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27 *Attorneys for Plaintiffs*

28 **IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

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31 **AARON KHERIATY, M.D.,** )  
32 **PETE MAZOLEWSKI, M.D., and** )  
33 **AZADEH KHATIBI, M.D., M.S., M.P.H.,** )

34 *Plaintiffs,* )

35 v. )

36 **GAVIN NEWSOM**, Governor of the State )  
37 of California, in his official capacity; )  
38 **KRISTINA LAWSON**, President of the )  
39 Medical Board of California, )  
40 in her official capacity; )  
41 **RANDY HAWKINS, M.D.**, Vice President )  
42 of the Medical Board of California, )

**Case No. 2:22-cv-1980**

**Plaintiffs' Memorandum of Law  
in Support of Their Position that  
This Case Is Not Moot**

1 in his official capacity; )  
**LAURIE ROSÉ LUBIANO**, Secretary )  
2 of the Medical Board of California, )  
in her official capacity; )  
3 **MICHELLE ANNE BHOLAT, M.D.,** )  
**M.P.H., DAVID E. RYU, RYAN BROOKS,**)  
4 **JAMES M. HEALZER, M.D.,** )  
**ASIF MAHMOOD, M.D., NICOLE A.** )  
5 **JEONG, RICHARD E. THORP, M.D.,** )  
**VELING TSAI, M.D., and ESERICK** )  
6 **WATKINS**, members of the Medical Board )  
of California, in their official capacities; and )  
7 **ROB BONTA**, Attorney General of )  
California, in his official capacity, )  
8 )  
*Defendants.* )

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**TABLE OF CONTENTS**

10

11 TABLE OF CONTENTS ..... ii

12 ARGUMENT ..... 1

13 I. INTRODUCTION ..... 1

14 II. PLAINTIFFS’ PURSUIT OF NOMINAL DAMAGES PRESENTS A LIVE CASE AND

15 CONTROVERSY ..... 2

16 III. DEFENDANTS’ REPEAL OF THE STATUTE DOES NOT PERMIT A FINDING OF

17 MOOTNESS UNDER THE VOLUNTARY CESSATION DOCTRINE ..... 6

18 CONCLUSION ..... 10

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1 **ARGUMENT**

2 **I. INTRODUCTION**

3 Plaintiffs submit this Memorandum of Law in response to the Court’s November 1, 2023 Order  
4 asking the parties to address the question of whether or not the California Legislature’s repeal of  
5 Business & Professions Code § 2270 renders this case moot. *See* ECF 49. California’s repeal of  
6 Section 2270<sup>1</sup> through passage of SB 815, which will become effective on January 1, 2024, does  
7 not render Plaintiffs’ claims moot—neither now nor after the repeal goes into effect.  
8

9 \*\*\*

10 Article III of the United States Constitution limits the jurisdiction of federal courts to live cases  
11 and controversies. *See* U.S. Const. art. III, § 2, cl. 1. The doctrine of mootness, embedded in  
12 Article III’s case or controversy requirement, necessitates the existence of an actual, ongoing  
13 controversy at all stages of federal court proceedings. *Bayer v. Neiman Marcus Group, Inc.*, 861  
14 F.3d 853, 868-69 (9th Cir. 2017). An action “becomes moot only when it is impossible for a court  
15 to grant any effectual relief whatever to the prevailing party.” *Chafin v. Chafin*, 568 U.S. 165, 172  
16 (2013) (quoting *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012)); *see*  
17 *also Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (“A case  
18 is not moot if *any* effective relief may be granted”) (emphasis in original); *Ruiz v. City of Santa*  
19 *Maria*, 160 F.3d 543, 549 (9th Cir. 1998) (explaining that a key consideration of mootness is  
20 whether court can fashion any effective relief for plaintiff).  
21  
22

23 The party asserting mootness bears the burden of establishing that there remains no effective  
24 relief that the court could provide. *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006).  
25 “That burden is always ‘heavy.’” *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017)  
26

27  
28 <sup>1</sup> Section 2270 of the Business and Professions Code was enacted by Assembly Bill 2098 (“AB 2098”), signed into law on September 30, 2022, and took effect January 1, 2023.

1 (quoting *Forest Guardians*, 450 F.3d at 461); *see also Mission Prod. Holdings, Inc. v. Tempnology,*  
2 *LLC*, 139 S. Ct. 1652, 1660 (2019) (to establish mootness, a “demanding standard” must be met).  
3 Moreover, there are “long-recognized exceptions” to the mootness doctrine that allow claims to  
4 remain live even when events occur after litigation commences that would deprive a plaintiff of  
5 standing to bring those claims at the outset of a lawsuit. *See Friends of the Earth, Inc. v. Laidlaw*  
6 *Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000) (mootness is not simply “standing set in a time frame”).

8 The California Legislature’s repeal of Section 2270 does not moot this case for two reasons.  
9 First, Plaintiffs seek nominal damages for violations of their constitutional rights—some of which  
10 have already been sustained—thus preserving a live controversy for which effective relief may be  
11 granted. That precludes mootness. *See* Complaint, ECF 1, PageID # 25; *see also Uzuegunam v.*  
12 *Preczewski*, 592 U.S. \_\_\_, 141 S.Ct. 792, 802 (2021) (“[N]ominal damages provide the necessary  
13 redress for a completed violation of a legal right.”); *Bayer*, 861 F.3d at 868-69 (“A live claim for  
14 nominal damages will prevent dismissal for mootness.”) (quoting *Bernhardt v. Cty. of Los Angeles*,  
15 279 F.3d 862, 872 (9th Cir. 2002)). Second, under the voluntary cessation doctrine, mootness does  
16 not apply where, as here, the Government has repealed a statute in bad faith, in order to deprive  
17 Plaintiffs of a favorable adjudication. *See Knox*, 567 U.S. at 307 (“[M]aneuvers designed to  
18 insulate a decision from review by this Court must be viewed with a critical eye.”). *See also*  
19 *Northeastern Florida Chapter*, 508 U.S. at 662 (1993) (defendant may not manufacture mootness  
20 by repealing challenged statute and replacing with a similar one).

## 23 II. PLAINTIFFS’ PURSUIT OF NOMINAL DAMAGES PRESENTS A LIVE CASE AND 24 CONTROVERSY

25 On November 1, 2022, Plaintiffs filed a complaint in this Court alleging that Section 2270  
26 (which took effect on January 1, 2023) is facially unconstitutional on both First Amendment and  
27 Due Process grounds. *See* Complaint, ECF 1. The next day, Plaintiffs sought a preliminary  
28 injunction. *See* Motion for Preliminary Injunction, ECF 5. Following a hearing on January 23,

1 2023, this Court granted Plaintiffs’ motion and enjoined Defendants from enforcing the challenged  
2 statute against Plaintiffs, finding that they had demonstrated a likelihood of success on the merits  
3 of their due process claim and were being irreparably harmed while the statute remained in effect.  
4 *See Høeg v. Newsom*, 652 F.Supp.3d 1172 (E.D. Ca. 2023) (granting motion for preliminary  
5 injunction). Accordingly, Plaintiffs suffered violations of their constitutional rights from January  
6 1, 2023, when Section 2270 took effect, until January 24, 2023, when this Court granted the  
7 preliminary injunction. During that 24-day period, Plaintiffs’ speech was chilled, as they were  
8 compelled to self-censor for fear of prosecution and the threat of sanctions under Section 2270,  
9 including the suspension or revocation of their medical licenses. As a result, Plaintiffs were unable  
10 to provide their honest opinions and individualized advice on Covid-related matters to their patients  
11 without the looming threat of severe professional consequences. *See* Declaration of Dr. Tracy  
12 Høeg, attached to Plaintiffs’ Motion for Preliminary Injunction as Exhibit A, ECF 6 at ¶¶ 33-34;  
13 Declaration of Dr. Ram Duriseti, attached to Plaintiffs’ Motion for Preliminary Injunction as  
14 Exhibit B, ECF 6 at ¶¶ 16-18; Declaration of Dr. Pete Mazolewski, attached to Plaintiffs’ Motion  
15 for Preliminary Injunction as Exhibit D, ECF 26 at ¶¶ 14-16; Supplemental Declaration of Dr.  
16 Tracy Høeg, attached to Plaintiffs’ Reply Memorandum in Support of Motion for Preliminary  
17 Injunction as Exhibit A, ECF 26 at ¶¶ 3-10.

21 Additionally, Plaintiff Azadeh Khatibi’s doctor told her that, due to the specter of  
22 punishment under Section 2270, he could no longer provide patients with his genuine opinion on  
23 Covid-related topics, proving to Dr. Khatibi that she “no longer ha[d] access to [her] doctors’ true  
24 medical opinions about Covid-19, which [she had] sought and are important to [her] as [she was]  
25 immunocompromised following recovery from a life-threatening disease.” Supplemental  
26 Declaration of Azadeh Khatibi, attached to Plaintiffs’ Reply Memorandum in Support of Motion  
27 for Preliminary Injunction as Exhibit D, ECF 26 at ¶¶ 10-11. Section 2270 thus deprived Dr.  
28

1 Khatibi of her First Amendment right to receive her doctors’ honest advice, unfettered by concerns  
2 about discipline under it. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457  
3 U.S. 853, 867 (1982) (holding that the right to receive information is “an inherent corollary of the  
4 rights of free speech and press that are explicitly guaranteed by the Constitution” because “the right  
5 to receive ideas follows ineluctably from the sender’s First Amendment right to send them.”); *id.*  
6 (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free  
7 to receive and consider them. It would be a barren marketplace of ideas that had only sellers and  
8 no buyers.” (quoting *Lamont v. PMG*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring))).  
9 Moreover, since Dr. Khatibi’s doctors were not granted relief by the preliminary injunction as she  
10 was, her constitutional right to receive information has been violated for nearly a year.  
11

12 Under these circumstances, this action is plainly not moot. In *Uzuegbunam*, the Supreme  
13 Court held that the plaintiff’s request for nominal damages alone (*i.e.*, absent a request for  
14 compensatory damages) for a completed violation of his First Amendment rights meant that the  
15 case was not moot—even where university officials had abandoned the challenged policy during  
16 the pendency of the district court proceedings. 141 S. Ct. at 798-802 (nominal damages alone could  
17 address the plaintiff’s First Amendment injury because “every violation [of a right] imports  
18 damage”). Drawing on the common law, the Court explained that, though small, “nominal damages  
19 are certainly concrete,” as they provide “relief on the merits of [the] claim” and permit a plaintiff  
20 to “demand payment ... no less than he may demand payment for millions of dollars in  
21 compensatory damages.” *Id.* at 801 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111, 113 (1992)).  
22 Because such damages are paid to the plaintiff, they ““affec[t] the behavior of the defendant towards  
23 the plaintiff” and thus independently provide redress.” *Id.* (quoting *Hewitt v. Helms*, 482 U.S. 755,  
24 761 (1987)); *accord Mission Prod. Holdings*, 139 S. Ct. at 1660 (“If there is any chance of money  
25 changing hands, [the] suit remains live.”). Even though a single dollar often cannot provide full  
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1 redress, “the ability ‘to effectuate a partial remedy’ satisfies the redressability requirement.”  
2 *Uzuegbunam*, 141 S. Ct. at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S.  
3 9, 13 (1992)); *see also Carey v. Piphus*, 435 U.S. 247 (1978) (when a plaintiff’s constitutional  
4 rights have been violated, nominal damages may be awarded without proof of any additional  
5 injury). Indeed, an award of nominal damages constitutes a form of redressability and relief on the  
6 merits, as opposed to attorney’s fees, which are “merely a ‘byproduct’ of a suit that already  
7 succeeded.” *Uzuegbunam*, 141 S. Ct. at 801 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523  
8 U.S. 83, 107, 118 (1998)). Accordingly, courts routinely award nominal damages to prevailing  
9 parties for constitutional violations even when claims for injunctive or declaratory relief are  
10 moot. *See, e.g., Klein v. Laguna Beach*, 810 F.3d 693 (9th Cir. 2016) (plaintiff entitled to  
11 nominal damages despite not seeking compensatory damages and mootness of injunctive relief  
12 after city repealed challenged portions of law during litigation).

15 *Uzuegbunam* cannot be distinguished in any pertinent way from this case. Plaintiffs were  
16 subject to Section 2270’s unconstitutional mandate for several weeks. During this time, they self-  
17 censored during interactions with patients so as not to subject themselves to discipline. Dr. Khatibi  
18 has been deprived of her right to her doctors’ honest opinions on Covid-19 related topics for nearly  
19 a year—a deprivation which continues to this day. Accordingly, Plaintiffs have experienced  
20 completed (*and* ongoing) violations of their constitutional rights, and are thus entitled to nominal  
21 damages, which they properly sought in their Complaint. Therefore, for the same reasons that the  
22 Supreme Court held that *Uzuegbunam* was not moot, this case is not moot. 141 S. Ct. at 802  
23 (“Because every violation of a right imports damage, nominal damages can redress [plaintiff’s]  
24 injury even if he cannot or chooses not to quantify that harm in economic terms.”) (internal citation  
25 and quotation marks omitted).

1           **III. DEFENDANTS’ REPEAL OF THE STATUTE DOES NOT PERMIT A FINDING OF**  
2           **MOOTNESS UNDER THE VOLUNTARY CESSATION DOCTRINE**

3           Voluntary cessation of challenged conduct does not render a case moot because dismissing  
4           under such circumstances would allow the defendant to evade an adverse ruling and simply “return  
5           to his old ways.” *Friends of Earth*, 528 U.S. at 189; *see also City News & Novelty, Inc. v. City of*  
6           *Waukesha*, 531 U.S. 278, 284 n. 1 (2001) (the general rule is that voluntary cessation of a  
7           challenged practice rarely moots a federal case). At the same time, repeal, amendment, or  
8           expiration of challenged legislation is often sufficient to render a case moot and appropriate for  
9           dismissal. *See Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195,  
10          1198 (9th Cir. 2019). In *Chambers*, the Ninth Circuit “joined the majority of [other] circuits in  
11          concluding that legislative actions should not be treated the same as voluntary cessation of  
12          challenged acts by a private party, and that we should assume that a legislative body is acting in  
13          good faith in repealing or amending a challenged legislative provision[.]” 941 F.3d at 1199.

14          Nevertheless, the *Chambers* rule is not absolute, and the present case does not fit within its  
15          framework. Indeed, the voluntary cessation exception “traces to the principle that a party should  
16          not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable  
17          behavior.” *City News & Novelty, Inc.*, 531 U.S. at 284 n. 1. *Chambers itself* recognized this  
18          principle and that the presumption of good faith that usually applies to legislative actions has no  
19          application where there is a “reasonable expectation that the legislative body will reenact the  
20          challenged provision or one similar to it.” *Id.* (emphasis added). Similarly, in *City of Mesquite v.*  
21          *Aladdin’s Castle, Inc.*, the Supreme Court refused to dismiss an appeal as moot where a city’s  
22          revision of a challenged ordinance would not preclude it from reenacting the offending provisions  
23          if the District Court’s judgment was vacated on mootness grounds. 455 U.S. 283, 289 & n.11  
24          (1982) (noting that the city had stated its intention to reenact the challenged provisions during oral  
25          argument). For similar reasons, in *Northeastern Florida Chapter*, the Court declined to dismiss an



1 appeal as moot after a city had entirely repealed and replaced a challenged ordinance, because the  
2 replacement ordinance disadvantaged plaintiffs only to a lesser degree than the original one. 508  
3 U.S. at 662-63.

4 In any event, *Chambers* is no longer viable in light of the Supreme Court’s decision in *West*  
5 *Virginia v. Environmental Protection Agency*, 597 U.S. \_\_\_, 142 S. Ct. 2587 (2022), at least insofar  
6 as the specific facts of this case are concerned. In *West Virginia*, the Supreme Court held that the  
7 EPA’s stated intention not to reinstate or enforce the challenged regulation did not moot the case.  
8 The Court explained that “‘voluntary cessation does not moot a case’ unless it is ‘absolutely clear  
9 that the allegedly wrongful behavior could not reasonably be expected to recur.’” *Id.* at 2607  
10 (quoting *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719  
11 (2007)). The Court continued:

12  
13  
14 Here the government “nowhere suggests that if this litigation is  
15 resolved in its favor it will not” reimpose emissions limits predicated  
16 on generation shifting; indeed, it “vigorously defends” the legality of  
17 such an approach. [*Parents Involved*, 551 U.S. at 719]. We do not  
18 dismiss a case as moot in such circumstances. *See City of Mesquite*  
19 [455 U.S. at 288-89]. The case thus remains justiciable, and we may  
20 turn to the merits.

21 *Id.*

22 The same logic applies here.<sup>2</sup> At no time has California explicitly renounced an intention  
23 to discipline doctors for disseminating “misinformation” about Covid-19 to patients. To the  
24 contrary, it has “vigorously defend[ed] the legality of such an approach,” *West Virginia*, 142 S. Ct.  
25 at 2607, and attempted to achieve the same ends through other means. *Cf. Brach v. Newsom*, 38  
26 F.4th 6, 12 (9th Cir. 2022) (finding voluntary cessation exception to mootness applicable to action  
27 challenging State’s restrictions against in-person schooling during Covid-19 pandemic where State  
28 had reopened schools, “unequivocally renounced the use of future school closures,” and maintained

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<sup>2</sup> The Supreme Court’s decision did not hinge on whether the contested government action had been imposed through the legislative process or by executive decree.

1 a “steady and consistent” policy allowing schools to permanently reopen).

2 Despite facing multiple lawsuits challenging Section 2270, California has defended the  
3 statute as constitutional on every possible occasion at both the district and circuit court levels. *See*  
4 Brief for Appellees, *McDonald v. Lawson*, Dkt. 42 (9th Cir. 2023), (Nos. 22-56220, 23-55069).  
5 *See also Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985) (holding that abandonment of  
6 a federal investigation into illegal voter registration by non-citizens did not moot the plaintiffs’ suit  
7 because the United States attorney “ha[d] at all times continued to argue vigorously that his actions  
8 were lawful”). The Ninth Circuit recently asked the parties in *McDonald*—which was heard this  
9 past July but has not yet been decided—to brief the mootness issue. Yet nowhere in the  
10 Government’s filing did it acknowledge the unconstitutionality of Section 2270. *See* Letter Brief  
11 for Appellees, *McDonald v. Lawson*, Dkt. 69 (9th Cir. 2023), (No. 22-56220) (9th Cir. 2013). *Cf.*  
12 *White v. Lee*, 227 F.3d 1214, 1242-44 & n, 27 (9th Cir. 2000) (finding HUD’s new policy was  
13 sufficient to moot case where new policy became “entrenched” during the years of case’s litigation  
14 and was distributed to all HUD employees with “specific guidelines on speech and activities  
15 protected by the First Amendment,” which addressed “all of the objectionable measures that HUD  
16 officials took against the plaintiffs in this case, and even confesse[d] that this case was the catalyst  
17 for the agency’s adoption of the new policy”). This silence speaks volumes, given that the  
18 Government has had every opportunity to bolster its mootness argument by conceding that Section  
19 2270 is unconstitutional, yet it declines to do so.

20  
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22  
23 There are additional indications that the Government intends to continue effectuating its  
24 unlawful censorship regime despite Section 2270’s repeal. When asked about the repeal by  
25 *MedPage Today*, one of Section 2270’s most vocal sponsors, Representative Evan Low, responded  
26 “fortunately ... the Medical Board of California will continue to maintain the authority to hold  
27 medical licensees accountable for ... misinforming their patients about Covid-19 treatments.” *See*  
28

1 Cheryl Clark, *California Misinfo Law is Destined for the Dustbin*, MEDPAGE TODAY, Sept. 13,  
2 2023. The medical board has also started the disciplinary process against at least one physician for  
3 advising a patient that he and his girlfriend should not get one of the Covid-19 vaccines. Motion  
4 For Leave to File First Amended Complaint at ¶ 30, *Hoang v. Bonta*, (E.D. Ca. Oct. 2, 2023), No.  
5 2:22-cv-02147. Recognizing the risks of enforcing Section 2270 at this juncture given the  
6 skepticism that the Government has faced defending the law in court, it is clear that California is  
7 trying to sidestep judicial determinations and punish doctors for departing from state orthodoxy on  
8 Covid-19 related matters by other means. That evidence of bad faith should preclude a finding of  
9 mootness here. *See Fikre v. Federal Bureau of Investigation*, 904 F.3d 1033, 1038-39 (9th Cir.  
10 2018) (finding case moot only when “absolutely clear” to court, upon consideration of  
11 government’s “avowed rationale” for voluntary cessation of challenged position or conduct, that  
12 no risk of reoccurrence exists) (internal citations and quotation marks omitted); *Porter v. Bowen*,  
13 496 F.3d 1009, 1016-17 (9th Cir. 2007) (holding lawsuit was not moot because “the Secretary has  
14 maintained throughout the nearly seven years of litigation ... that [her predecessor] had the  
15 authority under state law to threaten [plaintiffs] with prosecution”); *Olagues*, 770 F.2d at 795  
16 (determining case not moot where government “did not voluntarily cease the challenged activity”  
17 and “at all times continued to argue vigorously that [its] actions were lawful”).

21 It is evident that the State’s motivation in repealing Section 2270 was to evade adverse  
22 precedent. Only after this Court granted Plaintiffs’ motion for preliminary injunction and the  
23 Government faced a skeptical panel in the Ninth Circuit did the Legislature’s action to repeal the  
24 law take place. *See McDonald v. Lawson* Oral Argument (Jul. 17, 2023),  
25 <https://www.youtube.com/watch?v=lShpRZ2KxbA>. Governments should not be granted free rein  
26 to pass unconstitutional laws and subsequently dodge liability by repealing them if it appears that  
27 courts are poised to rule against them. That is simply an abuse of the system and should not be  
28

1 tolerated. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (“[A] defendant cannot  
2 automatically moot a case simply by ending its unlawful conduct once sued.”); *see also Fikre*, 904  
3 F.3d at 1037, 1040 (government cannot moot a case unless it can show that the change in its  
4 behavior is “entrenched” or “permanent” and that it has repudiated the challenged conduct); *U.S.*  
5 *Navy SEALs 1-26 v. Biden*, 72 F.4th 666, 677-78 (5th Cir. 2023) (Ho, J., dissenting) (“[T]he  
6 military’s record on these issues does not inspire trust. We should be ‘suspicious ... of officials  
7 who try to avoid judicial review by voluntarily mooting a case’—especially in the absence of an  
8 admission of illegality or credible assurance of future compliance.”) (quoting *Tucker v. Gaddis*, 40  
9 F.4th 289, 295 (5th Cir. 2022) (Ho, J., concurring)).

### CONCLUSION

12 For the reasons set out above, the Court should hold that this case is not moot, either now  
13 or after January 1, and should permit Plaintiffs to proceed with prosecuting their claims.

15 Respectfully submitted,

16 */s/ Laura B. Powell*

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