No. 13-2307

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MASSACHUSETTS DELIVERY ASSOCIATION,
Plaintiff-Appellant,

v.

MARTHA COAKLEY, in her official capacity as Attorney General of the Commonwealth of Massachusetts,
Defendant-Appellee.

On Appeal from the United States
District Court for the District of Massachusetts
The Honorable Denise J. Casper, Presiding
Civil Action No. 1:10-cv-11521-DJC

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. Public Citizen has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its nationwide membership before Congress, administrative agencies, and courts and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal appellate courts.

Among Public Citizen's particular concerns is that defendants in a broad range of cases increasingly argue that federal laws preempt state statutes protecting consumers and workers. Public Citizen submits this brief because it is concerned that the argument of the trucking industry in this case and related cases—that federal law displaces basic state labor protections—reflects an overly-broad reading of the preemptive scope of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, § 601(c), 108 Stat. 1569. This brief seeks to provide an understanding of the language, purposes, and goals of the FAAAA and the statute's express preemption clause. As we explain, the FAAAA does not sweepingly displace background wage-and-hour laws that apply to all businesses and relate only tenuously to motor carrier prices, routes, and services.

Both parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

BACKGROUND AND SUMMARY OF ARGUMENT

The Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705, eliminated federal economic regulation of the airline industry, including controls over market entry, fares, and routes. "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), the ADA included a preemption provision prohibiting States from enacting or enforcing laws "related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1).

In 1980, Congress similarly deregulated the trucking industry, *see* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, but did not preempt state trucking regulation. By 1994, many states regulated "intrastate prices, routes and services of motor carriers." H.R. Conf. Rep. No. 103-677, at 86 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715. Concerned that state controls were anti-competitive and advantaged airlines over motor carriers, Congress "sought to pre-empt state trucking regulation." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008).

The FAAAA included an amendment to Title 49 entitled "Preemption of State Economic Regulation of Motor Carriers." Pub. L. No. 103-305, § 601(c). "Borrowing from the ADA's preemption clause, but adding a new qualification," *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1775 (2013), that amendment provides that states may not enact or enforce laws "related to a price, route, or service of any motor carrier … with respect to the transportation of property," 49 U.S.C. § 14501(c)(1).

The conference report accompanying the FAAAA described the kinds of state laws that concerned Congress. "Typical forms of regulation include[d] entry controls, tariff filing and price regulation, and types of commodities carried" and were "usually designed to ensure … not that prices [were] kept low, but that they [were] kept high enough to cover all costs and [were] not so low as to be 'predatory.'" H.R. Conf. Rep. No. 103-677, at 86; *see also* Statement by President William J. Clinton Upon Signing the FAAAA, 30 Weekly Comp. of Pres. Doc. 1703 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1762-1 ("State regulation preempted under this provision takes the form of controls on who can enter the trucking industry within a State, what they can carry and where they can carry it, and whether competitors can sit down and arrange among themselves how much to charge shippers and consumers.").

Based on its concerns, Congress "resolved to displace '*certain* aspects of the State regulatory process.'" *Dan's City*, 133 S. Ct. at 1780 (quoting FAAAA § 601(a)). Those aspects include state laws with respect to the transportation of property that "hav[e] a connection with, or reference to" motor carrier prices, routes, or services. *Rowe*, 552 U.S. at 370 (quoting *Morales*, 504 U.S. at 384 (emphasis omitted)). But the FAAAA does not preempt state laws that affect prices, routes, or services "in only a 'tenuous, remote, or peripheral … manner.'" *Id*. at 371 (quoting *Morales*, 504 U.S. at 390).

In this case, the Massachusetts Delivery Association (MDA) contends that the FAAAA preempts a Massachusetts statute requiring workers to be classified as employees rather than independent contractors for the purpose of the state's wage laws if the workers perform services within "the usual course of the business of the employer." Mass. Gen. Laws ch. 149, § 148B(a)(2). Below, the district court held that the provision is not preempted because it neither "relate[s] to the transportation of property" nor has a sufficient "connection to prices, routes, and services." JA 159, 162.

The district court's decision is correct. As the Supreme Court clarified in *Dan's City*, 133 S. Ct. 1769, FAAAA preemption extends only to state laws that concern or target a motor carrier "with respect to the transportation of property."

The independent contractor provision at issue here does not target motor carriers of property; it applies generally to all businesses.

Moreover, the provision does not relate to motor carrier prices, routes, or services. State laws are not preempted merely because they regulate employment relationships or affect motor carriers' "business models." Nor does the FAAAA prevent states from enacting laws of general applicability that raise motor carriers' costs of doing business. Finally, state laws are not preempted merely because they may differ from the laws of surrounding states. The FAAAA dictates that states may not enact laws relating to prices, routes, or services, not that states must standardize laws that do not have that forbidden relationship. Accordingly, the FAAAA does not preempt generally applicable labor laws, such as the independent contractor provision at issue here.

ARGUMENT

I. THE FAAAA PREEMPTS ONLY STATE LAWS THAT CONCERN OR TARGET MOTOR CARRIERS WITH RESPECT TO THE TRANSPORTATION OF PROPERTY.

In *Dan's City*, the Supreme Court emphasized that, although the FAAAA's preemption provision was modeled after that of the ADA, "the FAAAA formulation contains one conspicuous alteration—the addition of the words 'with respect to the transportation of property.'" 133 S. Ct. at 1778 (quoting 49 U.S.C. § 14501(c)(1)). Quoting Justice Scalia's dissent in an earlier FAAAA case (and

noting that nothing in the majority opinion in that case was inconsistent with Justice Scalia's characterization of the statute), the Court stated that the addition of the words "with respect to the transportation of property" "'massively limits the scope of preemption.'" *Id.* (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 (2002) (Scalia, J., dissenting)). That limitation means that "it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property.'" *Id*. at 1778-79. Thus, although states may not "single out for special treatment 'motor carriers of property,'" they "remain free to enact and enforce general traffic safety laws, general restrictions on the weight of cars and trucks that may enter highways or pass over bridges, and other regulations that do not target motor carriers 'with respect to the transportation of property.'" *Ours Garage*, 536 U.S. at 449 (Scalia, J., dissenting).

The provision at issue here does not single out motor carriers of property for special treatment. Rather, the Massachusetts statutory provision defining who is an employee under state wage laws applies to motor carriers "solely in their capacity as members of the general public." *Rowe*, 552 U.S. at 375. The statute "appl[ies] broadly to all employees of businesses located in the Commonwealth" and has "nothing to do with the regulation of the 'carriage of property.'" *Schwann v. FedEx Ground Package Sys., Inc.*, 2013 WL 3353776, at *3 (D. Mass. July 3, 2013)

(quoting *Dan's City*, 133 S. Ct. at 1775). In that sense, wage laws are just like state laws governing taxes, zoning, trespassing, speed limits, workplace discrimination, corporate structure and internal affairs, and financial transactions.

MDA attempts to downplay the significance of the lack of connection between the provision at issue and the transportation of property by arguing that the term "with respect to the transportation of property" in the FAAAA does "not create an element itself, but rather modifies the terms 'price,' 'route,' and 'service.'" MDA Br. 34. In *Dan's City*, however, the Supreme Court stated that "*the law* must . . . concern a motor carrier's 'transportation of property,'" 133 S. Ct. at 1779 (emphasis added). Moreover, after concluding that the claims in *Dan's City* were not preempted because they did not concern "the transportation of property," the Supreme Court stated that they "*also* survive preemption under [the FAAAA] because they are unrelated to a 'service' a motor carrier renders its customers." *Id*. at 1779 (emphasis added). Specifically, the Court explained that the state law at issue in *Dan's City* "has neither a direct nor an indirect connection to any transportation services a motor carrier offers its customers." *Id*. If the MDA were correct that the phrase "with respect to the transportation of property" merely modifies "price, route, or service," it would have been nonsensical for the Supreme Court to state, after discussing that phrase, that the law was "also" not preempted because it did not relate to transportation services; its statement that the claims did

not relate to transportation services would simply have been a *reiteration* of its conclusion that the claims did not "relate[] to a ... service ... with respect to the transportation of property," not an *additional* reason why the claims were not preempted, as the Supreme Court presented it. *Id.*; *see also id.* at 1778 (concluding that "Pelkey's state-law claims are 'related to' *neither* the 'transportation of property' *nor* the 'service' of a motor carrier" (emphasis added)).

MDA's reliance on *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), is misplaced. There, the Supreme Court held that the FAAAA preempted provisions of an agreement that trucking companies had to sign in order to transport cargo at the Port of Los Angeles. The provisions required a placard on each truck and submission of a plan for off-street parking. These provisions, which were part of the Port's "Clean Trucks Program," specifically targeted motor carriers of property. In other words, contrary to the MDA's claims, MDA Br. 34, the provisions themselves were "with respect to the transportation of property." Moreover, the only disputed question before the Supreme Court in *American Trucking Ass'ns* was whether the agreement had "the force and effect of law," 133 S. Ct. at 2101, so the Supreme Court did not analyze whether the agreement was "with respect to the transportation of property" as required for preemption under the FAAAA.

Unlike the provisions at issue in *American Trucking Ass'ns*, the Massachusetts independent contractor statute is not aimed at motor carriers of property. Like other general restrictions that apply in the same way to all businesses, the provision and the wage laws it triggers are outside the FAAAA's preemptive scope.

II. THE MASSACHUSETTS INDEPENDENT CONTRACTOR PROVISION DOES NOT RELATE TO MOTOR CARRIER PRICES, ROUTES, OR SERVICES.

The Massachusetts independent contractor provision also does not "relate[] to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The statute does not reference or regulate motor carrier prices, routes, or services. It does not "limit when, where, or how" package delivery services are performed. *Dan's City*, 133 S. Ct. at 1779. It does not "requir[e] a motor carrier to offer services not available in the market," or "'freez[e] into place services that carriers might prefer to discontinue in the future.'" *Id.* at 1780 (quoting *Rowe*, 552 U.S. at 372). It requires only that if a service is performed within the usual course of an employer's business, the people who perform that service must be classified as employees for wage-law purposes.

A. State Laws Are Not Preempted Merely Because They Relate to Motor Carriers' Business Models.

MDA argues that the independent contractor statute is preempted because it would "drastically alter the business model of the MDA's members." MDA Br. 2.

But whether a law affects a motor carrier's "business model" is irrelevant to the FAAAA preemption inquiry; the question for FAAAA preemption is whether the law relates to prices, routes, or services and is with respect to the transportation of property, not whether it somehow affects how the motor carrier does business.

Thus, for example, in *Dan's City*, the Court held that the FAAAA does not preempt state laws regulating how towing companies may store and dispose of towed cars. 133 S. Ct. at 1775. It did not matter that, as part of its business, the towing company in question—a motor carrier—sold cars that were not retrieved after being towed. *Id.* at 1780-81. The laws in question did not concern the transportation of property and did not "relate to" towing prices, routes, or services, and therefore were not preempted. *Id.* at 1779. Likewise, here, it does not matter whether the independent contractor provision affects motor carriers' business models or employment relationships, or how motor carriers structure their administrative staffs. The only relevant questions are whether the law is with respect to the transportation of property and whether it relates to the prices, routes, and services the motor carriers offer to their clients. Because the independent contractor provision does not concern the transportation of property or relate to motor carrier prices, routes, and services, it is not preempted by the FAAAA.

B. State Laws Are Not Preempted Merely Because They Raise the Cost of Providing Services.

MDA contends that the Massachusetts independent contractor provision is preempted because it would "force" one of its members, Xpressman, to "alter its routes and services," MDA Br. 30, and "preclude Xpressman from offering on-demand delivery services," *id*. at 31. But the provision does not "force" Xpressman to do anything related to the prices, routes, or services it offers to its customers. It leaves motor carriers entirely free to decide which routes and services to offer and what price to charge for those routes and services. The law simply requires that if a motor carrier chooses to employ people to do services within the usual course of its business, then, just as all other businesses, it must classify those people as employees for wage-law purposes.

Thus, what MDA evidently means in saying that the independent contractor statute would "compel a motor carrier to change its *routes* and cease offering a particular type of delivery *service*," *id*. at 33, is that, if its members are required to classify their deliverers as employees, they will make different decisions about what prices, routes, and services to offer. Whether or not this is true as a factual matter, a state law is not preempted simply because a motor carrier threatens to change its prices, routes, or services if it is required to follow the law—even if it threatens to abandon its services in response to the law. In *Dan's City*, for example,

the towing company told the Supreme Court that the sale and disposition of towed vehicles "ensure[d] payment to tow truckers for their towing and storage of vehicles that are never claimed," and that "tow truckers would not provide the essential service of towing vehicles ... if there were no assurance of payment if the vehicle is abandoned." Petitioner's Brief on the Merits at 21-22, *Dan's City*, No. 12-52 (U.S. 2013). Yet the Supreme Court held that state-law claims relating to the disposal of a towed car are not preempted. *Dan's City*, 133 S. Ct. at 1775.

Moreover, the primary reason MDA provides for why motor carriers would change their prices, routes, and services if they were required to comply with the law is that there are costs associated with providing workers with the rights and benefits afforded to employees.[1] This Court, however, has already rejected the argument "that state regulation is preempted wherever it imposes costs on airlines and therefore affects fares because costs 'must be made up elsewhere, i.e., other prices raised or charges imposed.'" *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011) (citation omitted). As the Court recognized, this argument, if

[1] MDA also claims its members would be forced to change their routes if they were required to follow the law because "employee-drivers must start and end their workday at the company's worksite, adding what is known as 'stem miles' to the route." MDA Br. 14. MDA points to no law, however, requiring employees to begin and end their routes at the company's site. Likewise, although MDA claims its members would be forced to combine or eliminate routes that are under four hours if it used employee-drivers, *id*. at 31, MDA identifies no law requiring such a change.

accepted, "would effectively exempt airlines from state taxes, state lawsuits of many kinds, and perhaps most other state regulation of any consequence." *Id*.[2]

Indeed, many background laws may affect the costs of doing business, and therefore the cost of providing services; that does not mean those laws are preempted. For example, state and local zoning regulations dictate where motor carriers may locate their operations and in that way may affect both the cost of using a particular location and decisions about whether to open or maintain operations in that location. But "[i]t is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep of § 14501(c)(1)." *Dan's City*, 133 S. Ct. at 1780. Likewise, one could imagine that if a state tax rate were raised, some motor carriers operating on the

[2] *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), is not to the contrary. That case addressed a Puerto Rico tax that prevented shippers from delivering packages unless the recipient evidenced payment of the tax or unless the shipper prepaid the tax and sought reimbursement later, complying with a complex system of regulations in the process. This Court held the tax preempted, explaining that the main part of the law "*forbids delivery* unless and until" a certificate was produced and that "the prepayment mechanism imposes extensive requirements that must be met before a carrier may make a lawful delivery." *Id*. at 335-36. "These requirements," the Court continued, "create a substantial burden on [United Parcel Service (UPS)], in the form of additional labor, costs, and delays," that "directly and significantly affects UPS's routes and services." *Id*. at 336. Although the Court then noted that "[t]he costs of this scheme necessarily have a negative effect on UPS's prices" and cited a case stating that "'[t]erms of service determine costs. To regulate them is to affect prices,'" *id*. (quoting *Fed. Express Corp. v. Cal. Pub. Util. Comm'n*, 936 F.2d 1075, 1078 (9th Cir. 1991)), the Court did not indicate that it would hold a law preempted if it simply raised the cost of doing business in the state, without placing any requirements on the shipping or delivery process.

edge of profitability would decide that their businesses were no longer profitable and decide to shut their doors. But such an effect would not immunize motor carriers from paying generally applicable taxes.

Background laws that affect the costs of doing business in the state are outside the FAAAA's preemptive scope because any effect they have on motor carrier prices, routes, or services is "'tenuous, remote, [and] peripheral,'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 390), and "far removed from Congress' driving concern," *Dan's City*, 133 S. Ct. at 1780. As the Seventh Circuit has explained,

> [T]he production function that drives market transactions in the transportation industry … typically includes inputs such as labor, capital, and technology. These inputs are often the subject of a particular body of law. For example, labor inputs are affected by a network of labor laws, including minimum wage laws, worker-safety laws, anti-discrimination laws, and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately affect the costs of these inputs, and thus, in turn, the "price ... or service" of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable state laws …. Instead, laws that regulate these inputs operate one or more steps away from the moment at which the firm offers its customer a service for a particular price.

S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc., 697 F.3d 544, 558 (7th Cir. 2012); *see also Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (holding that prevailing wage law that dump truck association claimed "increase[d] its prices by 25%, cause[d] it to

utilize independent owner-operators, and compel[led] it to re-direct and re-route equipment to compensate for lost revenue," was not related to association's prices, routes, and services because the law's effect was "indirect, remote, and tenuous").

As the district court noted, "in drafting the FAAAA, Congress did not draft a blank check to the trucking industry protecting it from any state regulation that increases the cost of doing business." JA 164. MDA protests that it is not challenging all state regulations that increase cost, but rather "carefully confined this action to challenge only *one subsection* of the Independent Contractor law." MDA Br. 41. But the MDA's brief demonstrates the far-reaching nature of its argument. The MDA is not objecting solely to motor carriers having to call their workers employees rather than independent contractors; it is objecting to motor carriers having to comply with any laws that are triggered by the employee classification. The MDA's brief makes clear that it believes that the independent contractor provision triggers a wide variety of employment laws and that it thinks its members should be exempt from all of them, insofar as the laws apply to the drivers they wish to treat as contractors. It does not want its members to have to pay their drivers a minimum wage. It does not want them to have to pay overtime. It does not want them to have to provide the drivers with health insurance. It does not want them to have to provide workers compensation. It does not want them to have to provide drivers with meal breaks and days off. It does not want them to

have to verify the immigration status of drivers. It does not want them to have to reasonably accommodate drivers with disabilities. It does not want them to have to reasonably accommodate drivers' religious practices. It does not want them to have to investigate and remedy allegations of harassment and abuse towards drivers. It does not want to pay payroll taxes for drivers.

Moreover, the MDA provides no reason why its argument should be confined only to those drivers who are defined as employees because of the one provision of the independent contractor statute that it is challenging. The logical implication of its argument is that its members should be free from having to comply with these requirements whether they apply because the drivers meet the test for being an employee under that subsection of the independent contractor statute, or whether they apply because the drivers meet another test of employee status.

In short, the MDA argues that, to the extent the laws apply to its members and the drivers they wish to consider contractors, its members should be exempt from a wide range of laws that apply to all other businesses with employees in Massachusetts. State laws are not preempted, however, simply because they raise the cost of doing business in the state, and the FAAAA does not preempt background labor laws or the independent contractor statute that triggers their application to drivers.

C. State Laws Are Not Preempted Merely Because They Differ From Those of Neighboring States.

MDA suggests that the independent contractor provision is independently problematic because it differs from employee classification laws in other states, insisting that "the motor carrier industry is a field where States cannot experiment or enact conflicting laws." MDA Br. 50 (emphasis omitted). But the FAAAA does not preempt the application to motor carriers of all state laws that differ from one state to the next. It preempts those laws only when they are "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). In enacting the FAAAA, Congress was concerned not with differing laws generally, but with the creation of "a patchwork of state *service-determining* laws, rules, and regulations." *Rowe*, 552 U.S. at 373 (emphasis added). Congress's goal was to remove "governmental commands" that prevent motor carriers from competing, *id*. at 372, not to insulate the trucking industry from the normal multi-state landscape of labor, taxing, and zoning laws that apply to all businesses.

MDA is also wrong in contending that the independent contractor provision is preempted because it constitutes a "barrier to entry" for interstate motor carriers who use independent contractors as drivers. MDA Br. 49. Barriers to entry are laws or costs that prevent new entrants from competing with incumbent motor carriers, not background state laws that may discourage a carrier from doing

business in a state. *See* H.R. Conf. Rep. No. 103-677, at 86 ("Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business."); *Black's Law Dictionary* (9th ed. 2009) (defining "barrier to entry"); R. Preston McAfee, Hugo M. Mialon, & Michael A. Williams, *What Is A Barrier to Entry?*, 94 Am. Econ. Rev. 461, 461-65 (2004) (same). The independent contractor provision does not determine which companies may operate as motor carriers, nor does it have different effects on incumbent carriers than on potential new entrants. It applies equally to all motor carriers and, indeed, to other members of the public as well.

CONCLUSION

The Court should affirm the district court and hold that the Massachusetts independent contractor statute is not preempted by the FAAAA.

Respectfully submitted,

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March 19, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,411 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2014, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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