No. 16-55249

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, a Virginia corporation; PREGNANCY CARE CENTER, D/B/A PREGNANCY CARE CLINIC, a California corporation; and FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation,
Plaintiffs–Appellants

v.

KAMALA HARRIS, in her official capacity as Attorney General for the State of California, THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; and EDMUND D. BROWN, JR., in his official capacity as Governor of the State of California,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:15-cv-02277-JAH-DHB – Hon. John A. Houston

APPELLANTS' PETITION FOR REHEARING
AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Center, and Fallbrook Pregnancy Resource Center, are non-profit corporations with no parent corporations. The corporations have no stock, and so no public corporation owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT

The Panel's decision on October 14, 2016 affirming the District Court's denial of Plaintiffs' motion for preliminary injunction, *NIFLA v. Harris*, No. 3:15-02277, 2016 WL 5956734 (9th Cir. Oct. 14, 2016), conflicts with the United States Supreme Court decision requiring strict scrutiny for content based regulations in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), as well as *In re Primus*, 436 U.S. 412 (1978), which held restrictions on professional speech that is part of public interest advocacy must be subjected to strict scrutiny. It also conflicts with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), which limited compelled speech regarding abortion to the context of obtaining informed consent for a medical procedure, *United States v. Alvarez*, 132 S. Ct. 2537 (2012), which limits the government's ability to target misleading speech, and the prohibition on targeting religious organizations established in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Conflict with this Court's decision restricting limits on professional speech in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), is also a problem with the Panel Opinion, and consideration of the full Court is

necessary to maintain uniformity of decisions within the Ninth Circuit, as well as conformity with Supreme Court precedent.

Finally, rehearing en banc is warranted because the Panel's decision directly conflicts with rulings in other Circuits regarding compelled speech and regulation of professional speech. *See, e.g., Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Moore–King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013); and *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014). The en banc Eleventh Circuit is rehearing a case concerning regulation of physician speech on the controversial issue of gun possession. *See Wollschlaeger v. Governor of Florida*, 649 Fed. Appx. 647 (Mem) (11th Cir. order, Feb. 3, 2016).

SUMMARY

The State admits, and the District Court found, that the Reproductive FACT Act being challenged in this case ("the Act") was passed with the stated "Purpose" of targeting pro-life "crisis pregnancy centers" because of their viewpoint that "discourag[es]" abortion. The Act's prophylactic remedy is to compel innocent non-commercial pro-life medical facilities to promote abortion options and tell women to contact the State to get them. But Plaintiffs-Appellants are religiously-motivated

non-profit centers that exist to help women *not* to choose abortion. The Act also forces non-medical pro-life organizations (which need no medical license) to recite disclaimers in extensive multiple languages that effectively preclude any external advertising.

The Panel's decision to uphold the Act dangerously erodes the foundational constitutional principle that the government cannot punish citizens for not conveying messages they deem objectionable. *See*, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (forbidding government from requiring citizens to display state motto on license plates); *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality) (forbidding government from requiring a business to include a third party's expression in its billing envelope); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796–800 (1988) (forbidding government from forcing non-profit to begin phone solicitations with disclosures); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include an article).

Rehearing en banc is necessary to preserve this principle and resolve the many conflicts with Supreme Court, Ninth Circuit, and sister circuit precedents the Panel Opinion presents.

REASONS FOR GRANTING THE PETITION

I. The panel resolved multiple, far-reaching questions of free speech doctrine in conflict with the Supreme Court and other circuits.

The panel's decision conflicts with the Supreme Court and other circuits on several core questions of free speech doctrine. The panel acknowledges a "circuit split" on the applicable scrutiny level for regulations of speech between physicians and patients. 2016 WL 5956734 at *10. Indeed, the panel decision conflicts with this Court's own application of strict scrutiny to the regulation of physician-patient speech on controversial issues. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (applying strict scrutiny to regulation of physician speech about medical marijuana). The panel's decision references multiple other issues where it conflicts with the Supreme Court and various circuit cases on whether the government can compel speech regarding a contentious public health question.

A. The decision conflicts with the Supreme Court, this Court, and other circuits on the scrutiny level applicable to content-based regulations of physician-patient speech on controversial issues.

The panel acknowledges that it takes a position amidst "a circuit split regarding the appropriate level of scrutiny to apply" to regulations

of professional speech. 2016 WL 5956734 at *10 (citing various cases).

The panel admits the Act on its face is "content-based." *Id.* at *9. The Act requires licensed medical pregnancy centers to tell women, "California has public programs that provide immediate free or low-cost . . . contraception . . . and abortion," and to tell them, "contact the county social services office at [insert telephone number]." *Id.* at *2. This holding should have led the panel to apply strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("[a] law that is content based on its face is subject to strict scrutiny"). But the panel incorrectly chose to apply intermediate scrutiny instead. 2016 WL 5956734 at *11.

Even worse than this, the Act is admittedly viewpoint based and subject to strict scrutiny, but the panel disregarded *Reed*'s definition of how to judge whether laws are viewpoint based. *Reed* declares a law can be content or viewpoint based *either* "on its face or when the purpose and justification" are viewpoint based. 135 S. Ct. at 2228. Here the legislature baldly declared, and the State concedes, that the "PURPOSE" (caps in original) of the Act is to target "crisis pregnancy centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions" by practices the State believes "misinform" women. EOR 11,

76, 86; State Opening Br. at 5. This targets viewpoints discouraging abortion and providing information about abortion the State disagrees with. But the panel rejected *Reed*'s strict scrutiny based solely on the law's facial characteristics, not its purpose and justification. 2016 WL 5956734 at *8 (concluding the Act is not "based on viewpoint" because that analysis does "not turn exclusively on the law's motivation or purpose"). This conflicts with *Reed*. It also conflicts with *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–65 (2011). The panel misconstrued *Sorrell* as being based on facial viewpoint discrimination, but instead *Sorrell* deemed a law facially content-based, but found viewpoint discrimination in "legislative findings" similar to the ones that exist here. *Id.*

This panel's rejection of strict scrutiny also conflicts this Court's own precedent in *Conant*. There the Court applied strict scrutiny to a parallel circumstance: a law forcing doctors not to recommend medical marijuana. 309 F.3d at 632–33. *Conant* insisted speech between a doctor and a patient "may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* at 637 (quoting *Florida Bar v. Went-For-It, Inc.,* 515 U.S. 618, 634 (1995)). The panel's attempt to distinguish *Conant* falls flat. Both *Conant* and this case involve a regulation of speech

rather than conduct, an application to speech by medical professionals in the examination room, and a controversial public health issue. Yet the panel refused to apply *Conant*'s strict scrutiny by saying *Conant* implicated a "particular viewpoint" on medical marijuana. 2016 WL 5956734 at *8. So does this Act: it forces facilities to tell women to "contact" California to access programs offering free abortions. Such a disclosure cannot be said to be neutral in comparison to *Conant*. If a law forced physicians to tell patients to call the state to access free medical marijuana, *Conant* would require strict scrutiny.

The Eleventh Circuit recently granted en banc review of a law burdening physician speech to patients about a controversial public health issue (guns). *Wollschlaeger v. Governor of Florida*, 649 Fed. Appx. 647 (Mem) (11th Cir. order, Feb. 3, 2016). This Court should do the same.

B. The decision conflicts with the Supreme Court and Fourth Circuit on whether *pro bono* professional speech is protected by strict scrutiny.

The panel explicitly references a conflict between its ruling and the Supreme Court and Fourth Circuit on a related issue: whether professional speech receives the protection of strict scrutiny, not intermediate scrutiny, if it is conducted *pro bono*.

In *In re Primus*, 436 U.S. 412 (1978), the Supreme Court held that even though law is a regulated profession, regulations of attorney speech are subject to strict, not intermediate, scrutiny, if the attorney is offering her services *pro bono* for public interest purposes. *Id*. at 437–38 & n. 32. The court explained "prophylactic" speech regulations can govern attorney speech made "for pecuniary gain," but "significantly greater precision" is required for regulating *pro bono* for public interest advocacy attorney speech. *Id.* at 434, 438. Following Supreme Court precedent, the Fourth Circuit defines the issue of "whether to apply the professional speech doctrine" as "whether the speaker is providing personalized advice in a private setting *to a paying client*." *Moore–King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added).

The panel cited both of these decisions but declared "[w]e reject this argument." 2016 WL 5956734 at *12. It gave the reason that pregnancy centers "have positioned themselves in the marketplace as pregnancy clinics." *Id*. This begs the question. Pregnancy center Appellants charge no fee for their services and information, and do so to further their religious pro-life mission. EOR 34, 37. There is no relevant constitutional distinction between this activity and the ACLU's in *In re Primus*. If pro

bono public interest services count as putting oneself in the "marketplace," it negates the holding of *In re Primus*.

C. The decision conflicts with the Second Circuit on whether pregnancy centers may be forced to recite specific disclosures mentioning abortion.

The panel discusses a decision from the *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), but conflicts with that case on the issue of whether pregnancy centers can be forced to recite disclosures specifically mentioning abortion, even under the intermediate scrutiny standard.

The Second Circuit considered a law that forced pregnancy centers to recite several disclosures. One disclosure declared whether the facility had licensed professionals ("the Licensed Disclosure"), one disclosure said the City encourages women to consult a licensed provider ("the 'Government Message'), and one disclosure required centers to say "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care' (the 'Services Disclosure')." *Id.* at 238. The court considered these three disclosures separately. *Id.* at 246–51. The court struck down the Services Disclosure, saying that the "context" precluded it, namely, "a public debate over the morality and

efficacy of contraception and abortion." *Id.* at 249. Thus, contrary to the First Amendment, the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues." *Id.* at 249–50. Notably, the court reviewed the Services Disclosure under both strict and, distinctly, "intermediate scrutiny," and concluded the disclosure is unconstitutional either way. *Id.* at 245. The court separately struck down the Government Message disclosure for "requir[ing] pregnancy services centers to advertise on behalf of the City." *Id.* at 250.

The panel rejected this analysis and misconstrued *Evergreen*. The Act lists the same items in *Evergreen*'s Services Disclosure: abortion, contraception, and prenatal care. But the Act here goes further: it also says *California offers subsidies for those services*, and tells women to "contact the county social services office" to get them. 2016 WL 5956734 at *2. Thus the Act is worse than the Services Disclosure, adding elements of *Evergreen*'s Government Message by "requir[ing] pregnancy services centers to advertise on behalf of" the government. *Evergreen*, 740 F.3d at 250. The panel ruling conflicts with *Evergreen*'s intermediate scrutiny holding regarding its Services Disclosure.

Furthermore, the panel mistakenly claimed that when the Second Circuit reviewed its Services Disclosure it "applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today." 2016 WL 5956734 at *14. As mentioned, this is incorrect. *Evergreen* expressly applied both scrutiny levels and held the Services Disclosure unconstitutional even "under intermediate scrutiny." *Evergreen*, 740 F.3d at 250. Notably, this makes it immaterial that the pregnancy centers in *Evergreen* were unlicensed while the medical centers here are licensed. Both courts explicitly applied intermediate scrutiny.

D. The decision conflicts with the Supreme Court and other circuits on circumstances in which speech may be compelled between physicians and patients.

The panel committed an overarching error that conflicts with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and with other circuits applying *Casey*.

The panel held that *Casey* is applicable to this case, but it is not. *Casey* allowed states to require physicians to disclose certain things to women before an abortion, but only as part of the process of obtaining their informed consent to conduct that surgery, and pursuant to the state's interest to protect unborn life. 505 U.S. at 881–83. This served a

particular interest in ensuring "relevant" information is provided so that a necessary step in any surgery—consent—is actually obtained. *Id.* *Casey* did not give the state *carte blanche* to force doctors to recite information regarding abortion outside of obtaining informed consent to surgery.

The Act has nothing to do with informed consent. Its disclosure must be provided to all patients whether they receive any service in particular (ultrasounds, pamphlets, or baby clothes), or none at all. A law regulating informed consent applies before all such surgeries. But the Act does not impose disclosures before all ultrasounds—many ultrasounds in California occur outside of facilities defined by this law, such as hospitals, doctor's offices, abortion clinics or other places. The Act's definitions gerrymander all those facilities outside its definitions, even if they provide pregnancy services. Cal. Health & Safety Code § 123471. The panel conflicts with the Supreme Court because *Casey* is inapplicable.

The panel ruling also conflicts with the Fourth Circuit's application of *Casey* in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). The panel claims to agree with *Stuart*, but these two cases are inconsistent. *Stuart* struck down an (actual) informed consent law where doctors were required to show women an ultrasound and describe the fetus before an

abortion. *Id.* at 242. Doctors were not required to encourage women not to have abortions, just to describe details that the court conceded "are factual." *Id.* at 246. Nevertheless, *Stuart* held that mere fetal facts have "ideological implications," that is, fetal facts are "facts that all fall on one side of the abortion debate" and "promote[] a pro-life message." *Id.*

The panel's ruling here rejects *Stuart*'s approach. The medical disclosure here—as discussed above—has an advocacy component. It requires pregnancy centers to tell women California has programs offering subsidized abortion, and directing women to "contact the county" for them. 2016 WL 5956734 at *2. But the panel called this non-ideological, while saying the merely factual disclosure in *Stuart* "convey[ed] a particular opinion." 2016 WL 5956734 at *8 (quoting *Stuart*, 774 F.3d at 246). This renders circuit precedent arbitrary on the issue what disclosures are "factual," and what mere facts are nevertheless deemed ideological. Mere fetal facts are deemed to advance a pro-life message, but telling women to contact the county for free abortion programs are deemed non-ideological. The possibility of such inconsistency is why the Supreme Court insists that "compelled statements of opinion" are constitutionally no different than "compelled

statements of 'fact,' since either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797. The panel conflicts with that precedent.

E. The decision conflicts with the Supreme Court on whether the compelled speech on non-commercial, non-professional speakers satisfies strict scrutiny.

The panel's ruling conflicts with the Supreme Court when it declares that unlicensed facilities can be forced to recite extensive messages even under the strict scrutiny test.

Although it applied intermediate scrutiny for medical facilities, the panel correctly declared that strict scrutiny applied to the Act's unlicensed facility disclosures. But the panel severely misapplied the strict scrutiny test. To prove a compelling interest, "[t]he State must specifically identify an actual problem in need of solving . . . and the curtailment of free speech must be actually necessary to the solution.". *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (internal citations and quotation marks omitted). The state's "evidence is not compelling" if it merely shows a correlation, not a "direct causal link," between the target of its regulation and the alleged harm. *Id.* at 799–800.

Here the panel cited, and the state relies on, no scientific studies showing that women are actually being harmed at unlicensed pregnancy

centers. They advance no evidence that *if the disclosures are recited* the harm will be alleviated. The panel and the state cite nothing but non-scientific testimony by pro-choice organizations and the legislature vaguely declaring that pregnancy centers "often present misleading information to women about reproductive medical services." 2016 WL 5956734 at *14. This is neither sufficient nor pertinent. There is no compelling evidence that the Act's "curtailment of free speech," namely its disclosures, is "actually necessary to the solution." *Brown*, 564 U.S. at 799. The Act is not tailored (much less narrowly tailored) to "misleading speech" at all. The Act applies without regard to whether a pregnancy center speaks anything "misleading." It applies prophylactically to centers focusing on pregnancy, offering "options counseling," and making note that they spoke to pregnant women. Cal. Health & Safety Code § 123471. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801. Such a law must "eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Finally, the panel misapplied strict scrutiny by not applying the

least restrictive means prong of the test. In *Riley*, the Supreme Court considered a law that compelled professional fundraisers for charities to disclose financial information at the beginning of their phone calls. 487 U.S. at 786. The Court required the government to show it could not achieve this interest in another way: "[f]or example, as a general rule, the State may itself publish the detailed [information]. This procedure would communicate the desired information to the public without burdening [the] speaker with unwanted speech during the course of a solicitation." *Id.* at 800. "Alternatively, the State may vigorously enforce its antifraud laws." *Id.*

Here the same should have applied. If pregnancy centers are allegedly "misleading" women in some compelling way about whether they are medical facilities, the state can vigorously prosecute the unlawful practice of medicine. *See* Cal Bus. & Prof. Code § 2052. Likewise the state could advertise to women itself about the alleged dangers of pregnancy centers—it could even post signs on public property outside pro-life centers. The panel did not require the state to disprove these or any less restrictive alternatives. Its decision conflicts with *Riley*.

F. The decision conflicts with the Supreme Court and this Court on whether a speech regulation can target "misleading" speech.

The panel decision conflicts with the Supreme Court in justifying the Act based on the government's alleged interest in curtailing "misleading" speech. The panel identified the government's alleged interest as being based on "the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services." 2016 WL 5956734 at *14. Targeting "misleading information" is even more dangerous than targeting "false" speech, since misleading is a term used when statements are not bad enough to be deemed false. Yet the Supreme Court struck down an attempt to directly punish admittedly false speech, *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). If a narrow ban on false speech failed in *Alvarez*, the Act's prophylactic compulsion of speech on centers innocent even of "misleading" speech cannot be considered constitutional.

Therefore the panel conflicts with this Court's recent adherence to *Alvarez* in *United States v. Swisher*, 811 F.3d 299, 315 (9th Cir. 2016) (en

banc) (striking "a content-based regulation of false symbolic speech" under intermediate scrutiny). The panel cannot be reconciled with *Swisher*, for the panel upheld compelled speech under strict scrutiny based on the rationale that "misleading" speech generally exists, but *Swisher* said a ban on false speech fails even intermediate scrutiny. Nor can any distinction between compelled speech and compelled silence save the panel: both must be scrutinized equally. *Riley*, 487 U.S. at 796.

II. The panel resolved far-reaching questions of free exercise doctrine in conflict with the Supreme Court and other circuits.

The panel's determination that the Act is neutral under the Free Exercise Clause conflicts with the Supreme Court's determination that an ordinance impermissibly targets religion if its practical application affects a religious group and no others. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-37 (1993).

The Act is drafted so as to apply only to entities like the Plaintiffs whose religious beliefs require them to oppose abortion. The Panel skirts this analysis by stating, "The Act applies to all covered facilities," but it is within the definition of "covered facilities" where the targeting of religion takes place. 2016 WL 5956734 at *15.

Unlike this Court's decision in *Stormans, Inc. v. Wiesman,* 794 F.3d 1064, 1077-78 (9th Cir. 2015), upholding a law requiring "*all* pharmacies [to] deliver *all* lawfully prescribed drugs," the Act is not neutral because it doesn't apply to all (or even most) health facilities offering pregnancy services. It defines its scope as applying only to facilities "whose primary purpose is providing pregnancy-related services." Cal. Health & Safety Code § 123471. Thus the Act doesn't apply to hospitals and clinics whose medical services cover a wide range of activities, even if their pregnancy services are offered in *exactly the same way pregnancy centers' services are offered*. It does not apply to individual doctors' offices offering pregnancy services, because the licensed facility definition does not include doctor's licenses, and the unlicensed facility definition exempts facilities that have "a licensed medical provider on staff or under contract." *Id.* And it does not apply to licensed clinics that are Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees, even though women could be at those facilities and not know that one of Medi-Cal's benefits is free or low cost abortions. "[T]he burden of the ordinance, in practical terms, falls on …[Pro-life Pregnancy Centers] but almost no others…" *Lukumi*, 508 U.S. at 536.

As in *Lukumi*, the lack of neutrality is also shown by the "historical background" of the Act. *Id.* at 540. It has a viewpoint discriminatory legislative purpose and justification discussed above targeting CPCs because their religious convictions require them to discourage abortion and offer "[mis]information" the State disagrees with. *See* EOR 11, 76, 86; State Opening Br. at 5.

The list of pregnancy service providers the Act does not apply to not only shows lack of neutrality, but also lack of generally applicability. The panel mistakenly relies on *Stormans* which held that allowing *all* pharmacies to not carry certain drugs for business reasons did not violate the general applicability requirement. 2016 WL 5956734 at *16. That is very different than the Act here: it does not apply to all providers of pregnancy services such as pregnancy centers provide. Instead the Act exempts whole classes of providers, like hospitals and individual doctor's offices. This undermines the Act's purported purpose ensuring women are fully informed about their reproductive rights.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: October 28, 2016

Respectfully submitted,

s/ Matthew S. Bowman

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached petition for panel rehearing and rehearing en banc is proportionally spaced, has a typeface of 14 points or more and contains 3,988 words.

s/ Matthew S. Bowman
Matthew S. Bowman
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 28, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Matthew S. Bowman
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