
Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, (a/k/a MASON EDMO),
Plaintiff-Appellee,

vs.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants.
and
CORIZON, INC., et al.,
Defendants-Appellants.

On Appeal from Orders of the United States District Court
For the District of Idaho
Case No. 1:17-cv-00151-BLW

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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INTRODUCTION

The Ninth Circuit panel found that "the facts of this case call for expeditious effectuation of the [district court's] injunction," given that it has been over a year since medical experts concluded gender confirmation surgery is medically necessary for Plaintiff-Appellee Adree Edmo due to acute gender dysphoria, including two self-castration attempts. Dkt. 96-1 at 85. The panel "urge[d] the State to move forward" with providing surgery to Ms. Edmo because of her daily suffering and ongoing risk of life-threatening harm in the absence of necessary treatment. *Id*.; *see* SER 014 ("[T]here is a substantial risk that Ms. Edmo will make a *third* attempt to self-castrate if Defendants continue to deny her gender confirmation surgery. In short, her medical needs are urgent. The Constitution requires Defendants to act accordingly.").

None of Defendants' arguments satisfies the extraordinary bar for rehearing en banc. The panel's finding that the district court's proceedings did not violate Defendants' right to a jury trial regarding the specific injunctive relief at issue follows Supreme Court and Ninth Circuit precedent. Similarly, in affirming the district court's order that Defendants provide Ms. Edmo gender confirmation surgery, the panel squarely applied long-established Supreme Court and Ninth Circuit law regarding injunctions to correct Eighth Amendment violations for failure to provide adequate medical treatment. That this case involves a transgender plaintiff does not change the Eighth Amendment analysis or render the case exceptional. Finally, the panel's holding that the injunctive relief order satisfies the requirements of the Prison Litigation Reform Act ("PLRA") is also consistent with Ninth Circuit precedent. Accordingly, this Court should deny Defendants' petition.

ARGUMENT

Rehearing of cases en banc is the exception, not the rule. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960); *Makaeff v. Trump Univ.,*

LLC, 736 F.3d 1180, 1180 (9th Cir. 2013) (Wardlaw, J. and J. Callahan concurring in denial of rehearing en banc); Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered…"). The Court "take[s] cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance." *Hart v. Massanari*, 266 F.3d 1155, 1172 n.29 (9th Cir. 2001) (internal quotations and citation omitted); Fed. R. App. P. 35(a). In order for the Court to rehear a case en banc on the basis that a panel decision "directly conflicts with an existing opinion by another court of appeals," the opinion must also "substantially affect[] a rule of national application in which there is an overriding need for national uniformity." Circuit Rule 35-1.

Defendants proffer three purported bases for rehearing en banc: 1) the panel's holding that Defendants waived their Seventh Amendment right to a jury trial with respect to the injunctive relief ordered by the district court conflicts with this Circuit's precedent and with other circuits; 2) the panel's application of the Eighth Amendment deliberate indifference standard to provision of gender confirmation surgery conflicts with Supreme Court precedent and rulings in other circuits; and 3) the panel's conclusion that the district court satisfied the PLRA requirements for injunctive relief conflicts with this Circuit's precedent and with the Eleventh Circuit. With one exception—the conflict between the panel's decision and a recent Fifth Circuit decision that rejects forty years of controlling Supreme Court Eighth Amendment precedent—Defendants have misconstrued these purported "conflicts," and none of Defendants' arguments supports rehearing en banc.

I. The Panel's Holding that Defendants Waived Their Right to a Jury Trial with Respect to the Injunctive Relief at Issue is Consistent with Precedent

Relying on Supreme Court and Ninth Circuit precedent, the panel ruled that

Defendants waived their "right to a jury trial with respect to issues common to [Ms.] Edmo's request for an injunction ordering GCS [gender confirmation surgery] and her legal claims." Dkt. 96-1 at 84. The panel found Defendants "vigorously participated in the evidentiary hearing" conducted by the district court "without ever raising the right to a jury trial." *Id.* at 83. "The State remained silent in the face of statements from the district court that it was considering treating, and then that it had treated, the hearing as a final trial on the merits, which made it clear that the court 'intended to make fact determinations.' It also remained silent despite the district court asking twice whether the hearing was one for a permanent injunction—as clear a time as any to raise any concerns about a jury trial." *Id.* at 83-84. Instead, "the State raised the issue of a jury trial for the first time on appeal, after the district court ruled against it." *Id.* at 84.

Rather than conflicting with "U.S. Supreme Court, Ninth Circuit, and other Circuits' precedent," Dkt. 99 at 2, as Defendants contend, the panel's ruling applied controlling law. The panel followed longstanding Supreme Court precedent holding that a party can waive the right to a jury trial in civil suits, *United States v. Moore*, 340 U.S. 616, 621 (1951), and Ninth Circuit precedent holding that a "party's vigorous participation in a bench trial, without so much as a mention of a jury, . . . can only be ascribed to knowledgeable relinquishment of the prior jury demand." *White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (en banc); Dkt. 96-1 at 82-3; *accord Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984); *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 111 (1st Cir. 2008). The panel also ruled that Defendants waived this issue by waiting to raise it for the first time on appeal. Dkt. 96-1 at 84. This ruling tracks well-established precedent regarding jury trial waivers, as well as basic principles of appellate review. *See, e.g., Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (en banc) (appellate courts do not "entertain[] arguments on appeal that were not presented or developed before the district court") (quoting

Visendi v. Bank of Am., N.A., 733 F.3d 863, 869 (9th Cir. 2013); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

The panel's holding that the district court did not improperly deprive Defendants of their right to a jury by consolidating the preliminary injunction hearing with a final trial on the merits for injunctive relief also does not conflict with precedent or create intracircuit conflict. The district court asked the parties to address whether the hearing was for a permanent injunction and a final trial on the merits as to plaintiff's request for surgery both at the beginning and end of the evidentiary hearing. But "[t]he State never answered the court's question or objected to consolidation, despite the district court specifically noting it had treated the hearing as final." Dkt. 96-1 at 80-81; *see also id.* at 27 & 37. Given Defendants' failure to respond to the district court's directive to address the issue, or to object at any time to consolidation or fact-finding by the district court, the panel found that Defendants waived any such objection. *Id.* at 80-81 (citing *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) ("[W]hen a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge's attention or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles.")); *see also K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989) ("A party cannot lay back, acquiesce in the merger of a preliminary hearing with a permanent one, and then protest the procedure for the first time after the case is decided adversely to it."); Dkt. 96-1 at 82 (quoting *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004) ("A failure to object to a proceeding in which the court sits as the finder of fact waives a valid jury demand as to any claims decided in that proceeding, at least where it was clear that the court intended to make fact determinations.").

The panel's decision does not conflict with *Isaacson v. Horne*, 716 F.3d 1213

(9th Cir. 2013), the only Ninth Circuit case Defendants cited on this issue. In that case, "[f]ollowing the [preliminary injunction] hearing, and without any prior notice to the parties, the court *sua sponte* and retroactively consolidated the preliminary injunction hearing with a trial on the merits and issued a final decision denying all relief." *Id.* at 1219. In contrast, the panel here found that "[t]his is not a case where the district court gave no notice whatsoever,"—rather, "the State was provided notice, twice, that the district court considered the evidentiary hearing a final trial on the merits of Edmo's request for GCS." Dkt. 96-1 at 80-81; *see also id.* at 80 (citing *Isaacson* and *Michenfelder v. Sumner*, 860 F.2d 328, 337 (9th Cir. 1988)). Similarly, the cases from other circuits that Defendants rely on for a purported inter-circuit conflict, Dkt. 99 at 5-7, do not actually pose such conflict, given the panel's findings that the district court gave adequate notice of consolidation. Moreover, Defendants made no showing that the panel's ruling in this regard "substantially affects a rule of national application in which there is an overriding need for national uniformity," as this Circuit requires for rehearing en banc premised on inter-circuit conflict. Circuit Rule 35-1.

Defendants' new argument that the district court's actions with respect to consolidation were so unclear as to be unascertainable prior to the panel's limited remand, Dkt. 99 at 4, misconstrues the panel's remand order and is belied by Defendants' own prior filings. The panel asked the district court to clarify certain aspects of its injunctive relief order, not the proceedings the district court utilized during the trial on injunctive relief. Dkt. 90 at 4. While Defendants now conflate the two, their opening appellate brief reflects their position—fully briefed prior to remand—that the district court converted the hearing to a final trial on the merits. *See* Dkt. 13-1 at 2 (framing issue on appeal as whether district court erred "in converting the abbreviated preliminary injunction hearing to a full and final trial on the merits"); *id.* at 25-26 & 61-65 (claiming district court converted evidentiary

hearing to final trial on the merits). The panel considered and rejected Defendants' argument that the district court did not provide adequate notice of consolidation. Dkt. 96-1 at 80-1.

Consistent with Ninth Circuit precedent, the panel also ruled that, regardless of waiver, Defendants failed to establish "any prejudice" as a result of the procedures used by the district court, *id.* at 81, much less the "substantial prejudice" required. *Id.* at 80 (citing *Michenfelder*, 860 F.3d at 337 (party challenging consolidation of preliminary injunction hearing with final trial on merits must show not only inadequate notice, but also "substantial prejudice in the sense that [it] was not allowed to present material evidence" that could have altered the outcome)); *see also Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (appellate court "will only excuse a failure to comply with th[e waiver] rule when necessary to avoid a manifest injustice") (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)). As the panel noted, "the district court permitted the parties four months of discovery and held a three-day evidentiary hearing," heard live witnesses, and reviewed declarations from other witnesses as well as "thousands of pages of exhibits and extensive pre- and post-trial briefing." Dkt. 96-1 at 81. The panel observed that, "[t]he State also urges that it would have requested that the named defendants be able to testify live, but it stipulated—knowing full well the stakes of the hearing—to submit certain testimony via declaration '[i]n lieu of and/or in addition to live testimony.' Moreover, the State fails to identify what testimony those witness would have offered or explain how presenting that testimony live, instead of via declaration, 'could have altered the outcome.'" *Id.* at 81. Thus, the panel's conclusion that "[t]he district court did not commit reversible error in consolidating the evidentiary hearing with a trial on the merits of Edmo's request for GCS," *Id.* at 81-2, is consistent with Circuit precedent.

For all of these reasons, the panel's rulings regarding jury waiver and

consolidation of the evidentiary hearing are consistent with precedent, and do not support rehearing en banc.

II. The Panel's Application of Settled Eighth Amendment Law is Consistent with Precedent

The panel applied the deliberate indifference standard for evaluating Eighth Amendment claims established by the Supreme Court more than forty years ago in *Estelle v. Gamble*, 429 U.S. 97 (1976). The panel's "decision cleaves to settled Eighth Amendment jurisprudence, which requires a fact-specific analysis of the record (as construed by the district court) in each case." Dkt. 96-1 at 65. The panel relied on, *inter alia*, *Estelle, Farmer v. Brennan,* 511 U.S. 825, 835 (1994), *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016), and *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004), requiring that, to establish deliberate indifference to a prisoner's right to medical treatment, "the plaintiff must show that the course of treatment the [official] chose was medically unacceptable under the circumstances and that the [official] chose this course in conscious disregard of an excessive risk to the plaintiff's health." Dkt. 96-1 at 49 (quoting *Hamby*, 821 F.3d at 1092); *see id.* at 49-51.

Defendants argue that en banc review is "critical because the panel expanded the deliberate indifference standard well beyond prior precedent" and "upend[ed] decades of sound jurisprudence" deferring to "professional judgments of individual medical providers." Dkt. 99 at 7. As an initial matter, Defendants misstate this Circuit's precedent regarding deference to prison medical providers. As the panel recognized, "'[i]n deciding whether there has been deliberate indifference to an inmate's serious medical needs, we need not defer to the judgment of prison doctors or administrators.'" Dkt. 96-1 at 50 (quoting *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989)). Thus, the panel affirmed the district court's injunction pursuant to controlling Supreme Court and Circuit authority: "In the final analysis under the

Eighth Amendment, we must determine, considering the record, the judgments of prison medical officials, and the views of prudent professionals in the field, whether the treatment decision of responsible prison authorities was medically acceptable." Dkt. 96-1 at 50; *see also Colwell v. Bannister*, 763 F.3d 1060, 1068-70 (9th Cir. 2014).

The panel did not create a new legal standard regarding deliberate indifference. Rather, it explicitly considered and rejected Defendants' argument that Defendants' refusal to provide gender confirmation surgery was merely a difference of medical opinion and that the denial of care at most constituted "mere negligence or medical malpractice." Dkt. 99 at 7. The panel held: "[T]his is not a case of dueling experts, as the State paints it. . . . The credited testimony establishes that GCS is medically necessary." Dkt. 96-1 at 51. Rejecting an argument is not the same as changing the legal standard.

The panel's decision tracks not only Eighth Amendment precedent generally, but, also, how this and most other circuits have evaluated Eighth Amendment claims related to gender confirmation surgery in particular. This Circuit, in *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (per curiam), held that a transgender prisoner alleging deliberate indifference based on failure to provide gender confirmation surgery states a claim under the Eighth Amendment. *See also Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015); *accord Fields v. Smith*, 653 F.3d 550, 552-53, 558-59 (7th Cir. 2011); *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013). While the First Circuit, considering the evidence before it from the 2006 evidentiary hearing record, reached a different result in *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014), as to the medical necessity of gender confirmation surgery for that plaintiff, the panel explained that both courts used the same "fact-based approach" to the Eighth Amendment deliberate indifference inquiry. Dkt. 96-1 at 66-71. The panel affirmed the district court's order that gender confirmation

surgery is medically necessary for Ms. Edmo given her particular factual circumstances. *Id.* at 66-67 ("Our approach mirrors the First Circuit's, but the important factual differences between cases yield different outcomes."); *id.* at 67 ("[T]he district court's careful factual findings . . . unequivocally establish that GCS is the safe, effective, and medically necessary treatment for Edmo's severe gender dysphoria.").

Only the recent decision of a Fifth Circuit panel in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), conflicts with the panel's decision. *Gibson* is the outlier in federal Eighth Amendment jurisprudence. Dkt. 96-1 at 68. In *Gibson*, two members of the Fifth Circuit panel repudiated *Estelle's* holding that "a plaintiff establishes an Eighth Amendment claim by demonstrating that prison officials were deliberately indifferent to a serious medical need," in favor of their own originalist re-interpretation of the Eighth Amendment's "cruel and unusual punishment" clause. *Id.* at 72. *Gibson* categorically held that failure to provide gender confirmation surgery cannot, as a matter of law, constitute an Eighth Amendment violation, regardless of an individual plaintiff's circumstances. *Id.* at 67 & 69. *Gibson* thus "directly conflicts with decisions of the Ninth Circuit, the Fourth Circuit, and the Seventh Circuit, all of which have held that denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim," as well as "Eighth Amendment precedent requiring a case-by-case determination of the medical necessity of a particular treatment." *Id.* at 71; *see also Colwell*, 763 F.3d at 1063 ("[T]he blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that 'one eye is good enough for prison inmates' is the paradigm of deliberate indifference."). *Gibson* also conflicts with the First Circuit's decision in *Kosilek*, which "expressly cautioned that the opinion should not be read to 'create a de facto ban against GCS as a medical treatment for any incarcerated individual,'" *id.* at 72, and considered the medical necessity of gender confirmation

surgery in the context of the specific "factual circumstances of that case, that is, based on the unique medical needs of the prisoner at issue." *Id.* at 69.

Contrary to Defendants' argument, the Fifth Circuit's outlier decision in *Gibson* does not support rehearing en banc. The mere existence of a conflict with an opinion by another court of appeals is not sufficient; rather, a party seeking rehearing en banc must also demonstrate that the decision "substantially affects a rule of national application in which there is an overriding need for national uniformity." Circuit Rule 35-1. Defendants fail to address the latter requirement, nor could they satisfy this criterion. The panel's decision follows decades of Eighth Amendment jurisprudence in the Supreme Court, this Circuit, and nationwide.

At its core, much of Defendants' Eighth Amendment argument for rehearing en banc urges this Court to do what an appellate court is not permitted to do, whether as a three-judge panel or en banc: review the evidence presented to the district court *de novo*, and substitute its own factual and evidentiary determinations for the district court's. *See United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (appellate court does not review district court's findings of fact and its application of those findings of fact to the correct legal standard *de novo*, but, rather, for whether they are "illogical, implausible, or without support in inferences that may be drawn from facts in the record."); *see also Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) (en banc court rehearing case sits in same role as panel hearing the case on appeal for the first time). Defendants argue, for example, that the World Professional Association for Transgender Health ("WPATH") Standards of Care do not establish the accepted standard of the medical community. Dkt. 99 at 10. As the panel found, however, the district court properly rejected that argument based on overwhelming evidence in the record, including, *inter alia*, adoption of the WPATH standards by major medical, mental health, and correctional healthcare groups in the United States, reliance by every expert in the case, including Defendants' experts,

"on the WPATH Standards in rendering an opinion," and the State's own admissions that the WPATH Standards "provide the best guidance" and "are the best standards out there." Dkt. 96-1 at 14. Defendants also challenge the district court's credibility determinations regarding Defendants' experts and witnesses, and subsequent factual findings. Dkt. 99 at 10-14. However, the panel employed the correct deferential "clear error" standard to review the district court's credibility and fact determinations. Dkt. 96-1 at 47; *Hinkson*, 585 F.3d at 1251. Finding that "[t]he district court's detailed factual findings were amply supported by its careful review of the extensive evidence and testimony," Dkt. 96-1 at 9, the panel "reject[ed] the State's portrait of a reasoned disagreement between qualified medical professionals." *Id.* at 9-10; *see also id.* at 38-39 (summarizing district court's credibility determinations and factual findings); *id.* at 51-63 (examining district court's credibility determinations in detail).

In sum, the panel's rejection, consistent with settled precedent, of the arguments Defendants make again in their petition does not constitute a conflict of law or extraordinary question of law appropriate for rehearing en banc. Both the district court and the panel applied well-established Eighth Amendment law to a context district courts and appellate panels routinely address: the serious medical need of an incarcerated person, and the deliberate refusal of prison authorities to provide necessary treatment. The fact that this case concerns a transgender plaintiff, or the serious medical condition of gender dysphoria, does not change the Eighth Amendment legal analysis or render the case extraordinary. *See Rosati*, 791 F.3d at 1040.

III. The Panel's Ruling that the Injunctive Relief Order Satisfies PLRA Requirements Is Consistent with Precedent

The panel correctly concluded that the district court's injunction satisfied the PLRA's requirements that prospective relief "is narrowly drawn, extends no further

than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A); Dkt. 96-1 at 42-44. Consistent with Circuit precedent, the panel focused on whether the substance of the district court's findings reflect consideration and satisfaction of the elements set forth in the PLRA. *Id.* at 43 ("'What is important, and that the PLRA requires, is a finding that the set of reforms being ordered—the 'relief'—corrects the violations of prisoners' rights with the minimal impact possible on defendants' discretion over their policies and procedures.'") (quoting *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010)*; see also Armstrong*, 622 F.3d at 1070 ("[W]e understand the statutory language to mean that the courts must do what they have always done when determining the appropriateness of the relief ordered: consider the order as a whole."); *Gilmore v. Cal.*, 220 F.3d 987, 1008 n. 25 (9th Cir. 2000) ("We do not read this to mean that explicit findings must have been made, so long as the record, the court's decision ordering prospective relief, and relevant caselaw fairly disclose that the relief actually meets the § 3626(b)(2) narrow tailoring standard."). Defendants have not cited any Ninth Circuit cases interpreting the PLRA to require a court to use the exact "needs-narrowness-intrusiveness" words where the court has otherwise reflected its consideration of the PLRA standard.

Nor does the panel's decision conflict with *United States v. Sec'y, Fla. Dep't of Corr. ("FDOC")*, 778 F.3d 1223 (11th Cir. 2015), as Defendants contend. In that case, "the parties did not mention the PLRA in any of their briefs or during the hearing on the motion. And the district court did not mention the statute in its order entering the preliminary injunction or any of its later orders regarding the scope of that injunction." *Id.* at 1229. Based on those facts, the Eleventh Circuit determined the PLRA requirements were not satisfied. *Id.* Here, the panel noted the district court expressly enumerated the applicable PLRA requirements for injunctive relief

when setting forth the legal standards governing its consideration of Plaintiff's motion, and made substantive findings that the relief satisfies PLRA requirements. Dkt. 96-1 at 43. Moreover—and again in contrast to the Eleventh Circuit case—in response to the limited remand, the district court "note[d] that its original injunction complied with the Prison Litigation Reform Act's requirement that the Court consider and make certain factual findings regarding the scope of the injunction," and, "in an abundance of caution," expressly found that its injunction satisfied the needs-narrowness-intrusiveness requirements. D. Dkt. 196 at 2 n.2; *see FDOC*, 778 F.3d at 1229 (considering whether district court's later orders addressed PLRA requirements). Accordingly, even if there had been any question regarding the sufficiency of the district court's order with respect to the PLRA requirements, that issue was fully cured during the appeal. Dkt. 96-1 at 45 n.12 (noting that the "district court, incorporating its previous [PLRA] findings, renewed the injunction.").

CONCLUSION

Defendants have not satisfied the standard for the exceptional and disfavored step of rehearing this case en banc. This Court should deny Defendants' petition.

DATED: September 30, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-35017, 19-35019

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Signature _____s/Lori Rifkin_____ **Date** September 30, 2019
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