Amazon & Antitrust: Restoring Competition in the Digital Economy through Structural Separation Policy

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The federal government's ability to regulate the economic markets that operate within their borders is paramount to any democratic system. This sentiment was expressed by several Framers of the American Constitution – James Madison, Alexander Hamilton, and John Jay – in a collection of essays in support of Constitutional ratification, often referred to as *The Federalist Papers*. The ability of the federal government to exercise such a right was enshrined in the Constitution through the Commerce Clause. The Commerce Clause allowed policy makers in the late nineteenth century to reign during the economic and societal damage of the infamous Robber Baron's business practices. Members of Congress in 1890 were faced with a difficult policy environment. Intense economic advancements combined with rapid market consolidation gave rise to the first American monopolies. These monopolies existed as trusts – a business structure designed to co-ordinate the interests of multiple parties through a unified management structure. These trusts were able to leverage their market dominance to increase profits and expand their reach. The Standard Oil Company of New Jersey – founded by John D. Rockefeller – would attempt to buy out rivals when moving into a new area. If the rival refinery would refuse to sell, Standard Oil would leverage their market influence to establish 'sweetheart deals' with railway companies to transport their products at a cheaper rate. Standard Oil would then flood the market with cheaper oil and force their rival to sell to them or inevitably go out of business. To outlaw these types of harmful business practices and to 'rein in the trusts', policy makers were required to establish new policy instruments – which came in the form of the *Sherman Antitrust Act*[1]. As with the end of the nineteenth century, contemporary society has witnessed similar technological innovation over the past two decades. The proliferation of 'tech giants' has yielded numerous societal benefits. However, investigations into digital markets conducted by the House Judiciary Committee have confirmed the allegations of anticompetitive business practices from the likes of Google, Apple, and Amazon – alleging practices both similar to historical monopolies and new practices exclusive to the digital economy. Using the allegations of Amazon's monopolistic practices outlined in the 2020 Congressional Antitrust Subcommittee Report on Competition in Digital Markets, this paper will seek to demonstrate that the current mechanisms to enforce competition are insufficient for regulating the digital economy. The remainder of the paper will be structured as follows: context will provide background on existing antitrust laws, a case study

[1] *Sherman Antitrust Act of 1890*, 26 Stat. 209, 15 U.S.C § 1–2.

on marketplace relationships in connection to Amazon's anti-competitive practices, and a discussion section to explore the use of structural separations[2] as a best practice for restoring competition in the digital economy.

The introduction of the *Sherman Antitrust Act* – named after its principal author – was borne out of an increasingly tense policy environment in the United States resulting from the consolidation of economic power through the formation of trusts. Senator John Sherman, who served as the 32nd Secretary of the Treasury, was the loudest supporter for antitrust legislation in the Senate. Robert Bork, former Supreme Court Justice, and Antitrust scholar, said Sherman was, “by far the most articulate spokesman for antitrust in Congress”.[3] The act passed the Senate with a near unanimous vote (51-1) on the first day of the 51st United States Congress. Despite the bill’s popularity in Congress, the actual language of the bill has been the subject of harsh criticism and even more contentious litigation. Five years passed between the passage of the *Sherman Act* and the federal government’s first attempt to prosecute an American Trust. In 1892, the American Sugar Refinery Company, through a series of mergers and acquisitions, had monopolized the sugar industry, and they gained control of ninety-eight percent of domestic sugar production.

Following a Congressional investigation, the Cleveland administration sought to break up the Sugar Trust – filing suit under the *Sherman Act* in 1893. Two years after the Cleveland administration filed suit against American Sugar, the court ruled in an 8-1 decision in favour of the defendant in 1895. The Court held that the result of the transaction surely created a monopoly, but a monopoly of manufacturing (here, the refinement of sugar) did not fall under the jurisdiction of commerce, and therefore was not subject to Section 1 of the *Sherman Act*. Writing for the majority opinion, Chief Justice Melville Weston Fuller argued that the Commerce Clause did not vest the State with policing powers to regulate combinations of manufactures.[4] Chief Justice Fuller went on to argue that the power to control manufacturing of an item involves control of its distribution (i.e., commerce), however “affects it only incidentally

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[2] Structural separations are a policy tool that outlines specific organizational structures for firms in designated markets. Separation regimes are used in highly concentrated industries wherein firms participate in harmful biasness conduct and/or the possibility of such conduct is likely due to a firm’s outsized market share.

[3] See Bork (1966). See also Bork (1978).

[4] See majority opinion, *United States v. E.C. Knight Co.,* 156 U.S. 1 (1895), pp. 1 – 35.

and indirectly".[5] Justice John Marshall Harlan, in the lone dissenting opinion, delivered a scathing rebuke of the view of the majority. He argued that the strict, textualist, interpretation of the act would have far-reaching implications that could potentially hinder Congress's ability to regulate commerce under the Commerce Clause of the Constitution. Justice Harlan argued that if the combination of sugar manufacturers under the Sugar Trust was indeed beyond the scope of the Commerce Clause, "it will be cause for regret that the patriotic statesmen who framed the constitution did not foresee the necessity of investing the national government with the power to deal with gigantic monopolies".[6] Justice Harlan continued attacking the majority opinion for its immovable interpretation of the powers invested in Congress by the Framers. He argued, "the constitution, which enumerates the powers committed to the nation for objects of interest to the people of all the states, should not, therefore, be subjected to an interpretation so rigid, technical, and narrow that those objects cannot be accomplished".[7] The sentiments echoed by the lone dissenting Justice served as a stark warning for forward-looking antitrust enforcement. The following administration of President William McKinley witnessed the largest corporate merger movement in American history – largely because of the E.C. Knight decision and McKinley's aversion to antitrust enforcement. Subsequently, the decision in the E.C. Knight case to limit the *Sherman Act's* scope directly necessitated the passage of the *Clayton Act* to allow for substantive enforcement to take place.

Application of the *Sherman Act* yielded many unintended consequences. This included interpreting the law to break up trade unions and rigid jurisprudential interpretation of the Commerce Clause led to a massive wave of mergers. The accumulation of economic power through the monopolization of industries pre-empted the breakup of Standard Oil and American Tobacco; yet it was clear that further legislative action would be required to properly regulate the ever-growing interstate economy of the United States. In 1911, Congress introduced a bill to establish a government entity charged with regulating trade among the states. Congress tried for the next several years to pass legislation establishing a Federal Trade Commission that would effectively and efficiently regulate trade through an administrative board that served functions

[5] See majority opinion, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), pp. 1 – 35.
[6] See dissenting opinion, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), p. 40.
[7] Ibid, p. 41

previously delegated to the courts.[8] With the Election of Woodrow Wilson in 1912, reforming antitrust legislation was a top priority for his incoming administration. This is evidenced by the 1912 Democratic Presidential platform saying of antitrust legislation:

> We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade (…) and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.[9]

President Wilson signed the Federal Trade Commission Act in September of 1914. This was the Wilson administration's first attempt to reduce the harm of the "indefensible and intolerable"[10] effects of private monopoly. With the passage of the *Clayton Antitrust Act* three weeks later, the Democrats were attempting to fulfil their campaign obligations. The Bureau of Corporations, established under the Department of Commerce and Labour in 1903, was absorbed into the newly established Federal Trade Commission (FTC). The jurisdiction of the FTC and updated regulations of which they could enforce were passed three weeks later in the form of the *Clayton Antitrust Act*. The Act looked to increase the role of the federal government in regulating market conditions through the actions of individuals. This was done by prohibiting discriminatory practices, such as preferential rebates or unilateral price discrimination; Congress was expanding the powers of the federal government to ensure fairness in the economy.[11] The second principle prohibited exclusive dealings, which barred an individual from conducting business with other firms as a condition of a sale. It also prohibited tying, which tied the purchase of an item to the requirement that the same buyer also purchase a second item, when these actions "substantially lessen competition or tend to create a monopoly"[12] within a given market. The third principle proposed to close the loophole, established by the Supreme Court, that allowed the targeting of labour movements under the *Sherman Act*.[13] Section 17 of the *Clayton Act* prohibits the application of antitrust laws to break-up labour organizations. The fourth principle was in response to another Supreme Court precedent resulting from the interpretation of the *Sherman*

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[8] See Phillips Sawyer (2019).
[9] See Image 891 of *Woodrow Wilson Papers*: Series 7: Speeches, Writings, and Academic Material, 1873-1923; Subseries A: Speeches, 1882-1923; 1910, Nov. 5-1912, Sept. 26 https://www.loc.gov/resource/mss46029.mss46029-476_0018_1100/?sp=891&r=-0.057,0.136,0.563,0.286,0
[10] Ibid, Image 891.
[11] See Khan (2017).
[12] *Federal Trade Commission Act*, 15 U.S.C § 41 (1914).
[13] See Khan (2019).

Act that spawned the "great merger movement" (1895-1904).[14] During this time – due to the Court's interpretation of the law to horizontal agreements – more than 1,800 firms merged into larger corporations, in violation of the spirit of competition laws, but not in violation of the *Sherman Act.* Section 18 of the *Clayton Act* strengthened merger regulations by requiring firms above specific thresholds to seek approval from the government before purchasing/merging with another firm in the same industry. Enforcement of the *Clayton Act* was the responsibility of the newly established FTC.[15] This regulatory dynamic is still in place in the United States. The following case study will demonstrate the ineffective nature of the current regulatory framework.

Amazon.com Inc. established its operations in Seattle, Washington in 1994. While Amazon began as an online bookseller, it has grown to dominate the modern digital economy. Amazon has expanded its market share as an online marketplace for books to an online marketplace for everything.[16] As an e-commerce platform, Amazon.com is home to over 2.3 million third-party vendors – forty-five times the number of third-party vendors that are on Walmart's e-commerce site (the second largest e-commerce firm).[17] Along with the marketplace of Amazon.com, Amazon owns a private label brand that is in competition with third-party sellers on the same marketplace. Amazon reports the financial information for its cloud-computing business, Amazon Web Services (AWS), separately from its other businesses. Amazon has been able to leverage its market power to increase the market share of both its retail business and its cloud computing business. It has increasingly become a more profitable business, according to the congressional report,

> For 2019, Amazon reported total revenue of about $280 billion, up 20% from the previous year, and a net income of over $11 billion. AWS's revenue increased 37% in 2019 to $35 billion. Retail operations continue to be the platform's largest source of revenue, but AWS is a key source of its overall profits.[18]

The relationship between Amazon and its third-party retailers was the subject of much scrutiny in the Congressional report. According to interviews conducted by the subcommittee team, the

[14] See Lamoreaux (1985).
[15] *Federal Trade Commission Act,* 15 U.S.C § 41 (1914).
[16] See title of Stone (2013).
[17] See Nadler (2020) p. 249.
[18] Ibid p. 248.

dominant market share possessed by Amazon has had a toxic effect on the relationship between the two sides.[19]

Open competition is integral to the free market. When monopolies like Amazon can leverage their dominant e-commerce platform to expand its reach into other markets (i.e., private label products), it stifles competition. Interviews conducted by the antitrust subcommittee, and detailed in the report, provide an overview of the harmful effects Amazon's business practices have on the market and their third-party partners. The Committee report outlines multiple instances of anti-competitive practices demonstrated by Amazon that are harmful to various markets in relation to the digital economy. One instance of this found by the committee:

> The Subcommittee's investigation, however, produced evidence that the platforms' access to competitively significant market data is unique. Specifically, the dominant platforms collect real-time data which, given the scale of their user-base, is akin to near-perfect market intelligence. Whereas firms with a choice among business partners might seek to protect their proprietary data, the platforms' market power lets them compel the collection of this data in the first place.[20]

Amazon's conduct has had a toxic effect on innovation in the digital economy. The committee found that, because of its market dominance, Amazon can force economic concessions that rely on its platform to reach a large portion of the consumer market. This sentiment was attested to by PopSocket's CEO David Barnett before the committee; he cited having to pay "almost two million in marketing dollars in order to remove illegal products from the Amazon marketplace".[21] Barnett explained the negative effect of this policy on his business, claiming he was unable to increase his staff to develop new innovative products at the company.[22] An example of this abuse of dominance demonstrated in the congressional report continue, stating:

> Several market participants told the Subcommittee that they 'live in fear' of the platforms. One said, 'it would be commercial suicide to be in Amazon's crosshairs . . . If Amazon saw us criticizing, I have no doubt they would remove our access and destroy our business'.[23]

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[19] See Nadler, et. al. (2020), pg. 248; see also Amazon.com Inc., Annual Report (Form 10-K) 3 (Jan. 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf

[20] Ibid p. 377.

[21] Ibid p. 51.

[22] Ibid p. 51.

[23] Ibid p. 74.

This is a clear demonstration of the influence wielded by Amazon because of its market dominance. Retribution against the 'partners' that Amazon claims to support is yet another demonstration of the harm brought by its monopoly.

Amazon's behaviour in respect to mergers and acquisitions was also of interest to the antitrust subcommittee. According to the committee, Amazon has acquired at least 100 companies across a broad range of markets. The largest expansion into new markets occurred in 2017 with their $13.7 billion acquisition of *Whole Foods*; in 2018, Amazon spent $1.2 billion and $1 billion for *Ring* and *PillPack* respectively.[24] These acquisitions fall in line with expansion of Amazon into new markets. For *Ring*, their video doorbell and home security services can be integrated with another core business of Amazon, *Alexa,* a virtual assistant technology. With Amazon's purchase of *PillPack*, the firm has expanded its market share in the healthcare industry and laid the groundwork for their 2020 announcement of their newest business, *Amazon Pharmacy*. The committees report categorizes Amazon's merger strategy as,

> Amazon's acquisition strategy has led to fewer choices for consumers in terms of differentiated online retail channels, as well as reduced competitive pressure in terms of price and quality (…) Amazon's acquisitions set in motion a self- reinforcing cycle, creating an ever-widening gap between the platform and its competitors.[25]

The success of a business should be the result of the market placing value in the product or service the business provides through the reallocation of resources from individuals to these firms. However, when firms can leverage their monopoly power to absorb their smaller competitors in order to avoid competition, they no longer are subject to the mercy of market forces, and from that point on, dictate market forces.[26] One area for concern in relation to market consolidation is that of e-books. Since its first acquisition of the company *Bookpages*, a British company, in 1998, Amazon has acquired over one hundred companies across various industries.[27] In 2004, Amazon purchased the Chinese ecommerce company *Joyo.com* (which now operates as Amazon China). In 2005, Amazon bought *Mobipocket,* a software company developing formats for e-book files. In 2008, Amazon purchased *Audible*, an audio book platform, and *AbeBooks*, a Canadian e-commerce platform. In the e-reader market, Amazon has

[24] See Nadler et al., p. 264.
[25] Ibid p. 262.
[26] See Spulber et al. (2014).
[27] See Nadler et al., p. 413.

also acquired: *Toby Press*, *The Book Depository*, *Avalon Books*, *Goodreads*, and *Liquavista*. The result of these mergers has led to consolidation in the e-reader market to an astronomical scale. Amazon, with its 83.6% of market share, has a monopoly on the e-reader industry; their next closest competitor is *Kobo*, with a mere 13.4%. One way of measuring the relative concentration of a given market is with the Herfindahl-Hirschman Index (HHI).[28] The e-reader industry has an HHI of over 7,000 – indicating a significantly concentrated market.[29] In another major market for Amazon – cloud computing services – Amazon has also been attempting to leverage their influence to consolidate the market. Amazon's acquisitions relating to its cloud business include *Amiato, 2lemetry, ClusterK, AppThwack, Elemental Technologies, Safaba Translation Systems, Orbeus, NICE, Emvantage Payments, Cloud9 IDE, harvest.ai*, *Thinkbox Software*, and *Graphiq*, among others. Amazon's expansion in the cloud market has led to the moderate concentration of the market. The global cloud market has an HHI of 1,563, demonstrating that the cloud market is far less concentrated than that of the e-reader market. Nevertheless, Amazon has been able to obtain a market share equal to their three next closest competitors combined (Microsoft's Azure, 18%; Google Cloud 9%; Alibaba Cloud, 6%) for their most profitable business.

Amazon's market dominance can be witnessed through the staggering sum of acquisitions over its history as a company. Yet, it is just one way that Amazon can exploit its possession of monopoly power. According to the subcommittees report,

> Amazon has significant and durable market power in the U.S. online retail market … Based on the information Subcommittee staff gathered during its investigation, estimates that place Amazon's share of U.S. e-commerce at about 50% or higher are more credible than lower estimates of 30-40%.[30]

The committee also alleged that Amazon controls 65% - 70% of all online sales conducted in the United States. As the owner and operator of the world's largest online marketplace, Amazon can collect marketplace analytics and use them to improve their private label products and/or expand into new categories. Armed with business trend analytics that its third-party sellers are unable to access, Amazon can tailor its expansion strategy with scalpel-like precision[31]. They can also

[28] HHI can be measured between 0-10,000 (the larger the sum, the more concentrated the industry). HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. See https://www.justice.gov/atr/herfindahl-hirschman-index

[29] The U.S. Department of Justice considers markets with the HHI between 1,500 to 2,500 to be moderately concentrated; they consider any market with the HHI in excess of 2,500 to be highly concentrated.

[30] See Nadler, et. al. (2020), pg. 254.

[31] Ibid p. 42

leverage the size and profitability of its other businesses to subsidize their entrance into new markets. This often leads to Amazon being able to price their private label products at a discount to the prices offered by third-party sellers. Leveraging the ability to initially enter a market at a loss, Amazon can also preferentially promote its own private brands. This is done by placing its products on pages with higher visibility, increasing the chance they will be selected by consumers. Amazon can also leverage its market dominance by forcing certain brand manufacturers that would prefer to be third-party sellers into being wholesalers for Amazon instead. In 2016, Sebastian Gunningham, then Senior Vice President of Amazon Marketplace, echoed this sentiment, saying,

> I would add that there are x,000 suppliers around the world that do not get this choice... I am talking about the Apple, Nikes and P&G, etc... We don't want to open that door; relationship has to be reseller.[32]

The subcommittee also found that it was not uncommon for Amazon to use its brand standards policy to shut down a brand's third-party seller account and force brands into an exclusive wholesaler relationship.[33]

The Congressional report into digital markets highlights several harmful business practices undertaken by Amazon – the first of which is the conflict of interest when a firm acts as both a marketplace and a vendor on said marketplace. When a business operates as a digital marketplace for third-party vendors, there is an obvious conflict of interest when that same business can offer products and/or services in competition with third parties that operate on the same platform. Preferential placement in search results for private label products is just one way that Amazon can leverage its conflict of interest in the e-commerce market to its own financial benefit. Another way Amazon can benefit from conflicts of interest relates to its collection of marketplace data for products relevant to its ancillary businesses. As previously demonstrated, Amazon can provide its private label brands with sensitive market information to gain a competitive edge.

Preventing protected profits from financing entry into new markets has been a concern of policy makers throughout the history of antitrust.[34] Naturally, this was another concern of the antitrust subcommittee. Federal regulators like the FTC were concerned with the ability of

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[32] Ibid p. 259
[33] Ibid. p. 259
[34] See *Sherman Antitrust Act of 1890*, 26 Stat. 209, 15 U.S.C § 1–2.

banking monopolies to expand into new lines of business, such as commerce, by leveraging their inherent government-advantage.[35] This can be seen across the globe (for example, the British Government regarding the Bank of England). The ability to preferentially finance companies that Banks have financial stakes in – or provide lack of financing to competitors of their own business – presents an apparent conflict of interest that is dangerous to competition. In the case of Amazon, their ability to leverage financing new ventures from their ever-expanding economic behemoth allows them to enter markets without being hindered by barriers experienced by competitors already in the market or by new potential entrants. These barriers include access to financing, name recognition, and market share (i.e., e-commerce). Regulating structural separations upon Amazon would prevent them from entering new markets and allow for more diverse competition, without the veil of monopoly smothering an industry. During the breaking-up of American Telegraph and Telephone in 1984, the government acknowledged the threatening ability of cross-financing; the result was the increase in competition in the data-processing market. If Amazon was prohibited from entering consumer goods markets – thus preventing them from leveraging their financial might and access to behavioural analytics from its marketplace – competition among smaller firms would increase and new players would be able to enter the market without the barrier of monopoly hindering them from doing so.

The final concern of relevance highlighted by the Congressional report into digital markets related to the prevention of excessive concentrations of market power. The harm of firms with dominant monopoly power is not limited to the markets of which said monopolized firm is a part of. The concentration of economic power in the hands of non-elected, modern-day Robber Barons, threatens the stability of democratic governance in the United States. This fear of *capital-based* tyranny spurred the original antitrust movement[36], with an understanding that consolidation of commercial markets would infringe on democratic processes. Structural separations are one method that regulators can undertake to reduce the burden of *capital-based* tyranny. Under a structural separation regime, specific organizational structures would be set in place for firms in designated markets. Separation regimes are used in highly concentrated industries wherein firms participate in harmful business conduct and/or the possibility of such conduct is likely due to a firm’s outsized market share. As highlighted by Khan (2017), the

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[35] See Hockett & Omarova, 2016.
[36] See Phillips Sawyer (2019).

implementation of structural regimes was common practice prior to the rise of the Chicago School.[37] When structural separations are put in place, they create safeguards that prevent the toxic accumulation of power created by monopolies and limit the ability of infrastructure-like firms from operating businesses that compete against other parties that rely on the infrastructure. In the case of Amazon, the implementation of regulations that establish structural separations strictly prohibit the operators of marketplaces from competing against the third parties that use their platform. This would enable smaller firms to operate in a more competitive marketplace; with dominant firms no longer absorbing all the oxygen within a market, consumers will have greater access to a more diverse range of firms to choose from.

In conclusion, this paper examined whether antitrust laws in the United States, as they currently stand, are sufficient to properly regulate the 'tech giants', with a particular examination of Amazon – through a qualitative analysis of historical antitrust legislation and Congressional reports into digital market competition. The report established that current antitrust laws are in fact not sufficient. The issue of antitrust legislation and enforcement is being hindered from multiple angles that have been examined in detail throughout this paper. First, the instruments available for the government to enforce antitrust lack the scope to regulate the digital economy. The *Sherman Act* – the preeminent antitrust law – was written over a century before Amazon was founded. If regulation of the digital economy is to be done through the strict framework established by the current laws, it will be disadvantageous to the economy. Second, antitrust laws have been degraded through rigid interpretations of language by the Supreme Court and have yielded binding precedent that limits the efficiency of antitrust. The Court's use of the consumer welfare standard[38] narrowed the interpretation of the act which is divorced from its initial purpose.[39] Third, the allegations of anti-competitive business practices levelled against Amazon by Congress are beyond the scope of the *Sherman* and *Clayton Acts* – when the acts previously mentioned were debated and written, many of the business practices alleged to have been committed by Amazon could not have been imagined by policy makers at the time. There would be no need to regulate the use of behavioural analytics collected from online platforms in the late 1890s mainly, because 'online platforms' and the internet had not been invented. The initial need

[37] See Khan (2017, pp. 730-732).
[38] See Bork (1966).
[39] See Pitofsky (2008).

for antitrust regulation was borne out of rapid economic expansion and innovation in new industries. With the intention of drafting legislation to properly regulate the digital market, policy makers should explore structural separations into markets where there is significant consolidation. Structural separation can be used to regulate companies that serve as infrastructure in certain markets by preventing them from also competing against other businesses in the market that use their infrastructure. Implementing structural separation policy reduces the harmful market effects on smaller firms which can operate in a more competitive marketplace. Structural separation can eliminate conflicts of interest between the operators of marketplaces and their private label brands. Structural separation can prevent monopolies from leveraging their ability to cross-finance into new markets. In the case of structural separations to regulate Amazon, the implementation of regulations strictly prohibits the operators of marketplaces from competing against the third parties that use their platform. This will allow competition within the e-commerce market to flourish.

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