Court File No. 38585

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Respondent in the Court of Appeal)

AND:

G.

RESPONDENT
(Appellant in the Court of Appeal)

AND:

ATTORNEY GENERAL OF CANADA
CANADIAN CIVIL LIBERTIES ASSOCIATION
CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO DIVISION
CRIMINAL LAWYERS ASSOCIATION (ONTARIO)
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
EMPOWERMENT COUNCIL

INTERVENERS

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PART I – OVERVIEW AND FACTS

1. The Asper Centre (AC) intervenes pursuant to the order of Karakatsanis J. of January 20, 2020, to provide submissions on the law applicable to the Appellant's request for a suspended declaration of invalidity without an exemption to benefit the respondent.

PART II – POSITION ON THE ISSUE

2. Without taking a position on whether a suspension or an exemption from that suspension is warranted in this case, the Asper Centre submits that the Appellant's requests for a suspension without an exemption provides an opportunity to consolidate and clarify the Court's remedial jurisprudence based on established remedial principles. The AC will propose the following approach: Immediate declarations of invalidity should be considered the default remedy and requests for a suspension must be justified for a range of legitimate objectives including but not limited to threats to the rule of law, public safety, and legitimate reliance interests. A suspension should require the court to retain jurisdiction over the case and where possible exempt the otherwise successful applicant from the suspension and/or devise interim remedies to prevent irreparable harm to rights during the suspension.

PART III – ARGUMENT

The Need for Principled Tests to Govern Suspended Declarations of Invalidity and Exemptions

3. The Court's use of suspended declarations has inspired courts and constitutions throughout the world. It has also been criticized at home. Some critics argue the remedy is an illegitimate judicial notwithstanding clause or a non-binding declaration of incompatibility.[1] Others, however, accept the remedy, but stress the harms it can cause for unsuccessful applicants

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[1] Robert Leckey, "Enforcing Laws that Infringe Rights" (2016) 2 Public Law 206; Hugo Cyr, "Réflexions sur la normalisation de l'exceptionnel" in Yves De Montigny, *La sécurité nationale devant les tribunaux: un équilibre précaire entre droits fondamentaux et sûreté de l'État*, (Montréal, Éditions Thémis, 2016) 95; Brian Bird, "The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity" (2018) 42:1 Man LJ 23; Arthur Peltomaa *Understanding Unconstitutionality: How a Country Lost its Way* (Toronto: Teja Press, 2018).

and the uncertainty it can create about what happens during the suspension.[2] Hence, there are calls for the Court to clarify "when and why declarations of invalidity will be suspended and whether the litigants in the particular case, and perhaps others similarly situated to them, can be exempted from a suspended declaration of invalidity if necessary to give them an effective and meaningful remedy."[3]

4. Although the court has stressed the different roles of s.24(1) and s.52(1)[4], a watertight compartment approach to these two remedial provisions should be avoided. Both provisions are concerned with addressing the remedies deficit of the Canadian Bill of Rights. The interpretation of both provisions should be informed and disciplined by general remedial principles.[5]

The Legitimacy of Suspended Declarations of Invalidity

5. Suspended declarations of invalidity accord with the increasing recognition that the respect and protection of many rights require positive state action and a recognition that some departures from the norm of immediate and retroactive relief may be justified. The German Constitutional Court has long used suspended declarations of invalidity "to prevent the greater hardship or inconvenience that would flow from the complete voidance of a statute. How long

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[2] Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2d) 267; Kent Roach, "Principled Remedial Decision-Making under the Charter" (2004) 25 SCLR (2d) 101; Grant Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity" (2001) 49 Atla LRev 107; Robert Leckey, "The Harms of Remedial Discretion" (2016) 14:3 I Con 584; Kent Roach, *Constitutional Remedies in Canada* 2nd ed (Toronto: Thomson Reuters, as updated) (loose-leaf updated 2019, release 34) at 14.1530; Carolyn Mouland, "Remedying the Remedy: Bedford's Suspended Declaration of Invalidity" (2018) 41:4 Man LJ 281; Sara Buringham, "A Comment on the Court's Decision to Suspend the Declaration of Invalidity in Carter v Canada" (2015) 78 Sask LRev 201 at 203-4; Joanne Ettel, "To the Extent of the Inconsistency: Charter Remedies and the Constitutional Dialogue" (2018) 38 NJCL 279.

[3] Robert Sharpe & Kent Roach, *The Canadian Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 456.

[4] *R v Demers*, 2004 SCC 46 [*Demers*]; *R v Ferguson*, 2008 SCC 6 [*Ferguson*].

[5] Many of these general remedial principles including those respecting to proportionality and respect for the separation of powers are articulated in *Schachter v Canada*, [1992] 2 SCR 679 [*Schachter*]; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*]; *Canada (Attorney General) v Hislop,* 2007 SCC 10 [*Hislop*]; and *Vancouver (City) v Ward,* 2010 SCC 27 [*Ward*].

and under what conditions an unconstitutional, but still viable, law can remain in force is a matter the Court reserves to itself."[6] In 1986, the then President of the German Constitutional Court explained this development as related to "avoiding legal chaos," recognizing the "creative leeway of the legislature" and allowing choices to be made about the extension of constitutionally under inclusive statutes. He explained that such an approach "allows the legislature to make the political decision which will determine the nature of a future regulation."[7]

6. The Hong Kong Court of Final Appeal has used suspended declarations of invalidity and related them to their powers to make a declaration in the first place.[8] It has stressed that such suspensions will "be decided by an independent judiciary after a full, fair and open hearing, and with reasons given. Suspension would not be accorded if it is unnecessary. And it would not be accorded for longer than necessary… [D]espite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional."[9] Sir Anthony Mason explained "the protection of wide-ranging human rights and fundamental freedoms has generated new and not infrequent problems arising from the invalidity of statutes, leaving a "gap" in the law, with novel and serious problems for the community."[10]

7. Irish[11] and American[12] courts have recognized that a suspended declaration of invalidity may be appropriate in some cases. An English court has used a 6 month suspended declaration of invalidity in cases where data protection law was found to be inconsistent with EU law and legislation was required to provide the required protections.[13] Under s.172 of its Constitution, the

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[6] Donald Kommers & Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (Durham: Duke University Press, 2012) at 35-36.
[7] Wolfgang Zeidler, "Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms" (1986) 62:4 Notre Dame L Rev 504 at 511.
[8] *Koo Sze Yiu & Anor v Chief Executive of HKSAR*, [2006] HKCU 1152 at para 35 (Court of Final Appeal, Hong Kong) [*Koo Sze Yiu*].
[9] *Ibid* at para 41. See also *Chan Kin Sum Simon v Secretary for Justice & Ors*, [2009] HKCU 360 at para 42 (Court of First Instance, Hong Kong).
[10] *Ibid* at para 62.
[11] *C v Minister of Social Protection*, [2018] IESC 57 at para 20 (Ireland); *Osinuga and Agha v Minister for Social Protection*, [2018] IECA 155 at para 64 (Ireland). See Eoin Carolan, "The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity" 46 Ir Jur 180.
[12] *Northern Pipeline Construction v Marathon Pipe Line Co*, 102 S Ct 2858 at 88-89 (US 1982).
[13] *R (National Council for Civil Liberties) v Secretary of State for Home Department*, [2018] EWHC 975 (Admin), at para 100.

South African Constitutional Court has frequently ordered suspended declarations of invalidity. An early case suggested that the unconstitutional law would continue to apply to all and "the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same circumstances as the litigants."[14] Subsequently, however, the court has frequently issued interim orders designed to regulate and minimize the harms caused by the unconstitutional law during the suspension.[15]

The Need to Justify Suspensions of Declarations of Invalidity

8. The AC submits that the proper approach to suspended declarations of validity is that they must be justified as necessary based on a legitimate objective and consistent with general principles of proportionality as they relate to the nature of the violation and the proposed suspension.[16] This approach is already taken by the Court both under s.52(1) in deciding whether the government has justified a departure from the remedial norm of fully retroactive relief[17] and under s.24(1) in deciding whether the government has established legitimate countervailing factors to limit or negate an otherwise justified award of damages.[18] This would provide a principled framework to decide whether and when a suspended declaration of invalidity was justified. It would be consistent with the statement of the Hong Kong Final Court of Appeal that "suspension would not be accorded if it is unnecessary. And it would not be accorded for longer than necessary."[19]

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[14] *S v Bhulwana*, *S v Gwadiso*, [1995] ZACC 11 at para 32, 1996 1 SA 388.

[15] Robert Leckey, *Bills of Rights in the Common Law World* (Cambridge: Cambridge University Press, 2015) at 105; *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35 at para 109; 2013 (12) BCLR 1429.

[16] Roach, *supra* note 2, at 3.1060-3.1070; Sharpe & Roach, *supra* note 3 at 429; Hoole, *supra* note 2.

[17] *Hislop*, *supra* note 5 at para 86 recognizing: "Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling."

[18] *Ward*, *supra* note 5.

[19] *Koo Sze Yiu*, *supra* note 8 at para 41.

9. The attempt in *Schachter*[20] to categorize cases in which suspended declarations of invalidity are appropriate as limited to the three categories of threats to the rule of law, public safety or under inclusive benefits, has been widely criticized. Professor Roach has argued that as rules they are "inevitably under and over inclusive" and do not capture the decided cases. In his view "courts should be cautious in using suspended declarations of invalidity, but the answer is to justify their use in each case, not to attempt to devise limited categories which fetter the court's remedial discretion to deal with new cases."[21] Many examples of the Supreme Courts' use of suspended declarations of invalidity such as in *Corbiere*,[22] *Dunmore*,[23] *Chaoulli*,[24] *Bedford*[25] and *Carter*,[26] do not fit into the *Schachter* categories.

10. Chief Justice Lamer's statement in *Schachter* that suspended declarations should "turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public" has also been criticized as inconsistent with other cases where suspended declarations have been used to allow the legislature time to deal with complex problems and make policy choices to comply with the constitution.[27] In *M. v. H.*[28], *Corbiere*[29], *Bedford*[30] and *Carter*[31], the Court explicitly recognized that a legitimate reason for suspending a declaration of invalidity was the ability of legislatures to consult, formulate complex laws and to make choices among a variety of options to comply with the *Charter*. The latter principle finds support in other parts of the *Schachter* decision governing when reading in is an appropriate remedy[32] as well as in the importance of respecting

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[20] *Schachter*, *supra* note 5.
[21] Roach, *supra* note 2 at 14.1680.
[22] *Corbiere v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].
[23] *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.
[24] *Chaoulli c Québec (Procureur général)*, 2005 SCC 35.
[25] *Bedford v Canada (Attorney General)*, 2013 SCC 72 at paras 2, 169 [*Bedford*].
[26] *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].
[27] *Schachter*, *supra* note 5 at para 84.
[28] *M v H*, [1999] 2 SCR 3 at para 142 [*M v H*].
[29] *Corbiere*, *supra* note 22 at para 115.
[30] *Bedford*, *supra* note 25 at para 167.
[31] *Carter*, *supra* note 26 at paras 125-127.
[32] See also *Vriend v Alberta* [1998] 1 SCR 493; *M v H*, *supra* note 28. For a recent application in South Africa see *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*, [2018] ZACC 16 at para 72, 2018 (8) BCLR 921.

both the roles of courts and legislatures recognized by the Court in other remedial cases.[33] The AC submits that the Court should clearly sanction a principled approach over the categorical pigeon hole approach suggested albeit not required by *Schachter*.

The Need to Reconcile Suspensions with Effective Remedies

11. Professor Ryder has criticized routine use of suspended declarations of invalidity for "placing temporary limits on the exercise of *Charter* rights and freedoms that are not reasonable and demonstrably justifiable."[34] Dean Leckey has similarly warned about the harms of suspensions to rights holders and the uncertainty that can be created during a suspension when courts do not apply clear interim remedies such as those used by the South African Constitutional Court.[35]

The Court's Prior Use of Exemptions During Suspended Declarations

12. In its first *Charter* cases that employed suspended declarations of invalidity, the Court issued interim guidelines[36] and indicated that various remedies including *habeas corpus* and appeals would be available for any abuse of the unconstitutional law during the period of the suspension. The AC submits that this appropriately recognizes that a court that suspends a declaration of invalidity should take responsibility for what happens to the applicants and, if possible, others during the suspension.

13. In 1998, the Court suspended a declaration under s.52 that a tax levied by Ontario was unconstitutional for 6 months because of concerns that an immediate declaration would have "harmful consequences for the administration of justice in the province."[37] It exempted the successful applicant from the suspension, refunding a $5,710 probate fee, because it would "be inequitable to deny recovery at this stage."[38] The AC submits that this represents the importance

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[33] *Doucet-Boudreau*, *supra* note 5.
[34] Ryder, *supra* note 2 at 275.
[35] Leckey, *supra* note 2 at 593; Leckey, *supra* note 15 at 174-175.
[36] *R v Swain*, [1991] 1 SCR 933 at paras 166-168; *R v Bain*, [1992] 1 SCR 91 at para 92.
[37] *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 44. But for a refusal to order an exemption in a similar taxation case see *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 94. These conflicting approaches underline the need for more clarity.
[38] *Ibid* at para 47.

of providing those who have gone to the expense of engaging in successful constitutional litigation with meaningful remedies wherever possible,[39] a principle that has long been a part of Anglo-American constitutional traditions[40] and is also followed in prospective ruling cases.[41]

14. In *Corbiere* [42], the Court recognized that "in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling," even if the effect of the declaration is suspended. Nevertheless, it held that this was "one of the exceptional cases where immediate relief should not be given to those who brought the action."[43] In other cases, the Court granted applicants exemptions from the suspension [44] but more recently has overturned such exemptions without citing the presumption in *Corbiere* in favour of a remedy for the successful applicant.[45] Wherever possible the Court should recognize the traditional common law principles of a "right to a remedy".

15. In *Carter I* [46], the Court did not grant an exemption because Gloria Taylor had passed away by the time the Court rendered its judgments. The courts below in that case as well as the dissenters in *Rodriguez*[47] crafted an exemption for successful litigants. This recognizes that while Parliament has an important role to play in selecting among various constitutional options for medical assistance in dying, the courts had an obligation to provide an effective remedy for those who had gone to court seeking a remedy and relief from their suffering. Chief Justice Lamer in his dissent invoked the long tradition that "to create a right without a remedy is surely

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[39] *Doucet-Boudreau*, *supra* note 5*; Hislop*, *supra* note 5.
[40] *Marbury v Madison*, 5 US 137 (US Dist Col 1803) at 17 citing William Blackstone, *Commentaries on the Laws of England* (1765), vol 3; *Roncarelli v Duplessis*, [1959] SCR 121 at para 44.
[41] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1998] 1 SCR 3 at para 20.
[42] *Corbiere*, *supra* note 22 at para 122.
[43] *Ibid*.
[44] *R v Guigard*, 2002 SCC 14 at para 32; *Martin v Nova Scotia (Workers Compensation Board)*, 2003 SCC 54 at paras 118-211; *Wakeling v United States of America*, 2014 SCC 72 at para 149.
[45] *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 41.
[46] *Carter*, *supra* note 26.
[47] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 220 quoting *Nelles v The Queen* [1989] 2 SCR 170 [*Rodriguez*].

antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur."[48]

16. In *Carter II* [49], the majority of Court recognized that exemptions "can mitigate the severe harm that may be occasioned" by delay. The AC respectfully submits that the dissent erred in applying the restriction on permanent constitutional exemptions to temporary exemptions that Lamer C.J.C. had recognized in his dissent in *Rodriguez.*[50] Access to justice could be increased by following the South African practice of interim remedies that provide declaratory guidance to the executive about how unconstitutional laws would be applied during the suspension.[51]

17. Temporary or ancillary exemptions in combination with a suspended declaration of invalidity are not contrary to the Court's reluctance to use constitutional exemptions as a permanent remedy.[52] Temporary exemptions do not create the same distortion of legislative intent because the remedy would only last for so long as the suspension.

The Need to Qualify or Overrule *R. v. Demers*

18. This Court's recognition in *R. v. Demers*[53] of a rule that "precludes courts from granting a s.24 (1) individual remedy during the period of suspended invalidity" has been widely criticized.[54] The Court has subsequently recognized in *Hislop* [55]that the general rule under s.52 is that declarations of invalidity have retroactive effect. The idea articulated by the majority in *Demers* that qualified *Charter* applicants can only obtain an individual remedy after a year to give the legislature time to select among various constitutional options, runs counter to the idea that individuals whose rights have been violated should receive effective and meaningful remedies that are "not smothered in procedural delays and difficulties."[56]

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[48] *Ibid*.
[49] *Carter v Canada (Attorney General)*, 2016 SCC 4 at para 6.
[50] *Rodriguez*, *supra* note 47 at paras 577-578, 581.
[51] Leckey, supra note 2 at 591.
[52] *Ferguson*, *supra* note 4.
[53] *Demers*, *supra* note 4 at para 62.
[54] Kent Roach, "New and Problematic Restrictions on Charter Remedies" (2004) 49:3 CLQ 253; Vinay Shandal, "Combining Remedies under Section 24 of the Charter and Section 52 of the Constitution Act, 1982: A Discretionary Approach" (2003) 61:2 UT Fac L Rev 175.
[55] *Hislop*, *supra* note 5 at para 86. See also at para 138 per Bastarache J.
[56] *Doucet-Boudreau*, *supra* note 5 at para 55; *Mills v The Queen*, [1986] 1 SCR 863 at para 63.

19. In his strong dissent in *Demers,* Justice LeBel argued, "corrective justice suggests that the successful applicant has a right to a remedy. There will be occasions when the failure to grant the claimant immediate and concrete relief will result in an ongoing injustice. This is the case here."[57] The Court has been reluctant to use suspended declarations of invalidity in subsequent criminal cases where a rigid application of the *Demers* rules against combining remedies under ss.24 and 52 could potentially lead to the unjust result of imprisoning a person under an unconstitutional law while Parliament has a year's opportunity to enact a new law.[58]

Circumvention of the Harsh Rule Against Combining Individual Remedies and Suspensions

20. The Court of Appeal's decision in this case circumvented the injustice of the rigid *Demers* rule when using a suspended declaration of invalidity. Even if the rule applied, the Court of Appeal, like Chief Justice Lamer in *Rodriguez*, worked around the rule by recognizing it "has jurisdiction under s.52 to make the declaration subject to such conditions as it considers necessary and just to vitiate the impact of the violation during the period of the suspension."[59]

21. A similar approach was taken by Cournoyer J.A. when he took guidance from Justice LeBel's dissent in *Demers* and concluded that an exemption for a litigant was "an additional, effective remedy based on subsection 24(1)" and consistent with general remedial principles.[60]

22. As in *Carter II,* courts should combine individual and systemic remedies wherever possible.[61] This has been done in recent cases that, like the Court of Appeal in the case below, have not followed the *Demers* rule against combining remedies under ss.24(1) and 52.[62] The fact

[57] *Demers*, *supra* note 4 at para 101.
[58] *R v Boudreault*, 2018 SCC 58 at para 98; *R v Smith*, 2015 SCC 34 at para 32; *Canada (Attorney General) v Whaling*, 2014 SCC 20. But see *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1030 at paras 112, 119.
[59] *Rodriguez*, *supra* note 47 at paras 571-2.
[60] *R v Gagnon*, 2015 CMAC 2 at paras 260-261.
[61] Kent Roach, "Dialogic Remedies" (2019) 17:3 I Con 860 at 872-3.
[62] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 5; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 177. See also *Truchon v Canada (Attorney General)*, 2019 QCCS 3792 at paras 742-747 (providing exemptions for applicants from 6-month suspension).

that multiple courts have felt compelled to circumvent the rigid *Demers* rule suggests that this Court should clarify it or, if necessary, overrule it.

Conclusion

23. Rather than viewing ss.24(1) and 52 as watertight compartments or devising complex rules or restrictions on combining these two remedial provisions, courts should focus on general remedial principles. Suspended declarations of invalidity can recognize compelling social interests that justify a limitation on an immediate or fully retroactive remedy. They can also allow the legislature to discharge its role in formulating complex and multi-faceted legislation. At the same time, the court still has important roles to play. It should retain jurisdiction in part to determine whether governments can justify the extension of a suspension but also to respond to changed circumstance and new evidence, especially as it relates to unanticipated and irreparable harm to rights. In addition, litigants who establish that their *Charter* rights have been violated have a legitimate expectation that they will receive some remedy. Although there should be no absolute or automatic entitlement to an exemption from a suspended declaration of invalidity, the Court should be open to such exemptions as well as more expansive interim remedies when justified.

PARTS IV & V - SUBMISSIONS ON COSTS AND ORDER SOUGHT

24. The Asper Centre does not seek costs and respectfully requests that none be awarded against it.

25. The Asper Centre requests that pursuant to the Order of Justice Karakatsanis it be allowed to provide oral argument. The Asper Centre takes no position on the outcome of the appeal but asks that this Court consider these submissions in addressing the issue of remedy.

All of which is respectfully submitted this 5th day of February, 2010.

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David Asper Centre for Constitutional Rights

PART VI – LIST OF AUTHORITIES

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