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On POINT

Major Questions on Net Neutrality

A primer on the FCC's brewing broadband legal fight

By Brian A. Rankin

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The Federal Communications Commission (FCC) is poised once again to change and classify broadband internet access service (BIAS), the mass market wireline and wireless broadband services sold to consumers and businesses, as a common carrier telecommunications service. That would make broadband subject to utility-style regulation under Title II of the Communications Act.[1] By proposing this rule, the agency is abandoning the light-touch approach that spurred innovation and investment in an effort to ensure what is called "net neutrality."[2]

This rule will almost certainly lead to litigation. Classification under Title II of the Communications Act could face a serious challenge under the Supreme Court's "major questions doctrine," which places the power to make decisions of vast economic and political significance with Congress rather than with unelected agencies and their regulators.

Given the development of the major questions doctrine, the Supreme Court's decision to review *Chevron* deference, and the anticipated FCC decision, there are a lot of regulatory questions. What follows is an airing of some of those questions, with likely answers.

What is the major questions doctrine?

The major questions doctrine is a rule of statutory construction that is rooted in the constitutional separation of powers and the principle that it is the people's representatives in Congress who write the laws and authorize administrative agency power. The doctrine holds that for questions of vast economic and political significance, a federal administrative agency (such as the FCC, Food and Drug Administration, or EPA) must have clear congressional authorization for any regulatory power it asserts. Absent clear congressional authorization, the agency lacks authority because Congress has retained the power to make those determinations.

The Supreme Court issued a ruling in *West Virginia v. EPA* in June 2022 that brought the major questions doctrine

into sharper relief by invalidating a rule because the agency did not have the authority to issue it.[3] The ruling consolidated the logic of previous, partially overlapping holdings into a clearer analytical framework for regulatory analysis.

How did the major questions doctrine develop?

The major questions doctrine has deep roots, with different interpretations and applications as it developed. (This paper is not an exhaustive discussion of all such possibilities.)[4] In 1986, future Supreme Court Justice Stephen Breyer wrote in a law review article, "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[5] The following sample of cases

1 47 U.S.C. § 153.

2 Federal Communications Commission, FCC Fact Sheet: Safeguarding and Securing the Open Internet, Notice of Proposed Rulemaking – WC Docket No. 23-320, September 28, 2023, https://docs.fcc.gov/public/attachments/DOC-397309A1.pdf.

3 *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).

4 Additionally, the ongoing development of the major questions doctrine leads to elements of imprecision and uncertainty as to its application.

5 Stephen Breyer, "Judicial Review of Questions of Law and Policy," *Administrative Law Review*, Vol. 38, No. 4 (Fall 1986), p. 370, https://www.jstor.org/stable/40709526.

illustrates the doctrine's development over the past few decades.

In the 2000 case *FDA v. Brown & Williamson*, the FDA asserted jurisdiction to regulate, and even ban, tobacco products "after having expressly disavowed" the authority to regulate tobacco products in the past.[6] The Court found the FDA's regulation to be an expansive construction of the Food, Drug and Cosmetic Act, providing it with authority not clearly stated in that statute. Citing Breyer's law review article (which itself was expressly concerned with how best to understand the "major questions" that Congress had focused on), Justice Sandra Day O'Connor wrote for the Court that "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress intended such an implicit delegation."[7] She added, "Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power."[8]

The Court held in the 2014 case *Utility Air Regulatory Group v. EPA* that under the Clean Air Act smaller stationary source emissions of greenhouse gases on their own could not trigger either the Act's Prevention of Significant Deterioration program or Title V permitting requirements.[9] In his opinion, Justice Antonin Scalia wrote, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[10] He found that in the EPA's assertion of authority, "we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it."[11] In taking this position "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant."[12]

In the 2021 case *Alabama Association of Realtors v. Department of Health & Human Services*, the Court struck down a COVID-related moratorium on evictions of tenants who lived in a county that experienced substantial or high levels of COVID–19 transmission and made certain declarations of financial need.[13] The Court found that even if the statute was ambiguous, the "sheer scope" of the CDC's claimed authority would counsel against the Government's interpretation.[14] The Court cited *Utility Air* in stating that "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[15]

In 2022, the Court found in *West Virginia v. EPA* that the EPA's clean power plan involved a major question because it involved a "transformative expansion" of the EPA's regulatory authority.[16] The EPA asserted it had the authority to issue rules requiring "generation shifting," essentially reallocating electricity production and market share from coal to gas generation, and from coal and gas to renewable energy.[17] The EPA sought to alter the overall power system by forcing a shift throughout the power grid from one type of energy to another, an action of obvious vast economic and political significance.

Chief Justice John Roberts authored the opinion that held "the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner."[18] The Court found that the EPA's view of its authority "was not only unprecedented; it also effected a 'fundamental revision of the statute'" and that "We also find it 'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades."[19]

In *West Virginia*, the Court found that the EPA had enacted a program that "'Congress considered and rejected' multiple times."[20] If Congress had considered and rejected such a program, the EPA would have to show clear congressional authority for it to promulgate a regulatory program Congress itself had rejected. The Court found no such authority in the statute.

Justice Neil Gorsuch's detailed concurrence in *West Virginia* elaborated on the implications of the major questions doctrine: "Under that doctrine's terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the

6 *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).
7 *Brown & Williamson*, 529 U.S. at 159.
8 *Brown & Williamson*, 529 U.S. at 160.
9 *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014).
10 *Utility Air Regulatory Group*, 134 S. Ct. at 2444.
11 *Utility Air Regulatory Group*, 134 S. Ct. at 2444.
12 *Utility Air Regulatory Group*, 134 S. Ct. at 2444.
13 *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021).
14 *Alabama Association of Realtors*, 141 S. Ct. at 2489.
15 *Alabama Association of Realtors*, 141 S. Ct. at 2489.
16 *West Virginia*, 142 S. Ct. at 2610.
17 *West Virginia*, 142 S. Ct. at 2603.
18 *West Virginia*, 142 S. Ct. at 2614.
19 *West Virginia*, 142 S. Ct. at 2612-2613.
20 *West Virginia*, 142 S. Ct. at 2614.

power to make decisions of vast 'economic and political significance.'"[21]

The 2023 case *Biden v. Nebraska* dealt with a federal student loan plan in which Secretary of Education Miguel Cardona invoked wide-ranging authority to waive or modify statutory and regulatory provisions under the student financial assistance program. In striking down the loan plan, the Court found that "'the economic and political significance' of the Secretary's action is staggering by any measure" and that the "indicators from our previous major questions doctrine cases are present."[22]

Justice Amy Coney Barrett provided her analysis of the major questions doctrine in a concurrence to *Biden*, discussing the concept of "important subjects" by stating that in a system of separated powers "a reasonably informed interpreter would expect Congress to legislate on 'important subjects' . . . ."[23] This analysis based on "important subjects" is somewhat in contrast to questions of "vast economic and political significance," but each look to congressional authorization for the asserted regulatory power.

Varying applications of and disagreements about major questions doctrine remain and will likely be further developed by the Supreme Court. This paper leans heavily on questions of "vast economic and political significance" expressed in cases such as *Utility Air* and *Alabama*. A basic way to understand this approach to the major questions doctrine is to ask two further questions.[24] First, does the regulatory power asserted by the agency concern a question of vast economic and political significance? Second, if so, is there clear congressional authorization for the regulatory power asserted by the agency?

How is the major questions doctrine different from *Chevron* deference?

In the 1984 case *Chevron v. NRDC*, the Supreme Court held that federal courts should defer to an agency's reasonable construction of law when the statute is silent or ambiguous.[25] This has become known as "*Chevron* deference" because courts defer to the statutory interpretation of the "expert agency" under these circumstances. The decision has led to an expanding regulatory authority via agency decisions and is now being challenged at the Court.[26]

Although both the major questions doctrine and *Chevron* deference deal with how far agencies can go in regulating, the two differ at important points. Initially, the major questions doctrine applies when a major question or important subject is at issue, but the Court found in the 2015 case *King v. Burwell*, a case litigated by the Competitive Enterprise Institute, that the *Chevron* framework does not apply in "extraordinary cases."[27]

The major questions doctrine is fundamental, requiring clear congressional authorization for the agency's asserted power. In contrast, *Chevron* currently requires judicial deference to an agency's reasonable interpretation when (very generally) the statute is silent or ambiguous. If *Chevron* is overturned, courts will likely change their behavior. In that circumstance, they will interpret silent or ambiguous statutes more and defer to agencies less.

Silence or ambiguity provides no support for agency authority under the major questions doctrine. That doctrine requires that the statutory authorization for agency power must be clear, and a court must not defer to the agency in making that determination.

How has the FCC regulated broadband?

To see how an FCC decision to classify BIAS as a telecommunications service will fare under a major questions doctrine review, it's best to start with the FCC's history of broadband regulation.

That history has been a winding road. Under the Communications Act, the FCC has either declared broadband is an information service, with light-touch regulation under Title I of the Act, or classified it as common carrier telecommunications service under Title II of the Act. That punted broadband into a utility-style regulation regime that was designed for old fashioned telephone networks and services.

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[21] *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). In his concurrence, Gorsuch provides factors about when an agency action involves a major question for which clear congressional authority is required. These include when an agency (i) claims the power to resolve a matter of great political significance, (ii) seeks to regulate a significant portion of the American economy, and (iii) seeks to intrude into an area that is a particular domain of state law. He notes that other suggestive factors were also present in *West Virginia*.

[22] *Biden v. Nebraska*, 143 S. Ct. 2355, 2373-2374 (2023).

[23] *Biden*, 143 S. Ct. at 2380-2381 (Barret, J., concurring). Barrett cited the Supreme Court case *Wayman v. Southard* from 1825 for this proposition, demonstrating the deep roots and different interpretations of the major questions doctrine.

[24] The Supreme Court is still developing the major questions doctrine and summarizing the doctrine in this manner is solely done to provide an analytical framework. The Court may choose not to analyze an appeal of an FCC classification of BIAS as a telecommunications service in this manner or to combine it with other factors.

[25] *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[26] Amy Howe, "Supreme Court Likely to Discard *Chevron*," SCOTUSblog, January 17, 2024, https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.

[27] *King v. Burwell*, 576 U.S. 473 (2015). Since *King v. Burwell* (which upheld advance tax credits for the purchase of health insurance on a federal exchange under the Affordable Care Act), the Court has not addressed the applicability of the *Chevron* framework in major question doctrine cases.

In 1998, the FCC initially classified digital subscriber line (DSL), a broadband service provided over telephone companies' copper phone lines, as a telecommunications service.[28]

In 2002, the FCC classified cable modem broadband as an information service even though DSL was classified as a telecommunications service,[29] a decision upheld by the Supreme Court in *NCTA v. Brand X*.[30] Justice Clarence Thomas authored the opinion in which the Court applied *Chevron* deference. The Court found the Communications Act ambiguous and the FCC's statutory construction reasonable. It held that the FCC "is free within the limits of reasoned interpretation to change course if it adequately justifies the change."[31] The FCC then reclassified DSL as an information service in 2005 to be consistent with the *Brand X* case.[32]

In 2010, the FCC maintained the Title I information service classification but imposed net neutrality rules for transparency, no blocking and no unreasonable discrimination.[33] The order was overturned by the DC Circuit Court of Appeals which found the net neutrality rules to be common carrier-type rules and that the FCC could not impose common carrier rules on a service that it had not classified as a telecommunications service.[34]

In 2015, the FCC overturned the years-long bipartisan consensus in support of the Title I information service classification, and defined BIAS to be a mass market broadband service and classified it as a telecommunications service.[35] In 2018, the FCC restored the classification of BIAS as an information service.[36] The DC Circuit upheld each of these dramatically differing decisions by applying *Chevron* deference.[37] (This demonstrates one of the perils of *Chevron* deference; the same statute was interpreted differently based on which political faction controlled the FCC, each time upheld due to deference to the "expert agency".)

Now the FCC is about to change again, this time classifying BIAS as a telecommunications service. The FCC says the change is needed for "re-establishing the FCC's oversight over broadband and restoring uniform, nationwide net neutrality rules, which would allow the FCC to protect internet openness and consumers, defend national security, and advance public safety."[38] It seeks to put BIAS "on par" with water and other utilities.

Will the major questions doctrine apply to FCC's broadband reclassification?

While the FCC has classified BIAS as a telecommunications service before, the Supreme Court has not examined the major questions doctrine in this context. An appeal of the expected FCC order is almost a certainty and would very likely reach the Supreme Court.

What considerations might influence the Supreme Court's thinking in such a decision? There are many issues that might sway such a ruling, including what the D.C. Circuit has to say, whether the FCC is deemed to have been given clear authorization by Congress, whether Congress has considered and rejected the approach, and the technical and policy expertise of the agency to address the policy.[39]

But to the extent that the major questions doctrine affects such a ruling, the two-prong test would still likely be the most relevant.

Vast economic and political significance: The FCC's notice proposing telecommunications service classification characterizes BIAS as an "essential service." BIAS is the most important communications service of our time and is relied upon by hundreds of millions of American consumers and businesses that are served by an industry worth billions of dollars. It touches nearly every aspect of our lives and the economy. How it is regulated has enormous consequences for consumers and service providers alike.

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28 Federal Communications Commission, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, In the Matter of Deployment of Wireless Services Offering Advanced Telecommunications Capability, FCC 98-188, August 7, 1998, https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98188.pdf.

29 Federal Communications Commission, Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 02-77, March 15, 2022, https://docs.fcc.gov/public/attachments/FCC-02-77A1.pdf.

30 *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

31 *Brand X*, 545 U.S. at 1001.

32 Marguerite Reardon, "FCC Changes DSL Classification," CNET, December 11, 2005, https://www.cnet.com/tech/tech-industry/fcc-changes-dsl-classification/.

33 Federal Communications Commission, Report and Order, In the Matter of Preserving the Open Internet, FCC 10-201, December 23, 2010, https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf.

34 *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014).

35 Federal Communications Commission, Report and Order on Remand, Declaratory Ruling, and Order, In the Matter of Protecting and Promoting the Open Internet, FCC 15-24, March 12, 2015, https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf.

36 Federal Communications Commission, Declaratory Ruling, Report and Order, and Order, In the Matter of Restoring Internet Freedom, FCC 17-166, January 4, 2018, https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf.

37 *United States Telecom Association v. Federal Communications Association*, 825 F.3d 674 (D.C. Cir. 2016); *Mozilla Corp. v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2019).

38 "FACT SHEET: FCC Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules," Office of the Chairwoman, Federal Communications Commission, September 26, 2023, https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf.

39 The analysis of this paper focuses on what the Supreme Court may do and is not based on the current law of the D.C. Circuit or what that court may do.

The change in classification from the current light-touch regulatory Title I information services regime to one of Title II common carrier regulation designed for telephone networks is a decision of great consequence for the deployment, provision, and pricing of BIAS. The FCC has expansive authority under Title II that covers almost every aspect of the service, including the heavy burden of utility-style regulation such as rate regulation, terms of service, and determining returns on capital investment.[40] It's hard to imagine a more economically consequential decision by the FCC or one that is a more substantial expansion of its regulatory authority.

Indeed, the FCC's 2018 Restoring Internet Freedom Order ("RIF Order") found that Title II regulation had "adversely affected investment."[41] Economist Hal Singer concluded that ISP investment by major ISPs fell by 5.6 percent between 2014 and 2016 (most of which time was under Title II regulation).[42] An assertion of regulatory power over a service that adversely affects investment in that service is one clear indicator of economic significance.

Then D.C. Circuit judge and current Supreme Court Justice Brett Kavanaugh's dissent in the denial of the Petition for Rehearing En Banc of the FCC's 2015 Open Internet Order to classify BIAS as a telecommunications service is instructive. He stated that "under any conceivable test for what makes a rule major, the net neutrality rule qualifies as a major rule" because "it imposes common-carrier regulation on Internet service providers."[43] Kavanaugh found that "The net neutrality rule is a major rule under any plausible conception of the major rules doctrine."[44]

Additionally, Congress is very interested in broadband, as seen by its passage of the Infrastructure Act of 2021, which included $65 billion for broadband deployment[45] and included a subsection on digital discrimination, which seeks to provide "equal access" to BIAS by prohibiting "deployment discrimination" based on income level, race, ethnicity, and other factors.[46] There's no question that broadband is a top issue for Congress.

A future Court holding that emphasizes this factor – vast economic and political significance – would certainly apply the major questions doctrine.

Clear congressional authorization questioned: The Communications Act was initially drafted in 1934 to apply to the copper wire circuit-switched telephone networks that were the order of the day. Congress could not possibly have been considering broadband at that time.

When Congress last updated the Act in 1996, it was again focused on telephone service and the opening of local and long-distance markets to competition. However, that update does have a few relevant provisions. In Sections 230(b)(1) and (2), Congress declared that it is the policy of the United States to promote the development of the Internet and other interactive computer services "unfettered by Federal or State regulation."[47]

Further, Section 230(f)(2) states that the term "'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet . . . .*"[48] Section 223(e)(6) states that "Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."[49]

The text of the Act therefore raises serious doubts about a clear congressional authorization to classify BIAS as a telecommunications service. As Kavanaugh wrote in his 2017 dissent, "What that Act does not clearly do is treat Internet service as a telecommunications service and thereby authorize the FCC to regulate Internet service providers as common carriers. At most, the Act is ambiguous about whether Internet service is an information service or a telecommunications service."[50] Indeed, in *Brand X*, the Supreme Court found the Act to be ambiguous.

That is critical because ambiguity does not suffice under the major questions doctrine. The congressional authorization of authority must be clear.

Under the Act, a service can either be an information service or a telecommunications service; it cannot be both. The best reading of the Act is that BIAS is an information service and not a telecommunications service. BIAS meets the definition of an information

[40] The FCC's invocation of forbearance under Section 10 of the Communications Act, 47 U.S.C. § 160, (the ability to refrain from enforcing otherwise applicable statutory provisions and regulations) as to many of the utility-style regulations does not ameliorate the heavy regulatory burden because the FCC can discontinue forbearance and enforce those statutory provisions and regulations at any time.

[41] Federal Communications Commission, Declaratory Ruling, Report and Order, and Order, FCC 17-166, p. 56.

[42] Federal Communications Commission, Declaratory Ruling, Report and Order, and Order, FCC 17-166, p. 55.

[43] *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[44] *United States Telecom Association*, 855 F.3d at 424 (Kavanaugh, J., dissenting).

[45] "Fact Sheet: The Bipartisan Infrastructure Deal," The White House, November 6, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

[46] 47 U.S.C. § 1754(c).

[47] 47 U.S.C. § 230(b)(1)-(2).

[48] 47 U.S.C. § 230(f)(2) (emphasis added).

[49] 47 U.S.C. § 223(e)(6).

[50] *United States Telecom Association*, 855 F.3d at 424 (Kavanaugh, J., dissenting).

service as set forth in Section 153(24) of the Act by providing the capability for customers to interact with information stored on computers.[51] BIAS also includes integrated information processing capabilities, such as access to third party websites, domain name system and caching. The Supreme Court recognized in *Brand X* that these capabilities are information services.[52]

Additionally, as shown in *Brown & Williamson* and *West Virginia*, a key part of the analysis is whether Congress has considered and rejected the proposed regulation. Congress has considered whether BIAS should be classified as a telecommunications service.

The $65 billion in deployment funds and the digital discrimination provisions show that Congress has a strong interest in broadband and has passed legislation regarding it. But Congress has never passed a statute declaring BIAS a telecommunications service, even though bills to do so have been introduced. For example, the Net Neutrality and Broadband Justice Act of 2022 proposed to amend the Communications Act's definition of telecommunications service to include BIAS.[53] Neither this nor other similar bills were ever enacted.

Congress therefore has expressed strong interest in broadband but has rejected attempts to classify BIAS as a telecommunications service, and congressional authorization of authority must be clear to clear the major questions hurdle.

So what will happen?

Most cases take years to reach the Supreme Court and it's entirely possible that a shuffling of the political and regulatory deck could render litigation moot. But based on this analysis, it appears that a telecommunications classification may fail at the Supreme Court under the major questions doctrine. It likely is a question of vast economic and political significance and there appears to be no clear congressional authorization for the power the FCC is asserting. Such a ruling would be a victory for the separation of powers principle that Congress makes decisions of vast economic and political significance rather than unelected agencies.

About the author

Brian A. Rankin is an Adjunct Fellow at the Competitive Enterprise Institute who focuses on communications and technology issues. He is an attorney with over 30 years of experience practicing law for cable, telecommunications, and technology companies. His practice has included regulatory and policy matters, including advocacy before federal, state and local agencies, as well as counsel for business operations, mergers and acquisitions and other transactions.

[51] 47 U.S.C. § 153(24).

[52] For examples of detailed discussions as to why an information service classification of BIAS is the best reading of the Act, see Federal Communications Commission, Declaratory Ruling, Report and Order, and Order, FCC 17-166, paragraphs 26-64; Comments of the U.S. Chamber of Commerce, In the Matter of Safeguarding the Open Internet, before the Federal Communications Commission, WC Docket 23-320, December 14, 2023, pp. 40-49, https://www.fcc.gov/ecfs/document/1214121718819/1.

[53] H.R. 8573 – Net Neutrality and Broadband Justice Act of 2022, 117th Congress, Second Session, https://www.congress.gov/bill/117th-congress/house-bill/8573/text.

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