To be argued by
MICHAEL H. SUSSMAN, ESQ.
Time Requested: 15 minutes

Appellate Division – Third Department Case No. 530783

New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

F.F. on behalf of her minor children, Y.F., E.F. Y.F.; M. & T. M. on behalf of their minor children, C.M. and B.M.; E.W., on behalf of his minor son, D.W.; Rabbi M., on behalf of his minor children I.F.M, M.M & C.M.; M.H. on behalf of W.G.; C.O., on behalf of her minor children, C.O., M.O, Z.O. and Y.O; Y. & M. on behalf of their minor children M.G., P.G., M.G., S.G., F.G. and C.G.; J.M. on behalf of his minor children C.D.M. & M.Y.M.; J.E., on behalf of his minor children, P.E., M.E., S.E., D.E., F.E. and E.E.; C.B. & D.B., on behalf of their minor children, M.M.B. and R.A.B.; T.F., on behalf of her minor children, E.F., H.F. and D.F.; L.C., on behalf of her minor child, M.C.; R.K., on behalf of her minor child, M.K.; R.S. & D.S., on behalf of their minor children, E.S. and S.S.; J.M. on behalf of her minor children, S.M. & A.M.; F.H., on behalf of her minor children, A.H., H.H. and A.H.; M.E. on behalf of his minor children, M.E. & P.E.;

(*caption continued on inside cover*)

APPELLANT'S REPLY BRIEF

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Albany County Index No. 4108-2019

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Plaintiffs-Appellants

–against–

STATE OF NEW YORK; ANDREW CUOMO, GOVERNOR
LETITIA JAMES, ATTORNEY GENERAL,

Defendants-Respondents.

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PRELIMINARY STATEMENT

The Constitution forbids state action which is tainted by animus or hostility toward religion. This is a clearly established constitutional principle. Here, appellants contend that the repeal of the religious exemption to vaccinations was punctuated by the same kind of religious animus as made unconstitutional the State of Colorado Human Rights Commission's enforcement action against a baker who refused to bake a wedding cake for a gay couple. On the one side of that dispute were settled equal protection rights; on the other side, a claim that, by forcing the baker to bake the cake, the state was trammeling his religious beliefs and compelling his speech. However, despite great expectations, the Supreme Court did not decide which of these rights had primacy; rather, while recognizing both, it reviewed the administrative record and found that active hostility toward religion animated and thereby invalidated the state's enforcement action.

Likewise, after recognizing the religious exemption to vaccinations for more than five decades, in June 2019, without any public hearings and after the "measles" outbreak had largely waned, the New York State legislature repealed that exemption in a hail of hostility toward religion. That states may mandate vaccinations and not recognize religious exemptions is not dispositive here. Indeed, that argument elides the central issue: whether having long recognized

such an exemption, a state legislature may repeal it while attacking the *bona fide* religious beliefs of those holding it.

It would have been one thing if the New York State legislature had declared that, despite its appreciation for the religious scruples of a small portion of its population, the religious repeal was required to protect public health. But, the debate on the repeal revealed much more: leading legislators, indeed, sponsors of the legislation in both houses of the New York State legislature, caricatured and derided those of religious faith, challenging the *bona fides* of their claims and mocking them as fraudsters. Such comments belie any argument that religious animus played no role in the repeal, and that role makes unconstitutional the state action. A little bias toward those of faith is too much.

This case comes before this Court on an appeal from Supreme Court's grant of a motion to dismiss. In adjudicating such a motion, Supreme Court was bound to accept the well-pled factual allegations and apply the settled law to those facts. But, it refused to do so: instead, it made findings of fact regarding disputed legislative intent and the hotly-disputed necessity of the repeal, violating basic procedural rules.

Had the court accepted the well-supported factual allegations pled in appellants' Verified Complaint – *to wit*, that leading sponsors of the repeal expressed active hostility toward religion, acted after the measles outbreak had

waned, failed to act during the height of the outbreak, failed to recognize that County and State Health Departments responsible for dealing with the measles outbreak had categorically failed to utilize the means provided by the state's Public Health Law to deal with the outbreak – the Court would have been compelled to deny the motion to dismiss and permit discovery to proceed on appellants' claims.

In short, the facts alleged in the Verified Complaint plainly support the viable legal claims appellants asserted and dismissal as a matter of law could not be supported and must be vacated and reversed.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Between pages 4-22 of their Brief in Chief, appellants set forth the numerous facts which supported their causes of action and are equally material to disposition of this appeal. Respondent challenges none of these statements of fact, but provide their own censored version of legislative motive and intent.

On page 3 of their brief, respondents note the Legislature's 1968 action to include measles vaccinations among those required of school children. Yet, for fifty-one years, this requirement co-existed with the religious exemption. Our state reconciled public health concerns with respect for those for whom immunization violated sincerely-held religious beliefs.

On page 3 of respondents' brief, the State defendants claim that the diagnosis of 810 cases of measles during nine months in a State of more than 19.4 million people motivated the religious repeal.

Respondents address the religious animosity which the Verified Complaint illuminates by making a factual claim – that the statements appellants cite were "isolated" expressions of animosity. Respondents provide no evidence which substantiates this claim and, had they, a motion to dismiss is not the forum for disposition of competing explanations of events. Respondents cannot, and do not, deny that the principal sponsors of the repeal legislation uttered these statements and provide no basis for the assertion that their many similarly-themed statements were "isolated". See Respondents' Brief at 7. Respondents' explication of appellants' Verified Complaint is truncated and misleading.

Finally, in its formulation of Supreme Court's decision, see id. at 10, respondents admit that the court below rested its decision on the wholly unsupported factual conclusion that "anything less than repeal of the non-medical exemption would necessarily be less effective to serve" the interest of public health. Since the public health authorities never employed the method set forth in public health law to control outbreaks, *i.e.*, quarantine, and have not explained on this record that failure, any such conclusion is empirically baseless.

ARGUMENT

Point I

The Verified Complaint amply states appellants' causes of action under the applicable motion to dismiss standard.

In its discussion of the "legal standards" to be applied to this case, respondents submit that "conclusory allegation . . are insufficient to survive a motion to dismiss." Respondents' Brief at 11. However, appellants' Verified Complaint makes no conclusory allegations and provides a detailed factual recitation which should have controlled resolution of respondents' motion to dismiss.

Ironically, our courts have paid "substantial deference" to legislation because of the view that the enacting legislature "has investigated and found facts necessary to support the legislation." *Hotel Dorset Co. v. Tr. for Cultural Res. of City of New York*, 46 N.Y. 2d 358, 370 (1978). Here, of course, there is no basis for any such conclusion or presumption for, as the Verified Complaint explicates, there were no legislative hearings by relevant committees concerning the religious repeal and no public testimony of any sort was taken by either the Assembly or Senate. Indeed, no legislative record supports the repeal of a broadly accepted exemption which covered 26,000 children in our state when summarily extinguished.

Point II

Active hostility toward regligion invalidates this repeal.

The challenged religious repeal was no enactment of general applicability; it was directed to families exercising a 55 year-old exception to mandatory vaccination, one recognized by more than 45 states. In June 2019, the State legislature did not mandate that all children be vaccinated. It did not mandate that all those working in public schools demonstrate evidence of vaccination. It did not systematically review whether the state Health Department or County Commissioners of Health had utilized the means and measures provided by state law and regulation to combat a measles outbreak. It did not hold any public hearings to take testimony from members of the public concerning improvements which might be made to abate an outbreak of any contagious disease. Instead, it took one action, motivated by express religious intolerance: to repeal the religious exemption. Of course, the legislators knew this was wrong and the State cites to their efforts to revise the record and make it appear as if other motives controlled. This merely raises a disputed issue of fact which cannot be suppressed by grant of a motion to dismiss.

Contrary to Supreme Court's conclusion and the defense of that decision authored by respondents, the First Amendment does not tolerate such blatant infringements on religious beliefs, particularly where, as here, the challenged state

action manifests active hostility toward religion. And, that alone invalidates the exercise of state authority. That is the teaching of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*., 138 S. Ct. 1719 (2017).

Respondents do not address this critical precedent until pages 31-32 of their Brief, and their treatment of the case is materially deficient. First, respondents claim that the bedrock principle upon which this controlling precedent stands for does not apply to a legislative body. Put another way, respondents seem to believe that, where a legislative body acts in a manner which reflects religious hostility, its conduct cannot be reached and is beyond the constitutional prohibition against state action animated by religious intolerance.

This is wrong, and *Masterpiece Cakeshop* itself repudiates the claim. The Court recognizes that laws of general applicability can burden religious rights but, for the majority, Justice Kennedy explains that this principle has limitations applicable to our case:

> Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Id. at 1724. In short, even a measure which may otherwise be valid is unconstitutional when the State displays religious hostility in enacting it.

Likewise, appellants' free exercise rights were plainly implicated by the religious repeal, and hostility toward their religious beliefs could not be part of the balance the state reached. But, according to the well pled allegations in the Verified Complaint, consideration of the repeal *was* suffused with religious hostility, subjecting it to the same constitutional infirmity the Court identified in *Masterpiece Cakeshop*.

Moreover, members of a legislative body are no more entitled to express religious hostility when considering an otherwise valid exercise of state power than was the State of Colorado Human Rights Commission. The Masterpiece Cakeshop decision made this crystal clear: "*the Commission's treatment of Philips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or a religious viewpoint*." *Id.* at 1732 [emphasis supplied].

The government may not act "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* at 1722. The legislature, as a vehicle of state power, was obliged to "proceed in a manner neutral toward and tolerant of . . . religious beliefs." *Id.* at 1731. This is so because

"the Constitution 'commits government itself to religious tolerance, and upon *even the slightest suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices*, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'" *Id.* [emphasis added]. To the extent the respondents claim that the holding in *Masterpiece Cakeshop* does not apply to the New York State Legislature, it is wrong and this court should reject any such claim.

In this regard, *Masterpiece Cakeshop* cites and builds upon *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993), noting that factors relevant to an assessment of governmental neutrality include: "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*

As in Colorado, the New York State legislature was neither tolerant nor respectful of appellants' religious views and gave every appearance of evaluating them based on negative normative evaluations. Rather than state that those holding such views were sincere and that over-riding public health reasons required elimination of the religious exemption, the sponsors of the legislation attacked

those professing religious beliefs as frauds and as taking advantage of loopholes for other than religious reasons.

Indeed, the contemporaneous statements by decision-makers in New York disrespected religion more dramatically than those in Colorado. As Justice Kennedy wrote, "It hardly requires restating that government has no role in deciding or even suggesting whether the religious grounds for Phillips' conscience-based objection is legitimate or illegitimate." *Id.*

A recent case decided by the Second Circuit after appellants filed their brief-in-chief here is further instructive and, indeed, quite on point. In *New Hope Family Servs. v. Poole*, 966 F.3d 145 (2d Cir. 2020), a private Christian ministry providing adoption services in New York refused, upon its sincere religious beliefs, to recommend placement of children with same-sex or unmarried couples, instead referring such couples to other adoption agencies. *See Id.* at 148-49. In 2013, OCFS had promulgated a regulation prohibiting adoptions agencies from discriminating against applicants for adoption services on the basis of, *inter alia*, sexual orientation and marital stastus. *See Id.* at 155; 18 N.Y.C.R.R. § 421.3(d). In 2018, OCFS advised New Hope that its policy of refusing to adopt to same-sex or unmarried couples violated this reguialtion and gave it an ultimatum – change your policy or close your adoption operation. *See Id.* at 149.

New Hope brought suit in federal district court to challenge OCFS's promulgation and enforcement of its reguliation, claiming that same impermissibly violated its First Amendment free exercise and free speech rights and its Fourteenth Amendment equal protection rights, and seeking to preliminarily enjoin its enforcement. *See Id.* The district court declined to issue a preliminary injunction and dismissed the complaint for failuare to state a claim. *See Id.*

The Second Circuit reversed, holding that the complaint states plausible First Amendment claims and directing that the district court reconsider the plaintiff's preliminary injunction motion in light of its holding. *See Id.* at 183-84. In doing so, the Court first emphasized the procedural posture of the case, noting that the district court's dismissal of the complaint "was premature," and explaining:

> The pleadings allege that OCFS's actions prelcude New Hope from pursing its adoptiong ministry constistent with its religious beliefs. Even if such intrusion on the exercise of religion would not violate the First Amendment if compelled by a valid and netural law (or regulation) of general application, the pleadings here, when viewed in the light most favorable to New Hope, do not permit a court to conclude, as a matter of law, that OCFS's actions in promulgating and enforcing the reguliation at issue were neutral and not informed by hostility toward certain religion.

Id. at 160.

In setting forth the applicable First Amendment principles, the Second Circuit pointed to *Masterpiece Cakeshop*, explaining that the First Amendment

prohibits state action motivaited by even the slightest hint of religious animosity and that "[t]hese principals are particularly relevant to beliefs about *family* and marriage, where society's views have sometimes proved more fluied than religion's." *Id.* at 161 (emphasis added).

The Court then explained that, even if a law is facially neutral, this does not end the analysis because "hostility to religion can be masked and overt." *Id.* at 163. In conducting this evaluation

> a court must survey meticulously the totality of the eivdnece, both direct and circumstantial. It must consider the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statmeents by members of the decisionmaking body. . . . It must also carefully consider the effect of the law in its real operation which is strong evidence of its object.

Id. at 163 (quotations and citations omitted).

Applying these standards, the Second Circuit concluded that the "pleadings easily give rise to the 'slight supsicion' of religious animosity the Supreme Court, in both *Lukumi* and *Masterpiece Cakeshop*, indicated could raise constitutional concern." *Id.* at 165. Several points the Court relied upon are applicable to our case. For instance, the Court noted that the regulation, which barred adoption agencies from refusing to place children with same-sex or unmarried couples, was disconnected from the law it implemented, which merely permitted such couples to

adopt, while otherwise seeming ot accommodate for the religious views of certain adoption agencies. *See Id.* at 165-66. The Court explained that this disconnect raises a suspicion of religious animsotity. *See Id.*

Likewise, here, while the legislature purported to act because of a recent measles outbreak and to protect those in schools, its specific action – to repeal the longstanding religious exemption – was at odds with its goal. Indeed, the legislature still permitted medical exemptions and did not also require that adults in schools – *i.e.*, teachers, administartors, and others – likewise be vaccinated. Nor did the legislature seek to employ other, less intrusive means of responding.

The Second Circuit also cited statements made by OCFS personnel pled in the complaint, which it concluded could demonstrate religious animosity:

> Third, even before discovery, New Hope points to some statements by OCFS personnel that are similar to statements in Masterpiece Cakeshop that the Supreme Court interpreted as arguably evincing religious hostility. Notably, New Hope asserts that when it invoked religious freedom to protest OCFS's directive that it either agree to approve unmarried and same-sex adoption applicants or close its adoption services, OCFS responded that "[s]ome Christian ministries have decided to compromise and stay open." Compl. ¶ 192 (brackets in original). *See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1729 (quoting statement by Colorado Civil Rights Commissioners that businessman who "wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, *he needs to look at being able to compromise*" (emphasis added) (internal quotation marks omitted)). Further, when OCFS was asked by a reporter to comment on the closure of a

> long-established Christian adoption agency in Buffalo, its spokeswoman stated that "[t]here is no place for providers that choose not to follow the law." Compl. ¶ 204; *see Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. at 1729 (quoting Commissioners that plaintiff "can believe 'what he wants to believe' but cannot act on his religious beliefs 'if he decides to do business in the state'").

Id. at 167-68. The Second Circuit then explained:

> As in Masterpiece Cakeshop, these statements are subject to various interpretations, some bening. *But on a motion to dismiss, we must draw the inferences most favorable to New Hope*, i.e., that OCFS did not think New Hope's religious beliefs about family and marriage could legitimately be carried into the public sphere.

Id. at 168 (quotations & citations omitted) (emphasis added).

Likewise, here, appellants pled numerous comments suggesting the legislature's religious animosity. On respondents' motion to dismiss, Supreme Court was obliged to interpret those statements in a manner most favorably to appellants, but it did not. Indeed, as in *Masterpiece Cakeshop* and *New Hope*, such statements, when viewed in the light most favorably to appellants and drawing all reasonable inferences in their favor, certainly suggest the type of religious animosity our Constitution prohibits.

The Court's intolerance for the internalization of religious intolerance in government decision-making involving religious rights finds doctrinal analogue in equal protection law. As Judge Kearse wrote in vacating Judge Sand's holding

that the State of New York could not be held liable for the creation of racial segregation in Yonkers' schools, "The plaintiff need not show . . . that a government decision-maker was motivated solely, primarily or even predominantly by concerns that were racial, for 'rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even a particular purpose was the 'dominant' or 'primary' one.'" *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996) (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)).

Here, there is plain evidence that a constitutionally impermissible motive animated the religious repeal and that key legislators chose to use words evincing an active hostility toward religion in justifying religious repeal. That they did not have to do so does not distinguish the impermissibility of their action from that taken by the Colorado Human Rights Commission. As Justice Kennedy recognized, "it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite neutrality that must be strictly observed." *Masterpiece Cakeshop*, 138 S.Ct. at 1732 But, as in New York, this did not occur and decision-makers brought religious animus to the table, thereby invalidating their own conduct. Had they acted

without such animus, the Court might well have upheld their conduct. But, as in New York, they did not. The same analysis applies here.

The kinds of comments leaders of the New York State legislature made during the debate on religious repeal mirror those which the Supreme Court found to evince religious hostility in Colorado. Justice Kennedy wrote, "To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere." *Id.* at 1729. And, as the Verified Complaint shows, in the New York debate and comments leading up to it, the sponsors of the legislation claimed those with religious exemptions were committing fraud, taking advantage of loopholes and the Majority leader of the NY State Senate claimed that, by eliminating the religious repeal, the legislature was choosing science over rhetoric. Indeed, there are shocking similarities between the religious intolerance manifested in both states.

In this context, respondents' claim that petitioners point to no similar expressions of religious intolerance in the statements of sponsors of the religious repeal simply ignores the record as set forth in paragraphs 113-127 of the Verified Complaint [R-82-85].

In short, dismissal of the Verified Complaint was inappropriate because, through it, petitioners pled a valid First Amendment claim against the State of New York for ending religious repeal in a manner which was permeated with religious intolerance. That is enough to invalidate the state action whether New York could have passed the repeal absent such hateful and unconstitutional expressions and whether this court agrees with respondents' disputed claim that its law is one of general applicability or not. And, as is plain, these strictures apply to a legislative body every bit as much as to an administrative one

Point III

The religious repeal impermissibly burdens religion.

Apart then from the active hostility to religion, which should resolve this appeal for appellants, respondents' trespassed appellants' freedom of religion by impermissibly burdening their right to choose a religious education without a compelling state interest. This claim makes out a viable constitutional claim which Supreme Court should have recognized, not dismissed.

New York State long provided a religious exemption from vaccinations for persons with a *bona fide* religious belief. This permitted the free exercise of religion by appellants, whose beliefs prohibited immunization. In June 2019, the State revoked this exemption, requiring that all children either be vaccinated or lose their right to attend a state supported public school or even to enroll in a

private religious school. The force and effect of this repeal was to burden those with sincerely-held religious beliefs. *See Little Sister of the Poor Saints Peter and Paul Home v. Pennsylvania,* 591 U.S. ___ (2020) ("It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct.") (Alito, J. concurring at 7).

Point IV

The repeal was not a law of general applicability.

The content of the repeal, when combined with contemporaneous statements by decision-makers and the sequence of events, makes plain that the religious repeal was not a law of general applicability. Rather, it was a narrow legislative action impelled by religious intolerance. It was directed toward those of religious faith and its proponents repeatedly scorned their beliefs.

In this context, and in light of the burden the repeal imposed on those exercising their right to free exercise, strict scrutiny must be applied in evaluating the repeal. The state must adduce a compelling state interest to limit free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (compelling state interest is satisfied only by "the gravest abuses, endangering paramount interests").

The Verified Complaint avers that no compelling state interest supported the repeal of the religious exemption. "[A] law cannot be regarded as protecting an

interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye, supra.* at 547.

In reviewing whether New York State had a compelling interest in repealing the religious exemption, this Court must take into account exceptions to the asserted rule of general applicability. *See Gonzales v. O Centro Espirita Beneficiente Unido do Vegetal*, 546 U.S. 418, 436 (2006). Here, the legislature left untouched medical exemptions to vaccination, which allowed introduction into the school environment of those who were too medically fragile to be vaccinated. It also imposed absolutely no vaccination requirement on any adult who worked in the state's schools, whether in close contact with students or not. Thus, a reasonable fact-finder could conclude that the limited nature of the repeal, when combined with the legislative failure to mandate vaccinations either for others in the school environment, or more generally, "unmistakably" showed that New York did not regard the interest of preventing the spread of contagious disease as a compelling interest. *See Little Sisters*, *supra* [Alito, J. concurring at 10-13].

On a motion to dismiss, Supreme Court erred in determining that the State had demonstrated a compelling state interest for the religious exemption repeal. This inquiry is fact-sensitive and petitioners had a right to demonstrate that the legislature lacked any such interest. The Verified Complaint raises an issue of fact

for resolution by a finder of fact, making grant of a motion to dismiss plain error. Instead, based upon the allegations of the Verified Complaint, Supreme Court should have denied respondents' motion to dismiss as, at that stage of this proceeding, it could not determine whether the state did, or did not, have a compelling state interest in ending the religious exemption after 55 years.

Each of respondents' other arguments has been addressed in appellants' brief in chief.

CONCLUSION

Supreme Court erroneously granted respondents' motion to dismiss. This case is controlled by the Supreme Court's 2017 decision in *Masterpiece Cakeshop*, *supra*, which imposed substantive limitations on state action motivated in any manner by religious intolerance as expressed by decision-makers. Respondents cannot re-create the record, and statements mocking the religious beliefs of those who held religious exemptions taint this state action in a manner directly addressed in this recent and binding Supreme Court precedent. Accordingly, Supreme Court erred in dismissing the Verified Complaint. This Court should vacate this dismissal and remand to Supreme Court for the setting of a discovery schedule.

Dated: Goshen, New York
September 21, 2020

Respectfully submitted,

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