

1 rendered uninhabitable large tracts of the pika's historic range, and if current trends continue the
2 species may well become extinct in the foreseeable future.

3 3. Of the 36 American pika subspecies that inhabit western North America, five can be
4 found in the mountains of eastern California. On August 21, 2007, the Center petitioned the
5 Commission to protect California's pika under CESA by listing them as "threatened" due to global
6 warming. Alternatively, the Center asked the Commission to list California's five pika subspecies
7 individually as either "threatened" or "endangered."

8 4. CESA sets forth a two-step process whereby the Commission must evaluate whether
9 a species should be listed as threatened or endangered. In the first step, the Commission determines
10 whether the listing petition, when considered together with other information in the Commission's
11 possession, provides sufficient information to indicate that listing *may* be warranted. (Fish & G.
12 Code § 2074.2.) If this first hurdle is cleared, the Commission designates the species as a
13 "candidate" for listing and the Department of Fish and Game (the "Department") begins a
14 comprehensive year-long review of the species' status. (Fish & G. Code § 2074.6.) Only after the
15 Department completes its scientific review does the Commission decide whether the species indeed
16 warrants listing as threatened or endangered. (Fish & G. Code § 2075.5.)

17 5. At issue in this case is the Commission's decision to reject the Center's petition to list
18 California's pika at the first stage of CESA's listing process. Despite substantial evidence from
19 leading scientists demonstrating that pikas in California are imperiled by global warming, the
20 Commission concluded on April 10, 2008 that the Center's petition does not provide sufficient
21 information to indicate that listing the pika may be warranted. The Commission adopted written
22 findings in connection with that decision on June 27, 2008.

23 6. The Commission prejudicially abused its discretion in rejecting the Center's petition
24 to list California's pika under CESA. As set forth below, the Commission misconstrued
25 fundamentally CESA's listing process, and it ignored and misrepresented substantial information
26 indicating that listing may be warranted. The Center therefore asks this Court to issue a writ of
27 mandate setting aside the Commission's rejection of the Center's petition and directing the
28 Commission to designate California's pika as candidates for listing under CESA.

1 **JURISDICTION AND VENUE**

2 7. The Commission’s decision to reject the Center’s pika petition is subject to judicial
3 review under Section 1094.5 of the Code of Civil Procedure. (Fish & G. Code § 2076.)

4 8. Venue is proper in the Superior Court for the County of San Francisco under Section
5 401(1) of the Code of Civil Procedure, because the Commission is a state agency based in
6 Sacramento County and the California Attorney General has an office in San Francisco.

7 **PARTIES**

8 9. Petitioner Center for Biological Diversity is a non-profit 501(c)(3) corporation with
9 offices in San Francisco, Joshua Tree, and San Diego, California; Phoenix and Tucson, Arizona;
10 Pinos Altos, New Mexico; Portland, Oregon; and Washington, D.C. The Center has over 40,000
11 members throughout the United States and the world and works through science, law, and policy to
12 secure a future for all species hovering on the brink of extinction. The Center is actively involved in
13 species and habitat protection throughout the western United States, including protection of the
14 American pika. The Center brings this action on its own behalf and on behalf of its adversely
15 affected members and staff.

16 10. The Center’s members and staff include individuals with a wide variety of interests in
17 the American pika and its alpine habitat, ranging from scientific, professional and educational to
18 recreational, aesthetic, moral and spiritual interests. The Center authored the petition to protect
19 California’s pika under CESA, and its members and constituents are adversely affected and
20 aggrieved by the Commission’s refusal to make the pika a candidate for possible protection under
21 the statute. Without the substantial protections of CESA, pikas are more likely to continue to decline
22 and become extinct. The Center and its members are therefore injured because their use and
23 enjoyment of pika is threatened by the decline and likely extinction of pikas. These are actual,
24 concrete injuries to the Center, caused by the Commission’s failure to comply with the CESA. The
25 relief requested will fully redress those injuries.

26 11. Respondent California Fish and Game Commission is a five member State board,
27 appointed by the Governor, charged with final decision making authority for the designation of
28 candidate, threatened and endangered species under CESA.

1 **FACTUAL BACKGROUND**

2 **The American Pika**

3 12. Pikas belong to the order *Lagomorpha*, which also includes rabbits and hares, and the
4 genus *Ochotona*, which in North America is comprised of two distinct species. One species, known
5 as the collared pika (*Ochotona collaris*), inhabits northwest Canada and Alaska. The second species,
6 known as the American pika (*Ochotona princeps*), is distributed discontinuously throughout the
7 western contiguous United States, with the exception of Arizona, and the Canadian provinces of
8 British Columbia and Alberta. This case involves the American pika.

9 13. American pikas are alpine specialists. They live primarily in talus fields fringed by
10 meadows on the rocky slopes of high mountains. Adults weigh less than a half pound, but their
11 dense fur retains heat efficiently, and pikas remain active year-round without hibernating. They
12 spend the short alpine summer collecting and caching the vegetation that will sustain them in their
13 burrows during the long, harsh winters that follow.

14 14. Pikas are extremely territorial, and adults rarely venture more than 40 yards from
15 their burrows. Occasionally, juvenile pika may attempt to disperse and establish new territories
16 elsewhere if unoccupied habitat is not available nearby. However, topography confines most pika
17 populations to small mountaintop “islands” of high elevation habitat, and the vast majority of
18 juveniles have little or no opportunity for dispersal.

19 15. There are 36 recognized subspecies of American pika, five of which inhabit
20 California. The Taylor pika (*O. princeps taylori*) can be found in Modoc, Lassen and Siskiyou
21 counties from 5,000 to 9,000 feet in elevation. The gray-headed pika (*O. princeps schisticeps*)
22 inhabits the northern Sierra Nevada from Mount Shasta south to Donner Pass also at elevations from
23 5,000 to 9,000 feet. The Yosemite pika (*O. princeps muiri*) ranges from El Dorado County to Inyo
24 County further south in the Sierra Nevada from 7,700 to 12,000 feet in elevation. The White
25 Mountain pika (*O. princeps sheltoni*) can be found at 8,000 to 13,000 feet in elevation to the east of
26 the Sierra Nevada in Mono and Inyo counties. Finally, the Mount Whitney pika (*O. princeps albata*)
27 inhabits Tulare, Fresno, and Inyo Counties in the southern Sierra, from Kearsarge Pass to the
28 headwaters of the Tule and Kern Rivers from 8,500 to 13,000 feet in elevation.

1 **The Threat Posed by Global Warming**

2 16. The earth's climate is warming due to society's production of greenhouse gas
3 pollution, primarily from the combustion of fossil fuels for energy. The chief greenhouse gas
4 pollutants include carbon dioxide, methane, nitrous oxide, and black carbon. Increasing
5 concentrations of these pollutants cause the earth's atmosphere to retain a greater proportion of the
6 sun's energy, warming the planet's climate much like the interior of a greenhouse.

7 17. According to the Intergovernmental Panel on Climate Change, "warming of the
8 climate system is unequivocal, as is now evident from observations of increases in global average air
9 and ocean temperatures, widespread melting of snow and ice and rising global average sea level."
10 The average air temperature at the surface of the earth has increased by 1.3° Fahrenheit over the past
11 century, and the rate of warming over the past 50 years is nearly twice that of the past century.
12 Eleven of the last 12 years were the warmest on record. Depending on whether future greenhouse
13 gas emissions are curtailed entirely, remain stationary, or continue to grow, global temperatures are
14 projected to increase by an additional 2 to 11.5° Fahrenheit by the end of this century.

15 18. Global warming is impacting biodiversity worldwide, but it is having a particularly
16 severe and immediate impact on American pikas. Indeed, researchers have described American
17 pikas variously as "early sentinels of biological response to global warming," "a litmus paper for
18 faunal loss due to global climate change," and "the global warming canaries of western North
19 America." Pikas are especially sensitive to global warming for a number of reasons.

20 19. First, pikas are unique among mammals in that they are extremely vulnerable to
21 hyperthermia – or heat stroke – at relatively low temperatures. The same thick fur that allows pikas
22 to endure harsh alpine winters inhibits evaporative cooling and limits the species' ability to dissipate
23 heat. Studies have shown that pikas will die when ambient air temperatures reach just 77.9 to 84.9°
24 Fahrenheit unless they seek shelter in their burrows. Thus, at the lower end of their high-elevation
25 range, pikas can remain active above ground only during the morning and evening, which restricts
26 significantly their ability to forage and disperse.

27 20. Second, the pika's high-elevation habitat in western North America is warming even
28 more rapidly than many other locations around the world. Western temperatures have increased

1 already by 2 to 5° Fahrenheit during the past century, exceeding the average global temperature rise
2 by more than double in many places. As a result, snowpack has decreased significantly in most high
3 elevation western regions, including the southern Cascades and Sierra Nevada in California. And
4 conditions for the pika are expected to worsen. In the west, average temperatures are projected to
5 rise by 8.6 to 12.7° Fahrenheit during the winter and by 4.8 to 7.7° Fahrenheit during the summer.
6 Snowpack will continue to decrease, because autumn snowfall will be delayed and winter
7 precipitation will increasingly come as rain instead of snow. On average, the snowline is projected
8 to rise by approximately 500 feet for each 1.8° Fahrenheit increase in temperature.

9 21. Finally, while certain animals may be able to survive some degree of global warming
10 by moving north or upslope with the changing climate, most pika populations are already effectively
11 marooned atop the west's highest mountains and have nowhere to go. Even if society manages to
12 reduce greenhouse gas emissions significantly and in short order, suitable habitat for the American
13 pika in California is projected to be virtually eliminated by the end of this century.

14 22. Global warming has already extracted a heavy toll on American pikas. A recent
15 study resurveyed 25 historic pika populations in the Great Basin and found that seven have
16 disappeared, likely as a result of global warming. The study did not resurvey the portion of the
17 Great Basin that extends into northeastern and eastern California. However, six of the seven pika
18 populations sites that were resurveyed and found to have disappeared were located in close
19 proximity to the California border in southern Oregon and northwestern Nevada, and they belonged
20 to two of the pika subspecies that inhabit California – the Taylor pika and the gray-headed pika.

21 23. In California, researchers recently resurveyed several locations in Yosemite National
22 Park where pika were found between 1911 and 1920. The researchers were unable to find any pika
23 at the lowest elevation site resurveyed. Subsequent surveys indicate that this Yosemite pika
24 population has retreated 500 feet upslope.

25 24. In short, there is abundant scientific evidence that American pika populations in
26 California and elsewhere are at serious risk from global warming. Indeed, if present trends continue,
27 the American pika may become extinct throughout all or a significant portion of its range in
28 California in the foreseeable future.

STATUTORY BACKGROUND

1
2 25. In 1970, California became one of the first states in the Union to enact a statutory
3 scheme to protect endangered and rare animals. Fourteen years later, this original scheme was
4 replaced with a new one modeled after the federal Endangered Species Act and known as the
5 California Endangered Species Act (“CESA”).

6 26. In enacting CESA, the Legislature recognized that numerous species have been
7 rendered extinct as a result of human activities; that other species are in danger of extinction; that
8 California’s native species are of substantial ecological, educational, historical, recreational,
9 aesthetic, economic and scientific value to the people of the state; and that the protection and
10 enhancement of such species and their habitat is of statewide concern. (Fish & G. Code § 2051(c).)

11 27. CESA contains a number of procedural and substantive provisions that are designed
12 to protect imperiled species and prevent further extinctions. However, with few exceptions, these
13 protections do not apply unless a species is first listed by the Fish and Game Commission as either
14 “endangered” or “threatened.” (Fish & G. Code § 2052.)

15 28. CESA defines a species as “endangered” if it is “in serious danger of becoming
16 extinct throughout all, or a significant portion, of its range due to one or more causes, including loss
17 of habitat, change in habitat, overexploitation, predation, competition, or disease.” (Fish & G. Code
18 § 2062.) A species is defined as “threatened” if it is not presently threatened with extinction but “is
19 likely to become an endangered species in the foreseeable future” in the absence of special
20 protection and management efforts. (Fish & G. Code § 2067.)

21 29. Pursuant to CESA, an interested person may petition the Commission to list a species
22 as threatened or endangered. (Fish & G. Code § 2071). The statute specifies certain information
23 that must be included in the petition: for example, information regarding the species’ range,
24 distribution, abundance, and life history. (Fish & G. Code § 2072.3.) The Commission returns
25 petitions that do not contain the statutorily specified information to the petitioner within 10 days of
26 receipt. (Tit. 14, Cal. Code Reg. § 670.1(b).)

27 30. Within 10 days after receiving a listing petition that has been deemed complete, the
28 Commission must refer the petition to the Department of Fish and Game. (Fish & G. Code § 2073.)

1 The Department then has 90 days to prepare a report to the Commission that evaluates whether the
2 petition contains sufficient information indicating that listing “may be warranted.” (Fish & G. Code
3 § 2073.5.) During this review period, interested persons may submit information relating to the
4 petition to the Department. (Fish & G. Code § 2073.4.)

5 31. Upon receiving the Department’s report, the Commission must determine at its next
6 public meeting whether the petition – when considered together with the Department’s report and
7 any comments received – provides sufficient information to indicate that listing the species may be
8 warranted. (Fish & G. Code § 2074.2.) This “sufficient information” standard has been interpreted
9 by a California Appellate Court as that which would “lead a reasonable person to conclude there is a
10 substantial possibility the requested listing could occur.” (*Natural Resources Defense Council v.*
11 *California Fish and Game Comm’n* (1994) 28 Cal. App. 4th at 1125, 1129.)

12 32. If the Commission finds that a petition does not provide sufficient information to
13 indicate that listing may be warranted, it must “publish a notice of finding that the petition is
14 rejected, including the reasons why the petition is not sufficient.” (Fish & G. Code § 2074.2(a)(1).)

15 33. If, on the other hand, the Commission finds that listing may be warranted, it must
16 accept the petition and designate the species as a “candidate” for listing. (Fish & G. Code
17 § 2074.2(a)(2).) Then begins a more exacting level of review. The Department has 12 months to
18 complete a thorough evaluation of the species’ status and recommend to the Commission whether
19 listing is indeed warranted. (Fish & G. Code § 2074.6.) Following receipt of the Department’s
20 status review, the Commission holds an additional public hearing and determines finally whether to
21 list the species as threatened or endangered. (Fish & G. Code § 2075.5.)

22 34. Once a species is listed as threatened or endangered, state agencies may not approve
23 projects that would jeopardize the species’ continued existence or result in the destruction or adverse
24 modification of its essential habitat. (Fish & G. Code § 2053.) In addition, CESA directs all state
25 agencies, boards and commissions to exercise their respective authorities to “conserve” threatened
26 and endangered species. (Fish & G. Code § 2055.) The term “conserve” is defined broadly to
27 include all actions that are necessary to bring the species to the point at which protection under
28 CESA is no longer necessary. (Fish & G. Code § 2061.)

PROCEDURAL BACKGROUND

1
2 35. On August 21, 2007, the Center petitioned the Commission under CESA to list the
3 American pika as threatened throughout its range in California. Should the Commission determine
4 not to do so, the Center requested that it consider listing California's five pika subspecies
5 individually.

6 36. The Commission received the Center's petition to list the pika on August 22, 2007
7 and referred it to the Department of Fish and Game for review and evaluation on August 30, 2007.
8 On October 12, 2007, the Commission granted the Department's request for an additional 30 days,
9 for a total of 120 days, to evaluate the petition.

10 37. In November 2007, the Department asked two pika researchers – Dr. Lyle Nichols
11 and Dr. Edward West – for their opinions regarding the pika petition. By letter dated December 13,
12 2007, Dr. Nichols confirmed that pika populations in the Bodie Hills in eastern California have
13 “suffered marked declines in recent decades.” Dr. Nichols concluded that “all available evidence
14 strongly supports the proposition that American pikas merit protection under the California
15 Endangered Species Act.” Dr. Nichols urged the Department to contact three additional pika
16 researchers – Drs. Mary Peacock, John Nagy, and Andrew Smith – for their views; however, on
17 information and belief, the Department did not do so.

18 38. On December 14, 2007, Dr. West likewise advised the Department that the Center's
19 petition identified “a genuine potential problem with regard to the potential impacts of climate
20 change on thermally sensitive species such as the pika.” Dr. West explained that “lower elevation
21 populations such as those at Bodie now would likely go extinct with increased temperatures.” Dr.
22 West also further advised the Department that he expected to complete in early 2008 a study focused
23 on the adaptive capacity of pikas to climate change.

24 39. The Department completed its evaluation of the Center's petition to list the pika on
25 December 21, 2007. In its report to the Commission, the Department recognized that pikas are
26 “vulnerable to even slight changes in climate” and are “biogeographically isolated in habitat patches
27 referred to as ‘islands’ in areas having short summers, long winter with most days below freezing
28 temperatures, and high annual rainfall.” The Department also acknowledged implicitly that climate

1 is changing rapidly throughout the pika’s high-elevation habitat. Nevertheless, the Department
2 concluded inexplicably that “neither the petition nor other sources offers information supporting the
3 suggestion that the pika in California is being threatened by climatic warming.” The Department
4 also advised – incorrectly – that “mitigating greenhouse gas pollution [and] facilitating adaptation to
5 climate change . . . are not in the purview of the Commission or Department to effect.” Accordingly,
6 the Department recommended that the Commission reject the Center’s petition.

7 40. The Department’s evaluation of the Center’s petition ignored and mischaracterized
8 substantial information indicating that California’s pika are threatened by global warming and may
9 warrant listing under CESA. For example, the Department failed entirely to evaluate substantial
10 evidence cited in the petition regarding global warming’s adverse impacts on pika habitat, and it
11 misrepresented the results of studies linking global warming to population declines. The Department
12 nowhere discloses the fact that several of the pika researchers it had contacted confirmed that the
13 species is imperiled by global warming and supported listing. Nor does the Department consider
14 whether any of California’s five pika subspecies may warrant listing independent of the other
15 subspecies.

16 41. On March 4, 2008, the Center submitted additional information to the Commission
17 detailing the various factual and legal shortcomings in the Department’s evaluation and report and
18 further demonstrating that listing the pika under CESA may be warranted.

19 42. On March 7, 2007, the Commission held a public hearing on the Center’s petition to
20 list California’s pika as threatened or endangered under CESA. At the conclusion of the hearing, the
21 Commission voted to continue its consideration of the petition at its next meeting.

22 43. On April 8, 2008, the Center submitted to the Commission two additional scientific
23 studies indicating that California’s pika are at serious risk from global warming. One study
24 employed state-of-the-art ecological models to conclude that – even assuming future greenhouse gas
25 emissions are curtailed substantially – “suitable habitat for the American pika in California will be
26 virtually eliminated except for a tiny fragment of habitat in the central Sierra Nevada.”

27 44. On April 10, 2008, the Commission held another public hearing, at the conclusion of
28 which it voted to reject the Center’s petition.

1 report and any public comments received by the Commission, provides sufficient information to
2 indicate that listing may be warranted. (Fish & G. Code § 2074.2.) The courts have interpreted this
3 standard to mean “that amount of information . . . that would lead a reasonable person to conclude
4 there is a substantial possibility the requested listing *could* occur.” (*Natural Resources Defense*
5 *Council, supra*, 28 Cal. App. 4th at 1125, emphasis added.)

6 50. In rejecting the Center’s petition to list California’s pika as threatened or endangered
7 under CESA, the Commission fundamentally misapplied CESA’s listing standards and improperly
8 raised the bar for accepting a species as a listing candidate. For example:

9 A. The Commission improperly demanded evidence demonstrating “a substantial
10 possibility that the species *will* qualify for listing,” rather than evidence demonstrating “a substantial
11 possibility that the requested listing *could* occur;”

12 B. The Commission improperly demanded “empirical data” that is “definitive”
13 and “dramatic” rather than evidence “that would lead a reasonable person to conclude there is a
14 substantial possibility the requested listing *could* occur;” and

15 C. The Commission improperly demanded evidence showing the existence of
16 “*imminent* adverse effects of not listing pikas,” rather than evidence that one or more of California’s
17 pika subspecies may warrant listing as “threatened” on the grounds that they may be “likely to
18 become an endangered species *in the foreseeable future*.” (Fish & G. Code § 2067(a), emphasis
19 added.)

20 51. In rejecting the Center’s petition to list California’s pika, the Commission also failed
21 to give “meaningful consideration” to substantial evidence indicating that listing may be warranted,
22 as CESA requires. (*Natural Resources Defense Council, supra*, 28 Cal. App. 4th at 1126.) For
23 example, the Commission ignored entirely comments and testimony from scientists who supported
24 listing California’s pika under CESA. The Commission also ignored or otherwise failed to consider
25 meaningfully evidence demonstrating that climate change poses a serious threat to California’s pika.

26 52. Finally, the Commission failed to consider whether any one of the five pika
27 subspecies in California may warrant listing as threatened or endangered “throughout all throughout
28 all, or a significant portion, of its range.” (Fish & G. Code §§ 2062, 2067.) Instead, the Commission

1 concluded only that there was insufficient evidence “to warrant listing pikas within the Sierra
2 Nevada ecoregion in California.” The Commission failed entirely to consider whether the
3 subspecies that inhabit the Cascades and Great Basin within California may warrant listing as
4 endangered or threatened.

5 53. In these and other respects, the Commission prejudicially abused its discretion by
6 failing to proceed in the manner required by law.

7 **SECOND CAUSE OF ACTION**

8 **(Failure to Adopt a Decision that Is Supported by the Findings)**

9 54. The Center re-alleges, as if fully set forth herein, each and every allegation contained
10 in the preceding paragraphs.

11 55. Under CESA, if the Commission determines that a listing petition does not provide
12 sufficient information to indicate that the requested listing may be warranted, it must “publish a
13 notice of finding that the petition is rejected, *including the reasons why the petition is not sufficient.*”
14 (Fish & G. Code § 2074.2(a)(1), emphasis added.)

15 56. The findings adopted by the Commission on June 27, 2008 fail to bridge the analytic
16 gap between the evidence before the Commission and the Commission’s decision to reject the
17 Center’s petition to list California’s pika as threatened or endangered.

18 57. The Commission prejudicially abused its discretion by failing to adopt a decision that
19 is supported by the findings.

20 **THIRD CAUSE OF ACTION**

21 **(Failure to Adopt Findings that Are Supported by Substantial Evidence)**

22 58. The Center re-alleges, as if fully set forth herein, each and every allegation contained
23 in the preceding paragraphs.

24 59. To the extent that the Commission did adopt limited findings in support of its
25 decision to reject the Center’s petition to list California’s pika as threatened or endangered, those
26 findings are unsupported by substantial evidence in the record.

27 60. The Commission prejudicially abused its discretion by adopting findings that are
28 unsupported by substantial evidence in the record.

1 **FOURTH CAUSE OF ACTION**

2 **(Declaratory Relief)**

3 61. The Center re-alleges, as if fully set forth herein, each and every allegation contained
4 in the preceding paragraphs.

5 62. The Center contends that the Commission’s decision to reject the petition to list
6 California’s pika under CESA, its decision to deny the pika candidacy status, and its failure to
7 prepare adequate findings in support of that decision constitute a prejudicial abuse of the
8 Commission’s lawful discretion under CESA.

9 63. The Commission contends that its decision to reject the Center’s petition and deny
10 California’s pika candidacy status was and is lawful.

11 64. An actual controversy has arisen and now exists between the Center and the
12 Commission regarding their respective rights and duties under CESA.

13 65. The Center desires a judicial determination and declaration of the parties’ respective
14 rights and duties, including a declaration of whether the Commission’s decision denying California’s
15 pika candidacy status and its failure to make and release adequate findings in support of that decision
16 violate CESA and other legal requirements. Such a declaration is necessary and appropriate at this
17 juncture.

18 **REQUEST FOR RELIEF**

19 Wherefore, the Center respectfully requests relief as follows:

20 1. On the First, Second and Third Causes of Action, that the Court issue a writ of
21 mandate commanding the Commission to set aside its prejudicial actions of April 10, 2008 and June
22 27, 2008, and issue a new decision accepting the Center’s petition to list California’s pika and
23 advancing the pika to candidacy; or, alternatively, a writ of mandate directing the Commission to
24 reconsider the petition consistent with CESA, and make a timely new decision supported by
25 substantial evidence;

26 2. On the Third Cause of Action, that the Court declare the parties’ respective rights and
27 duties under CESA and other legal requirements;

1 **VERIFICATION**

2 I, Kassia R. Siegel, hereby declare:

3 I am a staff attorney at the Center for Biological Diversity and the director of the Center's
4 climate, air and energy program. The facts alleged in the above petition and complaint are true to
5 my personal knowledge.

6 I declare under penalty of perjury under the laws of the State of California that the above is
7 true and correct and that this verification is executed on this ___ day of August, 2008 at Joshua Tree,
8 California.

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10 _____
11 Kassia R. Siegel
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