

**FILED  
Court of Appeals  
Division II  
State of Washington  
11/13/2019 2:37 PM**

No. 52458-9-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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ANTI-SMOKING ALLIANCE dba PINK LUNG BRIGADE,  
a Washington non-profit corporation,

*Respondent,*

v.

TACOMA-PIERCE COUNTY DEPARTMENT OF HEALTH AND  
HEALTH BOARD,  
a division of Pierce County and City of Tacoma

*Appellant.*

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**STATEMENT OF ADDITIONAL AUTHORITIES**

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## **TABLE OF AUTHORITIES**

### **Statutes**

**WAC 248-80-001**

**WAC 246-80-010**

**WAC 246-80-020**

**WAC 246-80-025**

**WAC 426-80-030**

**WAC 246-80-040**

### **Other Authority**

**EO 19-03**

COMES NOW Appellant, Tacoma-Pierce County Health Department (the “Health Department”), and hereby submits these additional authorities pursuant to RAP 10.8.

On September 27, 2019, Gov. Inslee announced executive order 19-03 addressing the vaping use public health crisis. (App. A). In this order, Gov. Inslee directed the Washington State Department of Health to impose a ban on all flavored vapor products at its next scheduled meeting on October 9, 2019.

On October 9, 2019, the Washington State Board of Health (“BOH”) adopted WSR 19-51-050, which created WAC 246-80-001, WAC 246-80-010, WAC 246-80-020, WAC 246-80-025, WAC 246-80-030, and WAC 246-80-040. (App. B). The BOH found:

The immediate adoption of a rule prohibiting the sale of flavored vapor products and requiring sellers of vapor products to post warning signs about the risk of vaping-related lung disease is necessary to prevent and reduce youth and young adult exposure, especially of youth and young adults, to severe lung disease associated with the use of vapor products. The Washington State Board of Health has the authority and responsibility to adopt rules for the prevention and control of such disease.

App. B, 1. In these newly adopted WACs, the BOH prohibited the sale of flavored vapor products, mandated that warning signs about

the risk of lung disease associated with the use of vapor products must be displayed, and ordered health care providers to submit case reports of cases of lung injury associated with the use of vapor products to the local health jurisdiction within three days of a case.

DATED this 13th day of November 2019

McGAVICK GRAVES, P.S.

By: 

Lori M. Bemis, WSBA #32921  
Of Attorneys for Appellant

## DECLARATION OF SERVICE

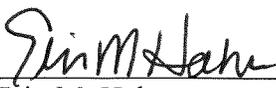
The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal which will send notification of such filing to the following:

Eric Krening  
Thomas T. Osinski, Jr.  
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*Attorneys for Respondent*

Signed at Tacoma, Washington this 13th day of November  
2019.

McGAVICK GRAVES, P.S.

By:   
Erin M. Hahn

# Appendix A

JAY INSLEE  
Governor



STATE OF WASHINGTON  
OFFICE OF THE GOVERNOR  
*P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • [www.governor.wa.gov](http://www.governor.wa.gov)*

**EXECUTIVE ORDER 19-03**  
**ADDRESSING THE VAPING USE PUBLIC HEALTH CRISIS**

**WHEREAS**, it is the policy of the state of Washington to support the health, safety, and well-being of all Washingtonians; and

**WHEREAS**, vaping devices—also known as e-cigarettes, JUULs or vape pens—and the vape juices and/or cartridges used with them (hereafter referred to, collectively, as “vapor products”), can contain nicotine, tetrahydrocannabinol (THC) and/or other substances, like flavoring or chemicals; and

**WHEREAS**, vapor products containing nicotine are the most commonly used nicotine products in Washington among youth; and

**WHEREAS**, notwithstanding state law prohibiting the sale or distribution of vapor products to minors, the 2018 Washington State Healthy Youth Survey reported that vapor product use increased dramatically among 8th, 10th, and 12th grade students between 2016 and 2018. Specifically, use of vapor products among 12th grade students increased from 20% in 2016 to nearly 30% in 2018; and

**WHEREAS**, preliminary results from the 2019 National Youth Tobacco Survey reported more than one in four high-school students use vapor products with an overwhelming majority reporting use of fruit, menthol, or mint flavors; and

**WHEREAS**, the appeal of flavored nicotine vapor products, as well as advertising and promotional activities targeted at youth, are contributing to the dramatic increase in youth vaping; and

**WHEREAS**, there are no manufacturing standards for non-THC vapor products, and some vapor products are sold as open containers, which allows for the addition of a broad range of substances to the vapor products without regulatory oversight or full user knowledge about the content or impact of the substances being consumed; and

**WHEREAS**, consumers who vape can choose from over 8,000 e-liquid flavors to use with their vaping devices. Some of those flavors can damage lung cells and may play a role in addiction; and

**WHEREAS**, in 2019, an outbreak of a lung injury emerged in previously healthy individuals who had recently vaped THC and/or nicotine vapor products, and the cause of this injury is not yet known; and

**WHEREAS**, as of September 26, 2019, over 800 cases of this vaping-related lung injury have been reported nationwide—with seven cases reported in Washington State—and including 12 deaths around the country. The number of known cases of this injury is expected to grow; and

**WHEREAS**, roughly 67 percent of the cases of this vaping-related lung injury were reported in 18 to 34 year olds and 16 percent of the cases involved individuals under 18 years of age; and

**WHEREAS**, both the U.S. Food and Drug Administration (FDA) and the U.S. Centers for Disease Control and Prevention (CDC) have expressed concern at this nationwide outbreak and have initiated investigations into this complex health emergency, including testing of a broad range of vapor products and an investigation into the supply chain of vapor products. The CDC has not yet determined the specific cause of this outbreak and has recently advised consumers to consider refraining from vaping pending the outcome of their investigation; and

**WHEREAS**, the FDA has announced that e-cigarette use among youth has reached epidemic proportions and that this epidemic presents a clear and present danger;

**WHEREAS**, no one substance has been identified as the cause of these vaping-related lung injuries; and

**WHEREAS**, even if/when the specific ingredient(s) or compound(s) causing this vaping-related lung injury were to be identified, the state has no viable means to identify which vapor products for sale in Washington contain the injury-inducing substance(s) so that these products can be quickly removed from the marketplace; and

**WHEREAS**, Washingtonians suffering from this vaping-related lung injury have experienced severe harm to their health; and

**WHEREAS**, in the absence of one or more known, specific harmful substances in this vapor-product health emergency, and in the absence of the ability to fully isolate and remove those harmful substances once they are identified, it is imperative that the state respond in a comprehensive and evidence-based manner to address this public health crisis.

**NOW THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the power vested in me by the Constitution and statutes of the state of Washington do hereby order and direct as follows:**

### **Washington State Department of Health:**

- **Emergency Rule to Ban Flavored Vapor Products:** Request that the State Board of Health use its emergency rulemaking authority to impose a ban on all flavored vapor products, including flavored THC vapor products, at the Board's next meeting on October 9.
- **Immediately Ban Identified Causes of Outbreak:** Once the sources or causes of this vaping-related lung injury outbreak are identified, take immediate action to ban products containing those identified sources from sale, and work with other agencies and local partners to remove those products from retail stores to the extent those harmful products can be identified.
- **Consumer Warnings:** Develop a warning sign regarding the health risks of vaping. Request that all local health officers in Washington require the posting of these warning signs at all licensed retailers of non-THC vapor products.
- **Ingredient Disclosure:** Develop a plan to require manufacturers of non-THC vapor products to disclose all compounds (including ingredients, solvents, additives, etc.) used in the production and processing of their vapor products, as well as the sources of all vapor products. Incorporate this plan into a legislative proposal for 2020.
- **Provider Reporting:** Encourage health care providers to report all suspected cases of this severe vaping-related lung injury to their local health department.
- **Education Campaign:** Redirect available cannabis education program funds for a vaping awareness campaign, to include digital and social media messaging focused on youth, young adults, and parents.
- **Legislation:** In collaboration with the Liquor and Cannabis Board, and other agencies as appropriate, develop 2020 Governor-request legislative proposals to, at a minimum:
  - Ban all flavored vapor products, including those containing nicotine or THC, and take any other actions that deter youth access to and initiation of these products;
  - Disclose ingredients in vapor products to consumers to the extent permitted by federal law;
  - Increase regulatory oversight of vapor products;
  - Expand the educational campaign focused on the significant health impacts from vaping nicotine and THC;
  - Limit bulk sales at retail stores;
  - Clarify and expand the Department of Health's authority to take action when a harm or risk to public health is present but the specific cause is unknown; and,
  - Seek funding to increase oversight and enforcement, including enforcement related to illicit markets.

### **Washington State Liquor and Cannabis Board:**

- **Immediately Ban Identified Causes of Outbreak:** Once the sources or causes of this vaping-related lung injury outbreak are identified, take immediate action to ban products containing those identified sources from sale, and work with other agencies and local partners to remove those products from retail stores.

- Consumer Warnings: Require the posting of warning signs regarding the health risks of vaping at retailers where vapor products containing THC are sold.
- Ingredient Disclosure: Require manufacturers of THC vapor products to disclose all compounds (including ingredients, solvents, additives, etc.) used in the production and processing as well as the sources of all vapor products.

This Executive Order shall take effect immediately.

Signed and sealed with the official seal of the state of Washington, on this 27th day of September, 2019, at Seattle, Washington.

By:

/s/

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Jay Inslee

Governor

BY THE GOVERNOR:

/s/

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Secretary of State

# Appendix B

DATE: October 10, 2019

TIME: 12:27 PM

WSR 19-21-050



# RULE-MAKING ORDER

## EMERGENCY RULE ONLY

**CR-103E (December 2017)**  
**(Implements RCW 34.05.350**  
**and 34.05.360)**

**Agency:** State Board of Health

**Effective date of rule:**

**Emergency Rules**

- Immediately upon filing.  
 Later (specify)

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

- Yes  No If Yes, explain:

**Purpose:** Chapter 246-80 WAC - Vapor products and flavors. The Washington State Board of Health has adopted emergency rules to ban the sale of flavored vapor products, including flavored THC vapor products, to require retailers to display a sign warning of the risk of lung disease associated with use of vapor products, and to require reporting of cases of lung injury associated with the use of vapor products from health care providers and health care facilities.

**Citation of rules affected by this order:**

New: WAC 246-80-001, WAC 246-80-010, WAC 246-80-020, WAC 246-80-025, WAC 246-80-030, WAC 246-80-040  
Repealed: None  
Amended: None  
Suspended: None

**Statutory authority for adoption:** RCW 43.20.050(2)(f)

**Other authority:**

**EMERGENCY RULE**

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.  
 That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

**Reasons for this finding:** The immediate adoption of a rule prohibiting the sale of flavored vapor products and requiring sellers of vapor products to post warning signs about the risk of vaping-related lung disease is necessary to prevent and reduce youth and young adult exposure, especially of youth and young adults, to severe lung disease associated with the use of vapor products. The Washington State Board of Health has the authority and responsibility to adopt rules for the prevention and control of such disease.

The Centers for Disease Control, U.S. Food and Drug Administration, Washington State Department of Health, and many other state and local health departments are currently investigating a multistate outbreak of lung disease associated with vapor product use. More than one thousand cases have been reported across the United States, including eighteen deaths. Seven cases of lung injury have been reported in Washington state, and the number of cases is expected to grow. Approximately eighty percent of the cases nationwide have been reported in individuals under thirty-five years of age, with sixteen percent of the cases involving individuals under eighteen years of age and twenty-one percent of the cases involving individuals from eighteen to twenty years old. All reported patients have a history of using vapor products. The specific chemical exposure(s) causing the disease remains unknown, and no single product or substance has been linked to all lung injury cases.

Notwithstanding state law prohibiting the sale or distribution of vapor products to minors, the 2018 Washington state healthy youth survey indicates that the prevalence of vapor product use within the past thirty days by eighth, tenth, and twelfth graders in Washington has increased by sixty-nine, sixty-seven, and forty-nine percent, respectively, since 2016, and these results may be an underestimate. Research consistently shows that flavors, and associated advertising, contribute to the appeal, initiation, and use of vapor products, particularly among adolescents and young adults. National data show that the

use of flavored e-cigarettes among adolescents and young adults increased significantly from 2013-2018. Vapor products are not adequately regulated and there is not sufficient standardization, testing, or oversight of these products. Vapor products are not regulated or approved for smoking cessation.

The State Board of Health's Health Impact Review of HB 1932 found strong evidence that prohibiting the sale of flavored vapor products will likely decrease initiation and use of vapor products among adolescents and young adults. Reducing the initiation and use of vapor products by youth and young adults will reduce the exposure of our most vulnerable population to the current outbreak of severe lung disease associated with the use of vapor products. Requiring sellers of vapor products to post signs warning of the risk of vaping-associated lung disease will allow members of the public to make more informed decisions about the purchase and use of vapor products. Because the outbreak of lung disease is occurring now and growing, the immediate adoption of a rule prohibiting the sale of flavored vapor products and requiring the posting of warning signs is necessary for the preservation of the public health, safety, and general welfare by reducing youth exposure, especially of youth and young adults, to vaping-related severe lung disease.

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.**

**The number of sections adopted in order to comply with:**

Federal statute:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Federal rules or standards:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Recently enacted state statutes:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>

**The number of sections adopted at the request of a nongovernmental entity:**

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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**The number of sections adopted on the agency's own initiative:**

New	<u>6</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
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**The number of sections adopted using:**

Negotiated rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Pilot rule making:	New	<u>0</u>	Amended	<u>0</u>	Repealed	<u>0</u>
Other alternative rule making:	New	<u>6</u>	Amended	<u>0</u>	Repealed	<u>0</u>

**Date Adopted:** 10/09/2019

**Name:** Michelle A. Davis

**Title:** Executive Director, Washington State Board of Health



**Chapter 246-80 WAC  
VAPOR PRODUCTS AND FLAVORS**

NEW SECTION

**WAC 246-80-001 Purpose and necessity.** The immediate adoption of a rule prohibiting the sale of flavored vapor products and requiring sellers of vapor products to post warning signs about the risk of vaping-related lung disease is necessary to prevent and reduce exposure, especially of youth and young adults, to severe lung disease associated with the use of vapor products. The board has the authority and responsibility to adopt rules for the prevention and control of such disease.

The Centers for Disease Control, U.S. Food and Drug Administration, Washington state department of health, and many other state and local health departments are currently investigating a multistate outbreak of lung disease associated with vapor product use. More than one thousand cases have been reported across the United States, including eighteen deaths. Seven cases of lung injury have been reported in Washington state, and the number of cases is expected to grow. Approximately eighty percent of the cases nationwide have been reported in individuals under thirty-five years of age, with sixteen percent of the cases involving individuals under eighteen years of age and twenty-one percent of the cases involving individuals from eighteen to twenty years old. All reported patients have a history of using vapor products. The specific chemical exposure(s) causing the disease remains unknown, and no single product or substance has been linked to all lung injury cases.

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adoption of a rule prohibiting the sale of flavored vapor products and requiring the posting of warning signs is necessary for the preservation of the public health, safety, and general welfare by reducing exposure, especially of youth and young adults, to vaping-related severe lung disease.

#### NEW SECTION

**WAC 246-80-010 Definitions.** The definitions in this section apply throughout chapter 246-80 WAC unless the context clearly requires otherwise:

(1) "Business day" means any day that the department or a local health jurisdiction is open for business.

(2) "Case" means a person, alive or dead, diagnosed with a probable or confirmed case of a particular disease or condition by a health care provider or health care facility with diagnosis based on clinical or laboratory criteria or both.

(3) "Characterizing flavor" means a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco or marijuana or a taste or aroma derived from compounds or derivatives such as terpenes or terpenoids derived directly and solely from marijuana, as defined in RCW 69.50.101(y), or hemp plants that have been grown and tested as required by state law, imparted by a vapor product. Characterizing flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A vapor product does not have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. It is the presence of a distinguishable taste or aroma, or both, that constitutes a characterizing flavor.

(4) "Department" means the Washington state department of health.

(5) "Flavored vapor product" means any vapor product that imparts a characterizing flavor.

(6) "Health care facility" means:

(a) Any assisted living facility licensed under chapter 18.20 RCW; birthing center licensed under chapter 18.46 RCW; nursing home licensed under chapter 18.51 RCW; hospital licensed under chapter 70.41 RCW; adult family home licensed under chapter 70.128 RCW; ambulatory surgical facility licensed under chapter 70.230 RCW; or private establishment licensed under chapter 71.12 RCW; and

(b) Clinics, or other settings where one or more health care providers practice.

(7) "Health care provider" means any person having direct or supervisory responsibility for the delivery of health care who is:

(a) Licensed or certified in this state under Title 18 RCW; or

(b) Military personnel providing health care within the state regardless of licensure.

(8) "Marijuana product" has the same meaning provided in RCW 69.50.101.

(9) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corpora-

tion, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise.

(10) "Principal health care provider" means the attending health care provider recognized as primarily responsible for diagnosis or treatment of a patient, or in the absence of such, the health care provider initiating diagnostic testing or treatment for the patient.

(11) "Sell" means to transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person. It includes a person engaged in the business of selling vapor products giving or offering vapor products free of charge.

(12) "Vapor product" means any noncombustible product that may contain nicotine or a marijuana product and that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor or aerosol from a solution or other substance including any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container that may contain nicotine or a marijuana product in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device including, but not limited to, marijuana-infused extracts or marijuana concentrates for inhalation.

#### NEW SECTION

**WAC 246-80-020 Prohibition.** No person including, but not limited to, a person licensed under chapter 69.50 or 70.345 RCW, may sell, offer for sale, or possess with the intent to sell or offer for sale flavored vapor products or any product that he or she knows or reasonably should know will be used with or in a vapor product to create a flavored vapor product. The foregoing prohibition applies to the sale, offer for sale, or possession with intent to sell or offer for sale flavored vapor products at any location or by any means in this state including, but not limited to, by means of a telephonic or other method of voice transmission, the mail or any other delivery service, or the internet or other online service.

#### NEW SECTION

**WAC 246-80-025 Warning signs.** A person who holds a vapor product retailer's license or a vapor product delivery sale license issued under chapter 70.345 RCW must display a sign warning of the risk of lung disease associated with the use of vapor products, which the department shall design and make available on its website, so that it is clearly visible to anyone purchasing vapor products from the license holder.

NEW SECTION

**WAC 246-80-030 Reporting.** (1) Principal health care providers and health care facilities shall submit individual case reports of cases of lung injury associated with the use of vapor products to the local health jurisdiction within three business days. For the purposes of this subsection, local health jurisdiction means where the patient resides, or, in the event the patient's residence cannot be determined, the local health jurisdiction in which the patient received treatment.

(2) Health care providers and health care facilities shall provide the following information in each case report:

- (a) Patient first and last name;
- (b) Patient physical address including zip code;
- (c) Patient date of birth;
- (d) Patient sex;
- (e) Patient best contact telephone number;
- (f) Name of the principal health care provider;
- (g) Telephone number of the principal health care provider;
- (h) Address where patient received care;
- (i) Name and telephone number of the person providing the report;
- (j) Case diagnosis;
- (k) Pertinent laboratory data, if available;
- (l) Pertinent lung imaging, if available; and
- (m) Patient history of vapor product use, including whether the vapor product used included nicotine, marijuana, or both.

(3) Health care facilities may assume the notification requirements established in this chapter for health care providers practicing within the health care facility.

(4) Health care providers and health care facilities shall comply with the requirements for the handling of case reports and medical information described in WAC 246-101-120.

(5) Local health jurisdictions shall notify the department within three business days using a secure electronic disease surveillance system for each case report received by the local health jurisdiction.

(6) Local health jurisdictions shall submit a case report to the department using a secure electronic disease surveillance system for each case report received by the local health jurisdiction:

- (a) Within seven days of completing a case investigation; or
- (b) Within twenty-one days of receiving the case report if the investigation is not complete.

NEW SECTION

**WAC 246-80-040 Enforcement.** (1) Violations of these rules may be subject to enforcement by any agency under authority of RCW 43.20.050(5). Enforcement actions may include, but are not limited to, requiring a person to stop selling flavored vapor products prohibited under WAC 246-80-020 through the use of one or more of the following:

- (a) A conference with the person to explore facts and resolve problems;
- (b) A compliance agreement with the person;
- (c) A notice of correction;

(d) A notice of violation;

(e) An order;

(f) Other authorized proceedings.

(2) Enforcement orders issued under this section shall be in writing and shall include the violation and the corrective action required, and the name, business address, and phone number of an appropriate staff person who may be contacted regarding the order.

(3) Enforcement orders shall be personally served in the manner of service of a summons in a civil action or in a manner showing proof of receipt.

**MCGAVICK GRAVES, PS**

**November 13, 2019 - 2:37 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52458-9  
**Appellate Court Case Title:** Anti-Smoking Alliance, Respondent v. TPCHD, Appellant  
**Superior Court Case Number:** 16-2-06251-8

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