Appeal No. 21-11681

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

MARTIN J. WALSH,
Secretary of Labor

Petitioner,

v.

TAMPA ELECTRIC COMPANY,

U.S. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISION[1]

Respondent.

On Appeal from the United States of America
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
OSHRC Docket No. 17-2144

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, GLOBAL COLD CHAIN ALLIANCE, THE INTERNATIONAL INSTITUTE OF AMMONIA REFRIGERATION, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT

[1] The Occupational Safety and Health Review Commission is not an active party to this appeal. *See Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1184 (3rd Cir. 1980).

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

11th Cir. R. 26.1-1 Certificate of Interested Persons and Corporate Disclosure Statement requires that every party and *amicus curiae* include a certificate of interested persons and corporate disclosure statement with every motion, petition, brief, answer, response, and reply filed. The second and all subsequent briefs filed may include only persons and entities omitted from the Certificate of Interested Persons contained in the first brief filed and in any other brief that has been filed.

Amici, through undersigned counsel, hereby certify that they know of the following ***additional*** persons who may have an interest in the outcome of this case:

Compere, Eric L., Attorney for *Amici*

Edison Electric Institute, *Amicus Curiae*

Global Cold Chain Alliance, *Amicus Curiae*

Hammock, Bradford T., Attorney for *Amici*

The International Institute of Ammonia Refrigeration, *Amicus Curiae*

Littler Mendelson, P.C., Attorneys for *Amici*

Martin, Sarah M., Attorney for *Amici*

The National Association of Manufacturers, *Amicus Curiae*

The Edison Electric Institute ("EEI") is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. EEI has no

parent corporation and no publicly held company has 10% or greater ownership in EEI.

The Global Cold Chain Alliance ("GCCA") is an alliance of four core partner associations, and has no parent entity and has no subsidiaries. No publicly-traded company owns 10% or more of GCCA.

The International Institute of Ammonia Refrigeration ("IIAR") is a 501(c)(6) non-profit association and has no parent entity. IIAR staff support a foundation, Ammonia Refrigeration Foundation ("ARF"), which is a 501(C)(3) non-profit, and is a separate legal entity. No publicly-traded company owns 10% or more of IIAR.

The National Association of Manufacturers ("NAM") has no parent entity and has no subsidiaries. No publicly-traded company owns 10% or more of NAM.

Dated: November 1, 2021

s/Bradford T. Hammock

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I. INTERESTS OF THE *AMICI*

Edison Electric Institute ("EEI"), Global Cold Chain Alliance ("GCCA"), The International Institute of Ammonia Refrigeration ("IIAR"), and The National Association of Manufacturers ("NAM") are filing this *amicus curiae* brief in support of Respondent, Tampa Electric Company ("TECO").

EEI is an association that represents all United States investor-owned electric companies. Its members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. In addition to its U.S. members, EEI has more than 65 international electric companies as International Members, and hundreds of industry suppliers and related organizations as Associate Members. Organized in 1933, EEI provides public policy leadership, strategic business intelligence, and essential conferences and forums.

GCCA serves more than 1,100 companies in 85 countries who serve the food industry by providing third-party, temperature-controlled supply chain services, and serves as the focused voice of the cold chain industry. GCCA is a platform for communication, networking, and education for each link of the cold chain. The cold chain refers to the temperature management of perishable products in order to maintain quality and safety from the point of slaughter or harvest through the distribution chain to the final consumer. GCCA members make extensive use of

ammonia as a refrigerant.

The IIAR is the world's leading advocate for the safe, reliable, and efficient use of ammonia and other natural refrigerants. IIAR members share their collective knowledge and experience to produce consensus documents that address various aspects of the natural and industrial refrigeration industry. IIAR has broad industry representation including manufacturers, design engineers, contractors, end users, academics, scientists, and trainers. IIAR sets the standard for providing advocacy, education and the most up-to-date technical information to the ammonia and natural refrigeration community.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.35 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the Nation.

Amici collectively represent employers and subject matter experts who work with ammonia and are subject to the Occupational Safety and Health Administration's ("OSHA") Hazardous Waste Operations and Emergency Response

("HAZWOPER") standard (29 C.F.R. 1910.120). A ruling in this matter that adopts OSHA's newly asserted interpretation of the scope and coverage of 29 C.F.R. 1910.120(q) would severely impact operations involving ammonia and other hazardous chemicals and would do so in a broad range of industries. More importantly, if adopted, OSHA's interpretation would not advance safety for employers and employees that manage risks associated with ammonia on a daily basis.

Participation of *Amici* will help this Court understand the historical practice of industry in responding to chemical releases and the reliance of industry on past OSHA interpretations of the HAZWOPER standard. It will also help inform the Court of the practical impact of OSHA's "new" interpretation of the HAZWOPER standard on employers across the country.

Petitioner and Respondent do not oppose participation of *Amici* as *Amicus Curiae* in support of Respondent.

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* state: (1) no party's counsel authored this brief; (2) no party nor their counsel contributed money to fund the preparation or submission of this brief; and (3) no person other than *amici* herein contributed money intended to fund the preparing and submitting of this brief.

II. SUMMARY OF ARGUMENT

The arguments OSHA is setting forth in support of its case against Tampa

Electric Company ("TECO"), if accepted as precedential, will have wide-reaching and negative effects across industry, including with respect to worker safety and health.

OSHA is ignoring its past letters of interpretation regarding when emergency response operations are triggered under the HAZWOPER standard, which industry has relied upon for over thirty years. Specifically, OSHA has for *decades* taken two positions upon which industry has heavily relied: first, that the term "immediate release area" can be the entire geographic boundary of an employee's assigned work area; and second, that emergency response requirements cannot be reduced to a simple formula, such as whether a responding employee is close enough (or not close enough) to witness a particular occurrence. OSHA's position has been that employer responses to chemical releases require a judgment call considering a number of factors by highly trained employees. TECO followed OSHA's previous positions in responding to the release at issue in this case.

Unfortunately, OSHA – presumably not approving of TECO's response to the release at issue – has completely changed its position regarding responding to chemical releases and seeks this Court's approval of the change. The effect would be to require employers to fully implement the emergency response requirements set forth in 29 C.F.R. 1910.120(q) in virtually *all* releases of any chemical. OSHA's position not only threatens to upend years of reasonable industry reliance on

positions announced by OSHA, but will detract from safety.

OSHA should not be allowed to effectuate such quasi-legislative change in the context of an enforcement proceeding, without notice or consideration of the impact on various stakeholders. Furthermore, it puts employers in the impossible position of "projecting" how OSHA may view a response to a release, given the Agency's shifting and inconsistent views of the application of the performance-based HAZWOPER standard.

In practice, employers on a daily basis must use their judgment and training to respond to situations that may occur throughout power plants, manufacturing facilities, and other work environments. And when OSHA promulgated the HAZWOPER standard, it appeared to understand that. With OSHA's approach here and as set forth in OSHA's opening brief, employers can no longer exercise this flexibility and would be subject to an endless cycle of "Monday-morning quarterbacking" from OSHA, without any recognition from the Administration of the extensive training and response procedures put in place by employers subject to the HAZWOPER standard to handle chemical releases and to handle them safely.

III. ARGUMENT

A. The HAZWOPER Standard.

This case involves the HAZWOPER standard for general industry, set forth at 29 C.F.R. 1910.120. The purpose of the standard is "to protect workers and enable

them to handle hazardous substances safely and effectively." *See* OSHA, Safety and Health Topics: Hazardous Waste Operations and Emergency Response (HAZWOPER), available at https://www.osha.gov/emergency-preparedness/hazardous-waste-operations/background (last visited Oct. 27, 2021). The standard covers a variety of operations, including and as relevant here, emergency response to incidents involving hazardous substances such as ammonia. 54 Fed. Reg. 9294 (Mar. 6, 1989). To that end, the HAZWOPER standard sets forth the requirements for emergency response at paragraph (q).

"Emergency Response," is a defined term that must be met to trigger the extensive requirements of paragraph (q) of the standard to protect employees that would be required to address a significant release of a hazardous chemical. 29 C.F.R. 1920.120(a)(3). The definition states that an "emergency response" is:

> [A] response effort by employees from outside the immediate release area or by other designated responders (i.e., mutual aid groups, local fire departments, etc.) to an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance. Responses to incidental releases of hazardous substances where the substance can be absorbed, neutralized, or otherwise controlled at the time of release by employees in the immediate release area, or by maintenance personnel are not considered to be emergency responses within the scope of this standard. Responses to releases of hazardous substances where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure) are not considered to be emergency responses.

29 C.F.R. 1920.120(a)(3).

Once triggered, paragraph (q) imposes multiple requirements, including but

not limited to:

- Activation of a site-specific Incident Commend System (ICS). 29 C.F.R. 1910.120 (q)(3)(i)-(iii).
- Use of required personal protective equipment ("PPE"), including donning of self-contained breathing apparatus while engaged in emergency response until air monitoring establishes a lesser level of respiratory protection is sufficient. 29 C.F.R. 1910.120 (q)(3)(iv).
- Implementation of a buddy system of two or more for operations in the hazardous zone. 29 C.F.R. 1910.120(q)(3)(v).
- Ensuring back-up personnel are equipped and ready to provide assistance or rescues, including basic life support personnel with medical equipment and transportation capability. 29 C.F.R. 1910.120(q)(3)(vi).
- Designation of a safety officer with specific responsibility to identify and evaluate hazards and to provide direction. 29 C.F.R. 1910.120(q)(3)(vii).
- Implementation of decontamination procedures. 29 C.F.R. 1910.120(q)(3)(ix).

Implementation of these procedures requires time and extensive resources. Requiring an employer to implement all of these procedures in any non-trivial[2]

[2] Opening Brief at 43.

release of a chemical would prove infeasible and not consistent with OSHA's original intent in promulgating the HAZWOPER standard.

That is why the definition of "emergency response" provides that responses to lesser events do not trigger paragraph (q). An interpretation of the HAZWOPER standard that requires employers to follow all of the requirements of paragraph (q) to investigate and address essentially all releases is not only inconsistent with the qualifications in paragraph (a)(3), but also would completely paralyze employers and stymie their risk mitigation processes.

B. No Single Factor Determines Whether Paragraph (q) Is Triggered.

Until this case, OSHA has told American industry that the phrase "immediate release area" was broad enough to encompass employees who respond to releases from the "geographic boundary of the employee's assigned work area." In a 1989 Letter of Interpretation, OSHA stated:

> The "immediate release area" can be the entire geographic boundary of the employee's assigned work area. On a case-by-case basis OSHA will determine whether such employees are capable of responding to incidental releases and will evaluate the emergency response plan, including an evacuation plan, if an emergency situation is possible.[3]

[3] Letter of Interpretation from P. Clark to R. Boggs (July 28, 1989), available at https://www.osha.gov/laws-regs/standardinterpretations/1989-07-28 (last visited Oct. 27, 2021).

OSHA re-affirmed this position in a subsequent 1992 Letter of Interpretation.[4]

OSHA's compliance directives regarding enforcement of the HAZWOPER standard have also made clear that, in determining whether a response is an "emergency" response, no "formula" can be set down[5] but instead employers are expected to weigh various "factors":

> 5. Immediate Release Area. The immediate release area is the area, process, or machine which is creating the hazardous release. This term is not meant to be used exclusively to determine whether a situation is an emergency under this standard. The key factor that must be considered on a case-by-case basis is the actual or estimated exposure or degree of danger to responders, other employees, neighbors, etc. In order to determine this, factors such as the size of the spill/release, the material of the spill, and the location of the incident (e.g., confined space) play a significant role. Emergency planning must take place prior to any releases that pose an emergency. An employer must determine all likely potentials for emergencies using worst-case assumptions and plan response procedures accordingly. Past history of emergencies at the site should be used as a guide.[6]

What OSHA's previous interpretations and the above-referenced enforcement directive make clear is that employers subject to the HAZWOPER standard must

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[4] Letter of Interpretation from P. Clark to R. Andree (June 29, 1992), available at https://www.osha.gov/laws-regs/standardinterpretations/1992-06-29 (last visited Oct. 27, 2021).

[5] OSHA Directive No. CPL 02-02-073, Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases, at p. 13, available at: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-02-073.pdf

[6] *Id.* at p. 15.

exercise judgement and, based upon their training and expertise, determine whether a chemical release incident warrants application of all of paragraph (q) of the standard, or another safe response. Throughout industry, as set forth below, there are a number of potential events or "releases" that occur frequently that have little impact on workplace safety and health. These are successfully managed by employers – without having to implement the procedures required by paragraph (q).

OSHA's brief, however, would substitute a rigid formula for determining whether the requirements of paragraph (q) apply to a particular situation: that is, if a "responding" employee is not close enough to witness any non-trivial occurrence of a chemical release, then the requirements of paragraph (q) would apply necessarily. This upends decades of regulatory interpretation and would prevent employers from reasonably responding to chemical situations (*e.g.*, odors or perceived odors, small releases) with highly-trained employees based upon procedures that protect the responders, but may not include all of the requirements of paragraph (q).

OSHA's position would also lead to absurd results.

C. OSHA's Arguments Lead To Absurd Results And Must Be Disregarded.

OSHA states that emergency responders should be considered in the "immediate release area" only if they are close enough "to notice" the release occurring and they are there "at the time of the release," which OSHA seems to view

as limited to the inception of the release.[7] OSHA attempts to support its position with reference to a single rule of statutory interpretation: that reading the incidental release exemption to apply to all releases would render the requirement that response efforts to emergencies come "from outside the immediate response area," superfluous.[8] In doing so, OSHA may have forgotten that statutes and regulations are also to be read to avoid absurd results. *Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011) (holding that plain meaning analysis is trumped by the requirement that courts are to avoid absurd results and to read a statute as a whole and not merely individual words in isolation). It is absurd to expect that responses will occur at the inception of a release; in the real world, responses always occur after some delay.

OSHA's interpretation undoubtedly leads to other absurd results and the absurdities are potentially endless. Taking the facts in this case, under OSHA's interpretation, if a security guard noticed a release and called in a responder, paragraph (q) would be triggered because the responder was not close enough to notice the leak. However, if the same release occurred, but the responder noticed the leak, and not the security guard, there is no emergency response required even though the nature of the leak (*i.e.*, the hazard) has not changed. Indeed, any time a sensor detected an ammonia release, the release could *not* be incidental under

[7] Opening Brief at p. 27.

[8] *Id.*

OSHA's interpretation, regardless of the levels detected because no one was there to witness the actual occurrence.

The variations on this theme are endless. More to the point, OSHA's new position does not incentivize safety – having employees in areas where they might not otherwise be, *e.g.*, a machinery room, to avoid emergency response procedures over incidental releases would create more potential exposure. Worse still, although OSHA issued a citation for a violation of one emergency response procedure, paragraph (q) has many requirements – all of which would be triggered in every circumstance identified above. The delay inherent in implementing the procedures would waste valuable time that could allow many otherwise incidental releases to become full blown uncontrolled emergencies.

OSHA's prior position, which focused on the nature of the release, was the reasonable interpretation. Rigid formulas for determining whether an "emergency response" is required are impossible to implement and unreasonable for employers, particularly given OSHA's approach in this case. To "Monday-morning quarterback" every decision an employer makes in attempting to protect employees from a range of releases of chemicals in the worksite is not consistent with the performance-oriented nature of the HAZWOPER standard. The vast majority of chemical releases do not present any hazard to employees.

D. OSHA's Interpretation is Patently Unreasonable.

OSHA claims the interpretation it put forward before the Commission is reasonable, and thus, due deference. Opening Brief at 20; *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144 (1991). In *Martin*, the Supreme Court carefully stated that "although we hold that a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary, we emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is* reasonable." Where an OSHA citation is used as the "initial means" to announce "a particular interpretation," it is appropriate to consider "the adequacy of notice to regulated parties," "the quality of the Secretary's elaboration of pertinent policy considerations," and "other factors relevant" in determining whether "the Secretary's exercise of delegated lawmaking powers" is reasonable. *Martin*, 499 U.S. at 146, 158. Contrary to OSHA's contention, its interpretation is not entitled to deference because both the substance of the interpretation and the manner in which it was made are patently unreasonable and inconsistent with the requirements of administrative law.

1. OSHA provided no notice to impacted parties of its shifting interpretation.

Under the Administrative Procedures Act, rulemaking and adjudicative authorities are separate, and different procedural rules apply to the exercise of such

powers. Rulemaking, for example, must be prospective and must follow notice and comment procedures. 5 U.S.C. § 551, *et seq*. Through adjudication, laws may be established that are both retroactive and prospective, where necessary to fill an interpretive void. In his concurrence in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (finding rule invalid for retroactive application without congressional grant), Justice Scalia explained that an agency may "make law" retroactively through adjudication "where an interpretive rule is held invalid, and there is no pre-existing rule which it superseded." *Bowen*, 488 U.S. at 222. Naturally, it is improper to "make law" in such a way where valid – and contradictory – interpretive authority exists.

As explained, OSHA's definition of "emergency response" under the HAZWOPER standard has been carefully expounded upon through decades of OSHA interpretations. It is improper for OSHA to force a contrary interpretation of the application of the standard through an enforcement proceeding that is entirely inconsistent with the Agency's long-standing interpretations that are *well-known* and *relied upon* by employers subject to the HAZWOPER standard. This does not provide affected parties with appropriate notice.

2. OSHA fails to demonstrate any awareness of pertinent policy issues.

In presenting its interpretation before the Commission, OSHA presented a one-sided analysis and failed to address, or even acknowledge, important

considerations that will impact parties subjected to this standard interpretation and that are relevant to both worker safety and employer feasibility. *Amici* wish to emphasize the practical impact of OSHA's position before this Court.

For example, OSHA's new interpretation would trigger application of paragraph (q) measures to address ammonia (or other chemical releases) where unwarranted by the nature of the hazard. These heightened measures would increase the time it would take personnel to respond to the release, and as a result, increase the duration of the release. All of which increases the hazard to employees.

Indeed, for employers that use ammonia in their operations, small leaks or odors can occur frequently. Ammonia has a strong odor and, even at very small levels, can be noticeable by employers and employees. The vast majority of these "leaks" present no safety or health hazard to employees. However, when odors are detected, employers should investigate the source of the odors. This is important from a safety and health management system perspective. Yet, OSHA's interpretation would seemingly prevent *any* trained personnel from investigating these types of situations or complaints without engaging all of the paragraph (q) requirements.

OSHA's new position would also require more frequent use of emergency response personnel and equipment, such that employers would have no choice but to rely on public responders, such as fire departments. This, in turn, would increase

the demand on local public resources and result in more delay in response. OSHA's brief is oblivious to these real-world consequences. OSHA does not demonstrate any knowledge of what impact, if any, its proffered interpretation of "emergency response" would have on workers or employers subject to the HAZWOPER standard.

Covered employers run the gamut in terms of size, location, and industry. Aside from power plants, ammonia is used extensively in agriculture (raising livestock and crops), manufacturing (chemicals, textiles, metals, latex, pulp, paper), and refrigeration (including food, beverage, and chemical storage). Employers in these industries come in all sizes. Even larger employers may have resources spread between numerous work sites, without a large employee presence at any one site. For smaller employers in particular, the impact of OSHA's "re-interpretation" would be great. OSHA's view would lead to more frequent triggering of a full emergency response – even when not warranted due to the release itself. Many employers would not have enough staff to handle these operations. They would have to outsource these responses, which would increase response times, allowing small releases to develop into bigger problems. Safety will be diminished, not increased.

3. Adopting OSHA's interpretation would create perverse incentives to flout rulemaking procedures.

If OSHA is permitted to change its long-standing and well-established interpretation by offering a new interpretation to the Commission during

enforcement proceedings, OSHA would have strong incentives to avoid the process of promulgating standards through notice and comment in favor of the comparatively easy approach of advancing new policy through adjudications with tilted scales. *See Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820, 830-831 (9th Cir. 2012). Congress established procedures to ensure proper notice to regulated bodies and an opportunity to provide meaningful input and comment in the rulemaking process. Those procedures could be completely circumvented if complete deference were granted by courts to new policy interpretations espoused in adjudications, particularly those with no advance notice.

At bottom, this case crystallizes OSHA's shifting positions and overreach. For over thirty years, OSHA interpreted the HAZWOPER standard in a manner that provided employer flexibility in emergency response and was recognized by the regulated community. Now – in this case – OSHA deviated from that position, issuing citations to TECO for essentially adhering to OSHA's previous interpretations. For an employer that uses ammonia or any other chemical in their operations, OSHA's approach is unmanageable. If OSHA wishes to amend the HAZWOPER standard, it knows how to do so. Changing the standard in the course of an enforcement proceeding is improper.

Ironically, OSHA has sought comment on potentially amending the HAZWOPER standard. In a Request for Information ("RFI"), OSHA inquired of

stakeholders as to the "the range of activities that might constitute emergency response." 72 Fed. Reg. 51735 (Sep. 11, 2007). A section of the announcement, "The Scope of Emergency Response," stated that "it is important to define the scope and nature of work activities that might be called emergency response..." *Id.* at 51738. The Court should be wary of arguments offered by OSHA which, if adopted, would obviate that future rulemaking. Such rulemaking would be the appropriate way to address any potential changes to the standards and would allow for industry stakeholders to provide comments on concerns regarding any new interpretations of the term "emergency response."

OSHA asked the Commission, and now asks this Court, to abandon its long-standing interpretation of the regulatory text of the HAZWOPER standard defining "emergency response," in favor of an interpretation that swallows part of the definition and in practice would negatively impact worker safety and health. The Commission was right to reject it.

IV. CONCLUSION

For the reasons above, OSHA's new interpretation should be rejected and the Commission's ruling affirmed.

Dated: November 1, 2021

s/Bradford T. Hammock

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,886 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4. I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2021, a copy of the foregoing brief was filed electronically, and all counsel of record were served, via the Court's CM/ECF system.

s/Bradford T. Hammock
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