NO. 102701-0

SUPREME COURT OF THE STATE OF WASHINGTON

COURTNEY PEREZ,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES;
and DIGITAL CONTROL, INC.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the application of ordinary statutory construction principles to a plainly-worded workers' compensation statute that does not warrant this Court's review. Courtney Perez seeks Washington workers' compensation benefits after her spouse, Julian Perez Ortega, died while working and living in another state. Perez is entitled to extraterritorial survivor benefits under Washington law only if Perez Ortega did not spend a "substantial part" of his "working time in the [employer's] service" in another state. The trial court found that Perez Ortega spent a substantial part of his working time in the employer's service in Indiana, where Perez Ortega had lived and worked since 2007.

The undisputed testimony and documentary evidence—including expense reports, mileage logs, contract, and payroll information—show that, in 2017 and 2018, Perez Ortega worked 247 and 146 days for DCI respectively, not including holidays and paid time off. Of those days, Perez Ortega worked

from home in Indiana 128 days (52 percent of the time) in 2017, and 56 days (38 percent of the time) in 2018. Compared to his time spent working in other states (between one percent to eight percent), the Court of Appeals appropriately determined that Perez Ortega spent a substantial part of his working time in Indiana, precluding benefits under the extraterritoriality statute.

Perez challenges the Court of Appeals' inclusion of time Perez Ortega allegedly spent "on-call" in Indiana during a standard Monday-Friday workweek as part of his "working time." But Perez cannot deny that he was salaried and that salaried workers are paid the same salary regardless of the numbers of hours actually worked. Nor can she deny that his work contract required him to work Monday through Friday each week, or otherwise take leave for time he was not working.

The Court of Appeals' determination that the statutory definition of "working time" encompasses a salaried employee's expected workweek applies the plain language of RCW 51.12.120. This determination does not require this Court's review. The Department of Labor and Industries asks this Court to deny review.

II. STATEMENT OF THE ISSUE

Does substantial evidence support finding that Perez Ortega spent a substantial part of his working time in Indiana when the evidence shows that he spent nearly half of his work time "home office based" in Indiana where he was paid a salary to work Monday through Friday and other hours as needed?

III. STATEMENT OF THE CASE

A. Perez Seeks Extraterritorial Workers' Compensation Coverage

Julian Perez Ortega worked for Digital Control, Inc. (DCI) from 1998 until his death in August 2018. CP 1008 (Ex 4). DCI manufactures horizontal directional drilling guidance equipment. CP 1017 (Ex 4). It sells its products through

independent resellers, and it has territory managers to support the DCI resellers and customers in its regions. CP 1003 (Ex 4).

Perez Ortega initially contracted with DCI to work in Washington State, and then moved to work, first in Florida and then in California. CP 1008, 1013 (Ex 4). In 2007, Perez Ortega relocated to Indiana. CP 718. From 2007 to August 2018, Perez Ortega worked as DCI's Midwest Territory Manager, and in April 2018, became DCI's North American Field Manager. CP 1008 (Ex 4).

In his role as territory manager, his primary territory was the Midwest (Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Ohio, and Wisconsin), and he also covered South America. CP 719, 787, 798. As field manager, he supervised other territory managers in North America and continued to serve as Midwest territory manager. CP 789, 1008 (Ex 4).

While working in Michigan, he was in an accident in the end of July 2018 that led to his death on August 2, 2018. CP 547, 998. His spouse Courtney Perez filed for extraterritorial

industrial insurance survivor benefits in Washington, which L&I denied. CP 648. She appealed to the Board of Industrial Insurance Appeals. CP 643-45.

That Perez Ortega neither worked (other than a fraction of time) nor lived in Washington after his initial hire is not dispositive. Instead, a worker injured outside Washington may receive Washington workers' compensation benefits if they were under an employment contract made in Washington and working in employment "not principally localized in any state." RCW 51.12.120(1)(b).[1] "Principally localized" means where a worker is "domiciled in and spends a substantial part" of their "working time in the [employer's service] in this or the other state." RCW 51.12.120(5)(a)(ii).

Here, it is undisputed that Perez Ortega originally entered into his employment contract with DCI in Washington and was domiciled in Indiana. CP 731, 1710, 1718, 1734, 1758. So the

[1] RCW 51.12.120 was amended in 2023. Laws of 2023, ch. 88, § 11. The changes are not material to this case.

relevant inquiry for the courts below was how much time Perez Ortega spent working in Indiana in the service of DCI.

B. Perez Ortega Worked from Home in Indiana When He Wasn't Traveling Out of State

Perez Ortega's primary roles were to support the DCI resellers within his territory and to support and train customers in how to use DCI's drilling equipment. CP 785, 1017 (Ex 4). Ultimately, his job was to develop and execute marketing strategies to grow DCI's business. CP 785, 1017 (Ex 4).

When Perez Ortega became DCI's Midwest Territory Manager, he had to move to the Midwest to take the promotion, and chose to live in Indiana. CP 733. DCI required its managers to live inside their service territory to more easily reach their customers. *See* CP 786. Face-to-face interactions with customers helped accomplish the job. CP 785.

Perez Ortega often travelled for work outside of Indiana. Territory managers are required to travel throughout their territories up to 50 percent of their time. CP 1004-5 (Ex 4). Perez estimated that Perez Ortega spent about 50 percent of his

time outside of Indiana, with the inference that 50 percent of his non-travel time was spent in Indiana. *See* CP 722.

When territory managers are not traveling, DCI expects them to work from home or to take leave for any time that they are not working. CP 796, 836, 845. DCI paid Perez Ortega a salary for all his time, whether he was traveling or not. *See* CP 847. DCI expected him to work Monday through Friday, and beyond. CP 805, 845. He was on-call 24 hours a day. CP 805.

Perez Ortega's job description says that the territory managers are "home office based." CP 1004 (Ex 4). DCI's chief of staff, Matt Mercer, explained that, when the territory managers were not traveling, they would work from their home offices in several ways: supporting customers at any time with troubleshooting issues; absorbing product content; and working on presentations, test reports, field testing, bench testing, and trip reports. CP 786. They were also responsible for competitive analysis, quarterly reports, and goal setting for the team members. CP 796-97.

DCI reported that "[o]n non-travel days, [Perez Ortega] typically worked out of his home, communicating with resellers and customers." CP 1010 (Ex 4). In his role as North American Field Manager, he would communicate with territory managers, including "checking in with each of them, helping them work through issues, creating reports for the team, [and] following up on broader communications with headquarters-based DCI employees." CP 1010 (Ex 4).

Perez Ortega also set up his home to work in Indiana. He had a company laptop and a home office. CP 722-23, 749, 1011. DCI reimbursed him for 80 percent of the cost of his home internet because his work required him to work from home. CP 742, 826-27. DCI also paid for a storage unit in Indianapolis for Perez Ortega's work equipment. CP 723, 742. DCI paid payroll and unemployment taxes in Indiana because Indiana was his primary location where much of his work was performed. CP 828-30.

Perez Ortega also had significant work responsibilities in Indiana. He worked with DCI's biggest customer, Vermeer, which represents 80 percent of DCI's business and had a branch in Indiana. CP 732, 788, 806. Perez Ortega was responsible for the Vermeer Midwest group—the largest group at Vermeer. CP 788. DCI promoted him because of his success with Vermeer. CP 790-91.

Perez noted that, when Perez Ortega was at home, he would be a "little bit more hands on" in terms of participating in family activities in ways he couldn't when traveling. CP 724. But even so, he always responded to calls, texts, and emails:

> [H]e always had his phone on him. So even if he was out in the yard mowing and his phone rang, he would take the call. If someone would e-mail or text, he would respond to it. So regardless of if he was at a baseball game or whatever we were doing, even on vacations, he would take the call.

CP 724-25. He would receive calls in evening hours. CP 735. He would also work weekends in Indiana. CP 738.

Perez claimed that Perez Ortega did not work full eight-hour days when he was working at home. CP 725, 761. But she conceded that she was unaware of how much time he spent working because she had her own responsibilities. CP 736, 739. Perez admitted that given the 24-hours-a-day nature of his job, she could not specify the amount of time he worked each day in Indiana. CP 739. And she conceded that he would immediately respond to texts, calls, or emails. CP 734.

At the hearing, Perez raised a theory that Perez Ortega was not working when in Indiana, but was instead ostensibly "on call," and that the time in Indiana (when he wasn't in the field) was mostly not working. CP 53, 72-77. But DCI's chief of staff affirmed that Perez Ortega worked at home when he was not traveling—it was a "requirement" that he either work or take paid time off. CP 796, 836, 845. The chief of staff stressed that Perez Ortega supported resellers "from home over the phone." CP 814-15.

DCI's supervisors alternatively characterized Perez Ortega's activities as being "on call" when at home or "working when he was at home." *Compare* CP 836 ("[I]f he was on call at home, he would technically still be working.") *with* CP 796 ("Part of his job would be working when he was not traveling."). The chief of staff emphasized that the territory managers were required to always be available to customers: "You're on call 24/7." CP 805.

DCI accounting manager, Emily Williams, emphasized that, if Perez Ortega was "on call" at home, he would still be working. CP 836. And DCI considers time spent Monday through Friday at home to be workdays in Indiana unless leave is submitted. CP 845.

Perez testified that Perez Ortega worked around the house when he was in town. CP 724. But DCI's accounting manager testified that, if Perez Ortega wanted to fix things around the house during an ordinary workday, he would be required to submit time off from work. CP 836.

C. Perez Ortega Spent Nearly Half of His Working Time in Indiana

Both DCI's chief of staff Mercer and accounting manager testified that a substantial part of Perez Ortega's time was working for DCI in Indiana. CP 807, 830. Mercer cited information from customers and from Perez Ortega's travel expenses. CP 813, 1036-1122 (Ex 6), 1123-1451 (Ex 7), 1463-1502 (Ex 13). Accounting manager Williams calculated the time Perez Ortega worked in Indiana versus other locations based on Perez Ortega's expense reports, activity reports submitted with the expense reports, receipts, mileage logs, and the company payroll database. CP 821-22. Williams compiled her calculations in a document admitted as Exhibit 5:

2017 Locations Worked

Location	Days in Location
Colombia	12
Holiday No Work	10
Illinois	22
Indiana	128
Iowa	7
Kansas	8
Kentucky	5
Mexico	4
Michigan	14
Missouri	25
Ohio	2
PTO No Work	10
Texas	8
Washington	5
Wisconsin	7
Grand Total	**267**

2018 Locations Worked

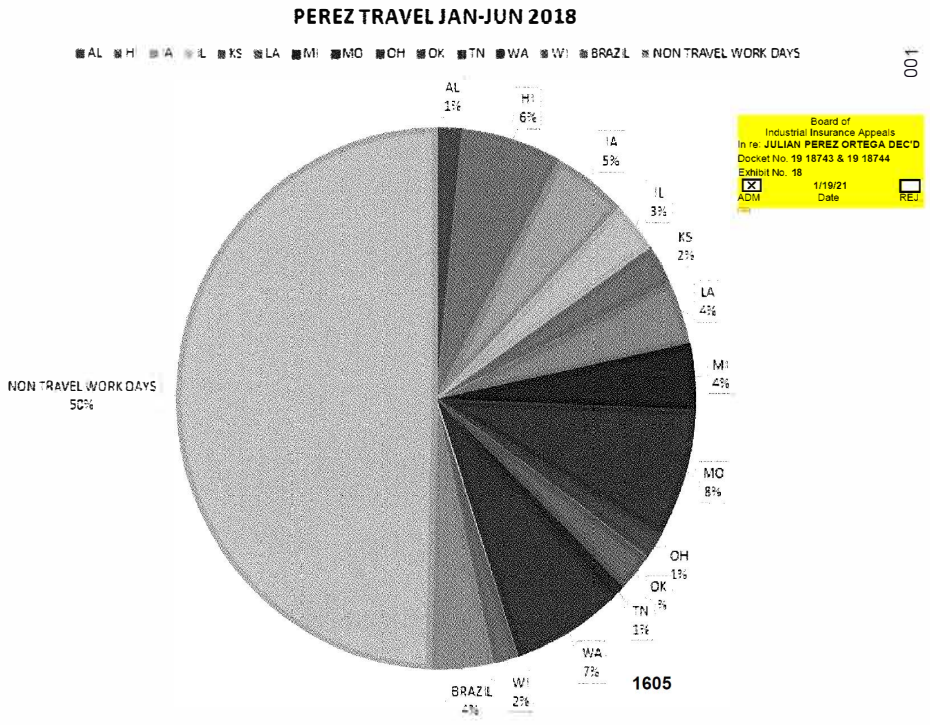
Location	Days in Location
Alabama	1
Brazil	6
Hawaii	8
Holiday No Work	6
Illinois	12
Indiana	56
Iowa	7
Kansas	6
Louisiana	4
Michigan	6
Missouri	5
Missouri/Illinois	3
Ohio	1
Oklahoma/Kansas	4
PTO No Work	9
Tennessee	2
Unknown	12
Washington	13
Grand Total	**161**

CP 1035 (Ex 5).

Williams determined that, in 2017, Perez Ortega worked 128 out of 267 possible workdays in Indiana. CP 836. And for 2018, Perez Ortega worked 56 days in Indiana out of 161

possible work dates. CP 835. According to Williams' calculations, Perez Ortega worked 43 percent of these working days in Indiana over the two years.

Another exhibit using information from Perez quantified that Perez Ortega spent 50 percent of non-travel working time in Indiana. CP 1625 (Ex 18); RP 31, 40.



Thus, the percentage of time he worked in Indiana in 2017 and 2018 was between 43 to 50 percent. CP 722; CP 1035 (Ex 5); CP 1635 (Ex 18). In 2018, beyond the time he spent

working in Indiana, he spent eight percent of his working days in Missouri, seven percent in Washington, six percent in Hawaii, five percent in Iowa, four percent in Louisiana, four percent in Michigan, three percent in Illinois, two percent in Kansas, two percent in Oklahoma, two percent in Wisconsin, one percent in Ohio, one percent in Tennessee and one percent in Alabama. CP 1625 (Ex 18). He also worked for short periods in Brazil and Colombia. CP 1035 (Ex 5).

D. The Board and Trial Court Affirmed That Perez Ortega Was Principally Localized in Indiana

L&I issued an order finding that Perez Ortega was not covered under Washington workers' compensation law because he was principally localized in Indiana. *See* CP 649. On appeal, at the Board, the Board denied the parties' cross-motions for summary judgment. CP 119. Based on the testimony, the Board affirmed L&I. CP 21, 130. And the trial court later affirmed the Board, finding that Perez Ortega "spent a substantial part of his time working in the service of DCI in the State of Indiana." CP 1837 (FF 1.12). In support of this finding, the trial court noted

that Perez Ortega resided in Indiana, was " a salaried worker that was required to be available 24 hours per day," and that "he worked from home in the State of Indiana, he worked with customers in the field in the State of Indiana, [and] he traveled in and around the State of Indiana for work related travel." CP 1837 (FF 1.12). The trial court also noted that Perez Ortega maintained and rented a storage unit for work equipment in the State of Indiana. CP 1837 (FF 1.12).

The trial court determined that Perez Ortega spent 50 percent of his time in Indiana—"that 50 percent mathematical computation." RP 86. The trial court defined "substantial" for purposes of applying the extraterritoriality statute as "considerable in quantity" and "of considerable importance." RP 86. The trial court ruled "there is no way that I can conclude based on this record that Mr. Perez's involvement in the state of Indiana was anything other than considerable in quantity, ample or of considerable importance." RP 87. The trial court concluded that, because Perez Ortega's work with DCI was

principally localized in Indiana, he was ineligible for Washington benefits. CP 1837.

Perez appealed and the Court of Appeals affirmed. It held that "working time" included time spent on salary, thus supporting the determination that Perez Ortega spent the substantial part of his working time in Indiana. *Perez v. Dep't of Lab. & Indus.*, No. 84864-0, slip op. at 9-10 (Wash. App. Ct. Dec. 4, 2023).

IV. ARGUMENT

This Court should deny review of the fact-bound application of RCW 51.12.120 to Perez Ortega's employment circumstances. Perez's generic argument that the Industrial Insurance Act is a remedial statute does not warrant review here. And her argument that this issue is likely to recur in the future, despite never having been addressed before, rests on pure speculation. Pet. 12, 28. Contrary to Perez's arguments, out-of-state work-from-home arrangements will almost invariably require spending substantial working time in another

state. And, in the unlikely situation this issue ever recurs again the future, applying the extraterritorial statute requires a routine application of plainly-worded statutory language to the facts of each case. This case does not meet the criteria for this Court's review.

A. The Court of Appeals Correctly Concluded That Working Time Under RCW 51.12.120 Includes Salaried Time

The key question is this case is straightforward: whether Perez Ortega's employment was "principally localized" in Indiana under RCW 51.12.120(5)(a)(ii). That statute provides that "[a] person's employment is principally localized in . . . another state when" they spend "a substantial part" of their "working time in [the employer's service] in . . . the other state." *Id.*

Perez argues that the term "working time" is ambiguous, requiring liberal construction. Pet. 15-17, 19. But she explicitly argued the statute was not ambiguous below. Appellant's Br. 43. There is no ambiguity here.

The Court of Appeals' decision that salaried time counts as "working time" under the statute is the only reasonable interpretation of the statute. *Perez*, slip op. at 9-10. When a worker is on salary, there are no limits to the number of hours they may work in a day. RCW 49.46.010(3)(c), .130; *e.g.*, *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528, 546, 61 P.3d 1130 (2003). Perez seems to suggest that the fact that Perez Ortega was a salaried employee is not relevant to quantifying and determining the location of his working time and that the quantification should include only those hours Perez Ortega was physically working. Pet. 18, 19. She argues that on-call time should not be included as Perez Ortega's "working time" unless he worked an eight-hour day. *Perez*, slip op. at 9; Pet. 19.

But this position is inconsistent with both the evidence in this case and the long established case law regarding the obligations and compensation of a salaried worker. Here, Perez Ortega was expected to work at least Monday through Friday or

was required to take leave. *Perez*, slip op. at 9; CP 796, 836, 845. He was also required to work hours beyond the ordinary workweek. CP 805. Indeed, Perez conceded below that "if a worker had a set schedule for working and instead ignored his duties, that would still be considered working time because the employer had a reasonable expectation that the worker would actually be working during that entire time." Appellant's Br. 61 n.17. But DCI similarly expected Perez Ortega to be actually working during his ordinary workweek, making Perez's full workweek count as "working time," as well.

Perez's argument also conflicts with established law. The Court in *Drinkwitz v. Alliant Techsys., Inc.* correctly observed that salaried employees are paid a normal salary regardless of hours actually worked. 140 Wn.2d 291, 302, 996 P.2d 582 (2000) ("Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. .... The salaried employee decides for himself how much a particular task is worth, measured in

the number of hours he devotes to it." (quoting *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 184 (3d Cir. 1988)).

Perez argues *Drinkwitz* is distinguishable because the case addressed situations where a salaried employee works less than 40 hours. Pet. 22-23 (citing *Drinkwitz*, 140 Wn.2d at 296). But this is just the other side of the same coin: a salaried workers' compensation is the same whether they work over or under 40 hours per week. Perez concedes as much, acknowledging that an employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." Pet. 22 (quoting *Drinkwitz*, 140 Wn.2d at 302). So too here: Perez Ortega's "working time" in Indiana included hours during the week for which he was paid a salary and was expected to work, even if he did not physically work during that entire time and even if consideration of this entire time results in a greater than 40-hour workweek.

Finally, Perez asserts that the Court of Appeals incorrectly concluded that Mr. Perez "was paid for every work day that he was outside of Indiana and for every work day that he was in Indiana, no matter how many hours he worked." Pet. 20 (citing *Perez*, slip op. at 10). But she cites no place in the record for this. In fact, the opposite is true: by being a salaried worker, Perez Ortega was paid for a standard workweek in Indiana no matter how many hours he actually worked each day while there. CP 845, 847.

B. Perez's Challenges to Findings of Fact Don't Merit Review

Perez quibbles with Finding of Fact 1.12 and 1.13, arguing that they are not findings of fact. Pet. 26. The Court of Appeals recognized that finding 1.13 was a conclusion. *Perez*, slip op. at 13. Perez's real concern is with finding 1.12: that Perez Ortega "spent a substantial part of his time working in the service of DCI in the State of Indiana." Pet. 26 (quoting CP 1837). But this challenge does not warrant review.

First, Perez is wrong that this finding is a pure question of law. Perez argues that the Court of Appeals

> acknowledged initially that "[t]he meaning of 'substantial part' and 'working time' in RCW 51.12.120(5)(a)(ii) is a question of law," but later in its opinion stated that "whether Perez Ortega spent a substantial part of his working time in the service of DCI in Indiana is a fact question reserved for the fact finder." . . . Only one of these statements can be true.

Pet. 26-27 (citing *Perez*, slip op. at 6, 12). Not so. The Court of Appeals correctly determined that the meaning of a statutory term is question of law, but applying that language to determine whether a statutory condition has been satisfied involves a question of fact. After determining the meaning of the term as a matter of law, the Court of Appeals correctly applied this meaning to the undisputed evidence.

And in holding that Perez Ortega spent a "substantial" part of his working time in Indiana, the Court of Appeals noted a number of pertinent facts: that Perez Ortega "worked from home in Indiana," was a salaried worker required to be

available 24 hours per day, "worked with customers in Indiana," and "traveled in and around Indiana for work-related travel." *Perez*, slip op. at 13. Perez argues this evidence is not sufficient because there isn't a quantification of the hours worked. Pet. 28. But she cites no authority that a fact-finder can't rely on qualitative facts to make this determination.

In any event, her quantification argument is a red herring. Perez doesn't argue that, if Perez Ortega spent nearly 50 percent of his working time in Indiana, it would not be substantial; she only disputes that the time Perez Ortega spent in Indiana should count in this calculation. Pet. 27-28. This is wrong, as detailed above.

Finally, Perez's argument that the trial court did not adequately explain the factual basis of this finding should be rejected. In the oral ruling, which can be examined to determine what the trial court considered, *Gay v. Cornwall*, 6 Wn. App. 595, 599, 494 P.2d 1371 (1972), the trial court credited Perez Ortega as spending 50 time percent of his time in Indiana—

"that 50 percent mathematical computation," implicitly referencing Exhibit 18. RP 86; CP 1625 (Ex 18). The trial court also defined "substantial" as "considerable in quantity" and "of considerable importance," ruling, "there is no way that I can conclude based on this record that Mr. Perez's involvement in the state of Indiana was anything other than considerable in quantity, ample or of considerable importance." RP 86-87. This is sufficient to explain the trial court's findings.

This fact-specific application of a plainly worded statute does not warrant this Court's review.

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V. CONCLUSION

L&I asks this Court to deny review.

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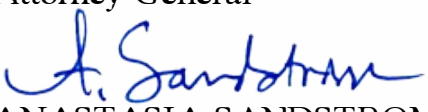
RESPECTFULLY SUBMITTED this 23rd day of February, 2024.

ROBERT W. FERGUSON
Attorney General



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SUPREME COURT
STATE OF WASHINGTON

COURTNEY PEREZ, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES and DIGITAL CONTROL, INC., Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer to Petition for Review and this Certificate of Service in the below described manner:

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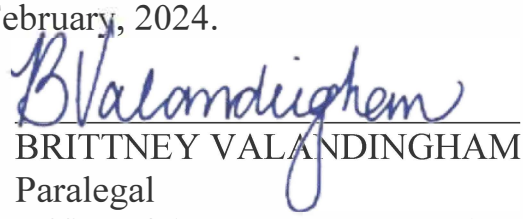
DATED this 23 day of February, 2024.



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