord on the key *legal* question at issue in this case—that plaintiffs' claims require reasonable reliance. *Compare* Pet. App. 2a-3a, *with* Pet. App. 78a-82a.

2. Even if the *D.T. Woodard* decision had somehow shed light on the meaning of state law (which it did not), a GVR still would be unwarranted because that state court decision has no precedential value and is binding on no court. Indeed, it cannot even be considered a persuasive statement of California law.

Under the California Rules of Court, the unpublished *D.T. Woodard* opinion "must not be cited or

relied on by a court or a party in any other action." Cal. R. Ct. 8.1115(a). The California Supreme Court strictly adheres to this rule, and it will not consider an unpublished opinion as a statement of California law. *People v. Russo*, 25 P.3d 641, 646 n.1 (Cal. 2001) (refusing to "consider" an unpublished opinion cited by the state attorney general); *People v. Webster*, 814 P.2d 1273, 1280 n.4 (Cal. 1991) (rejecting State's suggestion that an unpublished decision resolving "certain common appellate issues is deserving of 'some consideration' by this court").

Although petitioners contend that the Ninth Circuit has cited unpublished decisions on occasion (Pet. 21-22), that court has done so only "as a possible reflection of California law." *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 n.6 (9th Cir. 2011). This Court should not grant the extraordinary remedy of vacatur based on a ruling that cannot be cited in and is not binding on other California courts and, at best, would be considered merely a "*possible* reflection of California law." *Ibid.* (emphasis added).[3]

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[3] Indeed, in California, intermediate state court decisions do not bind other appellate courts, or even the *same* appellate court, within the State. *McCallum v. McCallum*, 235 Cal. Rptr. 396, 400 n.4 (Cal. Ct. App. 1987) ("A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions."); *People v. Yeats*, 136 Cal. Rptr. 243, 245 (Cal. Ct. App. 1977) (division of appellate district not bound to follow its own

(Continued on following page)

3. Petitioners identify a handful of cases in which this Court has GVRed based on an intervening state court ruling. Those cases bear no resemblance to this one. The vast majority of those GVR orders involved an express repudiation of an intermediate state court decision on which the federal appellate court had relied. And, in all of those cases, the highest court of the State (not an intermediate appellate court) issued the intervening ruling as to state law in a published, binding decision.

For example, in *Collins v. Commissioner*, this Court GVRed in light of an intervening Oklahoma Supreme Court ruling. *See* 93 U.S. 215 (1968). The Tenth Circuit had attempted to reconcile potentially conflicting state law precedent concerning a state statute that was further clarified *after* the court of appeals had ruled. *Collins v. Commissioner*, 388 F.2d 353 (10th Cir. 1968); *Collins v. Commissioner*, 412 F.2d 211 (10th Cir. 1969); *see also National Union Fire Ins. Co. of Pittsburgh, PA v. American Med. Int'l, Inc.*, 516 U.S. 984 (1995) (GVR in light of California Supreme Court decision); *Mullaney v. Wilbur*, 414 U.S. 1139 (1974) (GVR in light of Maine high court);

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prior precedent); *Saucedo v. Mercury Savs. & Loan Ass'n*, 168 Cal. Rptr. 552 (Cal. Ct. App. 1980) (same). Thus, a GVR here would be instructing the Ninth Circuit to consider a decision that not only cannot be cited to or relied on by any California court, but also one that comes from an intermediate state court that cannot bind any other California Court of Appeal panel addressing the same issue.

Conner v. Simler, 367 U.S. 486 (1961) (GVR in light of Oklahoma Supreme Court ruling).[4]

Indeed, in one case cited by petitioners (Pet. 17), the state supreme court explicitly rejected the federal court decision sought to be GVRed. *Blabon v. Nelson*, 393 U.S. 20 (1968) (GVR order); *Wilson v. Blabon*, 402 F.2d 963, 965 (9th Cir. 1968) (noting that the California Supreme Court rejected the Ninth Circuit's prior state law interpretation); *In re Bevill*, 442 P.2d 679, 682 (Cal. 1968) (rejecting Ninth Circuit's prior *Blabon* ruling); *see also Downey v. Beck*, 343 U.S. 912 (1952) (GVR in light of California Supreme Court ruling in *Beck v. West Coast Life Ins. Co.*, 241 P.2d 544, 546-547 (Cal. 1952), which had expressly rejected the Ninth Circuit *Downey* opinion's reasoning). No such circumstances exist here.[5]

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[4] Ironically, in *Conner*, on remand following the GVR order, the Tenth Circuit followed the state law precedent that had been the basis for the GVR order, but this Court then reversed, holding that the question was answered by federal law. *See Simler v. Conner*, 295 F.2d 534 (10th Cir. 1961) (no right to jury trial on plaintiff's claim), rev'd, 372 U.S. 221 (1963) (plaintiff's right to jury determined by federal law). *Conner* thus should serve as a caution against such GVR orders, rather than as support for them.

[5] One case petitioners cite does not even involve the resolution of a question of state law. In *Chew-Villasana*, the Court GVRed because the state court decision overturned the very criminal conviction of petitioner that formed the predicate for petitioner's deportation. *See* Pet. for Writ of Cert., *Chew-Villasana v. INS*, 506 U.S. 910 (1992) (No. 91-7800).

Petitioners identify only two cases in which this Court has issued a GVR order in light of an *intermediate* state court ruling. Pet. 18. Neither is like this case. In both *Blaauw* and *Exxon*, this Court GVRed in light of published state court decisions. *Blaauw v. Grand Trunk W. R.R. Co.*, 380 U.S. 127 (1965); *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988). Those published and precedential state court decisions had adopted different legal rules of state law than that adopted by the federal court. *American Nat'l Bank & Trust Co. v. Pennsylvania R.R. Co.*, 202 N.E.2d 79, 94 (Ill. App. Ct. 1964); *Blaauw v. Grand Trunk W. R.R. Co.*, 333 F.2d 540 (7th Cir. 1964); *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, 675 (5th Cir. 1989). Here, by contrast, the intermediate state court decision on which petitioners rely is unpublished, with no precedential value in any court, and it applies the same relevant state-law legal principle as did the Ninth Circuit.

B. In Any Event, The Court Of Appeals Would Not Alter Its Decision In Light Of The Unpublished *D.T. Woodard* Opinion

The Court also should not GVR the case because petitioners did not press below the fact-specific litigation theory they now advance in this Court. Thus, even if GVRed, the court of appeals would deem petitioners' arguments waived.

The *D.T. Woodard* action was brought by a franchisee who converted a Mail Boxes Etc. center to The

UPS Store. Pet. App. 68a. The state intermediate appellate decision on which petitioners rely reversed the grant of summary judgment. Pet. App. 64a. That appellate decision was based on four fact-specific alleged misrepresentations contained in the "Summary of New Gold Shield Program" (Gold Shield Summary). Pet. App. 73a-74a.[6] The Gold Shield Summary was provided to existing franchisees in connection with the opportunity to convert their franchises to the new The UPS Store brand. Pet. App. 68a, 73a-75a. The California Court of Appeal construed the four statements as "factual assertions regarding the past performance of the UPS Store model in market tests and defendants' assurances that those tests reliably measured The UPS Store model." Pet. App. 73a.

While respondents disagree with *D.T. Woodard*'s application of the law to the facts in that case, the critical point for present purposes is that petitioners

[6] The *D.T. Woodard* decision discussed four statements in the Gold Shield Summary that allegedly misrepresented the reliability of market testing of The UPS Store model. Pet. App. 73a-74a. The challenged statements referenced the "'*small but reliable scale*'" of the tests, the "'*accuracy and reliability* of the information for comparative and other analytical purposes,'" the selection of markets "'in order to have a representative cross-section of centers,'" and that Mail Boxes Etc. provided the documents so that franchisees had "'*relevant information to help you decide*,'" whether to convert to The UPS Store brand. *Ibid*. (emphases added by court). Neither the Gold Shield Summary nor information about the market testing was given to new franchisees.

here did not press in the Ninth Circuit *any* of the four statements addressed in (and that were critical to) the *D.T. Woodard* decision. That, alone, should be fatal to petitioners' reliance on the intermediate state court ruling. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929-930 (9th Cir. 2003); *International Union of Bricklayers Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

Indeed, about *half* of the petitioners here could not have relied on those statements because they did not receive them. There is no dispute that the New Franchisee petitioners did not receive the Gold Shield Summary containing the four statements at issue in *D.T. Woodard*. Those petitioners thus cannot base claims on the purported misrepresentations that were the basis for the unpublished, intermediate state court ruling. Instead, the New Franchisee petitioners received, and based their misrepresentation claims on, Franchise Offering Circulars for sales of new The UPS Stores. *See* Pet. App. 10a, 33a. Those circulars played no role whatsoever in the *D.T. Woodard* case.

Although the Converting Franchisee petitioners did receive the Gold Shield Summary, those petitioners did not base their claims on the four statements at issue in *D.T. Woodard*. Rather, in the Ninth Circuit, petitioners argued only that statements *in the Franchise Offering Circulars*, including the Risk Factor Acknowledgements exhibit, received by New Franchisees were actionable misrepresentations. Pet. CA9 Br. 42-45 (argument titled "Respondents' Risk Factor

Representations Are Actionable"). Instead of relying on the statements at issue in *D.T. Woodard*, petitioners pointed to forward-looking statements in the Risk Factor Acknowledgements such as "'the success or failure of your business will depend primarily on your local marketing efforts'" and a statement in the Franchise Offering Circular's description of the franchised business. Pet. CA9 Br. 42-44; *see* Pet. App. 33a, 35a (quoting same statements in discussing New Franchisees' misrepresentation claims); *see also* Pet. CA9 Reply Br. 12-13.

Moreover, no statement of California law in *D.T. Woodard* is inconsistent with the Ninth Circuit's decision. In particular, the *D.T. Woodard* analysis concerning disclaimers that "no representations have been made" and precluding "a per se rule that an integration/no oral representation clause, establishes" that reliance was unreasonable, has no bearing on the statements in the Risk Factor Acknowledgements at issue in this case (which were not at issue in *D.T. Woodard*). Pet. App. 82a. As the district court concluded, the Risk Factor Acknowledgements were not representations of fact but disavowals of profitability and concerned future events. *See* Pet. App. 33a. And because the statements were part of New Franchisees' acknowledgement of their *own* particular risks, it was patently unreasonable to rely on them as a basis for their fraud claims. *See* Pet. App. 34a. Nothing in *D.T. Woodard* even addresses such statements, much less holds to the contrary.

There is no basis to believe that the Ninth Circuit would revisit its decision based on an unpublished opinion that focused exclusively on four specific statements that were not pressed by, and thus were not preserved by, petitioners in the Ninth Circuit. Indeed, the Ninth Circuit's waiver rules would preclude petitioners from asserting these new arguments at this late date. *See Independent Towers*, 350 F.3d at 929-930 ("a bare assertion of an issue does not preserve a claim") (brackets and citations omitted); *International Union of Bricklayers*, 752 F.2d at 1404 (holding that issues that "are not specifically and distinctly raised and argued in appellant's opening brief" are waived, and limiting review to the specific "factual issues" raised in the opening brief). This Court thus should not grant petitioners the extraordinary remedy of a GVR merely so they can seek to have a "do over" by presenting the theory pursued by the *D.T. Woodard* plaintiff after petitioners' own, different theories were found wanting. The Ninth Circuit's fact-bound application of state law to fact should be left undisturbed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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