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STATE OF WASHINGTON
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No. 95062-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person,
individually, and BIANCA BELTRAN as guardian ad litem of the
person and estate of CESAR BELTRAN-SERRANO,

Petitioners,

v.

CITY OF TACOMA, a political subdivision of
the State of Washington,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE SUSAN K. SERKO

CITY OF TACOMA'S RESPONSE TO BRIEFS OF AMICUS CURIAE

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TABLE OF CONTENTS

A.	Maintaining the peace is a duty only the government has. That duty is owed to the public at large.....	1
B.	A plaintiff's claimed mental illness or inability to speak English does not create a new tort or a special relationship with the police.	6
C.	A police officer's "pre-intentional negligence" or "operational discretion" does not create a cause of action.....	8
D.	Negligent training or supervision is not in this case.....	11
E.	Restatement §302B is not a path to liability.	13
F.	Conclusion.	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Anderson v. Soap Lake School Dist.</i> , ___ Wn.2d ___, 423 P.3d 197 (Aug. 09, 2018).....	12
<i>Billington v. Smith</i> , 292 F.3d 1177 (9th Cir. 2002), <i>overruled on other grounds by County of Los Angeles v. Mendez</i> , ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017)	10
<i>Binschus v. State</i> , 186 Wn.2d 573, 380 P.3d 468 (2016).....	7
<i>Boyles v. City of Kennewick</i> , 62 Wn. App. 174, 813 P.2d 178, <i>rev. denied</i> , 118 Wn.2d 1006 (1991)	10
<i>Davidson v. City of Westminster</i> , 185 Cal. Rptr. 252, 32 Cal.3d 197, 649 P.2d 894 (1982)	4
<i>Dist. of Columbia v. Chinn</i> , 839 A.2d 701 (D.C. 2003)	11
<i>Edgar v. State</i> , 92 Wn.2d 217, 595 P.2d 534 (1979), <i>cert. denied</i> , 444 U.S. 1077 (1980).....	8
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	6
<i>Mason v. Bitton</i> , 83 Wn.2d 321, 534 P.2d 1360 (1975)	8
<i>Munich v. Skagit Emergency Communication Center</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	2
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	6, 12

<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983)	6
<i>Plakas v. Drinski</i> , 19 F.3d 1143 (7th Cir.), cert. denied, 513 U.S. 820 (1994).....	3, 11
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002)	12
<i>Robb v. City of Seattle</i> , 176 Wn.2d 427, 295 P.3d 212 (2013)	4, 14
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	6, 8, 12
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	2, 13-14
<i>Webstad v. Stortini</i> , 83 Wn. App. 857, 924 P.2d 940 (1996), rev. denied, 131 Wn.2d 1016 (1997)	6
Other Authorities	
http://community.seattletimes.nwsources.com/archive/?date=19970825&slug=2556687	4
https://komonews.com/news/local/911-calls-show-man-accused-in-lake-city-murder-may-have-been-in-mental-distress	4
http://www.peninsuladailynews.com/crime/police-homeless-man-stabbed-in-port-townsend	4
https://www.kiro7.com/news/local/man-stabbed-near-queen-anne-dicks-drive-in/538663418	4
, https://www.seattletimes.com/nation-world/man-killed-woman-seriously-hurt-in-random-seattle-stabbing	4
<i>Restatement (Second) of Torts</i> §302B	13-15

Respondent City of Tacoma submits this brief in answer to the amicus curiae briefs of the American Civil Liberties Union of Washington (cited as ACLU Br.), Disability Rights Washington (DRW Br.), and Washington State Association for Justice Foundation (WSAJ Br.), referencing the amicus curiae briefs of the Washington Cities Insurance Authority and Washington Counties Risk Pool (WCIA Br.), and Washington State Association of Municipal Attorneys (WSAMA Br.).

A. Maintaining the peace is a duty only the government has. That duty is owed to the public at large.

Amicus ACLU succinctly states the basic premise of plaintiff's argument, and of his amici: "Mr. Beltran's neighbors would be liable for negligently (or intentionally) employing excessive or deadly force against him under the circumstances at issue here." (ACLU Br. 17) But that is simply not the case. "Mr. Beltran's neighbors" would be liable for the deliberate use of force against him based only on well-established intentional tort principles governing assault and battery, subject to the defense of self-defense. (Resp. Br. 18-20; WCIA Br. 16-18) If "Mr. Beltran's neighbors" *unintentionally* injured him, however, they would be liable in negligence, but only if their failure to exercise reasonable care was the proximate of his injury. (Resp. Br. 13, 17) Given that the Legislature intended the government to be

liable in tort only to the extent private individuals would be (Resp. Br. 10-13), that should be the end of the inquiry into the use of negligence principles to address the intentional use of “excessive” or “deadly” force. (See WSAMA Br. 4-8; WCIA Br. 2-4)

As amici argue (DRW Br. 7; WSAJ Br. 18-19), the City, through its police officers, has a “community caretaking function” and duty to preserve the peace. (See Resp. Br. 35-36; WCIA Br. 7-9) But that is a duty owed to the public at large (a “public duty”), not to any particular individual. As Justice Chambers noted in his concurrence in *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 887, ¶ 32, 288 P.3d 328 (2012), “[p]rivate persons are not required by statute or ordinance to . . . maintain the peace and dignity of the State of Washington.” See also *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, ¶ 47, 310 P.3d 1275 (2013) (Chambers, J., concurring) (“[G]overnments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law”).

Amici’s reliance on a claimed “common law” duty of reasonable care ignores that only the government, acting through police officers, have a “community caretaking” duty to the public to keep the peace. That is precisely the point of the Tacoma Police

Department “core values,” owed to “every” and “all” individuals, “to provide *the public* with a general standard.” Tacoma Police Department, Professional Standards (quoted ACLU Br. 12-13, emphasis in this brief added).

Indeed, far from creating a common law duty in negligence to specific individuals, “to do something, to help, to arrest, to inquire” is what we, as a society, pay police officers to do:

Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Plakas v. Drinski, 19 F.3d 1143, 1150 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994). Fulfilling that public duty does not create a “common law” cause of action in negligence.

A hypothetical, based closely on the “circumstances at issue here” (ACLU Br. 17) illustrates the point: Suppose Officer Volk had not, in the exercise of her duties, stopped to engage Mr. Beltran-Serrano, who was in fact walking through traffic on Portland Avenue,

a busy Tacoma thoroughfare,¹ and instead of striking Officer Volk with his metal club, Mr. Beltran-Serrano had used it to smash the window of one the cars stopped at the Portland Avenue intersection, injuring the child in the passenger seat of witness Winona Stevens' car.² (See Resp. Br. 5-6; CP 310-11, 422) Would the City be liable in those circumstances? The answer would be "no." See *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) (discussed *infra*); *Davidson v. City of Westminster*, 185 Cal. Rptr. 252, 32 Cal.3d 197, 649 P.2d 894 (1982) (police owed no special duty to woman assaulted in laundromat that was under police surveillance because officers did not increase risk of harm to victim by failing to stop an individual they recognized as potential assailant). But that would not

¹ Mr. Beltran-Serrano was "wandering aimlessly" (App. Br. 2) with a sign through traffic stopped at an intersection on a busy Tacoma thoroughfare. (See Resp. Br. 2-6) Amici's embrace of plaintiff's benign characterization of Mr. Beltran-Serrano's conduct as "blameless" (see, e.g., ACLU Br. 16, WSAJ Br. 1), has no support in the record.

² This is by no means a fanciful scenario. Random attacks on innocent citizens by individuals who have not been detained by "first responders" are another tragic fact the government and police officers in their community caretaking function must attempt to address. See, e.g., <https://www.seattletimes.com/nation-world/man-killed-woman-seriously-hurt-in-random-seattle-stabbing/>; <http://community.seattletimes.nwsourc.com/archive/?date=19970825&slug=2556687>; <https://komonews.com/news/local/911-calls-show-man-accused-in-lake-city-murder-may-have-been-in-mental-distress>; <http://www.peninsuladailynews.com/crime/police-homeless-man-stabbed-in-port-townsend/>; <https://www.kiro7.com/news/local/man-stabbed-near-queen-anne-dicks-drive-in/538663418>

change Officer Volk's duty *to the public* to stop and engage Mr. Beltran-Serrano as he walked among cars in the street.

By injecting "negligence" into Officer Volk's "split-second" calculus how to best "do something, to help, to arrest, to inquire," (see Resp. Br. 20) plaintiff and his amici instead propose an unprecedented "professional" standard of care for police officers, akin to that owed lawyers to their clients, or physicians to their patients, that has no support in case or statutory law, and that would make law enforcement officers and the governments they serve the guarantors of the safety of every individual with whom they have contact – be they perpetrators or victims, the mentally ill or bystanders – in the course of their *public* duty. There is no support in Washington law for such a duty of care in the exercise of law enforcement duties absent a special relationship to a particular individual created by the defendant. Worse, imposing such a tort duty would discourage officers from fulfilling their community caretaking duty to the public for fear of claims they were negligent in fulfilling it.

B. A plaintiff's claimed mental illness or inability to speak English does not create a new tort or a special relationship with the police.

Contrary to amici's claims (ACLU Br. 4-9; DRW Br. 2-7), plaintiff's mental illness does not change the legal analysis. An individual's mental illness or disability may create a "special relationship" when the government (or a private individual or entity, for that matter) has control of the individual because of their mental disability. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Hartley v. State*, 103 Wn.2d 768, 783, 698 P.2d 77 (1985); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). But absent control of the mentally ill individual, the fact of mental illness cannot create a duty on the part of the government (or a private individual) to avoid acting in a way that may cause the individual harm.³ See *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 (1996) (rejecting "special relationship" based on defendant's knowledge of the "fragile mental condition" of plaintiff's decedent that could create a duty "not [to] have engaged in activities . . . that exacerbated [her] fragile mental state"), *rev. denied*, 131 Wn.2d 1016 (1997). To the contrary, a

³ In particular, this Court must reject amicus ACLU's attempt to inject the Americans with Disabilities Act into the tort analysis relevant to plaintiff's claims. (ACLU Br. 15) Plaintiff has never made an ADA claim, and this Court will not address issues and arguments made only by amicus. *Ruff v. King County*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995).

government's tort duty extends only to third parties harmed by the mentally ill individual while under the government's control. *Binschus v. State*, 186 Wn.2d 573, 380 P.3d 468 (2016).

Nor does an individual's claimed inability to speak English impose a heightened duty on the government, as amici imply. (ACLU Br. 8-10, arguing that "[p]ublic service providers cannot adequately serve these communities if they are unable to effectively communicate with them.") Police officers have no duty to be multilingual, or to patrol with a translator (WSAJ Br. 12), nor do amici provide any support for those claims.

To return to the hypothetical introduced above: suppose, as amici argue she should have, Officer Volk refrained from approaching Mr. Beltran-Serrano, who was "wandering aimlessly," with a sign, through traffic stopped at an intersection on a busy Tacoma thoroughfare, because his "bizarre behavior" caused her to believe he might be mentally ill (DRW Br. 7), or because his sign was in Spanish,⁴ causing her to believe he did not speak English (WSAJ Br. 12), and that thereafter Mr. Beltran-Serrano was hit and seriously injured by Ms. Stevens' vehicle while Officer Volk was waiting for a

⁴ The hypothetical slightly changes the facts of this case. The sign Mr. Beltran-Serrano was holding while walking through traffic was in English.

Spanish-speaking backup, or for “a referral for mental health evaluation and services” (DRW Br. 7), to arrive. Plaintiff’s counsel would undoubtedly claim Officer Volk should have detained Mr. Beltran-Serrano for his own safety. But contrary to amici’s claims, a plaintiff’s claimed mental illness or inability to speak English cannot create a new tort or a special relationship with the police.

C. A police officer’s “pre-intentional negligence” or “operational discretion” does not create a cause of action.

Ignoring that the issue is not one of “immunity,” a defense that respondent City of Tacoma has never claimed (Resp. Br. 10-13), amicus ACLU claims that Officer Volk’s “operational discretion”⁵ “to stop and engage Mr. Beltran-Serrano, . . . failing to recognize his potential mental illness . . . and failing to allow Mr. Beltran-Serrano reasonable language access, . . . us[ing] a taser [and] then deadly

⁵ This Court should not reach amicus ACLU’s argument that “operational discretion” is a basis for liability because this is, once again, not a claim that plaintiff himself has ever raised. *Ruff v. King County*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995). In any event, amicus ACLU in making this new argument grossly mischaracterizes this Court’s decision interpreting a statutorily-imposed duty to protect “innocent third parties” from the consequences of an unnecessary high-speed pursuit in *Mason v. Bitton*, 83 Wn.2d 321, 534 P.2d 1360 (1975) (ACLU Br. 13-14). As this Court said in distinguishing *Mason* four years later, “[t]he question is, does the plaintiff seek to hold the State liable ‘to the same extent as if it were a private person or corporation’ or does he seek to impose upon it a liability which has no parallel in the private sector?” *Edgar v. State*, 92 Wn.2d 217, 224, 595 P.2d 534 (1979), *cert. denied*, 444 U.S. 1077 (1980). The answer here is the latter.

force” was a basis for liability in negligence. (ACLU Br. 14-15) This is just another way of improperly parsing Officer Volk’s “split-second judgments” by claiming she was negligent before intentionally defending herself against Mr. Beltran-Serrano’s attack. This Court should reject any claim based on an officer’s “pre-intentional negligence” just as other courts have.

It is not clear whether amicus ACLU is arguing that the officer’s decision to stop and engage Mr. Beltran-Serrano and alleged failure to properly recognize or address his mental illness or speech limitations was in and of itself actionable, or is only actionable because it preceded and allegedly led to the application of force. Regardless, the argument is flawed. If the argument is that pre-shooting tactical decisions are – in and of themselves the basis for a negligence claim – the claim runs afoul of basic tort principles. The tactical decisions made by the officer (alleged pre-shooting negligent conduct), on their own, are not actionable because that conduct (without the application of force) did not proximately cause Mr. Beltran-Serrano’s injuries. (*See* WCIA Br. 9-15)

If the argument instead is that pre-shooting tactical decisions made the application of force unreasonable, amicus ACLU ignores long-standing jurisprudence governing use of force analysis.

Washington has adopted the “excessive force standard” for a battery claim brought against an officer for a use of force in the discharge of the officer’s official duties. *Boyles v. City of Kennewick*, 62 Wn. App. 174, 176, 813 P.2d 178, *rev. denied*, 118 Wn.2d 1006 (1991) (quoted at Resp. Br. 9). As outlined below and under well-established precedent (Resp. Br. 18-23), whether an officer’s use of deadly force is excessive is determined by whether – *at the moment the officer deployed deadly force* – the officer had probable cause to believe that the plaintiff presented an imminent threat of death or serious bodily harm. (Resp. Br. 18-20) The excessive force analysis does not reach back in time to consider earlier conduct; bad pre-shooting tactical decisions by an officer will not render an otherwise permissible use of force excessive. Amicus ACLU’s “totality of the circumstances” argument (ACLU Br. 10) does not negate the requirement that the officer’s use of deadly force be judged based on the whether there is probable cause to believe the suspect is an *imminent* threat.

“[E]ven if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.” *Billington v. Smith*, 292 F.3d 1177, 1190-91 (9th Cir. 2002) (emphasis in original), *overruled on other grounds by County of Los Angeles v.*

Mendez, ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017). “It is tautological to speak of the applicable standard of care as being the duty not to use excessive force; that is the precise boundary line of the privilege itself.” *Dist. of Columbia v. Chinn*, 839 A.2d 701, 711 (D.C. 2003); see also *Plakas v. Drinski*, 19 F.3d at 1150 (“Our historical emphasis on the shortness of the legally relevant time period is not accidental. The time-frame is a crucial aspect of excessive force cases”). An officer’s “pre-intentional” conduct, strategic decisions, or exercise of “operational discretion” before the deliberate use of force cannot transform that intentional act into negligence. (See Resp. Br. 19-23; WSAMA Br. 14-16; WCIA Br. 3-7, 10-15)

D. Negligent training or supervision is not in this case.

Amicus WSAJ Foundation asserts that a negligent training/supervision claim is not “redundant” of plaintiff’s proposed new tort of negligent commission of an intentional tort. (WSAJ Br. 14-16) Amicus Disability Rights Washington devotes most of its brief to a description of training programs it advocates. (DRW Br. 1-2, 5-8) But plaintiff failed to adduce any competent evidence to support a negligent training or supervision claim in response to summary judgment, and made no argument against dismissal of the claim on summary judgment. A negligent training or supervision claim is not

in this case, and this Court should not address it at amici's urging. *Ruff v. King County*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995).

In any event, this Court has recently confirmed that in order to survive summary judgment on a negligent training/supervision claim, a plaintiff must present a genuine issue of material fact that the employee was acting outside the scope of employment. *Anderson v. Soap Lake School Dist.*, ___ Wn.2d ___, 423 P.3d 197, 208, ¶ 39 (Aug. 09, 2018), citing *Niece*, 131 Wn.2d at 51-52. Just as plaintiff did not submit any evidence of negligent training or supervision of Officer Volk here, plaintiff did not present evidence that she was acting outside the scope of employment.

Whether an employee "was within the scope of employment depends on whether [she] was 'fulfilling [her] job functions at the time he engaged in the injurious conduct.'" *Anderson*, ¶ 41, quoting *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53, 59 P.3d 611 (2002). Officer Volk was clearly acting within the course and scope of her employment as a Tacoma police officer in her encounter with Mr. Beltran-Serrano, as plaintiff alleged in his complaint and the City conceded in its answer. (CP 74, 81)

Thus, although amicus ACLU is correct when it states that "when the employer does not disclaim liability for the employee,

claims of negligent hiring, training, and supervising collapse into a direct tort claim against the employer” (ACLU Br. 12), what amicus ACLU fails to appreciate is that it is the negligent training/supervision claims that “collapse” and fall away. Only plaintiff’s “direct tort claim,” based on the employee’s injurious conduct, remains.

E. Restatement §302B is not a path to liability.

This Court has adopted §302B of the *Restatement (Second) of Torts* to create a duty “*in limited circumstances,*” to guard another against the criminal conduct of a third party. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 757-58, ¶ 57, 310 P.3d 1275 (2013) (emphasis added). This duty “only arises” where “the actor’s own affirmative act has created or exposed the other to a recognizably high degree of risk of harm” from a third party’s criminal acts. *Washburn*, 178 Wn.2d at 757-58, ¶ 58 (quoted source omitted). Amicus WSAJ Foundation attempts to interject § 302B analysis into this case by claiming that somehow Mr. Beltran-Serrano, the injured “first party,” was also the “third party” whose conduct the City of Tacoma could be held accountable for. (WSAJ Br. 12-13: “here Beltran-Serrano’s reaction may instead constitute ‘conduct of the

other’ within the meaning of § 302B.”) To repeat the assertion demonstrates its absurdity.

Restatement § 302B has no application in this case, as this Court’s cases analyzing its negligence principles make clear. In *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), for instance, this Court reasoned that “absent some kind of special relationship between the plaintiff and defendant under Restatement § 302B, only misfeasance, not nonfeasance, could create a duty to act reasonably to prevent foreseeable criminal conduct.” *Washburn*, 178 Wn.2d at 758, ¶ 60. Because (as here) the police had no special relationship with the plaintiff and their conduct did not create a new risk to the plaintiff (but rather simply failed to ameliorate an existing risk by not picking up the shotgun shells), § 302B did not operate to create a duty in *Robb*, 176 Wn.2d at 437-38, ¶ 22. In contrast, this Court concluded in *Washburn* that because the officer had a statutory duty to serve an anti-harassment order, and by his affirmative conduct created a new risk to the decedent, Restatement § 302B operated to create a duty, imposed on the officer, to guard the decedent against the criminal acts of her boyfriend. 178 Wn.2d at 760, ¶ 65.

Here, amicus WSAJ Foundation tries to create a new duty by defining Mr. Beltran-Serrano as not only the third party criminal, but

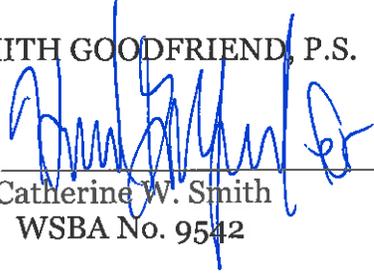
as the first party victim, to conjure up a “special relationship” out of thin air. In doing so, it reveals the fallacy of plaintiff’s reasoning, and amici’s own, in attempting to apply the negligence principles defined by Restatement § 302 to Officer Volk’s intentional acts.

F. Conclusion.

As amici argue, a significant number of the individuals with whom police officers interact suffer from mental illness, language barriers, or homelessness. Our treatment of these problems raises difficult and pervasive issues that we must confront as a society. The Legislature may well charge law enforcement, to whom our Legislature has given the primary duty to keep the peace, a more expansive community caretaking responsibility to protect society’s most vulnerable. But creating a new and unprecedented tort sounding in negligence in favor of individual plaintiffs against police officers, as plaintiffs and their amici ask this Court to do, is neither an effective nor just way of doing so.

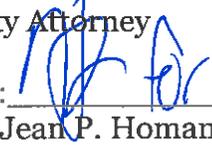
Dated this 26th day of October, 2018.

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DECLARATION OF SERVICE

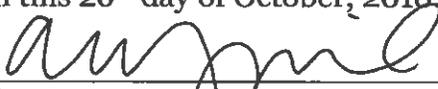
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 26, 2018, I arranged for service of the foregoing City Of Tacoma's Response to Briefs of Amicus Curiae, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 26th day of October, 2018



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