MODERNIZING NORTH CAROLINA’S OUTDATED OCCUPATIONAL LICENSING PRACTICES

Earning a Living Shouldn’t Be This Hard or This Costly
ABOUT THE AUTHOR

Jon Sanders studies regulatory policy, a veritable kudzu of invasive government and unintended consequences. As Director of Regulatory Studies at the John Locke Foundation, Jon gets into the weeds in all kinds of policy areas, including electricity, occupational licensing, hydraulic fracturing, the minimum wage, poverty and opportunity, state rulemaking, film and other incentives programs, certificates of need, and cronyism. A classical liberal, which for the uninitiated doesn’t mean a socialist who happens to like Mozart, Jon takes to heart the revolutionary declaration that all are created equal and endowed with the unalienable rights of life, liberty, the pursuit of happiness, property, and the enjoyment of the fruits of their labor. He shares the belief with Milton Friedman and Gary Becker that “the greatest beneficiaries of capitalism are those at the bottom of the income ladder” and agrees with Julian Simon that “the ultimate resource is people.”

Jon holds a master’s degree in economics with a minor in statistics along with a bachelor of arts degree in English literature and language from North Carolina State University. This left brain/right brain confluence sometimes causes Jon to cite Jane Austen in discussing energy, Chaucer in lending regulations, C.S. Lewis in overregulation, and Shakespeare pretty much whenever he thinks he can get away with it. He’s also prone to drop pop-culture references as the mood strikes.

Prior to joining the research division at JLF, Jon researched issues in higher education for the John William Pope Center for Higher Education Policy. Jon has also taught economics as an adjunct for N.C. State and the University of Mount Olive.
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In North Carolina, occupational regulation tends to be an all-or-nothing thing. Either the state applies the most extreme form of regulation (licensing), or it mostly leaves the occupation alone.

This approach means North Carolina licenses more occupations than most states. It also means that when industry interest groups go to the legislature to address problems in their field of labor, they often ask for licensure to address them. It seems like the only way.

Finally, it means state occupational licensing boards are at risk of federal antitrust violations, after the U.S. Supreme Court ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission* (2015).¹

This paper calls for an overhaul of North Carolina’s approach toward occupational regulation. It argues for reforming occupational licensing for several reasons: legal, practical, and feasible.

**Reform is a legal necessity**

By design, licensing blocks people from simply entering their chosen field of labor. Only those who cross all the hurdles to get a license can ply their trade.

Those hurdles can include licensing fees, school tuition and fees to obtain mandatory credentials or continuing education credits, sitting fees for qualifying exams, time spent gaining experience, time spent studying for classes and qualifying exams, opportunity costs of forgone work, and also satisfying licensing boards’ criminal background checks and “good moral character” requirements.

**A constitutional right**

This entry regulation is a problem because North Carolina recognizes a constitutional right of people to enjoy the fruits of their own labor. The language lifts from the Declaration of Independence, but it adds the labor clause and is inscribed in the state constitution:

*Section 1. The equality and rights of persons:* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.² (Emphasis added.)

“By design, licensing blocks people from simply entering their chosen field of labor.”

**A federal fight**

In its 2015 ruling against the N.C. Board of Dental Examiners, the U.S. Supreme Court dismantled a long-held presumption: that state occupational licensing boards are automatically immune from federal antitrust laws.

In the court’s opinion, a state licensing board may violate federal antitrust law if a controlling number of board members comprise “active market participants” regulated by the board but the board is not actively supervised by the state.³

It is not clear how the state could demonstrate active supervision over licensing boards. If the state were to free more occupations from the highly restrictive, all-or-nothing approach of licensing, however, that would eliminate anticompetitive concerns at their root.

**An ongoing federal fight**

Meanwhile, the Federal Trade Commission (FTC) has a new Economic Liberty Task Force to focus on state occupational licensing activities.⁴ Acting FTC chairman Maureen Ohlhausen announced it in a March 31 speech...
and safety concerns and streamline them to only the extent needed:

The Trump administration is committed to working with you to strengthen our economy and empower the American workforce. Americans want principled, broad-based reform.

If licenses are unnecessary, eliminate them.

If they are needed, streamline them.

And, if they are honored by one state, consider honoring them in your own state.¹¹

State leaders should know that the Trump administration is building on reform efforts started under the Obama administration.¹² The federal government’s interest in state occupational licensing reform doesn’t appear to be a passing fancy.

**A broader approach is a practical need**

The General Assembly regularly receives requests from occupations seeking special validation. The 2017 session, which was typical, saw bills filed that would:

- Establish new licensing boards for naturopathic doctors¹³ and music therapists¹⁴
- Forbid hospitals from hiring uncredentialed surgical technologists¹⁵
- Require insurers to pay for autism treatment by certified behavioral analysts¹⁶
- Allow (for a fee) a special endorsement to a respiratory care practitioner’s license to recognize outside training and credentialing beyond requirements for licensure¹⁷
- Allow (for a fee) voluntary registration of certified interior designers within the N.C. Department of Insurance¹⁸

Right now, North Carolina’s approach to occupational regulation is too heavy-handed to meet these criteria. Leaving aside how state licensing could affect competition, North Carolina’s approach is not geared for keeping occupational regulation narrowly tailored to the policy issue at hand, nor to seek less restrictive alternatives to achieve the same goal.

In July, U.S. Secretary of Labor Alexander Acosta spoke to a gathering of state legislators about the need to reform occupational licensing. Citing that “more than one in four Americans need a license to legally perform their work,” Acosta warned legislators about the problems of “excess licensing” and “using licensing to limit competition, bar entry, or create a privileged class.”¹⁰

Acosta then urged legislators to limit licensing to only where it is clearly necessary to address compelling health

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¹ The National Law Review expects there will be “an increase in FTC actions involving licensing boards.” It counsels:

License boards and those who are involved in licensing regulations should examine the ways in which the regulation affects or could affect competition, whether there is evidence that a regulation is necessary to achieve the targeted policy goal, whether the regulation is narrowly tailored to meet the policy goal, and whether a less restrictive alternative is available to achieve the policy goal and benefit competition. (Emphasis added.)

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Successful De-Licensing Attempts in the U.S. Since 1972

From 1972 to 2015 there were only eight successful occupational licensing reforms. Since the U.S. Supreme Court ruled against the North Carolina Board of Dental Examiners in 2015, there have been seven more occupational licensing reforms.

de-licensing efforts. It found “only eight instances of the de-licensing of occupations over the past 40 years.” Only eight successes in 50 states over 40 years.

In just the past year, however, seven new de-licensing attempts have succeeded. As suggested above, the political landscape has changed.

Since 2016, several states have succeeded in occupational licensing reforms. Those reforms can be put in two categories: removing certain required state licenses and changing the state’s entire approach to occupational regulations.

States removing certain occupational licenses:

- **Arizona, 2016**: Gov. Doug Ducey signed a bill to exempt four occupations from licensing requirements.
- **Rhode Island, 2016**: Gov. Gina M. Raimondo eliminated 27 licenses identified by the Office of Regulatory Reform in collaboration with state licensing agencies as part of the 2016 budget.
- **Nebraska, 2017**: Gov. Pete Ricketts signed a package of bills that, among other things, let state banks and credit unions opt out of the requirement that officers hold a state bank executive officer license.
- **Connecticut, 2017**: Gov. Dannel Malloy signed Senate Bill 191, which eliminated licenses that did
A state that recognizes its people have a constitutional right to “the enjoyment of the fruits of their own labor” should be extra careful its laws don’t tread on that right.

States revamping their entire approach to occupational regulations:

- **Tennessee, 2016**: Gov. Bill Haslam signed the Right to Earn a Living Act, which limits entry regulations into an occupation (i.e., licensing) to only those that are legitimately necessary to protect public health, safety, or welfare, and when those objectives could not be met with less burdensome means, including certification, bonding, insurance, inspections, etc.\(^{24}\)

- **Arizona, 2017**: Gov. Doug Ducey signed State Bill 1437 into law, as Arizona joined Tennessee in passing the Right to Earn a Living Act.\(^{25}\) Ducey also issued an executive order that all state licensing boards report their minimum requirements and be required to justify any that exceed national averages.\(^{26}\)

- **Mississippi, 2017**: Gov. Phil Bryant signed House Bill 1425, a far-reaching reform of state occupational licensing. The new law puts the governor, secretary of state, and state attorney general in an active supervising role over existing state occupational licensing boards. Going further, the law creates alternative structures to licensure for professions — private certification, third-party reviews, fraud protection, inspections, bonding, insurance, etc. — that must be proven lacking before seeking to expand into licensure.\(^{27}\)

### Conclusion and recommendations

After decades of occupational licensing being nearly untouchable in state governments, several states have very recently made sweeping reforms. It’s not an aberration. Those states show that modernizing a state’s approach to regulating occupations, including getting rid of unnecessary licensing, is a winning idea.

Meanwhile, however, North Carolina risks being left shackled to an unwieldy, highly restrictive, and patently anticompetitive approach. The risk is not just being passed by states with more competitive labor practices. The risk is also from federal antitrust and other enforcement actions.

What should North Carolina policymakers do? Who is pointing the way?

- Tennessee and Arizona now both have Right to Work Acts
- Mississippi now offers an array of alternative structures to licensing
- The FTC seeks narrowly tailored occupational regulations and less
How To Protect Consumers and Freedom, Too

Policy options to address legitimate concerns without going to the extreme of occupational licensing.

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Some potential market failure? With market freedom as the default, let labor compete and consumers choose freely.</td>
</tr>
<tr>
<td>2</td>
<td>Fraud? Strengthen consumer protections in law against unfair and deceptive trade practices (see G.S. 75)</td>
</tr>
<tr>
<td>3</td>
<td>Cleanliness? Require inspections.</td>
</tr>
<tr>
<td>4</td>
<td>Externalities? (i.e. damages to third parties) Require bonding or insurance.</td>
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<tr>
<td>5</td>
<td>Fly-by-night companies? (e.g. outfits showing up after a natural disaster) Require registration with the Secretary of State.</td>
</tr>
<tr>
<td>6</td>
<td>Asymmetrical information? (i.e. when providers can know more technical info than a consumer could be expected to know) Promote certification. Providers who earn title of ‘certified’ signal technical competence to consumers. Also for when insurance reimbursement is an issue.</td>
</tr>
<tr>
<td>7</td>
<td>Major risk of public harm? Reserve the extreme policy tool of occupational licensing only for a significant public harm.</td>
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Policy Retains Occupational Freedom | Policy Blocks Occupational Freedom

Note: Adapted from The Institute for Justice, “From Liberty to License: A Heirarchy of Regulatory Options”

Restrictive alternatives to licensing to protect competition

Numerous industries in North Carolina come to the legislature each year with a range of concerns, most of which are unsuited for licensing even if they are legitimate concerns.

**A more comprehensive, nimble process**

For all these reasons, North Carolina needs a Right to Work Act approach to occupational regulation:

1. Principles that, first and foremost, protect competition and the constitutional right to work
2. Narrowly tailored regulations to address a legitimate concern
3. The least restrictive regulations necessary to address that concern
4. An array of policy alternatives to licensing, depending upon the kind of concern

Placing state entry regulations on some people’s chosen fields of labor should be a regulation of last resort, reserved only for the most extreme regulatory concerns. A state that recognizes its people have a constitutional right to “the enjoyment of the fruits of their own labor” should be extra careful its laws don’t tread on that right.

The state’s involvement in an occupation should be conformed to the legitimate issue at hand, and then go no further. What would that mean?

**Matching regulation to concern**

It means if there’s a significant concern about protecting consumers from fraud, then enhance the powers of the attorney general and the deceptive trade practices act.

If the significant concern is over cleanliness, then require inspections. If it’s damage to third parties, require bonding. If it’s shady, fly-by-night providers, require registration.

And if it’s insurance reimbursement or a knowledge imbalance, require certification.

Unlike licensing, none of those policies would preclude North Carolinians from enjoying their self-evident right to the enjoyment of their own labor.
APPENDIX A

Tennessee’s Right to Earn a Living Act

Following is the text of the Right to Earn a Living Act of Tennessee (Senate Bill 2469, 2015-2016 session of the General Assembly):

WHEREAS, the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right; and

WHEREAS, the freedom to earn an honest living traditionally has provided the surest means for economic mobility; and

WHEREAS, in recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition; and

WHEREAS, the burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed; and

WHEREAS, it is in the public interest to ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition; to provide the means for the vindication of this right; and to ensure that regulations of entry into businesses, professions, and occupations are demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "Right to Earn a Living Act".

SECTION 2. Tennessee Code Annotated, Title 4, Chapter 5, is amended by adding the following language as a new part:

4-5-501. As used in this part:

(1) "Entry regulation" means:

(A) Any rule promulgated by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any rule prescribing qualifications or requirements for a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; or

(B) Any policy or practice of a licensing authority that is established, adopted, or implemented by a licensing authority for the purpose of regulating an occupational

or professional group, including, but not limited to, any policy or practice relating to the qualifications or requirements of a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; and

(2) "Licensing authority" means any state regulatory board, commission, council, or committee in the executive branch of state government established by statute or rule that issues any license, certificate, registration, certification, permit, or other similar document for the purpose of entry into, or regulation of, any occupational or professional group. "Licensing authority" does not include any state regulatory board, commission, council, or committee that regulates a person under title 63 or title 68, chapter 11 or 140.

4-5-502.

(a)(1) No later than December 31, 2016, each licensing authority shall submit a copy of all existing or pending entry regulations pertaining to the licensing authority and an aggregate list of such entry regulations to the chairs of the government operations committees of the Senate and House of Representatives. The committees shall conduct a study of such entry regulations and may, at the committees' discretion, conduct a hearing regarding the entry regulations submitted by any licensing authority. The committees shall issue a joint report regarding the committees' findings and recommendations to the General Assembly no later than January 1, 2018.

(a)(2) After January 1, 2018, each licensing authority shall, prior to the next occurring hearing regarding the licensing authority held pursuant to § 4-29-104, submit to the chairs of the government operations committees of the Senate and House of Representatives a copy of any entry regulation promulgated by or relating to the licensing authority after the date of the submission pursuant to subdivision (a)(1). The appropriate subcommittees of the government operations committees shall consider the licensing authority's submission as part of the governmental entity review process and shall take any action relative to subsections (b)-(d) as a joint evaluation committee. Prior to each subsequent hearing held pursuant to § 4-29-104, the licensing authority shall
submit any entry regulation promulgated or adopted after
the submission for the previous hearing.

(3) In addition to the process established in subdivisions
(a)(1) and (2), the chairs of the government operations
committees of the Senate and House of Representatives
may request that a licensing authority present specific
entry regulations for the committees’ review pursuant to
this section at any meeting of the committees.

(4) Notwithstanding this subsection (a), the governor or
the commissioner of any department created pursuant
to title 4, chapter 3, relative to a licensing authority
attached to the commissioner’s department, may request
the chairs of the government operations committees of
the Senate and House of Representatives to review, at
the committees’ discretion, specific entry regulations
pursuant to this section.

(b) During a review of entry regulations pursuant to this
section, the government operations committees shall
consider whether:

(1) The entry regulations are required by state or
federal law;

(2) The entry regulations are necessary to protect the
public health, safety, or welfare;

(3) The purpose or effect of the entry regulations is to
unnecessarily inhibit competition or arbitrarily deny
entry into a business, trade, profession, or occupation;

(4) The intended purpose of the entry regulations could
be accomplished by less restrictive or burdensome
means; and

(5) The entry regulations are outside of the scope of the
licensing authority’s statutory authority to promulgate
or adopt entry regulations.

(c) The government operations committees may express
the committees’ disapproval of an entry regulation
promulgated or adopted by the licensing authority by
voting to request that the licensing authority amend
or repeal the entry regulation promulgated or adopted
by the licensing authority if the committees determine
during a review that the entry regulation:

(1) Is not required by state or federal law; and

(2)(A) Is unnecessary to protect the public health,
safety, or welfare;

(B) Is for the purpose or has the effect of unnecessarily
inhibiting competition;

(C) Arbitrarily denies entry into a business, trade,
profession, or occupation;

(D) With respect to its intended purpose, could be
accomplished by less restrictive or burdensome means,
including, but not limited to, certification, registration,
bonding or insurance, inspections, or an action under
the Tennessee Consumer Protection Act of 1977,
compiled in title 47, chapter 18, part 1; or

(E) Is outside of the scope of the licensing authority’s
statutory authority to promulgate or adopt entry
regulations.

(d)(1) Notice of the disapproval of an entry regulation
promulgated or adopted by a licensing authority shall
be posted by the secretary of state, to the administrative
register on the secretary of state’s website, as soon as
possible after the committee meeting in which such
action was taken.

(2) If a licensing authority fails to initiate compliance
with any recommendation of the government operations
committees issued pursuant to subsection (c) within
ninety (90) days of the issuance of the recommendation,
or fails to comply with the request within a reasonable
period of time, the committees may vote to request the
General Assembly to suspend any or all of such licensing
authority’s rulemaking authority for any reasonable
period of time or with respect to any particular subject
matter, by legislative enactment.

(e) Except as provided in subdivision (a)(2), for the
purposes of reviewing any entry regulation of a licensing
authority and making final recommendations under this
section, the government operations committees may
meet jointly or separately and, at the discretion of the
chair of either committee, may form subcommittees for
such purposes.

SECTION 3. This act shall take effect upon becoming a law,
the public welfare requiring it.
APPENDIX B

Right to Earn a Living Act — model legislation

Following is the text of the model Right to Earn a Living Act by the Goldwater Institute (reprinted with permission).

Section 1. This Act may be referred to as the “Right to Earn a Living Act.”

Section 2. {Statement of Findings and Purposes.}

(A) The legislature hereby finds and declares that:

(1) The right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right.

(2) The freedom to earn an honest living traditionally has provided the surest means for economic mobility.

(3) In recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition.

(4) The burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed.

(5) It is in the public interest: (a) To ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition; (b) To provide the means for the vindication of this right; and (c) To ensure that regulations of entry into businesses and professions are demonstrably necessary and carefully tailored to legitimate health, safety, and welfare objectives.

Section 3. {Definitions.}

(A) “Agency” shall be broadly construed to include the state, all units of state government, any county, city, town, or political subdivision of this state, and any branch, department, division, office, or agency of state or local government.

(B) “Entry regulations” shall include any law, ordinance, regulation, rule, policy, fee, condition, test, permit, administrative practice, or other provision relating in a market, or the opportunity to engage in any occupation or profession.

(C) “Public service restrictions” shall include any law, ordinance, regulation, rule, policy, fee, condition, test, permit, or other administrative practice, with or without the support of public subsidy and/or user fees.

(D) “Welfare” shall be narrowly construed to encompass protection of members of the public against fraud or harm. This term shall not encompass the protection of existing businesses or agencies, whether publicly or privately owned, against competition.

(E) “Subsidy” shall include taxes, grants, user fees or any other funds received by or on behalf of an agency.

Section 4. {Limitation on Entry Regulations.}

All entry regulations with respect to businesses and professions shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.

Section 5. {Limitation on Public Service Restrictions.}

All public service restrictions shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives.

Section 6. {Elimination of Entry Regulations.}

(A) Within one year following enactment, every agency shall conduct a comprehensive review of all entry regulations within their jurisdictions, and for each such entry regulation it shall:

(1) Articulate with specificity the public health, safety, or welfare objective(s) served by the regulation, and

(2) Articulate the reason(s) why the regulation is necessary to serve the specified objective(s).

(B) To the extent the agency finds any regulation that does not satisfy the standard set forth in Section 4, it shall:

(1) Repeal the entry regulation or modify the entry regulation to conform with the standard of Section 4 if such action is not within the agency’s authority to do so; or

(2) Recommend to the legislature actions necessary to repeal or modify the entry regulation to conform to the standard of Section 4 if such action is not within the agency’s authority.

(C) Within 15 months following enactment, each agency shall report to the legislature on all actions taken to conform with this section.
Section 7. (Administrative proceedings).

(A) Any person may petition any agency to repeal or modify any entry regulation into a business or profession within its jurisdiction.

(B) Within 90 days of a petition filed under (A) above, the agency shall either repeal the entry regulation, modify the regulation to achieve the standard set forth in Section 4, or state the basis on which it concludes the regulation conforms with the standard set forth in Section 4.

(C) Any person may petition any agency to repeal or modify a public service restriction within its jurisdiction.

(D) Within 90 days of a petition filed under (C) above, the agency shall state the basis on which it concludes the public service restriction conforms with the standard set forth in Section 5.

Section 8. (Enforcement.)

(A) Any time after 90 days following a petition filed pursuant to Section 6 that has not been favorably acted upon by the agency, the person(s) filing a petition challenging an entry regulation or public service restriction may file an action in a Court of general jurisdiction.

(B) With respect to the challenge of an entry regulation, the plaintiff(s) shall prevail if the Court finds by a preponderance of evidence that the challenged entry regulation on its face or in its effect burdens the creation of a business, the entry of a business into a particular market, or entry into a profession or occupation; and either

1. That the challenged entry regulation is not demonstrably necessary and carefully tailored to fulfill

legitimate public health, safety, or welfare objectives; or

2. Where the challenged entry regulation is necessary to the legitimate public health, safety, or welfare objectives, such objectives can be effectively served by regulations less burdensome to economic opportunity.

(C) With respect to the challenge of a public service restriction, the plaintiff(s) shall prevail if the court finds by a preponderance of the evidence that on its face or in its effect either:

1. That the challenged public service restriction is not demonstrably necessary and carefully tailored to fulfill legitimate public health, safety or welfare objectives; or

2. Where the challenged public service restriction is necessary to fulfill legitimate public health, safety or welfare objectives, such objectives can be effectively served by restrictions that allow greater private participation.

(D) Upon a finding for the plaintiff(s), the Court shall enjoin further enforcement of the challenged entry regulation or public service restriction, and shall award reasonable attorney’s fees and costs to the plaintiff(s).

Section 9. (State preemption of inconsistent local laws)

(A) The right of individuals to pursue a chosen business or profession is a matter of statewide concern and is not subject to further inconsistent regulation by a county, city, town or other political subdivision of this state. This article preempts all inconsistent rules, regulations, codes, ordinances and other laws adopted by a county, city, town or other political subdivision of this state regarding the right of individuals to pursue a chosen business or profession.
ENDNOTES


7. Ohlhausen, “Advancing Economic Liberty.”


11. “Acosta Addresses Occupational Licensing Reform.”


ENDNOTES - CONTINUED


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