ORAL ARGUMENT NOT YET SCHEDULED

No. 18-3052

IN THE

United States Court of Appeals for the District of Columbia Circuit

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
GRAND JURY ACTION NO. 18-34 (BAH)

MOTION FOR LEAVE TO INTERVENE OF CONCORD MANAGEMENT AND CONSULTING LLC

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PRELIMINARY STATEMENT

Concord Management and Consulting LLC ("Concord") seeks permission to intervene in this appeal from a contempt ruling by Chief Judge Beryl A. Howell in grand jury proceedings that specifically and definitively resolved constitutional challenges to the appointment of Special Counsel Robert S. Mueller III. In reaching her ruling, Chief Judge Howell expressly considered a brief Concord itself filed in its own criminal case brought by the same Special Counsel, effectively denying Concord's motion to dismiss the indictment against it before Concord's motion was heard in its own case. And, although based on different rationales than those of Chief Judge Howell, Judge Dabney L. Friedrich later issued a ruling denying those same challenges in Concord's case. In these unique circumstances, Concord should be permitted to intervene in this appeal. Otherwise, if subsequently convicted at trial, it could be foreclosed from advocating on its own behalf as to the constitutional issues that should have barred its prosecution in the first place.

On June 25, 2018, Concord, a defendant in a criminal case brought by the Special Counsel pending before Judge Friedrich, moved to dismiss the indictment on grounds that the Special Counsel's appointment violated the Appointments Clause of the U.S. Constitution. Three days later, and without Concord's knowledge, Appellant here, Mr. Andrew Miller—the target of grand jury subpoenas in a proceeding overseen by Chief Judge Howell—attached Concord's 50-page motion-to-dismiss brief as an exhibit to his motion to quash the subpoenas and expressly incorporated

Concord's arguments into his motion. Chief Judge Howell allowed the incorporation even though it exceeded the local rules for page limitations, issued a 92-page ruling specifically rejecting ***Concord's*** arguments, with no less than 22 citations to Concord's brief, and decided the Appointments Clause issues adversely to Mr. Miller and Concord. That ruling is now on appeal in this proceeding.

Concord was not a party to the motion proceeding or hearing before Chief Judge Howell, which were conducted in secret. Yet, this appeal plainly will address and resolve legal arguments critical to Concord's own constitutional challenge to the Special Counsel. Basic fairness therefore dictates that Concord should be permitted to participate in this appeal. So do the settled principles that govern intervention.

With respect to Concord's intervention, this appeal presents the substantial likelihood that this Court will resolve the lawfulness and constitutionality of the Special Counsel's appointment and issue a ruling with *stare decisis* effect for future panels of this Court. Given the proceedings below, specifically Chief Judge Howell's explicit consideration and rejection of Concord's arguments, it is inevitable that arguments developed and advanced by Concord will be addressed in the course of resolving this appeal. As a result, a decision in this appeal will impact, directly,

Concord's constitutional right to have a lawfully appointed prosecutor in its own case.[1]

BACKGROUND

In May 2018, the Special Counsel served Mr. Miller with two subpoenas to produce documents and appear before the grand jury. ECF No. 32-3 at 19. After he failed to appear, the Special Counsel moved to compel and for an order to show cause why Mr. Miller should not be held in contempt. *Id.* at 22. On June 18, Chief Judge Howell granted the Special Counsel's motion to compel and directed Mr. Miller to appear before the grand jury on June 28. *Id.*

Meanwhile, a separate case brought by the Special Counsel, *United States v. Internet Research Agency LLC et al.*, No. 1:18-cr-32-DLF (D.D.C.), was proceeding before Judge Friedrich. In February 2018, a grand jury returned an indictment against thirteen individual and three corporate defendants, including Concord, alleging a conspiracy to interfere with the U.S. political and electoral process. Case No. 1:18-cr-32-DLF-2 (D.D.C.), ECF No. 1. Concord, a company with no presence in the United States, voluntarily appeared and on June 25, 2018, it moved to dismiss the indictment on grounds that (1) the appointment of the Special Counsel violates the

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[1] Concord intends to file a timely notice of appeal from Judge Friedrich's August 13, 2018 ruling. It is anticipated that the Special Counsel will contest this Court's jurisdiction to entertain Concord's appeal. Concord's intervention here, however, rests on independent grounds consistent with Federal Rule of Civil Procedure 24.

Appointments Clause, U.S. Const. art. II, § 2, cl. 2; (2) the regulations governing the Special Counsel, 28 C.F.R. pt. 600, are unlawful and violate core separation-of-powers principles; and (3) even if the regulations are valid and binding, the order appointing the Special Counsel is inconsistent with the regulations and does not authorize a prosecution against Concord. *See* Case No. 1:18-cr-32-DLF-2 (D.D.C.), ECF No. 36.

Three days after Concord filed its motion, Mr. Miller filed under seal a motion to quash the grand jury subpoenas. ECF No. 10. In that motion, he challenged the Special Counsel's appointment and expressly incorporated Concord's 50-page memorandum of law into his own 21-page memorandum. *Id.* at 2 & Ex. 5. The next day, Chief Judge Howell issued an expedited briefing and hearing schedule. *See* Minute Order (June 29, 2018). The parties then filed their respective briefs under seal and on July 18, Chief Judge Howell heard argument in a sealed courtroom. ECF No. 32-3 at 23.

Less than two weeks later, on July 31, 2018, Chief Judge Howell issued a sealed order denying the motion to quash, with an accompanying 92-page memorandum opinion. In her opinion, Chief Judge Howell acknowledged that Mr. Miller "adopt[ed] and incorporate[d] by reference th[e] same arguments" advanced by Concord. ECF No. 32-3 at 22 (citation omitted). She went on to conclude that, even though the court's local rules limit memoranda of law to 45 pages, she would consider and rule upon the arguments raised in Concord's 50-page memorandum:

> Sifting through Concord's arguments to determine which apply here poses little difficulty, however, as the witness and Concord raise overlapping, if not entirely identical, arguments that turn on pure issues of law common to both litigants rather than facts peculiar to them. Thus, despite the page limit's unsanctioned exceeding, the Court exercises discretion to hear arguments raised in Concord's memorandum to the extent such arguments overlap with those the witness presents.

ECF No. 32-3 at 23 n.9. Chief Judge Howell proceeded to cite Concord's motion and memorandum no less than 22 times in her opinion, explicitly rejecting each of Concord's challenges to the constitutionality of the Special Counsel's appointment. *Id.* at 36–80.

After Chief Judge Howell's ruling, Mr. Miller still failed to appear. Accordingly, on August 10, 2018, he was held in civil contempt. ECF Nos. 36, 39. Three days later, he filed his notice of appeal. ECF No. 39.

In the meantime, on August 3, Judge Friedrich held a hearing on Concord's motion to dismiss and considered the same arguments that Chief Judge Howell had rejected a few days earlier. *See* Case No. 1:18-cr-32-DLF-2, Minute Entry (Aug. 3, 2018). Because Concord did not obtain Chief Judge Howell's opinion until 24 hours prior to that hearing, and as such had no opportunity to address it, Judge Friedrich suggested that she might not consider Chief Judge Howell's opinion in reaching her own decision. *Id.*, Hr'g Tr. at 73:22–23, ECF No. 57. Judge Friedrich subsequently issued her own memorandum opinion denying Concord's motion to dismiss on August 13, later issuing one with clerical errors corrected. *Id.*, ECF No. 58 ("Friedrich Op."). In her ruling, and unlike Chief Judge Howell, Judge Friedrich found many of

Concord's arguments well-supported, and cast doubt on certain of the Special Counsel's arguments. *See, e.g.*, *id.* at 18 (agreeing with Concord that "[a]t the very least, some Special Counsel decisions remain insulated from review or countermand"); *id.* at 20 ("There is reason to think . . . that the Special Counsel regulations afford the Special Counsel more substantial protection against removal, and thus risk rendering him a principal officer."); *id.* at 35 (concluding that the statutes cited by the Special Counsel "'do not explicitly authorize' the Acting Attorney General to appoint the Special Counsel" as required by the Appointments Clause) (citation omitted).

Indeed, Judge Friedrich's interpretation of the statutes that the Special Counsel claimed provide the authority for his appointment contradicts the reading Chief Judge Howell adopted. *Compare* ECF No. 32-2 at 67 (concluding that "two statutes—28 U.S.C. §§ 515(b) and 533(1)—vest in the Attorney General the power to appoint a Special Counsel"), *with* Friedrich Op. at 28–34 (analyzing §§ 515(b), 533(1), and other statutes cited by the Special Counsel and finding that none of them explicitly authorize the Acting Attorney General to appoint a Special Counsel). And, in examining whether the Special Counsel is a principal or inferior officer under the Appointments Clause, Judge Friedrich disagreed with Chief Judge Howell's findings that: (i) the constitutional analysis "look[s] solely to statutes, rather than to any regulations," ECF No. 32-3 at 29; *compare* Friedrich Op. at 11 ("Court does not begin its analysis by 'looking solely to statutes'"); and (ii) the regulations governing the Special Counsel "only confirm that . . . the Attorney General exercises substantial

direction and supervision over virtually every facet of a Special Counsel's work[,]" ECF No. 32-3 at 34; *compare* Friedrich Op. at 22 (observing that "the regulations as written may prevent the Acting Attorney General from countermanding certain actions taken by the Special Counsel" and the regulations' for-cause removal provision could be read to "afford[] the Special Counsel substantial protection from removal[,]" in which case he "is not truly inferior").

Because of the direct relationship between Mr. Miller's appeal and Concord's own action, Concord seeks leave to intervene in this appellate proceeding to ensure that its interests are fully protected.

ARGUMENT

I. This Court applies Federal Rule of Civil Procedure 24 to requests for leave to intervene on appeal.

This Court looks to Federal Rule of Civil Procedure 24 in determining requests to intervene. *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (recognizing the power to allow "intervention *in* the court of appeals" and stating that the Court follows Rule 24 of the Federal Rules of Civil Procedure and applies "the same standards [for intervention] as in the district court") (citing *Building & Construction Trades Dep't v. Reich,* 40 F.3d 1275, 1282–83 (D.C. Cir. 1994)) (emphasis in original).

Rule 24 provides for intervention as "of right" for one who "claims an interest relating to the property or transaction that is the subject of the action, and is so

situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Rule 24 also provides for "permissive" intervention for one who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Both of these grounds support Concord's intervention request here.

II. Consistent with Rule 24, Concord should be granted leave to intervene as of right.

Rule 24(a)(2)'s intervention as "of right" provision "implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). The Rule sets out four requirements: "(1) the motion for intervention must be timely; (2) intervenors must have an interest in the subject of the action; (3) their interest must be impaired or impeded as a practical matter absent intervention; and (4) the would-be intervenor's interest must not be adequately represented by any other party." *In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). Each requirement is satisfied here.[2]

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[2] Some of this Court's decisions state that an intervenor also must show that it has standing. *See, e.g.*, *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). *But see In re Brewer*, 863 F.3d at 872 (not including standing as a requirement). Concord has standing because it already has suffered injury-in-fact—a criminal indictment charging it with a federal crime, along with the reputational and defense (continued)

Concord's motion to intervene is timely. "A nonparty must timely move for intervention once it becomes clear that failure to intervene would jeopardize her interest in the action." *In re Brewer*, 863 F.3d at 872 (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)). "'The timeliness of a motion to intervene is 'to be judged in consideration of all the circumstances.'" *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (citation omitted). This requirement is aimed primarily at "preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Id.* (citation omitted).

The proceedings in this action have explicitly placed Concord's interests in some jeopardy. Chief Judge Howell effectively ruled on Concord's motion, which was incorporated by Mr. Miller without Concord's consent and without hearing any argument from Concord or considering the reply brief Concord filed in its own criminal case. If this Court affirms Chief Judge Howell's ruling on the merits, including her Appointments Clause findings, that decision likely will have *stare decisis* effect on any future Circuit panel that might review Concord's Appointments Clause arguments. Additionally, intervention by Concord would not unduly disrupt this appeal since the issues Concord will address will be encompassed in those raised by the parties. *See, e.g., Roane*, 741 F.3d at 152 (no prejudice to parties where adding

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costs associated with it—which flows from the unconstitutional act of indictment by an unconstitutionally appointed Special Counsel.

intervenor "would have required no additional factual development" and "[t]he claims in this litigation are legal challenges").[3] In sum, Concord has moved promptly to intervene, its interests are at stake here, and its participation will not disrupt orderly resolution of the disputed issues. As a result, Concord's request meets the timeliness requirement for intervention as of right.

Concord has a sufficient interest in the subject of this appeal. The "interest" requirement for intervention as of right is a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). This Court has recognized "such an interest among 'persons who allege that they have suffered injury from the same or very similar wrongful acts as those complained of'" by an existing party to the case. *In re Brewer*, 863 F.3d at 872–73 (quoting *Foster*, 655 F.2d at 1324–25). Thus, for example, an intervenor has the requisite interest where its "claims for relief are founded on the same statutory rights as are the claims of the plaintiffs." *Foster*, 655 F.2d at 1325.

Under these standards, Concord has a substantial interest in this appeal because it claims—indeed, it was the first to claim—the same constitutional injury from the

[3] Concord agrees to abide by the briefing schedule set by this Court in its August 16, 2018 order and would file its principal and reply briefs on or before September 7 and October 9, 2018, respectively.

acts of a Special Counsel appointed in violation of the Appointments Clause as does Mr. Miller. Mr. Miller likewise rested his legal arguments on Concord's arguments, expressly using Concord's own words. *Supra* at 4–5. As a result, Concord has a sufficient interest in the subject of this appeal to support intervention as of right.

Concord's interests will be impaired and impeded as a practical matter absent intervention. Rule 24(a)(2)'s requirement that disposing of the action absent intervention "may as a practical matter impair or impede the movant's ability to protect [its] interest" was the result of a 1966 amendment that was "designed to liberalize the right to intervene in federal actions." *Nuesse*, 385 F.2d at 701. Prior to the amendment, the rule required the movant to show that it "may be bound by a judgment in the action." *Fund For Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2) (1966)). The amended language now looks to "the 'practical consequences' of denying intervention, even where the possibility of future challenge . . . remain[s] available." *Id.* (citation omitted).

Such "practical consequences" include the *stare decisis*—or even just persuasive—effect of a court ruling in the matter in which intervention is sought. *See Nuesse*, 385 F.2d at 702 (recognizing that "stare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right"); *Roane*, 741 F.3d at 151 ("At a minimum, if the suit proceeds without [intervenor], a decision rejecting the [plaintiffs'] claims could establish unfavorable precedent that would make it more difficult for [intervenor] to succeed on similar claims if he brought them

in a separate lawsuit of his own, which is sufficient to support intervention under our caselaw."); *Foster*, 655 F.2d at 1325 ("[A]ppellants' ability to protect their interest could be impaired or impeded by the principle of stare decisis. This possibility is a sufficient showing to meet the Rule 24(a)(2) criterion."). The burden of showing impairment is minimal—a "possibility" of impairment is sufficient. *Foster*, 655 F.2d at 1325.

Concord's interests indisputably will be impaired absent intervention. As noted, this appeal raises the distinct likelihood that this Court will rule on the merits of Chief Judge Howell's resolution of Concord's arguments. If published, its ruling likely would have binding *stare decisis* effect on any future panel of this Court faced with the same or similar arguments. This apparent consequence is more than sufficient to meet the impairment-of-interest requirement.

For example, in *Nuesse*, 385 F.2d 694, this Court found that a state bank commissioner was entitled to intervene as of right in the district court in a state bank's suit against the federal Comptroller of the Currency in light of the potential *stare decisis* impact of a ruling in the case on a particular question under the National Bank Act. The Court explained that it "may expect that a decision by the District Court here, the first judicial treatment of this question, would receive great weight, whether the question arose again in this jurisdiction or in the federal court in Wisconsin. Should this court on appeal render a decision in the Commissioner's absence, and contrary to his view, he would presumably be hampered in seeking to vindicate his approach in another court." *Id.* at 702. So too here—and then some—for Concord, whose

"approach" not only may be "be hampered": it may be foreclosed by this Court's determination of the Appointments Clause questions raised in this appeal.

Concord's interests are not adequately protected by another party. This Court gives the inadequacy-of-representation requirement a "liberal application in favor of permitting intervention." *Nuesse*, 385 F.2d at 702. The requirement is not that current representation *is* inadequate, but only that it "'*may* be'" inadequate. *In re Brewer*, 863 F.3d at 873 (quoting *Hodgson*, 473 F.2d at 130). "[T]he burden is on those opposing intervention to show that representation for the absentee will be adequate." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (citation omitted); *see also In re Brewer*, 863 F.3d at 872 (noting that "the burden of proof" for showing adequacy of representation "rests on those resisting intervention") (citation omitted). Accordingly, a movant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.'" *Fund For Animals*, 322 F.3d at 735–36 (citations omitted).

Mr. Miller cannot adequately represent Concord's interests in this appeal. First, Concord, a voluntarily appearing criminal defendant, has engaged its own counsel, which is different from Mr. Miller's counsel. Second, the parties seek different relief—Mr. Miller from having to testify before the grand jury; Concord from even being subject to criminal indictment in the first place. If anything, a business entity like Concord subject to indictment and the possibility of a lengthy trial has considerably more to lose than a recalcitrant witness like Mr. Miller subject to the

momentary inconvenience of having to testify before a grand jury. Third, in the district court, Mr. Miller borrowed heavily from Concord's motion-to-dismiss brief for his own arguments, essentially deferring to Concord's counsel's substantive expertise on the critical issues. At the same time, Mr. Miller's reply brief in the district court—in marked contrast with Concord's reply brief before Judge Friedrich—failed to address, or barely addressed, significant aspects of the Special Counsel's arguments, including the Special Counsel's reliance on 28 U.S.C. § 515(b) (which formed part of the basis for Chief Judge Howell's ruling), *see* ECF No. 32-2 at 14–15; his purported historical evidence of special-counsel appointments, *id.* at 15–21; and his citation to numerous, but plainly inapposite, appropriations statutes and case law, *id.* at 21–22 & n.7. *Compare* ECF No. 19 (Miller's Reply), *with* Case No. No. 1:18-cr-32-DLF (D.D.C.), ECF No. 48 at 5–9, 14–18 (Concord's Reply). On this record, Concord should be granted leave to intervene in this appeal as of right under Rule 24(a)(2) to make sure its interests are adequately represented.

At bottom, intervention is warranted due to the unique circumstances of this case. Chief Judge Howell ruled on Concord's motion in secret, without Concord's counsel having the opportunity to appear and argue before her. Judge Friedrich reached the same conclusion but for different reasons and made findings contradicting Judge Howell. And now, absent intervention, Concord faces the real prospect that this Court in this appeal could address Concord's challenges to the constitutionality and lawfulness of the Special Counsel's appointment—and issue a

ruling with law-of-the-Circuit and *stare decisis* effect—without Concord having an opportunity to explain the fundamental errors in Chief Judge Howell's opinion to this Court. Given the significance of the issues raised, this Court would benefit from briefing and argument by Concord—the party that formulated and advanced the arguments that were addressed and ruled upon by the district court below.[4]

III. Consistent with Rule 24, Concord should be granted leave to intervene permissively.

The Court at a minimum should permit Concord to intervene permissively under Rule 24(b)(1)(B). Permissive intervention "is an inherently discretionary enterprise" for which courts are afforded wide latitude. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citing *Hodgson*, 473 F.2d at 125 n.36). In order to qualify for permissive intervention, "the putative intervenor must ordinarily present: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *Id.*

Each of these elements is satisfied here: Concord has shown an independent ground for subject matter jurisdiction, *supra* at 8–9 n.2; a timely motion, *supra* at 9–10;

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[4] Participation as amicus curiae is no substitute for intervention as a party. *Nuesse*, 385 F.2d at 704 n.10 (recognizing that amicus curiae status "is not an adequate substitute for participation as a party"); *United States v. Laraneta*, 700 F.3d 983, 986 (7th Cir. 2012) ("Participation as amici curiae would not be an adequate substitute, for as nonparties [the putative intervenors] could not seek rehearing or rehearing en banc or review by the Supreme Court, should our decision go against [it].").

and dispositive constitutional defenses that have multiple questions of law in common with those of Mr. Miller in this appeal, *supra* at 10–13. Indeed, on the latter requirement, Chief Judge Howell specifically stated that "the witness and Concord raise overlapping, if not entirely identical, arguments that turn on pure issues of law common to both litigants rather than facts peculiar to them." ECF No. 32-2 at 23 n.9.

For these reasons, Concord should be permitted to intervene in this appeal under Rule 24(b)(1)(B).

CONCLUSION

For the foregoing reasons, the Court should grant Concord leave to participate in this appeal as an intervenor.

Dated: August 22, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On this twenty-second day of August, 2018, the undersigned certifies that:

1. The foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 3,978 words, as determined by the word-count function of Microsoft Word 2010; and

2. As required by Federal Rule of Appellate Procedure 27(d)(1)(E), the foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

/s/ James C. Martin
James C. Martin

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), the undersigned certifies that on this twenty-second day of August, 2018, he caused the foregoing motion to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Pursuant to Circuit Rule 27(b), the undersigned also caused four (4) copies of the foregoing motion to be hand-delivered to the Clerk of the Court. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ James C. Martin
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