determined to be in violation of the *Charter*, then there is no defensible rationale for this infringement sounding in damages in circumstances where no measurable loss has been caused. As in *Guimond*, to hold the official liable in this situation will only serve to "deter his willingness to execute his office with the decisiveness and judgment required by the public good."[75]

55. Indeed, both courts and commentators have identified the risks inherent in an affirmative response to the constitutional question. As Professor Otis has stated:

> Governmental authorities who genuinely and reasonably rely on the apparent validity of their legislative mandates could not, and should not, be deterred from administering the laws that are on the statute books. This is so even if later jurisprudential developments may retrospectively prove their actions to have been constitutionally defective. The same is true of instances, where, for example, police officers act reasonably and in good faith in procuring a seemingly valid search warrant which is subsequently found to violate the *Charter* on the basis of a novel interpretation of the requisite basis for probable cause. In seeking and properly executing the warrant, the police behaved in a manner that was expected of them. Extending the logic of deterrence to this type of constitutional infringement could be tantamount to inhibiting officials from performing what society regards as their duties. [Emphasis added.][76]

56. One American academic has similarly observed that "imposing this type of liability would be unacceptably likely to overdeter."[77]

57. This Court has cautioned against this same outcome, noting that "unless deterrence is confined to situations where it can be effective, there is a danger that the general community will be *over*deterred from activities which are socially useful and ought to be promoted rather than penalized." [Emphasis in original.][78] Similarly, those exercising government decision-making powers which impact on areas ranging from public safety to national security should not have their discretion unduly fettered by the prospect of *Charter* damages resulting from the good faith exercise of their public offices.

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[75] Ibid.

[76] Otis, Ghislain. "Constitutional Liability for the Infringement of Rights Per Se: A Misguided Theory" (1992), 26 *U.B.C.L. Rev.* 21 at pp. 33-34.

[77] Rosenthal, Lawrence. "A Theory of Governmental Damages Liability: Torts, Constitutional Torts and, Takings" (2006-2007), 9 *U. Pa. J. Const. L.* 797 at p. 860.

[78] *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45, 2005 SCC 60 at para. 55.

58. In *R. v. Kokesch,*[79] this Court recognized in the s. 24(2) context that "[t]he police cannot be expected to predict the outcome of *Charter* challenges to their statutory search powers."[80] The situation is no different for other public officials who take actions which they honestly believe to be lawful but which are subsequently found to be contrary to the *Charter*. As in *Kokesch*, the success of a *Charter* challenge to the exercise of their discretion does nothing to vitiate the good faith of these officials.[81]

59. In seeking to limit *Mackin,* the Respondent wrongly assumes that every government decision that results in a *Charter* infringement will necessarily involve a public official who knowingly chooses to act in a way which is contrary to the *Charter*. The Respondent relies on this sweeping generalization to support a deterrent purpose for damage awards for *Charter* infringements *per se*.[82]

60. What this assumption fails to recognize is that *Charter* violations are often the product of good-faith decisions made by public officials who honestly but mistakenly believe their actions to be lawful. Indeed, this is the assumption which underlies the constitutional question. Rather than deterring *Charter* violations, awarding damages under s. 24(1) for *Charter* infringements *per se* will only inhibit such public officials from acting resolutely and in accordance with their best judgment. This cannot be in the public interest.

61. Requiring *mala fides* as a prerequisite to liability in damages under s. 24(1) of the *Charter* has been explained as being necessary to preserve the good-faith exercise of discretion essential to the effective operation of government. As the New Brunswick Court of Appeal stated in *McGillivary v. New Brunswick*[83] in relation to the proper functioning of the criminal justice system:

> The enforcement of the criminal law is one of the most important aspects of the maintenance of law and order in a free society. So long as the carrying out of duties in relation to the investigation and prosecution of persons in pursuit of the aims of the justice system is done within jurisdiction and with an absence of *mala fides*, there can be no recovery. A breach, in order to be actionable must be

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[79] [1990] 3 S.C.R. 3.
[80] Ibid. at p. 34.
[81] Ibid.
[82] Respondent's Factum at paras. 116-135.
[83] (1994), 92 C.C.C. (3d) 187 (N.B.C.A.), application for leave to appeal dismissed, [1994] S.C.C.A. No. 408.

> carried out in disregard of fundamental justice resulting in, for example, a loss of liberty. In order for the criminal justice system to function effectively, there has to be something more than an allegation of an error in reaching a conclusion or in the making of a decision by law enforcement officers, or the experts upon which they rely for professional advice.[84]

62. The Ontario Court of Appeal, citing *McGillivary*, has also held that *mala fides* is a requirement to authorize an award of damages as a remedy under s. 24(1) of the *Charter*. As LaForme J.A., writing for the majority, stated in *Ferri v. Root*:[85]

> Liability for a constitutional tort, such as under ss. 6 and 7 of the *Charter*...requires wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award of damages in an action under the *Charter*. [Citations omitted.][86]

63. Conversely, the Ontario Court of Appeal has reversed a damage award under s. 24(1) in a case in which the trial judge concluded that *mala fides* was a precondition for *Charter* damages only in cases like *Mackin* in which the infringing actions were taken pursuant to legislation or judicial authority which was subsequently overruled.[87]

(vi) The Financial Impact of Damages for Freestanding Charter Violations

64. A further societal consideration that should be borne in mind in considering the prospect of liability in damages for the infringement of constitutional rights *per se* is the significant drain on the public purse that would inevitably result from this development.

65. As Professor Pilkington has noted, the financial reserves that would be required to pay damage awards as an independent remedy for *Charter* violations will be absorbed by the public at large in the form of tax increases.[88] Saunders J.A., in dissenting in the court below, concluded that the financial implications of the availability of damages as a freestanding *Charter* remedy justified applying the public law principles which support

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[84] Ibid. at p. 191. See also *Stenner, supra*, at paras. 85-86.
[85] (2007), 279 D.L.R. (4th) 643 (Ont. C.A.), application for leave to appeal dismissed, [2007] S.C.C.A. No. 175.
[86] Ibid. at para. 108. See also at para. 157 *per* Juriansz J.A. dissenting.
[87] *Hawley v. Bapoo* (2007), 227 O.A.C. 81 at paras. 6-10, reversing (2005), 76 O.R. (3d) 659 (Sup. Ct.).
[88] Pilkington, *supra*, at p. 574.

qualified immunity for government decision-making to the interpretation of the remedial scope of s. 24(1).[89]

66. While this Court has made clear that purely financial considerations cannot justify the infringement of *Charter* rights, the Court has recognized that the allocation of scarce government financial resources forms a relevant consideration both in assessing the minimal impairment aspect of the s. 1 *Charter* analysis and in the exercise of a court's remedial discretion under s. 52.[90] In *Schachter*, Lamer C.J.C. stated the following in the course of discussing remedies under s. 52:

> This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.[91]

67. Financial considerations should similarly inform the fashioning of appropriate and just remedies under s. 24(1) of the *Charter*. As in the s. 1 *Charter* context, it is not realistic to assume that the state has access to unlimited funds.[92] As Bastarache J. stated in *Gosselin v. Québec (Attorney General)*,[93] in deciding on a s. 24 remedy, "the significant cost that would be incurred by the government were it required to pay damages must be considered."[94] The English Court of Appeal has likewise noted in considering whether damages are a "just and appropriate remedy" under the United Kingdom's *Human Rights Act, 1998* that there has to be a balancing between the interests of the claimant and those of the public as a whole. In particular, regard must be had "for the wider public who have an interest in the continued funding of a public service."[95]

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[89] JAR, Vol. 1 at pp. 97-98, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at para. 86 (Saunders J.A. dissenting).
[90] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 at paras. 282-284.
[91] *Schachter, supra,* at p. 709.
[92] Ibid. at p. 723; and *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 572.
[93] [2002] 4 S.C.R. 429, 2002 SCC 84.
[94] Ibid. at para. 297.
[95] *Anufrijeva v. Southwark London Borough Council* [2003] EWCA Civ 1406 at para. 56, leave to appeal refused [2005] 1 W.L.R. 2809 (H.L.)

68. As one commentator has pointed out, one "argument against monetary redress is that where the class of potential claimants is large, the government's liability is so potentially huge that ordering compensation could constitute a major drain on the public purse causing under-funding of other programmes."[96]

69. The South African Constitutional Court has declined to award damages for constitutional infringements *per se*, citing the undesirable effects this would have on the allocation of limited government resources. Ackermann J. stated in this regard:

> In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform", it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement. [Emphasis added.][97]

D. Section 24(1) of the *Charter* Should be Interpreted in a Manner Consistent with s. 24(2) and the Common Law

(i) A Harmonious Construction of s. 24 of the Charter Depends on Good Faith Being Relevant to the Question of Remedy Under Both s. 24(1) and s. 24(2)

70. This Court has stated that one of the guiding principles in the interpretation of s. 24 of the *Charter* is that s. 24(1) and s. 24(2) must be read together to create a harmonious interpretation.[98]

71. An example of this approach is the decision to exclude evidence as a *Charter* remedy under s. 24(1) as opposed to s. 24(2). In considering this issue in *Bjelland*, this Court imposed criteria not unlike the considerations that govern the decision to exclude evidence under s. 24(2) in assessing whether exclusion is an appropriate and just remedy under s. 24(1). Rothstein J. stated that the exclusion of evidence as a remedy under s.

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[96] Howard, John Geoffrey. "Civil Remedies Under the Charter: Options and Issues" (1989-1990), 11 *Advoc. Q.* 47 at pp. 68-69.
[97] *Fose v. Minister of Safety and Security* [1997] ZACC 6 at para. 72.
[98] *Dunedin Construction, supra*, at para. 21.

24(1) "should only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system."[99]

72. In fashioning remedies under s. 24, this Court has frequently had regard to the notion of good faith. The Court's jurisprudence on the question of whether evidence obtained in violation of the *Charter* should nonetheless be admitted under s. 24(2) is pervaded by the concept that the presence or absence of good faith is a relevant consideration.[100] Indeed, the Court has recognized a direct relationship between the indicia of good faith and the relative seriousness of the *Charter* breach in issue.[101] It would be incongruous, then, if good faith were made irrelevant in determining whether damages should be awarded as a remedy for a *Charter* breach under s. 24(1).

73. Considering a typical prosecution readily reveals the patchwork application which would result if all *Charter* violations were actionable in damages under s. 24(1) according to the "reasonableness" standard suggested by the Respondent.[102] Imagine that evidence is seized by police in a manner that is found to amount to an unreasonable search in violation of s. 8 of the *Charter*. The evidence is nonetheless ruled admissible under s. 24(2), based in part on the good faith of the police officers responsible for the search and seizure. The accused is convicted but is able to recover damages against the Crown under s. 24(1) for the breach of s. 8 in and of itself despite having suffered no compensable loss and notwithstanding the good faith of the police officers involved. This outcome creates a discordant relationship between s. 24(1) and s. 24(2) of the *Charter*.

(ii) Section 24(1) of the Charter Should Not Allow for Damages as a Remedy Where Damages Are Not Available at Common Law

74. As Saunders J.A. noted in her dissent, the prospect of damages under s. 24(1) of the *Charter* absent negligence or tortious conduct "would create two classes of wrongs,

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[99] *Bjelland, supra*, at para. 19.

[100] See for example *R. v. Collins*, [1987] 1 S.C.R. 265 at pp. 283-284; and *Grant, supra*, at paras. 75, 108, 124 and 127.

[101] *R. v. Therens*, [1985] 1 S.C.R. 613 at p. 652.

[102] Respondent's Factum at paras. 110-114.

with a s. 24 action for damages available as a 'fall-back' to an action in tort in the event a tort cannot be established."[103] In other words, such an approach would create a cause of action in damages under the *Charter* for conduct which does not support a cause of action at common law. This inconsistency runs afoul of this Court's stipulation that the *Charter* and the common law should, to the extent possible, be interpreted in a harmonious fashion.

75. This Court adopted this approach in the remedial context in *O'Connor* in refining the test for a stay of proceedings under s. 24(1) of the *Charter* owing to an abuse of process. The Court found that the test for obtaining a stay of proceedings as a remedy for an abuse of process, both under the *Charter* and at common law, should be founded on the same standard, being reserved for the "clearest of cases".[104] In concluding that there was no basis for retaining a separate common-law regime, L'Heureux-Dubé J. stated:

> As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.[105]

76. Similarly, there is no justification for making actionable under s. 24(1) of the *Charter* conduct which would not support a remedy at the common law. As Professor Mullan has noted:

> Given the reluctance of the Canadian courts to impose common law liability in damages on those exercising legislative, law enforcement, prosecutorial, and judicial and quasi-judicial powers, or more generally, to treat liability in tort as springing automatically from the existence of an ultra vires decision or action, acceptance of this form of per se liability for any species of *Charter* violation would involve the adoption of very different principles of official liability in the context of *Charter* litigation than our law has countenanced to this point.[106]

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[103] JAR, Vol. 1 at p. 98, Reasons for Judgment of the British Columbia Court of Appeal dated January 27, 2009 at para. 87 (Saunders J.A. dissenting).
[104] *O'Connor, supra,* at para. 68.
[105] Ibid. at para. 70.
[106] Mullan, David J. "Damages for Violation of Constitutional Rights – A False Spring?" (1996), 6 *Nat'l J. Const. L.* 105 at p. 116.

(iii) The Notion of Presumed Damages for Charter Violations Per Se is Inconsistent with Remedial Principles

77. As this Court has emphasized, the purpose of damage awards is ordinarily to compensate for the losses caused by a wrongdoer's misconduct with a view to restoring the claimant to the position that they would have been in had no actionable wrong occurred.[107] The exception is punitive damages, which are intended to effect retribution, deterrence and denunciation in cases of particularly egregious misbehaviour. There is no compensatory aspect to punitive damages; their aim is to punish, not to compensate.[108] The test for punitive damages, as articulated by the Court, is that they are limited to exceptional cases of "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."[109]

78. In *Guimond*, this Court indicated that damages as an "appropriate and just" remedy under s. 24(1) of the *Charter* will either be compensatory or punitive in nature.[110] However, it is difficult if not impossible to discern on what basis damages would properly lie as a s. 24(1) *Charter* remedy in the absence of bad faith, an abuse of power or tortious conduct. In the absence of any loss, there would be no need to award damages to "make whole" the rights holder, and therefore no basis for compensatory damages.[111] In such circumstances, any damage award would necessarily be punitive, but the legal threshold for punitive damages would not be met. Moreover, awarding such damages for a *Charter* breach occasioned by the good-faith exercise of discretion by a government official which results in no measurable loss would not contribute to retribution, deterrence or denunciation.

79. This Court has applied similar principles in determining the proper scope of damage awards under the *Québec Charter of Human Rights and Freedoms*. In *Béliveau St-Jacques v. Fédération des employées et employés des services publics inc.*,[112] Gonthier

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[107] *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30 at para. 43.
[108] *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 at paras. 68 and 92.
[109] Ibid. at para. 94; and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196.
[110] *Guimond, supra*, at para. 15.
[111] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at pp. 410-411.
[112] [1996] 2 S.C.R. 345.

J., for the majority, observed that "[t]he violation of a guaranteed right does not change the general principles of compensation or in itself create independent prejudice. The *Charter* does not create a parallel compensation system."[113]

80. Similarly, in *Aubry v. Éditions Vice-Versa*,[114] L'Heureux-Dubé and Bastarache JJ. concluded:

> Where extrapatrimonial damages are concerned, we agree with Baudouin J.A. that the infringement of a right guaranteed by the Québec *Charter* is in itself insufficient to establish that damage has been sustained. Nor is an award of symbolic damages justified when the courts wish to punish the infringement of a right that will, in most cases, result in minimal injury. This would be contrary to the principles of civil responsibility. [Emphasis added.][115]

81. Other jurisdictions have also rejected the notion that damages should be available against the state based solely on the presumed or inherent value of constitutional rights. Something more is required.

82. In the United States, in the leading case of *Carey v. Piphus*,[116] the U.S. Supreme Court held that compensatory damages could only be recovered for a denial of constitutional rights if a loss resulting from the denial was proven. The court rejected the argument that damages should be available for the deprivation of a constitutional right whether or not any injury was caused by the deprivation on the basis that constitutional rights are valuable in and of themselves. Powell J. stated that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests."[117]

83. The U.S. Supreme Court reaffirmed this finding in *Memphis Community School District v. Stachura*,[118] recognizing that *Carey* "makes clear that the abstract value of a constitutional right may not form the basis for…damages."[119] The court in *Stachura* also

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[113] Ibid. at para. 121. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, 2004 SCC 30 at paras. 21-23.
[114] [1998] 1 S.C.R. 591.
[115] Ibid. at para. 68.
[116] 435 U.S. 247 (1978).
[117] Ibid. at p. 254.
[118] 477 U.S. 299 (1986).
[119] Ibid. at p. 308.

rejected the further argument that damages are necessary to vindicate denials of constitutional rights. The court was not persuaded of the deterrent value of this approach to damages. Powell J., again writing for the court, explained:

> ...damages based on the "value" of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants. *Cf. Gertz,* 418 U.S. at 350. Such damages would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in § 1983 cases. We therefore hold that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in such cases.[120]

84. In determining whether damages should be awarded as a remedy under Article 41 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the European Court of Human Rights has generally applied the principle that monetary remedies should only be compensatory in nature. In *Kingsley v. United Kingdom*,[121] for example, the court stated:

> The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible.[122]

85. In *R. (Greenfield) v. Secretary of State for the Home Department*,[123] the House of Lords applied the jurisprudence of the European Court in delineating the principles which should govern decisions to award damages under the *Human Rights Act, 1998.* Lord Bingham of Cornhill observed that the European Court "has ordinarily been willing to depart from its practice of finding a violation of article 6 to be, in itself, just satisfaction under article 41 only where the Court finds a causal connection between the violation

[120] Ibid. at p. 310.
[121] (2002) 35 E.H.R.R. 177.
[122] Ibid. at para. 40.
[123] [2005] UKHL 14.

found and the loss for which an applicant claims to be compensated." [Emphasis added.][124]

86. The availability of damages as a remedy under s. 24(1) of the *Charter* should be similarly circumscribed. Damages should not lie for *Charter* infringements in and of themselves absent evidence of bad faith, an abuse of power or tortious conduct committed by the infringer. To hold otherwise would create a freestanding entitlement to damages that would be neither appropriate nor just.

E. Conclusion

87. This Court in *Miazga* explained that requiring proof of malice to support a claim of malicious prosecution is essential to achieving an appropriate balance between society's interest in the effective administration of the criminal justice system and the need to compensate individuals who have been wrongly prosecuted.[125]

88. The availability of damages as a remedy under s. 24(1) of the *Charter* must also strike an appropriate balance between individual interests and public policy imperatives. Any other approach "would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity."[126]

89. Awarding damages in the absence of bad faith, an abuse of power or tortious conduct would be neither appropriate nor just. A freestanding entitlement to damages in these circumstances would significantly erode the limited immunity which this Court has recognized as necessary for those who are obliged to make decisions in the public interest and impose an unnecessary burden on public funds. Such a remedy also does not comport with accepted remedial principles governing the awarding of damages. As Professor Otis has observed:

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[124] Ibid. at para. 11.
[125] *Miazga, supra*, at para. 56.
[126] *Hislop, supra*, at para. 117.

> The justification of substantial awards based on deterrence is flawed when applied to conduct that falls outside the appropriate purview of exemplary remedies. With regard to such conduct, the proposed monetary claim would be "inappropriate" since it would fail to achieve the end of inducing compliance with constitutional duties. It would also be "unjust" in that it would result in an unnecessary drain on governmental resources. While considerations related to cost or administrative convenience should not hamper the courts in their mission of enforcing constitutional rights, needless pressure on already overstretched public finances would not be justifiable under s. 24(1). [Emphasis added.][127]

90. Finally, this outcome would render s. 24(1) of the *Charter* fundamentally at odds with both s. 24(2) and the common law.

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[127] Otis, *supra*, at p. 35.

PART IV – COSTS

91. The Attorney General of Canada does not seek costs and submits that the ordinary rule that costs not be awarded against interveners should apply.

PART V – ORDER SOUGHT

92. The Attorney General of Canada submits that the constitutional question should be answered "no".

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 23rd day of December, 2009.

"Mark R. Kindrachuk, Q.C."

Mark R. Kindrachuk, Q.C.

Jeffrey G. Johnston

of Counsel for the Attorney General of Canada

PART VI - TABLE OF AUTHORITIES

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