

NO. 56653-2  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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TIM EYMAN AND TIM EYMAN WATCHDOG FOR  
TAXPAYERS LLC,

Appellants,

v.

STATE OF WASHINGTON,  
Respondent.

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BRIEF OF *AMICUS CURIAE* PRIVATE CITIZEN, INC.

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### **INTEREST OF AMICUS CURIAE**

Private Citizen is a non-profit, public benefit corporation established in 2015 to advance civil rights with a specific focus on the First Amendment. Private Citizen protects the civil rights of individuals and groups through public education and litigation. It supports challenges to unjust and unconstitutional laws, regulations, and enforcement—often in areas involving political speech, association, and expression.

### **SUMMARY OF THE ARGUMENT**

The trial court concluded that “Tim Eyman is a continuing political committee, as that term is defined under [law].” See Appx. A to Appellant’s Brief, ¶3.6. Presumably on the strength of that conclusion, it then ordered that Eyman “shall report, in compliance with the FCPA, *any* gifts, donations, or any other funds Defendant Eyman receives directly or indirectly,” unless those funds are for legal defense or W-2 employee payments. *Id.* at p.30 (emphasis added). No person in the history of this state, and so far as we can tell, no United States citizen, has ever been

subject to such a lifelong intrusion upon his relations with his fellow citizens. But we write not to address the impact on Mr. Eyman. Instead, we write to address a consideration ignored by the Court below: the many ways in which this sweeping order reaches out to injure the First Amendment rights of hundreds of people who have supported, and will likely continue to support, Mr. Eyman outside the context of any election.

Tim Eyman's supporters give him money for a variety of reasons. Some give to support Eyman's ballot measures and initiative petitions. Others give to a "legal defense fund," intending to help Eyman pay his legal fees in defending against the State. Still others give money as an expression of support for Eyman's political efforts, without regard to any specific initiative petition or ballot measure. And others give money merely to financially support Eyman and his family.

The State may well have an interest in compelling disclosure of the first group —those who give specifically to influence the outcome of a ballot measure or initiative petition.

But it has no legitimate interest in forcing individuals to disclose private donations or gifts to Eyman where those gifts are not intended to, cannot, and do not influence any election or officeholder. Yet that is precisely the result of the State's conversion of Tim Eyman, the individual, into a continuing committee under Washington law: any person that donates or gifts money to Eyman *for any purpose*<sup>1</sup>—whether related to electoral politics or not—becomes a contributor whose relationship to Eyman must be disclosed to friends, neighbors, coworkers and bosses, and the world at large.

This hyper-extension of the law turns real life upside down. It hands the State a microscope under which a man's daily interactions with his fellow citizens can and must be scrutinized—and then publicized—as a matter of vital State

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<sup>1</sup> Though apparently unrooted from any statutory exception, the parties and the Superior Court all agree that the State is not attempting to compel the disclosure of funds given to Eyman's "legal defense fund." Though amicus believes that position is correct, it begs the question as to why those "contributions" are treated differently than other non-electoral contributions. As discussed further below, this ad hoc exception renders the State's enforcement scheme both under- and over-inclusive.

interest. Both man and associate are under the microscope. Family, friends, and moral and political supporters will now have to carefully weigh whether to give money to Eyman to pay rent or buy a meal or groceries. Should they give a favorite book? The analysis applies to any number of other things that the State will view as an “in-kind” contribution to the man whose entire life is a campaign and who exists as a PAC: subscriptions, articles, writing, advice—maybe even legal advice or professional guidance. These elements of daily life, of social interaction with friends and supporters, all become reporting events for the “man-PAC.” And for many of those friends, supporters, or acquaintances whose lives may touch the man-PAC, they must change the way they relate to him socially and politically. After all, their relationship will now be a vital interest of the State, subject to mandatory disclosure to their own neighbors, friends, and bosses.<sup>2</sup>

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<sup>2</sup> The FCPA regulates gifts to elected officials and campaigns as the public has an interest in knowing who may influencing elected officials, but even there the definition of gift under the statute is much narrower than the

This weaponization of the FCPA is at odds with the First Amendment, including the rights of those who wish to support and associate with Tim Eyman. Whatever penalties Mr. Eyman may owe for violating bona fide FCPA reporting requirements, the punishment cannot reach out to encompass his innocent family, friends, and supporters.

### **ARGUMENT**

#### **I. The First Amendment Protects Donors' Right to Anonymously Associate, including by Giving Money or Other Things of Value to Further Common Interests.**

The First Amendment prohibits the State from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I. Courts have “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to

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order being challenged. It specifically excludes, “Items from *family members or friends* where it is clear beyond a reasonable doubt that the gift was not made as part of any design to gain or maintain influence in the agency of which the recipient is an officer or employee”. [emphasis added] RCW 42.17A.005(26) citing to RCW 42.52.010(1)(A)

associate with others.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Marchioro v. Chaney*, 90 Wn.2d 298, 308 (1978) (citizens have a constitutional right to political association under the First and Fourteenth Amendments). Protected association furthers “a wide variety of political, social, economic, educational, religious, and cultural ends,” and “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Id.* Government infringement of this freedom “can take a number of forms... it may attempt to require disclosure of the fact of membership in a group seeking anonymity...” *Id.* The First Amendment protects the rights of third-parties to anonymously associate with Tim Eyman for non-electoral political purposes.

**a. The right to associate protects the giving and pooling of funds to support common goals.**

The right to associate under the First Amendment includes the use of money or other things of value to further the interests

of that association, as it must for the right to be effective. “The right to join together ‘for the advancement of beliefs and ideas’...is diluted if it does not include the right to pool money though contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’” *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). “Moreover, the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for ‘(f)inancial transactions can reveal much about a person's activities, associations, and beliefs.’” *Id.* (citing *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974)(Powell, J., concurring)).

This right is not, and never has been, limited to those making election campaign contributions; it has always protected non-electoral political association, too. *See Id.* (“Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably.”). In fact, the basis for the Court’s pronouncement of this protection in *Buckley*



was unrelated to campaign contributions. *See Bates v. City of Little Rock*, 361 U.S. 516 (1960) (overturning convictions under ordinances purporting to require NAACP to disclose list of members and contributions made to organization); *United States v. Rumely*, 345 U.S. 41 (1953)(setting aside a contempt conviction of an organization official who refused to disclose names of those who made bulk purchases of books sold by the organization).

The State disclaims a disclosure interest in funds given to Eyman to help support his legal defense. Though the distinction between those funds and other funds given to Eyman to help offset other non-legal expenses lacks support in the FCPA, the State's decision not to compel disclosure of those transactions is the right one. The Supreme Court has been hostile to attempts to regulate the pooling of funds to engage in litigation, even via indirect regulations. In *NAACP v. Button*, the Court held that Virginia's attempt to prevent the NAACP from operating its legal defense fund under the auspices of the State's expanded

definition of “improper solicitation of legal business” did not pass constitutional muster. 371 U.S. 415, 426 (1963). “For such a group, association for litigation may be the most effective form of political association.” *Id.* at 531; see also *NAACP Legal Def. & Ed. Fund, Inc. v. Comm. on Offenses Against Admin. of Just.*, 133 S.E.2d 540, 544 (Va. 1963) (“The law has always recognized the right of one to assist in commencing or prosecuting a legitimate undertaking, and financial support therefor is essential. A denial of such support would be a denial of the right.”).

**b. The First Amendment protects anonymous association.**

Laws prohibiting or limiting anonymous association, including compelled disclosure laws, directly burden fundamental First Amendment rights. “It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in

the cases above were thought likely to produce upon the particular constitutional rights there involved.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Acknowledging that risk, the Supreme Court observed that “privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.*

**II. The Compelled Disclosure Scheme Fabricated by the State Violates the First Amendment Rights of Third Parties Who Give Money to Tim Eyman for Purposes Unrelated to Electoral Politics.**

Last term, the Supreme Court reiterated the principle from *NAACP v. Alabama* that compelled disclosure regimes are subject to First Amendment scrutiny. See *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (citing *NAACP*, 357 U.S. at 462). The Court clarified that a compelled disclosure regime violates the First Amendment if it does not withstand exacting scrutiny. *Id.* at 2383 (“Regardless of the type of association, compelled disclosure requirements are reviewed

under exacting scrutiny.”). Because the State’s attempt to label Tim Eyman as a continuing political committee—a man-PAC—requires the forced disclosure of all those who give money to him *regardless of the purpose of the donation*, it cannot survive exacting scrutiny.

**a. Exacting scrutiny requires a sufficiently important state interest and a substantial relationship between that interest and the disclosure requirement, neither of which are present here.**

Exacting scrutiny requires “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Bonta*, 141 S.Ct. at 2387. “To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* at 2383 (*quoting Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted)). Such scrutiny is appropriate given the “deterrent effect on the exercise of First Amendment rights” that arises as an “inevitable result of the government’s conduct in requiring disclosure.” *Id.* (*quoting*

*Buckley*, 424 U.S. at 65). “While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.” *Id.*

**b. No sufficiently important state interest is served through the disclosure of private financial transactions unrelated to electoral politics.**

If the State has a relevant and permissible interest, it must be articulated somewhere within the FCPA. The FCPA is a campaign finance disclosure scheme, not a consumer protection or business practices statute. Its structure and text suggest that the State has no lawful interest in transforming an individual citizen into a “PAC for life.”

First, the FCPA identifies eleven state interests which may justify the burden imposed on a citizen's First Amendment rights when the public disclosure of their financial transactions is compelled by state law. RCW 42.17A.001(1)-(11) (Declaration of Policy). None of those interests apply to non-electoral contributions of the type that Eyman has received.

Next, it defines a political committee as “any person (except a candidate or an individual dealing with the candidate's or individual's own funds or property) having the expectation of receiving contributions or making expenditures *in support of, or opposition to, any candidate or any ballot proposition.*” RCW 42.17A.005(41) (emphasis added). Again, there is an explicit requirement that the contributions and expenditures which give rise to the FCPA’s reporting requirements be for the purpose of influencing an election.

Finally, it imposes disclosure requirements on contributions and expenditures made to a political committee, which must regularly report the name, address, and dollar amount given by any person to the committee. RCW 42.17A.225. The definition of “political committee” is crucial, as it tethers the disclosure requirements imposed on a committee to the State’s legitimate interests, imposing those requirements only where funds are used to influence electoral politics by supporting or opposing a candidate or ballot proposition.

This reading of the FCPA comports with U.S. Supreme Court precedent, which articulates three interests which may, under certain circumstances, justify campaign finance disclosures and the resulting infringement on First Amendment associational rights: 1) providing the electorate with information, 2) deterring quid pro quo corruption or the appearance of it, and 3) gathering data to determine whether contribution limits were violated. *Buckley*, 424 U.S. at 66-67.

Neither *Buckley*'s second nor third interests are served by the order below. Under Washington law, there are no contribution limits for an individual giving to a PAC. So even if one were to accept the State's view of Eyman as a lifelong man-PAC, disclosures of contributions to him cannot be justified by a need to track non-existent contribution limits. Similarly, the presence or appearance of corruption cannot justify the disclosure scheme the State advocates. RCW 42.17A.001(2)-(6) address the State's interest in protecting the integrity, impartiality, and honesty of public officials through the

avoidance of impropriety or corruption. Yet *quid pro quo* corruption is a concern only with regard to contributions to candidates, a concern which is not implicated in Mr. Eyman's occasional ballot measure campaigns. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 203 (1999) (“We note, furthermore, that ballot initiatives do not involve the risk of ‘*quid pro quo*’ corruption present when money is paid to, or for, candidates.”).

Thus, the only interest which could conceivably support the State's compelled disclosure of these transactions is a public informational interest. *See* RCW 42.17A.001(10) (“...[T]he public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.”). Yet the Legislature's declaration makes clear that the public's “right to know” must be tethered to “the financing of political campaigns” or “the financial affairs of



elected officials and candidates.”<sup>3</sup> The Legislature did not declare it the policy of the FCPA that the public should have a right to know about a gift to someone simply because the recipient is or has been politically active.

This distinction is critical. The record below showed that many gifts made by donors to Eyman were not made in pursuit of a particular political end—let alone to support or oppose an initiative or ballot measure. *See* Sept. 27, 2019, Mtn. to Intervene, ¶¶5-7 (intervenors gave money to Eyman for non-political purposes which the Court then deemed “‘contributions’ in support of ballot propositions...and not gifts.”). Instead, they were merely gratuitous. *See* Sept. 27, 2019, Dec. of Intervenor Roe, ¶3-4 (gift to Eyman was not solicited or given for political purposes); Sept. 27, 2019, Dec. of Intervenor Doe (same). The State is aware of the distinction, but rather than attempting to craft a more narrowly-tailored disclosure requirement, it simply

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<sup>3</sup> No party claims that Tim Eyman is either a candidate or an elected official.

doubled down on its theory in the apparent belief that Mr. Eyman's advocacy is so dangerous that especially harsh measures are necessary to police him and his friends and supporters.

Because no sufficiently important government interest is served by compelling disclosure of private financial transactions to Eyman which do not influence any election or campaign in Washington, the scheme as applied to Eyman and his donors fails exacting scrutiny. *Bonta* 141 U.S. at 2385.

**c. The only interest served by the State's actions here is retribution against Eyman and his supporters, an interest which is neither legitimate nor important.**

The State does have a real interest in this case, but it is illegitimate: an irrational bias against not only Eyman, but also against any citizen who dares step forward to give him support or solace. Despite the Attorney General's assertions that the rights of donors are not implicated here, the State of Washington has exhibited a severe animus against individuals who have

donated to Eyman, even where those donations were unrelated to any electoral goal.

In 2019, two Eyman supporters who gave money both to help Eyman with his legal defense and to help with his family's expenses (but not to influence any particular ballot measure or election) moved to intervene in the Superior Court. Their argument, in short, took the position of amicus here. They argued that some citizens might support Eyman in ways that are not reached by the FCPA's restrictions, and that under the First Amendment, that support is not subject to compelled public disclosure by any authority, whether the disclosure is ordered as a matter of statutory interpretation or as a "discovery sanction" against a litigant. On October 25, 2019, after briefing and oral argument, the Superior Court granted the Eyman donors' motion to intervene to assert and protect their associational rights under the First Amendment. CP October 25, 2019, p. 1.

Over two months later, as the intervening donors were actively participating in the litigation, they received an

unsolicited “Settlement Offer” signed by Assistant Attorney General Eric Newman. See Ex. 645. Without any citation to authority, Newman asserted for the first time that the FCPA (specifically, RCW 42.17A.780) would permit the State to seek attorneys’ fees from the intervenors, even though they were involved in the case only to assert their own constitutional rights and no enforcement action was pending or sought against them. Newman stated that the State intended to seek those fees:

Your clients may not yet be aware that the State intends to seek from your client all costs and fees incurred related to your clients’ intervention... Because your clients have aligned themselves with the Eyman Defendants, your clients will be jointly and severally liable for most of the State’s fees and costs from the date of intervention going forward. By the time of trial that amount will certainly exceed \$500,000. There can be no doubt that the State will prevail in this matter.

See Ex. 645. The State graciously offered to “waive” the costs and fees if intervenors dismissed their counterclaim against the State and withdrew from the matter. *Id.*

The State made no attempt to hide its true purpose in making the “settlement offer.” It wanted to levy crippling financial sanctions against the intervening donors not because they broke any law, engaged in wrongful conduct, or harmed anyone, but simply because they “aligned themselves with the Eyman Defendants.” This alignment—that is, this association—with Eyman was constitutionally protected, as was the right of those donors to intervene in the case to petition the court to protect their own First Amendment interests and engage in public interest litigation. *See Button*, 371 U.S. at 429 (in addition to protecting speech, “the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion”).

Indeed, there is serious doubt whether fees can be awarded against intervenors who join an ongoing enforcement proceeding merely to petition the Court for protection from the collateral impact (compelled disclosure) that the litigation may have on the First Amendment rights of themselves and hundreds of others

who occupy the same position. *See* RCW 42.17A.780. But in a case in which the State had already convinced the Superior Court to subject Eyman to sweeping, severe sanctions, the mere threat of an errant decision awarding hundreds of thousands or millions of dollars of fees against the intervenors was sufficient to achieve the State’s secondary purpose: to force Eyman supporters from this case and keep them from pursuing meritorious civil rights claims.<sup>4</sup>

In short, the retaliatory animus the State harbors against Eyman is by no means limited to him. It applies, too, to any Washington citizen who supports Eyman, even if the support is not to advance any particular measure or election. Two unfortunate intervenors experienced this first-hand in this very

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<sup>4</sup> In its response brief in this appeal, the State disingenuously characterizes its threat against the intervenors as an “explanation...that they could be required to pay attorney’s fees if they lost.” Resp. Br., p. 51. The State apparently felt the need to “explain” its position because it was unprecedented. The fee shifting provision is intended to shift the cost on a defendant whose conduct in violating the FCPA causes the State to incur costs to prosecute that violation. It cannot reasonably be read to impose the liability suggested by the State.

proceeding. If the order below stands, however, the injury will not be so fleeting. Hundreds or thousands more who support Eyman in the future, wholly outside of any election contest, will find that their support has become the business of the State, their neighbors, coworkers, and bosses. This is an utterly illegitimate and unconstitutional basis for state action.

**d. The State’s compelled disclosure of private, non-electoral financial transactions is not narrowly tailored.**

Initially applied as a discovery sanction against Eyman, then adopted as a finding of fact by the Superior Court, Eyman was labeled a political committee and over \$700,000 in transfers to him were deemed “contributions” in support of ballot propositions rather than gifts. See Appx. A to Appellant’s Brief, ¶¶2.56-59. The State successfully advocated for this relief throughout the proceedings below.

The State’s scheme is not only grounded in an insufficient state interest, it is not close to being narrowly tailored. Narrow tailoring is crucial where First Amendment activity is chilled—

even if indirectly—“[b]ecause First Amendment freedoms need breathing space to survive.” *Bonta*, 141 S.Ct. 2384 (citing *Button*, 371 U.S. at 433). When it comes to “a person’s beliefs and associations,” “[b]road and sweeping state inquiries into these protected areas ... discourage citizens from exercising rights protected by the Constitution.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion).

Even a “legitimate and substantial” state interest “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). “The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.” *Id.* Following this authority, in determining whether legislation is narrowly tailored, the Ninth Circuit considers whether the restriction “(1) promotes a substantial government interest that would be achieved less effectively absent the regulation, and (2) [does] not burden substantially more speech than is necessary to further the



government's legitimate interests.” *Kuba v. I–A Agricultural Ass’n*, 387 F.3d 850, 861 (9th Cir. 2001) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)) (alteration and internal quotation marks omitted).

The Superior Court’s order fails both prongs of the Ninth Circuit test. It would compel disclosure of anyone who gives money to Tim Eyman regardless of the purpose for which it is given. There is a critical distinction between a person who donates expecting those funds will be used in a candidate or ballot measure election, and a person who gives a gift with no such expectation. As the Washington Supreme Court noted in the lobbying context, the state and the public have an interest in full disclosure of the former, but not the latter. *Young Americans For Freedom, Inc. v. Gorton*, 83 Wn. 2d 728, 732–33 (1974). Thus, there is no “substantial interest” that would be accomplished less effectively by paring back the injunction to comply with the FCPA—to only require disclosure of contributions made in support of or opposition to a candidate or ballot proposition. *See*

RCW 42.17A.005(41) (definition of “political committee”). As to the second prong, without narrowing to make the order consistent with the FCPA, it will capture an array of transactions having nothing to do with elections—far more than is necessary to achieve the only legitimate state interest.

At the same time, the Order is also under-inclusive. Under-inclusiveness often reveals not only a problem with tailoring, but also that the State’s interest (here, the supposed need to reveal all those who choose to support Eyman, both inside and outside of politics) is fundamentally insincere. Why does the State exempt from the reporting requirement those funds given to Eyman to support his legal defense? Those funds, no less than mere gifts, will reveal who dares to support him, and a true PAC cannot conceal funds received to cover legal expenses. Perhaps this “give” by the State is an implicit recognition that there is something deeply wrong with the theory that a single man can become a lifelong PAC and have all of his supporters revealed to the world in regular reports.

**e. This decision will set a dangerous precedent if not reversed.**

Today, there is only one Tim Eyman. There are only a few thousand individuals in this state and across the country who have given him money—including some people like the Intervenor below who did not give for any candidate or ballot measure campaign. But the consequences of approving the Superior Court’s order would affect far more than even these supporters, and would set an example that would ripple across other state campaign finance authorities and courts.

The State asks this Court to approve a template by which it can, *ad hoc* and on a case-by-case basis, permanently cripple politically active individuals by driving a wedge between those activists and their supporters. Forcing a citizen’s supporters to accept the legal fiction that he is a life-long political committee subjects them to mandatory disclosure of “any” gifts they may make—including even gifts to lessen the blow of other, massive financial penalties. This cannot help but break the targeted

citizen from his network of family, friends, and supporters, all of whom will shy from public disclosure and potential retaliation at home, in the community, or at work for supporting the target. No campaign finance infraction, regardless of its severity, is deserving of such punishment. Nor should an innocent friend or supporter be forced to surrender First Amendment-protected anonymity merely for continuing to associate with a targeted citizen outside the context of campaigns. The campaign finance laws are tethered to election campaigns precisely to avoid such over-reaching. This Court should not be the first to extend regulation of campaign finance to the regulation of everyday living and civil society.

### **CONCLUSION**

Amicus Curiae Private Citizen respectfully suggests that the Court should reverse the judgment of the Superior Court with respect to its determination that Tim Eyman is a continuing political committee.

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Respectfully submitted this \_\_\_\_\_ day of June 2022.

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