

No. 23-411

**In the Supreme Court of the United
States**

VIVEK H. MURTHY, SURGEON GENERAL, ET AL.,

Petitioners,
v.

MISSOURI, ET AL.,

Respondents.

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

**BRIEF OF AMICUS CURIAE
INFORMED CONSENT ACTION NETWORK IN
SUPPORT OF RESPONDENTS**

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*Amicus Curiae*¹ respectfully submits this brief in support of Respondents and asks that Petitioner’s Application to Stay the injunction issued by the District Court be denied:

INTRODUCTION

Government suppression of the media and of public discourse has preceded the backslide from democracy into authoritarianism throughout recorded history. Prior to 1917, the provisional government in what is now Russia had abolished censorship. In November 1917, following the takeover of the Bolsheviks, censorship was reintroduced and continued for more than 60 years.² In 1933, Germany was a democracy with a constitutionally guaranteed right to freedom of speech. Following the takeover by the National Socialist German Workers’ Party, on October 4, 1933, the Editor’s Law was enacted, directing that “Editors are especially bound to keep out of the newspapers anything which tends to weaken the strength of the German Reich [German government,] outwardly or inwardly.”³ Prior to 2013, Venezuelans enjoyed constitutionally protected free speech. Since the rise of President Nicolás Maduro’s

¹ Rule 37 Disclosure: No counsel for any party authored this brief in whole or in part. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² See *Censorship: Censorship in the USSR*, YIVO Encyclopedia of Jews in Eastern Europe, https://yivoencyclopedia.org/article.aspx/censorship/censorship_in_the_ussr (last accessed Feb. 5, 2024).

³ See Reichsgesetzblatt I, 1933 RGBL I 713, <https://avalon.law.yale.edu/imt/2083-ps.asp>.

administration, Venezuelan authorities have closed off virtually all media channels for political dissent.⁴ The escalating human rights violations that followed each of these government censorship programs are infamous and need not be reiterated here.

What is distinct and perhaps even more concerning about the instant example of government censorship currently before the Court is that it occurred covertly, in the total absence of any enabling public law, under the carefully crafted façade that social media companies had simply taken it upon themselves to suppress disfavored viewpoints. Thus, unlike in the historic examples above, Americans have been largely ignorant to the fact that most of the COVID-19 vaccine-related content they are permitted to see online exists there only because it complies with the government's chosen speech. Their ignorance is understandable. Beginning as young schoolchildren, Americans are taught that government censorship is unquestionably wrong and violative of our founding principles. Therefore, the last place they expect to see it occurring is at home.

Amicus Curiae, Informed Consent Action Network (“ICAN”), submits this brief in support of Respondents. ICAN is a 501(c)(3) with a weekly internet show and has grown to be a prominent and trusted media source for health-related information. Since the rise of the pandemic, *Amicus Curiae* has frequently found itself a target of Petitioners' modern age censorship regime, which masqueraded government oppression as corporate freedom. *Amicus*

⁴ See *Freedom on the Net 2023: Venezuela*, Freedom House, <https://freedomhouse.org/country/venezuela/freedom-net/2023> (last accessed Feb. 5, 2024).

Curiae's experience further supports how the government's conduct transformed social media companies' content moderation into state action and violated Respondents' and others' First Amendment rights. These violations had devastating effects on its membership, administration, mission, and audience. *Amicus Curiae* respectfully submits that the facts herein further support the conclusion that the Court should deny Petitioner's Application for a Stay of the Injunction issued by the District Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae, ICAN, is a Texas-based 501(c)(3) which was founded by Del Bigtree in 2016. ICAN's mission is to "put the power of scientifically researched health information" into the public's hands "and to be bold and transparent in doing so," allowing citizens to give informed consent regarding health interventions.⁵ To carry out this mission, ICAN investigates and disseminates information regarding the safety of medical procedures, pharmaceutical drugs, and vaccines, including through its website,⁶ postings on social media, press events, and press releases. Importantly, one of the vehicles for ICAN's activities is its rapidly growing internet-based talk show, "The HighWire with Del Bigtree" ("**The HighWire**").⁷ The HighWire is hosted by Del Bigtree and is live streamed via The HighWire's website and via social media accounts on multiple platforms.

⁵ Informed Consent Action Network, www.icandecide.org.

⁶ *Id.*

⁷ The HighWire, <https://thehighwire.com>.

Mr. Bigtree is one of the most sought-after public speakers in the natural health arena, often gathering audiences in the thousands who travel from around the world to hear his unique blend of passion and scientific expertise. He is a long-time producer and the recipient of multiple awards including an Emmy Award, Best Drama at the New York Television Festival, and the Health Freedom Hero Award from the National Health Freedom Federation, the oldest natural health organization in America.⁸

ICAN has been instrumental in demanding accountability for government narratives regarding vaccines and drugs through various successful lawsuits against government agencies such as the Food and Drug Administration, the Department of Health and Human Services, the Centers for Disease Control and Prevention, and the National Institutes of Health. Furthermore, ICAN has filed hundreds of Freedom of Information Act (“**FOIA**”) requests to obtain additional insight into the decision-making processes of these agencies. Through *The Highwire*, ICAN is able to shed light on governmental oversight in the area of vaccine and drug development, produce reports from leading experts in the scientific community, disseminate information obtained through legal action, and solicit donations to fund its charitable activities.

⁸ See *Del Bigtree*, ICAN, <https://icandecide.org/team-member/del-bigtree/>.

SUMMARY OF ARGUMENT

As Respondents point out in their Amended Complaint,

[Petitioners], those acting in concert with them, and those allied with them routinely seek to justify overt censorship of disfavored speakers and viewpoints by wrapping it in the monikers ‘misinformation,’ ‘disinformation,’ and/or ‘malinformation.’ Their standard tactic is to label speech that contradicts their preferred political narratives ‘misinformation’ ‘disinformation’ or ‘malinformation’ to justify suppressing it. (Dkt. 45 at 46-47.)

Since the beginning of the COVID-19 pandemic, ICAN has gathered and disseminated diverse health-related content created by scientists, doctors, and other industry professionals to provide the public with differing perspectives on the pandemic. It has also obtained and widely disseminated over a million pages of government records, through hundreds of FOIA requests, regarding government actions taken during the pandemic, including actions concerning COVID-19 vaccines. At times, the information that ICAN disseminates contradicts the government orthodoxy or policy, and that is how, like Respondents, ICAN found itself a target in Petitioners’ war on disfavored speech. Consequently, ICAN’s YouTube channel and Facebook pages were shut down for purported violations of the social media companies’ “misinformation policies” which were crafted, implemented, and enforced with tremendous

influence from Petitioners. The loss of access to these media outlets was in clear violation of ICAN's First Amendment rights; it further severely compromised ICAN's ability to provide accurate and reliable public health information and caused it to incur substantial financial losses.

ARGUMENT

As mentioned above, ICAN began its internet talk-show, The HighWire, to disseminate medical news and information in the area of human health, including information obtained from federal health authorities as a result of ICAN's legal action, and to provide a platform for scientists and experts to debate ideas and express their opinions. In order to livestream the show, ICAN created a YouTube channel in 2017 by executing the website's terms of service. From 2017 through July 2020, ICAN maintained its YouTube channel by livestreaming a new live video every Thursday. ICAN also actively used The HighWire episodes to solicit donations from its viewers to raise funds for carrying out its not-for-profit operations.

The HighWire's popularity increased rapidly and, by 2020, its YouTube page had more than 250,000 subscribers worldwide. ICAN has always abided by YouTube's Terms and Community Guidelines. Given its importance in disseminating information, ICAN valued its YouTube Channel. Thus, prior to the social media censorship actions taken at the behest of Petitioners, ICAN never received a single complaint or "strike" from YouTube regarding any of its videos. After implementing a systematic "three strike" system on July 3, 2020,

YouTube commenced its systematic attack against *Amicus Curiae's* channel, The HighWire.

First, on or around July 3, 2020, YouTube took down one of The HighWire's videos featuring a doctor discussing hydroxychloroquine, claiming that the video violated YouTube's community guidelines. However, YouTube informed The HighWire that this removal "ha[d] not" resulted in a strike against the channel. Over the following four weeks, YouTube took down seven other videos on The HighWire's channel, each time noting that the removals "ha[d] not" resulted in a strike against the channel.

For example, on July 7, 2020, YouTube removed a post addressing masks for children for similar reasons, again stating that no strikes had been issued against the channel.

----- Original Message -----
On Tuesday, July 7, 2020 6:23 PM, YouTube <accounts-noreply@youtube.com> wrote:



Hi The HighWire with Del Bigtree,

As you may know, our [Community Guidelines](#) describe which content we allow – and don't allow – on YouTube. Your video [MASK TEST PROVES TOXIC FOR CHILDREN](#) was flagged to us for review. Upon review, we've determined that it violates our guidelines and we've removed it from YouTube.

We know that this might be disappointing, but it's important to us that YouTube is a safe place for all. If content breaks our rules, we remove it. If you think we've made a mistake, you can appeal and we'll take another look. Keep reading for more details.

Video content restrictions

YouTube doesn't allow content that encourages or promotes violent or dangerous acts that have an inherent risk of serious physical harm or death. We also don't allow content that appears to be posted in a shocking, sensational, or disrespectful manner.

The only depictions of such activities that we may allow need to be educational or documentary in nature and shouldn't be designed to help or encourage others to imitate them. When uploading a video, make sure to post as much information as possible in the title and description to help us and your viewers understand the primary purpose of the video. Learn more [here](#).

Impact on your account

This removal has not resulted in a [Community Guidelines strike](#) or penalty on your account. However, we still encourage you to review all of your content to make sure it's in line with our Community Guidelines. Additional violations could result in strikes against your account, or even lead to account termination.

Two days later, on July 9, 2020, YouTube removed a similar post about masks. Apparently, no strikes were issued.

----- Original Message -----
On Thursday, July 9, 2020 1:40 PM, YouTube <accounts-noreply@youtube.com> wrote:



Hi The HighWire with Del Bigtree,

As you may know, our [Community Guidelines](#) describe which content we allow – and don't allow – on YouTube. Your video [THIS LIVE MASK TEST SHOCKS VIEWERS](#) was flagged to us for review. Upon review, we've determined that it violates our guidelines and we've removed it from YouTube.

We know that this might be disappointing, but it's important to us that YouTube is a safe place for all. If content breaks our rules, we remove it. If you think we've made a mistake, you can appeal and we'll take another look. Keep reading for more details.

Video content restrictions

YouTube does not allow content that spreads medical misinformation that contradicts the World Health Organization (WHO) or local health authorities' medical information about COVID-19, including on methods to prevent, treat, or diagnose COVID-19 and means of transmission of COVID-19. Learn more [here](#).

Impact on your account

This removal hasnot resulted in a [Community Guidelines strike](#) or penalty on your account. However, we still encourage you to review all of your content to make sure it's in line with our Community Guidelines. Additional violations could result in strikes against your account, or even lead to account termination.

On July 28, 2020, YouTube removed yet another post questioning whether or not masks should be worn for violating Community Standards against misinformation, but again, did not issue any account strikes.

----- Original Message -----
On Tuesday, July 28, 2020 10:12 PM, YouTube <accounts.noreply@youtube.com> wrote:



Hi The HighWire with Del Bigtree,

As you may know, our [Community Guidelines](#) describe which content we allow – and don't allow – on YouTube. Your video [SHOULD YOU REALLY WEAR A MASK?](#) was flagged to us for review. Upon review, we've determined that it violates our guidelines and we've removed it from YouTube.

We know that this might be disappointing, but it's important to us that YouTube is a safe place for all. If content breaks our rules, we remove it. If you think we've made a mistake, you can appeal and we'll take another look. Keep reading for more details.

Video content restrictions

YouTube does not allow content that spreads medical misinformation that contradicts the World Health Organization (WHO) or local health authorities' medical information about COVID-19, including on methods to prevent, treat, or diagnose COVID-19 and means of transmission of COVID-19. Learn more [here](#).

Impact on your account

This removal has not resulted in a [Community Guidelines strike](#) or penalty on your account. However, we still encourage you to review all of your content to make sure it's in line with our Community Guidelines. Additional violations could result in strikes against your account, or even lead to account termination.

The next day, on Wednesday, July 29, 2020, despite the lack of “strikes,” YouTube terminated The HighWire’s account without any prior warnings after removing another post referring to an action by ICAN against the Centers for Disease Control and Prevention. YouTube alleged that “the activity in [The HighWire’s] account violates [YouTube’s] terms of service.”

----- Forwarded message -----

From: YouTube<accounts-noreply@youtube.com>
Date: On Wed, Jul 29, 2020 at 1:03 AM
Subject: Fwd: Your video has been removed from YouTube
To: The HighWire with Del Bigtree <highwire-with-d-6711@pages.plusgoogle.com>
Cc:



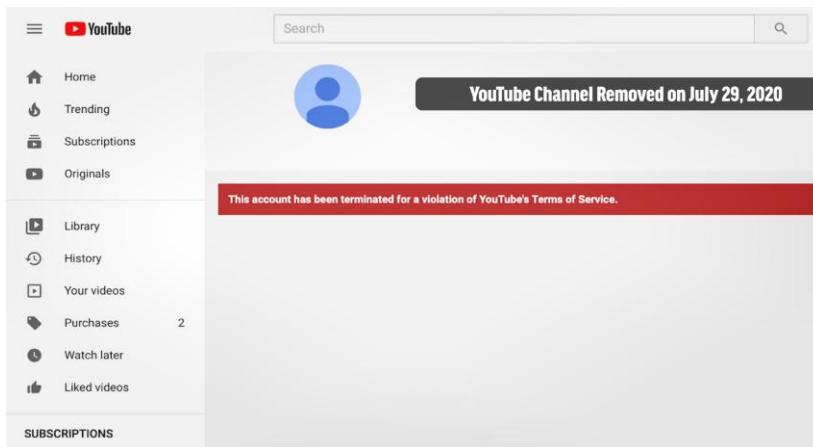
Hi The HighWire with Del Bigtree,

As you may know, our [Community Guidelines](#) describe which content we allow – and don't allow – on YouTube. Your video [ICAN VS CDC](#) was flagged to us for review. Upon review, we've determined that it violates our guidelines and we've removed it from YouTube.

We know that this might be disappointing, but it's important to us that YouTube is a safe place for all. If content breaks our rules, we remove it. If you think we've made a mistake, you can appeal and we'll take another look. Keep reading for more details.

Video content restrictions

YouTube does not allow content that spreads medical misinformation that contradicts the World Health Organization (WHO) or local health authorities' medical information about COVID-19, including on methods to prevent, treat, or diagnose COVID-19 and means of transmission of COVID-19. Learn more [here](#).



We'd like to inform you that we've received a complaint regarding your YouTube account [The HighWire with Del Bigtree](#). Upon review, we've determined that activity in your account violates our Terms of Service (<https://www.youtube.com/t/terms>). As a result, we've terminated your account.

Please be aware that you are prohibited from accessing, possessing or creating any other YouTube accounts. For more information about account terminations and how our Community Guidelines are enforced, please visit our [Help Center](#).

If you would like to appeal the suspension, please submit [this form](#).

ICAN has regularly continued to receive notifications that additional content is being removed from The Highwire's YouTube channel, despite the fact that ICAN continues to have no access to The Highwire's YouTube account or any of the content posted on it since the account was terminated in July 2020. As recently as November 5, 2023, ICAN received the following:

----- Forwarded message -----

From: YouTube <no-reply@youtube.com>

Date: On Thursday, November 2nd, 2023 at 6:16 PM

Subject: YouTube removed your content

To: highwire-with-d-6711@pages.plusgoogle.com <highwire-with-d-6711@pages.plusgoogle.com>

Hi The HighWire with Del Bigtree,

We wanted to let you know our team reviewed your content, and we think it violates our **medical misinformation policy**. We know you may not have realized this was a violation of our policies, so we're not applying a strike to your channel. However, we have removed the following content from YouTube:

Video: [Immune System Psychosis! -HighWire Episode 11](#)

We realize this may be disappointing news, but it's our job to make sure that YouTube is a safe place for all. If you think we've made a mistake, you can appeal this decision - you'll find more details below.

YouTube's termination of The Highwire's channel was in bad faith as it occurred without cause or fair warning. Further, the termination was not in accordance with YouTube's Terms of Service since *Amicus Curiae* had not repeatedly or materially breached the Agreement with YouTube; there was no legal requirement or court order requiring YouTube to suspend or terminate ICAN's channel; and YouTube did not indicate it believed there was conduct that created, or could create, liability or harm to any user or third party, YouTube, or its affiliates.⁹ This abrupt and unexpected termination caused *Amicus Curiae* to lose all of its 250,000 subscribers who regularly watched the weekly episodes. The termination also left ICAN with less than twenty-four hours to find an alternative avenue to livestream the next episode of its show on July 30, 2020. ICAN further lost all its historical analytical data and videos uploaded on YouTube since 2017. ICAN and its viewers were effectively locked out of viewing any content that ICAN had ever uploaded on YouTube as well as all data associated with such content. To date, The Highwire's YouTube account has not been reinstated.

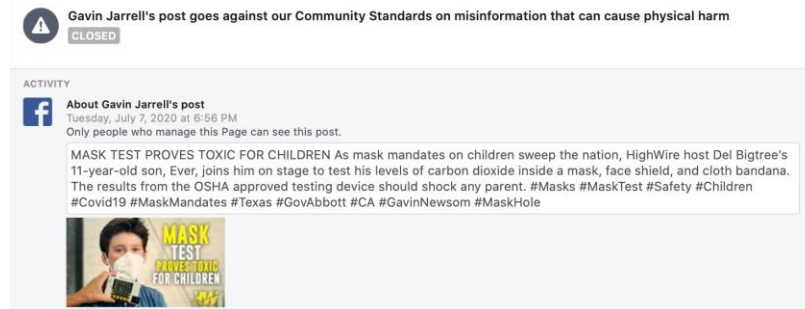
Since the termination, ICAN has had to raise and expend thousands of dollars to get its own website hosting operations established, and to re-upload all of its previous episodes and other educational materials it routinely provides its viewers. The termination not only impacted ICAN, but also medical professionals and others who either appeared on the show and/or

⁹ See *Terms of Service*, YouTube, <https://www.youtube.com/t/terms#8d13a409a3>.

who used ICAN's YouTube links on their own individual websites and social media to help disseminate educational materials.

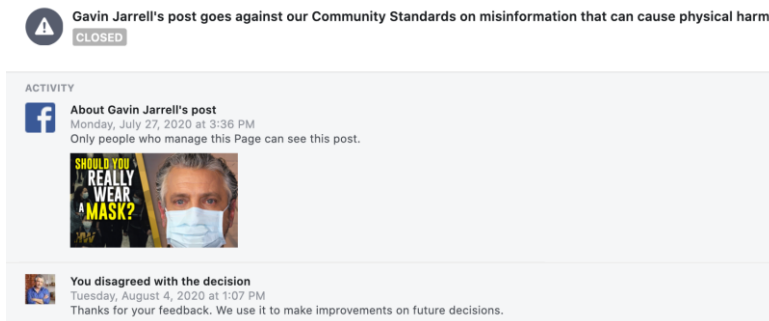
Outside of YouTube, ICAN also maintained two Facebook pages: one under the name of "Informed Consent Action Network" and one named "The HighWire with Del Bigtree," the latter of which livestreamed weekly episodes of its show. ICAN's Facebook page had over 250,000 followers and a 4.4 out of 5-star rating from users. ICAN used The HighWire page for the same purposes it used the YouTube channel prior to its termination—that is, to make available weekly episodes of The HighWire for its viewers. The HighWire Facebook page had a following of over 360,000 users and had over 30 million views on its videos.

On or about July 7, 2020, Facebook took down one of The HighWire's videos, discussing facemasks on children, from its page stating that the "post goes against [Facebook's] Community Standards on misinformation that can cause physical harm."



Several videos concerning COVID were removed thereafter with similar vague explanations from Facebook. For example, on July 27, 2020,

Facebook removed a post questioning the effectiveness and safety of mask-wearing for the same reasons.



On November 21, 2020, Facebook joined YouTube in permanently de-platforming ICAN by “unpublishing” The HighWire Facebook page. This purge was not preceded by any warning, nor was it supported by adequate reasoning for the decision. This was despite the fact that, prior to July 2020, neither ICAN nor The Highwire ever received a single complaint from Facebook regarding any of its videos. ICAN had always abided by Facebook’s Terms and Facebook’s Community Standards because, given its importance in disseminating information, ICAN valued its Facebook page. Facebook’s removal of ICAN’s videos and unpublishing HighWire’s Facebook page were actions taken in bad faith since they were without cause and were not preceded by any fair warning. Further, the termination was not in accordance with Facebook’s Terms since *Amicus Curiae* had not repeatedly breached Facebook’s

Terms¹⁰ or Community Standards;¹¹ *Amicus Curiae* did not repeatedly infringe other people’s intellectual property rights; nor was Facebook required to terminate The HighWire’s page for legal reasons. To date, Facebook has not reinstated The HighWire’s Facebook page.

Before censorship pressure was applied by Petitioners, social media companies had never removed ICAN’s or The HighWire’s content. Other than governmental pressure, there is no explanation for why these companies purged *Amicus Curiae*’s platforms which would be contrary to their business models of increasing engagements and interactions on their sites, not diminishing them.

The loss of these two platforms for ICAN cannot be understated. YouTube and Facebook control an enormous percentage of the social media market. In being prevented from posting on their websites, ICAN and The HighWire lost the ability to reach millions, if not more, potential viewers.

Even though a private party is usually not constrained by the First Amendment, “it is if the government coerces or induces it to take action the government itself would not be permitted to do, such as censor expression of a lawful viewpoint.” *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). This is so because “[t]he government cannot accomplish through threats of adverse government

¹⁰ See *Terms of Service*, Facebook, <https://www.facebook.com/terms.php>.

¹¹ See *Facebook Community Standards*, Meta, <https://transparency.fb.com/policies/community-standards/>.

action [against a private party] what the Constitution prohibits it from doing directly.” *Id.* In this context, “[g]overnmental compulsion or coercion may exist where the State ‘has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.’” *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742 (9th Cir. 2020) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). This type of governmental compulsion or coercion alleged by Respondents is precisely what occurred with ICAN.

Censorship runs contrary to social media companies’ economic interests because their business models are premised on making content “go viral” and then selling advertising with that content. Consistent with this approach, before Petitioners started to pressure them in 2019 and 2020, social media companies never censored any of ICAN’s content. In fact, YouTube’s terms of service had no mention of so called “misinformation” until 2020, as it just was not something they were concerned about¹² given that Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, has immunized them from suits regarding the content on their sites.

Respondents paint a vivid picture of the conspiratorial behavior that occurred between the United States government and social media platforms aimed at suppressing constitutionally protected speech regarding important public health issues. A key question now being considered by this Court is whether these actions taken by Petitioners were

¹² See *Terms of Service: Our Terms of Service Have Been Updated*, YouTube, <https://www.youtube.com/t/terms?preview=20191210#summary>.

sufficient to convert the social media companies' subsequent removals of this protected speech into state action. To support that this indeed was the case, *Amicus Curiae* offers the concrete examples described above. Furthermore, it should speak volumes that prior to the launch of Petitioners' censorship program, particularly the aspect that suppressed disfavored viewpoints surrounding the pandemic, ICAN had never had issues with any content posted on their various social media platforms. In sum, Petitioners dictated what was or was not misinformation, then threatened and prevailed upon the social media companies to incorporate this information into their vaccine and COVID-19 misinformation policies and then enforce same, at the expense of *Amicus Curiae's* First Amendment rights.

CONCLUSION

As discussed above, history has provided us with repeat lessons of what follows each time the government is permitted to assume control of the media, including in this instance. Granting a stay of the injunction will give government actors a powerful tool to limit speech on the modern public square, social media platforms, including the speech of *Amicus Curiae*. For these reasons, *Amicus Curiae* respectfully asks the Court to deny Petitioners' Application to Stay the injunction issued by the District Court.

Respectfully submitted, this 9th day of
February 2024.

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