IN THE
SUPREME COURT OF INDIANA
No. _____

Court of Appeals Cause No. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS OF INDIANA, INC. and LEAGUE OF WOMEN VOTERS OF INDIANAPOLIS, INC.	)	Marion Superior Court Civil Division-02
Appellants/Respondent (Plaintiffs below),	)	Trial Court
vs.	)	Cause No. 49D02-0806-PL-027627
TODD ROKITA, in his official capacity as Indiana Secretary of State	)	The Honorable S. K. Reid
Appellee/Petitioner (Defendant below).	)	

APPELLANTS' RESPONSE TO PETITION TO TRANFER

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STATEMENT OF ISSUES

1. Whether the State's objective of preventing in-person voter fraud is reasonably related to the Photo ID Law requirement that in-person voters must present a form of governmental identification that is not held by all qualified Indiana voters when it has been acknowledged by the State that there have been no documented cases of in-person voter impersonation fraud and the State's overall objective is to encourage in-person voting.

2. Whether the State's objective of preventing in-person voter fraud is reasonably related to the Photo ID Law requirement that in-person voters must present a form of governmental identification that is not held by all qualified Indiana voters while mail-in absentee voters are not even required by law to affirm their identification under oath, when this Court has specifically held that mail-in absentee voting presents the greater opportunity for fraud and that in-person voting has numerous safeguards in place to prevent vote fraud.

3. Whether the State's objective of preventing in-person voter fraud is reasonably related to the Photo ID Law requirement that persons living in state-licensed facilities in which the clerk decides to place a polling location are not required to present specific identification, while elderly and disabled persons who live in a state licensed facility or at home with family, are required to produce the

requisite identification simply because there is no polling place located in their place of residence.

4. Whether Indiana's chief election officer is properly named as a party in a declaratory judgment action seeking a declaration that the Photo ID Law is unconstitutional when that officer's responsibilities includes communicating to local election boards and voters that the law is constitutional and must be enforced.

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ARGUMENT

The Indiana Constitution provides robust protections to the voting rights of Hoosier voters. In contravention of those protections, the Indiana Legislature passed the Photo ID law which serves no legitimate function and disenfranchises eligible Hoosiers. Before the Indiana Court of Appeals, the League of Women Voters of Indiana, Inc. and the League of Women Voters of Indianapolis, Inc. (hereinafter the "League") successfully challenged the Photo ID law as a violation of the Indiana Constitution. Unable to justify the law under Indiana's Constitution, Secretary of State Todd Rokita ("Rokita") relies heavily upon the federal decisions analyzing the Photo ID Law under the Equal Protection clause of the federal constitution, doctrine that is inapplicable to this case because the Indiana Constitution provides independent authority for protecting the right to vote.

> The rights of Americans cannot be secure if they are protected only by courts or only by one court. Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights.

Chief Justice Randall T. Shepard, Second Wind for the Indiana Bill of Rights, 22 Ind. L. Rev. 575, 586 (1989).

I THE COURT OF APPEALS PROPERLY DETERMINED THAT THE PHOTO ID LAW IS UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION 23 OF THE INDIANA CONSTITUTION AS REGARDS IN-PERSON VOTERS AND MAIL-IN ABSENTEE VOTERS

The photo ID law, on its face, sets forth certain classifications—one granting privilege to mail-in absentee voters and another granting privilege to persons living in state-run residential facilities in which a polling place is located. A two step analysis is applied to determine whether a law's disparate treatment among the classes violates Article 1, Section 23 of the Indiana Constitution.

> First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994).

The Court of Appeals properly recognized that in a Section 1, Article 23 analysis, the deference granted to the legislature is not absolute and that the objectives of the State in enacting the Photo ID Law do not reasonably relate to the characteristics which distinguish the classifications at issue.

A. THE INDEPENDENT ANALYSIS APPLIED TO AN ARTICLE 1, SECTION 23 CHALLENGE IS NOT A RATIONAL BASIS ANALYSIS

Contrary to Rokita's claim, the *Collins* analysis employs less legislative deference than the rational basis analysis applied under the Equal Protection

Clause of the federal constitution. *See, McIntosh v. Melroe Company,* 729 N.E.2d 972, 992 (Ind. 2000) ("[T]he Indiana Constitution demands more than simply a rational relationship between the legislative goal and the classification").

Indeed, when performing the first prong of the *Collins* analysis, the Court "look[s] at the Legislature's 'balancing of the competing interests involved' and the Legislature's basis in creating the distinction." *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 256 (Ind. 2003) (citation omitted).

> [T]he Indiana Equal Privileges clause elevates individual rights by requiring more than some recognized governmental interests before legislation can override the interests of the individual. Thus under *Collins* a "rational relationship to any legitimate governmental interest" is not enough to carry the day. Under the balancing test of our state constitution, the governmental interests must outweigh those of the private citizen before a statute may deny a privilege granted to others.

Humphreys, 796 N.E.2d at 270. *See also, Collins,* 644 N.E.2d at 81 (In articulating *Collins* standard, this Court recognized that analysis under Article 1, Section 23 could provide protection additional to that provided by Equal Protection Clause of U.S. Constitution).

Under *Collins,* the question presented here is whether the disparate treatment imposed upon persons casting a ballot in-person by requiring certain photo identification is reasonably related to the characteristics of the class of in-person voters. The Court of Appeals correctly determined that when the legislature's interest in preventing vote fraud -- especially when no vote fraud exists -- is balanced against a Hoosier's right to vote -- a core value that is more

protected under the Indiana Constitution than under the federal constitution -- the Photo ID Law is unconstitutional.

B. UNDER THE INDIANA CONSTITUTION, THE RIGHT TO VOTE IS A CORE VALUE THAT IS PROTECTED AGAINST ABRIDGEMENT BY THE LEGISLATURE

Of all the rights protected by the Indiana Constitution, none better reflects the intent of its framers than the right to vote.

In 1800, the Indiana territory was formed and operated under the Northwest Ordinance. "In this territorial setting, southern planters, a minority with aristocratic tendencies, dominated governmental leadership and established little regard for the ability of the common person to criticize or direct the conduct of governmental officials or to assume the responsibility of self-government." Michael John DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 Val. U. L. Rev. 489, 508 (2004). "However, the poor farmers and frontiersmen who opposed the southern planters and advocated democratic principles insisted that 'even the poorest had a right to a voice in the determination of the policies which affect his life as well as the career of the richest.'" *Id.* (citations omitted). When the first Indiana Constitutional Convention convened in 1816, "the people were recognized to have inherent political power as the political sovereigns." DeBoer, *supra* at 509-510 (citations omitted). *See also, Price v. State of Indiana*, 622 N.E.2d 954, 961-962; n. 10 (Ind. 1993) (framers "eschew[ed] the elitist provisions favored by territorial federalists, such as tax requirement for

voting, property qualifications for officeholders, unequal apportionment of representation").

The right to vote is granted by the Indiana Constitution. *Gougar v. Timberlake*, 148 Ind. 38, 47 (1897). The framers' view of the fundamental importance of voting is reflected in provisions which protect the right to vote from legislative incursions and which are unique to the Indiana Constitution. The preamble to the Indiana Constitution gives thanks "for the free exercise of the right to choose our own form of government." Article 1, Section 1 recognizes that Hoosiers hold an inalienable right to life, liberty and pursuit of happiness and "[f]or the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." Article 2 addresses only voting and Section 2 places limitations only upon the age, residency and citizenship of voters. Article 16, Section 1 dictates that Hoosiers must vote approval to amend the Indiana Constitution. And, in recognition of the equal voices of all Hoosiers, the Indiana Constitution assiduously protects the right of Hoosiers to elect the members of government.[1] Even Article 8, which addresses education, was enacted, in part, to educate Hoosier voters so they can be better informed when

[1] *See, e.g,* Article 4, Section 2 (legislature selected by Hoosiers); Article 5, Section 3 (governor and lieutenant governor elected by Hoosiers); Article 6, Section 1 (Hoosiers elect Secretary of State, Auditor and Treasurer); Article 6, Section 2 (Hoosiers in every county elect Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner and Surveyor); Article 7, Section 7 (Hoosiers elect circuit court judges); Article 7, Section 11 (Hoosiers approve or reject continued appointments of Indiana Supreme Court justices and judges of Indiana Court of Appeals); Article 7, Section 16 (Hoosiers elect county prosecutors).

voting. *See, Bonner v. Daniels,* 907 N.E.2d 516, 522 (Ind. 2009) (acknowledging Indiana constitutional framers recognized "that a public education system was needed to eliminate illiteracy and to protect Indiana's democracy").

The framers recognized that the right to vote is the right from which flow all other rights promised by the Indiana Constitution. This most fundamental of all rights -- the right to vote as guaranteed by the Indiana Constitution-- is entitled to great consideration when balancing it against the State's interest and objectives. *Cf., Weinschenk v. Missouri,* 203 S.W.3d 201, 212 (Mo. 2006) ("Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart," finding Missouri's photo ID law unconstitutional).

C. THE RIGHT TO VOTE OUTWEIGHS THE OBJECTIVE OF PROTECTING AGAINST NONEXISTENT IN-PERSON VOTE FRAUD

Under the first prong of the *Collins* analysis, while the rights impacted are balanced against the legislative objective considered when enacting the law. Balancing both in this case reveals that no distinctive, inherent characteristics of in-person voters justify bestowing the privilege of not having to show photo identification upon mail-in absentee voters, nor is the disparate treatment accorded by the Photo ID Law reasonably related to characteristics distinguishing in-person and mail-in absentee voters.

"The characteristics which can serve as a basis of a valid classification must be such as to show *an inherent difference in situation* and subject-matter of the subjects placed in different classes *which peculiarly requires and necessitates different or exclusive legislation* with respect to them." *McIntosh,* 729 N.E.2d at 992 (emphasis in original). Rokita does not dispute that there is "no evidence of any [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history." *Crawford v. Marion County Election Board,* ___ U.S. ___, 128 S. Ct. 1610, 1619 (2008).[2] In the present case, there is nothing "that peculiarly requires and necessitates" exclusive legislation requiring presentation of a specific and not easily obtainable identification from an in-person voter to prevent a type of fraud that does not exist.[3]

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[2] Nor is there empirical support for the idea that improving voter perception will increase voter turnout. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud In The Eye of The Beholder: The Role Of Public Opinion in the Challenge To Voter Identification Requirements*, 121 Harv. L. Rev. 1737, 1751 (2008) ("If the Purcell theory of citizen engagement were true, voter participation should be lower among those who think fraud or impersonation occurs very often" but according to the survey performed by the authors "[n]o such correlation emerges").

[3] The burden imposed by the Law in securing the required identification is extensively discussed in the League's prior appellate briefs. *See also,* Kern, Julien, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws after Crawford v. Marion County Election Board,* 42 *Loy. L.A. L. Rev.* 629, 632-633 (2009). Further, as noted in the Notices of Supplemental Authority filed by the League, the burden is defined by and imposed at the will of the Indiana Bureau of Motor Vehicles ("BMV"). The BMV website now states that first-time applicants will have to satisfy the new requirements, starting in 2010 and all others will have to comply upon renewal after January 1, 2010, http://www.in.gov/bmv/ (Last visited Oct. 28, 2009), even though in response to the League's Notice Rokita asserted that the regulations had been withdrawn.

When it comes to the classifications of in-person voters and mail-in absentee voters, laws intended to prevent voter fraud and imposing additional requirements upon mail-in absentee ballots are reasonability related to the inherent differences between the classifications of in-person and mail-in absentee voters, i.e., the ease of fraud through illegal use of absentee ballots. *See, e.g., Horseman v. Keller*, 841 N.E.2d 164, 172-3 (Ind. 2006) ("The fact that absentee ballots reach the hands of election officials outside of the confines of the Election Day polling place necessitate statutory procedures for receiving, verifying, storing, transporting, and counting these ballots"). In this case, Rokita does not contend, and there is absolutely no basis for assuming, that citizens who vote in person are inherently more prone to commit fraud than those who mail in an absentee ballot. The record in this case is devoid of any evidence that in-person voting, with its attendant safeguards and felony penalties for voting under someone else's name, is conducive to voter impersonation fraud. In fact, the only fraud cases prosecuted to date involve mail-in absentee voting . *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138, 1145 (Ind. 2004) (special election ordered due to fraudulently cast mail-in absentee ballots).

Assuming *arguendo* that there are isolated cases of undetected in-person voter impersonation, the Law still is not reasonably related to the characteristics which distinguish in-person voters. It has been documented that a minimum of 902 voters were prevented from having their ballot counted in the 2008 general election because they lacked the requisite photo identification. Michael J. Pitts

and Matthew D. Neuman, *Documenting Disenfranchisement: Voter Identification at Indiana's 2008 General Election*, 25 J.L. & Pol. ___ manuscript at 10-11, (forthcoming, 2010), available at http://papers.ssrn.com/so13/papers. cfm?abstract _id=1465529. Balancing these 902 persons against the ***mere speculation*** that there ***might be*** some cases of undetected in-person voter fraud ***does not demonstrate a reasonable relationship*** between the Photo ID Law and the characteristics of in-person voters, particularly when Rokita acknowledges that "[t]he General Assembly, having provided for in-person voting generally, has decided to encourage in-person over absentee voting as much as possible consistent with providing secure elections." (Rokita Petition, p. 14). Finally, Rokita's claim the Law is easier to administer when the person is in front of the poll worker is irrelevant. The comparable ease of comparing a voter's face to the identification when the voter is in front of the pollworker cannot suffice as a justification for a law intended to prevent nonexistent fraud.

On the basis of the foregoing, the Court of Appeals properly concluded that the Photo ID Law is unconstitutional under Article 1, Section 23.

II THE PHOTO ID LAW IS UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION 23 AS REGARDS VOTERS IN STATE LICENSED FACILITIES AND VOTERS LOCATED OUTSIDE OF STATE LICENSED FACILITIES

The Court of Appeals correctly found that the Law's disparate treatment of elderly and/or disabled voters who do not live in a state licensed facility with a polling location is also unconstitutional under Article 1, Section 23.

Under the Photo ID Law, persons who are disabled and/or elderly and who reside in a state licensed facility, can vote in person without a photo identification, if the local election board decides to locate a polling place in the facility. Otherwise, any elderly and/or disabled voter living in a state licensed facility without a polling place or, who is residing with family, must present the requisite identification to vote on election day. Requiring these persons to present photo identification while their counterparts lucky enough to have a polling place in their facility get the privilege of avoiding such burden, violates the constitutional requirement that the disparate treatment be related to the distinguishing characteristic, i.e., that no polling place is present where they live. Rokita claims that workers in the facility where the polling place is located know the identity of the elderly and/or disabled voters; however, these workers are not pollworkers.

As there have been no cases of in-person voting fraud anywhere, and no specific cases among the elderly or disabled, then if the objective, as Rokita claims, is to encourage in-person voting, all elderly or disabled persons should be allowed to vote in-person without photographic identification.

III THE COURT OF APPEALS PROPERLY ORDERED THE TRIAL COURT TO ENTER A FINAL JUDGMENT DECLARING THE PHOTO ID LAW TO BE UNCONSTITUTIONAL

Rokita claims that it was inappropriate to order the trial court to enter final judgment without giving Rokita the chance to present evidence. (Rokita Petition to Transfer, p. 15).[4] App. R. 66(D) authorizes the Court of Appeals to "direct that Final Judgment be entered . . . without a new trial or hearing unless this relief is impracticable or unfair to any of the parties or is otherwise improper." It is well recognized under Indiana case law that this rule is intended to be applied when the court is ruling upon a question of law such as a facial challenge. *See, e.g., Miller v. Mayberry*, 546 N.E.2d 834, 836 (Ind. 1989) ("a reviewing court should direct a final judgment on a pure question of law"); *Rebel v. National City Bank of Evansville,* 598 N.E.2d 1108, 1111 (Ind. Ct. App. 1992) ("Although [former App. R. 15(N) now App. R. 66(D)] allows a Court of Appeals to direct final judgment without a new trial, this power is to be utilized only if the court is reviewing a pure question of law or a mixed question of law and fact").

Rokita filed a motion to dismiss on the grounds that the League's complaint failed to state a claim upon which relief could be granted, i.e., a facial challenge. (Rokita App. Brief, p. 37). In reversing the trial court, the Court of Appeals found

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[4] Rokita also complains that he has not even been permitted to answer the complaint. (Rokita Petition, p. 15). But it was Rokita who declined to answer the complaint after filing his motion to dismiss.

that the trial court had erred in granting dismissal because the Photo ID Law was unconstitutional on its face. *League of Women Voters v. Rokita*, No. 49A02-0901-CV-40, slip op. at 24 (Ind. Ct. App. Sept. 17, 2009).[5] As this was a question of law, the Court of Appeals was correct in ordering the trial court to enter a final judgment.

IV IF TRANSFER IS GRANTED, THE PORTION OF THE COURT OF APPEALS' OPINION UPON WHICH THE PARTIES DO NOT DISAGREE SHOULD BE SUMMARILY AFFIRMED

If this Court should elect to exercise its discretion to grant transfer, the League maintains that the portions of the Court of Appeals opinion over which the parties do not disagree should be adopted, incorporated or summarily affirmed by this Court.

The Court of Appeals correctly found that the Photo ID Law was not uniformly applicable to all voters. *League*, slip op. 24-29 (Ind. Ct. App. Sept. 17, 2009). Rokita does not request that transfer be granted on this portion of the Court of Appeals' opinion nor does he address the issue in his petition to transfer. Thus if transfer is granted, the opinion of the Court of Appeals striking down the Photo ID Law due to its lack of uniformity should be incorporated, adopted or summarily affirmed.

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[5] The League maintains that it pled both a facial challenge and an as-applied challenge to the Photo ID Law. Before the Court of Appeals, the League noted that the case was dismissed pursuant to T.R. 12(B)(6) and that "the opportunity to present evidence was not available to the League" but that there were many examples of non-uniform treatment among in-person voters. (League App. Brief, p.p. 38-39).

V THE COURT OF APPEALS PROPERLY FOUND THIS CASE JUSTICIABLE

The Court of Appeals issued a cogent and legally correct opinion holding that Rokita is properly named as a party to this action.

This is a case involving the constitutional rights of Hoosiers and in such instances, this Court has recognized:

> The Indiana Constitution lacks the well known "cases" and "controversies" language of Art. III, § 2 of the U.S. Constitution. This Court can and does issue decisions which are, for all practical purposes, "advisory" opinions. However, it is also true that the separation of powers language in Art. III, § 1 fulfills an analogous function in our own judicial activity, or lack thereof. While this Court respects the separation of powers, we do not permit excessive formalism to prevent necessary judicial involvement. Where an actual controversy exists we will not shirk our duty to resolve it. "Courts of justice are established to try questions pertaining to the rights of individuals."

Indiana Dept. of Environmental Management v. Chemical Waste Management, Inc., 643 N.E.2d 331, 337 (Ind. 1994) (citation omitted).

Indiana's Declaratory Judgment Act, Ind. Code §34-14-1-2, provides: "Any person interested . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of . . . validity arising under the statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." As Indiana courts have noted, "[t]he test to determine the propriety of declaratory relief is whether the issuance of a declaratory judgment will effectively solve the problem involved, whether it will serve a useful purpose,

and whether or not another remedy is more effective or efficient." *KLLM v. Pierce,* 826 N.E.2d 136, 145 (Ind. Ct. App. 2005).

The Court of Appeals properly determined that a declaration of the unconstitutionality of the Photo ID Law would sufficiently redress the problem because Rokita, as the chief election official for all of Indiana, *see, e.g.,* www.in.gov/sos/3156.htm (last visited Oct. 31, 2009), advises each of the county election boards regarding Indiana election laws. http://www.in.gov/sos/elections/2397.htm (last visited Oct. 31, 2009). If the Photo ID Law is declared unconstitutional, Rokita would then advise the local election boards that the Law is unconstitutional and should not be enforced.

The declaration of unconstitutionality will serve a useful purpose because should an election board choose to enforce the Photo ID Law contrary to Rokita's advice, an action can then be brought against that particular election board, and the trial court would be bound through the doctrine of *stare decisis* by this Court's decision that the Law is unconstitutional. Further, there is no other remedy that is more effective or efficient. If the League had to file suit against each of the 92 county election boards, in addition to further stressing the resources of the courts and the League, the chance of conflicting opinions at the trial court level on various issues would increase 92 times.

Rokita mischaracterizes the Court of Appeals' opinion, claiming the appellate court found Rokita to be "a satisfactory defendant not because of *his* role, but because the Attorney General had been served and given 'ample

opportunity to defend the Photo ID Law.'" (Rokita Petition, p. 7) (emphasis in original). But the portion of the Court of Appeals' decision cited by Rokita does not form the basis for the justiciability finding; it merely finds that the League had complied with the statutory requirement that it effectuate service upon the attorney general. *League, slip op.* at 7-8.

Further, rather than "dismiss[ing]" any bedrock justiciability principles as Rokita claims, the Court of Appeals correctly observed that the case upon which Rokita relied, *Alexander v. PSB Lending Corp*., 800 N.E.2d 984, 989 (Ind. Ct. App. 2003), was actually a case applying federal justiciability standards, which are "merely instructive" to Indiana courts. *League*, slip op. at 6-7. *See also, Alexander*, 800 N.E.2d at 989) ("the federal limits on justiciability are instructive"). The *Alexander* case is also distinguishable because it was not a declaratory judgment action and instead decided the issue of standing, which is not at issue here. *See Alexander*, 800 N.E.2d at 989. Rokita has never characterized his "justiciability" challenge as one of standing.

On this basis, the Court of Appeals' opinion that Rokita is a properly named party should be affirmed.

CONCLUSION

The League respectfully requests that if transfer is granted, this Court adopt, incorporate or summarily affirm the opinion of the Court of Appeals. In the alternative, should this Court determine that the Photo ID Law is not unconstitutional on its face, then the League respectfully requests that the case be remanded to the trial court for the taking of evidence with respect to its as-applied challenge.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that this Response to Petition to Transfer contains no more than 4,200 words.

Karen Celestino-Horseman

CERTIFICATE OF SERVICE

I certify that on November 9, 2009, a copy of the forgoing Petition was transmitted via e-mail and by hand-delivery to Christopher Francis Zoeller, Thomas Molnar Fisher, Heather Lynn Hagan, and Ashley E. Tatman, Office of Indiana Attorney General, 219 Statehouse, Indianapolis, IN 46204 and via first class mail, postage prepaid, to the following:

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