IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. THOMAS E. PEREZ, SECRETARY OF LABOR, and UNITED STATES DEPARTMENT OF LABOR, Defendants.	Civil Action No. 3:16-cv-1476-M Consolidated with: 3:16-cv-1530-C 3:16-cv-1537-N

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC.,
IN SUPPORT OF DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' CONSOLIDATED CROSS-MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

Amicus curiae Public Citizen, Inc., is a non-profit consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has long played a role in the development of commercial speech doctrine. Public Citizen has defended commercial speech regulations as amicus curiae in cases where those regulations were important to protecting public health or served other important government and public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). Its attorneys have also represented parties seeking to invalidate overbroad restraints on commercial speech when those restraints harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Public Citizen has become increasingly concerned that corporate and commercial interests are promoting stringent applications of commercial-speech doctrine to stifle legitimate economic regulatory measures and protections for consumers. This case implicates that concern because plaintiffs' position that strict scrutiny applies to content-based commercial speech regulations, if accepted by this Court, would wrongly tilt the First Amendment balance against laws and regulations that serve important public interests.

Public Citizen has filed a motion for leave to file an amicus curiae brief in support of defendants. Defendants and the original plaintiffs in Nos. 3:16-cv-1530-C and 3:16-cv-1537-N have consented to the motion for leave to file. The original plaintiffs in No. 3:16-cv-1476-M (the Chamber of Commerce plaintiffs) state that they do not oppose Public Citizen's participation as

an amicus, but take no position at this time as to the appropriateness of having more than three amicus memoranda filed in support of one side in this litigation.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In April 2016, the Department of Labor (DOL) issued several related regulations (collectively, the Rule) to address conflicts of interest among providers of investment advice to retirement plans and retirement investors. The Rule expands the pool of individuals who are fiduciaries to an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) or to an Individual Retirement Account (IRA) under the Internal Revenue Code. It amends DOL's previous definition of "investment advice" that subjects an adviser to fiduciary obligations—including the obligation to refrain from certain "prohibited transactions"—and reworks the system of exemptions to those obligations set forth in earlier regulations.

Under ERISA, "fiduciary status and responsibilities are central to protecting the public interest in the integrity of retirement and other important benefits." Administrative Record (AR) 1. The Rule updates those central safeguards given changes in the market for investment services since 1975, when DOL adopted its previous rule to determine which individuals constitute ERISA fiduciaries. *Id.* Under the 1975 standard, "many investment professionals, consultants, and advisors ha[d] no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play[ed] in guiding plan and IRA investments." *Id.* They could "give imprudent and disloyal advice; steer plans and IRA owners to investments based on their own, rather than their customers' financial interests; and act on conflicts of interest in ways that would be prohibited if the same persons were fiduciaries." *Id.* DOL

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person aside from amicus curiae and its members, contributed money intended for the preparation or submission of this brief.

concluded that a new standard would "better reflect[] the broad scope of the statutory text and its purposes and better protect[] plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty." *Id.*

The original plaintiffs in No. 3:16-cv-1530-C, *American Council of Life Insurers v. Perez*, (collectively, ACLI) contend that the Rule is a content-based restriction on the commercial speech of their members and violates the First Amendment. Doc. 62, ACLI Mem. 10; *see also* Doc. 61, Chamber of Commerce Mem. 40 (adopting ACLI's argument). Although the Rule does not prohibit the provision of any type of investment advice, ACLI argues that it burdens commercial speech by subjecting ACLI members to fiduciary obligations—in the words of ACLI, "onerous terms and conditions"—if they provide investment advice as defined by the Rule. ACLI Mem. 11. ACLI contends that the content-based nature of this "restriction" warrants First Amendment review using strict scrutiny.

ACLI's First Amendment argument should be rejected because the Rule does not regulate speech: It regulates terms of a commercial or professional relationship and duties that attach to it. *See* Doc. 72-1, DOL Mem. 94-108. However, we submit this brief to emphasize that, even if the Rule were a content-based commercial speech regulation, *but see id.* 95-100, a long line of Supreme Court precedent, confirmed by recent decisions, demonstrates that regulation of commercial speech is not subject to strict scrutiny. If the Court finds that the Rule regulates commercial speech, the Rule should be analyzed and upheld under the intermediate scrutiny standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

ARGUMENT

I. The Supreme Court Has Consistently Applied Intermediate Scrutiny to Content-Based Restrictions on Commercial Speech.

For nearly four decades, the First Amendment standard that applies to restrictions on commercial speech has been clear: The government may regulate such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564). This standard—termed intermediate scrutiny or *Central Hudson* review—affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as political or religious expression. This "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (internal quotation marks omitted).

ACLI asks this Court to disregard the longstanding distinction between the treatment of commercial and non-commercial speech restrictions because it claims that the Rule is a content-based restriction on commercial speech. In ACLI's view, any content-based restriction on commercial speech should be treated just as if it regulated speech about religious views or speech in favor of a political party. ACLI fails to acknowledge Supreme Court cases recognizing that "regulation of commercial speech based on content is less problematic" than regulation of content-based non-commercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). In *Central Hudson* itself, the Supreme Court explained that "regulation of [commercial speech's] content" is permissible in part because such "speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by

overbroad regulation." *Cent. Hudson*, 447 U.S. at 564 n.6. By contrast, "[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message." *Id*.

ACLI also neglects to address a line of cases in which the Supreme Court has applied intermediate scrutiny to content-based restrictions on lawful, non-misleading commercial speech. *See*, *e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 183-84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited labels for beer, but not wine or distilled spirits, from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to prospective clients that "relate[d] to an accident or disaster involving the person to whom the communication [was] addressed or a relative of that person"); *Bolger*, 463 U.S. at 61, 68-69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205-07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed). In each case, the restrictions turned on the "subject matter" of speech and the identity of the speaker and hence would have been subject to strict scrutiny under ACLI's view. *See* ACLI Mem. 12. Yet in each case, the Supreme Court held that the restrictions were subject to intermediate scrutiny.

Indeed, *Central Hudson* itself struck down a regulation that banned all "advertising intended to stimulate the purchase of utility services," which would be treated as content-based under ACLI's position and subject to strict scrutiny. *Cent. Hudson*, 447 U.S. at 559 (internal

quotation marks omitted). Thus, under ACLI's view, the very case that gave First Amendment intermediate scrutiny its name was decided using the wrong standard.

II. Neither *Reed* Nor *Sorrell* Supports Applying Strict Scrutiny to Content-Based Commercial Speech Restrictions.

ACLI's position with respect to strict scrutiny hinges on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Those cases, however, do not step back from the Supreme Court's well-established distinction between commercial and non-commercial speech, even for restrictions that are content-based.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." 564 U.S. at 563. The Court held that the law imposed a "speaker- and content based burden on protected expression" by allowing the use of information by other entities, such as "private or academic researchers," and for non-marketing purposes, such as "educational communications." *Id.* at 564. The Court therefore concluded that "heightened judicial scrutiny [was] warranted." *Id.* at 565. Importantly, however, the Court went on to note the two types of "heightened" scrutiny that could apply to the speech at issue: "a special commercial speech inquiry or a stricter form of judicial scrutiny" for non-commercial speech. *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial or non-commercial because, even under the less stringent "commercial speech inquiry," the law was unconstitutional. *See id.* at 571-72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between the standard for commercial speech and the "stricter" standard for

non-commercial speech supports the continued application of intermediate scrutiny to commercial speech.

ACLI suggests that the phrase "heightened scrutiny" in *Sorrell* refers to strict scrutiny. *See* ACLI Mem. 10-11. But *Sorrell*'s application of intermediate scrutiny contradicts such a reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See*, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has likewise referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way—as a general description of scrutiny above a rational-basis test—not as another way of saying strict scrutiny.

Nor does *Reed* support ACLI's position. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short duration. *See* 135 S. Ct. at 2224-25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited non-commercial speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. The Court cited cases involving

commercial speech only in addressing whether the law was content-based. *See id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing, inter alia, *Sorrell*, 564 U.S. at 565). The Court found that the ordinance at issue was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of *non-commercial* speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based *commercial speech* restrictions. Surely if the Court intended to overrule its many decisions distinguishing commercial speech from non-commercial speech, its opinion would have mentioned "commercial speech." *Reed* does not use the term even once.

Consistent with *Sorrell* and *Reed*, the Fifth Circuit has continued to differentiate content-based restrictions on commercial and non-commercial speech after *Reed* and *Sorrell*. In *Serafine v. Branaman*, 810 F.3d 354, 361 (5th Cir. 2016), the court applied strict scrutiny only after finding that the plaintiff's speech was political speech, not professional or commercial speech. *Id.* It viewed the distinction as relevant even though it characterized the restriction as "a content-based restriction on speech—proscribing one's ability to claim to be a psychologist." *Id.*

The Fifth Circuit's approach agrees with the Eleventh Circuit's view that *Reed* and *Sorrell* do not displace intermediate scrutiny of content-based commercial speech restrictions. As that court has explained, "the general rule that content-based restrictions trigger strict scrutiny is not absolute." *Dana's R.R. Supply v. Attorney Gen. of Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015) (citing *Sorrell*, 564 U.S. 552). Commercial speech restrictions are subject to "the more flexible, yet still searching, standard of intermediate scrutiny," *id.*, even though "[a]ppropriately tailored

regulations of commercial speech . . . will necessarily target specific content and speakers," *id.* at 1248.[2]

Similarly, "almost all of" the federal district courts to address the issue "have concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*." *Mass. Ass'n of Private Career Schools v. Healey*, __ F. Supp. 3d __, No. 14-13706, 2016 WL 308776, at *10 (D. Mass. Jan. 25, 2016); *see*, *e.g.*, *Geft Outdoor LLC v. Consol. City of Indianapolis*, __ F. Supp. 3d __, No. 15-1568, 2016 WL 2941329, at *10 (S.D. Ind. May 20, 2016), *app. filed*, No. 16-2510 (7th Cir. June 17, 2016) ("[W]e have adopted the approach taken by a majority of the courts who have addressed the issue and hold that, since *Reed* does not change the controlling precedent, [the Ordinance at issue], which applies only to commercial speech, is subject to intermediate, rather than strict, scrutiny."); *Chiropractors United for Research & Educ., LLC v. Conway*, No. 15-556, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015), *app. filed*, No. 15-6103 (6th Cir. Oct. 7, 2015) ("Because the [statute at issue] constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."); *Contest Promotions, LLC v. City & Cty. of San Francisco*, No. 15-93, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015), *app. filed*, No. 15-16682 (9th Cir. Aug. 25, 2015) ("*Reed* does not concern

[2] Other appellate decisions also hold that *Sorrell* does not require strict scrutiny of content-based restrictions of commercial speech or other speech that is not fully protected. *See*, *e.g.*, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) (holding that, under *Sorrell*, "when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012) (citing *Sorrell* for the proposition that "intermediate scrutiny" applies in commercial speech cases); *King v. Governor of State of N.J.*, 767 F.3d 216, 236-37 (3d Cir. 2014) (rejecting argument that *Sorrell* requires strict scrutiny of content-based restriction of professional speech). In *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016), the Ninth Circuit likewise rejected strict scrutiny for content-based commercial speech restrictions but, mistakenly in our view, indicated that a heightened form of intermediate scrutiny applied. *Id.* at 648. As of this filing, a petition for rehearing en banc remains pending in the case.

commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."); *Cal. Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech . . . . The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it.").

This Court should accept the emerging consensus that *Reed* and *Sorrell* have not changed the longstanding application of intermediate scrutiny to commercial-speech restrictions.

III. Application of Strict Scrutiny to Content- or Speaker-Based Commercial Speech Regulations Would Impair the Government's Ability to Protect the Public.

The view that content- or speaker-based commercial speech restrictions are subject to strict scrutiny has exceptionally far-reaching implications because commercial speech restrictions are always, or virtually always, content- or speaker-based in the broad sense in which ACLI uses those terms. Commercial speech restrictions, by definition, apply to commercial messages and commercial speakers, and "the classification of speech between commercial and noncommercial is itself a content-based distinction." *CTIA—The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 n.9 (N.D. Cal. 2015), *app. filed*, No. 16-15141 (9th Cir. Feb. 1, 2016). As one scholar has observed, "this argument, that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content." Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. Bus. & Tech. L. 1, 20 (2016).

ACLI's position—in addition to making a mess of the case law—risks devastating consequences for the government's ability to adopt commonsense regulations that rein in

corporate abuses. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, and drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R. § 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)-(4). ACLI would apply strict scrutiny to all such laws because they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its fuel economy. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify rules like these if they were deemed content-based and subject to strict scrutiny. It "is the rare case" in which the government "demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665-66 (2015) (internal quotation marks omitted). Indeed, in the noncommercial speech context, the Supreme Court has described content-based restrictions as "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). If accepted, ACLI's position could obliterate many commercial speech restrictions that are longstanding and critical to the protection of consumers. And any

change in scrutiny would be doubly harmful with respect to commercial speech *disclosure* requirements, which are normally subject to a level of constitutional scrutiny akin to rational-basis review. *See Zauderer*, 471 U.S. at 650-52.

Applying strict scrutiny to content-based commercial speech restrictions could also have unintended, harmful consequences for the protection of noncommercial speech. "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456. ACLI's position would call into question a slew of regulations on which the public has depended for decades. If those regulations are to stand, strict scrutiny as we know it might have to change, to the detriment of speakers engaged in fully protected expression.

Furthermore, application of strict scrutiny is not necessary to curb government excesses in the realm of commercial speech. If anything, the First Amendment pendulum in this context has already swung too far in favor of corporate interests, at the expense of important public goals. One recent quantitative analysis of Supreme Court and court of appeals decisions found that, even under *Central Hudson*, "First Amendment cases in which businesses are the primary beneficiary have increasingly displaced cases in which individuals are the primary beneficiary." John C. Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 Const. Commentary 223, 262 (2015). And companies "are increasingly able to persuade courts . . . to exploit the 'fit' requirement of the *Central Hudson* test to achieve de- or re-regulatory goals not obtainable through the political process"—a trend contributing to what the author referred to as a "corporate takeover of the First Amendment." *Id.* at 269.

ACLI's arguments concerning the application of *Central Hudson* exemplify this problem. In the guise of First Amendment analysis, ACLI seeks de novo judicial review of the arguments for and against limiting the forms of compensation available to investment advisers and imposing fiduciary responsibilities on them, and asks the Court to determine that imposing those standards is bad economic and social policy. The "imposition of fiduciary obligations," ACLI predicts, will have the effect of "lowering supply and increasing the price" of investment advice. ACLI Mem. 18. ACLI's First Amendment argument thus recasts its policy preference for "commission-based compensation," free from requirements that advice be in the best interests of investors, rather than a "fee-for-advice model." *Id*. at 5.

That this case is fundamentally about the way investment advisers should be paid and what duties they should owe to retirement investors is exactly why even intermediate First Amendment scrutiny is, as DOL argues, inapplicable. The use of First Amendment scrutiny to put a deregulatory thumb on the scales of such economic policy debates threatens to revive Lochnerism in a new form. *See generally*, *e.g.*, Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133 (2016); Robert Post & Amanda Shanor, Commentary: *Adam Smith's First Amendment*, 128 Harv. L. Rev. Forum 165 (2015). Thus, in arguing that strict scrutiny is inapplicable to commercial speech restrictions, we by no means advocate even intermediate scrutiny of the Rule at issue. We write instead to emphasize that, while it would be bad enough to treat an economic regulation as if it were a speech regulation, it would be still worse to accept the view that strict scrutiny applies to commercial speech restrictions.

Accepting that view would make the corporate takeover of the First Amendment complete. It should be rejected.

CONCLUSION

This Court should deny plaintiffs' motions for summary judgment and grant DOL's consolidated cross-motion for summary judgment.

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Respectfully submitted,

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