POLICY BRIEF

The Biggest Health Care CON

The Effects of Certificate-of-Need Laws in Florida

By Logan Elizabeth Pike
Director of Public Affairs, The James Madison Institute
& Matthew Mitchell, Ph.D
Director of the Project for the Study of American Capitalism,
Senior Research Fellow, The Mercatus Center at George Mason University

The City of North Port, Florida, is one of the Sunshine State's fastest growing areas. Nestled along the Gulf Coast at the southern end of Sarasota County, the city has seen its population grow by 165 percent between 2000 and 2014.[1] Population projections for Sarasota County indicate that more than 40 percent of the county's residents will be over 65 by the year 2030.[2]

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Seeing the population trends and demographic projections as a clear indication of the need for health care access, in 2003 city leaders and community stakeholders made a rational and evidence-based decision to build an 80-bed hospital to serve the existing and future population.

To a casual observer, it would seem like an example right out of an economics 101 textbook – classic supply and demand. Seeing a growing demand for health care services in an expanding market without an existing supply, establishing a new hospital would meet the market demand, help drive costs lower, and increase the ability to meet future needs.

In 1987, as it became clear that CON regulations were not effective, the federal government repealed its CON program mandate and encouraged all states to follow suit. Since then, 15 states have repealed their Certificate-of-Need laws.

Casual observers, however, would be unfamiliar with the anti-competitive, politically charged, and crony system known as Certificate-of-Need.

The city hired a consultant and invested roughly $150,000 to prepare and submit a detailed and evidence-based Certificate-of-Need application to the Florida Agency for Healthcare Administration (AHCA). In a city of roughly 25,000 at the time, more than 22,000 letters of support from the city and surrounding areas accompanied the application. AHCA informed North Port that the application had been approved.

However, competing hospitals in other parts of Sarasota County, seeing a new hospital as nothing more than a threat to be eliminated, appealed the approval. An administrative judge overruled the AHCA approval and rejected the CON application. The reasoning used in rejecting the application was a belief that the city's growth projections (used to illustrate the need for a new facility) were too high.[3]

In reality, the growth projections were too low. Fast forward to 2016 and North Port has passed the City of Sarasota in population (a city that has not one but two hospitals) and because of the lack of a hospital, the community is unable to recruit any specialists. Without a single full-time obstetrician/gynecologist, orthopedic surgeon, urologist, cardiologist, or any other surgical specialist, residents of North Port are forced to drive extraordinary distances to access most healthcare services outside of primary care.

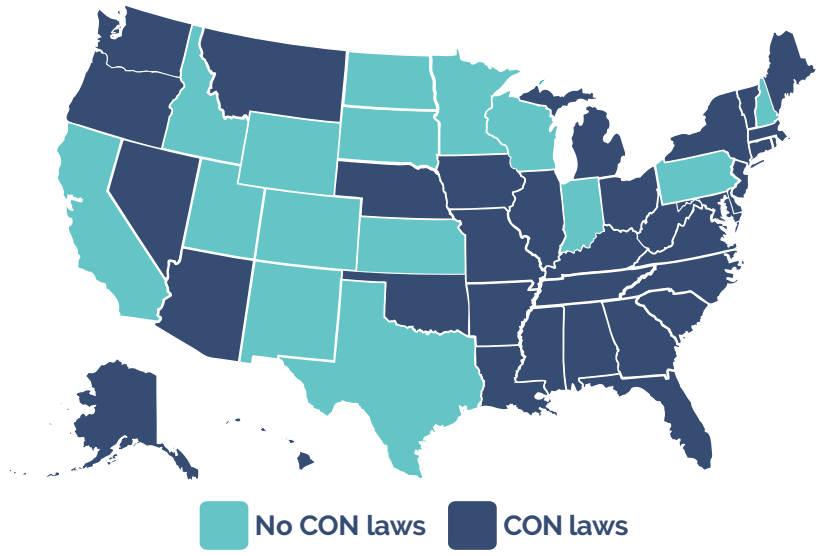
Found in 35 states and the District of Columbia, certificate-of-need (CON) laws in health care restrict the supply of medical services.[4] These regulations require providers eager to open a new health care facility, expand an existing facility, or procure certain medical equipment such as an MRI machine or a hospital bed, to first prove to a regulatory body that their community needs the service in question.

CON regulators do not evaluate quality or skill. Those are already assessed through other means such as occupational licensing and certification boards. Instead, as the name suggests, the CON process aims to assess whether a community "needs" a service in question. In almost every other industry in the country, entrepreneurs themselves weigh the viability of a service before they risk their own money. However, in states with CON laws such as Florida, health entrepreneurs can spend years and tens or even hundreds of thousands of dollars proving to regulators that their community "needs" the service they hope to offer.

CON laws constitute a significant barrier to entry in the health care industry. According to data provided by the Florida Agency for Health Care Administration, 55 percent of all CON applications have been denied since February 2014. An applicant for CON review must pay a fee to AHCA when the application is submitted. The minimum CON application filing fee is $10,000.[5] In addition to the base fee, an applicant must pay a fee

Figure 1

Certificate-Of-Need Laws In The United States (2016)



Source: American Health Planning Association, National Directory: State Certificate of Need Programs, Health Planning Agencies, Annual Volumes, 1994–2012 , 2012.
Produced by Matthew Mitchell and Christopher Koopman, September 2016.

of 1.5 percent of each dollar on the proposed expenditure; however, the total fee may not exceed $50,000. These expenses, however, ignore the costs of compliance which may reach tens or even hundreds of thousands of dollars.[6] In the process, other providers often go before these boards and try to persuade them that, all things considered, they would rather not have any competition.

So why were CON laws created?

The country's first CON program was adopted by New York in 1964 as a way to strengthen regional health planning programs. Over the course of 10 years, 23 other states adopted CON programs. Florida enacted its first CON program in 1973. The passage of the federal National Health Planning and Resources Development Act in 1974, which made federal funds contingent on the implementation of CON programs, provided a convincing incentive for most of the remaining states to enact CON programs. By 1980, every state except Louisiana had some form of a CON program.[7] In 1987, as it became clear that CON regulations were not effective, the federal government repealed its CON program mandate and encouraged all states to follow suit. Since then, 15 states have repealed their Certificate-of-Need laws.[8]

ORIGINAL STATED GOALS OF CON

CON programs were intended to limit the supply of health care services within a state. Proponents claim that the limits were necessary to, among other things, control costs and increase the amount of charity care being provided.[9] However, 40 years of evidence has demonstrated that these programs do not achieve their intended goals, but rather decrease the supply and availability of health care services by limiting entry and competition. For policymakers in Florida, this situation presents an opportunity to reverse course and open the market for greater entry, more competition, and ultimately more options for those seeking care.

One of the stated rationales behind CON regulations is that, without them, hospitals and other providers would be able to choose what services to offer and might over-invest in expensive technology in order to attract patients, leading to higher patient costs. CON laws, it was thought, would restrain these costs without harming patients or their access to care.

In the real world, that's not how it has worked.

THE ANTICOMPETITIVE EFFECTS OF CON

Antitrust officials at the U.S. Department of Justice (DOJ) and at the Federal Trade Commission (FTC) have long contended before state legislatures that CON laws undercut competition to the detriment of patient care. According to a 2008 FTC and DOJ joint report:

> The Agencies' experience and expertise has taught us that Certificate-of-Need laws impede the efficient performance of health care markets. By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers. They undercut consumer choice, stifle innovation, and weaken the ability of markets to contain health care costs. Together, we support the repeal of such laws, as well as steps that reduce their scope…O "On balance, CON programs are not successful in containing health care costs, and…they pose serious anticompetitive risks that usually outweigh their purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market… Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry. Other means of cost control appear to be more effective and pose less significant competitive concerns.[10]

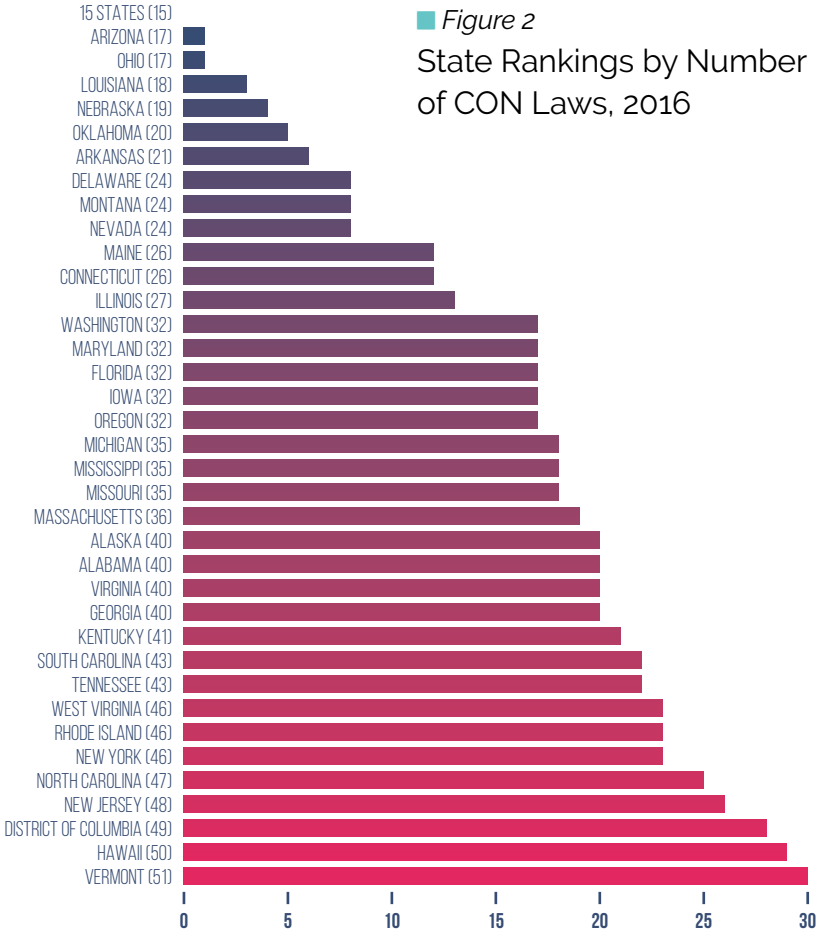
FLORIDA'S CERTIFICATE-OF-NEED PROGRAM:

Still, Florida remains among the 35 states, along with the District of Columbia, that continue to limit entry and expansion within their respective health care markets through certificate-of-need laws. Florida's CON program currently restricts 17 devices and services—ranging from acute hospital beds and burn care units to organ transplants and psychiatric services—requiring a certificate-of-need from the state before the device may be purchased or the service may be offered.[11]

As figure 2 shows, according to rankings done by scholars at the Mercatus Center at George Mason University, Florida's certificate-of-need program ranks 32nd most restrictive in the United States.

Figure 2

State Rankings by Number of CON Laws, 2016



Source: American Health Planning Association, National Directory: State Certificate of Need Programs, Health Planning Agencies, Annual Volumes, 1994–2012 , 2012. Produced by Christopher Koopman and Anne Philpott, September 2016.

DO CON PROGRAMS CONTROL COSTS?

Most knowledgeable policy experts question the effectiveness of CON programs and fear that they weaken competition. Still, proponents argue that they rein in health care spending. A recent study published by the Mercatus Center at George Mason University, however, belies this notion.[12] It offers a comprehensive review of the theoretical and empirical research on the relationship between CON laws and spending. After reviewing and summarizing four decades of peer-reviewed research on CON and spending, it concludes that there is no evidence that CON laws decrease per-unit costs or prices. In fact, three out of four studies that examine per-unit costs conclude that these laws are associated with higher per-unit costs and none suggest that it is associated with lower per- unit costs.[13] The most recent study, for example, finds that CON laws increase hospital charges by as much as five percent.[14] This is not surprising given that CON programs restrict competition and reduce the available supply of regulated services. As economists Jon Ford and David Kaserman articulated over two decades ago, "To the extent that CON regulation is effective in reducing net investment in the industry, the economic effect is to shift the supply curve of the affected service back to the left….The effect of such supply shifts is to raise . . . [the] equilibrium price."[15]

Given that Economics 101 teaches that restricting supply will increase price, one might wonder why anyone would expect CON to reduce cost. The answer appears to be that they don't. Instead, CON advocates seem to think that even if CON increases the cost per service, it might still reduce spending per patient or per citizen by limiting access to care. This is theoretically possible. But it is not clear why it is desirable. Limiting supply unambiguously reduces patient welfare by raising prices and diminished access to care. In any case, scholarly work indicates that CON laws fail to achieve even this version of "cost containment." The same George Mason University review also examined studies looking at this question. It found that the balance of evidence shows that CON increases per-patient and/or per-capita spending.[16]

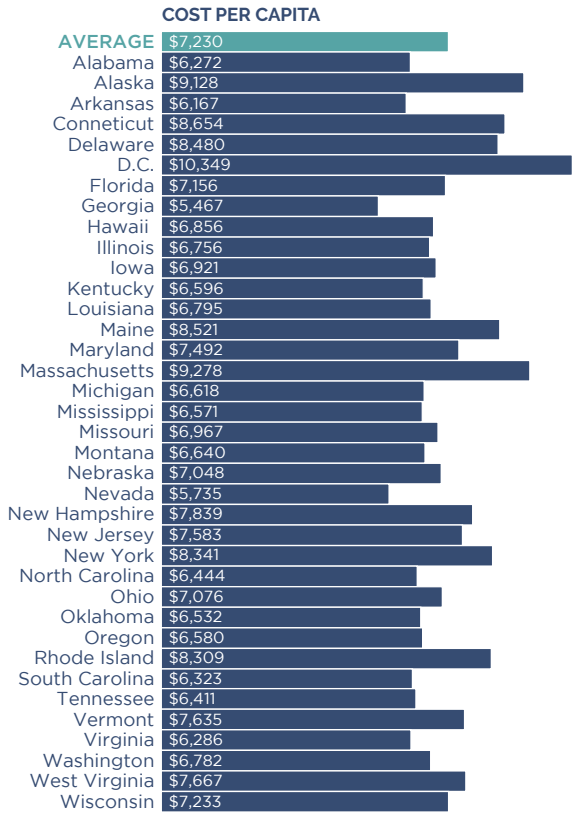
All of the studies reviewed were conducted by academics and were published in peer-reviewed academic journals. The papers use state-of-the-art empirical techniques that permit scholars to control for other factors that might confound the estimates. Even with simple comparisons of averages, however, one can see that CON fails to rein in spending. Figure 3 shows data on per-capita health care spending collected by the Kaiser Family Foundation. According to this data, health care costs are 11 percent higher in CON states ($7,320 per capita) relative to non-CON states ($6,526 per capita).

DO CON PROGRAMS INCREASE ACCESS TO CARE FOR THE NEEDY?

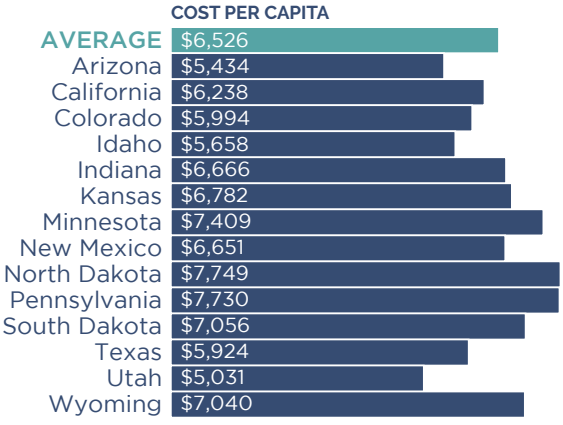
While there is little evidence to support the claim that certificates-of-need are an effective cost-control measure, many states continue to justify these programs under the belief that they might increase access to health care for the poor. Currently, 14 states — including Florida — incorporate some requirement for charity care in their CON application process.[17] The requirement is an example of what economists call a regulatory "cross subsidy." An excerpt from Certificate-of-need Laws: Implications for Florida, by Chris-

Figure 3

CON States



Non-CON States



Data Source: Kaiser Family Foundation, 2009

topher Koopman and Thomas Stratmann explains this theory:

> The theory behind cross-subsidization through these programs is straightforward. By limiting the number of providers that can enter a particular practice, and by limiting the expansion of incumbent providers, CON regulations effectively give a limited monopoly privilege to providers that receive approval in the form of a certificate-of-need. Approved providers are therefore able to charge higher prices than would be possible under truly competitive conditions. As a result, it is hoped that providers will use their enhanced profits to cover the losses from providing otherwise unprofitable, uncompensated care to the poor. In effect, those who can pay are charged higher prices to subsidize those who cannot.[18]

In reality, however, this cross-subsidization is not occurring. Early studies discovered some evidence of cross-subsidization among hospitals and nursing homes; however, the more recent academic research does not show this cross-subsidy taking place. The most comprehensive empirical study to date, conducted by Thomas Stratmann and Jacob Russ, finds no relationship between certificates-of-need and the level of charity care.[19]

Although certificates-of-need neither control costs nor increase charity care, they continue to have long-lasting effects on the provision of health care services. These effects have largely come in the form of reduced availability of services and lower hospital quality.

CON LAWS AND HOSPITAL QUALITY

Recall that the CON process is not designed to assess provider quality; that is done through other licensing systems. Nevertheless, CON advocates have long maintained that the CON process might increase health care quality by ensuring that more procedures are channeled through fewer providers, thus allowing providers to gain greater levels of expertise. This theory is suspect, given the fact that barriers to competition are generally thought to decrease quality rather than increase it.

In a recent study titled Certificate-of-Need Laws and Hospital Quality, Thomas Stratmann and David Wille assess the evidence and find that not only do CON laws fail to encourage quality care, but they may actually diminish quality.[20] Examining 900 hospitals from 2011 to 2015 and controlling for other factors that might affect quality, they concluded that, if anything, patients living in states with certificate-of-need laws receive worse health care than patients living in states without them. They found that hospitals in CON states have statistically significantly higher mortality rates for pneumonia, heart failure, and heart attack. The average 30-day

mortality rate for patients with pneumonia, heart failure, and heart attack who were discharged from hospitals in CON states was 2.5 to 3 percent higher than in non-CON-states. The largest difference is in deaths following a serious post-surgery complication, with an average of six more deaths per 1,000 patient discharges in CON states relative to non-CON states.[21]

CON LAWS AND ACCESS TO CARE

The federal legislation which encouraged states to adopt CON laws began with the observation that policy had thus far "failed to produce an adequate supply or distribution of health resources."[22] CON regulation, it was thought, might address this. It did not.

It is perhaps unsurprising that one of the more widely documented effects of CON is supply restriction, which results in a reduction of health care services. Researchers have found that CON laws are associated with fewer hospitals,[23] fewer rural hospitals,[24] fewer ambulatory surgery centers,[25] fewer dialysis clinics,[26] and fewer hospice care facilities.[27] They have also documented that it is associated with fewer hospital beds[28] and fewer hospitals with medical imaging equipment.[29]

■ The average 30-day mortality rate for patients with pneumonia, heart failure, and heart attack who were discharged from hospitals in CON states was 2.5 to 3 percent higher than in non-CON-states.

The impact of CON regulations on access to care in Florida has been examined as well. Throughout the U.S., there are approximately 362 beds per 100,000 persons. However, in states such as Florida that regulate acute hospital beds through their CON programs, that number is 231 beds per 100,000 persons – a 36 percent gap. For a county like Miami-Dade, with a population of approximately 2.62 million, this translates to 3,430 fewer hospital beds as a result of the state's CON program.[30]

In addition, several basic health care services are limited because of Florida's CON program. Across the United States, an average of six hospitals per 500,000 persons offer MRI services. In states such as Florida that regulate the number of hospitals with MRI machines, the number of hospitals that offer MRIs is reduced by between one and two per 500,000 persons.[31] Consequently, in an area like Miami-Dade County, there are approximately five to ten fewer hospitals offering MRI services. Florida's CON program also affects the availability of CT services. While an average of nine hospitals per 500,000 persons offer CT scans, CON regulations are associated with 37 percent fewer hospitals offering these services. For the 2.62 million people living in Miami-Dade, this translates to roughly 18 fewer hospitals offering CT scans.[32]

While it might seem obvious that a supply restriction would reduce the supply of services, perhaps CON improves the distribution of services by ensuring they adequately serve underserved communities. This, too, is not the case. Researchers have documented that CON laws are associated with longer travel distance to care.[33] They have also found that CON is associated with a more limited supply of rural care.[34]

CON LAWS AND NURSING HOMES

In 2014, the moratorium on the granting of CONs for additional community nursing home beds in Florida was repealed. In its place, the legislature imposed limitations on the issuance of CONs for community nursing home beds to limit the growth through July 1, 2017. The Agency for Health Care Administration (AHCA) may not approve a CON application for new community nursing home beds following the batching cycle in which the cumulative number of new community nursing home beds approved from July 1, 2014, to June 30, 2017, equals or exceed 3,750. AHCA reached the cap of 3,750 in February of 2016 and a moratorium on additional beds is in place until June 30, 2017.

Florida's population is rapidly expanding and aging, necessitating more facilities to meet both current and future needs. Conservative projections from the Florida Office of Economic and Demographic Research (EDR) indicate that the State will grow by roughly five million by 2030. Of that growth, two-thirds will be over the age of 65.[35] Currently, there are 683 licensed nursing homes in Florida, containing approximately 83,500 beds. The estimated number of residents in these homes is 73,000 (roughly 85 percent occupancy at any given time). The national average is 83 percent.[36]

Given the current population and occupancy rates, it is possible to provide a rough projection of future needs. Currently, there are 3.3 million Floridians over the age of 65, 73,000 (2.2 percent) of which reside in nursing home facilities. By 2030, EDR estimates 5.9 million Floridians will be over the age of 65.[37] Extrapolating the 2.2 percent of individuals over the age of 65 currently residing in nursing homes to population

projections in 2030, Florida will need approximately 129,800 beds to accommodate the needs of long-term care for Florida's elderly population, an increase of close to double the current capacity, assuming zero reduction in capacity between now and 2030.

Proponents of the nursing home CON believe supply in the nursing home industry should remain regulated in order to ensure more beds aren't added which might then be unoccupied. However, focusing solely on occupancy rates ignores the underlying reasons for why the beds are unoccupied. Many of these facilities are below capacity because they are older and are not offering the services consumers want or need. Health care companies invest in new facilities because they are in demand, and if the government allows the market to function without a moratorium, new facilities will eventually replace the old and occupancy rates will adjust naturally.

Conclusion

In 1964, Ronald Reagan uttered the now oft-quoted phrase, "a government bureau is the nearest thing to eternal life we'll ever see on this earth." Few recognize, however, that Reagan actually paraphrased a 1933 quote from Democratic Senator James F. Byrnes, who said on the United States Senate Floor, "The nearest earthly approach to immortality is a bureau of the federal government."[38]

Health care economists as well as antitrust authorities in both Democratic and Republican administrations have consistently warned state officials of the anticompetitive effects of certificate-of-need regulations. Despite good intentions at the time, CON laws result in precisely the opposite of their stated goals – they restrict access, limit individuals' ability to get care, increase cost of service, and degrade overall quality of care.

The forty-year experiment with CON explains why the nation's largest association of physicians and medical students, the American Medical Association opposes these barriers to entry. In a 2015 survey of the available evidence, they report that CON laws "have failed to achieve their intended goal of containing cost," and "are susceptible to abuse by creating opportunities for anticompetitive behavior."[39] Moreover, they write, these laws "can impede patient choice," "there is little evidence that CON laws improve healthcare quality" and they "represent a failed public policy."[40]

Government-imposed limits on competition harm consumers and increase the cost of health care. They have no place in a society seeking to ensure that all citizens have the ability to receive treatment.

Florida should join the other 15 states that have chosen to promote access to care, higher quality of service, and lower costs by repealing its antiquated certificate-of-need regulations. In making these decisions, providers in non-CON states are guided by the signals of prices, profit, and loss which guide all investments in a market economy. They do not need to seek approval for care. They do not have to wait years for that approval. And they do not need to spend thousands of dollars refuting the opinions of their would-be competitors. Instead they can focus on what caregivers do best: delivering care.

If Florida is serious about expanding care and avoiding an impending crisis in the supply of health care practitioners, the most meaningful step lawmakers can take is to repeal certificate-of-need laws and open the market for greater entry, more competition, and ultimately more opportunities for those obtaining care.

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The James Madison Institute
The Columns
100 North Duval Street
Tallahassee, FL 32301

850.386.3131

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