[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 22-1080, 22-1144, 22-1145

United States Court of Appeals for the District of Columbia Circuit

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Final Rule Issued by the National Highway Traffic Safety Administration

INITIAL BRIEF OF RESPONDENT-INTERVENORS NATIONAL COALITION FOR ADVANCED TRANSPORTATION AND ZERO EMISSION TRANSPORTATION ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certify as follows:

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in these consolidated cases are listed in Respondents' Brief:

Amici for Respondents: Institute for Policy Integrity at New York University School of Law; Senator Tom Carper and Representative Frank Pallone, Jr.

B. Ruling Under Review

The National Highway Traffic Safety Administration action under review is entitled "Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks," 87 Fed. Reg. 25,710 (May 2, 2022).

C. Related Cases

Other than these three consolidated cases, Respondent-Intervenors are unaware of any related cases under Circuit Rule 28(a)(1)(C).

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the National Coalition for Advanced Transportation and Zero Emission Transportation Association (collectively "Transportation Coalitions") state as follows:

The National Coalition for Advanced Transportation is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10 percent or more of the National Coalition for Advanced Transportation. The National Coalition for Advanced Transportation has the following members[1]: Constellation Energy Corporation, Edison International, EVgo, Exelon Corporation and its affiliate operating companies (Atlantic City Electric, Baltimore Gas & Electric, Commonwealth Edison Company, Delmarva Power, PECO, and PEPCO), Lucid USA, Inc., Pacific Gas and Electric Company, Plug In America, Portland General Electric, Rivian Automotive, Sacramento Municipal Utility District, and Tesla, Inc.

The Zero Emission Transportation Association states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Zero Emission Transportation Association has no parent corporation, and no publicly held

[1] National Coalition for Advanced Transportation member Center for Climate and Energy Solutions is not participating in this litigation as this organization does not participate in litigation as a matter of general practice.

company has 10 percent or greater ownership in the Zero Emission Transportation Association. The Zero Emission Transportation Association's membership is listed at https://www.zeta2030.org/members.

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GLOSSARY

Amicus Alliance	Alliance for Automotive Innovation as *Amicus Curiae* in support of Petitioners American Fuel & Petrochemical Manufacturers and State Petitioners
EPA	United States Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
Fuel Manufacturers and State Petitioners	Petitioners American Fuel & Petrochemical Manufacturers and States of Texas et al.
Fuel Mfrs. Br.	Brief of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners
Intervenor-Resp. States' Br.	Brief of Intervenor-Respondent States California et al.
NHTSA	National Highway Traffic Safety Administration
NHTSA Br.	Brief of Respondents National Highway Traffic Safety Administration et al.
Rule	87 Fed. Reg. 25,710 (May 2, 2022)
Transportation Coalitions	National Coalition for Advanced Transportation and Zero Emission Transportation Association

INTRODUCTION

Respondent National Highway Traffic Safety Administration ("NHTSA") followed the Energy Policy and Conservation Act's ("EPCA") mandate to reestablish fuel-economy standards for model year 2024 to 2026 automobiles ("Standards") based on maximum feasible average fuel economy. 87 Fed. Reg. 25,710 (May 2, 2022) ("Rule"), JA___. In doing so, NHTSA properly used its reasonable assessment of the Nation's existing automobile fleet as a starting point and conducted modeling that reflected the reality that alternative-fuel (*i.e.*, non-gasoline or diesel) automobiles represent a growing share of vehicles on the road. EPCA is fundamentally an energy conservation law, designed to reduce the Nation's dependence on petroleum-based fuels by requiring adoption of new, fuel-efficient technologies—whether through improvements in gasoline and diesel fuel vehicles or increased adoption of more fuel-efficient alternative-fuel technologies, such as battery-electric vehicles.

NHTSA's approach is wholly consistent with EPCA's text and purpose, and appropriately incentivizes alternative-fuel vehicles as well as fuel-economy improvements more generally. Contrary to Fuel Manufacturers and State Petitioners' and Amicus Alliance for Automotive Innovation's ("Amicus Alliance") arguments, NHTSA correctly applied EPCA's limitations regarding the consideration of alternative-fuel vehicles in its development of the fuel-economy

standards for these model years. Petitioners' logic would require NHTSA to rely on an artificial construct where alternative-fuel vehicles do not exist. Such a construct is contrary to reality and would undermine overall fleet fuel-efficiency improvements and the incentives for alternative-fuel vehicles that EPCA was intended to foster. EPCA intended for alternative-fuel vehicles to become not only viable, but integral to the Nation's fleet, as they have become. Nothing in EPCA's text directs NHTSA to disregard this reality. The petitions accordingly should be denied.

STATEMENTS OF JURISDICTION AND ISSUES PRESENTED

The Transportation Coalitions adopt Respondents' Statement of Jurisdiction and Issues Presented.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the addendum to Respondents' brief.

STATEMENT OF THE CASE

Respondent-Intervenors National Coalition for Advanced Transportation and Zero Emission Transportation Association (together, the "Transportation Coalitions") adopt Respondents' Statement of the Case, and add the following. The National Coalition for Advanced Transportation is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation

technologies and related infrastructure, including business leaders engaged in energy supply, transmission and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation. JA___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_at_1]. The Zero Emission Transportation Association is an industry-backed coalition of member companies advocating for 100 percent electric vehicle sales by 2030. JA___[Zero_Emission_Transportation_Association_Comments,_NHTSA-2021-0053-1510,_at_1].

Battery-electric vehicle sales in the United States have continued to grow dramatically in recent years, accompanied by significant investments in battery-electric vehicle charging and related infrastructure. *See, e.g.*, JA___, ___[87Fed.Reg._at_25,767,_25,783]; JA___-___,___-___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_Attachment_1,_at_1-2,_9-10]. NHTSA's standards, among other federal and state standards, have helped drive investment in battery-electric vehicle technology because these standards incentivize manufacturing vehicles with substantially higher fuel-economy equivalency values and provide a mechanism by which vehicle manufacturers that over-comply can earn and sell tradeable compliance credits. *See* 49 U.S.C. § 32903 (credits for exceeding average fuel economy standards); JA___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-

2021-0053-1508,_at_5]; JA___[Tesla_Comments_NHTSA-2021-0053-1480,_at_10].

SUMMARY OF ARGUMENT

I. NHTSA was well within the statutory bounds of EPCA when it based its determination of maximum feasible average fuel economy for model years 2024 to 2026 on a real-world, pre-Standards vehicle fleet that included battery-electric vehicles. The text, purpose, and history of EPCA all support NHTSA's approach. Petitioners' overly restrictive reading of Section 32902(h)(1) misconstrues this provision. While Section 32902(h)(1) limits NHTSA's considerations in determining how much automakers can improve fuel economy in the years for which NHTSA sets the Standards, it does not require NHTSA to use a fictional fleet (*i.e.*, one without the increasing number of battery-electric vehicles) as the starting point for its assessment. NHTSA's Rule is consistent with EPCA's purpose of reducing the Nation's dependence on petroleum-based fuels and incentivizing alternative-fuel vehicles to improve fleet-wide fuel-efficiency.

II. For many of the same reasons, NHTSA lawfully and reasonably incorporated battery-electric vehicles and compliance credits in modeling outside the rulemaking timeframe, while fully adhering to EPCA Section 32902(h).

III. There is no basis to set aside NHTSA's Standards, but even if this Court finds remand is necessary, vacatur of the Standards would be inappropriate. NHTSA

can address any deficiencies on remand and vacatur would have severely disruptive consequences, including to alternative-fuel vehicle industry stakeholders that have invested billions of dollars in reliance on these and other regulatory standards.

ARGUMENT

I. NHTSA'S ASSESSMENT OF THE REAL-WORLD, BASELINE FLEET WAS LAWFUL

The text, purpose, and history of EPCA all confirm that NHTSA may properly take into account the real-world vehicle fleet, including battery-electric vehicles, as the starting point for a rulemaking to establish the "maximum feasible average fuel economy level," 49 U.S.C. § 32902(a), (c), in a given model year. This approach is fully consistent with EPCA Section 32902(h)(1), which provides only that NHTSA "may not consider the fuel economy of dedicated automobiles"[2] when deciding what *further* increases in fuel economy automakers can achieve. Fuel Manufacturers and State Petitioners and Amicus Alliance wrongly argue that Section 32902(h)(1) prohibits NHTSA from taking into account the reality of battery-electric vehicles in the baseline fleet, because they read this provision as prohibiting consideration of alternative-fuel vehicles "for any purpose." *See* Fuel Mfrs. Br. 27-30; Amicus Alliance Br. 16-22. For the reasons explained by NHTSA and Intervenor-Respondent States, this extreme and overly broad reading of Section 32902(h)(1) is

[2] A "dedicated automobile" is defined as "an automobile that operates only on alternative fuel." 49 U.S.C. § 32901(a)(8).

inconsistent with the provision's text, purpose and legislative history. Section 32902(h)(1) limits NHTSA's consideration of how much automakers can *improve* fuel economy in the years for which it sets the Standards, not NHTSA's assessment of the fuel-economy level of the no-action baseline fleet (*i.e.*, the precursor to NHTSA setting the Standards). *See* NHTSA Br. 35-38; Intervenor-Resp. States Br. Section I. In this brief, the Transportation Coalitions provide additional reasons why NHTSA's accounting for the battery-electric vehicles in the no-action baseline fleet was logical and consistent with EPCA's purpose and legislative history.

EPCA was adopted "to provide for improved energy efficiency of motor vehicles." Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, § 2(5), 89 Stat. 871, 874. To achieve this purpose, the statute encourages technological advancement. *See Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1339 (D.C. Cir. 1986). Amendments to EPCA have emphasized the goal of saving energy by employing new technologies, including alternative fuels. *See, e.g.*, Alternative Motor Fuels Act of 1988 ("1988 Act"), Pub. L. No. 100-494, §§ 2, 3, 102 Stat. 2441, 2441-42 (finding "the displacement of energy derived from imported oil with alternative fuels will help to achieve energy security and improve air quality" and establishing the purpose of the Act as "to encourage . . . development and widespread use" and "production" of certain alternative-fuel vehicles).

Fuel Manufacturers and State Petitioners' and Amicus Alliance's novel and overbroad reading of Section 32902(h)(1) would prevent NHTSA from accounting for the baseline, pre-Standards fleet, which is evolving in ways the statute was designed to encourage. Sales of electric vehicles are rapidly increasing. As an example, in just one year—from 2019 to 2020—new light-duty vehicle sales jumped from 2.5 percent to 4.4 percent—and most projections appear to be underestimates of future growth. JA___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_Attachment_1,_at_1] (citation omitted). Electric vehicles and their manufacturers are no longer "niche." JA___[Tesla_Comments,_NHTSA-2021-0053-1480,_at_2]. For example, Tesla's vehicles have been named the top American-made cars in 2021 and 2022, based on overall contributions to the U.S. economy. *Id.*; Declaration of Joseph Mendelson, III ("Mendelson Decl.") ¶ 5, Doc. 1957366. The Transportation Coalitions' members have invested, or are in the process of investing, billions of dollars in manufacturing battery-electric vehicles and deploying charging-related infrastructure. JA___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_at_5]. Battery-electric vehicles are a proven technology, popular with consumers, and declining in cost. *E.g.*, JA___, ___[Zero_Emission_Transportation_Association_Comments,_NHTSA-2021-0053-1510,_at_2,_5].

If NHTSA were required to ignore the significant number of vehicles with high fuel-economy values currently in use and to fabricate a fictional no-action baseline fleet, automobile manufacturers would eventually be able to meet fuel-economy standards without *any* fuel-efficiency improvements to non-alternative-fuel vehicles. *See* NHTSA Br. 3-4. That cannot be what EPCA envisioned. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2115-16 (2018) (refusing "'to impute to Congress . . . such [a] contradictory and absurd purpose,' particularly where doing so has no basis in the statutory text" (alteration in original) (quoting *United States v. Bryan*, 339 U.S. 323, 342 (1950))). Rather, by acknowledging the presence of existing battery-electric vehicles already on the roads, NHTSA's Standards continue to drive improvements in fuel economy while also ensuring that such improvements do not render future standard-setting meaningless. This approach is wholly consistent with Section 32902(h) and with EPCA's purpose.

The legislative history arguments advanced by Fuel Manufacturers and State Petitioners (at 7, 33) and Amicus Alliance (at 13-14) suffer from the same inconsistent reasoning. They point to the purpose of Section 32902(h)'s initial adoption in the 1988 Act as protecting the incentives for development and use of alternative-fuel vehicles. But their sweeping interpretation of Section 32902(h)'s restrictions would reduce incentives for alternative-fuel vehicles (and, indeed, for fuel economy improvements generally) by causing the stringency of NHTSA's

standards to stagnate. *See supra* at 8. When enacting the 1988 Act, Congress explained that the legislation was "designed to encourage and promote the commercial application or use of alternative fuels" but added that those incentives were "not intended to allow manufacturers to relax their efforts to achieve better mileage in the remainder of their fleets that are still fueled with gasoline." H.R. Rep. No. 100-476, at 8, 12 (1987). Congress further explained that the Section 32902(h)-predecessor provision was intended to promote the development of alternative-fuel vehicles[3] and thus "*the technology feasibility requirement* . . . should reflect the experimental nature of such development." S. Rep. No. 100-271, at 13 (1987) (emphasis added). Congress did not intend to prevent NHTSA from accounting for alternative-fuel vehicles in the baseline, pre-Standards fleet. NHTSA acted well within the statutory bounds. And to the extent there is any ambiguity in the statute, NHTSA's interpretation of the statute is reasonable and afforded deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Ctr. for Auto Safety*, 793 F.2d at 1338 (applying *Chevron*).

[3] The alternative fuels covered in the 1988 Act were methanol, ethanol, and natural gas.

II. NHTSA LAWFULLY INCORPORATED BATTERY-ELECTRIC VEHICLES AND COMPLIANCE CREDITS IN MODELING OUTSIDE THE RULEMAKING TIMEFRAME

NHTSA's modeling was "reasonable and reasonably explained" and consistent with the statute, as required by the Administrative Procedure Act. *See POET Biorefining, LLC v. EPA*, 970 F.3d 392, 409, 414 (D.C. Cir. 2020). NHTSA's use of the model year 2020 fleet, including battery-electric vehicles, was an appropriate starting point because it was the most recent data set that was reasonably complete. NHTSA Br. 31, 66. NHTSA's modeling of developments from model years 2021 to 2023, based on a well-reasoned projection of real-world changes, *see id.* at 66, was permissible under EPCA, *see supra* at 5-9, and the agency's technical judgment is entitled to deference. *See, e.g.*, *Midwest Ozone Grp. v. EPA*, 61 F.4th 187, 192 (D.C. Cir. 2023) ("[A]gency determinations based upon highly complex and technical matters are 'entitled to great deference.'" (quoting *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1051-52 (D.C. Cir. 2001)).

For the reasons explained by NHTSA and Intervenor-Respondent States, NHTSA's modeling properly accounted for vehicles that manufacturers would produce to comply with state zero-emission vehicle requirements, regardless of NHTSA's Standards. *See* NHTSA Br. 50-65; Intervenor-Resp. States Br. Section II. Particularly given the rapid growth in the electric vehicle industry, *supra* at 3, 7, NHTSA reasonably assumed automakers would achieve their required and planned

commitments. *See* JA___-___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_at_6-7] (urging NHTSA to account for vehicles "already being sold and those that will be required to be sold under state [zero-emission vehicle] mandates in the future, in particular as alternative fuel vehicles are an increasingly substantial part of the U.S. market"); JA___-___[Rivian_Comments,_NHTSA-2021-0053-1562,_at 6-7] ("[A] growing list of bold commitments to vehicle electrification by traditional automakers, voluntary compliance with the California Framework, and other market signals that demonstrate the feasibility of more stringent standards.").

Fuel Manufacturers and State Petitioners argue that EPCA Section 32902(h)(3) "unambiguously bars NHTSA from considering compliance credits for any purpose." Fuel Mfrs. Br. 62-63 (heading). But Petitioners once again read the limitations in Section 32902(h) too expansively, as the plain language of (h)(3) does not prevent NHTSA from considering tradable credits outside of model years for which it is "prescribing a fuel economy standard"—here, outside model years 2024 to 2026. For decades EPCA has provided for manufacturers to earn tradable credits for exceeding average fuel economy standards. 49 U.S.C. § 32903; *supra* at 3-4. It is common practice for internal-combustion-engine vehicle manufacturers to rely on this compliance flexibility to purchase credits from other manufacturers to make up for shortfalls in their average fuel economy. *Supra* at 3-

4. Accordingly, it was consistent with Section 32902(h)(3) and reasonable for NHTSA to consider compliance credits outside standard-setting model years in this Rule to avoid being "forced to divorce its analysis from reality." JA___-___[87Fed.Reg._at_25,995-96]. Nothing in the statute's text requires the contrary.

III. EVEN IF PETITIONS ARE GRANTED, REMAND WITHOUT VACATUR WOULD BE THE APPROPRIATE REMEDY

Fuel Manufacturers and State Petitioners argue that alleged deficiencies in NHTSA's Rule call for vacatur of the Standards. *See* Fuel Mfrs. Br. 45-51, 60-61, 65-66. For the reasons discussed in NHTSA's brief and the briefs of Intervenor-Respondents, the Standards are lawful and there is no basis to set them aside. But even if this Court finds remand is necessary, vacatur is inappropriate in these circumstances. The "decision whether to vacate" an agency action depends on (1) "the seriousness of the order's deficiencies" and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation omitted).

With respect to the first factor, NHTSA has explained the record indicates the agency can address any defects identified and may reach the same result on remand, and thus vacatur is unwarranted. NHTSA Br. 28, 79-80.

With respect to the second factor, vacatur of the Standards would have a multitude of disruptive consequences, *id.* at 80-83, including to alternative-fuel vehicle industry stakeholders. Members of the Transportation Coalitions

manufacture battery-electric vehicles that are sold throughout the United States and these manufacturers earn tradeable compliance credits from over-performance with the fuel-economy levels of NHTSA's standards. Vacatur of the Standards would reinstate the fuel-economy standards established in NHTSA's 2020 rulemaking, which were substantially less stringent than the standards NHTSA had projected for those model years in its 2012 rulemaking. *See* 85 Fed. Reg. 24,174, 24,186 (Apr. 30, 2020); NHTSA Br. 11-12. NHTSA's 2022 Rule at issue here increased the stringency of the Standards as compared to the 2020 rule, closer in line with industry expectations from much of the prior decade. *See* JA___[87Fed.Reg._at_25,721]; JA___[Tesla_Comments_NHTSA-2021-0053-1480,_at_7]. Weakening of the standards reduces the economic value of the tradable compliance credits for past over-performance. Vacating the Standards would implicate potential credit generation and tradable value, undermine regulatory drivers for vehicle electrification, and threaten the benefits of the Transportation Coalitions' investments in reliance on the Standards. *See, e.g.*, Mendelson Decl. ¶ 15; Declaration of O. Kevin Vincent ¶ 9, Doc. 1957366; JA___[Tesla_ Comments,_NHTSA-2021-0053-1480,_at_10] ("Proceeds from such sales [of compliance credits] go towards building new factories to produce [electric vehicle]s that will continue to displace [internal-combustion-engine] vehicles, deploying associated [electric vehicle] infrastructure, and continued product innovation.").

Vacatur would have disruptive consequences for the compliance credit trading markets such that remand without vacatur would be appropriate. *See Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (remanding without vacatur after finding vacatur of the rule "could cause substantial disruption to the [allowance] trading markets that have developed" (alteration in original) (citations omitted)).

Vacatur could also have disruptive consequences for investments based in part on reliance on the Standards. *See Gulf Restoration Network v. Haaland*, 47 F.4th 795, 805 (D.C. Cir. 2022) (finding remand without vacatur appropriate where companies "acted for . . . years in reliance on" the challenged action, "including by investing substantial additional sums and by executing contracts with third parties"). NHTSA's Rule creates strong fuel-economy Standards, which incentivize investment in electric vehicles and the technology and infrastructure that supports them. JA___[National_Coalition_for_Advanced_Transportation_Comments,_NHTSA-2021-0053-1508,_at_5]. Vacating the Rule could disrupt those investments. *See Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) ("credit[ing] Intervenors' assertion that vacating the orders would needlessly disrupt [infrastructure] projects"). The Transportation Coalitions' members have collectively invested and committed to investing billions of dollars in manufacturing electric vehicles and deploying charging-related infrastructure. JA___[National_Coalition_for_

Advanced_Transportation_Comments_NHTSA-2021-0053-1508,_at_5]. Numerous other automakers have announced plans to invest billions in electric vehicle technologies. JA___[*Id.*_at_3]. The Transportation Coalitions' membership also includes companies engaged in developing transmission and distribution to support transportation electrification—a particularly long, capital-intensive process. JA___-___[*Id.*_at_9-10]. These investments rely on the certainty created by NHTSA's standards, along with other regulatory standards.

As NHTSA has explained, due to statutory lead-time requirements, vacatur of the Standards would effectively prevent NHTSA from adopting new standards for most if not all of the model years at issue. NHTSA Br. 82. The *Allied-Signal* factors support remand without vacatur, if this Court finds that any aspect of the Rule necessitates remand.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions.

Dated: April 11, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with Federal Rule of Appellate Procedure 32(f) and (g), along with the Court's September 22, 2022 Order, because it contains 2,889 words.

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman 14-point font.

/s/ Stacey L. VanBelleghem
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