No. 16-1362

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at automobile and truck dealerships are exempt from the overtime pay requirements of the Fair Labor Standards Act under 29 U.S.C. § 213(b)(10)(A), which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles [or] trucks."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state motor vehicle dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars, LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile and truck dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such, have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents franchised new motor vehicle[2] dealers nationwide. Its members sell new motor vehicles and related goods and services as authorized dealers of various

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief, having filed blanket consents with this Court on October 26, 2017. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Amici's members are comprised of both automobile and truck dealerships, referred to collectively in this brief as "motor vehicle dealerships."

motor vehicle manufacturers and distributors doing business in the United States. There are more than 18,000 franchised motor vehicle dealerships in the United States. Of those, more than 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a registered non-profit trade organization, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,700 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new motor vehicles and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of immense practical significance to amici and their dealership members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on all franchised motor vehicle dealers nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have relied in structuring their compensation plans for more than 40 years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's motor vehicle dealerships have relied on the overtime exemption in section 13(b)(10) of the Fair Labor Standards Act (FLSA) for "any salesman . . . primarily engaged in selling or servicing automobiles or trucks" in classifying and compensating their Service Advisors.[3] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based substantially on their sales productivity rather than on the number of hours they work. These compensation arrangements benefit both dealerships and employees, and Service Advisors are generally well paid for their contributions to dealership revenues.

Dealerships have relied not only on the statutory language of the exemption, but as important, on a solid wall of judicial authority interpreting its scope. Until the Ninth Circuit's decisions in this case, every federal and state court, including several circuit courts of appeals, held that that the statutory exemption encompasses Service Advisors.

The Ninth Circuit's most recent decision rejecting the applicability of the exemption to these

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[3] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Salesman, among other titles.

well compensated employees is an outlier that disregards an unbroken line of decisional law to the contrary. An affirmance of this startling decision would disrupt what was previously a settled, widely accepted compensation practice in the nation's franchised motor vehicle dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs Service Advisors.[4] Franchised automobile and truck dealerships (*i.e.,* motor vehicle dealerships) nationwide together employ more than 100,000 Service Advisors,[5] who are universally classified as overtime-exempt, typically under section 13(b)(10). The Ninth Circuit's decision invalidates the longstanding practice of classifying Service Advisors under this statutory exemption. An affirmance would result in unanticipated liability for

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[4] On average, light-duty automobile dealerships employ an estimated 5.7 Service Advisors each. National Automobile Dealers Assn., *NADA Data 2016: Annual Financial Profile of America's Franchised New-Car Dealerships* (2016) ("*2016 NADA Data*"). Commercial truck dealerships employ an estimated 3.5 Service Advisors each. National Automobile Dealers Assn., *ATD Data 2016: Annual Financial Profile of America's Franchised New-Truck Dealerships* ("*2016 ATD Data*").

[5] In amicus briefs filed by amici the last time this case came before this Court, NADA estimated that 45,000 Service Advisors were employed in dealerships nationwide. Based on a new review by expert data analysts and data collected for the *2016 NADA Data* and *2016 ATD Data* reports, cited above, NADA has concluded that is previous estimate significantly understated the actual number of Service Advisors employed nationally.

past pay practices and windfalls to these well compensated sales employees. Excluding Service Advisors from exempt status would cause disruption and upheaval to dealerships and employees alike, because it would force dealerships to restructure Service Advisors' compensation to avoid that liability going forward.

Amici urge the Court to reverse the decision of the Ninth Circuit and make clear that this key exemption remains in force as it has for the last 40 years.

ARGUMENT

I. Service Advisors Are Key Contributors to the Revenues of Franchised Motor Vehicle Dealerships, and Have Been Classified as Exempt Sales Employees for Four Decades.

There are more than 18,000 franchised motor vehicle dealerships in the United States, the great majority of which are represented by amici. Nationally, franchised dealerships together employ an estimated 1.2 million people and have an estimated annual payroll of nearly $70 billion.[6] At the same time, the overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised motor vehicle dealership in the country has a service department. Service departments provide expert vehicle maintenance

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[6] *2016 NADA Data* at 33, 35; *2016 ATD Data* at 6, 16.

and repair services to dealership customers, and are a key revenue and profit center for dealerships. No position is more crucial to the vehicle service function than the Service Advisor. Service Advisors evaluate customers' service and repair needs, help diagnose mechanical problems, advise customers about services to address specific problems, provide information about optional and supplemental services, work intimately with dealership mechanics, and ensure the customer is satisfied with the service received. In short, Service Advisors are engaged in selling service, maintenance and repairs through the customer relationships they cultivate on a day-to-day basis. They are quite simply indispensable to the servicing of automobiles and trucks at dealerships.

NADA estimates that 100,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2015 the average annual compensation for Service Advisors employed in automobile dealerships nationwide was $64,635, with the top 10% earning on average more than $97,335 per year.[7] Compensation levels are higher at automobile dealerships in the Ninth Circuit states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), where

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[7] National Automobile Dealers Assn., *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* (NADA 2016) (hereafter "*NADA 2016 Workforce Study*") at 11. The top 10% compensation figure is based on NADA's unpublished analysis of 2015 data collected for the *2016 Workforce Study*.

the annual average is $68,995, and the top 10% earn on average $103,560 per year.[8]

Service Advisors are universally classified as exempt from overtime, typically under section 13(b)(10) of the FLSA, which exempts "salesmen . . . primarily engaged in selling or servicing automobiles or trucks."[9] The 13(b)(10) exemption requires nothing other than that such an employee be engaged in the selling or servicing process at the dealership. It thus provides flexibility in terms of compensation structure and level, including arrangements that involve a generous and predictable base wage combined with the option for incentive pay as an upside to sales productivity.

II. For More Than 40 Years, Motor Vehicle Dealerships Have Relied on Authoritative Interpretations of the Section 13(b)(10) Exemption in Classifying and Compensating Their Service Advisors.

Because of the importance of the 13(b)(10) exemption to franchised dealerships, in the 40-plus years since the exemption was enacted, amici have closely tracked judicial and agency interpretations addressing its meaning and scope. Until the Ninth Circuit's 2015 and 2017 decisions in this case, federal and state courts had uniformly interpreted the exemption to encompass Service Advisors. Looking to the language of the statutory exemption

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[8] Unpublished NADA analysis of 2015 data collected for *2016 Workforce Study*.

[9] 29 U.S.C. § 213(b)(10).

itself, these courts uniformly rejected DOL's 1970 interpretive guidance that Service Advisors did not fall within the section 13(b)(10) exemption. For some 40 years, the DOL acquiesced in these judicial decisions. And based on that consistent, authoritative interpretation, for the last 40 years amici have advised their members that Service Advisors qualify for the section 13(b)(1) exemption and need not be paid overtime. Amici's member dealerships have entered into countless compensation arrangements with their Service Advisors based on this settled understanding of the law.

The section 13(b)(10) exemption was originally enacted in 1966.[10] In 1970, the DOL promulgated interpretive regulations that ignored the literal language of the statute and narrowed the exemption by defining "salesman" as "an employee who is employed for the purposes of and is primarily engaged in making sales or obtaining orders or contracts for sale of [vehicles]."[11] Indeed, the regulation went on to explicitly *exclude* Service Advisors from the exemption, although recognizing that their principle functions included "diagnosing the mechanical problems of vehicles brought in for repair, . . . and directing and checking on the work of mechanics."[12]

In the litigation that inevitably followed, the DOL's 1970 interpretive guidance was soundly and

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[10] Pub. L. No. 89-601, 80 Stat. 830 (1966).
[11] 29 C.F.R. § 779.372(c)(1) (1971).
[12] *Id.* § 779.372(c)(4).

consistently rejected by the courts. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[13] and up until the Ninth Circuit's 2015 decision in this case, the decisions of federal circuit courts,[14] federal district courts,[15] and state courts[16] uniformly held that Service Advisors are covered by the exemption.

In the face of consistent judicial rejection of its 1970 interpretive regulation, the DOL acquiesced to the courts' interpretation. In 1978 it rescinded its regulatory guidance, issuing an Administrator Opinion squarely declaring that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are generally exempt.[17] In 1987, the DOL revised its enforcement bible, the Wage & Hour

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[13] 475 F.2d 1095 (5th Cir. 1973).

[14] *Deel Motors,* 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[15] *Clark & Day v. Palmen Motors,* No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors,* No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.* , 529 F.2d 524 (6th Cir. 1976) (unpublished table decision).

[16] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont+. 2013).

[17] U.S. Dep't of Labor, Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

Field Operations Handbook (FOH), to reflect that opinion and to incorporate the judicial authority on which it was based.[18] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" to reflect the judicial interpretation of the exemption.

Nearly 20 years later, in 2008, the DOL issued proposed regulations to formally codify the judicial interpretations of the section 13(b)(10) exemption as encompassing Service Advisors and confirming the agency's acquiescence to these interpretations over the previous three decades.[19] In 2011, however, the DOL abruptly reversed course, issuing a Final Rule that reneged on its long-held position and 2008 proposal and revived its judicially-rejected 1970 position that the exemption covers only those dealership salesmen who sell vehicles.[20]

Litigation was inevitable and not long in coming. In 2012, the year after the Final Rule was promulgated, the plaintiff Service Advisors in this case filed their challenge to their classification under the section 13(b)(1) exemption. The District Court refused to defer to the DOL's new position, rejecting it as inconsistent with the statutory language and Congressional intent.[21] The Ninth Circuit reversed,

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[18] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[19] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

[20] *See* Updating Regulations Issued under the FLSA, 76 Fed. Reg. 18832, 18859 (Apr. 5, 2011).

[21] Appendix to Petition for Certiorari ("Pet.App.") at 83.

deferring to the agency's 2011 interpretation.[22] This Court granted certiorari, and in a 2016 opinion vacated the Ninth Circuit's decision because it erred in placing controlling weight on the DOL's 2011 Final Rule. No deference was owed to the DOL's new interpretation, this Court held, in part because in adopting it, the DOL had disregarded "decades of industry reliance on the Department's prior policy" in "negotiat[ing] and structur[ing] their compensation plans."[23]

On remand, however, the Ninth Circuit affirmed its original opinion that Service Advisors are not encompassed within the section 13(b)(10) exemption, all the while avoiding reference to the DOL's 2011 interpretive regulation. The Ninth admitted that a literal reading of the statute would encompass Service Advisors, but it rejected such a reading as inconsistent with Congressional intent. As before, it held that Service Advisors do not fall within the exemption because they do not personally perform servicing functions.[24] Nowhere did the court mention, much less consider, the reliance interests of an entire industry on 40 years of consistent judicial and agency authority, despite this Court's extensive discussion of reliance interests in its previous opinion in this case. Instead, the Ninth Circuit simply stated that it disagreed with the decisions of its sister circuits "for the reasons stated in our

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[22] Pet.App. at 55-73.
[23] Pet.App. at 42.
[24] Pet.App. at 13-15.

earlier opinion (except those reasons concerning deference to the agency)."[25]

The Ninth Circuit's most recent decision ignores the reliance interests that animated this Court's 2016 decision, and has upended settled industry practice among the more than 18,000 motor vehicle dealerships across the country.

III. The Ninth Circuit's Decision Creates Unanticipated Liabilities for the Nation's Motor Vehicle Dealerships and Disrupts Longstanding Compensation Arrangements.

Over the last 40 years, automobile dealerships across the country have classified Service Advisors as overtime-exempt in reliance on authoritative judicial interpretations of the section 13(b)(10) exemption, and have structured their compensation and recordkeeping practices accordingly. A decision by this Court affirming the Ninth Circuit's anomalous rule would upend these longstanding industry practices, creating unanticipated retroactive liability for past practices and widespread disruption for motor vehicle dealerships. The impact of this decision in the real world of brick-and-mortar dealerships cannot be overstated.

Without a reversal by this Court, dealerships that have relied on the section 13(b)(10) exemption in classifying their Service Advisors will face unanticipated liability for past violations, which at the time were not considered violations at all. If the

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[25] Pet.App. at 30.

exemption is foreclosed, these dealerships will be subject to private FLSA back pay claims and significant potential liability, given that the national average workweek for Service Advisors is about 45 hours.[26] In addition to unpaid overtime liability for about five hours per week for each Service Advisor going back up to three years, dealerships could face liability for liquidated damages equal to unpaid overtime, interest and attorney's fees.[27] Potential liability across the industry could swiftly approach many hundreds of millions of dollars.

This specter is very real. Contrary to Respondents' "no-big-deal" arguments the last time this case was before the Court, the FLSA's section 7(i) exemption for certain commissioned employees will be unavailable to a significant portion of the nation's dealerships with respect to past liability. That exemption has multiple technical requirements concerning type of business, compensation structure and hourly wage average, each of which must be satisfied.[28] Heretofore, dealerships have had no need to consider these requirements in structuring their pay and timekeeping practices due to the

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[26] *NADA 2016 Workforce Study* at 115. These weekly hours are consistent with the hours worked by exempt vehicle salespersons. *Id.*

[27] 29 U.S.C. § 216(b).

[28] The section 7(i) exemption applies only to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation. 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038, 1044-47 (9th Cir. 2005).

simplicity of section 13(b)(10), which has no such technical requirements.

The so-called commissioned sales exemption of section 7(i) of the FLSA, for example, is not available to dealerships whose compensation plans have been structured to provide more generous base compensation in comparison to commissions.[29] And dealerships that have not kept time records for their previously exempt Service Advisors (because there was no reason to do so, given the universal understanding of the law) will have difficulty establishing that employee's average hourly compensation meets the 7(i) requirement of pay exceeding 1.5 times the minimum wage for each and every hour worked.[30] Finally, the section 7(i) exemption is not available to dealerships that do not qualify as "retail establishments" due to their mix of revenue sources, when over 25% of revenues comes from non-retail sales, such wholesale fleet sales and leases.[31]

Furthermore, an affirmance would have a significant disruptive impact on employees themselves, as dealerships would be forced to radically restructure previously agreed-upon compensation arrangements to avoid future liability.

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[29] *See* 29 U.S.C. § 207(i) (exemption requires that commissions make up more than 50% of the employee's compensation).

[30] *Id.*

[31] *See Gieg,* 407 F.3d at 1048-49 (citing *Acme Car & Truck Rentals, Inc. v. Hooper,* 331 F.2d 442, 446-48 (5th Cir. 1964) and 29 C.F.R. § 779.371 (excluding fleet sales and leasing revenues from retail sales revenue calculation).

Many, at least those who qualify as retail establishments, may restructure Service Advisor compensation to allocate a greater proportion to commissions in an attempt to meet the 7(i) exemption, thus placing more wages at risk, a disadvantage to employees in lean economic times. Others will put Service Advisors on an hourly pay plan, paying overtime but lowering or even doing away with commissions, thus eliminating some or all of the upside advantage provided to employees through performance-based commission systems. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent or even greater.

Affirming the Ninth Circuit's decision also threatens to upend settled industry practice with respect to partsmen in dealerships. As demonstrated in Petitioner's Brief, the Ninth Circuit's crabbed reading of the statutory exemption as encompassing only those who personally sell or service vehicles effectively writes partsmen out of the exemption.[32] Indeed, partsmen's duties are clearly defined in the regulations as requisitioning, stocking, and dispensing parts,[33] duties that have nothing to do with personally servicing vehicles. Yet partsmen, like Service Advisors, are key members of the service team, historically classified as exempt under the section 13(b)(10) exemption. Citing the Ninth Circuit's rationale, however, a number of

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[32] Pet'r. Br. at 40-43.

[33] 29 C.F.R. 779.372(c)(2).

district courts have recently held that partsmen do not qualify for the exemption because they are not personally engaged in vehicle servicing functions.[34] The Ninth Circuit's error in this case – its rational for deeming Service Advisors non-exempt – and its disruptive impact on an entire industry – is thus being compounded in unanticipated ways that this Court can and should correct.

In sum, affirming the Ninth Circuit's anomalous decision would lead to significant unanticipated liability for dealerships that have justifiably relied on the section 13(b)(10) exemption in the past in classifying Service Advisors and other key members of their service teams. The disruption will extend to Service Advisors themselves going forward, who will find their compensation plans changed in ways that may not ultimately benefit them.

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[34] *Buehlman v. Ide Pontiac, Inc.*, No. 6:15-cv-06745(MAT), 2016 U.S. Dist. LEXIS 154054 (W.D.N.Y. Nov. 7, 2016) (partsmen who do not actually work on automobiles are not exempt); *Bowers v. Fred Haas Toyota World*, No. 4:17-CV-00183 (S.D. Tex. June 22, 2017) (relying on decision below to find that partsmen who do not personally perform repairs and maintenance are not exempt); *see also McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 383, 388 (E.D.N.Y. 2010) (interpreting 29 CFR § 779.372 as requiring partsmen to personally service vehicles to qualify for the exemption).

CONCLUSION

The nation's motor vehicle dealerships have relied on more than four decades of settled law in structuring their compensation arrangements with Service Advisors. These arrangements reward sales production, not hours worked. An affirmance would upend historically settled law and result in unanticipated liability to dealerships and severe disruption to Service Advisors.

Amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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