No. 15-330

IN THE

Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs on a host of legal issues, including property rights.

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This petition is important to *amici* because it affords the Court the opportunity to clarify that the "nexus" and

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

"rough proportionality" test from *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and its progeny applies to legislatively imposed development permit conditions. If the California Supreme Court's decision remains in place, then States and localities will use legislatively imposed conditions to circumvent the requirements of the Takings Clause in precisely the manner this Court sought to stop in *Nollan*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

SUMMARY OF THE ARGUMENT

In *Nollan*, this Court recognized that some States were using land-use permits to avoid their obligiations under the Takings Clause. The Court held that a State may not condition the grant of a land-use permit on the landowner giving up an interest in property unless the State provides just compensation for that property interest. The "unconstitutional conditions" doctrine prohibits States from accomplishing indirectly using land-use permits what they cannot do directly. *Dolan*, 512 U.S. at 385 ("[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."). The Court recently clarified the scope of this anti-circumvention principle when it struck down a condition requiring a landowner to pay for improvements on unrelated property in order to obtain a land-use permit. *See Koontz*, 133 S. Ct. 2586.

The test for determining whether a condition violates the unconstitutional conditions doctrine is straightfoward. The reviewing court must first determine whether the condition itself would be a taking if imposed outside the permitting context. *Koontz*, 133 S. Ct. at 2591, 2598. If so, the court must then ask whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 2591. By articulating the unconstitutional conditions doctrine in this manner, this Court's jurisprudence prohibits States from circumventing the Takings Clause.

Municipalities in California, however, have sought to evade this Court's attempts to stop uncompensated takings. At issue here, the City of San Jose passed an ordinance in 2010 requiring all landowners and developers to dedicate 15 percent of new residential units for sale at below-market prices as a condition for obtaining a permit to build 20 or more of such units. San Jose Mun. Code §§ 5.08.250(A), 5.08.400(A) ("San Jose Ordinance"). The California Supreme Court has held that so-called "legislatively imposed" conditions, such as the San Jose Ordinance, are exempt from the unconstitutional conditions doctrine. *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 670-71 (2002). In California, the doctrine applies only to conditions imposed during ad hoc permitting processes. *Id.* Applying that distinction in this case, the California Supreme Court analogized the San Jose Ordinance to routine zoning regulations such as "land use limitations on the height of buildings, setback requirements, [and] density limits." *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 462 (2015) ("CBIA"). The court thus held that the ordinance does not constitute an unconstitutional condition but a standard regulation of land use.

There is no basis in this Court's jurisprudence or in logic for treating legislatively imposed conditions in this manner. This Court has not distinguished between legislatively imposed conditions and ad hoc permitting conditions in its unconstitutional conditions jurisprudence. Instead, it has declined to elevate form over substance and has struck down both legislative and ad hoc conditions as unconstitutional. *See, e.g.*, *Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250 (1974) (finding a legislatively imposed condition violated the unconstitutional conditions doctrine); *Perry v. Sindermann*, 408 U.S. 593 (1972) (finding an ad hoc condition violated the unconstitutional conditions doctrine). Moreover, "[it] is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari). "A city council can take property just as well as a planning commission can." *Id.* at 1118. Indeed, it makes little sense to treat the two types of conditions differently.

Further, exempting legislatively imposed conditions from heightened scrutiny puts property rights at the mercy of the whims of state officials. A common justification for distinguishing between legislatively mandated conditions and ad hoc permitting conditions is that ad hoc conditions are more prone to abuse. *See, e.g., San Remo Hotel*, 27 Cal. 4th at 671. This view is myopic. Legislators are just as capable as administrators of imposing uncompensated conditions and can target groups (such as developers) in legislation that a majority of their constituents support. And while ad hoc permitting conditions apply only to a single landowner at a time, legislatively imposed conditions apply automatically to broad swaths of

landowners. Legislatively imposed conditions thus are much more efficient in effectuating takings. To that end, other municipalities in California have already indicated their intention to engage in broad takings similar to the San Jose Ordinance via legislatively imposed conditions. *See* Maura Dolan, *Developers Can Be Required to Include Affordable Housing, California High Court Rules*, L.A. Times, June 15, 2015. Naturally, then, legislatively imposed conditions are more threatening to individual property rights. Indeed, the proliferation of ordinances such as the one in San Jose, which are indistinguishable from market-wide caps on prices, threatens property rights all across California. As this trend demonstrates, the need to apply the unconstitutional conditions doctrine to legislative conditions is *more* acute than with ad hoc permitting conditions.

Finally, there is a split of authority on this issue. *See, e.g.*, *Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of certiorari). That split has deepened, with the majority of courts incorrectly exempting legislatively imposed conditions from the unconstitutional conditions doctrine. Without guidance from this Court, the lower courts will continue trending in the wrong direction, allowing more States broadly and systematically to skirt their constitutional obligations under the Takings Clause.

For these reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

ARGUMENT

I. States Evade Their Obligations Under the Takings Clause and Threaten Property Rights When Courts Exempt Legislatively Imposed Conditions from the Unconstitutional Conditions Doctrine.

A. The Decision Below Undermines This Court's Attempts in *Nollan*, *Dolan*, and *Koontz* to Protect Property Rights.

The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted).

This Court recognized in *Nollan*, *Dolan*, and *Koontz* that States circumvent their obligations to pay "just compensation" when they require landowners to turn over property in exchange for a land-use permit. In *Nollan*, the government conditioned a building permit on the landowners granting a public easement across their property to access the beach. 483 U.S. at 827. The Court explained that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis ..., rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831. The Court thus found that conditioning a permit upon the grant of that same easement, which had no relationship to the permit

request itself, is "an out-and-out plan of extortion." *Id.* at 837 (citation omitted). To prevent such circumvention of the Takings Clause, the Court has applied the doctrine of "unconstitutional conditions" to States' attempts to extract property interests in this manner. *See Dolan*, 512 U.S. at 385. As a result, States cannot force a landowner to choose between a building permit and the right to receive just compensation for a taking.

There are important reasons why courts should not allow States to bargain with land-use permits in order to bypass their takings obligations. In particular, "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth more than property it would like to take." *Koontz*, 133 S. Ct. at 2594. The government can take advantage of the fact that a land-use permit may be worth more than the property interest taken to force an owner to give up that property in exchange for the permit. *Id.* "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation," so "the unconstitutional conditions doctrine prohibits them." *Id.* at 2595. In short, this Court has made clear that States should not be able to take property without compensation through such "gimmickry." *Dolan*, 512 U.S. at 387.

To prevent this form of extortion, the Court applies heightened scrutiny to conditions embedded in land-use permits. Under that test, a court must first decide whether the condition would be a taking if the government imposed it directly on the landowner outside the permitting process. *Koontz*, 133 S. Ct. at 2595, 2598 ("A predicate for any

unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing."); *see also Lingle*, 544 U.S. at 537-40 (explaining the test for finding a taking). If the condition would be a taking, then the state cannot impose it *unless* there is a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the [landowner's] proposal." *Koontz*, 133 S. Ct. at 2595. By requiring a relationship between the condition and the landowners' requested permit, this Court made sure that States cannot effect takings of property wholly unrelated to the requested land-use permit.[2]

Unsurprisingly, States have tried to evade this restriction on uncompensated takings. The *Koontz* case involved just such an example of States' "gimmickry." In *Koontz*, a Florida water management district conditioned the landowner's requested permit on the landowner's payment for improvements on unrelated government-owned property. 133 S. Ct. at 2593, 2599. The government argued that the landowner's claim failed at the first step because "the exaction at issue here was the money rather than a more tangible interest in real property." *Id.* at 2599. This Court rejected that reasoning and explained that "if we accepted this argument it would be very easy

2. This test also preserves the States' ability to impose uncompensated conditions on a land-use permit when those conditions mitigate any issues the requested permit may cause. For example, if a landowner's "proposed development . . . somehow encroache[s] on existing greenway space in the city," then it would be permissible "to require the [landowner] to provide some alternative greenway space for the public either on her property or elsewhere" as a condition of obtaining the permit. *Dolan*, 512 U.S. at 394.

for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* "[A] permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* By rejecting the government's argument, the Court closed off another means of accomplishing an end-run around the just compensation requirement of the Takings Clause.

The San Jose Ordinance here is essentially the same as prior attempts to dodge the Takings Clause. Here, the California Supreme Court has immunized the ordinance from constitutional scrutiny by exempting all legislatively imposed conditions from the unconstitutional conditions doctrine. *See San Remo*, 27 Cal. 4th at 670-71; *CBIA*, 61 Cal. 4th at 459 n.11 ("Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test."). The court exempts legislatively imposed conditions from heightened scrutiny because it views such conditions as similar to regulations that fall within "municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." *CBIA*, 61 Cal. 4th at 461. It considers legislatively imposed conditions to be no different than regulations "designat[ing] certain areas of a city where only residential units may be built and other areas where only commercial projects are permitted," or regulations imposing "land use limitations on the height of buildings, set-back requirements, density limits (lot size and number of units per lot), bedroom requirements and a variety of other use restrictions." *Id.* at 461-62. For that reason, the Supreme Court of California has held that *identical conditions* should be treated differently if

one is legislatively imposed and the other is not. *See San Remo*, 27 Cal. 4th at 668 ("[I]ndividualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, while generally applicable development fees warrant a more deferential type of review."). Applying that distinction, the court below concluded that "the San Jose ordinance is subject to the ordinary standard of judicial review to which legislative land use regulations have traditionally been subjected." *CBIA*, 61 Cal. 4th at 483.

In short, San Jose took advantage of the California Supreme Court's differential treatment of legislatively imposed conditions and ad hoc permitting conditions. By imposing its condition through an ordinance, San Jose immunized itself from paying just compensation to landowners affected by its ordinance. Following the decision of the court below, San Jose and other California municipalities can thus bypass the requirements of the Takings Clause and undermine the protections that this Court's jurisprudence provides for property rights.

B. The California Supreme Court's Distinction Between Legislatively Imposed and Ad Hoc Permitting Conditions Is Illogical, Difficult to Apply, and Inconsistent with This Court's Precedents.

The California Supreme Court's decision to treat legislatively imposed conditions differently than ad hoc permitting conditions is an act of hollow formalism. As two justices of this Court recognized 20 years ago, "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for

the taking." *Parking Ass'n of Georgia*, 515 U.S. at 1118 (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). A citizen's property is taken whether it is done by legislative or administrative action. "A city council can take property just as well as a planning commission can." *Id.*

If allowed to stand, the California Supreme Court's decision will lead to absurd results. According to that court's reasoning, a municipality cannot require *one builder* to give up an easement if that condition comes from the ad hoc permitting process. But the same municipality can require *every builder in its jurisdiction* to give up an easement if that condition originates from a piece of legislation. This is apparently because legislative conditions are always akin to regulations such as those imposing "set-back requirements." *CBIA*, 61 Cal. 4th at 462. That cannot be.

There are also significant line-drawing problems between a condition that is legislatively imposed and one that is the result of an ad hoc permitting decision. While the San Jose Ordinance is clearly a legislatively imposed mandate, it is often the case that "the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 266 (2000). This has led some to conclude that "a workable distinction can[not] always be drawn between actions denominated adjudicative and legislative." *Town of Flower Mound*

v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004). The absence of a bright line delineating the difference between a legislative condition and an adjudicative one is an additional reason that courts should apply the unconstitutional conditions doctrine to land-use permits regardless of the source of the condition at issue.

Finally, this Court has never suggested that legislatively imposed conditions are somehow exempt from the unconstitutional conditions doctrine. Understanding that the government can impose conditions in a variety of ways, this Court has rightly declined to distinguish between legislatively imposed conditions and ad hoc permitting conditions. In fact, this Court has struck down both legislative and administrative mandates under the unconstitutional conditions doctrine. For example, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated a statute that conditioned the receipt of state-sponsored healthcare on living in that state for a year, *id.* at 251, 269-70; *see also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (applying the unconstitutional conditions doctrine to a federal statute without regard to its legislative origin); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (same). The Court in *Koontz* relied on these cases when it applied the unconstitutional conditions doctrine to land-use permits. *See* 133 S. Ct. at 2594.

C. Legislatively Imposed Conditions Threaten Property Rights More Broadly Than the Ad Hoc Permitting Process.

"One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A common justification for distinguishing between legislatively imposed conditions and ad hoc permitting conditions is that permitting conditions are more likely to be abused. *See, e.g., San Remo*, 27 Cal. 4th at 671 ("Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape ... political controls."). Similarly, the Arizona Supreme Court believes that "[t]he risk of [extortionate] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision." *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *see also San Remo*, 27 Cal. 4th at 668 (explaining that "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present" for legislative conditions).

The notion that ad hoc permitting conditions are more prone to abuse is overly simplistic; indeed, the risk of abuse may in fact be *greater* for legislatively imposed conditions. The Texas Supreme Court, for example, has recognized that government can "'gang up' on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town*

of Flower Mound, 135 S.W.3d at 641. In that regard, land-use decisions can "reflect classic majoritarian oppression." Reznik, 75 N.Y.U. L. Rev. at 271. As the San Jose Ordinance demonstrates, "developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored." *Id.* That is because the "single issue that characterizes the legislative process of many suburban communities in the United States is the antidevelopment issue." *Id.* As a result, "discrimination against a prodevelopment minority is quite likely given that they are so outnumbered." *Id.*

The potential for abuse through legislatively imposed conditions is amplified by the fact that such conditions have sweeping application. For example, the San Jose Ordinance applies on its face to every developer in the city. Instead of a single administrative body extracting unconstitutional concessions from landowners one by one, San Jose accomplished that feat in one fell swoop. Other municipalities—in California and other states that seek to flout this Court's guidance—are free to impose similar exactions in broad legislative enactments.

The San Jose Ordinance is a particularly troublesome type of taking because it is indistinguishable from a market-wide cap on prices. There is no question that the ordinance would constitute a taking if imposed outside the permitting context because it "limit[s] the price for which the developer may offer some of its units for sale." *CBIA*, 61 Cal. 4th at 461. The Fifth Amendment protects the right to seek the highest price for one's property. *See, e.g.*, *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 192 (1936) ("[T]he right of the owner of property to fix the price at which he will sell it is an inherent

attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments."). And this Court recognized in *Koontz* that the government cannot force landowners to pay money in support of a governmental project as a condition of obtaining a permit. 133 S. Ct. at 2598-602. Forcing landowners to sell their property at below-market prices to alleviate a housing crisis is essentially the same thing. "Money [is] fungible," *Robers v. United States*, 134 S. Ct. 1854, 1857 (2014), so it makes no difference if a landowner must pay money or forgo money to obtain a permit; the landowner has paid a price either way.

There is nothing to stop other municipalities in California from adopting a market-wide cap similar to San Jose's. In fact, the mayor of Los Angeles has already stated that the *CBIA* decision "gives Los Angeles and other local governments another possible tool to use" in their zoning decisions. Dolan, *supra* page 5, http://www.latimes.com/local/lanow/la-me-ln-affordable-housing-20150615-story.html. And a co-chairman of Los Angeles's advisory committee on zoning has predicted that the city will have a law similar to the San Jose Ordinance within a year. *Id.* Millions of landowners in California alone will have their property rights threatened as a result.

II. States and Circuits Will Remain Entrenched in a Deep Split Until This Court Gives Further Guidance on Legislatively Imposed Conditions.

Two justices of this Court recognized 20 years ago that there is a circuit split on whether legislatively imposed conditions are subject to the unconstitutional conditions doctrine. *See Parking Ass'n of Georgia,* 515 U.S. at 1117

(Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). They explained that "[t]he lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature." *Id.* at 1117.

Most immediately, this Court's review is necessary to resolve a conflict in the Nation's most populous State; the California Supreme Court and the Ninth Circuit are split on whether legislatively imposed conditions are subject to the unconstitutional conditions doctrine. California has held they are not, *San Remo*, 27 Cal. 4th at 670-71; *CBIA*, 61 Cal. 4th at 459 n.11, while the Ninth Circuit has held that they are, *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (applying the unconstitutional conditions doctrine to a legislatively imposed condition); *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (holding that, under Ninth Circuit precedent, legislatively imposed conditions are subject to the unconstitutional conditions doctrine). As a result, the validity of a legislatively mandated condition in California today depends on the court in which that condition is challenged.

Moreover, this Court has revisited its jurisprudence in this context only once since 1995, *Koontz*, 133 S. Ct. at 2586, but it did not address the split in that case. The split of authority has since deepened. *See* Petition at 27-28. The majority of courts during that period have followed the wrong path, choosing to exempt legislatively imposed conditions from the unconstitutional conditions doctrine. *See, e.g.*, *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634

F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinnell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo*, 27 Cal. 4th at 643, 670-71; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 996. Many of these courts refused to apply the doctrine to legislatively imposed conditions due to their mistaken belief that this Court has never applied the doctrine outside the ad hoc permitting process. *See* Petition at 17-18 (explaining how this Court has applied the "nexus" and "rough proportionality" test to legislatively imposed conditions); *Town of Flower Mound*, 135 S.W.3d at 641 (explaining how the exactions in *Nollan* and *Dolan* were imposed pursuant to a legislative scheme). For example, in *Krupp*, the Colorado Supreme Court believed that *Nollan* and *Dolan* arose only in the context of an ad hoc permit application. *See* 19 P.3d at 696. That court then refused to apply heightened scrutiny to a legislatively imposed condition, believing it somehow differed from the challenged actions in *Nollan* and *Dollan*. *Id.* If this Court does not clarify that such conditions are in fact subject to the unconstitutional conditions doctrine, then lower courts will continue to trend in the wrong direction. And States will continue to effect unconstitutional takings via legislatively imposed conditions.

CONCLUSION

This Court has "grant[ed] certiorari in takings cases without the existence of a conflict." *Parking Ass'n of Georgia*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of certiorari). "Where, as here, there *is* a conflict, the reasons for granting certiorari are all the more compelling." *Id.* (emphasis added). For the reasons set forth above, *amici* ask that the Court grant the petition.

Respectfully submitted,

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