IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR GRANT COUNTY

WADE KING and **TERESA KING**, husband and wife d/b/a **KING RANCH**,

Plaintiffs,

v.

STATE OF WASHINGTON et al.,

Defendants.

No. 26-2-00263-13

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Wade King and Teresa King d/b/a King Ranch, by and through undersigned counsel, respectfully move this Court pursuant to CR 56 for summary judgment. A hearing is scheduled for May 21, 2026, at 9:00 a.m.

This motion seeks a declaration that the administrative proceeding against the Kings before the Pollution Control Hearings Board violates their right to a jury trial under Article I, section 21 of the Washington Constitution and/or the Seventh Amendment to the United States Constitution, and an order enjoining Defendants from continuing that proceeding.

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This motion is based on the pleadings and records on file in this matter, including Plaintiffs' Memorandum in Support of Motion for Summary Judgment, the Declaration of Oliver Dunford and exhibits thereto, and such argument as the Court may consider.

A proposed order is attached.

RESPECTFULLY SUBMITTED this 13th day of April, 2026.

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CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on April 13, 2026, I caused true and correct copies of the foregoing document to be served via the Court's E-Filing System and by electronic mail on the following interested parties:

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I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on April 13, 2026, at Palm Beach Gardens, Florida.

/s/ Oliver J. Dunford
Oliver J. Dunford

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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR GRANT COUNTY

WADE KING and **TERESA KING**, husband and wife d/b/a **KING RANCH**, Plaintiffs, v. **STATE OF WASHINGTON**, **THE WASHINGTON STATE DEPARTMENT OF ECOLOGY**, and **POLLUTION CONTROL HEARINGS BOARD**, Defendants.	No. 26-2-00263-13 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs Wade and Teresa King d/b/a King Ranch are subject to a jury-less administrative proceeding before the Pollution Control Hearings Board (PCHB), through which the Department of Ecology seeks a $267,540 civil penalty for alleged violations of Chapter 90.48 RCW. This administrative proceeding denies the Kings their state constitutional right to a trial in an independent court before a jury of their peers. *See* WASH. CONST. art. I, § 21 ("The right of trial by jury shall remain inviolate."). It likewise violates the Seventh Amendment to the United States Con-

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stitution, which preserves the right to a jury trial in suits at common law.

This case is ripe for final resolution. It presents no genuine issues of material fact—all parties agree that (1) Ecology accuses the Kings of violating the state's Water Pollution Control Act (Chapter 90.48 RCW); (2) Ecology issued administrative orders requiring the Kings to pay $267,540 in civil penalties and to restore the alleged wetlands at the Kings' personal cost; (3) the Kings challenge these orders and are thereby subject to the PCHB proceeding; and (4) the PCHB does not and cannot hold jury trials.

The case also presents pure questions of law: whether the Washington Constitution and, independently, the Seventh Amendment to the United States Constitution preclude the PCHB proceeding against the Kings? The answer is, yes.

Therefore, this Court should grant the Kings' Motion, declare that the PCHB administrative proceeding violates the Kings' right to a jury trial guaranteed by the Washington Constitution and/or by the Seventh Amendment to the U.S. Constitution, and enjoin Ecology and PCHB from continuing that administrative proceeding.

II. BACKGROUND

Wade and Teresa King d/b/a King Ranch own and operate a cattle ranch in Grant and Douglas Counties. **Verified Complaint** (Compl.) ¶2. The ranch has been in the family since the 1950s. *Id.* Ecology claims that the Kings violated provisions of the state's Water Pollution Control Act (Chapter 90.48 RCW) and Chapter 173-201A WAC, by harming alleged wetlands through the digging and maintenance of stock-water ponds. Compl. ¶¶10–12; Ecology Answer ¶¶10–12. These pur-

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ported wetlands are located on both the Kings' private property and government-owned property that the Kings lease for cattle grazing. See **Exhibits 1–3** (Ecology's administrative orders), p. 1 ("Site Location[s]").

Ecology issued three Administrative Orders in February 2023 and January 2025. Compl. ¶¶10–12; Ecology Answer ¶¶10–12. Through these Administrative Orders, Ecology ordered the Kings to (1) pay a civil penalty in the amount of $267,540 (Order No. 21544, the Penalty Order) and (2) restore alleged wetlands purportedly harmed by the Kings (Order Nos. 21543, 23464, the Restoration Orders). *Id.* The Penalty Order is attached as **Exhibit 1** to the Declaration of Oliver Dunford; the Restoration Orders are attached thereto as **Exhibit 2** and **Exhibit 3**, respectively.[1]

The Kings deny Ecology's allegations and its claims for liability. But other than giving up their constitutional, property, and water rights; and admitting liability, paying the civil fine, and incurring "restoration" costs (Compl. ¶¶22, 34), the Kings' only option was to challenge Ecology's Orders in the PCHB. *See* RCW 43.21B, WAC 371-08; *see also* **Exs. 1–3**. The PCHB is made up of three members who are appointed by the Governor, with the advice and consent of the Senate. RCW 43.21B.020.

The Kings' challenges to Ecology's Orders were consolidated under PCHB

[1] Future references to "**Exhibit**" or "**Ex.**" in this brief apply to the exhibits attached to the Dunford Declaration.

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No. 23-007c (PCHB Proceeding).[2] Compl. ¶13; Ecology Answer ¶13. Proceedings before the PCHB are, of course, not held in an independent court and do not allow jury trials. *See* Ecology Answer ¶40; *see also* RCW 43.21B.090–.170 (administrative hearings). Accordingly, the Kings filed with the PCHB a Motion for Jury Trial and to Dismiss and Appellants' Motion for Partial Summary Judgment. On April 3, 2026, the parties were advised that the PCHB, in a forthcoming written opinion, will deny the Kings' motion. *See* **Ex. 4** (Apr. 3, 2026, Ltr.).

Separately, the Kings filed this lawsuit on March 2, 2026, and, on the same day, effected service through the Attorney General. The Kings immediately moved the Court for a temporary restraining order or preliminary injunction; the Court denied this PI Motion on April 1. Meanwhile, Ecology filed its answer March 23, and the PCHB has advised that it will not participate or take a position in this matter. *See* **Ex. 5** (Apr. 7, 2026, Ltr.). Finally, the Kings filed a Motion for Reconsideration re: the Preliminary Injunction Order or, In the Alternative, to Expedite Dispositive-Motion Briefing and Decision, which the Court denied on April 7.

III. ARGUMENT & AUTHORITY

A. Standard of Review

Summary judgment is appropriate if, construing the facts and all reasonable inferences in favor of the nonmoving party, "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c); *Reid v. Pierce Cnty.*, 136 Wn. 2d 195, 201, 961 P.2d 333 (1998). The nonmov-

[2] The docket for PCHB No. 23-007c may be found here: https://eluho2022.my.site.com/casemanager/s/case/50082000001BFVT/detail, last visited Apr. 12, 2026.

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ing party may avoid summary judgment only if it "set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Meyer v. Univ. of Wash.*, 105 Wn. 2d 847, 852, 719 P.2d 98 (1986) (citations omitted). But the nonmoving party "may not rely on speculation [or] argumentative assertions that unresolved factual issues remain." *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn. 2d 1, 13, 721 P.2d 1 (1986).

In this case, there are no genuine issues of material fact. The following material facts are undisputed and establish the Kings' entitlement to a jury trial:

- Ecology accuses the Kings of violating the state's Water Pollution Control Act (Chapter 90.48 RCW).
- Ecology issued administrative orders requiring the Kings to pay $267,540 in civil penalties and to restore the alleged wetlands at the Kings' personal cost.
- The Kings challenge these orders and are thereby subject to the PCHB proceeding.
- The PCHB does not and cannot hold jury trials.

See Compl. ¶¶10–13, 40; Ecology Answer ¶¶10–13, 40; **Exs. 1–3**; RCW 43.21B, WAC 371-08 (PCHB); RCW 43.21B.090–.170 (PCHB hearings without a jury trial).

B. <u>The Right of Trial by Jury "Shall Remain Inviolate"</u>

The "right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21. The "term 'inviolate' connotes deserving of the highest protection." *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 656, 771 P.2d 711 (1989). Accordingly, Washington Courts have long held that, even in close cases, they must err on the side of preserving the right to a jury trial. *Bain v. Wallace*, 167 Wn. 583, 587, 10 P.2d 226

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(1932); *Thorley v. Nowlin,* 29 Wn. App. 2d 610, 643–44, 542 P.3d 137, 154 (2024) (citing *Bain*, 167 Wn. at 587; *Furnstahl v. Barr*, 197 Wn. App. 168,175, 389 P.3d 635 (2016)).

Further, as discussed further below, because Article I, Section 21 of the Washington Constitution is a "mandatory" clause, *see id.* art. I, § 29 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."), the jury-trial right becomes even more unassailable. *See* Timothy Sandefur, *The "Mandatory" Clauses of State Constitutions*, 60 Gonz. L. Rev. 159 (2024–2025). Ecology cannot prevail by pointing to modern administrative convenience or legislative preference. Instead, it must demonstrate that the type of action it brings—one seeking substantial monetary penalties imposed for alleged statutory violations—falls outside the class of cases historically tried to juries in 1889. It cannot do so.

1. Courts preserve the right to a jury trial

To determine whether a jury trial is required in an action, courts "look to the right as it existed at the time of the constitution's adoption in 1889." *Sofie*, 112 Wn. 2d at 645 (citations omitted). This historical standard is used to determine "the scope of the right as well as the causes of action to which it applies." *Id.* Courts thus use a two-step analysis to determine whether this right exists for a particular case. *Matter of Det. of Detention of C.B.*, 9 Wn. App. 2d 179, 183, 443 P.3d 811 (2019). First, the court identifies the scope of the right to a jury trial in 1889. *Id.* Second, the court decides whether "the type of action at issue is similar to the one that would include the right to a jury trial at that time." *Id.* (footnote omitted).

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The scope of the right to a jury trial. Since at least 1889, the jury has had "the ultimate power to weigh the evidence and determine the facts." *Sofie*, 112 Wn. 2d at 646 (quoting *James v. Robeck*, 79 Wn. 2d 864, 869, 490 P.2d 878 (1971)).

The proceeding before the PCHB presents many questions of fact for the jury's consideration, including questions that go to the heart of Ecology's case, e.g., whether the purported "wetlands" are *in fact* wetlands subject to the Water Pollution Control Act. Ecology will likely object that these kinds of questions are better addressed by the expertise of Ecology and the PCHB, respectively. Not so. "The mere fact that the evidence may present complicated questions of fact … is not a sufficient reason for the denial of a trial by jury." *See Gatudy v. Acme Constr. Co.*, 196 Wn. 562, 569, 83 P.2d 889 (1938).

The type of action at issue. According to the Washington Supreme Court, the jury-trial right "attaches to actions in which a jury was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury." *Sofie*, 112 Wn. 2d at 648 (citations omitted). Importantly, the Court has stressed that precise analogs are not required. *See id.* 648–49 (rejecting argument that "the right to a jury does not apply to causes of action that did not exist at the time of the constitution's adoption"). As the Court explained, "[i]f the right to a jury trial applies only to those *theories of recovery* accepted in 1889—rather than the types of actions that, at common law, were heard by a jury at that time—then the constitutional right to a jury will diminish over time." *Id.* at 648.

Therefore, "the inquiry is not whether the specific cause of action existed in 1889, but rather whether the type of action is analogous to one available at that time." *Endicott v. Icicle Seafoods, Inc.*, 167 Wn. 2d 873, 884, 224 P.3d 761 (2010)

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(citation omitted).

Here, Ecology's claims against the Kings are analogous to actions that were heard by juries at common law long before the Washington Constitution was adopted in 1889: (1) actions in debt; (2) actions for injury to property; and (3) conversion.

First, Ecology's enforcement action is fundamentally a claim for money. Under RCW 90.48.144, Ecology seeks civil penalties from the Kings for alleged harm to (purported) wetlands. The statute authorizes Ecology to seek monetary penalties of up to $10,000 per day for each violation. Historically, statutory penalties of this kind were enforced through actions in debt—common-law actions to recover monetary obligations. *See Atcheson v. Everitt*, 1 Cowper 382, 98 Eng. Rep. 1142 (K.B. 1776) (characterizing civil penalty suit as a type of action in debt); *Calcraft v. Gibbs*, 5 T.R. 19, 101 Eng. Rep. 11 (K.B. 1792) (granting new jury trial in an action in debt for a civil penalty); *see also Tull v. United States*, 481 U.S. 412, 418 (1987) (citing same). As the United States Supreme Court summarized, "[a]ctions by the Government to recover civil penalties under statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury." *Tull*, 481 U.S. at 418–19.

Second, Ecology's claims are based on theories of negligent or intentional damage to property of another—in this case, the State's alleged wetlands. For example, in *Department of Natural Resources v. Littlejohn Logging, Inc.*, the Department of Natural Resources (DNR) filed an action for the recovery of fire-suppression costs it incurred because of Littlejohn's negligence as a logging contractor. 60 Wn. App. 671, 672, 806 P.2d 779 (1991). In an interlocutory ruling, the

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trial court struck Littlejohn's jury demand, and the Washington Supreme Court granted discretionary review. *Id.* at 673. At the Washington Supreme Court, the DNR argued that the statutory right of recovery for fire-suppression cost did not exist at common law. *Id.* at 674. That was true, the Court held, but that alone does not negate the right to a jury. The DNR's right of recovery was "clearly … founded on a theory of negligent damage to the property of another," and negligence is "a type of action defined by the common law and heard by a jury at the time of the adoption of the constitution." *Id.* Therefore, the Court concluded, a jury was required. *Id.*

The same reasoning applies here. Ecology seeks to impose a monetary penalty arising out of the Kings' alleged harm—whether negligent or intentional—to the State's property (as well as to the Kings' private property). *See* **Ex. 1** (Penalty Order). That claim, like the DNR's in *Littlejohn*, is "a type of action defined by the common law and heard by a jury at the time of the adoption of the constitution." 60 Wn. App. at 674 (footnote omitted). Indeed, the relief sought is functionally a cost-of-repair or in-kind restitution remedy for negligent or intentional injury to the property of another—the precise category of common-law claim heard by juries.

The Restoration Orders reinforce this point. They are not purely equitable. They closely resemble Washington nuisance-abatement actions under RCW Ch. 7.48, where abatement expenses—including the costs of removal, repair, or restoration—"can be collected by the officer in the same manner as damages and costs are collected on execution." RCW 7.48.280. In such actions, the underlying liability facts and the reasonableness and amount of abatement or restoration costs are re-

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solved as part of a legal claim for damages to property.[3]

Even more directly, the Restoration Orders parallel Washington timber trespass actions under RCW Ch. 64.12—classic property-tort claims heard by juries at common law. In those cases, restoration or replacement costs serve as the primary measure of damages, with the reasonableness of those costs determined by the trier of fact, typically a jury. *See, e.g., Allyn v. Boe*, 87 Wn. App. 722, 734, 943 P.2d 364 (1997).

These claims all resemble class tort claims, for which juries are required. *See* 3 William Blackstone, Commentaries on the Laws of England *115–19 (1768); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711 (1999) (holding that a cause of action under 42 U.S.C. § 1983 is a suit at common law because it "sound[s] in tort and s[eeks] legal relief"); *id.* at 727 (Scalia, J., concurring in part) ("[T]orts are remedies for invasions of certain rights, such as the rights to personal security, personal liberty, and property.") (citing Cooley, LAW OF TORTS 2–3 (1880)).

[3] The Kings expect that Ecology may try to manufacture a factual dispute based on the as-yet unknowable amount of the costs required to "restore" the alleged wetlands. But this "dispute" is *not* material to the legal issues before the Court. Because the Restoration Orders will impose *some* costs, and these costs resemble common-law damages, a jury is required. The Washington Constitution's jury-trial clause does not require a minimum amount to be in dispute. Therefore, the *amount* of the restoration costs is not material to the legal issues before the Court. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 349, 588 P.2d 1346 (1979) (A material fact is a "fact upon which the outcome of the litigation depends, in whole or in part.") (quoting *Morris v. McNicol*, 83 Wn. 2d 491, 494, 519 P.2d 7 (1974)); *see e.g.*, *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 956, 247 P.3d 18 (2011) (affirming trial court's grant of summary judgment to plaintiff and concluding that defendant failed to raise a dispute over a *material* fact, i.e., a fact upon which the outcome of the case depended). Finally, lest any doubt remain, to the extent the Kings relied on the amount of restoration costs in their PI Motion, the

(footnote continued on next page)

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Third, Ecology's claim against the Kings is analogous to a common-law claim for conversion. *See Watkins v. Siler Logging Co.*, 9 Wn. 2d 703, 710–12, 116 P.2d 315 (1941) (holding that complaint alleging damages for conversion of timber "states a purely legal cause of action, sounding in tort for conversion").

States with identical jury-trial guarantees have similarly found that jury trials are required in these circumstances. For example, Rhode Island's Constitution provides that "[t]he right of trial by jury shall remain inviolate." R.I. CONST. art. I, § 15. In *Bendick v. Cambio*, the Rhode Island Supreme Court held that a landowner was entitled to a jury trial under that clause when the state's Department of Environmental Management sued for injunctive relief and civil penalties. 558 A.2d 941, 945–46 (R.I. 1989). *See also Texas v. Google LLC*, 787 F.Supp.3d 357, 410 (2025) (explaining that under the Texas Constitution, art. I, § 15 (the "right of trial by jury ... remain inviolate"), "civil-penalty claims authorized by Texas statutes—including antitrust claims—*are* entitled to a jury trial under Texas law").

* * *

In sum, the scope of the right to a jury trial in 1889 included the jury's power to weigh and determine questions of fact; and "the type[s] of action" are "analogous to one[s] available at that time." *Endicott*, 167 Wn. 2d at 884. Therefore, the Kings are entitled to a jury trial for the claims asserted by Ecology, and the jury-less PCHB proceeding unconstitutionally deprives the Kings of their fundamental right to a jury trial.

Kings abandon that argument. Therefore, the Court should reject any attempt by Ecology to inject a non-material factual dispute into the Court's analysis.

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2. Ecology's claim for a civil monetary penalty leaves no doubt that a jury is required here

Ecology's enforcement action triggers the right to a jury trial because it seeks legal relief in the form of a $267,540 civil penalty. As explained above, at common law, suits to recover monetary penalties were brought as actions in debt and tried to juries. *See Tull*, 481 U.S. at 418–19; *see also Curtis v. Loether*, 415 U.S. 189, 196 (1974) (holding that statutory damages are legal in nature and therefore trigger the jury-trial right). That rule applies here. Ecology's claim for a fixed monetary sanction imposed for alleged statutory violations is a paradigmatic legal claim.

The presence of that legal claim is dispositive. When legal and equitable claims are joined in a single action, the jury-trial right attaches at least to the legal claim and to any common factual issues. Courts do not strip a litigant of the jury right simply because the government also seeks equitable relief. To the contrary, the jury right must be preserved wherever legal claims are present. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (holding that legal claims must be tried to a jury and cannot be displaced by prior determination of equitable issues); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472–73 (1962) (rejecting attempts to characterize legal claims as equitable to avoid the jury-trial right and requiring jury determination).

Washington law follows the same approach. Courts look to the nature of the claims and give "great weight" to preserving the jury right, especially where legal and equitable issues overlap. *Brown v. Safeway Stores, Inc.*, 94 Wn. 2d 359, 368, 617 P.2d 704 (1980) (citation omitted); *Thorley*, 29 Wn. App. 2d at 651–59. Where,

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as here, the same core factual questions—liability, causation, and the extent of harm—underlie both the monetary penalty and the requested restoration, those issues must be resolved by a jury.

Ecology cannot avoid that result by labeling the Restoration Orders as "equitable." The right to a jury trial turns on the substance of the action, not the form of the pleadings. *See Brown*, 94 Wn. 2d at 365. Here, both the Penalty Order and the Restoration Orders arise from the same alleged conduct and depend on the same factual determinations, including whether the land constitutes jurisdictional wetlands, whether the Kings caused legally cognizable harm, and the extent of that harm. Those are classic jury questions.

Moreover, the Restoration Orders themselves closely resemble traditional legal remedies for injury to property. They require the Kings to undertake corrective measures tied directly to alleged damage—functionally equivalent to damages measured by the cost of repair or restoration, a remedy historically determined by juries. *See, e.g., Littlejohn*, 60 Wn. App. at 674. At minimum, the Restoration Orders share common factual predicates with the legal penalty claim, requiring those issues to be tried to a jury.

Because Ecology seeks legal relief and because the legal and equitable aspects of its claims—if any—are intertwined, Article I, § 21 and the Seventh Amendment each require that the Kings receive a jury trial on the claims in this action.

3. Alternatively, the Kings are entitled to a jury trial on Ecology's Penalty Order

a. The Kings are entitled to a jury trial on the Penalty Order

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If the Court determines that the Restorative Orders involve solely equitable claims, the Court should still conclude that the Kings have the right to a jury trial on Ecology's proposed $267,540 civil money penalty. As discussed above, Ecology's claim here is analogous to, inter alia, a common-law action in debt for which juries have long been required.

Further, Ecology will likely argue that the civil penalty is merely incidental to the (purportedly) equitable Restoration Orders. But Washington law says otherwise, and it contradicts Ecology's arguments made elsewhere.

Ecology claims authority to impose the civil penalty under Chapter 90.48 RCW and "is basing the penalties on the violations listed in" the Penalty Order. *See* **Ex. 1**. Pursuant to RCW 90.48.144(3), anyone who "[v]iolates the provisions of RCW 90.48.080, or other sections of this chapter" or "rules or orders adopted or issued pursuant" thereto "shall incur, *in addition to* any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation." (Emphasis added.) "Each and every such violation shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance shall be and be deemed to be a separate and distinct violation," and "[e]very act of commission or omission which procures, aids or abets in the violation shall be considered a violation under the provisions of this section and subject to the penalty herein provided for." *Id.*

In short, Ecology may seek civil penalties if someone has otherwise violated the Pollution Control Act, and those penalties "shall" be incurred "in addition to" any other penalties imposed. RCW 90.48.144(3). Thus, contrary to Ecology's expected argument, the civil penalty sought by Ecology is a separate penalty that is

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very much *not* incidental to the Restoration Orders. The PCHB itself recognizes that RCW 90.48.144 is intended to both "punish" the violator and "influence behavior" through "[d]eterrence of both the violator and of the public at large." *Rivisto dba Am. Plating Co., Inc. v. Wash. Dep't of Ecology*, PCHB No. 84-340, 1986 WL 26556, at *3 (P.C.H.B. Jan. 23, 1986).

Not surprisingly, Ecology itself has (correctly) stated that "Ecology's penalty and Orders are treated as distinct by law and regulation," and that "[l]aw and regulation treat administrative orders and penalties issued under RCW 90.48 as distinct enforcement mechanisms." **Ex. 6**, PCHB No. 23-007c, Ecology Resp. in Opp. to the Kings' Mot. for Jury Trial and to Dismiss at 7 & n.8 (Feb. 2, 2026, Br.) (footnotes omitted).

Finally, long-standing principles of equity preclude the contention that a *penalty* may be an incident of an equitable order. *See, e.g.*, *Marshall v. Vicksburg*, 15 Wall. 146, 149 (1873) ("Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.") (citing *Livingston v. Tompkins*, 4 Johns. Ch. 415 (N.Y. Ch. 1820); 2 Story's EQUITY § 1319)); *Liu v. SEC*, 591 U.S. 71, 77 (2020) (same).

Therefore, if this Court decides that the Restoration Orders are purely equitable and, therefore, not subject to a jury trial, the Court should nonetheless conclude that the Penalty Order—since it is a stand-alone claim at law—cannot be resolved outside of a jury trial.

b. The jury trial on the Penalty Order must precede consideration of the Restoration Orders

Because of the importance of the jury trial, the Court should order that Ecol-

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ogy must proceed against the Kings in a jury trial on the Penalty Order before pursuing any equitable relief. *See* RCW 90.48.037 (authorizing Ecology, with the assistance of the attorney general, "to bring any appropriate action at law or in equity … to carry out the provisions" of RCW Ch. 90.48). *See Beacon Theatres*, 359 U.S. at 510–11 (holding that legal claims must be tried to a jury and cannot be displaced by prior determination of equitable issues).

4. Seventh Amendment jurisprudence lends persuasive support

In *State v. Gunwall*, the Washington Supreme Court noted that "[f]ederal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive." 106 Wn. 2d 54, 60, 720 P.2d 808 (1986) (quotation marks and citation omitted). And in *Sofie*, the Court observed that the United States Supreme Court's analysis of the Seventh Amendment, while not binding on Washington courts, provides "some insight." 112 Wn. 2d at 647. Not surprisingly, then, Washington courts often look to Seventh Amendment cases when considering the scope of the Washington Constitution's jury-trial guarantee. *See, e.g.*, *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn. 2d 255, 267–68, 956 P.2d 312 (1998); *Thorley*, 29 Wn. App. 2d at 657–58; *Auburn Mech., Inc. v. Lydig Constr., Inc.*, 89 Wn. App. 893, 897, 951 P.2d 311 (1998), *see also id.* at 903 (discussing U.S. Supreme Court's treatment of equity).

Several Seventh Amendment decisions are especially meaningful and instructive here. In *Tull*, the U.S. Supreme Court held that the federal government's claim for civil penalties arising out of violations of the Clean Water Act was analogous to the common-law action debt for which a jury is required. 481 U.S. at 422–

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25, 427 (reversing appellate court and holding that defendant had right to a jury trial).[4] *See also United States v. Nordbrock*, 941 F.2d 947, 949 (9th Cir. 1991) ("The Seventh Amendment guarantees a jury trial to determine liability in a Government action seeking civil penalties.") (citing *Tull*, 481 U.S. at 417–25).

Similarly, in *Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, the court held that Massachusetts's "claims for natural resource damages and recovery of public nuisance abatement expenses [under both state and federal statutes] present legal issues which must be tried to a jury as matter of right." 712 F.Supp. 994, 1004 (D. Mass. 1989); *see id.* at 1002 (rejecting argument that recovery of abatement costs would merely return to the *status quo ante* and were therefore equitable in nature because "little would be left in the realm of compensatory damages").

5. *Gunwall* analysis

Litigants in Washington may submit that a provision of the Washington Constitution affords broader protections than an analogous provision of the United States Constitution. When they do so, they generally must offer a "*Gunwall* analysis," named after the Washington Supreme Court's decision in *State v. Gunwall*, in which the Court discussed the then "relatively new movement to resort to independent state constitutional grounds" for the protection of individual liberty. 106 Wn. 2d at 59; *cf. also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (emphasizing that state

[4] In *Sofie*, the Washington Supreme Court disagreed with *Tull*'s conclusion, that the amount of the civil penalty was not a question for the jury. 112 Wn. 2d at 647–

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constitutions "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law"). *See Alderwood Assocs. v. Wash. Env't Council*, 96 Wn. 2d 230, 238, 635 P.2d 108 (1981) ("We have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart when the reasoning and evidence indicate such was intended and is necessary.") (citations omitted).

But arguably no *Gunwall* analysis is required here. In *Sofie*, the Washington Supreme Court noted that the Seventh Amendment is not incorporated against the states and, therefore, that the "right to jury trial in civil proceedings is protected [in Washington courts] solely by the Washington Constitution." 112 Wn. 2d at 644. The Court's decision was thus "based entirely on adequate and independent state grounds." *Id.* (footnote omitted). As a result, the Court in *Sofie* did not apply a *Gunwall* analysis. What's more, the Washington Supreme Court has already construed Washington's jury-trial right more broadly than the federal right. *Id.* at 645.

In the interest of completeness, however, the Kings provide a *Gunwall* analysis here. *Gunwall* identified six nonexclusive criteria relevant to determine "whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." 106 Wn. 2d at 61. The criteria are: (1) the textual language of the State Constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law his-

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48. The conclusion in *Sofie* supports the Kings, who seek a jury trial to determine

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tory; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Id.* at 61–62; *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn. 2d 791, 806, 83 P.3d 419 (2004).

Consideration of these factors confirms that the Washington Constitution's guarantee of the right to a jury trial is broader than that afforded by the Seventh Amendment.

(1) The textual language of the State Constitution and **(2) Significant differences in the texts of parallel provisions of the federal and state constitutions.** "Factors one and two of the *Gunwall* analysis focus on the textual language of the provision and the extent to which that language differs from that of the federal constitution." *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn. 2d at 806 (citing *Gunwall,* 106 Wn. 2d at 61).

According to the Washington Supreme Court, the "shall remain inviolate" language in Washington's Constitution provides a broader guarantee to a jury trial than the Seventh Amendment's guarantee that the "right of trial by jury shall be preserved" in suits at common law. *Sofie*, 112 Wn. 2d at 645. As noted above, the term "inviolate" "connotes deserving of the highest protection and demanding that the jury trial remain an essential component of our legal system." *Thorley*, 29 Wn. App. 2d at 643 (citations omitted). To "remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie*, 112 Wn. 2d at 656. And when the question is doubtful, the court always preserves the

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whether *and to what extent* Ecology may impose a civil penalty.

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right to a jury trial. *Bain*, 167 Wn. at 587.

(3) State constitutional and common law history and **(4) Preexisting state law.** Washington's Constitution was drafted during the "remarkably fecund period of constitution-making between 1865 and 1910," when "Americans looked primarily to state constitutions and state authorities to protect their freedom." Sandefur, 60 Gonz. L. Rev. at 161, 164. As Justice Robert F. Utter and Professor Hugh D. Spitzer remarked, the Washington Constitution "was drafted three decades after Oregon's, when 'natural-rights liberalism' was reaching a fever pitch in the American West." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 7 (2d ed. 2013). "Natural-rights liberalism" here is "defined in terms of individual self-seeking for economic advantage." *Id.* (quotation marks and citation omitted).

Washington's "independent ethos was further reflected in the declaration of rights, robust protections of individual freedom." Hugh D. Spitzer, *Washington: The Past and Present Populist State* in THE CONSTITUTIONALISM OF AMERICAN STATES 777 (Connor & Hammonds, eds., 2008). Accordingly, the delegates to the Washington constitutional convention "tended to copy strong rights provisions from other state constitutions rather than the less protective generalities of the Federal Bill of Rights." Utter & Spitzer, *supra*, at 5. And "the state constitutions were originally intended as the primary devices to protect individual rights." *Id.* (citation omitted).

To protect these rights, individuals turn to the courts. And, when the Washington Constitution was adopted, a predominant concern was judicial *passivity* in response to claims of individual rights. *See* Sandefur, 60 Gonz. L. Rev. at 165–66

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("Many people … thought the problem [posed by concentrated private and public power] wasn't just with lawmakers, but also with judges. Courts were supposed to be a bulwark of liberty—full partners in the tripartite separation of powers essential to protecting freedom. Yet many people during this era thought courts had become excessively lax in enforcing constitutional rules.").

Importantly, Washington's Constitution, like others adopted around the same time, includes a "Mandatory" Clause, adopted "to ensure that government officers regard constitutions as binding law, rather than as sets of advisory directives or admonitions." Sandefur, 60 Gonz. L. Rev. at 168.[5]

Therefore, the Washington Constitution provides that the "provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." WASH. CONST. art. I, § 29. Nothing in the constitution's jury-trial clause—"[t]he right of trial by jury shall remain inviolate," *id.* art. I, § 21—even hints that the right to a jury trial is anything but mandatory.

This Court, then, is obligated to treat Art. I, § 21 as mandatory. And as the Washington Supreme Court elaborated, because the Washington Constitution includes a Mandatory Clause, "[w]hen it comes to considering individual rights such as are protected by the guaranties, that the Right to trial by jury shall remain invi-

[5] In *Groves v. Slaughter*, for example, the United States Supreme Court considered the Mississippi Constitution's provision that stated, "The introduction of slaves into this state, as merchandise, or for sale, shall be prohibited…." 40 U.S. 449, 497 (1840). Despite the use of the word "shall," the Court held that this provision was "only directory to the legislature, and requiring their action, in order to bring it into full operation." *Id.* at 499. *See* Sandefur, 60 Gonz. L. Rev. at 169–73 (discussing distinction drawn by courts between "mandatory" and merely "directory" constitutional constructions).

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olate, [etc.], the courts have ample power, and will go to any length within the limits of judicial procedure, to protect such constitutional guaranties." *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn. 2d 476, 501, 585 P.2d 71 (1978) (quotation marks and citation omitted).

Ecology may argue, as it did its opposition to the Kings' PI Motion, that the Kings' demand for a jury trial is trumped by the legislature's decision to channel review of administrative orders through executive-branch agencies. But, as always, legislative enactments cannot trump the constitution, no matter the vintage of the statutory regimes. Indeed, "[l]ong usage can neither repeal, nor justify the violation of, such [mandatory constitutional] provisions, and disobedience or evasion is not permissible, even though the best interests of the public might apparently be promoted in some respects." *State ex rel. Billington v. Sinclair*, 28 Wn. 2d 575, 581–82, 183 P.2d 813 (1947) (quotation marks and citation omitted).

These principles support the point made above, that when courts are unsure whether a jury trial is required, they must err on the side of preserving the right to a jury trial. The benefit of the doubt thus goes to the individual facing the enormous power of the state.

Also discussed above, it is well-established that the jury has had "the ultimate power to weigh the evidence and determine the facts." *Sofie*, 112 Wn. 2d at 646 (quotation marks and citation omitted). It is for this reason, additionally, that the Court (if it concludes that the Kings are entitled to a jury only on Ecology's Penalty Order) should order that the jury consider the legal claim before the Restoration Orders are considered. Under federal law, courts *must* consider the legal

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claims first. *Beacon Theatres*, 359 U.S. at 510 (The jury right "cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.") (quotation marks and citation omitted). The Court should not construe the Washington Constitution's jury-trial right as less protective than the Seventh Amendment.

Finally, as again discussed above, Ecology's claims are analogous to several common-law claims that require a trial by jury.

(5) Differences in structure between the federal and state constitutions and **(6) Matters of particular state interest or local concern.**

The fifth factor "always point[s] toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." *State v. Gocken*, 127 Wn. 2d 95, 105, 896 P.2d 1267 (1995) (citing *State v. Young*, 123 Wn. 2d 173, 180, 867 P.2d 593 (1994)).

The sixth factor here also points to an independent state analysis. As noted above, the Washington Constitution includes an explicit Mandatory Clause, which further supports the Kings' argument for a broad reading of the jury-trial clause.

Another clause found in the state constitution but absent from the federal constitution furthers this view: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." WASH. CONST. art. 1, § 32. The right to a trial by jury is one of the most fundamental rights in our long Anglo-American tradition. It reaches back at least to Magna Carta. The Court must therefore consider these principles when Ecology

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responds, as it will, that the administrative regime must control the Kings' fate.

Further, the Court should consider that the Washington Constitution "was drafted three decades after Oregon's, when 'natural-rights liberalism' was reaching a fever pitch in the American West." Utter & Spitzer, *supra*, at 7. The state constitution also "[r]eflect[s] the Populists' distrust of concentrated power," *id.* at 9 (describing divided political authority within executive branch), and the importance of "safeguard[ing] [the] new constitutional order by limiting the power of the state legislatures," *id.* at 10 (internal quotation marks and citation omitted). The importance of independent farming was given pride of place. *See id.* at 6–9 ("protecting a self-sufficient way of life" (heading); discussing agriculturalists, farmers' concerns, etc.). In short, the Washington Constitution still shows that "individualism and suspicion of big business (as well as big government) remain strong in Washington State…." *Id.* at 11.

* * *

This *Gunwall* analysis supports reading Washington's jury-trial clause as affording more protections than those of the Seventh Amendment.

C. <u>The case is properly before this Court</u>

Ecology may argue that this Court lacks authority to consider the Kings' constitutional claims because the state's Administrative Procedure Act (APA) provides the exclusive means of judicial review of a decision by the PCHB and the Kings have not exhausted their administrative remedies. This argument, however, relies on faulty premises—most importantly, the erroneous premise that the Kings challenge a final PCHB order. They do not.

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The Kings instead bring a pre-enforcement constitutional challenge to the State's attempt to subject them to a jury-less administrative adjudication in which Ecology seeks substantial civil penalties. The Kings' injury is not the eventual outcome of the PCHB proceeding, nor any orders issued during the proceeding. Rather, the Kings' injury is the deprivation of their constitutional right to have (the alleged) liability for those penalties determined in an independent court with a jury. This injury commenced the moment Ecology issued its administrative orders and compelled the Kings to defend themselves in a forum that cannot provide a jury trial. *See Axon Enter., Inc. v. FTC,* 598 U.S. 175, 191–92 (2023) (holding that a party suffers a "here-and-now injury" when forced to undergo an unconstitutional administrative proceeding and that those subject to the proceeding may seek relief in district court without awaiting final agency action).

Nor does the APA displace this Court's authority to hear the Kings' claims. The APA governs judicial review of final agency action; it does not bar independent constitutional claims seeking to prevent an unlawful exercise of adjudicatory power before it occurs. *See* RCW 34.05.510; *cf. Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212–13 (1994) (recognizing that preclusion does not apply where meaningful judicial review is unavailable or the claim is wholly collateral to the administrative proceeding); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489–91 (2010) (allowing pre-enforcement structural constitutional challenge to agency adjudicatory scheme).

Finally, delaying review until after the PCHB proceeding would not provide an adequate remedy. Only the courts can resolve constitutional disputes. As Ecology itself argued, in response to the Kings' administrative Motion to Dismiss, the

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PCHB "does not have the authority to address the facial constitutionality of a statute, but has ruled, on occasion, on the constitutionality of a statute as applied." **Ex. 5** at 4 (quoting *Puget Soundkeeper All. v. Dep't of Ecology*, Nos. 07-022, 07-023, 2008 WL 5510415, at *4 (P.C.H.B. Sept. 29, 2008)); *see id.* at 5–6 (arguing that the Kings' jury-trial claim "goes beyond the Board's jurisdiction"). Therefore, post PCHB-hearing judicial review will come too late and will not remedy the constitutional injury foisted on the Kings.

The right to a jury trial is a guarantee that must be honored before adjudication occurs. If the PCHB enters a final order against the Kings, the constitutional harm will be complete—and cannot be undone on appeal. *See Axon,* 598 U.S. at 191 ("A proceeding that has already happened cannot be undone. Judicial review of [the Kings'] … constitutional claim[] would come too late to be meaningful."); *Tull*, 481 U.S. 412 at 417–18 (jury trial right attaches to actions seeking civil penalties); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989) (Seventh Amendment protects the right to a jury before adjudication of legal claims). Because the Kings challenge the State's authority to subject them to that proceeding at all, their claims are properly before this Court now.

D. <u>The Kings are entitled to a jury trial under the Seventh Amendment</u>

Under the U.S. Constitution, "In Suits at common law, ... the right of trial by jury shall be preserved." U.S. CONST. amend. VII. The Kings submit that they are entitled to a jury trial here under the Seventh Amendment.

The Kings recognize that the United States Supreme Court has not incorporated the Seventh Amendment against the states. *Minneapolis & St. Louis R.R. v.*

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Bombolis, 241 U.S. 211 (1916)). But as Justice Gorsuch has explained, *Bombolis* is "something of a relic." *Thomas v. Humboldt Cnty.*, 146 S.Ct. 27, 27 (2025) (Gorsuch, J., statement respecting the denial of certiorari). And in the years since *Bombolis*, the U.S. Supreme Court "has 'shed any reluctance' about the idea that the Fourteenth Amendment 'incorporate[s]' against the States many of the liberties enshrined in the Bill of Rights." *Id.* (citation omitted).

Importantly, Justice Gorsuch noted that *Bombolis*'s remaining on the books "subjects ordinary Americans to a two-tiered system of justice." *Thomas*, 146 S.Ct. at 28 (Gorsuch, J., statement respecting the denial of certiorari). The Kings will suffer this fate if the Court here concludes that they are not entitled to a jury trial under the Washington Constitution.

This case is on all fours with *Tull*, where the United States Supreme Court concluded that a landowner was entitled to a jury trial under the Seventh Amendment when the government accused him of violating the Clean Water Act and sought civil penalties. 481 U.S. at 422–25, 427.

According to the U.S. Supreme Court, one is entitled to a jury under the Seventh Amendment if the claim at issue is legal. *SEC v. Jarkesy*, 603 U.S. 109, 122 (2025). To determine whether a claim is legal in nature, courts consider (1) the cause of action and (2) the remedy it provides. *Id.* at 123. The remedy is the "more important" consideration. *Id.*; *see also Tull*, 481 U.S. 417 (same).

The cause of action need not have a precise analog at common law because the Seventh Amendment "requires trial by jury in actions unheard of at common law." *Tull*, 481 U.S. at 420 (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974)). Ecology's claims have several common-law analogs, as discussed above,

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And, in any event, the remedy is the "more important" consideration. Here, as in *Tull*, the remedy sought by Ecology is a civil penalty, which is "a type of remedy at common law that could only be enforced in courts of law." 481 U.S. at 422.

Accordingly, independent of their rights under the Washington Constitution, the Kings are entitled to a jury trial under the Seventh Amendment.

IV. CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion for summary judgment and enter the proposed order.

A proposed order is attached.

* * *

If the Court concludes that the Kings are entitled to a jury on the Penalty Order only, the Court should confirm in its opinion and judgment that the Kings are not entitled to a jury trial on the Restoration Orders. If the Court concludes that the Kings are not entitled to a jury trial on any of Ecology's claims, the Court should confirm in its opinion and judgment that the Kings are not entitled to a jury trial. That is, the Court should resolve all arguments in a final judgment so that the Kings, if necessary, may seek discretionary review with the Washington Supreme Court.

* * *

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RESPECTFULLY SUBMITTED this 13th day of April, 2026.

/s/ Oliver J. Dunford

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CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on April 13, 2026, I caused true and correct copies of the foregoing document to be served via the Court's E-Filing System and by electronic mail on the following interested parties:

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I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on April 13, 2026, at Palm Beach Gardens, Florida.

/s/ Oliver J. Dunford
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