STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Boonstra, P.J., and Ronayne Krause and Swartzle, JJ)

W. A. FOOTE MEMORIAL HOSPITAL, d/b/a ALLEGIANCE HEALTH,
Plaintiff-Appellee/Cross-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,
Defendants-Appellees,

and

JOHN DOE INSURANCE COMPANY,
Defendant.

Supreme Court Docket No. 156622

Court of Appeals Docket No. 333360

Kent County Circuit Court
Case No. 15-008218-NF

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AMICUS CURIAE BRIEF BY
THE COALITION PROTECTING AUTO NO-FAULT

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STATEMENT OF QUESTION PRESENTED

1. Should this Court's decision in *Covenant v State Farm*, prohibiting healthcare providers from filing direct actions against insurers for No-Fault benefits, be applied prospectively only to avoid prejudice to healthcare providers who relied upon prior case law at the time they filed their already pending No-Fault actions?

   Court of Appeals answered: No.

   Appellants answer: Yes.

   Appellee answers: No.

   Amicus Curiae CPAN answers: Yes.

STATEMENT OF INTEREST OF AMICUS CURIAE CPAN

CPAN is a broad-based coalition formed to preserve the integrity of Michigan's model no-fault automobile insurance system. CPAN consists of seventeen major medical groups and eight consumer organizations. CPAN's member organizations are identified below:

CPAN: Coalition Protecting Auto No-Fault	
Medical Provider Groups	**Consumer Organizations**
1. *Michigan Academy of Physician Assistants*	1. *Brain Injury Association of Michigan*
2. *Michigan Assisted Living Association*	2. *Michigan Association for Justice*
3. *Michigan Association of Chiropractors*	3. *Michigan Paralyzed Veterans of America*
4. *Michigan Brain Injury Provider Council*	4. *Michigan Protection and Advocacy*
5. *Michigan Home Care and Hospice Association*	5. *Michigan Disability Rights Coalition*
6. *Michigan Nurses Association*	6. *Michigan Senior Advocacy Council*

7. *Michigan Orthopaedic Society*	7. *Michigan Guardian Association*
8. *Michigan Orthotics and Prosthetics Association*	8. *Peckham*
9. *Michigan Osteopathic Association*	
10. *Michigan Rehabilitation Association*	
11. *Michigan Society of Oral and Maxillofacial Surgeons*	
12. *Michigan State Medical Society*	
13. *Michigan Dental Association*	
14. *Michigan Association of Neurological Surgeons*	
15. *Michigan Independent Case Management Council*	
16. *Michigan Committee on Trauma*	
17. *Michigan Podiatric Medical Association*	

The Court of Appeals' decision in this case, applying *Covenant* retroactively, will result in numerous lawsuits filed by medical providers being summarily dismissed. CPAN is an organization that includes many medical providers who, under the Court of Appeals' decision in this case, will be unable to collect their medical bills due to the *Covenant* decision's unexpected departure from established published case law. These medical providers will have wasted extensive time and resources on actions that were previously permitted but now held as contrary to the No-Fault Act. Moreover, insureds may no longer be able to file their own actions due to the one year back rule, which may cause hospital bills to simply be uncollectable. This will cost medical providers copious amounts of money. As a result, CPAN has a substantial interest in this case.

INTRODUCTION

This case concerns the retroactivity of cases that substantially alter the controlling law in an area, often to the detriment of persons who relied on the previous law. More specifically, this case concerns the retroactivity of this Court's decision in *Covenant Medical Center v State Farm*. The *Covenant* decision overruled decades of Court of Appeals' decisions that permitted healthcare providers to file actions on behalf of insureds to recover PIP benefits from a No-Fault insurer. Naturally, then, at the time the *Covenant* decision was issued, there were many pending cases filed by medical providers against insurers for No-Fault benefits, including this one. These cases were filed pursuant to the law existing at the time they were filed. Some had been pending for years by the time the *Covenant* decision was issued. The Court of Appeals' decision would have them all dismissed.

This Court has long taken a flexible approach to retroactivity of judicial decisions where a new decision overrules settled precedent and may prejudice persons who relied on prior precedents when making decisions. The *Pohutski* framework weighs fairness concerns against the general rule of retroactivity to determine whether particular cases that alter precedent should be limited in their retroactivity or prospective only in application. The *Pohutski* framework has never been overruled by this Court, and should be applied in this case with respect to *Covenant*.

Under the *Pohutski* framework, this Court should not apply the new rule established in *Covenant* retroactively. The rule overturned established Court of Appeals' precedent and has been extensively relied upon by many hospitals, doctors, medical providers, and others. Indeed, applying *Covenant* retroactively could cost medical providers copious

amounts of money even though they acted in accordance with established law when making decisions as to how to collect their medical bills. A small survey of providers revealed that most stood to lose over $100,000 due to the *Covenant* decision's retroactive application–sometimes over $200,000 or $300,000. These amounts are likely to be unrecoverable because at the time they were incurred, the providers acted in reliance upon prior case law and filed the actions for PIP benefits themselves. For all of these reasons, this Court should reverse the Court of Appeals and hold that *Covenant* does not apply retroactively.

STATEMENT OF FACTS

This case arose out of a car accident that occurred on September 4, 2014, and in which Zoie Bonner was injured. *W A Foote Memorial Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 164; 909 NW2d 38 (2017). Plaintiff Foote Memorial Hospital treated Zoie for her injuries. *Id.* at 165. Zoie never filed an action for PIP benefits.

On September 4, 2015, precisely one year after the accident, Plaintiff filed this action for PIP benefits against the Michigan Assigned Claims Plan. *Id.* at 165-166. There was a dispute in the trial court over whether Plaintiff could recover benefits from the Assigned Claims Plan because insurance covering the involved vehicle was later identified, and summary disposition was granted, and appealed. *Id.* at 167. At the time, the sole issue was whether the Assigned Claims Plan was the proper party for Plaintiff to seek benefits from. No party questioned Plaintiff's ability to bring the lawsuit as a healthcare provider.

While the *Foote* case was pending on appeal in the Michigan Court of Appeals on

the issue described above, however, this Court issued its decision in *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). *Foote*, 321 Mich App at 167-168. This Court held in *Covenant* for the first time that healthcare providers have no cause of action to recover PIP benefits from an insurer. *Covenant*, 500 Mich at 218.

As a result, the Court of Appeals in this instant case did not address the appeal issue that was originally raised and instead affirmed the trial court's grant of summary disposition on the ground that Plaintiff, as a medical provider, did not have a cause of action for PIP benefits. *Foote*, 321 Mich App at 196. To arrive at this decision, the Court of Appeals concluded that *Covenant* applied retroactively to cases already pending at the time it was decided. *Id.*

This appeal followed. On May 25, 2018, this Court scheduled an oral argument on the application for leave. This Court asked the parties to address the following issues: (1) whether this Court's decision in *Covenant* should be applied to this case; (2) whether *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) has been "effectively repudiated" in the context of judicial decisions of statutory interpretation; and (3) whether the *Pohutski* framework should have been applied in *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012). (05/25/18 S. Ct. Order).

ARGUMENT

I. The *Pohutski* framework serves the interests of justice by accounting for the very real practical reliance upon judicial decisions that persons may have, should continue to be followed by this Court, and counsels against retroactive application of *Covenant*.

A. This Court established a framework in Pohutski *to balance the general retroactive application of judicial decisions with the practical difficulties created in some cases by retroactive application.*

Although the general rule is that judicial decisions are given full retroactive effect, this Court has for many years applied a flexible approach when injustice might result from full retroactivity, such as where a holding overrules settled precedent. *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). In *Pohutski*, this Court established a clear framework for weighing the various concerns inherent in the retroactive application of judicial decisions.

The *Pohutski* framework has two parts. First, a threshold question: did the decision clearly establish a new principle of law? Second, a weighing of three factors: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice. *Id.* at 696-697.

With respect to the threshold question, the question essentially boils down to whether a decision overturns prior precedent—regardless of whether there is a statute involved. This Court in *Pohutski* made clear that even where a decision "gives effect to the intent of the Legislature that may be reasonably be [sic] inferred from the text of the governing statutory provisions," it announces a new rule of law when it overturns prior decisions that erroneously interpreted the statute. *Id.* at 696-697. *Pohutski* involved interpretation of the Governmental Tort Liability Act. This Court had interpreted the Act in two prior cases to retain common law exceptions to governmental immunity. *Id.* at 685-688. In *Pohutski*, however, this Court concluded that those prior decisions were inconsistent with the plain language of the Act and overruled them. *Id.* at 690, 695. When determining

whether to apply the decision retroactively, this Court concluded that *Pohutski* established a new principle of law and thus satisfied the threshold question.

With respect to the three factors, in *Pohutski*, this Court held that prospective application of the decision would serve the purpose of the new rule—to correct an erroneous interpretation of a statute. *Id.* at 697. This Court further concluded that the extent of reliance on the old rule favored prospective application. *Id.* Lastly, this Court concluded that prospective only application would minimize the effect of the decision on the administration of justice. *Id.*

This Court further considered the fact that retroactive application of the new rule would create "a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Id.* at 699. A new act had been passed that would provide a remedy to others in the plaintiffs' position in the future, but the plaintiffs would not be able to take advantage of that act because of a 45-day notice requirement in the act. *Id.* at 697-699. Ultimately, for all of these reasons, this Court held that its *Pohutski* decision would have prospective application only. *Id.* at 699.

The *Pohutski* framework recognizes the general rule of retroactive application while fairly accounting for the impact new decisions may have on people when they substantially diverge from prior decisions. Indeed, this Court had recognized the benefits of a "flexible" approach to retroactivity of judicial decisions long before *Pohutski*. In *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984), this Court stated that "'[i]t is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of

the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result.'" "'If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law.'" *Id.* "Appreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law." *Id.*

Without a framework that takes into account prior law and reliance on such prior law, persons who must base decisions on the prior law can lose thousands of dollars through no fault of their own. CPAN, as a coalition representing many medical providers, can attest that the financial impact on medical providers of the retroactive application of *Covenant*, for example, is severe. Indeed, a small survey of providers has already revealed the loss of hundreds of thousands of dollars. Most providers surveyed had cases pending in reliance upon prior case law for $100,000 at a minimum, and some up to $400,000. Much of this money will simply be lost due to their reliance on prior law, if *Covenant* is applied retroactively.

B. The Pohutski *framework has not been repudiated by any subsequent case law.*

The present case questions whether *Pohutski* "has been 'effectively repudiated' in the context of judicial decisions of statutory interpretation," such as by *Spectrum Health Hospitals v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012), *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). (05/25/18 S. Ct. Order). None of these cases,

however, should be considered to have repudiated *Pohutski*.

The earliest of the referenced cases, *Hathcock*, at least purported to *follow Pohutski*. *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004). That case overruled a prior case—*Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). Both cases involved interpretation of MCL 213.23, concerning condemnation, and of the takings clause of the Michigan Constitution.

When this Court considered whether the *Hathcock* decision should have retroactive effect, it decided to apply the case retroactively. *Hathcock*, 471 Mich at 484. The Court cited *Pohutski*, but appeared to have a completely new interpretation of the threshold question of *Pohutski*. Specifically, this Court held that the threshold question was not satisfied because "[o]ur decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963." *Id.* at 484. According to this Court, "Our decision simply applies fundamental constitutional principles and enforces the 'public use' requirement as that phrase was used at the time our 1963 Constitution was ratified." *Id.*

Those two sentences were practically the only analysis that was present in the *Hathcock* opinion. There was no detailed discussion of *Pohutski*, and the analysis was contrary to *Pohutski*'s own analysis of the threshold question because *Pohutski* specifically held that where an established precedent had interpreted a statute incorrectly, overruling that erroneous interpretation established a new rule of law. Whatever the case, this Court said nothing in *Hathcock* of overruling *Pohutski* or replacing the *Pohutski* rule.

In *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 564; 702 NW2d 539 (2005), this

Court overruled *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), with respect to MCL 500.3145(1), the one-year back rule, and judicial tolling. This Court determined that the decision should apply retroactively because it did not "overrule clear and uncontradicted case law." *Id.* at 587. According to this Court, *Lewis* was an anomaly that rested upon case law that "departed from decades of precedent" and thus was not "clear and uncontradicted." *Id.* It was, according to this Court, not a "new rule, but a return to an earlier rule." *Id.* This Court relied upon *Hathcock*. In both *Devillers* and *Hathcock*, the emphasis seemed to be on the fact that a prior precedent had departed from an older rule and the new decision was simply returning to the old rule.

Finally, in *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 492 Mich 503, 508-509; 821 NW2d 117 (2012), this Court considered the interpretation of MCL 500.3113(a), which bars a person from receiving PIP benefits when they are driving a vehicle they have taken unlawfully. This Court concluded that several prior cases were erroneously decided, and applied its new interpretation of the law retroactively. *Id.* at 535-537. Curiously, this Court cited neither *Hathcock*, nor *Pohutski*. Instead, it relied upon a 1948 case, *Gentzler v Constantine Village Clerk*, 320 Mich 394; 31 NW2d 668 (1948).

Gentzler had quoted American Jurisprudence for a general rule of retroactivity with one narrow exception, which *Spectrum* then quoted *Gentzler* to rely upon such rule. *Spectrum*, 492 Mich at 536. Unmentioned in *Spectrum*, however, is that in *Gentzler*, this Court went on to quote Corpus Juris for a broader exception, where retroactive application of a decision is inappropriate if it would "injuriously affect vested rights acquired in reliance on the earlier decision." *Gentzler*, 320 Mich at 398-399. *Gentzler* predated *Pohutski* by 54

years and was certainly not a basis for overruling *Pohutski*. Indeed, its consideration of reliance on an earlier decision is in line with the *Pohutski* framework. *Spectrum*'s failure to follow *Pohutski* and its application of *Gentzler* were simply wrong.

Unlike in *Spectrum*, in other cases, this Court has continued to apply *Pohutski* even after both *Hathcock* and *Devillers*. For example, in *Bezeau v Palace Sports & Entm't, Inc*, 487 Mich 455, 461-462; 795 NW2d 797 (2010), this Court considered the retroactivity of a judicial decision interpreting the Michigan Worker's Disability Compensation Act. In one decision, this Court had interpreted the Act to provide the Michigan Workers' Compensation Agency with jurisdiction over an employee injured in another state, as long as they were hired in Michigan. *Id.* In a subsequent decision, this Court interpreted the Act to only provide the Agency with jurisdiction if the worker was injured in Michigan *and* hired in Michigan, and thus overruled the prior decision. *Id.* at 462.

In *Bezeau*, this Court had to consider whether the subsequent decision that overruled the prior decision should be applied retroactively. *Id.* at 462-465. This Court faithfully applied the framework laid out in *Pohutski*. Like in *Pohutski*, this Court concluded that "[a]lthough the Court interpreted the statute consistently with its plain language, the Court's interpretation established a new rule of law because it affected how the statute would be applied to parties in workers' compensation cases in a way that was inconsistent with how the statute had been previously applied." *Id.* 463. This Court also emphasized that in *Bezeau*, the case had been ongoing for six years without there being any argument over the jurisdiction of the Agency. *Id.* at 465. Because a long-settled aspect of the case became a new issue after six years of litigation, this Court concluded that the decision

overruling settled precedent disrupted the administration of justice. *Id.* Ultimately, this Court concluded that the decision in question should not be applied retroactively. *Id.*

C. The Covenant *decision should not be applied retroactively because there has been extensive reliance upon prior precedent by many medical providers and others, and retroactive application would severely prejudice many who were always acting in accordance with the law as it was understood at the time.*

The present case concerns the retroactivity of this Court's decision in *Covenant Medical Center, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). *Covenant* overruled a long line of cases by the Michigan Court of Appeals that regularly permitted hospitals to sue for PIP benefits on behalf of an insured individual. *See, e.g.*, *Regents of the Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719; 650 NW2d 129 (2002); *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich 35; 645 NW2d 59 (2002).

In *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389; 864 NW2d 598 (2014), the Court of Appeals squarely addressed the issue of whether a medical provider could sue for an insured's PIP benefits. The Court of Appeals concluded that a healthcare provider has standing to bring a cause of action against an insurer for PIP benefits under the No-Fault Act. *Id.* at 396. The Court based its decision on MCL 500.3112, which states that "[p]ersonal protection insurance benefits are payable to *or for the benefit of* an injured person." *Id.* at 392-393 (emphasis in original). The Court also relied upon three prior cases wherein the Court had at least implicitly held that healthcare providers could sue for PIP benefits: *Regents of the University of Michigan v*

State Farm Mut Ins Co, 250 Mich App 719; 650 NW2d 129 (2002); *Lakeland Neurocare Centers v State Farm Mut Auto Ins Co*, 250 Mich 35; 645 NW2d 59 (2002); and *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 378; 554 NW2d 49 (1996). The practice had been accepted for many years.

This Court in *Covenant* recognized the "decades of Court of Appeals caselaw concluding that a healthcare provider may assert a direct cause of action against a no-fault insurer to recover no-fault benefits." *Covenant*, 500 Mich at 200. It ultimately, however concluded that the prior decisions were contrary to the plain language of the No-Fault Act and "overrule[d] all Court of Appeals caselaw inconsistent with this conclusion." *Id.* at 218.

The threshold question that must first be addressed when considering the retroactivity of the *Covenant* decision is whether it established a new principle of law. The *Covenant* decision clearly passes this threshold question. In *Pohutski*, this Court concluded that even a decision that "gives effect to the intent of the Legislature" that may "reasonably be inferred from the text of the governing statutory provisions" announces a new rule of law when it overturns prior decisions that erroneously interpreted the statute. *Pohutski*, 465 Mich at 696-697. Here, *Covenant* overruled decades of Court of Appeals' decisions permitting lawsuits by healthcare providers against insurers under the No-Fault Act. *Covenant*, 500 Mich at 200. Under *Pohutski*, such a decision satisfies the threshold question.

To the extent there is any question whether overruling Court of Appeals' decisions differs from overruling this Court's own decisions in regards to the threshold question, this Court squarely addressed that question in *Tebo*. This Court held that Michigan Court of

Appeals' decisions are controlling law that should be treated the same as Supreme Court precedent with respect to retroactivity analysis. *Tebo*, 418 Mich at 362.

With the threshold question met, this Court must weigh the three factors of *Pohutski* to determine whether *Covenant* should be applied retroactively. Through analysis of these factors, it is clear that *Covenant* should be applied only prospectively. First, the purpose of the new rule in *Covenant* is the same as it was in *Pohutski*—to correct an erroneous interpretation of a statute. *Pohutski*, 465 Mich at 697. In *Pohutski*, this Court held that such a purpose was served by prospective application. *Id.*

Second, there has been extensive reliance on the old rule in this case. Insurers and healthcare providers have relied upon prior precedents to shape their practices. Healthcare providers and injured persons have relied upon these precedents when determining whether to pursue a claim for benefits against an insurer. Healthcare providers who have engaged in litigation against insurers have spent copious amounts of time and resources on lawsuits that, if *Covenant* is applied retroactively, will now simply be dismissed. Injured persons may have refrained from filing lawsuits of their own due to reliance on their healthcare provider's lawsuit.

Indeed, filing a new lawsuit after *Covenant* will likely be restricted by the one-year-back rule. The one-year-back rule, found in MCL 500.3145(1), provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." In situations like this case where a medical provider files a lawsuit within 1 year of the loss, but that case is dismissed pursuant to *Covenant*, the injured person is prevented from filing their own action to recover those

benefits because more than a year has passed since the loss. Had medical providers had any notice of the *Covenant* rule, they could shape their practices around it and inform the injured persons that they must file their own claim and lawsuit (if necessary) or be liable for all of the bills themselves, or seek an assignment and pursue their bills under an assignment theory. If the injured person files the lawsuit or assigns their rights to the medical provider, the medical provider can be paid by the no-fault insurer. Because of these providers' reliance on prior case law, however, now if a case is dismissed, it is too late to recover no-fault benefits at all. In sum, reliance on prior decisions has been substantial, as will be the prejudicial impact of retroactive application.

Third, retroactive application of the *Covenant* decision will greatly impact the administration of justice. In *Pohutski*, this Court was concerned that retroactive application of the new rule would create "a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Id.* at 699. Similarly, in this case, those injured persons who relied upon lawsuits brought by their healthcare providers and healthcare providers who relied upon precedents to bring lawsuits will almost certainly be denied relief to which they were otherwise entitled simply because the healthcare provider filed the lawsuit instead of the injured person, and did not seek an assignment because the law did not require it. The healthcare provider will be unable to recover from the no-fault insurer, which may force them to seek recovery from sources such as medicaid, shifting the burden to taxpayers.

In addition, like in *Bezeau*, cases that have been ongoing for some time may now be moot even though there was previously never any question that the healthcare provider

had a cause of action. *Bezeau*, 487 Mich at 465. Participants in these lawsuits may have wasted substantial time and resources for nothing. Applying *Covenant* retroactively would thus greatly impact the administration of justice.

Weighing all of these factors, it is clear that *Covenant* should not be applied retroactively under the *Pohutski* framework. For all of these reasons, *Covenant* should be applied prospectively only.

CONCLUSION

This Court has followed the *Pohutski* framework in cases where a new decision overrules settled precedent in order to account for potential injustice that may result from the retroactive application of such a decision. Without that framework, many persons will be prejudiced by detrimental reliance on established case law simply because this Court later decided such case law was incorrect. In this case, medical providers' reliance on *Covenant* is extensive and retroactive application of the decision will cost them copious amounts of money through no fault of their own. This Court should follow its established retroactivity law and conclude that a decision like *Covenant* must have limited retroactivity.

RELIEF REQUESTED

Amicus Curiae CPAN respectfully requests that this Court reverse the decision of the Court of Appeals and hold that *Covenant* does not apply retroactively.

Date: October 5, 2018

Respectfully submitted,

/s/ Jennifer M. Alberts

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