

Court of Appeals No. 351742
Grant Co. Superior Court Cause No. 17-2-00228-0

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FRED MEISE, DOUG BIERMAN, PAT HOCHSTATTER, MIKE
COUNSELL, JASON MELCHER, AND JARED POPE,

Petitioners,

vs.

MICHELE JADERLUND, GRANT COUNTY AUDITOR,

Respondent,

and

KATIE PHIPPS, MICHELLE KITTRELL, KRISTA HAMILTON,
SUSAN MOBERG, CRAIG HARDER, DENNIS KEARNS, and
BARBARA KEARNS,

Intervenors.

PETITIONERS' REPLY BRIEF

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Petitioners submit the following reply to the brief filed on behalf of Respondent Michele Jaderlund, the Grant County Auditor (Jaderlund), and the brief filed on behalf of Intervenors:

I. REPLY

In responding to Petitioners' appeal, Jaderlund and Intervenors emphasize the rights of voters who supported a local school district bond measure. However, 31 voters—approximately 15 times the number of votes necessary to affect the outcome of the election—were disenfranchised by Jaderlund's admitted failure to comply with the telephone notification requirement of RCW 29A.60.165(1) and (2)(a), which was imposed by the Legislature to ensure that all those demonstrating an intent to vote have their votes counted. Under these circumstances, the supporters of the ballot measure have no right to claim that the measure passed by the requisite amount, or to enforce their will at the expense of the disenfranchised. Annuling the election results does not prevent the ballot measure from being re-presented to voters in a properly conducted election. If the supporters of the measure prevail at that time, then (and only then) can they legitimately enforce their will, having respected the rights of all voters.

Jaderlund and Intervenors invoke “judicial restraint” and “substantial compliance” to excuse Jaderlund’s failure to comply with RCW 29A.60.165(1) and (2)(a) and ignore the effect of her failure to comply. However, they offer no principled limits on the application of these doctrines, and they leave little or no room for the court to exercise its responsibility to engage in judicial review of election results. Judicial restraint and substantial compliance represent prudential limits on the statutory remedy of annulment when there is no possibility that the outcome of an election could have been affected. This understanding of judicial restraint and substantial compliance is supported by the case law on which all parties rely. Because it cannot be said that Jaderlund’s conduct had no effect here, the results of the election must be set aside.

A. Jaderlund and Intervenors do not dispute that Jaderlund’s admitted failure to comply with the telephone notification requirement of RCW 29A.60.165(1) and (2)(a) constitutes “misconduct” by an “election official.”

Jaderlund acknowledges that the definition of misconduct actionable under the election contest statute is “broad,” that her “failure to perform statutorily prescribed duties is arguably ‘misconduct’” within the meaning of the relevant statute. Jaderlund Br., at 7; *see also* Petitioners’ Br., at 9-10. Intervenors likewise

appear to acknowledge that Jaderlund's failure to comply with the telephone notification statute constitutes misconduct, although they suggest that the question of misconduct "begs the question" of whether such misconduct requires the result of the election to be annulled. *Intervenors' Br.*, at 6. Neither Jaderlund nor *Intervenors* dispute that, as county auditor, Jaderlund is an "election official." *See Petitioners' Br.*, at 8-9.

B. Jaderlund and Intervenors do not dispute that the express statutory remedy for misconduct by an election officer is annulment of the election.

In their opening brief, *Petitioners* pointed out how the statutory remedy for misconduct by an election official is to annul and set aside the election results. *See Petitioners' Br.*, at 10 & App. (citing and attaching RCW 29A.68.050). Jaderlund and *Intervenors* do not dispute that this is the proper statutory remedy, although they note that it is limited by principles of judicial restraint and the doctrine of substantial compliance, as previously acknowledged by *Petitioners*. *See Intervenors' Br.*, at 6 (quoting RCW 29A.68.050).¹

Intervenors further contend that violation of the statute containing the telephone notification requirement does not warrant annulment of the election because the statute containing the

¹ Jaderlund does not cite RCW 29A.68.050. *See Jaderlund Br.*, at iii-iv (table of authorities).

requirement does not specifically “provide that the failure to give telephonic notice requires the invalidation of the election.” Intervenors' Br., at 5; *accord id.* at 4, 6 & 11. However, it appears that no election law requirement contains a separate invalidation provision apart from that contained in RCW 29A.68.050. Requiring each election law requirement to contain a separate invalidation provision would be redundant, and contrary to normal rules of statutory construction. *See, e.g., State v. Bigsby*, — Wn. 2d —, 399 P.3d 540, 544 (Aug. 10, 2017) (stating “[t]he court ascertains a statute's plain meaning by construing that statute along with all related statutes as a unified whole and with an eye toward finding a harmonious statutory scheme”). Read as a whole, the election contest statutory scheme expressly provides that misconduct by an election official, including, but not limited to, failure to comply with the telephone notification requirement of RCW 29A.60.165(1) and (2)(a), warrants annulment of an election.

C. Jaderlund and Intervenors do not dispute that Jaderlund’s misconduct disenfranchised more than enough voters to make a difference in the outcome of the election.

As pointed out in Petitioners’ opening brief, this election was decided by only two votes. *See* Petitioners’ Br., at 3 (citing CP 59). Thirty-one votes were not counted because signatures were missing

on their ballots or their signatures were perceived not to match the signatures on file. None of these voters were notified by telephone, contrary to the requirements of RCW 29A.60.165(1) and (2)(a). CP 103. This is more than enough votes to change the outcome of the election.

Jaderlund contends that only 26 of these voters with missing or nonmatching signatures had telephone numbers on file with the auditor. *See Jaderlund Br.*, at 2 (citing CP 91 & 103); *id.* at 13-15 (no citation to record). This claim is unsupported by the record, and should be disregarded. CP 91 is Jaderlund's brief in the superior court, which states that 24 voters had phone numbers on file without citation to any evidence. CP 103 is the declaration of an employee of the auditor's office that confirms "[w]e did not initiate telephonic contact with the voters of the challenged signatures," but does not suggest that the auditor's office lacked telephone numbers for the voters. (Brackets added.) In any event, even if only 26 voters had numbers on file, that is still more than enough votes to change the outcome of the election.²

² Jaderlund attempts to minimize the number of disenfranchised voters by stating that they represent 0.3% of the total votes. *See Jaderlund Br.*, at 18. However, the vote margin was less than 0.03%, more than 10 times smaller.

D. The principle of judicial restraint and the doctrine of substantial compliance are not free-standing grounds to uphold flawed election results; they simply reflect prudential limits on annulling an election unless there is a possibility that a sufficient number of voters were disenfranchised to affect the outcome.

Jaderlund and Intervenors invoke judicial restraint as a basis to uphold flawed election results, but they provide no principled basis to guide or limit the exercise of such restraint. In a similar way, Jaderlund and Intervenors invoke the doctrine of substantial compliance, but they provide no principled basis for distinguishing between substantial and in-substantial compliance. In both ways, their arguments seem to leave little or no room for judicial review of election results.

In the context of an election contest, the principle of judicial restraint and the doctrine of substantial compliance both reflect the same prudential concern that election results should not be disturbed unless there is a possibility that a sufficient number of voters were disenfranchised to affect the outcome. In *Dumas v. Gagner*, 137 Wn.2d 268, 283, 971 P.2d 17, 25 (1999), the Court described this prudential concern in terms of “judicial restraint.” In *Sudduth v. Chapman*, 88 Wn.2d 247, 255, 558 P.2d 806, 811 (1977), the Court described the same concern in terms of

“substantial compliance.” Most of the relevant cases do not specifically mention either to the principle of judicial restraint or the doctrine of substantial compliance, but all of them express the same underlying concern.

For example, surveying precedent since Washington became a state, the Court in *Sudduth* noted:

All of these cases have held that technicalities will be overlooked in order to give effect to the will of the people expressed in an election. ***They do not support the proposition that irregularities will be overlooked where they result in the denial of the franchise or the right of petition.***

88 Wn.2d at 255 (emphasis added; discussing *Seymour v. Tacoma*, 6 Wash. 427, 33 P. 1059 (1893); *Loop v. McCracken*, 151 Wash. 19, 274 P. 793 (1929); and *Vickers v. Schultz*, 195 Wash. 651, 81 P.2d 808 (1938)).

Petitioners cited *Sudduth* for this proposition in their opening brief. See Petitioners’ Br., at 18. Jaderlund does not address *Sudduth* in her brief. See Jaderlund Br., at iii-iv (table of authorities). Intervenors cite the first sentence of the foregoing quotation from *Sudduth*, but they do not acknowledge the dispositive second sentence highlighted above. See Intervenors’ Br., at 7.

The cases cited by Jaderlund and Intervenors are in accord. See Jaderlund Br., at 9-11 (citing *Richards v. Klickitat Cty.*, 13 Wash. 509, 512, 43 P. 647 (1896); *Rands v. Clarke County*, 79 Wash. 152, 139 P. 1090 (1914); *Murphy v. City of Spokane*, 64 Wash. 681, 684, 117 P. 476 (1911); *Vickers v. Schultz*, 195 Wash. 651, 81 P.2d 808 (1938); *State ex rel. Dore v. Superior Court*, 171 Wash. 423, 18 P.2d 51 (1933); and *Hill v. Howell*, 70 Wash. 603, 127 P.2d 211 (1912)); Intervenors' Br., at 4, 7-12 (additionally citing *State ex rel. Sampson v. Superior Court*, 71 Wash. 484, 488, 128 P. 1054 (1913); *Shaw v. Shumway*, 3 Wash. 2d 112, 118-19, 99 P.2d 938 (1940); *Seymour v. Tacoma*, 6 Wash. 427, 33 P. 1059 (1893); *Loop v. McCracken*, 151 Wash. 19, 274 P. 793 (1929); *State ex rel. Mullan v. Doherty*, 16 Wash. 382, 47 P. 958 (1897); *Hesseltine v. Town of Wilbur*, 29 Wash. 407, 69 P. 1094 (1902); *Lee v. Bellingham Sch. Dist.*, 107 Wash. 482, 182 P. 580 (1919); *Groom v. Port of Bellingham*, 189 Wash. 445, 65 P.2d 1060 (1937)).

The language of the cases cited by Jaderlund and Intervenors declined to annul elections precisely because there was no **possibility** that the outcome could have been affected, yet neither Jaderlund nor Intervenors acknowledge the relevant language from these decisions. For example:

- *Richards*, 13 Wash. at 513 (stating “[t]he result in this case could not have been affected by the omission of the commissioners to specify the notice in the resolution, because the notice—and competent notice—was actually given”);
- *Rands*, 79 Wash. at 159 (stating “the requirements of a statute providing for the giving of notices of an election, either general or special, were directory rather than mandatory, unless ... the court can see from the record that the result of the election might have been different”; ellipses added);
- *Murphy*, 64 Wash. at 687 (upholding election despite violations of precinct staffing requirements in part because “[n]or does it appear that any qualified voters came to the polls to vote before the proper closing hour, and were prevented from voting because the polls were then closed”; brackets added);
- *Vickers*, 195 Wash. at 657 (declining to annul election based on improper notice because “[t]he want of statutory notice, it is clear, did not result in deprivation of sufficient number of the electors of the opportunity to exercise their franchise to change the result of the election”; brackets added);
- *Dore*, 171 Wash. at 427 (stating “[t]he vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election” and declining to annul election because allegedly defective notice “could not possibly have misled the electors and have any effect upon the result”);
- *Hill*, 70 Wash. at 609 (declining to annul election or throw out all votes from a precinct that failed to keep polls open for the statutorily prescribed length of time because there was “no allegation that, had the polls been kept open an hour longer, [the candidate] would have been in any wise benefitted by it”; brackets added); *id.* at 611-12 (declining to throw out all votes from a precinct that left ballot box

unguarded during the lunch hour because “it is not shown that harm resulted”);

- *Sampson*, 71 Wash. at 487-88 (quoting *Mullen*, 16 Wash. at 389, for the proposition that “[t]he vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election” and holding election invalid based on lack of notice; brackets added);

- *Groom*, 189 Wash. at 447 (stating “[a]n election will not be declared invalid for any irregularities when it appears that ... the want of statutory notice did not result in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election”; brackets & ellipses added);

- *Seymour*, 6 Wash. at 431 (declining to annul election based on improper notice because “[i]t is not pretended that the omissions in this case had any effect whatever on the result, or that a single vote additional would have been cast if the clerk had followed the ordinance to the letter”; brackets added); and

- *Loop*, 151 Wash. at 25 (stating “[t]he error of the election authorities should not disfranchise the voter”; declining to annul election based on improper notice).

Petitioners have shown that a sufficient number of voters were disenfranchised to change the outcome, and Jaderlund and Intervenors cannot establish that a different outcome is impossible. *See Jaderlund Br.*, at 14 (acknowledging that “such an outcome is hypothetically possible”). Intervenors claim that “[i]t is merely speculation on the Petitioners’ part that the uncounted votes would have made a difference in the outcome,” *See Intervenors’ Br.*, at 18;

but the foregoing cases clearly indicate that the possibility of a different outcome is sufficient to annul the election and they provide no contrary authority.

E. *Morgan v. Aalgard* is distinguishable because it involved the question of what constitutes a valid ballot and whether invalid ballots should be counted, rather than the effect of an election officer's failure to fulfill her obligation to ensure that valid ballots are cast.

Jaderlund and Intervenors cite *State ex rel. Morgan v. Aalgard*, 194 Wash. 574, 582, 78 P.2d 596 (1938), in support of their arguments. *See* Jaderlund Br., at 18; Intervenors' Br., at 18. In *Morgan*, one candidate for a school board position (Morgan) filed a quo warranto action alleging that another candidate (Aalgard) who claimed the position did not actually receive more votes. *See* 194 Wash. at 575. In reviewing the election tally, the court held ballots prepared by the school district that contained only one candidate's name were invalid and should not be counted, reasoning "[i]f such absolutely defective and illegal ballots be upheld [sic], the integrity of the ballot and of elections generally will be seriously impaired." *Id.* at 582 (brackets added). The court rejected an argument that the failure to count invalid ballots disenfranchised voters because they were "manifestly defective." *Id.* at 583. However, the court was not

asked to annul the election in light of the invalid ballots, and did not address the issue.

Morgan is distinguishable because the case did not address the validity of the election in question, as opposed to the validity of ballots counted to determine who won the election. *Morgan* was a quo warranto proceeding. See 194 Wash. at 575; see also *Foulkes v. Hays*, 85 Wn. 2d 629, 633, 537 P.2d 777 (1975) (noting procedural posture of *Morgan*). In a quo warranto proceeding, the court's authority is limited to determining whether a person unlawfully holds or exercises any public office. See RCW 7.56.010(1) (authorizing quo warranto proceeding “[w]hen any person shall usurp, intrude upon, or unlawfully hold or exercise any public office”; brackets added); RCW 7.56.010(3) (authorizing quo warranto action against multiple persons who “claim to be entitled to the same office ... in order to try their respective rights to the office”; ellipses added); RCW 7.56.040 (requiring quo warranto information to allege “the name of the person rightfully entitled to the office, with an averment of his or her right thereto”).

The court does not have authority to annul an election or order a new one in a quo warranto proceeding. See RCW 7.56.060 (authorizing judgment establishing “the right to an office”); RCW

7.56.070 (authorizing judgment “to exercise the functions of the office” and “to deliver over all books and papers ... belonging to the office”; ellipses added); RCW 7.56.100 (authorizing “judgment of ouster ... from the office”; ellipses added). In this way, the nature of a quo warranto action limited the remedies available to the court.

Morgan did not involve a statutory election contest comparable to this action. As noted above, under the statute that governs this case, “the court shall pronounce judgment in the premises, either confirming or annulling and setting aside such election, according to the law and right of the case.” RCW 29A.68.050. Misconduct by an election officer such as Jaderlund warrants such relief under the law and right of the case. *Morgan* simply did not address the issues present here.

F. Petitioners’ election contest petition is timely.

The Petitioners’ election contest petition is subject to the following time limit:

An affidavit of an elector under this subsection shall be filed with the appropriate court no later than ten days following the official certification of the primary or election as provided in RCW 29A.60.190, 29A.60.240, or 29A.60.250 or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.

RCW 29A.68.013. This statute contains two time limits, one expiring 10 days following the certification of the election and the other expiring 10 days following the date of the certification of a recount. The two time periods are joined by the conjunction “or,” indicating that they are alternative. *See Merriam Webster Online, s.v. “or”* (viewed Sept. 6, 2017; available at www.m-w.com). Therefore, Petitioners’ petition is timely if it was filed within either time limit. Even if the plain language of the statute were not clear, and there was uncertainty as to which time limit was applicable, the longer limit should be applied. *See Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 715, 709 P.2d 793, 796 (1985) (stating “[w]hen there is uncertainty as to which statute of limitation governs, the longer statute will be applied”; brackets added). It is undisputed that Petitioners filed their election contest petition while a recount was pending, well within the time limit expiring 10 days following certification of the recount. *See* Intervenors’ Br., at 18-19.

Presumably as an alternate basis to affirm under RAP 2.5(a), Intervenors argue that Petitioners’ petition is not timely because they challenged the election rather than the recount. In order to make this argument, they attempt to recast the election contest

petition as a claim that the auditor should have counted the 31 ballots with missing or non-matching signatures. They reason that such ballots cannot be considered in a recount, and that the recount-based time limit is therefore inapplicable. *See* Intervenors' Br., at 20-22. This argument should be rejected because the plain language of the statute does not require an election contest petition to be filed within 10 days after certification of an election if there is a recount, nor does it limit a petition filed within 10 days after certification of a recount to only those issues arising in the course of the recount.

Intervenors rely on *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004), *rev. denied*, 155 Wn. 2d 1005 (2004), but the case is unhelpful because it did not involve a recount, nor did it involve a comparable time limit to the one that governs this case. Instead, *Reid* involved former RCW 29.65.020 and former RCW 29.04.030(6), neither of which contains a disjunctive clause providing for an election contest petition to be filed within 10 days after certification of a recount.³

In the final analysis, the reason why an election contest petition should not have to be filed immediately when there is a

³ Former RCW 29.65.020 and former RCW 29.04.030 are reproduced in the Appendix to this brief.

recount is that the recount may render the petition moot, especially in a close election such as the one in this case. The courts have previously endorsed an approach to time limits that avoids unnecessary filings. *See Winbun v. Moore*, 143 Wn. 2d 206, 18 P.3d 576 (2001) (adopting “individualized application of the discovery rule” under medical negligence statute of limitations to spare physicians “unnecessary involvement” in litigation unless and until specific negligent acts or omissions can be attributed to them); *Webb v. Neuroeducation, Inc.*, 121 Wn. App. 336, 345, 88 P.3d 417 (2004) (noting the Supreme Court has rejected the “shoot first, ask questions later” approach to statutes of limitations). Allowing those contesting an election to postpone their challenge pending a recount is entirely consistent with, if not mandated by, this approach.

Respectfully submitted this 7th day of September, 2017.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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APPENDIX

In effect in 2002, when Reid arose

West's RCWA 29.04.030
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 29. ELECTIONS
CHAPTER 29.04. GENERAL PROVISIONS

29.04.030. Prevention and correction of election frauds and errors

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

- (1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or
- (2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or
- (3) The name of any person has been or is about to be wrongfully placed upon the ballots; or
- (4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or
- (5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or
- (6) An error or omission has occurred or is about to occur in the issuance of a certificate of election.

An affidavit of an elector under subsections (1) and (3) above when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the issuance of a certificate of election.

CREDIT(S)

1993 Main Volume

[1977 ex.s. c 361 § 3; 1973 1st ex.s. c 165 § 1; 1971 c 81 § 74; 1965 c 9 § 29.04.030. Prior: (i) 1907 c 209 § 25, part; RRS § 5202, part. (ii) 1889 p 407 § 19; RRS § 5276.]

HISTORICAL AND STATUTORY NOTES

1993 Main Volume

Effective date—Severability—1977 ex.s. c 361: See notes following RCW 29.01.006.

Source:

Laws 1889, p. 407, § 19.
Laws 1907, ch. 209, § 25.
RRS §§ 5202, 5276.

CROSS REFERENCES

In effect in 2002, when Reid arose

West's RCWA 29.65.020
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 29. ELECTIONS
CHAPTER 29.65. CONTESTS

29.65.020. Affidavit of error or omission—Time for filing—Contents—Witnesses

An affidavit of an elector with respect to RCW 29.04.030(6) must be filed with the appropriate court no later than ten days following the issuance of a certificate of election and shall set forth specifically:

- (1) The name of the contestant and that he is a registered voter in the county, district or precinct, as the case may be, in which the office is to be exercised;
- (2) The name of the person whose right is being contested;
- (3) The office;
- (4) The particular causes of the contest.

No statement of contest shall be dismissed for want of form if the particular causes of contest are alleged with sufficient certainty. The person charged with the error or omission shall be given the opportunity to call any witness, including the candidate to whom he has issued or intends to issue the certificate of election.

CREDIT(S)

1993 Main Volume

[1977 ex.s. c 361 § 102; 1965 c 9 § 29.65.020. Prior: (i) Code 1881 § 3110; 1865 p 43 § 6; RRS § 5371. (ii) Code 1881 § 3112; 1865 p 44 § 8; RRS § 5373.]

HISTORICAL AND STATUTORY NOTES

1993 Main Volume

Effective date—Severability—1977 ex.s. c 361: See notes following RCW 29.01.006.

Source:

- Laws 1865, pp. 43, 44, §§ 6, 8.
- Code 1881, §§ 3110, 3112.
- RRS §§ 5371, 5373.

LIBRARY REFERENCES

1993 Main Volume

- Elections ~~§~~ 278, 280, 285.
- WESTLAW Topic No. 144.
- C.J.S. Elections §§ 254 et seq., 258, 268.

NOTES OF DECISIONS

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- Limitations 3
- Review 4
- Sufficiency of affidavit 2

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September 07, 2017 - 2:04 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: Fred Meise, et al v. Michele Jaderlund, Grant County Auditor
Superior Court Case Number: 17-2-00228-0

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