No. 14-704

IN THE
SUPREME COURT OF THE UNITED STATES

ESPANOLA JACKSON, ET AL.,
Petitioners,
v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents.

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

BRIEF OF FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION, INC.; CALGUNS FOUNDATION, INC.; FIREARMS POLICY FOUNDATION, INC.; CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC.; MADISON SOCIETY, INC.; AND STATE FIREARMS POLICY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court expressly rejected a "freestanding interest-balancing" approach for analyzing Second Amendment claims. Yet the court below applied the prevailing approach in the lower courts generally, nominally applying intermediate scrutiny. It weighed the firearm restriction's burden on protected Second Amendment conduct against the governmental interest behind the law, while giving substantial deference to the government.

Isn't this precisely the sort of interest balancing the Court rejected?

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INTEREST OF *AMICI CURIAE*[1]

The Firearms Policy Coalition, Inc. (FPC) is a non-profit organization that serves its members and the public through direct and grassroots advocacy, legal efforts, and education. The purposes of FPC include defending the United States Constitution and the People's rights, privileges and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

The Second Amendment Foundation, Inc. ("SAF"), is a non-profit educational foundation that seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every State of the Union.

The Calguns Foundation, Inc., is a non-profit organization dedicated to promoting education for all stakeholders about California and federal firearm laws, rights and privileges; and defending and protecting the civil rights of California gun owners.

The Firearms Policy Foundation, Inc. (FPF) is a non-profit organization that serves the public through charitable and educational purposes,

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

with a focus on advancing the fundamental right to keep and bear arms.

The California Association of Federal Firearms Licensees, Inc. (CAL-FFL) is a non-profit association that serves its members and the public through direct lobbying, legal actions, education, and public outreach, all aimed at advancing the right to keep and bear arms. CAL-FFL's members include firearm dealers, training professionals, shooting ranges, collectors, consumers, and others who participate in the firearms ecosystem.

The Madison Society, Inc. is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. The organization spends time and resources on outreach, education and training related to assisting its members—and the law-abiding public in general—in obtaining and maintaining licenses to carry firearms for self-defense and for other Second Amendment purposes.

Florida Carry, Inc. is a non-profit, nonpartisan, grassroots organization that seeks to protect the rights of law-abiding Floridians, as well as the state's visitors, to possess and use firearms and other weapons for lawful purposes including recreation and self-defense. These goals are accomplished through education, legislative initiatives, and litigation.

Hawaii Defense Foundation (HDF) is a nonprofit organization formed to promote and defend the civil rights of the residents of Hawaii, specifi-

cally Second Amendment rights. HDF is composed of over 2,500 members of the Hawaii community, and routinely participates in training, education, and litigation related to their efforts.

Illinois Carry is dedicated to the preservation of Second Amendment rights. Among Illinois Carry's purposes are educating the public about Illinois laws as well as laws throughout the Nation governing the purchase and transportation of firearms, and supporting and defending the people's right to keep and bear arms, including the right of its members and the public to purchase, possess, and carry firearms.

Maryland Shall Issue, Inc. is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of all gun owners' rights in Maryland, with a primary goal of reform to allow all law-abiding citizens the right to carry a concealed weapon and to educate the community to the awareness that "shall issue" laws have, in all cases, resulted in decreased rates of violent crime.

Commonwealth Second Amendment, Inc. ("Comm2A") is a nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted *amicus curiae* briefs to this Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights of lawful Massachusetts gun owners. Massachusetts has a stor-

age law similar to the one challenged here; as such, the outcome in this case has direct impact on Comm2A and its supporters.

Virginia Citizens Defense League is a non-profit, non-partisan, grassroots organization dedicated to advancing the fundamental human right of all Virginians to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution and Article I Section 13 of the Constitution of the Commonwealth of Virginia.

West Virginia Citizens Defense League is West Virginia's largest non-partisan, non-profit, all-volunteer, grassroots organization of concerned West Virginians who support our individual right to keep and bear arms for defense of self, family, home and state, and for lawful hunting and recreational use, as guaranteed by Article III, §22 of the West Virginia Constitution and the Second Amendment of the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari to reaffirm key principles concerning the scope and substance of the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Court held that the Second Amendment confers an individual right to keep and bear arms for self-defense, and in *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010), confirmed that this right is a fundamental one.

Many lower courts have taken great pains to avoid the consequences of these decisions—defying a fundamental constitutional limitation this Court made explicit in *Heller*: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 635 (emphasis in original). Stated another way, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636.

At the forefront of this resistance is the lower courts' refusal to follow this Court's command, made in *Heller* and reiterated in *McDonald*, that Second Amendment claims are not to be judged by unrestrained judicial interest balancing. Here, the Ninth Circuit panel not only engaged in the now-common lower-court practice of weighing citizens' Second Amendment rights against the stated policy goals of the local government, it ventured where no other court (so far) has been will-

ing to go: defiance of one of *Heller*'s central holdings.

Whether through summary reversal or plenary review, this Court's intervention is necessary to prevent further erosion of the Second Amendment principles outlined in *Heller* and *McDonald*.

ARGUMENT

I. Summary Reversal Is Appropriate Because The Ninth Circuit's Decision Conflicts With One Of *Heller*'s Central Holdings.

Summary reversal is warranted because the Ninth Circuit's decision is plainly contrary to *Heller*. *Heller* is a big, pathmarking decision that left unresolved a number of Second Amendment questions. But on the right to keep and bear arms for self-defense inside the home, *Heller* is clear: the Second Amendment protects a personal right to keep and bear arms for self-defense, which includes the right to keep a "lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635.

Heller expressly considered and found unconstitutional the requirement that handguns in the home "be disassembled or bound by a trigger lock at all times":

> We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the

> core lawful purpose of self-defense and is hence unconstitutional.

Id. at 630.

Petitioners are thus correct that the Ninth Circuit's decision conflicts with this central holding, and summary reversal is therefore appropriate.

II. The Court Should Clarify The Standard Of Review That Applies To Second Amendment Challenges.

That the district court and Ninth Circuit panel here did not find themselves constrained by *Heller*'s treatment of a materially indistinguishable trigger-lock requirement, however, signals a much deeper problem that would not be solved by summary reversal. Plenary review is appropriate here to stem the tide of judicial resistance to Second Amendment rights throughout the Nation's courts, specifically, to address whether the prevailing approach adopted by the lower courts for analyzing Second Amendment claims is consistent with *Heller* and *McDonald*.

A. *Heller* and *McDonald* Expressly Hold That Second Amendment Claims Are Not Subject To An Interest-Balancing Inquiry.

Heller was based on a textual and historical analysis of the Second Amendment. In reaching its decision, the Court expressly rejected the approach advocated by Justice Breyer, who argued that the Court should adopt an "interest-balancing inquiry" akin to intermediate scrutiny.

554 U.S. at 689-91 (Breyer, J., dissenting). Under his standard, courts would "ask[] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," *id.* at 689-90, and "defer[] to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity." *Id.* at 690.

The Court rebuffed Justice Breyer's argument for a "judge-empowering 'interest-balancing inquiry,'" *id.* at 634, and explained:

> We know of no other enumerated constitutional right whose core protection has been subjected to a free-standing "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Id. at 634-35 (emphasis in original). "Like the First [Amendment], [the Second Amendment] is

the very *product* of an interest-balancing by the people . . . ." *Id.* at 635 (emphasis in original).

In *McDonald*, Justice Breyer picked up this torch again, arguing that intermediate-scrutiny-style review is appropriate for Second Amendment claims, 561 U.S. at 922-27 (Breyer, J., dissenting), because "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make." *Id.* at 922.

The Court expressly addressed and rejected this proposal a second time:

> Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.

561 U.S. at 790-91 (citing *Heller*, 554 U.S. at 634). *See also McDonald*, 561 U.S. at 785 ("In *Heller*, … we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing"). In short, *Heller* "neither requires nor permits any balancing beyond that accomplished by the Framers themselves." Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 405 (2009).

B. De Facto Interest-Balancing Is Now The Prevailing Rule In The Lower Courts.

Notwithstanding this Court's explicit direction, the lower courts have adopted a test that requires them to engage in the very sort of interest-balancing *Heller* and *McDonald* forbid. The prevailing two-step inquiry—what Petitioners dub the "post-*Heller* two-step"—purports to graft familiar First Amendment concepts onto the Second Amendment.[2]

First, the court "asks whether the challenged law burdens conduct protected by the Second Amendment," "based on a 'historical understanding of the scope of the [Second Amendment] right,'" "or whether the challenged law falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected.'" *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citations omit-

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[2] This test was first adopted by the Third Circuit in *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010). The *Marzarella* court reasoned that because *Heller* "repeatedly invokes the First Amendment in establishing principles governing the Second Amendment," "the structure of First Amendment doctrine should inform our analysis of the Second Amendment." *Id.* at 89 n.4. The two-step inquiry has since been adopted by a majority of the circuits. *E.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012).

ted; brackets in original), Pet. App. 7. "If a prohibition falls within the historical scope of the Second Amendment," the court then determines "the appropriate level of scrutiny" by engaging in pre-scrutiny scrutiny. That is, the "level of scrutiny" is determined only after scrutinizing "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *Id.* at 960-61 (internal quotation marks and citation omitted), Pet. App. 8.

On this score, the oral argument in *Heller* foreshadowed more than just the valuable "fiddling" and "fumbling" concerns cited by Petitioners with respect to trigger locks and gun safes. *See* Pet. 1, 14. Chief Justice Roberts expressed skepticism about importing the First Amendment's varied and complicated framework into Second Amendment analysis:

> [T]hese various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, … and determine how these—how this restriction and the scope of this right looks in relation to those?

> I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?

Tr. of Oral Arg. at 44, *Heller*, 554 U.S. 570 (2008) (No. 07–290) (Roberts, C.J.).

The prevailing application of this supposed borrowing from First Amendment jurisprudence has led to sharp disagreement among (and within) the lower courts, in no small part because the resulting analysis looks suspiciously similar to the "judicial interest balancing" expressly rejected by the Court. *See* generally *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, --- F.3d ----, 2014 WL 7181334, *7-18 (6th Cir. Dec. 18, 2014) (surveying various approaches and noting that "[a]lthough we might prefer to avoid a scrutiny-based approach altogether, *see Heller*, 554 U.S. at 634-35, [circuit precedent] now compels us to wade 'into the "levels of scrutiny" quagmire'") (quoting *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)) (internal quotation marks omitted).

These decisions follow a similar pattern. First, the court acknowledges *Heller* but conducts scant,

if any, historical analysis.[3] Next, the court weighs the burden on Second Amendment rights (characterizing it as "modest" or "indirect") against the government's proffered interest (often categorized at the most generalized level of "public safety," which is accepted as "substantial" or "important").[4] Compounding the problem, in many cases, is extreme *deference* to the government body restricting law-abiding citizens' possession of firearms that looks and sounds more like rational basis review than heightened judicial scrutiny. *E.g.*, *Drake v. Filko*, 724 F.3d 426, 437-38 (3d Cir. 2013) (deferring to the "predictive judgment" of the state legislature, even though the government provided no evidence to support its claim that the regulation furthered its public safety interest); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 98-99 (2d Cir. 2012) (giving "substantial

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[3] *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (refusing to "engag[e] in a round of full-blown historical analysis"); *id.* at 450-51 (Hardiman, J., dissenting) (criticizing majority for its failure to conduct an appropriate historical analysis).

[4] This case provides a textbook example: The San Francisco ordinance "indirectly burdens the ability to use a handgun, because it requires retrieving a weapon from a locked safe or removing a trigger lock." *Jackson*, 746 F.3d at 964, Pet. App. 15. Indeed, "because it burdens only the '*manner* in which persons may exercise their Second Amendment rights,' the regulation more closely resembles a content-neutral speech restriction that regulates only the time, place, or manner of speech." *Id.* (citation to *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) omitted) (emphasis in original). On the other hand: "'It is self-evident,' *Chovan*, 735 F.3d at 1139, that public safety is an important government interest." *Id.* at 965, Pet. App. 18.

deference" to the state legislature's "belief" that regulation would serve the state's public safety interest).[5] With so many tiers tilted in the government's favor, the inevitable result is to uphold the challenged restriction.

Thus, within a few years, *Heller*'s text- and history-based approach has largely been jettisoned in favor of formulas. Soon after *Heller* was decided, one scholar described the decision in terms that, in retrospect, presaged the dilemma facing a lower court hoping to actually apply *Heller*'s teaching:

> Justice Scalia's landmark ruling merits our attention for its method as well as its result. Behold: a constitutional opinion that actually dwells on the constitution itself!
>
> Most constitutional opinions do not do this. . . . Rather, these opinions often focus more on judicial doctrine—the multi-pronged tests, the tiers of scrutiny, the standards of review, and other implementing formulas and frameworks found in prior judicial rulings.

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[5] Or this case, where the court held the government to the standard needed to justify a zoning restriction on a pornographic theater: "In considering a city's justifications for its ordinance, we do not impose 'an unnecessarily rigid burden of proof ... so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" *Jackson*, 746 F.3d at 965, Pet. App. 18 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52 (1986)).

> At times, the Constitution's language can come to resemble a pea covered by a stack of judicial mattresses—a grain of sand no longer visible, though presumably resting deep inside the pearl of judicial elaboration.

Akhil Reed Amar, Heller*,* HLR*, and Holistic Legal Reasoning*, 122 Harvard L. Rev. 145, 147 (2008). *See also Tyler*, 2014 WL 7181334 at *18 (noting that, despite "intermediate scrutiny's shaky foundation in Second Amendment law," two circuit opinions in 2010 "were enough to trigger the cascade" of First Amendment-based intermediate scrutiny) (citing *Skoien*, 614 F.3d at 641-42, and *Marzarella*, 614 F.3d at 99-101)).[6]

This all amounts to the remarkably odd circumstance where the *Heller* and *McDonald* minority opinions now effectively control the course of Second Amendment litigation in the lower courts. One commentator has gone so far as to declare victory for Justice Breyer. "[The lower courts] have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly defer-

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[6] The *Tyler* court observed that "prior to [*Skoien*] and *Marzzarella*'s planting the tiers-of-scrutiny seed, the courts of appeals had no trouble reviewing Second Amendment challenges without relying on the tiers of scrutiny." 2014 WL 7181334 at *18 n.17 (citing *United States v. Vongxay*, 594 F.3d 1111, 1116-17 (9th Cir. 2010); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010); *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009); and *Houston v. City of New Orleans*, 675 F.3d 441, 451-52 (5th Cir.2012) (Elrod, J., dissenting)).

ential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld." Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-07 (2012). *See also id.* at 757-58 (observing that "the lower court decisions have admirably fulfilled [Justice Breyer's] promise" that whatever standard is used to evaluate Second Amendment claims "will *in practice* turn into an interest-balancing inquiry.") (emphasis in original).

No surprise then that the *Heller* two-step has led to rancorous debate within the lower courts. Several judges have noted that the test strays from *Heller*'s focus on the text and history of the Second Amendment, and defies the Court's admonition that Second Amendment claims are not to be judged by interest balancing. *E.g.*, *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1176 (9th Cir. 2014) (criticizing the analysis of the Second, Third, and Fourth Circuits as "near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*."); *Tyler*, 2014 WL 7181334 at *7 (noting that "[t]here may be a number of reasons to question the soundness of this two-step approach," as "[t]here is significant language in *Heller* itself … that would indicate that lower courts should not conduct interest balancing or apply levels of scrutiny."); *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a bal-

ancing test such as strict or intermediate scrutiny."); *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 338 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) ("[T]he Court's discussion [in *Heller*] leaves no doubt that the original meaning of the Second Amendment, understood largely in terms of germane historical sources contemporary to its adoption, is paramount."); *id.* ("[T]he fundamental right to keep and bear arms is not itself subject to interest balancing. The right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification."); *United States v. Chovan*, 735 F.3d 1127, 1143 (9th Cir. 2013) (Bea, J., concurring) (citing Judge Kavanaugh's dissent in *Heller II*); *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting) (characterizing the majority opinion's deference to state legislature as "akin to engaging in the very type of balancing that the *Heller* Court explicitly rejected."); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 701-02 (7th Cir. 2011) (determining the scope of the Second Amendment requires a "textual and historical inquiry into original meaning," "not interest-balancing").

There is thus a clear divide between those courts that nod along to *Heller* as they perform the post-*Heller* two-step (but actually apply Justice Breyer's deferential interest-balancing inquiry), and those courts determined to review Second Amendment claims in a manner consistent with *Heller* and *McDonald*. In the meantime, as more lower courts apply more layers of scrutiny that defer to state and local government policy choices (the supposed *process* of reviewing Second

Amendment claims under *Heller* and *McDonald*), those governments become all the more emboldened to push the envelope with regulations that become the functional equivalent of the outright bans on possession in the home (the *substance* of the "core" right recognized in *Heller* and *McDonald*).

The petition should be granted to clarify the standard governing Second Amendment challenges, and to confirm that courts must be guided by text and history rather than judicial interest balancing.

CONCLUSION

For these reasons, and those stated by petitioners, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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