No. 11-1062

In the Supreme Court of the United States

JOSEPH MICCI, PETITIONER

v.

RICK ALEMAN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 14 OTHER STATES FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, on a question that has fractured the circuits, that police may be civilly liable for the use of a suspect's custodial statement, obtained either in violation of *Miranda* or as a result of coercion, where the statement was introduced to charge the suspect but the charges were dismissed prior to trial.

2. Whether the Seventh Circuit correctly held—seemingly for the first time by any federal appellate court—that a police officer unconstitutionally coerced a suspect's statements by using the routine interview technique of lying to the suspect about the strength of the case against him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTEREST OF *AMICI CURIAE*[1]

The *amici* States have two distinct interests in this case. To begin, the States exercise the chief police powers of government. As a result, the standards that courts apply for evaluating police-officer conduct are vital to the States in investigating and prosecuting crime. Here, the rules the Seventh Circuit adopted will subject the police to judicial second-guessing and § 1983 liability for any circumstance in which a court later determines that the police violated the complex and seemingly ever-changing standards underlying *Miranda* and the Fifth Amendment. The decision's effect is chilling: any police officer investigating a serious crime will be forced to think twice before aggressively questioning a suspect, contrary to the public's safety and welfare interests.

In addition, the Seventh Circuit's decision forecloses state law enforcement officers from using the standard tool of "puffing" to obtain truthful, voluntary confessions. Police routinely embellish the strength of evidence or information gained from other participants, to increase the likelihood of obtaining truthful testimony from a suspect. While evidence obtained based on false promises and threats is properly excluded because such techniques may prompt false confessions, there is no similar risk from mere puffing. The Seventh Circuit's decision is an unnecessary obstacle to solving crimes and protecting the public.

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[1] Consistent with Rule 37.2, the counsel for the State of Michigan notified counsel for Rick Aleman on March 12, 2012, of the State's intention to file this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the petition and clarify two important issues for law enforcement.

First, the Court should provide the police clear guidance about when they will be subject to civil liability for their work in obtaining confessions. Questioning suspects is one of police work's most basic functions, yet the rules regarding officer liability vary from one circuit to another, and this Court's case law is not clear. The Court should grant the petition and reaffirm that *Miranda* is a prophylactic rule, one whose violation does not result in § 1983 liability for police officers. The proper remedy for a *Miranda* violation is exclusion of evidence. This is particularly true given the context. The question whether a *Miranda* violation has occurred is resolved only after numerous attorneys and multiple courts engage in a long, deliberative, and research-intensive process to examine a police officer's on-the-spot decisions made in response to a suspect's actions or comments.

There is a similar need for guidance about whether a police officer is exposed to § 1983 liability when a court determines that a statement was coerced under the Self-Incrimination Clause, irrespective of any corresponding *Miranda* violation. Outside of the core circumstances where a police officer engages in wrongful physical conduct, threatens such conduct, or engages in similar egregious violations, it is very difficult to predict when a court later will determine that a confession was "involuntary." The Seventh Circuit's analysis is

a case in point. The fact that later-obtained medical evidence indicated that the injuries to the young child here occurred days (rather than hours) earlier transformed what appeared to be effective police work into conduct that the Seventh Circuit was able to characterize as sinister. The courts should not subject a police officer to judicial second-guessing, far removed from the circumstances in which the police investigative decisions were made.

Second, the Court should make clear that police officers do not violate the Fifth Amendment when they engage in puffing about a case's strengths and then obtain a confession. Even accepting the Seventh Circuit's factual conclusion that the officers here misstated the medical evidence, there is no reason to conclude that the suspect's statements were involuntary. The standard the Seventh Circuit adopted—prohibiting the police from "destroy[ing] the information that [is] required for rational choice"—forecloses effective and appropriate law enforcement techniques. In fact, police officers across the nation regularly employ a puffing strategy to obtain voluntary confessions. If this Court allows the Seventh Circuit's decision to stand, it will force police in the Seventh Circuit to question subjects in a very different manner than do police in the rest of the country.

ARGUMENT

I. This Court should clarify the standards that govern § 1983 actions against police officers for alleged violations of *Miranda* and the Fifth Amendment.

The *amici* States routinely serve as counsel for police officers who are sued based on claims that the officers violated clearly established constitutional principles and therefore are subject to civil liability under 42 U.S.C. § 1983. As the petition explains, the federal circuits are divided on whether a § 1983 action will lie where there is a claim that a police officer has obtained a suspect's statement in violation of *Miranda*. Pet. 18–21. This Court's fractured decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003), did not resolve this question. There is also a split of circuits on the application of the Fifth Amendment for claims that the police obtained involuntary confessions. Pet. 21–24.

The *amici* States urge this Court to grant the petition and provide guidance on both issues. First, a § 1983 action should never lie for a *Miranda* violation, because the *Miranda* rule is prophylactic and its violation does not give rise to a Fifth Amendment claim. The proper remedy for a *Miranda* violation is suppression of evidence. Second, with regard to involuntary confessions and the Fifth Amendment's Self Incrimination Clause, it makes sense that this relief is more limited—only if the statement is admitted at trial—because that corresponds to the nature of the injury. The Fifth Amendment is a trial-based right, whereas the

remedies for a Due Process Clause violation may be broader.

A. The Court needs to reaffirm that *Miranda* is a prophylactic rule and that a § 1983 action does not lie for its violation.

The controlling law on this issue is this Court's splintered decision in *Chavez*. Justice Thomas' plurality opinion provided two strands of analysis regarding a possible Fifth Amendment violation. The decision distinguished between *Miranda* as a prophylactic rule and the "core" Fifth Amendment protection, which shields a suspect from the coercion of self-incrimination. *Chavez*, 538 U.S. at 772–73. As a consequence, the officer's failure to read *Miranda* warnings to the suspect in *Chavez* did not violate the suspect's constitutional rights and could not be a ground for a § 1983 action. *Id*.

The *Chavez* concurrence specifically reserved the question whether the Court's holding extended to *all Miranda* violations. *Chavez*, 538 U.S. at 779 (Souter, J., concurring) ("whether the absence of *Miranda* warnings may be a basis for a § 1983 action under any circumstance is not before the Court") (unnumbered footnote). The Court should now adopt the plurality's conclusion because it is a well-grounded distinction and would provide clear rules to police officers.[2]

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[2] In fact, there is a good claim that the dissent from Justice Kennedy in *Chavez* agrees that the remedy for a violation of the *Miranda* rule is only one of exclusion from trial and therefore a pure violation of *Miranda* would not provide a basis for a § 1983

The *Chavez* plurality relied on this Court's analysis in *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974), which described the *Miranda* warning itself as "justified only by reference to its prophylactic purpose." This Court has recently reiterated that idea repeatedly, referring to the *Miranda* rule as "judicially-created" and "prophylactic." *Howes* v. *Fields*, 132 S. Ct. 1181, 1188 (2012) ("*Miranda* adopted a set of *prophylactic measures* designed to ward off the inherently compelling pressures of custodial interrogation") (internal quotes omitted; emphasis added); *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1227 (2010) ("Our precedents insist that *judicially created prophylactic rules* like those in *Edwards* and *Miranda* [ ] maintain 'the closest possible fit' between the rule and the Fifth Amendment interests they seek to protect.") (emphasis added).

Of course, this Court earlier in *Dickerson* v. *United States,* 530 U.S. 428, 432 (2000) reiterated the point that *Miranda* was a "constitutional decision." This Court has clarified since that decision that the rules under *Miranda* are "prophylactic" in nature, designed to safeguard the constitutional protection against self-incrimination consistent with *Dickerson*. See *J.D.B.* v. *North Carolina,* 131 S. Ct. 2394, 2401 (2011) ("Recognizing that the inherently coercive nature of custodial interrogation 'blurs the line between voluntary and involuntary statements,' *Dickerson*, 530 U.S., at 435, 120 S. Ct. 2326, this

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action. *Chavez,* 538 U.S. at 790 ("*Miranda* mandates a rule of exclusion. It must be so characterized, for it has significant exceptions that *can only be assessed and determined in the course of a trial*.") (emphasis added).

Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination."). The proper relationship between these points is that the "core" protection of the Self-Incrimination Clause is protection from being coerced to give a statement that is used in a criminal case, even if these "complementary rules" of *Miranda* are employed as an aid to determine whether this has occurred. See *Chavez,* 538 U.S. at 777, 778 (Souter, J., concurring). The elemental constitutional value remains freedom from the use of *coerced* statements in a criminal case.

There is substantial support in this Court's precedents for drawing a distinction between statements obtained in violation of *Miranda* and those obtained through coercion. Those decisions allow the prosecutor to use for impeachment a statement taken in violation of *Miranda*, provided the statement was voluntary. *Oregon* v. *Hass*, 420 U.S. 714, 723–24 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). See also *United States* v. *Patane,* 542 U.S. 630, 643 (Thomas, J., plurality); 645 (Kennedy, J., concurring) (voluntary statement taken in violation of *Miranda*—"unwarned statement"—does not require suppression of physical evidence that was discovered based on that statement). Involuntary statements cannot be used for impeachment. *New Jersey* v. *Portash*, 440 U.S. 450, 459–60 (1979).

Accepting the *Chavez* plurality decision will resolve the circuit debate about whether an action lies for a *Miranda* violation in the absence of coercion. At least two circuits—including the

Seventh here—have stated that it might, creating a need for this Court's clarification. Pet. App. 1a; *Stoot* v. *City of Everett*, 582 F.3d 910, 927 (9th Cir. 2009) ([The police officer] was on notice under clearly established law that if he failed to provide [the suspect] with appropriate *Miranda* warnings or physically or psychologically coerced a statement from [the suspect], the use of the confessions could ripen into a Fifth Amendment violation.") (emphasis added).

But the proper analysis in the *Chavez* plurality opinion forecloses relief for *Miranda* violations where there is no finding that a statement was involuntary. Indeed, a majority of circuits have reached the same conclusion. *Jocks* v. *Tavernier*, 316 F.3d 128, 138 (2d Cir. 2003); *McKinley* v. *City of Mansfield*, 404 F.3d 418, 432 n.13 (6th Cir. 2005); *Hannon* v. *Sanner*, 441 F.3d 635, 637 (8th Cir. 2006); and *Marshall* v. *Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1165 n.6 (10th Cir. 2003). See also Pet. 20–21.

Regardless of the rule this Court chooses to adopt, there is a critical need for police to have clear instruction about which interrogation techniques are constitutionally permissible, and which may lead to civil liability. The reality is that police officers have a genuine (and legitimate) fear of civil suit, and that fear will drive investigatory decisions. Allowing the growing circuit split to linger will harm legitimate efforts to investigate and prosecute serious crimes.

B. The Fifth Amendment is rightly only violated in limited circumstances, limited to when a statement is introduced at trial because it is a trial-based right.

The Seventh Circuit concluded here that there was more than just a *Miranda* violation, that in fact the police had coerced Respondent into giving a statement. Pet. App. 15a. This area is also in need of clarification.

The second strand of analysis from the *Chavez* plurality was based on the fact that there was no "core" Fifth Amendment violation because there was no "criminal case" in which the plaintiff had been compelled to be a witness against himself. *Chavez*, 538 U.S. at 772–73. This analysis did not specifically address when a criminal case "commences," sufficing it to say that mere questioning itself was not adequate to meet this standard. *Id*. at 767.

Justice Souter's concurrence agreed with this basic analysis, explaining that the Fifth Amendment "focuses on courtroom use of a criminal defendant's compelled self-incriminating testimony" where the "core of the guarantee" is the exclusion of the evidence. *Chavez*, 538 U.S. at 777 (Souter, J.). But the concurrence qualified these points with the further explanation that the plaintiff had not made a "powerful showing" to demonstrate that the privilege should be "expand[ed]" to the point sought. *Id*.

These opinions do not resolve whether a § 1983 action will lie for an involuntary statement that served as a basis for an indictment but never ripened

into trial use. As Petitioner notes, the circuits have split on this question. Pet. 21–24.

Petitioner argues forcefully that the Fifth Amendment is a trial-based right, noting that the better-reasoned circuit cases are those declining relief where the statement—as here—was *never* introduced at trial. Pet. 26–28. In that circumstance, the suspect has not been compelled to serve as a witness against himself under the Fifth Amendment.

This point is underscored when comparing the relief available under the Fourteenth Amendment's Due Process Clause, which unlike the Fifth Amendment Self Incrimination Clause, is not limited to trial-based errors. As Justice Kennedy explained in his *Chavez* dissent, "[c]onstitutional protection for a tortured suspect is not held in abeyance until some later criminal proceedings takes place." *Chavez*, 538 U.S. at 789–90. The *Chavez* plurality clarified that it is not the Fifth Amendment that governs in such circumstances, but the Fourteenth Amendment. *Id.* at 773. And that is a critical point, because this case does not present a claim under the Fourteenth Amendment.

Justice Thomas' *Chavez* plurality described these Due Process Clause violations as involving police conduct that "shock[s] the conscience." *Chavez*, 538 U.S. at 774 (Thomas, J., plurality opinion), citing *County of Sacramento* v. *Lewis*, 523 U.S. 833, 850 (1998). Put another way, the police engaged in "egregious official conduct." *Chavez*, 538 U.S. at 774.

The fact that relief under the Fifth Amendment's Self-Incrimination Clause should be narrower than

the Fourteenth Amendment's Due Process Clause comports with the nature of the injury. Where the police conduct is not "shock[ing]" but merely mistaken and results in an involuntary confession, concluding that there is only an injury in the circumstance in which the confession is used at trial matches the nature of the wrong. The injury arises from the statement's *use* at trial, not from the police's coercion in obtaining the statement. The *Chavez* plurality recognized that for more egregious violations such as "torture or other abuse," the Due Process Clause "would govern the inquiry in those cases and provide relief in appropriate circumstances."[3]

And there is a need to provide guidance to the police about what constitutes a violation of the "core" Fifth Amendment for inducing an involuntary statement later used at trial. These kinds of statements are likely to be the ones for which the violation is most difficult to discern. In specific, these claims will only arise where the statement was introduced by the prosecution and with the approval of a judicial officer.[4] The police should be informed

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[3] The plurality supported its point with *Graham* v. *Connor*, 490 U.S. 386, 394–95 (1989), which indicated that where a specific constitutional provision provides relief for a violation, "that Amendment, not the more generalized notion of 'substantive due process," applies. Thus, the suggestion is that if the Fifth Amendment Self-Incrimination Clause provided relief in the absence of a criminal case, the Due Process Clause would be foreclosed. *Chavez*, 538 U.S. at 773 n.5.

[4] It is ironic that the attorneys—the judge and prosecutor—are shielded by absolute immunity, while the non-attorney police officer is only protected by qualified immunity. See *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976) (holding that a prosecutor

about the constitutional standards governing their conduct.

II. The police do not violate a suspect's constitutional rights by engaging in "puffing."

The Seventh Circuit decision here also fundamentally changes the existing professional standards of police work by concluding that Respondent's statement was coerced because the police "lied" about the strength of the evidence. Pet. App. 16a ("[Petitioner] induced [Respondent's] 'confession' by lying to him about the medical reports"). Conceding for purposes of argument only that Petitioner lied to Respondent to pressure him to speak about whether he caused the devastating head injury to 11-month old Joshua Schrik, this kind of "puffing" is wholly proper to obtain a truthful, voluntary confession. The Seventh Circuit's rule creates a sea-change in police operations. The decision also undermines established, legitimate police practices in the states of the Seventh Circuit.

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had absolute immunity because his activities were not investigative in nature but, rather, "were intimately associated with the judicial phase of the criminal process"). The police officer's decision will ordinarily not enjoy the same opportunity for research, reflection, and analysis as will the corresponding decision of the attorneys. And the question whether the statement will even be admitted at trial is wholly outside the police officer's control. In other words, whether there is ultimately a Fifth Amendment violation occurs irrespective of the officer's actions.

A. The Seventh Circuit adopted a constitutional standard that bars the use of police "puffing."

One of the primary techniques that police officers use in an interrogation is the so-called "Reid Technique." This technique is outlined in the police manual *Criminal Interrogations and Confessions*, Inbau, Reid, Buckley & Jayne, (4th ed, 2001). This Court has examined this manual when examining the voluntariness of confessions and evaluating police practices. See, e.g., *Missouri* v. *Seibert*, 542 U.S. 600, 610 n.2 (2004) (Souter, J., plurality opinion); *Miranda*, 384 U.S. at 449 n.9.[5]

The Reid Technique "involve[s] duplicity and pretense." *Criminal Interrogations*, p. 427. The Inbau and Reid text explains that "an investigator may falsely imply, or outright state, that evidence exists that links the suspect to the crime." *Id*. at 427–28. The manual explains why this kind of deception does not result in false confessions, and it distinguishes the Reid Technique from the circumstance in which a promise of leniency may induce an innocent person to give a false confession. *Id*. at 428–29. In contrast, the manual indicates that it is "absurd" to believe

[5] Even the literature criticizing the manual has acknowledged the central role that the Reid Technique plays in police training. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 808 (2006); Gisli H. Gudjonsson, *The Pscyhology of Interrogations and Confessions*, 12 (2003) ("the work of Inbau and his colleagues is very influential and commonly used by police and military interrogators").

that simply providing false evidence would cause an innocent person to confess:

> It is our clear position that merely introducing fictitious evidence during an interrogation would not cause an innocent person to confess. It is absurd to believe that a suspect who knows he did not commit a crime would place greater weight and credibility on alleged evidence than his own knowledge of his innocence. Under this circumstance, the natural human reaction would be one of anger and mistrust toward the investigator.

Id. at 429. The manual recommends that the introduction of "fictitious" evidence only occur as a last resort, and not be used for a suspect who acknowledges he may have committed the crime but does not recall the event, or for young suspects with low social maturity because of their inability to assert their innocence. *Id*. There is no suggestion that Respondent met either of these exceptions.

The evidence at issue here is the same basic type—fictitious evidence of guilt. The Seventh Circuit determined that the police officers, including Petitioner Micci, lied to Respondent when they interviewed him about the circumstances of little Joshua's death. The Seventh Circuit explained that the "lies convinced [Respondent] that he must have been the cause of Joshua's shaken-baby syndrome because . . . the doctors had excluded any other possibility." Pet. App. 16a. But that is the prime example of deception evidence indicating that other

eyewitness, accomplice, or physical evidence confirms the suspect's guilt.

The Seventh Circuit identified such puffing with false promises of leniency and other deceptions designed to trigger a false confession. Pet. App. 17a. The standard the Seventh Circuit articulated is that the police deception "destroy[ed] the information required for a rational choice." *Id*. The court reasoned that because the police told Respondent that the injury had been caused "immediately" before Joshua became unresponsive, Respondent would have reasoned that he "must" have caused the death. Pet. App. 16a, 18a. In other words, according to the Seventh Circuit, typical "puffing" about the evidence, the so-called Reid Technique, results in coerced confessions. No other court has ever so held.

B. This Court has recognized that police "puffing" does not render a confession involuntary, and there is no dispute about the value of confessions.

The Seventh Circuit standard contradicts this Court's analysis on this very issue. The typical deception, as identified by this Court in *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969), requires this very same calculus—addressing powerful evidence that directly implicates the suspect.

In *Frazier*, the interrogating officer falsely told the suspect that his cousin, a person who the suspect had admitted he was with the evening of the murder, had "confessed" to the crime. *Frazier*, 394 U.S. at 737–38. This Court rejected the claim that police deception rendered the voluntary confession

inadmissible, because the suspect was—as here—a "mature individual of normal intelligence." *Id.* at 739. "The fact that the police misrepresented the statements that [the cousin] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible." *Id.* at 740.

The nature of the police puffing in *Frazier* is analogous to that presented here. If true, a close confidant confessing to the crime when the suspect has admitted that he was with him that evening is very probative of the suspect's participation in that crime. Likewise, the claim that the injury occurred immediately before the symptoms surfaced is very strong evidence that the person in whose care the child was entrusted was the one who caused the injury. The Seventh Circuit's analysis indicates that the police placed Respondent in a "vise" in which he was "compelled by logic" to confess to violently shaking the child and causing his death. Pet. App. 18a. But the same would have been true in *Frazier*.

The *Frazier* analysis applies equally to the Reid Technique. As the Inbau & Reid manual provides, "[w]ould a suspect, innocent of a homicide, bury his head in his hands and confess because he was told that the murder weapon was found during a search of his home? Of course not!" *Criminal Interrogations*, p. 428. The manual recognizes that an ordinary, mature person will not admit to wrongdoing when confronted with a (false) claim of fact that strongly indicates the person is guilty. This point is reflected in the general rule among the circuits that such police puffing does not render a suspect's confession

involuntary. Pet. 29 (citing eight circuits). Ultimately, Respondent admitted to have shaken Joshua. This was not false information. Thus, this case only confirms the Inbau & Reid point.

The exception to the *Frazier* rule is where a rational person would confess to the crime based on false threats or promises. See, e.g., *Lynumn v. Illinois,* 372 U.S. 528, 534, (1963) (false threat if the suspect did not cooperate here financial aid would be cut off and children taken from her). Promises of leniency—whether true or false—create the expectation that a person knowing that he will be charged regardless of his statements may falsely confess to attempt to mitigate his punishment. *Criminal Interrogations*, p. 428. The circuits have also recognized this distinction. See, e.g., *United States* v. *Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) ("The reason we treat a false promise differently than other somewhat deceptive police tactics (such as cajoling and duplicity) is that a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable.").

Significantly, the Seventh Circuit would likely have viewed the police work here very differently if the medical evidence did not later indicate that the child's injury was sustained days earlier. Pet. App. 7a, 34a. Respondent had said to the officer who responded to the scene that "he did not want to go to jail for the rest of his life." Pet. App. 24a, 26a. He also told the police that later questioned him at the police station that he was "ashamed" of himself and that he "did shake the baby too hard." Pet. App. 30a,

31a. These statements were video recorded. Pet. App. 31a. The negative cast the Seventh Circuit gave to these facts demonstrates the fact-bound nature of the Fifth Amendment inquiry and the difficulty for police in predicting the circumstances in which a court will call their conduct into question and impose civil liability.

This Court has recognized the unmitigated good that voluntary confessions provide to the community and in the solving of crimes. *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986) ("Admissions of guilt are more than merely 'desirable,' . . . they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.") (citation omitted); *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). The Seventh Circuit's rejection of this standard police practice is not warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: MARCH 2012