In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DANIEL LEE ROMANOWSKI,

Defendant and Appellant.

Case No. S231405

Second Appellate District, Division Eight, Case No. B263164
Los Angeles County Superior Court, Case No. MA064403
The Honorable Christopher G. Estes, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether Penal Code section 490.2, added by Proposition 47 and redefining grand theft to exclude property valued under $950, applies to the fraudulent acquisition or possession of access card account information as defined by Penal Code section 484e, subdivision (d)?

STATEMENT OF THE CASE

A. Statutory Background

This case concerns the interpretation of the resentencing provisions of Proposition 47 (or "the Act"), which were intended to reduce certain specifically enumerated nonviolent and nonserious felonies to misdemeanors, and its interaction with Penal Code section 484e, subdivision (d) (hereafter "section 484e(d)," etc.), which is not specifically enumerated under the Act, and which is part of a broad statutory scheme to protect innocent consumers from criminals seeking to acquire or retain access card account information without the consent of the cardholder and with the intent to use it fraudulently. Where, as here, multiple statutory schemes become relevant, the reviewing court evaluates each scheme and seeks to "harmonize them to carry out their evinced intent." (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1224.)

1. Proposition 47

Proposition 47 was enacted on November 4, 2014, and went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) For offenders meeting statutory criteria, the Act converted certain drug and

theft-related offenses, which had previously been designated as either felonies or "wobblers," into misdemeanors. (*Id.* at p. 1091.)[1]

The Act added several sections to the Penal Code, including section 490.2 and section 1170.18. Section 1170.18, as added by the Act, states in relevant part:

> (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.
>
> (b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, [as] those sections have been amended or added by this act, unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

Section 490.2(a) provides:

> Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions

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[1] A "wobbler" is a crime punishable as either a felony or a misdemeanor. (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1091.)

for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

Proposition 47 was intended to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession" and "[a]uthorize consideration of resentencing for . . . any of the offenses listed herein that are now misdemeanors." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 3, 4, p. 70.)

2. Other relevant theft statutes

Section 487 provides, in relevant part:

> Grand theft is theft committed in any of the following cases:
>
> (a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950), except as provided in subdivision (b).

Section 484e(d) states:

> Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

The elements of a section 484e(d) offense are (1) the acquisition or retention of the account information of an access card issued to someone else, (2) without the consent of the cardholder or issuer of the card and (3) with the intent to use that information fraudulently. (See CALCRIM No. 1952[2]; *People v. Molina* (2004) 120 Cal.App.4th 507, 512.) It is not

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[2] CALCRIM No. 1952 provides in part:

> The defendant is charged [in Count _____] with (acquiring/ [or] retaining) the account information of an access card [in violation of Penal Code section 484e(d)].

(continued...)

necessary "that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts." (CALCRIM No. 1952; see *Molina*, at p. 516 [section 484e(d) does not require actual use "or that the account of an innocent consumer actually be charged or billed"].)

B. Procedural Background

Romanowski was charged in a felony complaint with fraudulently acquiring and retaining possession of access card account information, in violation of section 484e(d). It was further alleged he had served a prior prison term within the meaning of section 667.5(b). (1CT 1.) Romanowski pled no contest to the charge and admitted the prior prison term enhancement. (1CT 6-7.) He was sentenced to serve four years in county jail, consisting of the upper term of three years on count 1, plus a consecutive one-year term for the prior prison term enhancement. (1CT 8.)

After Proposition 47 passed, Romanowski filed a petition for resentencing pursuant to section 1170.18. The People opposed the petition on the ground that the underlying charge was ineligible for relief. (1CT 10, 14.) The sentencing court denied the petition, stating that section 484e(d) "focuses on obtaining the access card information with the intent to use it,"

(...continued)

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (acquired/ [or] retained) the account information of an access card that was validly issued to someone else;

2. The defendant did so without the consent of the cardholder or the issuer of the card;

AND

3. When the defendant (acquired/ [or] retained) the account information, (he/she) intended to use that information fraudulently.

and was therefore "more akin to . . . identity theft" than to grand theft. (1RT 2-3.)

C. The Court of Appeal's Opinion

On appeal, Romanowski contended that his conviction under section 484e(d) must be reduced to a misdemeanor pursuant to Proposition 47. (Slip Opn. at p. 3.) The Court of Appeal agreed, holding that the acquisition or possession of access card account information under section 484e(d) qualifies for Proposition 47 resentencing when the value of the access card information does not exceed $950. (Slip Opn. at pp. 4, 9.) In so doing, the court expressly disagreed with the opinions in *People v. Grayson* (2015) 241 Cal.App.4th 454, 458-459, review granted January 20, 2016 (S231757) and *People v. Cuen* (2015) 241 Cal.App.4th 1227, 1231-1232, review granted January 20, 2016 (S231107), which reached the opposite conclusion. (Slip Opn. at pp. 2, 5-9; see also *People v. Thompson* (2015) 243 Cal.App.4th 413, 418-422 [agreeing with *Romanowski* and disagreeing with *Cuen* and *Grayson*], review pending (S232212); *People v. King* (2015) 242 Cal.App.4th 1312, 1317 [disagreeing with *Romanowski*], review granted February 24, 2016 (S231888).) The matter was remanded to the trial court for a determination of the value of the property taken. (Slip Opn. at p. 10.)

ARGUMENT

PROPOSITION 47 DOES NOT MAKE FRAUDULENT ACQUISITION OR POSSESSION OF ACCESS CARD ACCOUNT INFORMATION UNDER SECTION 484E(D) A REDUCIBLE OFFENSE

Section 490.2(a) reduces a crime otherwise defined as grand theft to a misdemeanor if it involves "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars." Acquisition or possession of access card account

information under section 484e(d), although punished as grand theft, is more properly characterized as a crime prohibiting fraudulent possession and not theft. It is also not a crime whose subject matter—the acquisition or retention of access card account *information*—can be quantified in the way section 490.2 contemplates. Section 490.2, by its plain terms, therefore does not make the acquisition or possession of access card account information reducible to a misdemeanor. And even if there were any ambiguity in the statutory language, it would be resolved by reference to the electorate's intent. The voters would not have understood Proposition 47's reference to crimes involving the theft of property worth $950 or less to apply to the fraudulent possession of access card account information. In the absence of any such indication in the voting materials the voters would not have intended to dilute section 484e(d)'s strong consumer protection.

A. Principles of Construction

In interpreting a voter initiative, the court applies the same principles that govern the construction of a statute. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Hendrix* (1997) 16 Cal.4th 508, 512, internal quote marks and citations omitted.) "But if the language is ambiguous, [the court] consider[s] extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative." (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." (*In re Harris* (1989) 49 Cal.3d 131, 136, citing *In re Lance W.*

(1985) 37 Cal.3d 873, 890, fn. 11 ["The adopting body is presumed to be aware of existing laws and judicial construction thereof"].) Reviewing courts independently determine issues of law, such as the interpretation and construction of statutory language. (*People v. Love* (2005) 132 Cal.App.4th 276, 284.)

B. Fraudulent Acquisition Or Possession of Access Card Account Information Is Not a Reducible Offense Under Proposition 47 in Light of the Plain Language of Sections 490.2(a) and 484e(d)

Section 484e(d) is not a reducible offense under Proposition 47 because it is fundamentally a possession crime that does not require "obtaining any property by theft" and because it is not a crime that is amenable to the kind of valuation contemplated by section 490.2.

Section 484e is part of a "'comprehensive statutory scheme which punishes a variety of fraudulent practices involving access cards.'" (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 512; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1232.) In enacting this statutory scheme, "[t]he Legislature intended to provide broad protection to innocent consumers." (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 519; see also *People v. Butler*, *supra*, 43 Cal.App.4th at p. 1245 ["because the access card statutes are broadly worded, they are to be important weapons against fraudulent consumer and business practices"].) Section 484e defines four types of proscribed conduct and specifically denotes whether each one amounts to a felony or a misdemeanor. (See § 484e(a) ["Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of *grand theft*"]; § 484e(b) ["Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under

circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of *grand theft*"]; § 484e(c) ["Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of *petty theft*"]; § 484e(d) ["Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of *grand theft*"] [Italics added].)

Although section 484e(d) is punished as grand theft, it does not primarily define a "theft" crime. The section is violated when someone *acquires or retains possession* of access card account information issued to another person (and with the intent to use it fraudulently). (See *People v. Molina*, *supra*, 120 Cal.App.4th at pp. 516, 519; see also CALCRIM No. 1952.)[3] It is not necessary that anyone actually be defrauded or suffer a loss as a result of the defendant's acts. (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 516.) The Legislature's goal in criminalizing the acquisition or possession of access card account information was to prevent, ex ante, alteration of access cards through forgery (which is separately criminalized by section 484f). (*Id.* at pp. 518-519.) The crime therefore does not require theft, and instead focuses on the holding of account information with the intent to commit fraud. It is therefore misleading to refer to the crime, as the Court of Appeal below did, as "theft of access card information." (Slip Opn. at p. 9.) The crime is better characterized as "fraudulent possession of an access card." (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 517.)

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[3] For example, offenders frequently acquire access card account information by "dumpster diving."

Even if some violations of section 484e(d) might involve, as a factual matter, the "acquisition" of access card account information by theft, the overwhelming majority of those offenders would also be guilty under the statute for subsequently retaining the information. And even if there were some small subset of cases under which offenders would be guilty solely on the basis that they acquired access card information by theft (without "retaining" it), making only those crimes reducible under Proposition 47 would lead to an absurd result. Under that construction, a person who acquired access card account information by theft would be guilty of a misdemeanor, whereas a person who merely "retained possession" of access card account information—even if the value of the information did not exceed $950—would be guilty of a felony. That is a result the electorate could not have intended. Like all statutes, initiative measures are interpreted to avoid absurd results. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 52.) Since section 490.2 is addressed to those crimes that involve obtaining money, labor, real, or personal property "by theft," and since "theft" of access card account information is not required by, and is not the focus of, section 484e(d), the crime does not meet Proposition 47's definition of reducible grand thefts.

In addition, access card account information is not the kind of "money, labor, real, or personal property" that is amenable to valuation in the way that section 490.2 contemplates. Penal Code section 7 defines "personal property" to "include money, goods, chattels, things in action, and evidences of debt." Access card account information, on the other hand, is simply "account information with respect to an access card validly issued to another." (See *People v. Molina*, *supra*, 120 Cal.App.4th at p. 518.) Such information may be considered "property" under a broad definition of that term. (See *People v. Kozlowski* (2002) 96 Cal.App.4th 853, 864-869 [construing ATM card PIN number as property for purposes

of extortion].) But it is nonetheless qualitatively distinguishable from other types of personal property addressed by the theft statutes in that it is intangible and constitutes only a means of access to other valuable property. (See, e.g., §§ 484 [money, labor, real, or personal property], 484b [funds], 484c [construction loan funds], 484.1 [property from pawn broker]; 487 [money, labor, real, or personal property; fish, fowls, produce, automobiles, firearms], 487a [livestock], 487b & 487c [real property], 487d [metals], 487e & 487f [dogs], 487g [animals], 487h [cargo], 487i [public housing authority funds], 487j [copper].) Access card account information therefore does not fit neatly into the category of "personal property" as that term is used in the theft statutes.

For the same reason, its value is difficult to define. Unlike other grand thefts that were not expressly defined in terms of value before Proposition 47, such as the theft of an automobile or a firearm (§ 487(d))—and unlike those thefts that have always been so defined—the acquisition or retention of access card account information poses problems of valuation that would be complex and elusive, which is likely one reason why the Legislature chose not to make section 484e(d) value-dependent to begin with. The value of property for purposes of grand theft is determined by the "fair market value" test. (§ 484(a); *People v. Pena* (1977) 68 Cal.App.3d 100, 104.) Unlike a car or a firearm, access card account information has no inherent fair market value. It can be used to obtain things of value, but in that case the crime is separately punishable under section 484g, which defines the fraudulent use of access cards or account information as grand theft "[i]f the value of all money, good, services, and other things of value obtained" exceeds $950 in any consecutive six-month period.

While there may exist a black market for the exchange of access card account information itself (see Slip Opn. at p. 7), application of the fair

market value test in the context of a black market (so named because of its very obscurity) would be problematic. (See *Pugh v. Holmes* (Pa. 1979) 405 A.2d 897, 909 [observing that it is "questionable" whether a fair market value test could apply in a context where the only available market was a black, or illegal, one].) Not only would data about such a market be difficult to obtain, but the value of a transaction on the black market would likely depend, to a much greater extent than in a legal market, on the particular time, place, and circumstances of the transaction. This would make black market data especially unsuitable for determining with any precision whether a hypothetical fair market price falls above or below $950. (See *People v. Pena*, *supra*, 68 Cal.App.3d at p. 104 ["the 'fair market price' is the highest price obtainable from a willing buyer by a willing seller, neither of whom is forced to act. It is not the highest price in the market but the highest price a willing buyer and a willing seller will arrive at"].)

One recent appellate decision has suggested that the problem of valuation might be circumvented by simply deeming the value of access card account information necessarily de minimis, so that a violation of section 484e(d) would always fall below the $950 threshold and thereby qualify for reduction. (See *People v. Thompson*, *supra*, 243 Cal.App.4th at p. 423.) But that would plainly frustrate the statutory scheme. Section 490.2 presupposes that the grand thefts to which it would apply are capable of falling either above or below the $950 threshold. Proposition 47 elsewhere categorically converts possession-based crimes that were formerly felonies into misdemeanors without reference to value. (See, e.g., Health & Saf. Code, §§ 11350, 11357(a), 11377.) If that had been the intent as to section 484e(d), Proposition 47 would have accomplished the conversion in the same manner. Shoehorning a categorical reduction of section 484e(d) into the inherently non-categorical mechanism of section

490.2 would be inconsistent with the manifest purpose of the latter provision. Moreover, to say that the value of access card account information is always de minimis would be factually incorrect. While its value would be hard to pinpoint, there is no reason to think that at least some access card account information could be worth more than the relatively modest $950 threshold. (See Slip Opn. at p. 7 ["We can easily conceive of situations in which" access card account information would be worth more than $950].) For that reason, too, such a solution would be inappropriate.

In short, the acquisition or possession of access card account information is qualitatively different from most other grand theft crimes covered by section 490.2—crimes that involve the theft of tangible, personal property whose value may be ascertained fairly easily in most cases. Because the fraudulent acquisition or possession of access card information does not require or focus on theft and is not amenable to valuation as contemplated by section 490.2, it is not a reducible offense under Proposition 47.

C. The Voters Did Not Intend Proposition 47's Ameliorative Effects to Apply to Section 484e(d)

Even if the statutory language were ambiguous, any ambiguity is resolved by reference to the electorate's intent.

The voters were told that Proposition 47 would change "low-level, nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Argument in Favor at p. 38.) The voters were also told that "[t]his measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved . . . ." (Voter

Information Guide, Gen. Elec. (Nov. 4, 2014) Analysis at p. 35.) But acquiring or possessing access card information is not like petty theft or drug possession. As explained, the essence of a section 484e(d) violation is not theft but the acquisition or retention of access card information with the intent to use it fraudulently. The section aims "to provide broad protection to innocent consumers." (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 519.) The harm caused by the unauthorized acquisition or retention of access card information poses a significant risk of identity theft and the resulting "injury, expense and inconvenience arising from the fraudulent use of [consumers'] access card account information." (*Id.* at p. 516.)

Under the Court of Appeal's reasoning, many (if not most) violations of section 484e(d) would be reduced to misdemeanors. (See Slip Opn. at p. 9 ["We recognize our holding today has the potential to reduce most thefts under section 484e[(d)] to misdemeanors, given section 484e[(d)] requires no proof of actual loss and valuing the mere acquisition and possession of access card information may be difficult"].) However, in light of the nature of section 484e(d), which targets fraudulent possession of account information, and in light of what voters were told about Proposition 47's goal to target low-level crimes like petty theft and simple drug possession, the electorate could not have intended the effective gutting of section 484e(d) that would result from the Court of Appeal's view.

To be sure, Proposition 47's intent was to divert resources from the punishment of nonserious, nonviolent crime to the punishment of serious and violent offenses, as well as to school programs. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Text of Initiative at p. 70.) And the initiative is to "be broadly construed to accomplish its purposes." (*Id.* at p. 74.) But broad construction does not mean construction without limits. The test is not whether a particular crime's reduction to a misdemeanor would further the initiative's purpose of saving money, but whether, even

under a broad construction, the initiative was meant to encompass a particular crime. In the absence of any indication that the type of property theft offenses affected by section 490.2 would include a dissimilar crime like fraudulent possession of account information, the electorate could not have intended to sweep section 484e(d) within the scope of Proposition 47.

Thus, the voters did not intend to apply section 490.2 to section 484e(d) to reduce the offense to a misdemeanor, and the Court of Appeal erred when it concluded that section 490.2(a) "applies to theft of access card information under" section 484e(d). (Slip Opn. 9.)

CONCLUSION

The Court of Appeal's judgment should be reversed.

Dated: March 7, 2016

Respectfully submitted,

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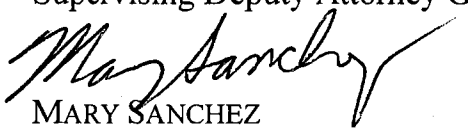

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 4,021 words.

Dated: March 7, 2016

KAMALA D. HARRIS
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DECLARATION OF SERVICE

Case Name: ***People v. Daniel Lee Romanowski*** No.: **S231405**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 7, 2016, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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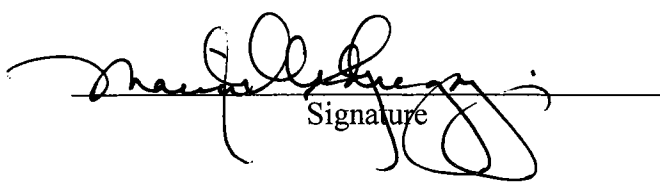
On March 7, 2016, I caused eight (8) copies of the **OPENING BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by FedEx Priority Overnight, Tracking # 8094 5192 2537.

On March 7, 2016, I caused one electronic copy of the **OPENING BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

The two copies for the California Appellate Project were placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 7, 2016, at Los Angeles, California.

M. O. Legaspi
Declarant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