No. 21-12

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

TED CRUZ FOR SENATE, *ET AL.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT AND VACATUR

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is an advocacy organization with members and supporters in all fifty states. Public Citizen appears before Congress, administrative agencies, and courts on a range of issues. Prominent among Public Citizen's concerns is combating the corruption, and appearance of corruption, of governmental processes that can result from infusions of private money into campaigns for public office. Public Citizen therefore seeks to enact and defend workable and constitutional campaign finance reform legislation at the federal and state levels. Public Citizen has been involved, often as amicus curiae, in many cases in this Court and others involving the constitutionality of such legislation. *See*, *e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015).

Public Citizen has an equally longstanding interest in issues concerning standing to seek judicial review of allegedly unconstitutional or unlawful government action. In its own litigation, Public Citizen often confronts standing issues, and it believes that unduly narrow conceptions of the injuries that give rise to standing, or of the related requirements of causation and redressability of injury, stand as obstacles to genuinely aggrieved persons who seek remedies for harms attributable to violations of the Constitution and laws. Standing decisions also tend to expand beyond their facts, as government defendants seize on words used in decisions of this Court and other appellate courts finding that particular plaintiffs lacked standing to

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

argue that differently situated plaintiffs lack standing based on superficial similarities. Catch-phrases, such as "self-inflicted injury," that may seem expressive of why one plaintiff lacks standing are particularly likely to be applied overbroadly to other plaintiffs who bring legitimate test cases when statutes or regulations impose negative consequences on their decisions to exercise their asserted rights. In this way, to paraphrase Justice Blackmun, easy standing cases may make bad law. *See O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment).

This case implicates Public Citizen's concerns both with campaign finance regulation and standing. The case is a challenge to a statute that limits to $250,000 the amount of post-election contributions that candidates may collect to repay debt owed to them by their campaigns. That law is aimed at contributions that pose an obvious risk of fostering real or perceived corruption because they go directly into an officeholder's pocket. Just as troubling as the challenge to that law is the fact that the challenge is being advanced by a plaintiff, Senator Ted Cruz, who was not injured by the challenged limit because his campaign could have repaid him in full with only $10,000 in post-election contributions.

Under these circumstances, Public Citizen agrees with the Federal Election Commission that Senator Cruz and his committee lack standing.[2] It submits this brief, however, to emphasize that a determination

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[2] Because the district court based its standing determination on an alleged injury to Senator Cruz, and for purposes of convenience, this brief refers to the appellees collectively as "Senator Cruz" unless the context indicates otherwise.

that Senator Cruz lacks standing should not be framed so as to suggest that a plaintiff who voluntarily engages in conduct that subjects him to the unconstitutional operation of a statute lacks standing to bring a test case. In addition, the Court should not suggest that a plaintiff need always subject himself to a completed injury, as opposed to a substantial risk of injury, to challenge an unconstitutional statute. The problem with Senator Cruz's case is that he showed neither that he suffered an actual injury attributable to the law's claimed unconstitutionality nor that he faces any substantial risk of suffering such an injury. A properly limited standing ruling in this case will not threaten legitimate challenges to this law or any other.

INTRODUCTION AND SUMMARY OF ARGUMENT

Senator Cruz claims that 52 U.S.C. § 30116(j) violates the First Amendment by imposing a $250,000 limit on the post-election contributions that can be used to repay loans made by candidates to their authorized election committees. One might expect an officeholder challenging that provision to have made a loan to his committee that, if the statute's application were enjoined, would be repaid using contributions exceeding that limit. At least, one would expect such a challenger to have concrete intentions to make such loans and, but for the statute, to repay them using post-election contributions exceeding $250,000 in future elections. Those circumstances would straightforwardly establish an injury, or a substantial risk of injury, fairly traceable to the claimed constitutional violation.

Not so here. Senator Cruz *did* make a $260,000 loan to his campaign in the last hours of the 2018 election campaign. Before this lawsuit was filed, however, his committee repaid $250,000 of that loan using *pre*-election contributions, leaving a balance of only $10,000—an amount far below the statutory limit on post-election contributions. The statutory contribution limit that Senator Cruz says is unconstitutional does not interfere in any way with his ability to raise $10,000.

Although it appears that Senator Cruz has lost $10,000, that is only because of a provision in FEC regulations under which, if more than $250,000 is outstanding on loans from a candidate to his committee 20 days after an election, the amount exceeding $250,000 must be treated as a contribution from the candidate and may no longer be repaid—even if the repayment would otherwise come from pre-election contributions and/or from post-election contributions that *comply* with the statutory limit. Any injury Senator Cruz has suffered is traceable to that regulation, not to the limit on post-election contributions that he challenges.

Accordingly, Senator Cruz lacks standing to raise his constitutional challenge. That consequence does not stem from any novel or especially onerous features of standing law. The basic requisites of standing to bring a constitutional challenge to an agency's implementation of a statute like the one at issue are well-established and easily stated: The challenger must have suffered, or face a substantial risk of, a concrete injury in fact; the injury must be fairly traceable to the claimed unconstitutionality of the statute; and the injury must be redressable by the relief the challenger seeks. Faced with a genuine threat that the statute

will be enforced in ways that allegedly infringe First Amendment rights and financial interests, a person actually affected by the statute should have little difficulty in demonstrating standing. If the statute genuinely limits a candidate's ability to raise funds to pay an outstanding loan, or is substantially likely to do so in light of the candidate's plans for financing imminent campaigns, the candidate will likely have standing to challenge it—whether the challenge is meritorious or not.

The problem here is not that the bar of standing is too high, but that Senator Cruz's challenge trips over the lowest of thresholds. The statutory limit on contributions that he claims is unconstitutional did not prevent him from raising the $10,000 at stake, and he has shown no likelihood that the limit will ever affect him. This Court need not—and should not—erect any new and more stringent standing barriers to find that Senator Cruz's challenge is nonjusticiable.

In particular, the Court should not suggest that Senator Cruz's standing problem arises because this is a "test case." Individuals are entitled to lay the groundwork for test cases—even if they would not otherwise face injury—by engaging in conduct that they claim is constitutionally or legally protected and exposing themselves to injury attributable to allegedly wrongful conduct, such as the application of a law they claim is unconstitutional. Injuries traceable to the wrongs alleged in such cases are not "self-inflicted." Senator Cruz's claim does not fail because it is a test case, but because he set up the test in a way that ensured that the feature he intended to challenge—the $250,000 limit on post-election contributions—had *no* impact on him.

As the FEC demonstrates, the $250,000 limit serves as a constitutional check on actual or perceived corruption because it applies to contributions that have minimal First Amendment value and maximal corruptive potential: those that go straight into the pocket of an officeholder who has already won an election. Nonetheless, this Court should, and indeed under its standing precedents must, leave consideration of the merits of the statutory limit on post-election contributions used to repay candidate loans to a case where that limit actually has operated, or threatens to operate, to restrict a candidate's ability to raise funds to repay a loan.

ARGUMENT

I. Requirements for establishing standing to challenge a statute such as the one at issue are neither novel nor onerous.

Although the requirement that a plaintiff have standing to sue is a much-litigated limit on the authority of federal courts to resolve a case or controversy, the basic elements of standing are simply stated. "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). These requirements "help[ ] to ensure that the plaintiff has a 'personal stake in the outcome of the controversy,' " *id.* at 158 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)), and confine federal courts to "their proper function in a limited and separated government." *TransUnion LLC v. Ramirez*, 141

S. Ct. 2190, 2203 (2021) (quoting John Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993)). Put simply, the requirements limit a court to deciding "a real controversy with real impact on real persons." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment).

Although determining the existence of "injury in fact" sometimes presents difficulties, in other cases it is easy. "[C]ertain harms readily qualify as concrete injuries under Article III," including "tangible harms, such as physical harms and monetary harms." *Ramirez*, 141 S. Ct. at 2204. Some intangible harms are just as easy to identify—in particular "harms specified by the Constitution itself," *id.*, such as claimed violations of personal constitutional rights, including those conferred by the First Amendment, *see id.* (citing examples).

This Court has also made clear that, when the redress sought by a plaintiff is prospective relief, a risk of future harm may suffice for standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Driehaus*, 573 U.S. at 158 (internal quotation marks and citation omitted). "[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *Ramirez*, 141 S. Ct. at 2210. Thus, an individual subject to "threatened enforcement of a law" that assertedly would infringe constitutional or other rights "satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of

prosecution thereunder.' " *Driehaus*, 573 U.S. at 158–59 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). In such circumstances, the plaintiff need not "expose himself" to the consummation of the threatened injury to have standing. *Id*. at 158–61 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–129 (2007), *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 396 (1988), and *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 15 (2010)).

As to the required element of causation, the plaintiff's injury (or the substantial threat of injury) must be "fairly traceable to the challenged action of the defendant." *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Defenders of Wildlife*, 504 U.S. at 560–61). Proximate or exclusive causation is not required, *see id*. at 168–69, as long as the injury is, in some real sense, attributable to the specific illegality alleged by the plaintiff. *California v. Texas*, 141 S. Ct. 2104, 2113–20 (2021). In a challenge to the implementation of an allegedly unconstitutional statutory provision, causation requires an injury "fairly traceable to the defendants' conduct in enforcing the specific statutory provision [plaintiffs] attack as unconstitutional." *Id*. at 2120.

That the plaintiff's own conduct plays a role in bringing to bear the challenged injurious application (or threat of application) of a statute to his conduct does not normally mean that the resulting injury or threat of injury is not fairly attributable to the challenged action. A plaintiff who claims a constitutional right or some other form of legal protection may engage in the conduct she claims is legally protected, knowing or expecting that she will be exposed to an action she views as illegal, and the resulting injury

will serve as a basis for a legal challenge because it is fairly attributable to the assertedly illegal conduct. *See*, *e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982). That the plaintiff could have avoided the injury by not exercising her claimed rights "does not negate the simple fact of injury" attributable to the defendant's assertedly illegal response. *Id.* at 374. That the plaintiff exercised her rights "for the purpose of instituting … litigation" likewise "is not significant." *Evers v. Dwyer*, 358 U.S. 202, 204 (1958). In short, an injury resulting from the application of an allegedly unconstitutional statute to a plaintiff willing to accept that consequence in order to bring a test case remains fairly traceable to the challenged conduct notwithstanding that it might be described as being "self-inflicted" in some sense.

Denying standing based on the characterization of such harm as "self-inflicted" would represent a significant, and unwarranted, extension of standing doctrine. This Court has given relatively little consideration to "self-inflicted" harm in the context of standing, using the term only twice. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Some lower courts, in particular the D.C. Circuit, have used that terminology more widely. *See ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 24–27 (D.C. Cir. 2011) (citing cases). Courts have not, however, applied it to direct consequences of statutory prohibitions or requirements that are triggered by a plaintiff's choice of engaging in conduct for which he claims constitutional or legal protection. Rather, as *Clapper* and *Pennsylvania v. New Jersey* illustrate, courts have generally used the concept in attempting to distinguish between those *indirect* consequences of challenged laws and actions that are fairly

traceable to the defendant's conduct and those that are not. More specifically, the term is most often used in cases where the issue is whether some action by an organizational plaintiff (such as an expenditure of resources) is attributable to the impairment of the plaintiff's mission by the defendant's challenged conduct, as in *Havens*, 455 U.S. at 379, or reflects a voluntary choice to engage in efforts to counter a policy to which the plaintiff merely objects, *see ASPCA*, 659 F.3d at 26. Whatever the usefulness of the term in that context—which appears doubtful given the difficulty courts have experienced in applying it[3]—it has no application to cases where plaintiffs expose themselves to potential injury directly attributable to statutory or regulatory restrictions by engaging in conduct for which they claim constitutional protection. *See*, *e.g.*, *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 538 (D.C. Cir. 2019).

II. The statutory contribution limit has not injured Senator Cruz.

Under the principles discussed above, a candidate wishing to challenge the statutory $250,000 limit on post-election contributions that may be used by his authorized committee to repay loans from the candidate would have ready options to establish standing if the limit really affected him adversely. Most obviously, a candidate in Senator Cruz's situation could use the full $250,000 in post-election contributions to repay as much of his loan as possible. Then, to the extent that the loan exceeded that amount and the candidate's committee was unable or unwilling to pay the

[3] *Compare*, *e.g.*, *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087 (D.C. Cir. 2015), *with Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136 (D.C. Cir. 2011).

remainder, the candidate would suffer a monetary injury traceable to the challenged limit. Even without exhausting the $250,000 limit on post-election contributions, a candidate who had lent more than that amount to his campaign (and had not yet been repaid) could assert an injury in fact traceable to the limit to the extent that he could establish a substantial likelihood that the limit would prevent use of post-election contributions to repay the full amount. Moreover, a candidate who could demonstrate that, but for the statute, he would finance his campaign through personal loans exceeding $250,000 that he would seek to have repaid using post-election contributions, and that the statute had caused him to refrain from using that method of financing, would likely also be successful in establishing an injury in fact (or a substantial risk of imminent injury) as a result of the application of the statute.

Senator Cruz, however, established none of these injuries. He *alleged* the first type of injury in his complaint, which averred that his committee had repaid him using "the statutory maximum of $250,000 from money raised after the election," JA 23, and that he had suffered a financial injury of $10,000 attributable to the challenged $250,000 limit, *see id.*[4] Prior to

[4] The FEC's brief discusses the claimed injury as involving harm to the committee's ability to repay Senator Cruz as opposed to harm to Senator Cruz. *See* FEC Br. 9. This brief refers to the claimed injury as being to Senator Cruz because the district court found standing on that basis. JS App. 51a. In any event, the committee has not been injured by the statutory contribution limits for the same reasons that Senator Cruz has not, and for the additional reason that the regulation transforming $10,000 of the loans into a gift to the committee confers a financial benefit on the committee, not an injury.

appointment of the three-judge court, the district court based its determination that the complaint adequately alleged standing on that asserted injury, which it viewed as a "consequence" of three alleged facts: Senator Cruz had "declined to pay himself back with available pre-election funds and instead used those funds to pay back other creditors"; subsequently, "Senator Cruz's campaign repaid him the $250,000 maximum using post-election contributions"; and the campaign is "legally barred from paying him back the $10,000 balance." JS App. 51a. At the summary judgment stage, the three-judge court repeated its understanding that "the campaign repaid Senator Cruz the maximum $250,000 with post-election contributions but [the statute] prevented the campaign from paying back the final $10,000." JS App. 9a.

Because the elements of standing must "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation," *Defenders of Wildlife*, 504 U.S. at 561, the district court was correct to rely on the complaint's allegations at the motion-to-dismiss stage, where even "general factual allegations of injury resulting from the defendant's conduct may suffice," *id*. *See also Bennett*, 520 U.S. at 168.

At summary judgment, however, the standard is different: At that stage, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Defenders of Wildlife*, 504 U.S. at 561. Moreover, because the standing requirement is jurisdictional, a court is

obligated to determine that standing has been properly shown even if the defendant does not challenge it at the summary judgment stage. *Cf. Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). Here, the summary judgment record failed to provide the degree of support necessary for Senator Cruz's allegation of monetary injury; indeed, it definitively established that the undisputed facts negated that allegation.

Specifically, the FEC's statement of undisputed material facts in support of its summary judgment motion stated (with citation of evidentiary support in the summary judgment record) that "[n]one of the $250,000 of the loan that was repaid was from contributions raised after the election." JA 246. Senator Cruz's response to the FEC's statement of undisputed material facts neither challenged the sufficiency of the evidentiary support offered by the FEC for its statement, identified any evidence that would create a dispute of fact on this point, nor contested the materiality of the fact. His response consisted of one word: "Admitted." JA 329.

The terms of Federal Rule of Civil Procedure 56 leave no doubt that a party may establish that a fact is undisputed at the summary judgment stage of a case by pointing to "stipulations … made for purposes of the motion [for summary judgment]" and "admissions." The purpose of local rules, such as those of the court below (D.D.C. Loc. Civ. R. 7(h)), that require statements of undisputed fact and responses thereto is to distinguish triable issues of fact from those that are uncontested and must be taken as givens in determining whether a party is entitled to judgment as a matter of law. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150–51 (D.C. Cir. 1996). And in cases like this one, where a

fact is unambiguously asserted as undisputed by a moving party and expressly admitted by the other party, there can be no doubt that that "judicial admission" conclusively determines the facts for purposes of summary judgment. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 470 n.6 (2013).[5]

The undisputed facts thus establish that Senator Cruz did not suffer a monetary loss that is fairly traceable to the statutory provision he claims violates the First Amendment—that is, the $250,000 limit on the amount of post-election contributions that can be used to repay a loan from a candidate to his committee. Because Senator Cruz's committee repaid $250,000 of his $260,000 loans using pre-election contributions, the statutory cap on post-election contributions did not prevent him from raising the additional amount needed to make him whole: He could have recouped his entire "loss" by having his committee repay only $10,000 of the loan using post-election contributions, nowhere close to the amount of the limit.

To the extent that Senator Cruz is out $10,000, it is not because of the $250,000 cap that he contends violates the First Amendment, but because of the operation of an additional requirement imposed by an FEC regulation. That regulation provides that a committee's "cash on hand" as of the day after the election may only be used to repay all or part of candidate

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[5] The district court's local rule provides that when a party fails to properly contest an opponent's statement of undisputed facts, the district court "may assume" the facts "are admitted." D.D.C. Loc. R. 7(h)(1); *see also Jackson*, 101 F.3d at 154 (under prior rule, court may "deem" facts not properly disputed "as admitted"). No such permissive assumption, however, is necessary when a party has *expressly* "admitted," JA 329, a fact proffered as undisputed.

loans exceeding $250,000 within 20 days after the election;[6] thereafter, the "committee must treat the portion of the aggregate outstanding balance of the personal loans that exceeds $250,000 minus the amount of cash on hand as of the day after the election used to repay the loan as a contribution by the candidate," which can no longer be repaid by the committee. 11 C.F.R. § 116.11(c). Because the outstanding balance of Senator Cruz's loans exceeded $250,000 as of the 20th day after the election, the committee was required to treat the excess amount of $10,000 as a contribution and thus can no longer repay that amount, whether it uses pre- or post-election contributions.

The challenged contribution limits are thus irrelevant to Senator Cruz's situation. The regulatory requirement bears no direct relationship to the $250,000 limit on repayment of loans from post-election contributions. The statute imposing the contribution limit says nothing about when repayments may be made, but on its face allows unlimited repayment of loans from pre-election contributions, regardless of when repayment is made, while limiting only the amount of post-election contributions used for loan repayment—again without regard to when in the post-election period repayment is made. The reasons behind the regulation seem vague: The Federal Register notice promulgating the regulation explains only that a committee must make repayments from pre-election contributions within 20 days because that is the time for "clos[ur]e of the books for the post-election general report." 68 Fed. Reg. 3970, 3974 (2003). Whether that

[6] The FEC does not appear to assert that the campaign's payment using pre-election contributions after the expiration of the 20-day limit violated this aspect of the regulation.

explanation is sufficient to sustain the 20-day cutoff is a different question altogether from the constitutionality of the limit on post-election contributions. Being injured by application of a regulatory cut-off date after which part of a loan may not be repaid even by contributions that *comply* with an allegedly unconstitutional statutory limit is not the same as being injured by the statutory limit itself.

Senator Cruz's test case thus fails not because his injury was "self-inflicted," but because it was not traceable to the constitutional violation he alleges. Of course, Senator Cruz was not required to avoid injury by forgoing exercise of what he claimed to be his rights; he could deliberately exercise those claimed rights to trigger an injury, or risk of injury, attributable to the statute he wished to challenge. That is, as Judge Mehta put it, he was not required "to *avoid* an injury by subjecting himself to the very framework he alleges is unconstitutional." JS App. 54a (emphasis added). But by the same token, to claim that he *actually suffered* an injury, he *was* required to subject himself to the injurious consequences he wished to challenge. He failed to do so.

Alternatively, Senator Cruz could have sought to demonstrate standing by alleging, and offering proof, that he had concrete plans (as opposed to vague, " 'some day' intentions," *Defenders of Wildlife*, 504 U.S. at 564) to finance later campaigns with loans that, but for the statutory limit, he would repay with post-election contributions exceeding $250,000. But the district court did not find standing on any such basis, and it appears that the very reason Senator Cruz chose to set up a test case was that the statute would otherwise be unlikely to have any impact on his real-world activities. Senator Cruz admitted and

stipulated below that "the sole and exclusive motivation behind [his] actions in making the 2018 loan … was to establish the factual basis for this challenge." JA 325. That concession strongly suggests that personal loans that would potentially trigger the limit on post-election contributions were not otherwise part of Senator Cruz's campaign-finance strategies. Senator Cruz's case thus stands or falls on whether the design of his test subjected him to injury traceable to the challenged contribution limits. Because it did not, this Court cannot delve into the merits of his challenge to the sufficiency of the substantial anti-corruption rationales offered by the FEC in defense of the statute.

CONCLUSION

The judgment of the district court should be vacated.

Respectfully submitted,

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