

23-13138

United States Court of Appeals
for the
Eleventh Circuit

AMERICAN ALLIANCE FOR EQUAL RIGHTS,

Plaintiff/Appellant,

– v. –

FEARLESS FUND MANAGEMENT, LLC, *ET AL.*,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO: 1:23-cv-03424-TWT (Hon. Thomas W. Trash, Jr.)

**BRIEF OF *AMICI CURIAE* NATIONAL VENTURE
CAPITAL ASSOCIATION AND VENTURE FORWARD
IN SUPPORT OF APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Amici Curiae National Venture Capital Association (“NVCA”) and The Venture Capital Foundation (a/k/a Venture Forward) hereby certify the following:

In addition to those identified in the Certificates of Interested Persons and Corporate Disclosure Statements filed by Plaintiff-Appellant, Defendants-Appellees, and any other *Amicus Curiae*, the following is a complete list of persons and entities known by NVCA and Venture Forward to have an interest in the outcome of this particular case or appeal:

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NVCA is a non-profit trade association with no subsidiaries or parent companies. NVCA does not issue stock and no publicly held corporation has a membership interest of ten percent or more in NVCA.

Venture Forward is a non-profit and supporting organization to NVCA. It was founded by, but is not a subsidiary of, NVCA. It has no subsidiaries or parent companies. Venture Forward does not issue stock and no publicly held corporation has a membership interest of ten percent or more in Venture Forward.

Per Circuit Rule 26.1-2(c), *Amici Curiae* certify that the CIP contained in the first brief filed and in any other brief that has been filed, including this brief, is complete.

Respectfully Submitted,
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Dated: December 12, 2023

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INTERESTS OF THE *AMICI CURIAE*¹

The National Venture Capital Association (“NVCA”) is a nonprofit trade association representing U.S. venture capital investors and the entrepreneurs they support. NVCA was founded in 1973. Its membership spans hundreds of VC firms from more than 40 states, including venture capital partnerships, corporate venture groups, seed capital funds, growth equity firms, and university innovation funds. NVCA is a leading advocate for America’s startup ecosystem and has a deep commitment to promoting venture capital’s role in enhancing U.S. economic growth and innovation. NVCA advocates at the federal level on behalf of venture capital firms and their portfolio companies for policies that encourage innovation. It also delivers resources and programs to help venture capital firms succeed.

The Venture Capital Foundation (a/k/a Venture Forward) is a nonprofit and supporting organization to NVCA, dedicated to addressing serious imbalances within the venture capital industry that prevent it from maximizing innovation, impact, and returns. Those imbalances exist both within the investor workforce and in the ecosystem of founders and entrepreneurs who need access to early capital investment. Venture Forward focuses on advancing Diversity, Equity, and Inclusion

¹ No party, party’s counsel, or person other than *amici*, their members, or their counsel has authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief.

(“DE&I”) among the investor class, striving to remove barriers for new entrants into venture capital through education, resources, and network building. Venture Forward also works directly with venture capital firms to expand their networks and help them implement DE&I strategies.

An important industry resource that NVCA and Venture Forward provide is the biennial VC Human Capital Survey, which collects demographic information on the venture capital industry’s workforce and information regarding firm talent management practices and DE&I programs.

NVCA and Venture Forward are keenly interested in promoting equal opportunity in the venture capital industry, including by correcting historical exclusion based on gender, geography, and race. Innovation—led by high-growth startups—is the bedrock of America’s economic success. When women, people of color, people from underrepresented geographic regions, and other marginalized communities are cut off from access to capital, the country’s economy suffers. Increasing representation of these groups in the venture capital industry is thus critical to maximizing economic opportunities for all. Grant programs like Fearless Foundation’s Strivers Grant Contest are an indispensable part of this effort.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

When venture capital thrives, the U.S. economy grows. And venture capital thrives most when it promotes innovation from businesses from all parts of the country. Too often, however, venture financing goes to companies on the coasts, founded and run disproportionately by non-minority entrepreneurs. This stifles growth—for example, companies with all-male founding teams perform, on average, worse than counterparts with at least one female founder. *See* 10 Year Project, First Round Capital (2015).² Venture capital is a relationship-driven, apprenticeship-based industry, so it is not surprising that most venture capital investors are non-minorities geographically based on the coasts, and most venture funding goes to non-minority-owned enterprise, geographically based on the coasts.

Just as with the economy as a whole, the promise of a more robust venture capital industry lies in diversifying its reach, so that the best ideas, not immutable characteristics, determine the direction of the country's growth. Grant programs like Fearless Foundation's that aim to redirect investment to Black-women-owned businesses are critical to realizing this goal. The law does not and should not prohibit these salutary initiatives, and the district court's order should be affirmed.

² Available at <http://10years.firstround.com> (last visited on Dec. 5, 2023).

ARGUMENT

I. Venture Capital Is The Engine Of U.S. Economic Growth.

Venture capital is, in effect, investment in innovation. Venture capital firms invest billions of dollars each year in small and expanding businesses that employ thousands of Americans. Between 1990 and 2020, employment at VC-backed companies grew at a rate of 8 times compared to non-VC backed businesses. *See Employment Dynamics at VC-Backed Companies in the United States: 1990 to 2020*, NVCA.org.³ And many of those businesses go on to become staples of the economy, collectively creating millions of jobs and countless new products. Microsoft, Apple, Amazon, Alphabet, and Facebook were all at one time venture-backed. *See What Is Venture Capital?*, NVCA.org.⁴ Forty-two percent of drugs approved by the FDA between 2009 and 2018 originated with venture capital funding. *See Trends in Healthcare Investments and Exits 2019 4*, Silicon Valley Bank (2019).⁵

Venture capital investment typically comes at a critical time in a company's development and growth. Early-stage investments provide risk capital to entrepreneurs to help them build and scale their products or services from what may

³ Available at <https://nvca.org/employment-dynamics> (last visited on Dec. 5, 2023).

⁴ Available at <https://nvca.org/about-us/what-is-vc> (last visited on Dec. 5, 2023).

⁵ Available at <https://www.svb.com/globalassets/library/managedassets/pdfs/healthcare-report-2019-midyear.pdf> (last visited on Dec. 5, 2023).

just be an innovative idea. *See* Ben Fowler, *Stages of Venture Capital*, Silicon Valley Bank.⁶ Because early-stage companies typically are not yet generating revenue, these investments are considered too risky for traditional bank loans or too small for private equity. *See What is Venture Capital?*, *supra*. Venture capital fills the gap, ensuring that smaller companies get the financial oxygen they need to scale and thrive. *Id.*

Venture capital firms also offer critical operational support to their investment companies. VC firms partner with company management to develop strategic priorities, solicit additional investment, and hire new employees. *See* Paul Gompers, William Gornall, Steven N. Kaplan & Ilya A. Strebulaev, *How Do Venture Capitalists Make Decisions?*, Nat'l Bureau of Econ. Rsch. (Sept. 2016).⁷

Venture capital is an increasingly significant source of funding for growing businesses. In 2004, venture-backed companies raised more than \$26 billion globally. *See* 2022 Venture Yearbook, NVCA.org.⁸ In 2022, venture-backed

⁶ Available at <https://www.svb.com/startup-insights/vc-relations/stages-of-venture-capital> (last visited on Dec. 5, 2023).

⁷ Available at https://www.nber.org/system/files/working_papers/w22587/w22587.pdf (last visited on Dec. 5, 2023).

⁸ Available at <https://nvca.org/wp-content/uploads/2023/03/2022-Venture-Yearbook-PDF-Data.pdf> (last visited on Dec. 5, 2023).

companies raised more than \$240 billion in the United States alone. *Id.* Access to venture capital is, in short, a prerequisite to the success of many new companies.

II. The Venture Capital Industry Has Historically Excluded Black Employees, Partners, and Founders—And In Particular, Black Women.

Access to venture capital is also not equal for all. By and large, the “gender and racial makeup of the venture capital industry is staggeringly homogeneous.” Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, Harvard Business Review (July-Aug. 2018).⁹ And the lion’s share of venture capital financing goes to non-minority-owned businesses.

VC Investors. Survey data show that the industry “has remained relatively uniform for the past 28 years,” largely controlled by non-minority employees. *Id.* Between 1990 and 2016, “[o]nly 8% of the investors [were] women,” while “about 2% of VC investors [were] Hispanic, and fewer than 1% [were] [B]lack.” *Id.*; *compare 2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021) (reporting U.S. population 19% Hispanic or Latino and 12% Black).¹⁰ Venture capitalists “have been, and continue to be,

⁹ Available at <https://hbr.org/2018/07/the-other-diversity-dividend> (last visited on Dec. 5, 2023).

¹⁰ Available at <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> (last visited on Dec. 11, 2023).

predominately white and male.” Jennifer S. Fan, *Startup Biases*, 56 U.C. Davis L. Rev. 1423, 1439–40 (2023).

In 2016, Black employees comprised just 3% of the workforce at venture capital firms. See Deloitte University Leadership Center for Inclusion, *NVCA-Deloitte Human Capital Survey Report* 3, 8 (2016).¹¹ By 2022, that percentage had increased to just 5%, while white employees constituted 70% of the workforce. Deloitte, Venture Forward & NVCA, *VC Human Capital Survey* 21 (2023) (hereinafter “*NVCA 2023 Survey*”).¹² Among junior-level investment professionals, Black employment is slightly higher, but significant disparities

¹¹ Available at <https://nvca.org/wp-content/uploads/2019/10/NVCA-Deloitte-Human-Capital-Survey-2016.pdf> (last visited on Dec. 5, 2023). NVCA uses a robust survey methodology to gather annual data on the state of venture capital. For the most recent iteration of NVCA’s survey, a total of 315 venture capital firms participated, which allowed NVCA to gather information on gender for “5,736 US-based fulltime employees at these firms as of June 30, 2022,” along with “information on race for 4,504 employees,” and “information on ethnicity (i.e., Hispanic versus non-Hispanic) for 3,882 employees.” Deloitte, Venture Forward & NVCA, *VC Human Capital Survey* 41–42 (2023), available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-audit-human-capital-survey-report.pdf> (last visited on Dec. 5, 2023). In addition, “participating firms had a total of \$594.5 billion in venture capital assets under management and a total of 42,735 US-based portfolio companies.” *Id.*

¹² Available at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-audit-human-capital-survey-report.pdf> (last visited on Dec. 5, 2023).

persist: Black employees filled 7% of junior investment roles in 2022, while white employees filled 61%. *Id.*

Racial disparities are even more pronounced at the partner level, with investment decision-making driven by non-minority leaders. In 2022, only 4% of investment partners at venture capital firms were Black—and that number represented only a small increase from a stagnant 3% in 2020 and 2018. *Id.*; *see also* Fan, *supra*, at 1441. Meanwhile, white employees held 75% of partner roles. *NVCA 2023 Survey* at 21. There is a “disproportionately low representation of Black employees” holding any leadership responsibility on investment teams, ranging from originating deals (only 5% Black employees), to sitting on portfolio company boards (4% Black), to serving on firm investment committees (4% Black), to owning a management company (5% Black). *Id.* at 19; *accord* Fan, *supra*, at 1441 (“[D]ecision-makers are still predominantly white and male.”).

Black women are among the least represented in venture capital employment, holding just 1% of investment partner positions in 2022, compared to 13% held by white women, 5% held by Asian/Pacific Islander women, and 2% held by Hispanic women. *NVCA 2023 Survey* at 15, 22. In 2020, Black women comprised a mere 0.25% of the investment partner ranks. *Id.* at 22.

These disparities are not without cause. People of color, and Black women in particular, face significant barriers to entry. For one thing, the size and recruiting dynamics of venture capital firms affect who gets in the door. Firms “tend to be small,” with low turnover in senior roles, and NVCA’s most recent survey found that 79% of respondents recruit by “rely[ing] on personal networks” which “tend to be homogenous and can lead to the exclusion of qualified professionals from underrepresented groups.” *Id.* at 11. Leaders may be drawn to working and investing with individuals from their own demographic groups: “[h]omophily, or the natural tendency to gravitate toward people from the same demographic group or similar backgrounds, can play a role when making an investment or hiring decision.” *See id.* at 9. In short, existing networks in the industry—which are predominantly non-Black and male—can reinforce themselves; one study even found that “[b]elonging to the same racial group increases the propensity to work together by 39.2%, and having a degree from the same school increases it by 34.4%.” Gompers & Kovvali, *supra*.

These network biases are compounded by financial barriers. Venture capital is a “risky and long-term asset class, where most investments inevitably fail.”
Statement of Maryam Haque Before the Committee on Financial Services Task

Force on Financial Technology 7 (June 30, 2022).¹³ This incentivizes participation by investors who have money to begin with, and can afford to bear the risk. And it puts venture capital investing opportunities out of reach for minorities who lack “financial security or personal wealth.” *Id.*

VC Portfolio Companies. The vast majority of venture capital funds are invested into non-minority enterprises. In the first half of 2023, venture-capital-backed startups raised \$75 billion, but only 0.75% of those funds were invested in startups with Black founders. See Dominic-Madori Davis, *Commentary: The Old Guard in Venture Reigns Supreme*, TechCrunch (Aug. 2, 2023).¹⁴ That makes this year so far slightly worse than 2021, when “VC-backed startups raised more than \$345 billion in VC funding, yet only 2.4% was invested in startups led by female founders, 1.3% in Black founders, and 2.1% in Hispanic founders.” *NVCA 2023 Survey* at 8; see also Olin Brookings Commission, *Bridging the Startup Funding Gap for Women, Black and Latinx Entrepreneurs* 13 (2023) (finding that “Black-

¹³ Available at <https://democrats-financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-harquem-20220630.pdf> (last visited on Dec. 5, 2023).

¹⁴ Available at <https://techcrunch.com/2023/08/02/black-founders-funding-h1-2023> (last visited on Dec. 5, 2023).

founded companies raised just \$2.2 billion in 2022, down from \$4.2 billion in 2021”).¹⁵

Mirroring the makeup of the VC industry itself, the racial disparities in VC portfolio companies are particularly stark for Black women. In an industry where “investment or hiring decision[s]” may be driven by leaders’ existing networks, *see NVCA 2023 Survey* at 9; Gompers & Kovvali, *supra*, the result is that “Black women continue to receive a paltry amount of all venture funding,” Fan, *supra*, at 1459. Between 2009 and 2017, “firms started by Black women received only .0006% of VC funding raised by startups.” Anne Kniggendorf, *The Barriers to Funding Equality Persist for Black Women*, Kauffman Foundation: Currents (May 2, 2019) (quoting survey data from DigitalUndivided, *The State of Black Women Founders* (ProjectDiane 2018)).¹⁶ “Before 2021, only 93 Black female founders had raised \$1 million or more in venture capital, and prior to 2018 just 34 had done so.” Alexandra York et al., *Meet the 71 Black Women Who Raised \$1 Million or More in VC Funding Since 2021*, Business Insider (Apr. 21, 2023).¹⁷

¹⁵ Available at https://olin.wustl.edu/_assets/docs/research/OlinBrookingsCommission2023-PolicyPaper.pdf (last visited on Dec. 5, 2023).

¹⁶ Available at <https://www.kauffman.org/currents/barriers-to-funding-equality-persist-for-black-women> (last visited on Dec. 5, 2023).

¹⁷ Available at <https://www.businessinsider.com/black-female-founders-raised-millions-in-vc-this-year-2021-9> (last visited on Dec. 5, 2023).

III. Grant Programs Like Fearless Foundation’s Are Critical To Rectifying Historical Imbalances And Promoting National Economic Growth.

The path to diversifying venture capital lies, in part, in cultivating a robust community of entrepreneurs in need of venture funding. Because VC investing has largely relied on network effects and pattern matching, most companies founded by Black women that merit VC investment have been excluded. But there is no shortage of women-owned businesses ready to grow. Between 2007 and 2019, more than 1,000 women-owned businesses *per day* opened their doors. *The 2019 State of Women-Owned Businesses Report*, American Express 4 (Sept. 2019).¹⁸ From 2014 to 2019, the number of women-owned businesses increased by 21% nationwide, and the number of Black women-owned business grew by 50%. *Id.* As of 2021, Black women-led business made up 36% of all Black-owned businesses with employees. *See* Elana Dure, *Black Women are the Fastest Growing Group of Entrepreneurs. But the Job Isn’t Easy*, J.P. Morgan Insights (Oct. 12, 2021).¹⁹

To take the next step, many Black women-owned businesses require modest seed capital investments. Most are self-funded, with “61% of Black women self-

¹⁸ Available at <https://ventureneer.com/wp-content/uploads/2019/10/Final-2019-state-of-women-owned-businesses-report.pdf> (last visited on Dec. 5, 2023).

¹⁹ Available at <https://www.jpmorgan.com/insights/business/business-planning/black-women-are-the-fastest-growing-group-of-entrepreneurs-but-the-job-isnt-easy#footnote-src-3> (last visited on Dec. 5, 2023).

fund[ing] their total start-up capital.” Donna Kelley, et al., *Black Women Are More Likely to Start a Business than White Men*, Harvard Business Review (May 11, 2021).²⁰ Programs like the Fearless Strivers Grant Contest bridge the gap for Black women-owned businesses. By connecting grantees with industry experts and other partner organizations, the Strivers program—and grant and accelerator programs like it—not only supply much-needed seed funding, but also enable Black women-owned businesses to access a diversified network. Such networks are critical to attracting talent and investment, including from venture capital firms.

Take, for example, Helen Adeosun, the founder and CEO of CareAcademy. CareAcademy is an online platform providing high-quality, state-approved training for home care and home health organizations.²¹ Ms. Adeosun attributes the early success of CareAcademy to the various angel investor organizations and accelerator programs that specifically aim to support businesses led or owned by women or women of color. When speaking about the barriers to entry she faced, Ms. Adeosun noted that while the seed capital itself was necessary to build credibility operationally, it also opened up a network of ally investors to which she otherwise

²⁰ Available at <https://hbr.org/2021/05/black-women-are-more-likely-to-start-a-business-than-white-men> (last visited on Dec. 5, 2023).

²¹ Available at <https://careacademy.com/who-we-are> (last visited on Dec. 5, 2023). *Amici* interviewed Ms. Adeosun on August 31, 2023.

would not have had had access. To date, CareAcademy has successfully raised over \$30 million in VC funding. Having closed a Series B round of funding in 2022, CareAcademy has now delivered over 1.5 million hours of training to nearly 300,000 learners. *CareAcademy Raises \$20M in New Strategic Funding Led by Goldman Sachs Asset Management*, Business Wire (June 8, 2022).²²

Stories like Ms. Adeosun's exemplify the benefits of early-stage funding for minority entrepreneurs historically denied meaningful access to venture capital. Feyi Ayodele, the founder and Chief Executive Officer of CancerIQ, Inc., likewise attributes her business's success to critical early funding.²³ CancerIQ is a healthcare technology venture that helps providers use genetic information to predict, pre-empt, and prevent diseases. *About CancerIQ*, CancerIQ, Inc.²⁴ Early seed funding positioned Ms. Ayodele to secure multiple rounds of venture capital investments to scale her business, grow revenues, and expand within the health care system. Today, having completed its Series B round of funding, CancerIQ contracts with over 40 health systems and partners with more than 200 clinical locations, improving

²² Available at <https://www.businesswire.com/news/home/20220608005178/en/CareAcademy-Raises-20M-in-New-Strategic-Funding-Led-by-Goldman-Sachs-Asset-Management> (last visited on Dec. 5, 2023).

²³ Amici interviewed Ms. Ayodele on August 30, 2023.

²⁴ Available at <https://www.canceriq.com/about-us> (last visited on Dec. 5, 2023).

assessment of cancer risks for thousands of patients nationwide. *The CancerIQ Difference: Services for Success*, CancerIQ, Inc.²⁵

As these examples illustrate, the benefits of early-stage funding like that offered by the Strivers program go far beyond the grantees themselves. When venture capital investing opportunities expand, so does the economy. *See supra* Part I. All the more so when those opportunities involve investing in women-led businesses. Women-led businesses grow faster than those helmed by men—by a significant margin. Between 2012 and 2019, the growth rates for women-led and men-led employers were 16.7% and 5.2%, respectively. *See* National Women’s Business Council Annual Report: 2022.²⁶ And companies with at least one female founder perform better, on average, than their exclusively male-led counterparts. *See* 10 Year Project, *supra*. “The economic impact of women-owned businesses is undeniable, from the trillions they contribute via revenue to the millions of jobs they provide. ... [W]hen they win, we all win.” *Woman-Owned Businesses Are Growing*

²⁵ Available at <https://www.canceriq.com/services> (last visited on Dec. 5, 2023).

²⁶ Available at <https://www.nwbc.gov/annual-reports/2022> (last visited on Dec. 5, 2023).

2X Faster On Average Than All Businesses Nationwide, Business Wire (Sept. 23, 2019).²⁷

Likewise undeniable are the benefits of investing in businesses owned by women of color, in particular. If companies led by women of color were to generate revenue matching those of women-owned businesses overall, one report estimates that would translate to \$981 billion in revenue and four million new jobs. *See id.*;²⁸ *see also* Andrew W. Hait, *Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018* (2021).²⁹ For example, CareAcademy generates millions of dollars in revenue, employs more than 60 workers, and has trained more than 500,000 home and community care professionals, home health nurses, and family care providers in the U.S. and Canada.

Fearless Foundation's Strivers grant program is thus a modest but important step toward diversifying venture capital opportunities and, in turn, expanding the economy. Enjoining its operation would serve no rational economic purpose and

²⁷ Available at <https://www.businesswire.com/news/home/20190923005500/en/Woman-Owned-Businesses-Are-Growing-2X-Faster-On-Average-Than-All-Businesses-Nationwide> (last visited on Dec. 5, 2023).

²⁸ This estimate is based on the estimated 10 million people employed by women-owned companies that generated nearly \$1.8 trillion in revenue in 2018, as reported by the U.S. Census Bureau.

²⁹ Available at <https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html> (last visited on Dec. 5, 2023).

only perpetuate racial and gender inequality that has historically pervaded the venture capital industry.

CONCLUSION

For the foregoing reasons and those stated in Fearless Foundation's brief, this Court should affirm the district court's order denying the plaintiff's motion for a preliminary injunction.

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Dated: December 12, 2023

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
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This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) , this brief contains 3,252 words.

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/s/ Charles C. Lifland

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Dated: December 12, 2023

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I hereby certify that on December 12, 2023, this document was filed with the clerk of the court and via the ECF system, and that as a result electronic notice of the filing will be served upon all counsel of record.

/s/ Charles C. Lifland
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