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ALLOWED TO STAY: AN EXPLORATION OF DHS NEW GUIDELINES TO DISMISS
CERTAIN IMMIGRATION CASES

by

Jazmin E. De La Cruz Sanchez

A master's capstone project submitted to the Graduate Faculty in the International
Migration Studies Program in partial fulfillment of the requirements for the degree of Master of
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APPROVAL

Allowed to Stay:
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This manuscript has been read and accepted for the Graduate Faculty in International Migration Studies in satisfaction of the thesis requirement for the degree of Master of Arts.

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ABSTRACT

Allowed to Stay:
An Exploration of DHS New Guidelines to Dismiss Certain Immigration Cases

by

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Advisor: Jamie G. Longazel

A new Department of Homeland Security (DHS) guideline issued with the intent of reducing case backlogs has led to the dismissal of many immigrants' legal proceedings. Having their case dismissed has allowed those immigrants to stay within the United States essentially with no legal status. I argue in this paper that these changes have left many in a state that's been termed *liminal legality*. Building on previous research that employs this concept, I specifically argue that being in this position affects one's employment, income, prospects for upward mobility, and future legal standing. Although this new guideline was created to ease the court's backlog, it has instead had some negative impacts in the lives of many immigrants.

ACKNOWLEDGMENTS

For the past year, I've been working in an immigration law firm that has showed me a side of immigration that I did not even know existed. Since I started at this job I have witnessed what is like to be in immigration court. As I watched many of our client's cases get dismissed, I kept wondering: what possible effect can this new legal position have in the lives of all those individuals?

First I want to thank my advisor, Professor Jamie Longazel, for all his help and support. This paper would not have been possible without your help. I appreciate everything you did for me throughout this semester. Your patience, knowledge and understanding inspired me to want to always be better. I would also like to thank the faculty and my colleagues in the International Migration Studies program for challenging me and helping me thrive in this hard and competitive environment. Every class I took during the past two years have made me better as a person and scholar.

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TABLE OF CONTENTS

Part One:

- Introduction.....1

Part Two:

- Understanding Prosecutorial Discretion in Immigration Court.....4

Part Three:

- Liminal Legality in the context of Dismissal.....9
 - Employment and Income.....11
 - Legal Vulnerability.....13
 - Upward Mobility.....15

Part Four:

- Conclusion17

References.....19

INTRODUCTION

On September 30, 2021, the Department of Homeland Security (DHS) published a memorandum titled, “Guidelines for the Enforcement of Civil Immigration Law.” The memo set forth new guidelines for the U.S. Immigration and Custom Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) attorneys on how to deal with certain proceedings before the Executive Office for Immigration Review (EOIR). In particular, it established three priorities which OPLA attorneys need to focus on when handling civil immigration cases (Doyle, 2022). The first priority, “Threat to National Security,” focuses on the apprehension and removal of migrants who engage in any activity, including terrorism and espionage, that might pose a danger to national security. The second priority, “Threat to Public Safety,” focuses on the apprehension and removal of any migrant that poses a threat to public safety by committing a serious crime. And the third priority, “Threat to Border Security,” focuses on the apprehension and removal of migrants currently attempting to enter the United States illegally or anyone else who entered the United States illegally on or after November 2020 (Doyle, 2022).

To implement these new guidelines, DHS gave OPLA attorneys the prosecutorial discretion to dismiss the immigration cases of individuals who are not deemed a priority. On the surface this seems like a positive outcome, however dismissal is not in the best interest of migrants who are not deemed threatening. In fact, by having their case dismissed, migrants go from being authorized to work and having a possible path to legal residency to just being allowed to stay in the US with no other benefit. For many migrants, being in this position leaves them in state of what Cecilia Menjívar (2006) terms *liminal legality*.

For example, consider the case of Martin and Gloria¹, an undocumented couple that had been living in the U.S. for the past 15 years. Frustrated with their lack of immigration status and the realities of living with the fear of deportation, Martin and Gloria decided to apply for cancelation of removal with the immigration court and as a result were placed in immigration proceedings. While their case was pending, they applied for an Employment Authorization Document (EAD). During their pending process, with their EAD approved, they decided to look for a new job that fits their qualifications. The new job hires them and offers better pay, better work conditions, and the possibility of joining a union. They are finally on track to a better life and future for them and their family. Then, their hearing day comes and they are informed that their case is not strong enough, and that they now have two options: Either move forward with the case, which would most likely result in having an order of removal, or take dismissal, which would allow them to stay in the United States with no other benefit. Afraid of being deported, they take the latter, and, as a result, lose their EAD and their hopes of obtaining legal residency. With their case now dismissed, they explain the situation to their employer who informs them that, unfortunately, without an EAD or actual proof of legal residency, they cannot longer work for the company. This left Martin and Gloria feeling they are in a worse position than what they were in before. They now have to look for a job that would hire them with no legal status. Plus, knowing immigration authorities now have all of their information, they're left worrying about the reality that they can end up back in proceedings at any moment. The plans they had carefully constructed were no longer relevant and they are left uncertain about what to do next. ²

¹ These are pseudonyms.

² This story is based on a real case. In fact, this is actually one of many similar cases.

In this paper, I will be focusing on the effects of liminal legality in the lives of migrants like Martin and Gloria whose immigration cases have been dismissed. Building on existing scholarship (e.g., Hamilton, Patler, & Savinar, 2021; Menjívar, Agadjanian, & Oh, 2020) that focuses on the lives of those experiencing liminal legality, I focus on migrants that were applying for cancellation of removal, which is a benefit for qualifying migrants, that allows them to obtain legal residency status from an immigration judge. To qualify for that benefit, one of the requirements is that they've maintained continuous physical presence in the US for ten years or more (U.S. Department of Justice [DOJ], 2015). I chose to focus on this group of migrants because I believe the dismissal has a greater effect on their lives given the lengthy amount of time they have spent in the United States. After being undocumented for so long, those immigrants enter immigration proceedings with hopes of obtaining legal residency, however after their proceedings get dismissed they are left in a position of limbo where they are allowed to stay but with no status or benefit. Being in that position makes these individuals relatively vulnerable because although dismissal could momentarily keep them safe from deportation, that could change at any time. Since this group of individuals has not been widely studied, I believe that understanding their new legal positionality could allow for the development of new resources and opportunities that could improve the lives of those immigrants.

In what follows, first, I will be describing and analyzing the implementation of DHS's new guideline and how that has affected the lives of impacted migrants. Then, I will be exploring liminal legality and how it applies to dismissal. Finally, I will argue that DHS's guideline has placed thousands of people in a position of liminal legality, with drastic consequences for their family, their employment, stability, and community involvement, amongst many other things.

UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION COURT

The Department of Homeland Security (DHS) is an agency under the executive branch that was created after 9/11 to combine and carry out the jobs of 22 different federal departments and agencies (An act to establish the Department of Homeland Security, and for other purposes, 2002). Within DHS there are three units who serve as enforcers of various immigration functions: Customs and Border protection (CBP), Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS). One important function of each of these units is that they all have the jurisdiction to initiate removal proceedings in immigration court (Wadhia, 2013).

The Executive Office for Immigration Review (EOIR) oversees immigration courts throughout the country. Independent of the immigration enforcement functions of DHS, the EOIR was created by the Department of Justice (DOJ) in 1983, to combine the Board of Immigration Appeals (BIA) with the immigration judge functions that at the time were performed by the Immigration and Naturalization Service (INS). The EOIR's mission is to adjudicate immigration cases. The office conducts immigration court proceedings, appellate reviews, and administrative hearings (Executive Office for Immigration Review [EOIR], 2022).

Once a respondent has been charged by DHS and proceedings have been initiated, the immigration judge has to decide whether the respondent can stay in the country or be deported (Executive Office for Immigration Review [EOIR], 2017). Immigration judges have the jurisdiction to adjudicate applications for relief from removal or deportation. There are many relief applications that a person can apply for while in proceedings, which include: asylum,

withholding of removal, and Cancellation of Removal (COR) (U.S. Department of Justice [DOJ], 2022).

For many undocumented immigrants, being in removal proceedings could be a choice or a matter of getting caught. Any person who has been found to have violated any immigration law can be placed in removal proceedings. However, many people can voluntarily enter removal proceedings if they want to apply for relief before an immigration judge. To begin the process, the respondent would have to file an application with the EOIR. A person is officially in removal proceedings when DHS files a Notice to Appear (NTA) with the respondent and the EOIR (Wadhia, 2013).

An NTA is a document which contains information regarding the nature of proceedings and the charges being brought against the respondent. It also includes information about the respondent's rights and a requirement for them to provide the Attorney General with their address and telephone number. On some occasions, it might also include a hearing date (DOJ, 2022). If the respondent fails to appear before the judge or does not follow the instructions listed on the NTA, that could lead to serious consequences.

During immigration proceedings, OPLA attorneys represent the government. Respondents have the right to seek an attorney or authorized representative at no cost to the government. The judge, as an impartial entity, has to decide "the case in accordance with applicable laws, regulations, and relevant case precedent" (EOIR, 2017).

In immigration court the first hearing is called a Master Calendar Hearing. That first hearing is an introductory hearing where the judge advises the respondents of their rights and what should be expected moving forward. The judge also explains the charges included on the

NTA and then the respondents plead guilty to the charges being brought against them.

Afterwards the judge schedules the next hearing and gives instructions and deadlines depending on the type of relief the respondent will be applying for. If the respondent fails to appear for this hearing the judge could order them removed in their absence (DOJ, 2022).

After the master hearing, if all parties involved agree to proceed, the next hearing, called the Individual Calendar Hearing, is scheduled. The purpose of this hearing is to discuss all evidence that had been submitted. This hearing could lead to another hearing or it could also lead to the termination of proceedings (DOJ, 2022). During this hearing, DHS can use their prosecutorial discretion to offer the respondent dismissal or administrative closure. If everyone agrees, the full hearing does not have to go forward and proceedings could be terminated right then and there.

DHS created prosecutorial discretion for both humanitarian and economic reasons, based on the large number of undocumented immigrants living in the US. In terms of humanitarian reasons, DHS would offer a respondent prosecutorial discretion, if they believe the respondent has a good reason for staying in the US but the facts of their case are not enough to qualify them for relief. In terms of economic reasons, DHS would offer a respondent prosecutorial discretion if they believe the person is not an enforcement priority and they do not want to waste time and resources going forward with the hearing. Prosecutorial discretion is often offered before the individual hearing begins to ensure that they could get proceedings terminated before they have to proceed with the full hearing, which would include testimony and the review of evidence (Wadhia, 2013).

According to Wadhia (2013), prosecutorial discretion was created as a tool to give the agency an opportunity to distribute the resources allotted to prosecute undocumented immigrants as they see fit. In hindsight, prosecutorial discretion was created to protect certain groups of undocumented immigrants, from removal/deportation (Wadhia, 2013). Although only OPLA attorneys have prosecutorial discretion in immigration court, immigration judges also have some discretion. They can make the decision to “request motions to administratively close, postpone, dismiss or reopen a removal proceeding” (Wadhia, 2013, p.45).

DHS has been using prosecutorial discretion for many years; the most recent use of prosecutorial discretion has been in the form of dismissal and administrative closure. When a case is administratively closed, it is removed from the court’s calendar but it remains in the backlog and can be reopened at any time. Respondents whose case has been administratively closed can continue to renew their work permit while their case is closed. On the other hand, when a case is dismissed or terminated, the case is removed from the docket altogether and the respondent can no longer renew their work authorization (Gelatt & Chishti 2022).

The use of prosecutorial discretion can change based on the agenda of the current presidential administration. During the Obama administration, for example, many immigration cases were administratively closed, which eased the court’s backlog while also providing respondents with the opportunity to continue renewing their work authorization. During the Trump administration, however, the use of dismissal and administrative closure were practically non-existent, leaving undocumented people with very limited options. Since Joe Biden took office, the number of dismissals has skyrocketed. The Biden administration has prioritized dismissal over administrative closure in order to adjudicate as many cases as possible (Gelatt & Chishti 2022).

The legal status of a person whose case has been dismissed is not definitive. The government can file new charges and the respondent can end up back in court at any time. Which is to say: the respondent might no longer have to worry about being deported, but that relief is temporary, as the government can bring them back to immigration court at any moment.

LIMINAL LEGALITY IN THE CONTEXT OF DISMISSAL

Cecilia Menjívar describes liminal legality as a temporary legal position which is characterized by its ambiguity. In a 2006 study, she described the lived experience of liminal legality among Salvadorian and Guatemalan migrants with temporary legal status. In particular, she explained how many Salvadorian and Guatemalan migrants often put off family reunification because they live with the hope that once their status becomes permanent, they will finally be able to bring their family to the United States. However, she argues that this never actually happens; thus, it ends up affecting migrants' relationships with their children and spouses, which often leads to divorce and/or estrangement (Menjívar, 2006).

A state of liminal legality can affect an individual's sense of belonging and their assimilation into society. Respondents in that position often fear engaging in certain societal activities because of fear of discrimination based on their legal status. Amelie F. Constant and colleagues (2009) argue that discrimination is one of the most important integration barriers that migrants face. In addition, liminal legality often restricts respondents from benefitting from societal resources. Major federal benefits programs such as Medicaid and Supplemental Security Income (SSI), for example, have often excluded many undocumented persons from eligibility for assistance (Broder, Lessard, & Moussavian, 2022).

Research on undocumented immigration has also demonstrated that undocumented status can affect an immigrants' job prospects, working conditions, and earnings (Simon and DeLey, 1984; Grasmuck, 1984; Chiswick, 1984). For example, in Nancy Bird's (2010) study of undocumented domestic workers, she found that undocumented domestic workers are more vulnerable to exploitation because of their legal status. The lack of employment law protections

for undocumented domestic workers often leads them to be mistreated, underpaid and exploited. Byrd explains that because they have no legal protection they often take the mistreatment because they have no other choice (Byrd, 2010). Like Martin and Gloria's case, when a respondent's immigration proceeding has been dismissed losing their work authorization could force them to look for the kind of work where they would be underpaid and mistreated because of their lack of legal status.

A condition of liminal legality not only dictates the potential income of an individual but also affects the social standing of the individual in society. Liminal legality shapes the political and societal participation of an immigrant in the host society (Menjívar, 2006). Migrants in this position, although they are allowed to stay in the U.S., have no voice or influence over new laws, regulations and the development of new resources in their community. Because they have no legal status and thus their voice often doesn't count, they have to endure whatever is thrown at them with no say in the matter. Liminal legality has affected the lives of respondents in many ways. In terms of dismissal, respondents in this position experience liminal legality because of all the uncertainties that comes with having your case dismissed.

The experience of migrants in state of liminal legality has recently been researched by many scholars. In 2020, Menjívar, Agadjanian & Oh published a paper which discusses Temporary Protected Status (TPS) as a type of liminal legality. They argue that this state of liminal legality has a big impact in the educational attainment and civic engagement of those individuals. They further argue that TPS recipients are often in lower paying positions because of the instability of their legal status. They explain that the state of liminal legality that comes with holding TPS often discourages employers from promoting migrants to higher paying positions

because they are afraid of the possibility of having to let the migrant go when their temporary status changes (Menjívar, Agadjanian & Oh, 2020).

Similarly, in 2021, Hamilton, Patler and Savinar, explained how the uncertainty and temporariness of being a Deferred Action for Childhood Arrivals (DACA) recipient can leave those with this status in state of liminal legality. In the article, they explained how “the temporary, stopgap nature of the program limited the extent to which recipients could make meaningful, long- term investments in education and in occupational mobility” (Hamilton, Patler & Savinar, 2021, p. 690). They furthered explained that many DACA recipients often experience fear and insecurity regarding their legal positionality because the temporariness of DACA means that their status could change at any time (Hamilton, Patler & Savinar, 2021).

A dismissal of a respondent’s immigration case can potentially have a huge effect in their overall life and future. A dismissal can affect a respondent’s position in society as they might not want to make any permanent changes in their lives because of fear of their temporary status changing at any time. To further explore these arguments, in the following sections, I will be focusing on how dismissal affects the lives of respondents that were in proceeding pursuing cancellation of removal. I will be discussing three separate aspects of their lives that are highly affected when their immigration proceedings get dismissed. Specifically, I will explore how being in a state of liminal legality affects their employment and income, their legal vulnerability, and their chances of upward social mobility.

Employment and Income

Under the discretion of DHS, individuals in immigration proceedings could obtain an EAD (Wadhia, 2016). An EAD grants respondents the opportunity to work in the United States

legally. This means that by possessing an EAD, an undocumented immigrant is protected under labor laws and regulations. They are entitled to regular wages and can join labor unions. Immigrants in immigration proceedings could have their EAD for months or even years depending on how long their proceedings last. Although the EAD is only issued for a period of one year, the individual can continue renewing it while their proceedings are ongoing.

Possessing an EAD improves the immigrant's wage, enhances their quality of employment, and makes them less vulnerable to work exploitation. As Leticia Saucedo (2017) puts it, "employment authorization bestows the same rights and protections shared by all workers, including equal protection" (P. 480). Employment equality is beneficial to all workers because it decreases the likelihood of an employer adopting poor working conditions (Saucedo 2017).

Undocumented immigrants who have an EAD can apply for jobs in private companies as well as government agencies. In other words, having an EAD gives undocumented immigrants the opportunity to apply for jobs that wouldn't have previously hired them because of their immigration status. Immigrants without immigration status or an EAD often have to settle for low-paying jobs and poor working conditions.

When a respondent's immigration case gets dismissed, they automatically lose their EAD. For many undocumented immigrants, losing their EAD also means losing their job. In their study of the liminal legality of DACA recipients, Martha Morales and Laura E. Enriquez (2021) explain how DACA recipients often have to think critically about their career goals after college because of the ever-present possibility of losing their EAD. Losing a job is hard for everybody, but the consequences can be especially detrimental for undocumented immigrants

because their legal status can make it very hard for them to find new equally beneficial employment.

For respondents who were in proceedings pursuing cancellation of removal, losing their work authorization is especially hard because of how long they have been in the U.S. working for low wages and in poor working conditions because of their legal status. Historically “the children of undocumented immigrants live in poverty and almost half lack any health insurance” (Androff, Ayon, Becerra, & Gurrola, 2011, pg. 79). An EAD can open the door to a large range of opportunities that could greatly benefit them and their families. An EAD increases their chances of better employment which can improve their income, living conditions and their access to health care.

Legal Vulnerability

When an immigrant’s case gets dismissed, their legal status becomes hampered by uncertainty. In recent years, presidential candidates have placed immigration at the top of their agendas. President Obama, for example, expanded prosecutorial discretion to allow as many immigrants as possible to obtain an EAD if they had no other legal path available (Gelatt, & Chishti, 2022). On the other hand, when president Trump was in office he believed that all illegal immigrants were an enforcement priority. This eliminated the possibility of any immigrant getting their immigration proceedings dismissed or administratively closed (American Immigration Council, 2018). Currently, President Biden’s top priority regarding immigration is to reduce the backlog of immigration court (Gelatt, & Chishti, 2022).

Under President Biden, DHS has been dismissing the immigration proceedings of many immigrants. The goal is to ease the court’s backlog while also minimizing the length of time that

a person spends in proceedings. The Biden administration is hoping to enact new legislation that will create a pathway to legal status for the millions of respondents in this situation (Krogstad, & Gonzalez, 2022). However, no new bills have yet been passed and the court's backlog continues to increase. As of now, the future legal status of many people continues to be uncertain. If no new legislation is enacted, when a new presidential administration begins, respondents will be feeling vulnerable and fearing the unknown with no ways of decreasing their vulnerability since they have no legal status or say in the matter.

Respondents whose cases were dismissed can end up back in immigration court at any time. At any moment, DHS could make the decision to put them back in proceedings entirely up to their discretion. This fear of possibly ending back in court results in respondents living in fear, always trying to avoid any situation that might place them back in court. Research shows that undocumented immigrants are less likely to report crimes out of fear of deportation (Comino, Mastrobuoni, & Nicolò, 2020). Furthermore, respondents in this situation can encounter a number of barriers and restrictions depending on the state they choose to live in. Although immigration laws are enacted by the federal government, states can regulate certain activities related to immigration by enacting their own state laws. Often, those state laws focus on education, employment, licenses and some state benefits (Findlaw, 2016). For example, in her book *Legal passing: navigating undocumented life and local immigration law*, Garcia (2019) explains how in certain towns in California, many undocumented immigrants sometimes fear driving, taking public transportation or even riding a bike because they are afraid of what might happen if they encounter the police. She explains that this fear stems from the close relationship that the police have with ICE. For many respondents, any legal violations, however petty, can become grounds for deportation.

Upward Mobility

As I previously mentioned, respondents who were in proceedings perusing cancellation of removal have been in the United States for at least ten years. These respondents have created a life in the United States. Many pursue cancellation of removal because they want to open new doors and create new opportunities for themselves and their families. However, when respondent's proceedings get dismissed, they are often left with very little hope.

Many undocumented immigrants live in low-income neighborhoods which are often surrounded by underfunded schools. As a result, the children of undocumented immigrants often face educational disadvantages. According to Eisema and colleagues (2014), public schools in low income neighborhoods often have limited resources, are underfunded and overcrowded. This, they explain, has negative effects in the upward mobility of the children of undocumented immigrants.

Dismissal leaves respondents with very little opportunity to move to a better neighborhood as they might not be able to afford it. The results of sending their children to overcrowded and underfunded schools could greatly affect the possibilities of their children pursuing higher education (Eisema, Fiorito, & Montero-Sieburth, 2014).

Dismissal is not only detrimental for the future education of the children of undocumented immigrants, but it could also have a negative effect on the educational attainments of immigrants themselves. Although majority of undocumented immigrants come to the United States looking for better possibilities for employment, some come with the hope of being able to have access to education. Although education for undocumented minors is

unrestricted, there are federal legislation prohibiting undocumented immigrants from receiving any federal assistance for postsecondary education (Drachman, 2006).

The key to upward mobility is access to education because of its potential benefits for a person's future employment. For respondents, whose immigration case gets dismissed, the chances to climb the socioeconomic ladder are slim.

CONCLUSION

In this paper, I have argued that DHS's policy has created a situation that has subjected immigrants to legal liminality. Specifically, I have identified three ways that this tenuous status impacts their lives. I explored the prospect of employment, income, legal vulnerability and upward mobility for respondents whose immigration case has been dismissed. I argued that the uncertainty of that legal status has had some negative effects in the lives of those respondents. Respondents in this position have to be constantly on the lookout, so that they don't end up having to face a situation where they end up back in court for something that might be minor for the rest of us, but could have a big impact in their case. They also don't have the luxury to move to any state they want within the U.S. because some U.S. states are more accepting than others and ending in the wrong one could tremendously affect their life and their families.

Building on existing scholarship on the lives of undocumented immigrants in the United States, this research shows a different legal positionality that has recently become the norm for thousands of immigrants. This research has shown a side of immigration court that has become a sort of in between state for undocumented people: Neither deported, nor with legal status. Allowed to stay but with no voice. However, unlike other immigrants who experience liminal legality, the respondents in the situation I've explored have very little benefits as a result of their new status. They have to pay taxes but can't benefit from many state or federal resources. They can't be part of the community, relegated to the role of silent participants. They are allowed to stay but have no influence over the adjustment and creation of laws and regulations that directly affect their life. They are allowed to be here but they don't count.

Immigration has always been a big issue in the United States, with all the recent immigrant entries that have taken place, government officials have been looking for ways to deal with this

problem. Immigration court and the immigration system as whole is currently very overwhelmed. Some might consider this new policy a positive step in regulating immigration within the U.S. However, as I have shown, when we look at this policy more closely it is clear that it does more harm than good.

Dismissal is not the answer. As I've argued, and as prior research has also shown, keeping people in a state of liminal legality is harmful. It doesn't help the country, doesn't help the economy, and, ultimately, it pushes people into a life of uncertainty. I think is time for Congress to enact some real change in immigration laws. Leaving immigration to be managed by the agenda of whoever is currently in office will not fix the problem. Even if the resultant law isn't perfect, actual legislation would be more helpful than just keeping a group of people trapped in state of liminal legality.

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