No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; HERCULES INDUSTRIES, INC., a Colorado corporation,
Plaintiffs-Appellees,

v.

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the Department of Health and Human Services; HILDA L. SOLIS, in her official capacity as the Secretary of the Department of Labor; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado (1:12-cv-01123) (Kane, J.)

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO; THE ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; THE INTERFAITH ALLIANCE FOUNDATION; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; THE UNITARIAN UNIVERSALIST ASSOCIATION; AND THE UNITARIAN UNIVERSALIST WOMEN'S FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

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STATEMENT OF *AMICI*

Amici are organizations that have a strong commitment to defending the fundamental right to religious liberty. *Amici* provide this brief to respectfully request that this Court reverse the preliminary injunction entered by the District Court. Specifically, *Amici* argue that Appellees are unlikely to succeed on the merits of their Religious Freedom Restoration Act claim because requiring an employer – particularly a for-profit employer – to provide comprehensive health insurance to its employees does not substantially burden the company's owner's religious exercise.

IDENTITY OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Colorado, the organization's affiliate in Colorado, was founded to protect and advance civil rights and civil liberties, and currently has over 9,500 members in the state. The ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the ACLU routinely brings cases designed to protect individuals' right to worship and express their religious beliefs. At the same time, the

ACLU vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation and entanglement with religion, and strives to advance individual religious liberty. ADL counts among its core beliefs strict adherence to the separation of church and state embodied in the Establishment Clause, and also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. In striving to support a robust, religiously diverse society, ADL believes that efforts to impose one group's religious beliefs on others are antithetical to the notions of religious freedom on which the United States was founded.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in initiating and

supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the fundamental principle of the free exercise of religion. Hadassah strongly believes that women have the right to make family planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral and ethical values. Consistent with those commitments, Hadassah is a strong supporter of the contraceptive rule and an advocate for the position that the rule's implementation does not violate the Religious Freedom Restoration Act.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization, which celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals

into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's Principles state that "[r]eligious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

The Unitarian Universalist Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state. The UUA participates in this *amicus curiae* brief because it believes that the federal

contraceptive rule does not create a substantial burden on religious exercise under the Religious Freedom Restoration Act.

The Unitarian Universalist Women's Federation has had an abiding interest in the protection of reproductive rights and access to these health services since its formation nearly 50 years ago. As an affiliate organization of the Unitarian Universalist Association of Congregations, its membership of local Unitarian Universalist women's groups, alliances and individuals has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights, with the affordable availability of birth control being essential and fundamental. The Unitarian Universalist Women's Federation has long recognized and will continue to oppose structural constraints posed when health care systems and health insurance providers limit or deny access to contraception and other reproductive health care.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* have obtained consent from all parties to file this brief.

AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF

No party's counsel authored this brief in whole or in part. With the exception of *amici*'s counsel, no one, including any party or party's counsel,

contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Appellees are unlikely to succeed on their claim that the federal contraceptive rule, which requires contraception to be offered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), substantially burdens their religious exercise under the Religious Freedom Restoration Act ("RFRA"). Indeed, this Court has already held as much in another materially indistinguishable case, denying a request for an injunction pending appeal in a challenge to the same contraceptive rule at issue here. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012), *application for injunction pending appeal denied*, 133 S. Ct. 641 (Sotomayor, Circuit Justice).

Appellees have failed to show that the contraception rule likely places a "substantial burden" on their free exercise of religion in two ways. First, the connection between the contraceptive rule and any impact on Appellees' religious exercise is simply too attenuated to rise to the level of a "substantial burden." The law does not require Appellees to use contraception themselves, to physically provide contraception to their employees, or to endorse the use of contraception. The contraceptive rule

creates no more infringement on Appellees' religious exercise than many other actions that Appellees readily undertake, such as paying an employee's salary, which that employee could then use to purchase contraception. Second, the employee's independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellees' free exercise.

Furthermore, RFRA does not permit Appellees to impose their religious beliefs on their employees. As another court has noted in upholding the federal contraceptive rule, RFRA "is a shield, not a sword." *O'Brien v. Dep't of Health & Human Servs.*, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). Indeed, "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id.* Accordingly, this Court should reverse the District Court's decision.

ARGUMENT

I. The Federal Contraceptive Rule Does Not Substantially Burden Appellees' Free Exercise of Religion Under the Religious Freedom Restoration Act.

RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to restore the strict scrutiny test for claims alleging substantial burdens on the free exercise of religion. Specifically, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

Although RFRA does not define "substantial burden," this Court has held that "religious exercise is substantially burdened" when the government:

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice – an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.

Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010).[1]

[1] Although *Abdulhaseeb* is a Religious Land Use and Institutionalized Persons Act ("RLUIPA") case, cases under RLUIPA are instructive because that statute also prohibits government-imposed "substantial burdens" on

While a RFRA claim may proceed when the plaintiff alleges that she was forced by the government to act in a manner that is inconsistent with her religious beliefs, this Court has made clear that not "every infringement on religious exercise will constitute a substantial burden." *Id.* at 1316. As the Eleventh Circuit has held, "a substantial burden must place more than an inconvenience on religious exercise," and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[2] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g., Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (the word "substantial" in the "substantial burden" test cannot be

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religion. 42 U.S.C. § 2000cc(a)(1). *See, e.g.*, *Abdulhaseeb*, 600 F.3d at 1313 n.5.

[2] Although some of the cases cited herein are Free Exercise cases decided prior to *Smith*, courts have held that those cases are instructive in the RFRA context "since RFRA does not purport to create a new substantial burden test" but rather restores the pre-*Smith* test. *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007) ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence[.]").

rendered "meaningless," otherwise "the slightest obstacle to religious exercise, . . . however minor the burden it were to impose," could trigger a RLUIPA violation).

The party claiming a RFRA violation must establish that the governmental policy at issue substantially burdens his or her sincerely held religious beliefs. *Abdulhaseeb*, 600 F.3d at 1318. Only after the plaintiff establishes a substantial burden does the burden shift to the government to prove that the challenged policy is the least restrictive means of furthering a compelling government interest. *Id.* Appellees here cannot meet their duty of demonstrating that their religious exercise is substantially burdened.[3]

There is no doubt as to the sincerity of Appellees' religious opposition to contraception. But that does not mean that the courts need not assess whether the contraceptive rule imposes a "substantial burden" on that sincerely held religious belief. To the contrary, that is the proper function of the courts. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (although, on a motion to dismiss, courts assessing RFRA claims must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere

[3] The district court gave short shrift to the question of whether the contraceptive rule substantially burdens religious exercise, devoting a mere three paragraphs to the issue. *Newland v. Sebelius*, No. 1:12-CV-1123-JLK, 2012 WL 3069154, at *6 (July 27, 2012). Nothing in the district court's decision indicates how the contraceptive rule even potentially burdens Appellees' religious exercise.

and of a religious nature," whether those beliefs are "substantially burdened" is a question of law properly left to the judgment of the courts); *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (holding in a RFRA challenge that although the government conceded that the plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

A. The Connection Between the Contraceptive Rule and the Impact on Appellees' Religious Beliefs Is Too Attenuated to Rise to the Level of "Substantial Burden."

The contraceptive rule neither requires employers to physically provide contraception to their employees, nor endorse the use of contraception, and does not prohibit any religious practice or otherwise substantially burden Appellees' religious beliefs. *See Abdulhaseeb*, 600 F.3d at 1315-16. The rule only requires Appellees to provide a comprehensive health insurance plan. While that health insurance plan might be used by a third party to obtain health care that is inconsistent with Appellees' faith, such indirect financial support of a practice from which Appellees wish to abstain according to religious principles does not constitute a substantial burden on Appellees' religious exercise. Indeed, this

Court, in denying a motion for an injunction pending appeal in the *Hobby Lobby* case, held that:

> The particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the corporate plan, subsidize someone else's participation in an activity that is condemned by plaintiff's religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc., No. 12-6294, slip op. at 7 (internal citations and quotations marks omitted), *application for injunction pending appeal denied*, 133 S. Ct. 644 (2012) (Sotomayor, Circuit Justice). Thus, this Court concluded that there was not a substantial likelihood that this Court would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.*

This Court's holding is consistent with other cases presenting similar facts. For example, in *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Appellees' claim here. 94 F.3d 1294 (9th Cir. 1996). In that case, public university students objected to paying a registration fee on the ground that the fee was used to subsidize the school's health insurance program, which covered abortion care. *Id.* at 1297. The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious

beliefs, but at most placed a "minimal limitation" on their free exercise rights. *Id.* at 1300. The court noted that the plaintiffs are not "required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services." *Id.*

Moreover, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals maintain health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *affirming Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The district court held that inconsequential burdens on religious practice, like the requirement to have health insurance, "do[] not rise to the level of a substantial burden." *Mead*, 766 F. Supp. 2d at 42.

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by compliance with the Fair Labor Standards Act ("FLSA"). 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846

(1990). The school paid married male, but not married female, teachers a "salary supplement" based on the school's religious belief that the husband is the head of the household. *Id*. at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers, and accordingly, a violation of FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened its religious beliefs, holding that compliance with FLSA imposed, "at most, a limited burden" on the school's free exercise rights. *Id*. at 1398. "The fact that [the school] must incur increased payroll expense to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id*.; *see also Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

There are strong parallels to the cases cited above and the instant action. Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here.

The mere fact that someone might have used the student health insurance in *Goehring* to obtain an abortion, or the fact that Appellees' employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on others' religious practice. Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their female employees does not substantially burden religious exercise. Appellees remain free to exercise their faith, by not using contraceptives and by discouraging employees from using contraceptives.[4]

Indeed, the burden on Appellees' religious exercise is just as remote as other activities that they subsidize that are also at odds with their religious beliefs. For example, Appellees pay salaries to their employees – money the employees may use to purchase contraceptives. And just as the court recognized in *Mead*, Appellees "routinely contribute to other forms of insurance" via their taxes that include contraception coverage such as Medicaid, and they contribute to federally funded family planning programs. 766 F. Supp. 2d at 42. These federal programs "present the same conflict with their [religious] beliefs." *Id.* But like the federal contraceptive rule, the

[4] Moreover, the same would be true if a company owned by a Jehovah's Witness insisted on excluding blood transfusions from its employees' health plan because of his or her religious beliefs, or if a Christian Scientist business owner refused, in violation of the ACA, to provide health insurance coverage based on his or her religious beliefs.

connection between these programs and Appellees' religious beliefs is too attenuated. Indeed, the Eighth Circuit has held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women).

B. An Employee's Independent Decision to Use Her Health Insurance to Obtain Contraception Breaks the Causal Chain Between the Government's Action and Any Potential Impact on Appellees' Religious Beliefs.

It is a long road from Appellees' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for contraceptives. That is, the independent action of an employee breaks the causal chain for any violation of RFRA. In this respect, the Supreme Court's decision in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), is instructive. In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause because parents' "genuine and independent private choice" to use the voucher to send their children to religious schools broke "the circuit between government and religion." *Id*. at 652. Here, as this Court held, an employer may end up subsidizing activity with which it disagrees only after a "series of independent decisions by health care providers and patients" covered by the

company's health plan. *Hobby Lobby Stores*, No. 12-6294, slip. op. 7. Therefore, as in *Zelman*, this scenario involves an employee's independent and private choice, which breaks the causal chain between government mandate and free exercise of religion. Any slight burden on Appellees' religious exercise is far too remote to warrant a finding of a RFRA violation.

II. RFRA Does Not Grant Appellees a Right to Impose Their Religious Beliefs on Their Employees.

RFRA cannot be used to force one's religious practices upon others and to deny them rights and benefits. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *see Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *see Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, where only the plaintiffs' rights were at issue, Appellees here are attempting to invoke RFRA to deny their female employees, who may have different beliefs – religious or otherwise – about contraception use from their employer, equal health benefits. As this Court has already held, the instant action is different from "other cases enforcing RFRA," which were brought "to protect a plaintiff's *own* participation in (or abstention from) a specific practice required (or condemned) by his religion." *Hobby Lobby Stores, Inc.*, No. 12-6294, slip op. at 7 (emphasis

added). Furthermore, as another court has held, "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien*, 2012 WL 4481208, at *6.

CONCLUSION

Accordingly, this Court should reverse the preliminary injunction entered by the District Court.

January 25, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) and Fed. R. App. P. 29(d) because:

   This brief contains 3,887 words, excluding the parts of the brief exempted by Fed. R. App. P. (a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. 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 in 14-point Times New Roman.

DATED: January 25, 2013

/s/Brigitte Amiri
Brigitte Amiri
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: January 25, 2013

/s/Brigitte Amiri
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

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DATED: January 25, 2013

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