[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 19-1140 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, and
AMERICAN PUBLIC HEALTH ASSOCIATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, and
ANDREW WHEELER, Administrator,
Respondents.

On Petition for Review of a Final Rule of the
U.S. Environmental Protection Agency

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* National Association of Home Builders states as follows:

A. Parties, Intervenors, and *Amici*

All parties, intervenors, and *amici* appearing before this Court are listed in the Brief for the State and Municipal Petitioners and the Brief for Respondents EPA, et al.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Respondents EPA, et al.

C. Related Cases

All related petitions challenging the final agency action at issue have been consolidated at Case No. 19-1140.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Home Builders ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no parent corporation and no publicly traded stock. Accordingly, no publicly held corporation owns 10% or more of its stock.

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CERTIFICATE OF COUNSEL PER D.C. CIRCUIT RULE 29(d)

Counsel for *amicus curiae* National Association of Home Builders (NAHB) hereby certifies, pursuant to D.C. Circuit Rule 29(d), that it is not practicable for NAHB to file a joint *amicus curiae* brief with other potential *amici* in support of Respondent. NAHB certifies that a separate brief is necessary because NAHB intends to proffer unique information focused on its own prior comments and experience regarding the unlawful nature and negative impacts of the Clean Power Plan, particularly focusing on how it would affect the builders and buyers of homes. This separate brief will allow the Court to receive this limited, targeted information efficiently without requiring NAHB to take positions on other issues.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of uncommon acronyms and abbreviations used in this brief:

BSER	Best System of Emission Reduction
CAA	Clean Air Act
EGU	Electric Generating Unit
EPA	Environmental Protection Agency
NAHB	National Association of Home Builders
Repeal Rule	Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019)

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is "to protect the American Dream of housing opportunities for all, while working to achieve professional success for its members who build communities, create jobs and strengthen our economy."[1] Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80% of all new homes built in the United States. The remaining members are associates working in closely-related fields, like mortgage finance and building products and services. NAHB's members collectively employ over 3.4 million people nationwide.

To achieve its goal of ensuring that all Americans have access to safe, decent, and affordable housing, NAHB frequently participates in regulatory proceedings and litigation. In this vein, NAHB actively participated in the Environmental Protection Agency (EPA or Agency) rulemaking processes for the Clean Power Plan and, more recently, for its repeal in conjunction with the Affordable Clean Energy Rule. Unlawful and otherwise problematic

[1] NAHB's mission statement is available at https://www.nahb.org/Why-NAHB/About-NAHB/About-NAHB (last visited June 22, 2020).

provisions in the Clean Power Plan that threatened significant harm to NAHB's mission and members led NAHB to participate in these regulatory proceedings, and now, this litigation.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Regulatory approaches are not "carved in stone." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). But neither should courts approve of whimsical change, and the Supreme Court therefore—and sensibly—requires agencies to have "good reasons" to unravel their prior work. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). With respect to rescinding the Clean Power Plan (Repeal Rule), 84 Fed. Reg. 32,520, (July 8, 2019), such good reasons are manifest. NAHB provides this *amicus curiae* brief solely to support the Repeal Rule[3] and illustrate why the Clean Power Plan was so flawed that its elimination cannot possibly be wrong.

As EPA itself has come to recognize, the Clean Power Plan constituted

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[2] After all parties consented to the submission of *amicus curiae* briefs on March 20, 2020, NAHB filed its notice of intention to participate as an *amicus curiae* on March 24, 2020. Fed. R. App. P. 29(a)(2); D.C. Circuit R. 29(b). No party's counsel authored this brief in whole or part; no party or party's counsel—or anyone other than *amicus curiae* NAHB, its members, and its counsel—contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

[3] This brief takes no position on the Affordable Clean Energy Rule as a replacement for the Clean Power Plan or on the implementing guidelines.

a paradigm shift with respect to the Agency's regulatory approach under Clean Air Act (CAA) Section 111(d), 42 U.S.C. § 7411(d). 84 Fed. Reg. at 32,523 (observing that the Clean Power Plan "encompass[ed] measures the EPA had never before envisioned in promulgating performance standards under CAA section 111"). Without any new statutory grant of power or discernible limiting principle, the Plan expanded EPA's traditional regulatory focus from establishing emissions limitations at electric generating units (EGUs) (*i.e.*, at the source), all the way to pushing energy codes for new homes—something far outside of the Agency's experience and expertise. However laudable the Agency's ambition to address climate change may have been, this expansive approach was impermissible.

Among the many "good reasons" for the Repeal Rule—beyond ensuring fidelity to the statute—are restraining blatant and improper federal encroachment into state and local regulatory domains (*e.g.*, demand-side energy efficiency programs)[4] and helping to ensure that prospective home buyers will have access to affordable housing, which is in short supply in many

[4] "Demand-side energy efficiency measures" include, *inter alia*, (1) measures that "reduce electricity use in residential and commercial buildings, industrial facilities, and other grid-connected equipment"; (2) "[w]ater efficiency programs that improve [energy efficiency] at water and wastewater treatment facilities"; and (3) state or local requirements that result in electricity savings, such as building energy codes and state appliance and equipment standards. *See* 80 Fed. Reg. 64,662, 64,904 (Oct. 23, 2015).

areas of the country. EPA rightly exercised caution, as the Clean Power Plan's effects on the housing industry are not universally beneficial even for the environment. Indeed, by raising the price of new homes, Americans would be far more likely to rely on existing (and far less energy-efficient) housing stocks.

Accordingly, EPA had many "good reasons," as *FCC v. Fox Television Stations* requires, to take swift and decisive action to curb what otherwise would effectuate an unauthorized shift both in the law and the economy. Based on these reasons alone, there is good cause for upholding the Repeal Rule and denying the petition in that respect.

ARGUMENT

The Clean Power Plan lacked an adequate legal foundation and unjustifiably threatened the supply of affordable housing for consumers. Over the past six years, NAHB vigorously has participated in the rulemaking proceedings related to the Clean Power Plan, including, most recently, its repeal.[5]

[5] *See* NAHB Comments on EPA's Proposed Rule: Carbon Pollution Guidelines for Existing Power Plants: Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units, EPA Docket No. EPA-HQ-OAR-2013-0602 (Dec. 1, 2014); NAHB Petition for Reconsideration of the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, EPA Docket No. EPA-HQ-OAR-2013-0602 (Dec. 22, 2015); NAHB Comments on the Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading

NAHB's argument begins with a brief discussion of some important background and concludes by showing that the Repeal Rule rightfully eliminates the Clean Power Plan's overly expansive regulatory framework.

I. The Clean Power Plan unlawfully expanded EPA's regulatory reach to measures applicable far beyond the source.

To achieve its ambitious climate-change goals, EPA acknowledged its intention in the Clean Power Plan to employ a "broader, forward-thinking approach to the design of programs to yield critical CO_2 reductions." 79 Fed. Reg. 34,830, 34,845 (June 18, 2014). True to its word, in an unprecedented regulatory effort, the Agency defined BSER more broadly than ever before. *See id.* at 34,844-34,845; *see also* 84 Fed. Reg. at 32,526 (confirming that the Clean Power Plan "was the first time" EPA interpreted BSER "to authorize measures wholly outside a particular source"). But in doing so, EPA went too far. Among other things, it assumed license and influence over demand-

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Rules; Amendments to Framework Regulations, EPA Docket No. EPA–HQ–OAR–2015–0199 & Evaluation Measurement and Verification (EM&V) Guidance for Demand-Side Energy Efficiency (EE) (Jan. 21, 2016); NAHB Comments on Proposed Clean Energy Incentive Program Design Details, EPA Docket No. EPA-HQ-OAR-2016-0033 (Oct. 31, 2016); NAHB Comments on Proposed Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, EPA Docket No. EPA-HQ-OAR-2017-0355 (April 26, 2018); NAHB Comments on Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, EPA Docket No. EPA-HQ-OAR-2017-0355 (Oct. 30, 2018).

side energy efficiency programs like building energy codes that are committed to state and local regulation. Agencies can and *should* reverse course to correct such excesses, and the Repeal Rule rightly reins in EPA's regulatory meddling in areas where it has no congressionally prescribed role, experience, or expertise.

To avoid unnecessary repetition,[6] it suffices to say that CAA Section 111(d) requires states to develop and submit plans to EPA for approval that establish standards of performance for categories of existing stationary sources (*e.g.*, fossil-fuel-fired EGUs) with respect to pollutant emissions (*e.g.*, carbon dioxide (CO_2) emissions). *See* 42 U.S.C. § 7411(d). Critical to determining the appropriate standards of performance (*i.e.*, pollutant-emissions limits) is how EPA defines the "best system of emissions reduction" (BSER) for the applicable pollutant and source category. 40 C.F.R. §§ 60.22(b)(5); 60.21(e).

At its inception, the Clean Power Plan proposed to define BSER for existing fossil-fuel-fired EGUs in terms of four categories of measures EPA called "building blocks." 79 Fed. Reg. at 34,835. These building blocks included improving efficiency at EGUs (block 1); using lower-emitting EGUs

[6] This brief avoids repeating facts or legal arguments made in the principal brief. *See* D.C. Circuit Rule 29(a).

(block 2); shifting from fossil-fuel-fired EGUs to zero-emitting renewable-energy sources (block 3); and, most relevant here, increasing end-use energy efficiency (block 4). *Id.*

EPA understood that its proposal to use measures related to shifting electricity generation to zero-emitting renewable-energy sources (block 3) and to the adoption of demand-side energy efficiency programs (block 4) constituted a dramatic departure from the Agency's past BSER approach. *See* 79 Fed. Reg. at 34,844-34,845. Before the Clean Power Plan, "*[e]very one*" of EPA's past rulemakings in this area applied emissions-reduction measures "directly to individual sources." 84 Fed. Reg at 32,526 (emphasis added). Despite this, through blocks 3 and 4, EPA was proposing to expand its regulatory reach to matters outside of its legal purview under CAA Section 111(d) and, related to block 4, inside the legal domain of state and local governments (and far beyond the Agency's expertise). For these reasons, NAHB strongly opposed EPA's inclusion of these blocks as BSER. *See* 80 Fed. Reg. 64,662, 64,738 (Oct. 23, 2015).

In its final rule, EPA claimed that it had resolved the legal problems plaguing the proposal. It did not. Although the final Clean Power Plan removed block 4, it left block 3 intact, which suffered from similar inescapable legal deficiencies. By leaving block 3 in place without articulating any

meaningful limiting principle, EPA set a dangerous precedent that, absent the Repeal Rule, would have opened the door for future impermissible Agency power grabs in this area, including the potential restoration of block 4 with its attendant *ultra vires* regulation of demand-side energy efficiency programs.

Keeping that door closed by upholding the Repeal Rule is not only appropriate but also necessary to prevent EPA from encroaching into regulatory domains committed to state and local governments and in which EPA has no experience or expertise. Congress has recognized and defined the limited role that the federal government plays in adopting and enforcing certain demand-side energy efficiency programs, such as residential-building energy codes. *See, e.g.*, 42 U.S.C. § 6831. This role does not include EPA. Instead, any federal role in that arena is exercised by the U.S. Department of Energy and is limited to the following:

- Proposing and reviewing updates to model building energy codes developed by non-governmental entities;
- Determining whether these updated code provisions would provide greater energy efficiency than the former versions of the code; and
- Calling on each state to certify that it has reviewed the updated code provisions and decided whether to revise its respective code to meet or

exceed the standards in those updates.[7]

The Department of Energy's role with respect to residential building energy codes is circumscribed by this legal framework and limited to that of a technical advisor. State and local governments, which are closer to the needs and realities of their economies and constituents, have primary authority to adopt and enforce building energy codes tailored to their jurisdiction's unique needs. *See* 42 U.S.C. § 6831(b)(2)-(3) (recognizing that the Department of Energy "provide[s] for the development and implementation of . . . voluntary performance standards" for new residential buildings and is to "encourage States and local governments to adopt and enforce such standards"); *see also* Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 Harv. Envtl. L. Rev. 335, 337 (2010) (explaining that the "regulation of building codes," including those related to energy, "has long been within the almost exclusive purview of the states, which, in turn, have delegated their authority to local governments").[8] Notably, and importantly for the Repeal Rule, Congress has provided EPA with no role under the CAA in

[7] *See generally* 42 U.S.C. § 6833(a)(5).

[8] The one exception to the Department of Energy's limited role is that Section 413 of the Energy Independence and Security Act of 2007, 42 U.S.C. § 17071, requires the Department to establish energy efficiency standards for manufactured housing. *See* 78 Fed. Reg. 37,995, 37,995 (June 25, 2013).

this process or otherwise with respect to building energy codes—and no party has said otherwise.[9]

II. The Clean Power Plan's focus on demand-side energy efficiency programs was imprudent and improper.

Courts rightly are skeptical about an agency's claims that would "bring about an enormous and transformative expansion in [its] regulatory authority" or have vast economic consequences, especially where the agency "has no expertise." *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The Clean Power Plan did all of these things. Besides grossly enlarging its authority under CAA Section 111(d), EPA's adoption of the Clean Power Plan utterly failed to account for the significant harm its inexpert and haphazard promotion of demand-side energy efficiency programs would have caused the public by increasing housing costs and decreasing the supply of affordable housing. These problems, too, justify the Repeal Rule.

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[9] In addition to its patent substantive problems, the Clean Power Plan also was procedurally deficient, having adopted an entirely new substantive program—the Clean Energy Incentive Program (CEIP)—which did not appear at all in the notice of proposed rulemaking. 80 Fed. Reg. at 64,675–76. Although the CEIP implicated further efforts by EPA to procure wide state adoption of demand-side energy efficiency programs, interested stakeholders like NAHB were denied any opportunity to comment on this new program. What is more, the Clean Power Plan adopted the program without including complete details about how the program would work. 80 Fed. Reg. at 64,675.

New and pervasive demand-side energy efficiency programs—which the Clean Power Plan openly intended to promote—can have devastating consequences for all levels of the economy, large and small businesses, and consumers.[10] Residential construction already is one of the most heavily regulated industries in America, routinely requiring planning, coordination, and authorizations at the federal, state, and local levels for each unit of production. Although the breadth and layers of laws and permitting requirements that businesses in this industry must navigate are largely invisible to home buyers, the public, and regulators like EPA, they nevertheless have profound impacts.[11]

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[10] EPA acknowledged that the "Clean Power Plan puts energy efficiency front and center" and "anticipates that, due to their low costs and large potential in every state, demand-side energy efficiency policies and programs will be a significant component of state compliance plans." *See* EPA, Fact Sheet: Energy Efficiency in the Clean Power Plan, *available at* https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-energy-efficiency-clean-power-plan.html (last visited June 22, 2020); *see also* 80 Fed. Reg. at 64,782 (stating that "demand-side EE programs, in particular, are expected to be a significant compliance method, in light of their low costs").

[11] NAHB Eye on Housing, Paul Emrath, Regulation: Over 30 Percent of the Cost of a Multifamily Development (June 14, 2018) (indicating that regulations imposed by all levels of government "accounts for 32.1 percent of the cost of an average multifamily development"), *available at* http://eyeonhousing.org/2018/06/regulation-over-30-percent-of-the-cost-of-a-multifamily-development/ (last visited June 22, 2020); NAHB Eye on Housing, Robert Dietz, Top Posts of 2016: Regulation is 24.3 Percent of the Average New Home Price (Dec. 27, 2016) (providing that "regulations imposed by government at all levels account for 24.3 percent of the final price of a new single-family home built for sale"), *available at* http://eyeonhousing.org/2016/12/top-posts-of-2016-regulation-is-24-3-

Pushing for the adoption of demand-side energy efficiency programs like building energy codes to achieve emissions reductions presents several serious practical problems for which EPA failed to account when adopting the Clean Power Plan. First, and critically important to NAHB's mission to ensure an adequate supply of affordable housing throughout the country, new building energy codes are *very* costly. For example, in multi-family residential buildings, a study shows that new insulation requirements in certain U.S. regions would "necessitate the use of more insulation as well as framing changes to accommodate the higher insulation levels," which would not only "add[] several thousand dollars to the cost of each apartment unit," but recouping those costs based on the effect of those upgrades would take between "191 to 252 years."[12] And, as confirmed by a December 2018 Home Innovations Research Labs survey of 300 U.S. home builders, the biggest challenges in constructing new homes to meet energy code requirements is cost.[13] Based

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percent-of-the-average-new-home-price/ (last visited June 22, 2020).

[12] *See* Impact of the 2009 and 2012 International Energy Conservation Code in Multifamily Buildings (Mar. 2012), *available at* https://www.nmhc.org/uploadedFiles/Articles/Research/IECC%202009-2012%20Analysis%20FINAL.pdf (last visited June 22, 2020); *see also* Home Innovation Research Labs, Estimated Costs for the 2018 ICC Code Changes for Multifamily Buildings, at 4 (Apr. 2018), *available at* https://www.homeinnovation.com/~/media/Files/Reports/2018-ICC-Code-Changes-for-MF-Buildings-April-2018.pdf (last visited June 22, 2020).

[13] Home Innovation Research Labs, Ed Hudson, Builders Identify Top Challenges in Meeting New Energy Code Requirements (Jan. 11, 2019), *available*

on NAHB member experience, building-energy-code updates consistently lead to incremental (but not insignificant) increases in construction costs that are necessarily passed on to home buyers.

Second, the impacts of these cost increases on housing affordability are not theoretical. For example, every $1,000 increase in the price of a home prevents approximately 158,857 potential home buyers from qualifying for a mortgage.[14] Reducing the number of potential home buyers for new homes (which are more efficient than existing homes)[15] steers more home buyers to older and less efficient homes. In other words, "[m]ore stringent energy conservation requirements for new homes can have a *reverse* effect . . . keeping people in older, less energy-efficient homes."[16]

The Clean Power Plan thus not only would have pushed states towards

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at https://www.homeinnovation.com/about/blog/20190111-eh-builders-identify-top-challenges-in-meeting-new-energy-code-requirements (last visited June 22, 2020).

[14] *See* NAHB Eye On Housing, Na Zhao, NAHB 2020 "Priced Out" Estimates (Jan. 24, 2020), *available at* http://eyeonhousing.org/2020/01/nahb-2020-priced-out-estimates/ (last visited June 22, 2020).

[15] Paul Emrath, et al., *How Much Energy Homes Use, and Why*, at 5 (Nov. 5, 2014), *available at* https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=237901&subContentID=623074 (last visited June 15, 2020).

[16] Paul Emrath, et al., *Residential Greenhouse Gas Emissions*, at 7 (April 30, 2007) (emphasis added), *available at* https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=75563&subContentID=105106 (last visited June 15, 2020).

adopting measures that impose significant costs on home builders, supporting industries, and, ultimately, consumers—but it also counterintuitively may have done little in terms of reducing CO_2 emissions, and possibly could have *increased* emissions. Worse, it would have done all of these things based on the decision-making of an agency without the experience or expertise to properly evaluate these and the other social and economic consequences of such provisions. These considerations, at the very least, qualify as "good reasons" that would support EPA's determination to jettison its unfortunate Clean Power Plan.

* * *

As explained above, the Clean Power Plan was fatally flawed both with respect to law, *supra* Part I, and to policy, *supra* Part II. The Repeal Rule corrects the problems described above—and many others—by revoking the Clean Power Plan, recognizing the irrefutable truth that EPA departed from its "traditional understanding" of CAA Section 111(d) in a way that "significantly exceeded the Agency's authority." *See* 84 Fed. Reg. at 32,523; *see also* 83 Fed. Reg. 44,746, 44,753 (Aug. 31, 2018) (providing that EPA's area of expertise is control of emissions at the source, and thus does not include demand-side energy efficiency programs). Agencies should not reverse course arbitrarily—but EPA's Repeal Rule here was an exercise of sound

administration that warrants this Court's approbation.

CONCLUSION

For the foregoing reasons, among many others, the Court should uphold the Repeal Rule and accordingly deny the petition.

Dated: June 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28 and 32(g)(1), the undersigned counsel for *amicus curiae* certifies that this brief:

(i) complies with the page/type-volume limitation of Rule 32(a)(7) because it contains 3,244 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and (6) because it has been prepared using Microsoft Office Word and is set in Georgia font and size 14-point or higher.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I electronically filed the foregoing amicus curiae brief with the Clerk of the Court using the CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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