Nos. 23-2134, 23-2216, 23-2958, 23-3035, 24-1352, 24-1884

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES *ex rel.* RONALD J. STRECK,
Plaintiff-Appellee/Cross-Appellant,

vs.

ELI LILLY AND COMPANY,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the Northern District of Illinois, No. 1:14-cv-09412

UNOPPOSED MOTION OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING

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Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the accompanying *amicus curiae* brief in support of rehearing en banc. In support of this motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

2. The False Claims Act ("FCA") affects nearly every sector of the economy, from health care, defense, and construction, to education, banking, and technology. The law is meant to promote the worthy goal of protecting the federal fisc against fraud. But profit-driven relators have invoked the FCA's *qui tam* mechanism, particularly over the past few decades, to pursue cases that do not involve genuine fraud against the United States.

3. As explained in the attached brief, the *qui tam* device is unusual. It deputizes individual relators to exercise executive power and pursue litigation on

behalf of the United States. And that transfer of core executive power from the President to private hands has exacted a substantial toll. Companies frequently spend millions of dollars conducting investigations, fielding discovery demands, and engaging in motions practice—all to defend against baseless allegations that the government has deemed unworthy of prosecution. Those litigation costs quickly add up, and the FCA's prospect of punitive liability always looms large. As a result, even meritless cases can be used to extract enormous settlements. The Chamber's members have a significant interest in avoiding that result.

4. As Justice Thomas recently explained, "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 451 (2023) (Thomas, J., dissenting). Justices Kavanaugh and Barrett have agreed that there are "substantial arguments" to support that view. *Id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring) (citation omitted). And so have other judges. *See United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1324 (M.D. Fla. 2024) (holding that the FCA's *qui tam* provisions violate Article II); *United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A.*, 133 F.4th 395, 411 (5th Cir. 2025) (Duncan, J., concurring) ("[I]t seems inescapable that the FCA's *qui tam* device violates the Appointments Clause"; and the device also "violates the Take Care Clause.").

5. The Petition here squarely tees up these important constitutional issues, and the Chamber believes that its brief will assist the Court in deciding whether to take this case en banc to resolve these "complex" matters. *Polansky*, 599 U.S. at 452 (Thomas, J., dissenting). The Chamber has regularly participated as *amicus curiae* in FCA cases across the country—including in several related to the constitutionality of the Act's *qui tam* provisions. *See, e.g.*, Br. of *Amicus Curiae* Chamber of Com. & Am. Tort Reform Ass'n, ECF 40, *United States ex rel. Penelow v. Janssen Prods. LP*, No. 25-1818 (3d Cir. July 21, 2025); Br. of *Amicus Curiae* Chamber of Com., ECF 101, *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, Nos. 24-13581, 24-13583 (11th Cir. Mar. 17, 2025); Br. of *Amicus Curiae* Chamber of Com., ECF 294, *United States ex rel. D'Anna v. Lee Mem. Health Sys.*, No. 2:14-cv-00437-JLB-NPM (M.D. Fla. July 2, 2024); Supp. Br. of *Amicus Curiae* Chamber of Com., ECF 262, *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-cv-01236-KKM-SPF (M.D. Fla. May 21, 2024); Br. of *Amicus Curiae* Chamber of Com., ECF 187-1, *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-cv-01236-KKM-SPF (M.D. Fla. Feb. 23, 2024); Br. of *Amicus Curiae* Chamber of Com., ECF 398-1, *United States ex rel. Shepherd v. Fluor Corp.*, No. 6:13-cv-02428-JD (D.S.C. Dec. 13, 2023).

6. In the attached brief, the Chamber explains why *qui tam* lawsuits like this one transgress Article II's limitations. Resolving these Article II issues requires

a deep understanding of English and Founding-era history and the Framers' conception of executive power. The Chamber's brief draws from many historical sources not covered by the Parties to facilitate this understanding.

7. The Chamber therefore respectfully requests that the Court grant leave for the Chamber to file the accompanying brief as *amicus curiae* in support of the petition for rehearing en banc.

8. Counsel for the Chamber has contacted counsel for the parties, which do not oppose this motion.

Respectfully Submitted,

/s/ Steven A. Engel

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I caused the foregoing motion for leave to file an *amicus curiae* brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit. The Court's CM/ECF system was used to file the motion, and service will therefore be accomplished by the CM/ECF system on all CM/ECF-registered counsel.

Dated: November 3, 2025

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 812 words, excluding those portions of the motion exempted by Fed. R. App. P. 32(f). This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-pt font.

Dated: November 3, 2025

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2134 (L)

Short Caption: United States ex rel. Streck v. Eli Lilly & Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Attorney's Signature: /s/ Brian A. Kulp Date: 11/3/25

Attorney's Printed Name: Brian A. Kulp

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(Revised to include Dechert LLP)

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Attorney's Signature: /s/ Mariel A. Brookins Date: 11/3/25

Attorney's Printed Name: Mariel A. Brookins

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

In recent years, profit-driven relators have invoked the unusual *qui tam* mechanism of the False Claims Act ("FCA") to exact a substantial toll on businesses nationwide. The Chamber has a significant interest in preventing such harm to its members. It therefore submits this brief to explain why FCA *qui tam* lawsuits violate Article II of the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article II vests "[t]he executive Power" in one elected President, who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. The Framers adopted that unitary structure to promote accountability and ensure that "a President chosen by the entire Nation" would "oversee the execution of the laws." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). Yet the President can ensure

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

that the laws are faithfully executed only when he "oversee[s] the faithfulness of the officers who execute them." *Id.* at 484.

The FCA's *qui tam* provisions violate this core constitutional requirement by wresting the executive Power from the President's hands. Private relators are not injured parties seeking to recover for personalized harms. They are unaccountable bounty hunters charged with pursuing claims that, in their judgment, the Executive should have asserted. All the while, they are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

This Court has defended the *qui tam* provisions based on their statutory "pedigree." *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 847 (7th Cir. 2020). But the "adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text"—even laws passed near the Founding—"cannot overcome or alter that text." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 36 (2022) (citation omitted). And the *qui tam* provisions' historical roots are limited at best. Many of the early enactments provided relators with only a bounty, not a cause of action, and many applied only to relators who *themselves* suffered injury. In all events, these long-repealed *qui tam* statutes—some of which authorized private *criminal* enforcement—reflected an ill-considered, pre-

ratification understanding of the Chief Executive. They cannot excuse the manifest conflict between the FCA's *qui tam* provisions and Article II's text.

Since this Court last addressed this constitutional question, three Justices have recognized that "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 451 (2023) (Thomas, J., dissenting); *see also id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring). The Court should grant rehearing en banc to consider this fundamental constitutional question anew.

ARGUMENT

The FCA's *qui tam* provisions violate Article II several times over. They empower self-appointed private persons to initiate and conduct litigation for the United States, in violation of Article II's Vesting Clause and Appointments Clause. And they inhibit both the President's prosecutorial discretion and his control over declined *qui tam* actions, in violation of the Take Care Clause.

I. The False Claims Act's *Qui Tam* Provisions Violate Article II's Vesting Clause.

Congress may not authorize bounty hunters to litigate for the United States. Rather, the Framers understood that "[a] basic step in organizing a civilized society" was to take the "sword" of law-enforcement actions "out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson*

v. United States ex rel. Watson, 560 U.S. 272, 282-83 (2010) (Roberts, C.J., dissenting from dismissal of writ of certiorari as improvidently granted). To that end, the Constitution vested "[t]he executive Power" in a single "President," U.S. Const. art. II, § 1, cl. 1, establishing a unitary and accountable Executive who alone would be responsible for enforcing federal law.

This conception of centralized executive authority finds roots in the work of John Locke. As he explained, "in the state of Nature[,] every one has the executive power of the law of Nature." John Locke, *Two Treatises on Civil Government* 197 (George Routledge & Sons ed., 1884) ("Locke"). But "when they enter into society," individuals "give up" the "executive power they had in the state of Nature into the hands of the society." *Id.* at 258.

William Blackstone expressed the same understanding. "In a state of society," he reasoned, the right "to put [the law] in execution" is "transferred from individuals to the sovereign power," who "alone" bears "the sword of justice by the consent of the whole community." 4 William Blackstone, *Commentaries on the Laws of England* *7-8 (1769) ("Blackstone"). And when the public "delegate[s] all its power and rights, with regard to the execution of the laws, to one visible magistrate," that officer is "the proper person to prosecute for all public offences." 1 Blackstone *258-59. Vindicating those public rights is his exclusive prerogative.

Of course, the common law recognized that one who "suffered the damage" from a public infraction might demand redress "in his own name." Locke 196. But he could not pursue relief on the public's behalf. "[N]o person" other than the official entrusted with the executive authority "can have an action for a public nuisance, or punish it," unless that "private person suffers some extraordinary damage." 3 Blackstone *219-20. That is because "the law gives no *private* remedy for any thing but a *private* wrong." *Id.* at *219.

The Framers enshrined this basic understanding in Article II. By entrusting "the President alone" with "all" executive Power, the Framers sought to ensure that he would remain accountable for all those who act on his behalf. *Seila Law LLC v. CFPB*, 591 U.S. 197, 203, 213 (2020). It is therefore "utterly inadmissible" for Congress to vest executive authority "in any other person." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816).

Yet that is precisely what the FCA's *qui tam* provisions do. Congress "sought to disperse some quantum of executive authority amongst the general public." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 750 (9th Cir. 1993). That defies the "[s]ettled rule" that courts will not entertain "any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States," unless the Executive represents the government. *Confiscation Cases*, 74 U.S. 454, 457 (1869). Congress's redelegation of the executive Power to private

parties thus thwarts the Constitution's assignment of that power to the President alone.

II. The False Claims Act's *Qui Tam* Provisions Violate the Appointments Clause.

The *qui tam* provisions also conflict with the Appointments Clause, which ensures that executive Power is exercised only by appointed "Officers of the United States." U.S. Const. art. II, § 2, cl. 2.

The key test for an "Officer" is whether the person "exercis[es] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). That includes the power to "conduct[] civil litigation in the courts of the United States for vindicating public rights." *Id.* at 140. But that describes an FCA relator's power to a tee: The relator may sue "for the United States" and "in the name of the Government" for "penalt[ies]" and "damages which the Government [has] sustain[ed]." 31 U.S.C. §§ 3729(a)(1), 3730(b)(1).

Buckley forbids such diffusion of executive Power. There, the Court struck down the FEC's original structure, which permitted congressional leaders to appoint commissioners. *See* 424 U.S. at 113. That violated the Appointments Clause, because the commissioners performed executive "functions" by wielding "enforcement power" to "seek judicial relief" for violations of law. *Id.* at 138-40. Such executive "functions may be discharged *only* by persons who are 'Officers of the United States' within the language" of the Appointments Clause—and who are

appointed consistent with its constitutionally prescribed method. *Id.* at 140 (emphasis added). Relators, however, appoint themselves.

Some courts have countered that relators lack a "continuing and formalized relationship of employment with the United States." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (en banc). But that makes the relator's exercise of prosecutorial power all the worse. Indeed, *Morrison v. Olson* held that an independent counsel—a temporary prosecutor appointed for one investigation—was "clear[ly]" an "'officer' of the United States." 487 U.S. 654, 671 & n.12 (1988); *see also United States v. Donziger*, 38 F.4th 290, 299 (2d Cir. 2022) (same, for court-appointed "special prosecutor").

As in *Morrison*, a *qui tam* relator functions as a single-case officer empowered to sue for the government. While the "office is limited in tenure" and "'temporary' in the sense that [relators are] appointed essentially to accomplish a single task," those limits do not foreclose officer status "in the constitutional sense." 487 U.S. at 671-72 & n.12. Rather, "the office of an FCA relator is continuous" by operation of law, "even if it is not continually filled." *United States ex rel. Zafirov v. Fla Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1300 (M.D. Fla. 2024). And the FCA empowers private individuals to appoint themselves. That arrangement runs afoul of the Appointments Clause.

III. The False Claims Act's *Qui Tam* Provisions Violate the Take Care Clause.

The *qui tam* provisions violate the Take Care Clause too. The Framers knew there "can be no liberty" if a single body "should enact tyrannical laws," to have them then "execute[d]" "in a tyrannical manner." The Federalist No. 47, at 300 (Clinton Rossiter ed., 2003) (James Madison) (emphasis omitted). So they divided the Nation's lawmaking and law-enforcement powers. That separation of functions "helps prevent tyranny precisely because a discretionary decision by executive officers intervenes between the enactment of the prohibition and its application to any particular individual." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 702 (2014).

By entrusting the President alone to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, the Constitution provides that "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). For good reason: "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's" compliance with the law. *Id.*

The FCA's *qui tam* provisions thus conflict with the Take Care Clause, by permitting unharmed private parties to commandeer the Executive's enforcement

discretion and decide whether, where, when, and how to sue. This "allows Congress to circumvent the Executive's check and to have its laws enforced directly by its own private bounty hunters." *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 211 (1989) ("OLC Memo"). Not only does this reallocation of power threaten individual liberty; it necessarily undermines the Executive's "overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

That is why the Framers entrusted these enforcement decisions to one, publicly accountable President. "[O]nly a unitary executive properly can balance the competing interests at stake, including law enforcement, foreign affairs, national security, and the overriding interest in just administration of the laws." OLC Memo 232. That is, only the President can "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, so as to best serve the "public-welfare needs of the American people," *United States v. Texas*, 599 U.S. 670, 680 (2023).

IV. History Cannot Salvage the *Qui Tam* Provisions' Affront to Article II.

History cannot wash away these constitutional shortcomings. After all, "[t]he Constitution, not history, is the supreme law." OLC Memo 233; *see Bruen*, 597 U.S. at 36. Historical practice thus cannot cure constitutional infirmities even when it "covers our entire national existence and indeed predates it." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970).

At any rate, *qui tam* suffers from a checkered history. In medieval England, *qui tam* "proved a vexatious device that ultimately could not be reconciled with the institutions of free and responsible government." OLC Memo 235. Accordingly, "many of the old [*qui tam*] enactments were repealed" entirely by the Jacobean era. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000).

Some English *qui tam* statutes did remain up through the Founding. But even those provide little support for the FCA's *qui tam* regime: "[T]he Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural departure from the English system of parliamentary supremacy, from which many legal practices like *qui tam* were inherited." *Polansky*, 599 U.S. at 450 (Thomas, J., dissenting).

Nor do the First Congress's actions change the constitutional calculus. Many early *qui tam* enactments are not "relevantly similar" to the current FCA. *Bruen*, 597 U.S. at 29. The FCA places unharmed plaintiffs in the government's shoes to litigate on its behalf. But most early statutes offered only a reward to informers, without providing a cause of action. *See Zafirov*, 751 F. Supp. 3d at 1319-20. Others sought to redress private injuries, with the government receiving only incidental recoveries. *See id.* These two categories differ in kind from the current FCA and thus have little bearing on the inquiry.

As to the few enactments that allowed informers to pursue sovereign claims, these "were essentially stop-gap measures, confined to narrow circumstances" to assist the fledging Executive. OLC Memo 213. And the "transitory and aberrational" *qui tam* device "never gained a secure foothold within our constitutional structure." *Id.* It produced "little actual litigation" and was curtailed by Congress in short order. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 728 (2004).

Tellingly, there is "no evidence" Congress ever "considered the constitutional status of qui tam." OLC Memo 214. The early *qui tam* statutes instead have all the hallmarks of action "taken thoughtlessly, by force of long tradition" from an archaic English device, "and without regard to the problems" presented to the new constitutional order. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

Reliance on early congressional practice also proves too much. For some "qui tam provisions authoriz[ed] individuals to sue under *criminal* statutes to help enforce the law." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 296-97 & n.104 (1989) (emphasis added). The government can hardly dispute that outsourcing such "core executive power" to the plaintiffs' bar would violate Article II. *Seila Law*, 591 U.S. at 219.

For all these reasons, "postenactment history" should not receive "more weight than it can rightly bear." *Bruen*, 597 U.S. at 35. The FCA's *qui tam*

provisions conflict with the original meaning of Article II's text. Rehearing en banc is necessary to restore the constitutional order.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,593 words, excluding the parts exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Dated: November 3, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I caused the foregoing Brief to be filed electronically with the Clerk of Court of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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