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No. 97630-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

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W.H., et al.,

Plaintiffs,

v.

OLYMPIA SCHOOL DISTRICT, et al.,

Defendants.

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BRIEF OF *AMICUS CURIAE* LEGAL VOICE

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## I. INTEREST OF AMICUS CURIAE

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of women and LGBTQ people in the Pacific Northwest through litigation, legislative advocacy, and legal rights education. Since its founding in 1978 as the Northwest Women's Law Center, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country involving gender discrimination, including sexual harassment and sex discrimination in the workplace, educational settings, and in public accommodations.

Legal Voice was counsel in one of the few Washington Supreme Court cases involving a claim of sex discrimination in a place of public accommodation, *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002). Legal Voice filed an *amicus curiae* brief in *Floeting v. Group Health Cooperative*, 192 Wn.2d 848, 434 P.3d 39 (2019), the reasoning of which was relied on heavily in the opinion of this Court. Legal Voice has a strong interest in ensuring that the Washington Law Against Discrimination is interpreted to fully protect against all forms of gender-based discrimination and harassment, including sexual harassment of children in educational settings.

## II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves two questions certified to this Court by the United States District Court for the Western District of Washington:

1. May a school district be subject to strict liability for discrimination by its employees in violation of the WLAD?
2. If a school district may be strictly liable for its employees' discrimination under the WLAD, does "discrimination" for the purposes of this cause of action encompass intentional sexual misconduct including physical abuse and assault?

Legal Voice agrees with Plaintiffs that the answer to both certified questions is an unqualified yes for the reasons set forth in Plaintiffs' briefs, including the plain language of the WLAD, this Court's decision in *Floeting*, and the long history of recognizing intentional sexual misconduct as discrimination under the WLAD. But in addition to answering yes to the certified questions, this Court should reject outright arguments raised by Defendant Olympia School District that distort the meaning and purpose of the WLAD and ignore the societal and historical context that surround the issues presented in this case.

First, this Court should expressly reject the District's argument that the female students abused here are not members of a protected class because the District's employee allegedly targeted both male and female students. Although this issue is not part of the certified questions, to the extent the Court addresses the District's argument, it must make clear that

sexual assault committed by an employee in a place of public accommodation is *always* discrimination based on sex, regardless of the number of victims or their gender. To hold otherwise would turn the Washington Law Against Discrimination on its head. The WLAD is meant to protect the “full enjoyment” of the services and privileges of a place of public accommodation, RCW 49.60.030(1)(b), and it prohibits mistreatment that makes a person feel “not welcome, accepted, desired, or solicited,” RCW 49.60.040(14). When a student is sexually assaulted by a school district employee, she or he is unequivocally denied the full enjoyment of their public educational institution because of their sex. The discrimination experienced by the student in no way changes because of the sexual proclivities of the abuser. The District’s argument would change the inquiry from whether the victim experienced discrimination to an exploration of the gratification motivating the abuser, with the perverse incentive of insulating places of public accommodation from liability when their employees sexually assault a broader array of victims.

Second, the District’s assertion that “this is not a WLAD case” because the legislature did not intend to include “children” as a protected class ignores the reality of how sexual abuse and assault is intertwined with other forces that perpetuate discrimination in schools. The simple truth is that sexual assault is more likely to impact young women; students

of color; transgender students; and other populations that already face barriers to the full enjoyment of public educational institutions. By making clear that strict liability for sexual harassment in places of public accommodations includes school districts—and thus incentivizing school districts to do all that they can to prevent sexual harassment and assault, rather than take action only when it is reported—this Court will further the purpose of the WLAD to eradicate discrimination for all of these groups.

Finally, the District’s argument that a school bus is not a place of public accommodation is not only wrong as a matter of statutory interpretation, it is willfully ignorant of the fundamental role that transportation has played in providing equal access to public education in Washington State and the nation. There is no rational reason that discrimination on a school bus should be treated any differently than discrimination in a classroom.

### **III. STATEMENT OF THE CASE**

*Amicus Curiae* adopts the Statement of the Case as outlined by plaintiffs in their opening brief.

### **IV. ARGUMENT**

#### **A. Sexual assault is always “because of sex.”**

Defendant Olympia School District acknowledges that the federal district court “declined to certify a question as to whether a plaintiff may

prove sex discrimination where, as here, the perpetrator sexually abused children of both genders,” Def. Br. 2, and this Court need not address that issue (which also remains subject to factual disputes, Pltf. Reply 23) in order to answer the certified questions. Nonetheless, the District raises this argument repeatedly, claiming that the WLAD should not apply to this case because “children” are not a protected class, and asking this Court to hold that “conduct targeting both men and women is not based on sex, no matter how reprehensible.” Def. Br. 6. Later, the District asserts again that the Legislature did not intend for the WLAD to reach sexual misconduct in places of public accommodation where “the victims of the physical abuse and assault are children,” *id.* at 27, and that the fact that its employee “sexually assaulted boys *and* girls demonstrates further why this is not a WLAD case,” *id.* at 28.

This Court should take this opportunity to unequivocally reject this argument and make clear that sexual assault by an employee in a place of public accommodation is *always* “because of sex.” The WLAD states that with respect to places of public accommodation, including public educational institutions, “[i]t shall be an unfair practice for any person or the person’s agent or employee to commit an act which directly or indirectly results in any . . . discrimination.” RCW 49.60.215. The WLAD defines freedom from discrimination “because of . . . sex” to

include “[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public . . . accommodation,” RCW 49.60.215.

When a person—in this case, a public school student—is sexually assaulted by an employee in a place of public accommodation, that person is indisputably denied the full enjoyment of the place of public accommodation “because of sex.” As this Court held in *Floeting*, for discriminatory conduct in a place of public accommodation to be actionable, it must be “*objectively discriminatory*. By this we mean that it must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff’s protected class, under the same circumstances, would feel discriminated against.” 192 Wn.2d at 858 (quoting *Floeting v. Group Health Coop.*, 200 Wn. App. 758, 403 P.3d 559 (2017)). This Court went on to make clear that “[r]epeated, express, and outrageous sexual harassment . . . satisfies the objective standard.” *Id.* at 859.

This objective standard is also satisfied by sexual assault (which is, of course, the most express and outrageous form of sexual harassment). When an employee of an educational institution sexually abuses a student, the employee “exposes that student to harm so severe, pervasive, and objectively offensive . . . that it cannot be said that this victim has equal access to the educational experiences offered at the institution. To the

contrary, that student has been denied the security that is fundamental to accessing the institution's resources and opportunities." *Doe A. v. Green*, 298 F. Supp. 2d 1025, 1038 (D. Nev. 2004); *see also* Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 Tul. L. Rev. 387, 391 (2002) ("Children respond to sexual harassment in a wide variety of ways: discontinuing use of a school bus, avoiding lunch in the cafeteria, refraining from using the restroom, staying home from school, quitting a team, withdrawing from school and having to do remedial work, and fearing for physical and emotional safety.").

A reasonable female student who suffers the type of conduct alleged here—a District employee removing the student's clothes, touching her genitals, and pleasuring himself while assaulting her on her way to or from school—would feel discriminated against, regardless of whether that employee also assaults students of the other sex. As a practical matter, the victim likely has no way of knowing whether the employee is abusing male and female students alike, and the purportedly egalitarian nature of the sexual abuse would have no effect on the harm that she experienced. But even if she could know, that knowledge would in no way erase the enormous personal indignity she suffered when her right to equal access of public education was disrupted by abuse of the parts of her body inextricably linked to gender and sexuality.

Numerous state and federal court cases support the reasoning behind this common-sense conclusion. “There is no question that rape constitutes a severe form of sexual harassment and, accordingly, also constitutes a severe form of sex discrimination.” *S.S. v. Alexander*, 143 Wn. App. 75, 108, 177 P.3d 724, 740 (2008); *cf. Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (“Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee’s sex.”). “Rape . . . imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex. Being raped is, at minimum, an act of discrimination based on sex.” *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967–68 (9th Cir. 2002); *see also, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) (“Such harassment—grabbing, poking, rubbing or mouthing areas of the body linked to sexuality—is inescapably ‘because of . . . sex.’”); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998) (“[W]e have difficulty imagining when harassment of this kind would *not* be, in some measure, ‘because of’ the harasser’s sex—when one’s genitals are grabbed . . . it would seem to us impossible to delink the harassment from the gender of the individual harassed.”); *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 349 (S.D.N.Y. 2003) (“A man’s hand

crawling under a woman’s skirt and creeping toward her groin, not once, but on four separate occasions, cannot reasonably be considered as anything but ‘because of sex.’”).

To adopt the argument put forth by the Olympia School District would be to change the court’s inquiry from whether a reasonable person would feel discriminated against to an exploration of the subjective motivations or sexual gratification of the District’s employee. This is both contrary to *Floeting*, 192 Wn.2d at 858, and makes no sense. When a victim is subjected to “physical attacks” that target “body parts clearly linked to [her] sexuality,” those attacks “were ‘because of sex.’” *Rene*, 305 F.3d at 1066 (internal alterations omitted). “Whatever else those attacks may, or may not, have been ‘because of’ has no legal consequence. ‘So long as the environment itself is hostile to the plaintiff because of [her] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.’” *Id.* (internal alterations omitted) (quoting *Doe*, 119 F.3d at 578); *see also Doe*, 119 F.3d at 580 (“We doubt that it would have mattered for H. Doe to know, when his testicles were in Dawe’s grasp, that Dawe was heterosexual . . . and thus he may not have been sexually interested in H. The experience was still humiliating in a deeply personal way, as only sexual acts can be.”).

The District’s argument relies entirely on language from this Court’s 1985 opinion in *Glasgow v. Georgia-Pac. Corp.*, which states that to prove harassment was “because of sex,” an employee in a workplace harassment case must show that she would not “have been singled out and caused to suffer the harassment if [she] had been of a different sex.” 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Because *Glasgow* is an employment case, it is not binding here, and instead this Court must follow its holding in *Floeting* that conduct in a place of public accommodation is objectively discriminatory if a reasonable person who is a member of the plaintiff’s protected class would feel discriminated against. 192 Wn.2d at 858. But the District’s assertion that this language from *Glasgow* stands for the proposition that “conduct targeting both men and women is not based on sex, no matter how reprehensible,” Def. Br. 6, is not a rational extension of this Court’s jurisprudence in any event. In *Glasgow*, the Court was not faced with undeniably sexual assaults committed against victims of both genders, and this Court has never been presented with that question in the thirty-five years since *Glasgow* was decided. Without that context, *Glasgow*’s language should not be read as demonstrating intent to remove such assaults—whether in the workplace or places of public accommodation—from the protections of the WLAD, a statute which the legislature has directed must be construed liberally “to

eradicate discrimination.” *Floeting*, 192 Wn.2d at 852. The District’s argument that the legislature intended to impose strict liability for sexual harassment in places of public accommodation but provide an escape hatch so long as the District’s employee assaulted *more* victims of *both* genders runs contrary to the fundamental purpose of the statute.

**B. Strict liability for sexual harassment in public schools furthers the WLAD’s goal of eradicating discrimination.**

The District’s assertion that sexual assault is not discrimination under the WLAD “at least insofar as the victims of the physical abuse and assault are children” because the statute does not separately delineate “children” as a protected class, Def. Br. 27, deliberately ignores the realities of sexual assault committed against children and teenagers. As the Olympia School District surely must know, “children” are not a monolith, or a separate species devoid of adult demographics. The children who attend Olympia’s schools represent all of the other characteristics that are expressly protected by the WLAD; they are girls and boys, gay and straight, nonbinary, cis- and transgender, of many different physical and mental abilities, from different racial and ethnic backgrounds. And the simple truth is that the burden of sexual assault does not fall equally across those many characteristics.

National statistics reflect the disproportionate and often intersectional impact of sex discrimination and sexual assault. Children under the age of eighteen are the victims in over two-thirds of sexual assault cases reported to law enforcement. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* at 2 (2000). Across all age categories, females are much more likely to be victims of sexual assault than males, and children are no different; 69% of victims under age six, 73% of victims age 6 to 11, and 91% of victims ages 12 to 17 are girls. *Id.* at 3. According to the National Women's Law Center, rates of forcible kissing and touching as well as forcible sex were reported as higher among LGBTQ girls, Native American girls, Black girls, and Latinas. Adaku Onyeka-Crawford, et al., National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* at 3 (2017); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (Transgender "individuals in K-12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out" (citing Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National*

*Transgender Discrimination Survey*, Nat'l Center for Transgender Equality, at 33 (2011)).

Girls of color vulnerable to sex discrimination are “victimized by the interplay of numerous factors.” Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 151. When girls of color are targeted, they often experience “double-discrimination—the combined effects of practices which discriminate on the basis of race and on the basis of sex.” *Id.* at 150. The restrictive qualifications proposed by the District would “interact[] with preexisting vulnerabilities to create yet another dimension of disempowerment” for girls of color. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of color*, 43 Stan. L. Rev. 1241, 1249 (1991).

In *Floeting*, this Court recognized that the Washington “legislature chose to fight discrimination in public accommodations by making employers directly responsible for their agents’ and employees’ conduct.” 192 Wn.2d at 856. The Court went on to explain how strict liability helps accomplish this purpose:

[I]f employers know that the only way they can prevent lawsuits is by preventing their employees from discriminating at all, they will try even harder to make sure

that their employees are well trained, are well supervised, and do not discriminate. In addition, it gives employers an incentive to end any alleged discrimination as soon as possible, limiting their exposure to damages. This will encourage employers to focus on preventing discrimination, rather than merely punishing employees when it occurs. Prevention will better further the legislative goal of eradicating discrimination in places of public accommodation.

*Id.* at 861. In the case of sexual harassment and assault, incentivizing prevention furthers the legislative goal of eradicating discrimination in multiple dimensions, because the burden of that particular type of discrimination falls more harshly on members of protected classes such as girls, racial minorities, and transgender students.

There is also another reason that this rationale is critically important when the discrimination at issue is sexual assault. Most sexual assaults are never reported to the police, and when the offender is a friend or acquaintance, 61% of completed rapes, 71% of attempted rapes, and 82% of sexual assaults are not reported. Bureau of Justice Statistics, U.S. Dep't of Justice, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000*, at 2–3 (2002). When school districts are focused primarily on responding to reports of sexual harassment and assault, and much of that behavior is never reported, more of these incredibly damaging acts of discrimination will continue unchecked. In contrast, incentivizing school districts to do everything in their power to

prevent assault by their employees in the first instance furthers the WLAD's purpose of eradicating discrimination in public schools.

**C. Transportation to school is a fundamental part of access to public education.**

The District also argues that the sexual harassment committed by its employee should fall outside the protections of the WLAD because that harassment occurred on a school bus rather than in a classroom. Def. Br. 7–8. But a conclusion that school districts can avoid direct liability for discrimination by their bus drivers because school buses are not “public accommodations” under the WLAD simply is incompatible with the statute's purpose to eradicate and deter discrimination.

As Plaintiffs highlight, this Court has repeatedly endorsed liberally reading what constitutes a public accommodation subject to the WLAD's prohibition of discrimination. “The overarching importance of eradicating [ ] discrimination requires that WLAD's provisions ‘be construed liberally for the accomplishment of the purposes thereof.’” *Jin Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, 189 Wash. 2d 607, 622, 404 P.3d 504 (2017) (citing RCW 49.60.020). The District's constricted interpretation not only runs afoul of this command, it is sadly ignorant of the role that public school buses play in ensuring equal access to public school education for protected classes, both in the past and present.

The public nature of school buses cannot be subject to serious dispute when one considers the history of school desegregation. After the U.S. Supreme Court declared racial discrimination in public schools unconstitutional, it assigned “the task of implementing programs to achieve desegregation in public schools” to local school authorities. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299 (1955). Though it took years for desegregation of schools to begin in earnest, many school authorities—often under court orders to desegregate—eventually devised busing plans to facilitate desegregation, transporting students throughout school districts in an effort to fulfill the promise of public education free of racial discrimination. Courts engaging in review of such plans observed the fundamental place of school buses in public education, and as a tool for desegregation. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 29 (1971) (“Bus transportation has been an integral part of the public education system for years...”); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 243 (1973) (“The transporting of school children is as old as public education, and in rural and some suburban settings it is as indispensable as the providing of books.”) (Powell, J. dissenting); *Medley v. Sch. Bd. of City of Danville, Va.*, 482 F.2d 1061, 1065 (4th Cir. 1973) (finding that a desegregation plan “failed to give appropriate consideration to the possible use of bus transportation”).

Here in Washington, parents of Black public school students filed lawsuits to force the Seattle School District to remedy the racial segregation in Seattle’s public schools. After several failed attempts to facilitate desegregation through voluntary programs, the school board implemented a mandatory busing program in 1978. In response, a statewide initiative was passed at the November 1978 general election that prohibited the school board from requiring students to attend a school other than the one geographically nearest their homes. The U.S. Supreme Court invalidated the initiative and restored the school district’s authority to resume the busing program. To settle this power dispute, the Court explicitly relied upon both state law and the Washington State Supreme Court’s own finding that it was within “the general discretion of local school authorities to settle problems related to the denial of ‘equal educational opportunity,’ and that “a program of desegregative busing [was] a proper means of furthering the school board’s responsibility to ‘administer the schools in such a way as to provide sound education for all children.’” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 478–79 (1982) (referencing *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wash.2d 121, 492 P.2d 536 (1972)).

Broadening the scope of this historical contextualization just a bit wider underscores the fact that the District’s interpretation of “public

accommodations” would produce absurd results that contradict the fundamental goals of the WLAD. Under the District’s interpretation, the WLAD would not prohibit the District’s bus drivers from forcing Black students to sit in the back of the school bus, or disparaging LGBT students by using slurs. Though such extreme scenarios may at first seem unlikely, the Court need not look any further than Plaintiffs’ experiences to be reminded that the types of discrimination assumed to be improbable are far more common than society ought to tolerate.

Indeed, to exclude public school buses from the protection of the WLAD would leave nearly half of the state’s public school students unprotected from discrimination during their bus rides to and from school. Washington Department of Transportation, Washington State 2016 Student Travel Survey State Report (July 2017), [https://www.wsdot.wa.gov/sites/default/files/2009/01/09/ATP\\_WA-2016-Student-Travel-Survey-Report.pdf](https://www.wsdot.wa.gov/sites/default/files/2009/01/09/ATP_WA-2016-Student-Travel-Survey-Report.pdf). (reporting that 41% of the state’s 1.1 million students ride school buses). Female students, students attending predominantly non-white schools, and students in rural areas would be at an even greater risk of experience discrimination on school buses. *Id.* (finding that 38% of female students ride the bus, compared with 35% of male students; 44% of students at predominantly non-white schools ride the bus, compared with 42% of students at predominantly white schools;

49% of students in rural districts ride the bus, compared with 41% of students in urban districts). Far from fulfilling the legislative purpose and intent of the WLAD, excluding school buses from the WLAD's protection undermines its objective, to deter and eradicate discrimination in the state.

School buses have never been isolated as separate or apart from public schools—rather, school bus transportation of students is “a normal and accepted tool of educational policy” *Swann*, 402 U.S. at 29. This is illustrated not only by the use of public school buses in eradicating race discrimination in public schools, but also in the context of providing full enjoyment of public schools for children with learning disabilities. The Individuals with Disabilities Education Act orders states and local school authorities to provide special education and related services to children with disabilities, with support from the federal government. *See 20 U.S.C. 1400 et seq.* State and local school authorities must arrange for student transportation to and from school, which is inclusive of everything from assigning aides to children riding public school buses to reimbursing parents for transportation of children to and from services outside the public school system. *See 20 U.S.C. § 1401(a)(17); 34 C.F.R. § 300.34; Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1528 (9th Cir. 1994) (finding that the “language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses”). The exclusion of school

buses from WLAD's public accommodation protections would be inconsistent with the federal guarantee of free appropriate public education for children with disabilities.

School buses cannot be excluded from the protections of the WLAD, both because a school bus is a public accommodation and because it is necessary to the full enjoyment of public schools. As the Court weighs the question of whether school buses are a "public accommodation," we urge consideration of the use of school buses in efforts to end racial segregation in public schools. We further encourage the Court to account for the indispensable role of public school buses in ensuring equal access to public school education for all children.

## **V. CONCLUSION**

There can be no doubt that the plaintiffs in the case, female public school children, had their right to full enjoyment of their public education disrupted by Olympia School District's employee because of their sex. We urge the Court to not only answer the certified questions in the affirmative, but also to make clear that sexual assault by an employee in a place of public accommodation is always discrimination based on sex, and that the District's employee was not exempt from the Washington Law Against Discrimination while he was on a school bus.

RESPECTFULLY SUBMITTED this 27th day of January, 2020.

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## **Declaration of Service**

I declare that on the date noted below I caused a copy of the foregoing **Brief of *Amicus Curiae* Legal Voice** to be served via the Washington Courts E-Portal:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of January, 2020 at Seattle, Washington

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