No. 99-15795

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAQUIN VELES, et al.,

Plaintiffs-Appellants

v.

CARL E. LINDOW AND MARY L. LINDOW,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS URGING THE COURT TO VACATE AND REMAND

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INTEREST OF THE UNITED STATES

The instant case raises the issue of the relationship between national origin and language as bases for discrimination. The United States has a stake in the proper development of the law on this subject because the United States has the responsibility to enforce a number of statutes that prohibit discrimination based on national origin. These include Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. In addition, under Executive Order No. 12,250, 3 C.F.R. 298 (1981), the Attorney General has the responsibility to coordinate enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., which also prohibits discrimination on the basis of national origin.

STATEMENT OF JURISDICTION

This suit was brought pursuant to the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. The district court had jurisdiction under 42 U.S.C. 3613 and 28 U.S.C. 1345. Judgment was entered on a special jury verdict on January 13, 1999 (E.R. 275-279),[1] and the district court denied the plaintiffs' motion for a new trial on March 22, 1999 (E.R. 283-287). The plaintiffs filed a timely notice of appeal on April 20, 1999 (E.R. 288-289). This Court has jurisdiction under 28 U.S.C. 1291.

QUESTION PRESENTED

The United States will address whether the district court's instructions to the jury adequately and correctly explained what it meant for a practice to have a "disparate impact" on the basis of national origin in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq.

STATEMENT OF THE CASE

A. Proceedings Below

The plaintiffs filed this suit on March 29, 1996 (R. 1), alleging that the defendants had refused to rent a house to them, and thereby discriminated against them on the basis of national origin in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. On February 9, 1998, the defendants filed a motion for summary judgment or, in the alternative, partial summary judgment (R. 39), and the plaintiffs cross-moved for summary (or

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[1] "E.R._" refers to the appellants' excerpts of record. "R._" refers to the district court docket. "Tr._" refers to the trial transcript.

partial summary) judgment on February 25, 1998 (E.R. 39-41). Both motions were denied on May 8, 1998 (E.R. 67-77). The case went to trial on December 1, 1998 (R. 57-63; see E.R. 100-207), and was submitted to the jury on several special questions. The jury found for the defendants (E.R. 268-270), and judgment was entered on the special verdict (E.R. 275-279). The plaintiffs then moved for a new trial (E.R. 280-282), and that motion was denied (E.R. 283-287). The plaintiffs filed their notice of appeal on April 20, 1999 (E.R. 288-289).

B. Facts

According to his testimony,[2] on the afternoon of July 14, 1995, Joaquin Veles saw an advertisement in the San Jose Mercury News for a house that looked suitable for his family. He called the number listed and had an extended conversation in English with the woman at the other end of the telephone. Having received the requisite information, he and his family went to see the property. Having decided that they liked the house, the family returned home, and Mr. Veles again telephoned the number listed in the advertisement. In response to his question, the woman who answered the telephone told Mr. Veles where to come to fill out an application. When he asked her to repeat, or spell, the street address, she became angry, announced that she did not rent to people who did not speak English, and hung up. Mr. Veles' young daughter, Veronica, called back. But as soon as it

[2] Joaquin Veles testified in English without an interpreter. Mary Lindow testified to understanding the important elements of his testimony (Tr. 418-420).

appeared to the woman that Veronica was translating to her parents in the background, the woman repeated that she did not rent to people who did not know English, and she did not deal with children (Tr. 83-90, 92-94).

Mr. Veles also testified that he had functioned as the superintendent-handyman at an apartment complex, and he now runs his own business which involves dealing with the public. He has conducted all of these dealings successfully in English (Tr. 74-77, 95-97, 106, 108-109, 116-117).

Delia Veles went to the local Legal Aid office for help and spoke to its housing counselor, Alicia Carvajal (Tr. 203-204). Mrs. Carvajal, who is from Chile (Tr. 240) and apparently has an accent, telephoned the same number listed in the advertisement. She offered to interpret for the Veles family (Tr. 237). The woman on the telephone responded rudely, saying that Mrs. Carvajal would not do as an interpreter because her English was just as bad as that of the prospective tenant (Tr. 239). According to Mrs. Carvajal, the woman said she would not rent to Mexicans who don't speak English (Tr. 239).

Two fair housing testers who worked for Legal Aid, one without an accent and one who feigned a Hispanic accent, participated in a test with respect to a property advertised by the same owners and testified about it at trial. Susana Paredes, speaking unaccented English, telephoned the listed number and was told by the woman at the other end that the property originally listed had been rented, but another house would be available in

about two weeks (Tr. 259-260). Reportedly, the woman was very nice and actively tried to persuade her to rent that house when it became available (Tr. 260). Ms. Paredes instructed the other tester to wait about two weeks before trying the same number (Tr. 260).

After two weeks, Theresa Ramos, the second tester, called the same number, assuming a heavy Spanish accent (Tr. 280). No sooner had she spoken her opening sentence when the woman at the other end told her that she had the wrong number and hung up (Tr. 281). When Ms. Ramos pushed the matter, saying "No, no. I got your number in [the] newspaper," the woman replied: "We don't have any house for rent right now" (Tr. 287). The woman did not mention that a house would be available in the near future (Tr. 291). Ms. Paredes checked the site of the house a couple of weeks after her initial call and determined that the house in question was still being repaired (Tr. 262). She called the advertised number again, and the woman who answered was very courteous, saying that the house was not yet ready, but that Ms. Paredes should come and get an application nonetheless (Tr. 261-265).

Carl Lindow testified that his wife generally answered the telephone (Tr. 348). He also testified that he and his wife have a policy of requiring at least one adult member of a family to speak English so that they could ensure the family's comfort and safety. He said that they adopted this policy after having a couple from Chile, who did not speak English, living in one of

their houses. Mr. Lindow claimed that the landlord-tenant relationship had been very frustrating. He felt that this situation was bad for the English-speaking children who had to translate for the parents (Tr. 327-330). Mr. Lindow denied ever turning anyone down because of national origin and adduced evidence that the tenants in his houses since 1990 were of many different national origins, including a variety of Hispanic and Filipino people (Tr. 330-346).

Mary Lindow, co-owner of the property, testified that she had no memory whatever of the incidents described by Mr. Veles and by the others (Tr. 398-399). She denied ever getting angry at anyone or hanging up on anyone (Tr. 402-403). She did, however, claim that her policy was as described by her husband (Tr. 406-407). When asked whether she ever considered an alternative, such as having a third person act as a translator or intermediary in cases of emergency, she conceded that she had not (Tr. 417).

C. Conference, Jury Instructions, And "Special Questions"

1. In chambers, before instructing the jury, the court explained to counsel that it thought the plaintiffs' case problematic insofar as it purported to be based on a theory of "disparate impact." The court noted that the theory of "disparate impact" discrimination required a facially neutral policy "but which has an impact o[f] excluding people from a particular national origin" (E.R. 166). The court took the position that it had not received any "broad ranking statistical information upon

which to base any determination," and that the jury would be limited to the evidence adduced at trial (E.R. 166). Adverting to the data adduced by the defendants regarding their tenant population since 1990 (see E.R. 169), the court noted that "on the face of that information, it appears that the policy has not had a sufficient disparate impact so as to preclude people [of] a particular national origin from becoming tenants" (E.R. 166). Nor was there data showing how many people of a particular national origin had applied and had been rejected (E.R. 166). Counsel mentioned that the court had refused to admit either expert testimony or population statistics which would have shown that the defendants' policy had an impact on Mexican-Americans. The court stated that this was because the case had not been brought as a class action (E.R. 168, 171).

The court further indicated during this in-chambers conference that it had decided that, if potential tenants did not understand English sufficiently to satisfy the landlords, it did not violate the law to reject them (E.R. 170). The court did not, however, agree to direct a verdict for the defendants on the issue of disparate impact (E.R. 174).

2. The district court instructed the jury that it could find discrimination based on disparate treatment if it found by a preponderance of the evidence that the defendants owned or managed a house on Ella Drive which they were offering for rent

to the public on July 14, 1995,[3] and that, while the plaintiffs were willing and able to pay the rent demanded, the defendants "refused to discuss the rental of the property or otherwise made the property unavailable to plaintiffs" (E.R. 186), and that one reason was "the actual or perceived national origin of the plaintiffs" (E.R. 186).

In order to prove discrimination based on "disparate impact," the court instructed, the plaintiffs had to prove the following by a preponderance of the evidence (E.R. 187-189):

> * * * Defendants owned or managed a house * * * which they were offering for rent to only those members of the public * * * with whom they could readily communicate in English;
>
> * * * While defendants' policy appears to treat all people equally, it has the effect of discriminating against persons on the basis of national origin;
>
> * * * * *
>
> To discriminate on the basis of national origin means to use any of the following as one reason to make housing unavailable for rental:
>
> The country or geographic region where a prospective tenant was born or was perceived by the defendants to have been born; or the country o[r] geographic region where the prospective tenant's ancestors were born or were perceived by the defendants as having been born; some actual or perceived physical characteristic of the prospective tenant which is identifiable with a particular country or geographical region.
>
> * * * * *
>
> A rental policy which requires that prospective tenants demonstrate English speaking abilities to the satisfaction of the landlord sufficient to facilitate communications about fundamental aspects of the land-

[3] There was never any dispute with respect to this factual matter.

> lord-tenant relationship does not violate the fair housing laws, as long as the policy is not a subterfuge or pretext for discrimination against a particular national origin group.
>
> The defendants claim that their selection criterion was based on compelling business necessity. The defendants have the burden of proving this defense by a preponderance of the evidence.
>
> If you find this defense has been proved, then you will find for the defendants unless you find that the plaintiff has proved by a preponderance of the evidence that another selection criterion without a similar discriminatory effect would serve the defendants' legitimate business interest and the defendants have refused to adopt such alternative selection criterion.

3. The court submitted the case in the form of several special questions which the jury answered as follows (E.R. 276-277):

> 1. Did the defendants deny or otherwise make unavailable for rental to the plaintiffs the house on Ella Drive?
>
> Answer: "Yes" or No": Yes
>
> If you have answered "Yes", and only in that event, then answer the following questions. * * *
>
> 2. Was the actual or perceived national origin of the plaintiffs a reason for such denial?
>
> Answer: "Yes" or "No": No
>
> 3. Did defendants' policy have the effect of discriminating against persons whose national origin is Mexico?
>
> Answer: "Yes" or "No": No
>
> If you answered "No" to question[] No. 2 and question No. 3, then skip the remaining questions and have the presiding juror sign and date the Verdict Form.

Thus, the jury did not answer the questions that followed, addressed to business necessity or the availability of alter-

native policies that would have had less discriminatory effect, and the questions addressed to damages.

STANDARD OF REVIEW

Findings based upon an erroneous interpretation of the governing law are reviewed de novo as questions of law. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

SUMMARY OF ARGUMENT

The plaintiffs argued below that the defendants' practice was discriminatory with respect to people of Mexican national origin (E.R. 171). If nothing else, people of Mexican national origin would be disproportionately excluded from housing because of the defendants' language policy. Although the district court did not rule out such an argument, it did not correctly instruct the jury on the elements of a disparate impact violation. For that reason, this Court should vacate the judgment and remand to the district court for disposition of the disparate impact claim under the correct standard. Since some of the district court's instructions reflect a misunderstanding of the legal standard, we believe this Court should provide guidance to the lower court. We therefore address the correct legal standard for proving disparate impact in this case.

The model for disparate impact analysis is Griggs v. Duke Power Co., 401 U.S. 424 (1971).[4] Using this model, an English proficiency requirement for renting housing may be facially

[4] This Court accepts disparate impact analysis in Fair Housing Act cases. Pfaff v. United States Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996).

neutral but have a disproportionately adverse impact on the basis of national origin. It cannot be upheld unless it can be justified by business necessity, and equally useful but less discriminatory alternatives are not available. The district court erred when it instructed the jury that national origin discrimination involves discrimination on the basis of physical but not linguistic or cultural characteristics of a specific country or region. If an English proficiency requirement disproportionately excludes people of Mexican national origin (or, indeed, any Hispanic national origin) as compared to "Anglos,"[5] that constitutes disparate impact based on national origin. It does not matter that such a requirement might also screen out other national origin groups. The district court erred by concluding that it would not be national origin discrimination unless the defendants discriminated against persons from particular countries or regions rather than persons from any or all non-English-speaking countries.

The presence of people of Mexican national origin in the defendants' tenant population did not mean that the defendants' policy had no adverse impact if the persons excluded by the policy are disproportionately Mexicans or other language-minority groups. Disparate impact is not necessarily measured by the "bottom line." If a qualification disproportionately affects members of a protected class, it is "adverse impact" for purposes

[5] This term is commonly used not only for white, English-speaking Americans, but generally for persons whose forebears came from English-speaking countries.

of this analysis. Connecticut v. Teal, 457 U.S. 440 (1982).

The court did not adequately or correctly instruct the jury how to determine whether the defendants had a rental policy that resulted in disparate impact. Accordingly, the case should be remanded for decision under the proper standard.

ARGUMENT

THE DISTRICT COURT'S LEGAL ERRORS IN INSTRUCTING THE JURY AND IN FORMULATING THE SPECIAL QUESTIONS REQUIRE REMAND AND RETRIAL UNDER THE PROPER LEGAL STANDARDS

A. The District Court Did Not Explain To The Jury How To Determine Whether The Defendants' Policy Had A Discriminatory Effect

There are three ways in which a landlord might discriminate on the basis of national origin. He could: (1) explicitly exclude persons of particular national origins; (2) demand that the potential tenant meet some qualification as a pretext for excluding persons of certain national origins; or (3) adopt a standard or qualification for potential renters that was facially neutral but disproportionately affected persons of one or more identifiable national origins. In the present case, the jury decided that the defendants engaged in none of these types of discrimination. The court had not, however, adequately instructed the jury with respect to the framework for finding that a policy had a discriminatory effect.

This Court has held "disparate impact" analysis applicable to cases under the Fair Housing Act. Pfaff v. United States Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996). In applying that analysis, this Court looks to law developed under

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., (employment discrimination) (88 F.3d at 745 & n.1), particularly Griggs v. Duke Power Co., 401 U.S. 424 (1971). To make out a prima facie case of discrimination under this theory, the plaintiffs must show that the defendants have an apparently neutral policy or practice that operates disproportionately to screen out members of a protected group. Pfaff, 88 F.3d at 745. Once such an effect has been established, the defendants must show they had a business necessity that would justify that policy or practice, and no less discriminatory alternative was available. Id. at 747; Mountain Side Mobile Estates Partnership v. Secretary of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987-988 (4th Cir. 1984). While the district court told the jury that there could be liability if the defendants' policy had the effect of discriminating on the basis of national origin, the court never explained to them what kind of proof would establish such an effect.

B. Disparate Impact Analysis Can Be Applied When More Than One National Origin Group Is Adversely Affected

The district court instructed the jury that discrimination based on national origin is discrimination based on the "country or geographic region" of a person's origin, or some "actual or perceived physical characteristic" identifiable with "a particu-

lar country or geographical region" (E.R. 187).[6] The court then asked the jury whether the defendants' policy "ha[d] the effect of discriminating against persons whose national origin is Mexico" (see p. 9, supra). Taken in combination, the instruction and special question conveyed the court's apparent conviction that discrimination based upon a person's lack of English proficiency, as such, is simply not national origin discrimination. Lack of proficiency in English is not a "physical" characteristic of a particular country or region, nor is it identified uniquely with people from Mexico.

Language is a cultural trait associated with national origin. Discrimination does not cease to be "based on national origin" just because it is based on a cultural trait rather than a physical (or perceived physical) trait. Nor does it matter that the cultural trait in question is shared by persons from many countries, and therefore, the policy may affect more than one national-origin group.[7] The district court should have clearly instructed the jury that English proficiency rules necessarily have a disproportionate (though not universal) impact

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[6] Without objection by any party, the court adopted the Equal Employment Opportunity Commission (EEOC) Guideline (29 C.F.R. 1606.1) position that "national origin" includes the place of origin of one's ancestors. It did not, however, define "national origin" discrimination — as the EEOC does (see ibid.) — as discrimination based, among other things, upon the "cultural or linguistic characteristics of a national origin group."

[7] The court did not permit the plaintiffs to introduce evidence that might have shown that persons of Hispanic national origins were the persons in the San Jose area most likely to suffer from lack of English proficiency (see E.R. 168).

on all persons from non-English-speaking countries. "Just because the country of origin of those [a]ffected by the English-only policy is not readily identifiable, does not mean that a disparate impact does not exist. Conversely, the fact that individuals from a multitude of foreign nations are [a]ffected by the English-only policy shows its far-reaching discriminatory impact." Sandoval v. L.N. Hagan, 7 F. Supp. 2d 1234, 1280 (M.D. Ala. 1998), appeal pending, No. 98-6598 (11th Cir.); see also EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999).[8]

In Lau v. Nichols, 414 U.S. 563 (1974), students of Chinese national origin who did not speak English challenged their English-only education under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Applying the Department of Health, Education, and Welfare "disparate impact" regulation, 414 U.S. at 568, the Court found in favor of the plaintiffs. At no time did the Court suggest that the plaintiffs needed to demonstrate a greater

impact upon Chinese students than upon other non-English-speaking students such as Hispanics. Similarly, the Equal Employment Opportunity Commission (EEOC) Guideline on Discrimination Because of National Origin, 29 C.F.R. 1606.7, addresses English-only workplace rules because of their potential impact "on the basis

[8] This is equally true whether disparate impact or disparate treatment is in issue. A landlord might utilize a language requirement as a pretext to exclude (or limit the number of) tenants of a particular national origin or tenants of non-English-speaking national origins in general.

of national origin" without reference to their impact on any particular nationality. And in Garcia v. Spun Steak Co., 998 F.2d 1480, 1488 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994), this Court recognized that a rule requiring that only English be spoken on the job could have an adverse impact on the basis of national origin.[9]

The phrasing of the third special question suggested that, if the defendants' policy could have affected Filipinos or persons of Chinese national origin just as badly as it affected the Veles family, then the plaintiffs did not suffer because of their national origin.[10] The jury was not given the option of finding that the defendants pursued a policy that discriminated on the basis of a cultural trait that the Veles family shared, disproportionately, with others from non-English-speaking countries. The instruction was, therefore, erroneous.

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[9] The named plaintiffs in Garcia were able to speak English, but wanted to converse in Spanish. This Court held, essentially, that they did not have standing to challenge the "English only" policy.

[10] Were there any doubt that this was what the district court intended to convey, it is dispelled by the court's holding on the cross-motions for summary judgment (E.R. 73): "[A]n English-only policy does not have a distinct impact o[n] persons of a particular national origin. Rather, it potentially affects those who speak only Chinese, Korean, Yiddish, Greek, Russian or any other language." Although these sentences appear in the part of the opinion that addresses "disparate treatment," the court later asserts (E.R. 75): "A key issue remains, however, as to whether the facially neutral practice has an adverse impact on individuals of a particular national origin. There is no evidence of adverse impact before the Court."

C. "Disparate Impact" Is Not Necessarily Measured By The "Bottom Line"

Although the district court did not expressly instruct the jury how it was to measure "disparate impact," in chambers, out of the hearing of the jury, the court gave a clear indication of how it thought such discrimination could be measured: (1) the plaintiffs might try to show that applicants of a particular national origin had been turned down more often than other applicants (applicant flow); or (2) the plaintiffs might show that persons of a particular national origin were absent from, or poorly represented among, the defendants' tenant population (see pp. 6-7, supra). The only data the court permitted to be presented at trial, however, were data regarding the defendants' tenant population since 1990 (see E.R. 168). The evidence was that the defendants had rented to a tenant population of diverse national origins including Mexicans. Thus, by giving no other instruction, and asking the jury whether the impact of the defendants' policy fell most heavily on persons of Mexican national origin, the court necessarily suggested that the jury should judge by the "bottom line" and answer in the negative.

Disparate impact is not necessarily measured by the "bottom line," however. In Connecticut v. Teal, 457 U.S. 440 (1982), the Court considered a challenge to an employee promotion process that had many stages. One stage in that process disqualified proportionately more African American than white candidates. But the employer "made up for it" at other phases so that the total

group of persons who received promotions (the "bottom line") was not disproportionately white. Nonetheless, the Court concluded that a successful challenge could be brought against the particular test or qualification that had disparate impact. See also Clady v. County of L.A., 770 F.2d 1421, 1429 (9th Cir. 1985)(discrete pass/fail barriers having adverse impact must be individually validated even if there is no "bottom line" disparate impact), cert. denied, 475 U.S. 1109 (1986).

The same analysis applies in language cases. In Lau v. Nichols, 414 U.S. 563 (1974), for example, it was irrelevant that many children of Chinese and Hispanic national origins spoke English quite well. Indeed, the children who were benefitting from public education (the "bottom line") might have been mainly or entirely children of Chinese national origin who did speak English. At the same time, however, the children who did not speak English were still victims of discrimination, on the basis of national origin, because they were being subjected to an English-only method of teaching. By the same reasoning, it was irrelevant that the defendants rented to English-speaking persons from non-English-speaking countries. It would not change the fact that those who were rejected for speaking English less proficiently were disproportionately from non-English-speaking countries.

Since the jury made a negative finding as to "disparate impact," it never reached the question whether the defendants

could justify requiring tenants to be proficient in English,[11] or if alternative means of communicating with tenants (e.g., through third parties) would be equally effective and less discriminatory. The United States accordingly does not address these issues. Because of the many errors in the instructions leading to judgment for the defendants, the judgment should be vacated and the case remanded for retrial under the proper standard.

CONCLUSION

The judgment below should be vacated and the matter remanded.

Respectfully submitted,

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[11] Nothing in the district court's instructions or special questions requested, or even allowed, the jury to determine what level of English proficiency the defendants actually demanded. Arguably, this is a necessary predicate to determining whether the standard applied was justified by a compelling business necessity.

STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-2.6, the United States knows of no related cases pending in this Court.

MIRIAM R. EISENSTEIN
Attorney

September 23, 1999

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS URGING THE COURT TO VACATE AND REMAND is monospaced, has 10.5 characters per inch, and contains 4633 words.

MIRIAM R. EISENSTEIN
Attorney

September 23, 1999

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 1999, I served all parties to this case with two copies of the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS URGING THE COURT TO VACATE AND REMAND by mailing them, postage prepaid, to the following addresses:

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