No. 18-1846

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Alexis Bailly Vineyard, Inc., et al,

Plaintiffs-Appellants,

vs.

Ramona Dohman, in her official capacity as
Commissioner of the Minnesota Department of Public Safety,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

BRIEF OF DEFENDANT-APPELLEE

INSTITUTE FOR JUSTICE

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SUMMARY OF CASE

Licensed farm wineries in Minnesota must produce wine with a majority of the ingredients from Minnesota, or receive an exemption. Minn. Stat. § 340A.101, subd. 11; Minn. Stat. § 340A.315, subd. 4. Two farm wineries brought this dormant Commerce Clause challenge to the in-state ingredient requirement. The district court found the farm wineries lacked standing because: "Plaintiffs can obtain wine-manufacturer licenses, with which they can produce wine free of the in-state requirement and avoid their asserted injury. Plaintiffs' injury stems from Plaintiffs' choice and is not fairly traceable to the in-state requirement." The court dismissed the lawsuit on standing grounds without reaching the merits of the dormant Commerce Clause claims. This appeal followed.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

STATE COURT CASES

STATUTORY AUTHORITIES

FEDERAL RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

LEGAL ISSUES

I. Whether Appellant farm wineries suffered a cognizable injury that is fairly traceable to the statutory provisions that farm wineries make their wine with a majority of ingredients from Minnesota.

Minn. Stat. § 340A.101, subd. 11
Minn. Stat. § 340A.315, subd. 4
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)
Babbitt v. Farm Workers, 442 U.S. 289 (1979)

II. Whether the statutory provisions that farm wineries make their wine with a majority of ingredients from Minnesota violate the dormant Commerce Clause.

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000)

STATEMENT OF THE CASE

I. MINNESOTA'S FARM WINERY LICENSE.

Minnesota, like many states, has a "three-tier" system for alcohol distribution. Alcoholic beverages, including wine, are sold by licensed manufacturers to licensed wholesalers, who in turn sell to licensed retailers. *See* Minn. Stat. § 340A.101 *et seq.*; *see also Federal Distillers, Inc. v. State*, 229 N.W.2d 144, 152 (Minn. 1975) (describing the "three-tiered" system). Under this system, the manufacturing, wholesale, and retail functions are generally kept separate, such that an entity with a manufacturing license cannot sell its alcohol directly to the public. *See* Minn. Stat. §§ 340A.301, 340A.401. A manufacturer, including a wine manufacturer, may import all of the ingredients it uses to make its products, but it generally cannot sell its products at retail. *Id.*

The U.S. Supreme Court has recognized that "the three-tier system itself is unquestionably legitimate" as a constitutional matter. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quotation omitted).

The Minnesota farm winery license is a limited exception to the three-tier system because it combines both manufacturing and retail functions. A "farm winery" is "a winery operated by the owner of a Minnesota farm and producing table, sparkling, or fortified wines from grapes, grape juice, other fruit bases, or honey with a majority of the ingredients grown or produced in Minnesota." Minn.

Stat. § 340A.101, subd. 11. A farm winery must operate on agricultural land and may sell its wine to customers on its premises. Minn. Stat. § 340A.315, subds. 2 and 9.

The intent of the farm winery law is to foster an agro-tourism industry by allowing the combined manufacture and sale of wine on Minnesota farm land. *See* Joint Appendix (J.A.) 93 ("[F]arm wineries were not meant to be just another kind[] of bar, with wine; the focus was to be on the 'farm' and not on the 'wine sales' aspect of the law."). However, it is undisputed that no farm winery has ever been fined or otherwise punished under the statute for failing to make wine with a majority of ingredients from Minnesota. J.A. 74 at 25:23–27:18 (Deposition of Michael McManus).

The statutory requirement that farm wineries make wine with mostly in-state ingredients is subject to an exemption. If Minnesota products are "not available in quantities sufficient to constitute a majority of the . . . wine produced by a farm winery, the holder of the farm winery license may file an affidavit stating this fact with the commissioner" for the Department of Public Safety (DPS). Minn. Stat. § 340A.315, subd. 4. If DPS, after consultation with the Minnesota Department of Agriculture, determines the facts in the affidavit are true, "the farm winery may use imported products" without losing any of its rights under the license. *Id.* The exemption is valid for one year. *Id.*

DPS has never denied an affidavit request for an exemption from a licensed farm winery. J.A. 71 at 14:19–15:6 (McManus Dep.), and J.A. 90 at 20:5–6 (Deposition of Carla Cincotta).

Appellants Alexis Bailly Vineyard and The Next Chapter Winery are Minnesota farm wineries licensed pursuant to Minn. Stat. § 340A.315. Alexis Bailly Vineyard applied for exemptions to the ingredient requirement in 2005, 2007, 2009, 2010, 2014, and 2016. J.A. 36 at ¶ 15. The Next Chapter Winery applied for exemptions in 2014 and 2016. J.A. 41 at ¶ 18. Their requests were always granted. J.A. 36 at ¶ 15; J.A. 41 at ¶ 18.

II. THE DISTRICT COURT FINDS APPELLANTS LACK STANDING.

Appellants brought this dormant Commerce Clause lawsuit to challenge the requirement that farm wineries produce wine with a majority of ingredients from Minnesota. On cross motions for summary judgment, the district court held the farm wineries lacked standing because their injury was attributable to their personal choice: "Plaintiffs can obtain wine-manufacturer licenses, with which they can produce wine free of the in-state requirement and avoid their asserted injury. Plaintiffs' injury stems from Plaintiffs' choice and is not fairly traceable to the in-state requirement." J.A. 134–35.

SUMMARY OF ARGUMENT

This Court should affirm the district court's finding that Appellants lack standing. Appellants have not demonstrated a credible threat of enforcement of the challenged provisions, and they were not injured by the mere enactment of those provisions. To the extent Appellants claim they are injured by their inability to both manufacture the wine they want and sell it directly to the public, their injury is not constitutionally cognizable. In the alternative, this Court should affirm on the merits.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the district court's grant of summary judgment de novo. *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To support an assertion that a fact cannot be or is genuinely disputed, a party must cite "to particular parts of materials in the record," show "that the materials cited do not establish the absence or presence of a genuine dispute," or show "that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). In determining whether summary judgment is appropriate, a court must

view facts that the parties genuinely dispute in the light most favorable to the nonmovant, *Ricci v. DeStefano,* 557 U.S. 557, 586 (2009), and draw all justifiable inferences from the evidence in the nonmovant's favor, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. APPELLANTS LACK ARTICLE III STANDING.

To establish standing, Appellants must demonstrate (1) a "concrete and particularized," "actual or imminent" injury that is (2) fairly traceable to the challenged statutory provisions, and that (3) it is "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (citation omitted). Thus, the "threatened injury must be *certainly impending* to constitute injury in fact"—"[a]llegations of *possible* future injury" are not sufficient. *Id.* A plaintiff's injury is not fairly traceable to a challenged provision where it stems from a "personal choice." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003), overruled on other grounds by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

A. Appellants lack standing based on an enforcement threat because DPS has never enforced or threatened to enforce the challenged provisions.

Appellants seek standing on the theory that this case is a "preenforcement challenge," where they are injured by "the possibility of enforcement" of the challenged provisions. Appellants' Br. at 18–19, 26–27. To establish an injury in a preenforcement suit, a plaintiff must show a "credible threat of enforcement." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342–43 (2014). An alleged enforcement threat is not sufficient where the Court must "hypothesize that such an event will come to pass." *Babbitt v. Farm Workers*, 442 U.S. 289, 304 (1979). A plaintiff may establish a cognizable preenforcement injury where there was either a history of enforcement against others for similar conduct, or an express threat of enforcement against the plaintiff. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (a challenge to a law criminalizing material support for foreign terrorist organizations was justiciable where the government had already charged 150 persons with violating the law); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (petitioner alleged a credible threat of enforcement where police officers had threatened to arrest the petitioner and his companion for distributing handbills, petitioner left to avoid arrest, and his companion was arrested).

Here, there is not a sufficiently imminent enforcement threat to establish standing. No farm winery has ever been fined or otherwise punished for violating

the challenged provisions. J.A. 74 at 25:23–27:18 (McManus Dep.). DPS has never threatened to punish anyone for a violation either. While Appellants argue it is possible DPS could enforce the requirement in the future, such conjecture is inadequate to establish a cognizable injury. *Babbitt*, 442 U.S. at 304.

Appellants rely primarily on *Susan B. Anthony List*. In that case, Susan B. Anthony List (SBA) challenged an Ohio statute prohibiting certain false statements during the course of a political campaign. 134 S. Ct. at 2338. The Supreme Court found that SBA had standing because "the threat of future enforcement of the false statement statute is substantial." *Id.* at 2345. The Court found "a history of past enforcement" against SBA. *Id.* Specifically, SBA had previously been subject to a complaint under the statute, and the state elections commission had "found probable cause to believe that SBA's speech violated the false statement statute." *Id.* at 2338–39, 2345.

By contrast, in this case, there is no history of enforcement of the challenged provisions against Appellants or any other farm winery. No farm winery has been punished for violating the provisions, and DPS has made no threats to enforce the provisions.

The fact that farm wineries, including Appellants, have repeatedly applied for exemptions to the provisions, and no licensed farm winery has ever been denied an exemption request, further shows that this case is not justiciable on a

preenforcement theory. J.A. 71 at 14:19–15:6 (McManus Dep.); J.A. 90 at 20:5–6 (Cincotta Dep.); J.A. 36 at ¶ 15; J.A. 41 at ¶ 18. In *Babbitt*, a farmworkers union challenged a statutory provision that deprived the Arizona labor relations board of discretion to compel employers to make employees accessible to the union. 442 U.S. at 303–04. The Supreme Court held that the challenge was not justiciable because: "It may be accepted that [the union] will inevitably seek access to employers' property in order to organize or simply to communicate with farmworkers. But it is conjectural to anticipate that access will be denied." *Id.* The union had to wait to bring the challenge until it had a "palpable basis for believing that access will be refused." *Id.* at 304.

The same reasoning applies here. While it may be accepted that Appellants will continue to seek exemptions, it is conjectural to anticipate that exemptions will be denied, because year after year their requests have been granted. J.A. 36 at ¶ 15; J.A. 41 at ¶ 18. To bring a justiciable challenge, Appellants must wait until they have a palpable basis for believing their exemption requests will be denied and the in-state requirement enforced against them.

B. Appellants lack standing based on the enactment of the challenged provisions because they did not suffer concrete economic losses as a result of the law.

This Court has held that "a plaintiff who does substantial business with out-of-state corporations and would suffer imminent business losses as a result of the

challenged law has standing to bring a commerce clause claim." *Jones v. Gale*, 470 F.3d 1261, 1266 (8th Cir. 2006) (citing *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003)). Appellants rely on this case law to establish their standing. Appellants' Br. at 23–25, 41. However, unlike the plaintiffs in *Hazeltine* and *Jones*, Appellants did not suffer concrete economic losses as a result of the enactment of the challenged provisions.

In *Hazeltine*, South Dakota enacted a law that prohibited corporations from acquiring or obtaining an interest in land used for farming and from otherwise engaging in farming, with an exemption for family farms. 340 F.3d at 587–88. Several South Dakota livestock businesses challenged the law because it prohibited them from continuing to contract with the out-of-state corporations whose livestock they raised. *Id.* at 588. The Court held the livestock businesses had standing because they suffered "an imminent loss of that business" with the out-of-state corporations. *Id.* at 592.

In *Jones v. Gale*, the Court followed *Hazeltine* in addressing a similar Nebraska law that prohibited corporations and non-family-owned limited partnerships from acquiring an interest in farmland or engaging in farming. 470 F.3d at 1265. The Court held that a Nebraska farmland owner had standing because he could no longer "transfer his farmland to a limited liability entity, which would, *inter alia*, allow for improved fiscal planning and operational

management of the farmland." *Id.* at 1266–67. A feedlot operator also had standing because he could no longer contract with out-of-state corporations to raise their livestock. *Id*.

Unlike the plaintiffs in *Hazeltine* and *Jones*, the farm wineries did not suddenly lose contracting and economic opportunities as a result of the law's enactment. Indeed, Appellant Alexis Bailly Vineyard claims that, around the time the in-state mandate was adopted in 1980, it was making wine exclusively with grapes grown at its own Minnesota vineyard. J.A. 15–16 at ¶¶ 56, 63; J.A. 33 at ¶¶ 2–4. Appellant The Next Chapter Winery did not bottle its first vintage until 2013. J.A. 39 at ¶ 4. Thus, the enactment of the challenged provisions did not terminate Appellants' existing business relationships, force them to alter their business practices, or reduce the value of their businesses. Accordingly, unlike the plaintiffs in *Hazeltine* and *Jones*, Appellants did not suffer concrete economic injuries as a result of the law.

The district court relied on *Jones* in finding that Appellants suffered an economic injury because the challenged provisions affect their "fiscal planning." J.A. 131 (citing *Jones*, 470 F.3d at 1267). While the *Jones* Court recognized that losses involving "borrowing power, financial strength, and fiscal planning" may constitute cognizable injuries, the Court did so in the context of explaining why a plaintiff could challenge the enactment of a law that restricts his ability "to dispose

of his land as he wishes [and thus] weakens his financial position." 470 F.3d at 1267. DPS disputes that a business's routine fiscal planning is a cognizable injury akin to the weakened financial opportunities suffered in *Jones.*

Regardless, the district court correctly concluded that any injury suffered by Appellants is not fairly traceable to the enactment of the challenged provisions. In *Hazeltine* and *Jones*, the negative economic consequences were the direct result of the enactment of the challenged laws. The plaintiffs' businesses and land lost value the moment the laws were enacted. The plaintiffs had no choice but to suffer those consequences.

Here, Appellants chose to obtain farm winery licenses. The fiscal plans they make as farm wineries are the direct result of their decisions to become farm wineries and hold farm winery licenses. Appellants could have obtained manufacturing licenses, but they elected not to do so. Any injuries they may suffer because of their fiscal activities are fairly traceable to their choices, and not to the enactment of the challenged provisions.

Thus, the district court correctly concluded that Appellants lack standing because: "Plaintiffs' injury stems from Plaintiffs' choice and is not fairly traceable to the in-state requirement." J.A. 134–35. *See McConnell*, 540 U.S. at 228 (candidates lacked standing to challenge increased campaign contribution limits because their decision "not to solicit or accept large contributions" was traceable to

their "personal choice," and not to the challenged limits); *Crawford v. U.S. Department of Treasury*, 868 F.3d 438, 461 (6th Cir. 2017) (plaintiff lacked standing to challenge a bank reporting requirement that would have been triggered if her father had transferred an account to her because: "This injury, however, is traceable to [his] personal choice not to transfer the account, and not to the [challenged requirement].").

In short, unlike the plaintiffs in *Hazeltine* and *Jones*, Appellants have not suffered concrete economic injuries that are fairly traceable to the enactment of the challenged provisions.

Appellants suggest that, if they lack standing, by logical extension nearly all plaintiffs will lack standing to challenge unconstitutional discrimination. Appellants' Br. at 38. Appellants' argument is misguided. Appellants' lack of standing will not impede plaintiffs, such as those in *Hazeltine* and *Jones*, who suffered concrete financial injuries as a result of the challenged provisions. Nor will it impede plaintiffs from bringing justiciable preenforcement suits, where there was a genuine enforcement action or enforcement threat.

C. Appellants' assertion that the challenged provisions prevent them from expanding their businesses does not present a cognizable injury.

Appellants claim the challenged provisions prevent them from being "able to conduct their businesses in the way they want." Appellants' Br. at 21. Appellants

would like the authority to make wine with whatever ingredients they want, including mostly out-of-state ingredients, and sell that wine directly to the public and to retail stores. Appellants' Br. at 15, 21. Appellants, however, cannot establish standing on this theory because they do not have a cognizable right to act as an alcohol manufacturer, wholesaler, and retailer.

Minnesota has a three-tier system, under which manufacturing, wholesale, and retail functions are kept separate. *See* Minn. Stat. § 340A.101 *et seq.*; *supra* at 2. A licensed wine manufacturer may import and manufacture wine without regard for the percentage of grapes that come from other states. Minn. Stat. § 340A.301. However, under the three-tier system, a licensed wholesaler sells that wine to a licensed retailer, Minn. Stat. § 340A.310, which in turn sells it to the public, Minn. Stat. § 340A.401–.425. The U.S. Supreme Court has recognized that "the three-tier system itself is unquestionably legitimate" as a constitutional matter. *Granholm*, 544 U.S. at 489 (quotation omitted).

Appellants state that they seek the ability to grow their businesses by manufacturing the wine they want and selling it directly to consumers and retail stores. Appellants' Br. at 15, 21 What they seek is prohibited under Minnesota's three-tier system. Because Minnesota's tiered system is constitutionally legitimate, Appellants' inability to conduct their businesses in the way they want is not a constitutionally cognizable injury. *Granholm*, 544 U.S. at 489. As the district

court explained: "There is no *right* to sell wine directly to the public, and the state of Minnesota is not required to configure its licensure statutes to allow Plaintiffs to conduct business in any fashion they choose." J.A. 133.

III. IN THE ALTERNATIVE, APPELLANTS' CLAIMS FAIL ON THE MERITS.

In the alternative, if this Court finds standing and decides to reach the merits in the first instance, it should affirm the district court's summary judgment dismissal on the grounds that the challenged provisions do not violate the dormant Commerce Clause.

The Commerce Clause establishes Congress's power over interstate and foreign commerce. U.S. Const., Art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause and establishes that states may not enact laws that discriminate against or unduly burden interstate or foreign commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). State laws violate the dormant Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations

among the Colonies and later among the States under the Articles of Confederation." *Id.*

A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the "law in question overtly discriminates against interstate commerce." *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002). A statute "overtly discriminates" if it is discriminatory on its face, in its purpose, or through its effects. *Id.* If the law is overtly discriminatory, it is per se unconstitutional, unless the state can demonstrate, "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). If the law is not overtly discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce "is clearly excessive in relation to its putative local benefits." *Pike*, 397 U.S. at 142.

Here, the challenged law does not overtly discriminate against out-of-state interests. On its face, it only regulates the in-state production and sale of wine in Minnesota. *See U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1068–69 (8th Cir. 2000) (holding that the "purely intrastate designation" of a waste processing ordinance "does not overtly violate the Commerce Clause"). By law, farm wineries must be located in Minnesota and must sell their products on their

agricultural farm winery premises. Minn. Stat. § 340A.315, subds. 1, 2, and 9. The law does not favor Minnesotan farm wineries over other states' wineries. For example, nothing in the law makes it costlier for a Minnesotan wine drinker to choose a trip to a Wisconsin winery over a Minnesotan one. Moreover, the law does not tax out-of-state businesses, such as grape growers, selling their products to Minnesotans. *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (holding that an excise tax on wholesale liquor, with an exemption for locally-produced beverages, violated the dormant Commerce Clause).

Because the law is not overtly discriminatory, Appellants must show that its burden "is clearly excessive in relation to its putative local benefits." *Pike*, 397 U.S. at 142. The Supreme Court has held that "protect[ing] and enhanc[ing] the reputation of growers within the State . . . . are surely legitimate state interests" under the Commerce Clause. *Id.* at 143. Here, similar local benefits arise because the statute fosters and promotes an agro-tourism industry for wine growers and producers on Minnesota farmland. These are legitimate state interests. *See Pike*, 397 U.S. at 143.

Appellants cannot show that these legitimate interests are greatly outweighed by the law's burden on interstate or foreign commerce. The burden, if any, is minimal. Under the law, Minnesota farm wineries can import nearly half of their ingredients from other states or countries. If a farm winery wants to use a

majority of out-of-state ingredients, it simply needs to submit an affidavit to the DPS Commissioner. The process is not cumbersome or onerous. A short letter will suffice. J.A. 71 at 13:23–14:1 (McManus Dep.).

The Commerce Clause does not restrict or limit intrastate commerce, and it does not regulate "the particular structure or methods of operation in an [intrastate] retail market." *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 127 (1978). Here, the farm winery scheme regulates an intrastate industry. It is not overtly discriminatory and has, at most, a minimal burden on interstate or foreign commerce. Accordingly, it does not run afoul of the Commerce Clause.

CONCLUSION

For all of these reasons, this Court should affirm the district court's summary judgment dismissal of Appellants' action.

Dated: July 11, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,053 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2010 in 14 pt Times New Roman font.

s/ Jason Marisam
Jason Marisam
Assistant Attorney General

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The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that it is virus-free.

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