UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA CAVAZOS, et al., Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior, et al., Defendants.	)	Civil Action No. 1:18-cv-0891-CKK

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Defendants' Motion to Dismiss should be rejected for several reasons. *First*, the Defendants do not contend—because they cannot—that Plaintiffs have failed to inform them of their claims. As the Complaint makes clear, Plaintiffs have done so repeatedly, formally and informally, for nearly three years. *Second*, the regulations on which Defendants rely do not require further exhaustion in this case. For that reason, § 704 of the Administrative Procedure Act ("APA") imposes no duty on Plaintiffs to exhaust. *Third*, dismissing this action and returning it to the agency for further proceedings would serve no purpose and would be futile. Defendants have unequivocally declared that they disagree that the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act requires them to take any action, Defs.' Mem. at 2 n.1, ECF No. 10-1, a position also relayed through their failure to respond to Plaintiffs' repeated requests. And *fourth*, further delay would irreparably harm Plaintiffs, who continue to be denied their tribal identity and access to essential tribal resources. This Court should not require Plaintiffs to engage in a pointless, harmful exercise.

II. FACTS AND PROCEDURAL HISTORY

This case arises under the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act, Pub. L. No. 99-346, 100 Stat. 674 (1986) (the "Judgment Funds Act" or "JFA"). Congress enacted the JFA to resolve a dispute over eligibility for membership in the Saginaw Chippewa Indian Tribe ("Tribe") by requiring that the Tribe permanently grant membership to the Plaintiffs and by forbidding the Tribe from discriminating against Plaintiffs in the future. Compl. ¶ 3, ECF No. 1. To achieve this purpose, the JFA assigns the Secretary of the Department of the Interior (the "Secretary") the duty to enforce the JFA's requirements, including

the provisions mandating that the Tribe enroll Plaintiffs and prohibiting the Tribe from discriminating against them. *Id.* ¶ 4.

Nevertheless, in 1996, in contravention of the requirements of the JFA, the Tribe attempted to disenroll those members who were enrolled pursuant to the JFA, including some of the Plaintiffs. *Id.* ¶ 52. These attempts to disenroll Plaintiffs continued over the intervening years, until the Tribe successfully disenrolled Plaintiffs, beginning in 2015. *Id.* ¶ 58.

Plaintiffs repeatedly have sought to inform the Secretary of the Tribe's illegal actions and to spur the Secretary to take the corrective action required by the JFA. *Id.* ¶¶ 61–64. Specifically, Plaintiffs, through prior counsel, first contacted Bureau of Indian Affairs ("BIA") officials in 2015, asking that the agency take action to stop the Tribe from unlawfully disenrolling tribal members. *Id.* ¶ 61. On October 19, 2016, having received no response, Plaintiffs filed a formal Petition with the Department of the Interior ("Interior"), requesting that the Secretary enforce the JFA. *Id.* ¶ 63. The Petition explained that the JFA required the Secretary to remedy the discriminatory disenrollments. *Id.* Additionally, the Petition asked that the Secretary take action to compel the Tribe to stop unlawfully disenrolling members and to re-enroll the disenrolled Plaintiffs, as the JFA requires. *Id.*

Since filing the Petition, Plaintiffs have continued to communicate with Interior officials, including Defendants, in a further attempt to prompt the Secretary to take the actions required by the JFA. *Id.* ¶ 64. To date, Defendants have not responded to Plaintiffs or taken any actions to enforce the JFA.

As a result of their disenrollment and the Secretary's failure to act, Plaintiffs have suffered extreme hardship. Expulsion from the Tribe has caused Plaintiffs to suffer serious stigmatic injury, including the loss of their claim to their tribal heritage, identity, and status. *Id.* ¶¶ 2, 65.

Disenrollment also has stripped Plaintiffs of access to tribal resources and the benefits and privileges of tribal membership, such as access to vital healthcare services, the right to vote on tribal matters, per capita payments, and subsidized educational benefits. *Id.* ¶ 65.

Plaintiffs commenced this action by filing their Complaint against the Defendants on April 16, 2018. ECF No. 1. On August 17, 2018, Defendants filed the instant Motion to Dismiss. ECF No. 10.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a party to move to dismiss a complaint for "failure to state a claim upon which relief can be granted."[1] Fed. R. Civ. P. 12(b)(6). "[I]n order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and internal quotation marks omitted), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). In considering a Rule 12(b)(6) motion to dismiss, a court must "view the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 134 (D.D.C. 2013).

[1] Defendants have moved to dismiss this action under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Defs.' Mem. at 6–7. For the reasons discussed below in Sections IV.B. and C., a motion to dismiss for failure to exhaust administrative remedies under the APA properly is brought under Rule 12(b)(6), not 12(b)(1). *See M2Z Networks, Inc. v. F.C.C.*, 558 F.3d 554, 558 (D.C. Cir. 2009); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011).

IV. ARGUMENT

A. No Statute or Regulation Requires Plaintiffs to Further Exhaust Administrative Remedies.

In 2015, Plaintiffs first requested that the agency take action to force the Tribe to stop immediately the unlawful and discriminatory disenrollment proceedings. Compl. ¶ 61. No Interior official responded to this request. *Id.* ¶¶ 62. After waiting over a year for a response, Plaintiffs submitted a formal Petition to the Department of the Interior on October 19, 2016. *Id*. ¶ 63. Following the submission of that Petition, Plaintiffs continued to communicate with BIA officials to prompt the Secretary to act on his mandatory duty to enforce the JFA, including its antidiscrimination mandate. *Id.* ¶ 64. Defendants do not dispute that Plaintiffs have provided Defendants with notice of their claims and ample opportunities to respond.

Additional exhaustion by the Plaintiffs is not required. *See Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1488–89 (D.C. Cir. 1983) (explaining that the purposes of exhaustion include giving "the agency a chance to discover and correct its own errors" and that exhaustion should not be used to bar the court's consideration of an issue where the purposes of doctrine are not advanced). No statute requires exhaustion. *See* 5 U.S.C. § 704 (mandating exhaustion only where "expressly required by statute" or where the agency "requires" such procedure "by rule and provides that the action meanwhile is inoperative"); *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (stating APA limits exhaustion requirement to procedures that "the statute or rule *clearly mandates*" (emphasis added)). The JFA does not require exhaustion or even set forth any procedure a party can or must follow in order to secure the required action by the Secretary.

Additionally, no regulations apply to this dispute. The Secretary has promulgated no regulations pursuant to the JFA either delegating any of his duties to other officials or setting out

any procedure through which those aggrieved by his failure to carry out his duties can contest his inaction.

Nor do the BIA's general regulations, promulgated pursuant to the general housekeeping statute, 5 U.S.C. § 301, require exhaustion. These regulations contemplate appeals from the action or inaction of subordinate Interior officials, up through the relevant chain of command. *See* 25 C.F.R. §§ 2.3–2.4. Although Defendants provide Plaintiffs and this Court with a detailed chart outlining the BIA regulations, they fail to identify any official subordinate to the Secretary with decision-making responsibility under the JFA. *See* Defs.' Mem. at 9; *see also id.* at 8 (failing to identify subordinate officials and instead using only general terms to contend that Plaintiffs failed "to notify *a BIA official*" and to "appeal the alleged inaction to *one of the senior officials tasked with deciding an appeal*" (emphasis added)).

Requiring Plaintiffs to exhaust a procedure that is not tailored to their situation and does not align with the relevant statutory scheme makes no sense. *See United States v. Hughes*, 813 F.3d 1007, 1010 (D.C. Cir. 2016) ("[E]ven assuming an available administrative remedy, § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, imposes no prerequisite of administrative exhaustion unless it is 'expressly required by statute or agency rule.'" (quoting *Darby*, 509 U.S. at 143)).

Even if the BIA regulations do apply, the regulations on which Defendants rely do not "require" an administrative appeal. Sections 2.6 through 2.10 of the regulations set out the BIA procedures governing appeals of agency decisions and inaction. *See* 25 C.F.R. §§ 2.6–2.10. Section 2.6(a) states, in relevant part, that:

> No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704 . . . .

Id. § 2.6(a). In this case, there is no decision from which Plaintiffs could have appealed. Despite the passage of nearly two years from the submission of Plaintiffs' Petition on October 19, 2016, Defendants have taken no action, let alone made a "decision." The only response Defendants have provided is their contention in the Motion to Dismiss that they have no intention of granting Plaintiffs the relief they seek. *See* Defs.' Mem. at 2 n.1. For this reason, § 2.6(a) does not preclude judicial review.

Section 2.8(a) is equally unavailing. It merely sets out a discretionary appeal process that a party *may* choose to invoke in the face of agency inaction. It requires nothing. The regulation provides that a "person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, *can make the official's inaction the subject of appeal*." *Id.* § 2.8(a) (emphasis added). The permissive language of this provision belies the claim that § 2.8(a) requires Plaintiffs to appeal a non-existent decision or the BIA's refusal to respond after nearly three years.[2] *See Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (collecting cases) ("[W]hen a statutory

[2] The Tenth Circuit, the only circuit to have considered this issue, determined—in a case where the BIA already had attempted to intervene on behalf of the plaintiffs—that the regulations did require exhaustion. *Gilmore v. Weatherford*, 694 F.3d 1160, 1169–70 (10th Cir. 2012). *Gilmore* presented a different situation from the case at hand. The *Gilmore* plaintiffs sought BIA intervention regarding the allegedly improper sale of portions of a mining byproduct—some of which was owned by the plaintiffs and could not be sold, and some of which was owned, and allegedly being sold, by another person. *Id*. at 1164–65. In that case, the BIA had responded to the plaintiffs' outreach, and had attempted to broker an agreement between the plaintiffs and the seller. *Id.* at 1165–66. These attempts were ongoing, with the seller continuing to make offers to the plaintiffs to resolve the dispute even as the case was filed. *Id.*

Additionally, *Gilmore* did not properly address the ambiguity in the BIA regulations. In accordance with a century of precedent recognizing the Indian canon of construction, any ambiguity should be resolved in favor of those the scheme was designed to protect. *See Haley v. Seaton*, 281 F.2d 620, 623 (D.C. Cir. 1960) (citing *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941); *Choate v. Trapp*, 224 U.S. 665, 675 (1912)). Because there is ambiguity as to whether § 2.8(a) of the BIA regulations is mandatory, this ambiguity should be resolved in favor of Plaintiffs.

provision uses both 'shall' and 'may,' it is a fair inference that the writers intended the ordinary distinction."); *see also* 3 Norman J. Singer & J.D. Shambie, Statutes & Statutory Construction § 57:11 (7th ed. 2007).

The APA establishes that a party's choice to bypass optional procedures is no bar to judicial review. *See Darby*, 509 U.S. at 147 ("Section 10(c) [of the APA, 5 U.S.C. § 704] explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well."); *see also CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1078 (D.C. Cir. 2009) ("[A]bsent a statutory or regulatory *requirement*, courts have no authority to require parties to exhaust administrative procedures before seeking judicial review." (emphasis added)). In this case, Plaintiffs did all that was required; they notified Defendants of their claims and gave them the opportunity to respond.

B. Even If Exhaustion Were Required, the Court Should Excuse Any Failure to Exhaust.

Equally unavailing is Defendants' claim that Plaintiffs' alleged failure to exhaust administrative remedies implicates the Court's subject matter jurisdiction. *See* Defs.' Mem. at 10, 12–15. The subject matter jurisdiction of this Court does "not depend upon the APA, which 'is not a jurisdiction-conferring statute.'" *Oryszak v. Sullivan*, 576 F.3d 522, 524 (D.C. Cir. 2009) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 183 (D.C. Cir. 2006)); *see also Califano v. Sanders*, 430 U.S. 99, 106–07 (1977). Rather, the Court has subject matter jurisdiction to review agency action pursuant to the "federal question" statute, 28 U.S.C. § 1331. *Oryszak*, 576 F.3d at 524–25; *see also Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 424 (6th Cir. 2016).

Accordingly, the asserted absence of an element of a claim under the APA—here, exhaustion—does not affect the Court's jurisdiction.[3] *See M2Z Networks, Inc. v. F.C.C.*, 558 F.3d 554, 558 (D.C. Cir. 2009) ("The Administrative Procedure Act (APA) does not pose a barrier to jurisdiction because judicial exhaustion requirements under the APA are prudential only."); *Dhakal v. Sessions*, 895 F.3d 532, 538 n.9 (7th Cir. 2018) ("[B]ecause the APA is not a jurisdiction-conferring statute, [the] elements of a claim under the APA, including exhaustion, are not jurisdictional." (citation and internal quotation marks omitted)); *see also Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("[T]he proposition that the review provisions of the APA [including § 704] are not jurisdictional is now firmly established.").

Because the APA's exhaustion requirement is prudential, not jurisdictional, the Court has discretion to excuse any failure to exhaust if it finds that the litigants' interest in immediate judicial review outweighs the government's interest in adhering to the administrative process. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004); *see also Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 128 n.19 (D.D.C. 2017) ("Because the [APA's exhaustion requirement] is prudential, the Court will consider if any failure to exhaust by Plaintiffs may be excused."). That balance tips in favor of excusing any requirement to exhaust where, as here, "further pursuit of an administrative remedy would be futile" or "delaying judicial review would cause irreparable injury" to the plaintiffs. *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir. 2007).

[3] The "final agency action" requirement also is not jurisdictional. *Trudeau*, 456 F.3d at 184–85 (explaining that the final agency action requirement determines whether a plaintiff has a cause of action under the APA); *see also Sierra Club*, 648 F.3d at 854.

1. Further exhaustion by Plaintiffs would be futile.

The purpose of the exhaustion requirement is not to "exhaust" the plaintiff, but to serve three main goals: first, to preserve the agency's autonomy by allowing the agency an opportunity to correct its own errors and exercise its lawful discretion; second, to aid eventual judicial review by allowing for a full development of the facts; and third, to promote judicial economy by "increasing the possibility that no judicial decision will be necessary." *Athlone*, 707 F.2d at 1488. Requiring Plaintiffs to return to the agency for further proceedings would serve none of these purposes.

First, Defendants have stated—clearly and unequivocally—that they "disagree with Plaintiffs that the Judgment Fund[s] Act requires the Department to take the particular actions that Plaintiffs assert." Defs.' Mem. at 2 n.1. They also have broadcast this position through their inaction—namely, refusing to respond to Plaintiffs' repeated requests for intervention for nearly three years. *See* Compl. ¶¶ 61–64. In light of Defendants' clearly expressed position, it is apparent that Defendants will take no action to remedy the Plaintiffs' ongoing injury. Where it is clear that any further efforts to elicit action from an agency will result in a certain adverse decision, it is futile to require a plaintiff to exhaust administrative remedies. *See Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105–06 (D.C. Cir. 1986) (concluding administrative delay can warrant application of futility exception "where it appears that agency inaction is in reality a statement by the agency of its unwillingness to consider the issue"); *Keating v. F.E.R.C.*, 569 F.3d 427, 432 (D.C. Cir. 2009) (finding further exhaustion futile even though Plaintiff did not fully exhaust all administrative remedies, where agency had weighed in on the merits of the precise

issue at hand and made its position known). Dismissing this case in favor of further agency proceedings would serve no purpose.[4]

Second, there is no dispute as to the facts such that the Court would benefit from fuller development of them at the agency level. Defendants do not contest the well-pleaded factual allegations in Plaintiffs' Complaint. Instead, the parties agree that the question here is strictly a legal one that requires the Court's interpretation of a statute to resolve: whether the "Judgment Fund[s] Act requires the Department to take the particular actions that Plaintiffs assert." Defs.' Mem. at 2 n.1. This controversy does not risk "invad[ing] the field of agency expertise or discretion." *Athlone*, 707 F.2d at 1489. To the contrary, because the dispute "relates to the meaning of . . . statutory term[s]" establishing the Secretary's duties under the JFA, it "presents issues on which courts, and not [administrators] are relatively more expert." *Id.* at 1488–89 (citation and internal quotation marks omitted) (concluding the purposes of exhaustion would not significantly be advanced by postponing judicial consideration of the "strictly" legal question whether the Consumer Products Safety Commission has the "statutory authority to assess civil penalties in an administrative proceeding"); *see also Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984) (concluding no need for exhaustion because the issue—the scope of the Secretary of Energy's statutory authority—was strictly legal, and factual development or application of agency expertise would not aid the court).

[4] Plaintiffs do not base their futility argument on subsequent, analogous agency action in other cases. *Compare Athlone*, 707 F.2d at 1489 (concluding, based on ruling agency made after case was filed in federal court, that it was "highly unlikely" agency would change its position on remand), *with Tesoro Ref. & Mktg. Co. v. F.E.R.C.*, 552 F.3d 868, 874 (D.C. Cir. 2009) (stating plaintiff could not rely on subsequent decisions of agency in other actions to show futility). Instead, Plaintiffs rely on Defendants' (in)actions and statements *in this matter*, about the precise issue that Plaintiffs have already raised with the agency. *See Keating*, 569 F.3d at 432. Accordingly, the Court would not risk "retroactively permitting [the plaintiff] to avoid agency adjudication" in a manner that would undermine an agency's authority. *Tesoro*, 552 F.3d at 875.

Third, judicial economy will not be served. The agency has announced its intention here. Should Plaintiffs be forced to return to the agency for further proceedings, the only effect will be to prolong the time during which Plaintiffs remain in limbo, harmed daily by the denial of their tribal membership. This case would return to Court with nothing gained and much lost.

2. Delaying judicial review would cause Plaintiffs irreparable harm.

The Secretary's inaction in the face of Plaintiffs' disenrollment from the Tribe has irreparably harmed, and will continue to irreparably harm, Plaintiffs. Expulsion from the Tribe is a devastating loss of the Plaintiffs' claim to their heritage, identity, and status as tribal members. Compl. ¶¶ 2, 65.

Disenrollment also has stripped Plaintiffs of the benefits and privileges of tribal membership, including access to vital healthcare services and the right to vote on tribal matters. *Id.* ¶ 65. Courts have found that similar injuries constitute irreparable harm. *See Bowen v. City of New York*, 476 U.S. 467, 483–84 (1986) (disability-benefit claimants would be irreparably harmed if forced to exhaust administrative remedies because "[m]any persons have been hospitalized due to the trauma of having disability benefits cut off"); *Duggan v. Bowen*, 691 F. Supp. 1487, 1508 (D.D.C. 1988) ("elderly, sick and poor" plaintiffs "surely are suffering irreparable harm and would continue to suffer such harm if needlessly forced to further fight the agency"); *Hummel v. Brennan*, 469 F. Supp. 1180, 1187 (E.D. Pa. 1979) (loss of voting rights constituted irreparable injury such that preliminary injunction was warranted).

These harms are irreparable; they are "both great and certain to occur, and for which legal remedies are inadequate." *See Xia v. Kerry*, 73 F. Supp. 3d 33, 42 (D.D.C. 2014), *clarified on denial of reconsideration*, No. 14-0057 (RCL), 2015 WL 11070246 (D.D.C. Mar. 25, 2015) (quoting *Beattie v. Barnhart*, 663 F. Supp. 2d 5, 9 (D.D.C. 2009)). This is not a situation where

"adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 127 (D.D.C. 2006) (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Nor "where the exhaustion requirement affects only the timing, [and] not the effectiveness of judicial review." *Randolph-Sheppard Vendors of Am.*, 795 F.2d at 109 (citation and internal quotation marks omitted). To the contrary, delaying judicial review would continue to cause Plaintiffs irreparable injuries—including the deprivation of the special privilege of tribal membership, access to healthcare, and the right to vote in tribal matters—that are not compensable through, for example, the retroactive payment of benefits.

C. Any Failure to Exhaust Administrative Remedies Has No Effect on the APA's Waiver of Sovereign Immunity.

Contrary to Defendants' assertion, *see* Defs.' Mem. at 12, the waiver of sovereign immunity embodied by § 702 of the APA "applies regardless of whether the elements of an APA cause of action are satisfied," *Trudeau*, 456 F.3d at 187. Put differently, even if there were no final agency action due to a failure to exhaust administrative remedies, the waiver of sovereign immunity stands. *Id.* (holding sovereign immunity waiver "applies regardless of whether [challenged agency conduct] constitutes 'final agency action.'"); *see also Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 304 & n.6 (D.D.C. 2018).

Accordingly, Defendants' argument that any failure to exhaust administrative remedies abrogates the APA's waiver of sovereign immunity must fail.[5]

[5] Defendants' argument that Plaintiffs' claims are not ripe because of a failure to exhaust administrative remedies merely restates their other arguments. As such, it fails for the reasons set forth above.

V. CONCLUSION

The Court should deny Defendants' Motion to Dismiss. Defendants cannot dispute that Plaintiffs have notified them—formally and informally—of Plaintiffs' claims. Nor can Defendants dispute that they have failed to respond to Plaintiffs for nearly three years. Neither the JFA nor any regulations require Plaintiffs to further exhaust their administrative remedies. Moreover, requiring Plaintiffs to return to the agency for further proceedings would be futile. Defendants have clearly stated that they disagree with Plaintiffs' claims, and their inaction indicates their unwillingness to consider Plaintiffs' request. Delaying judicial review would irreparably harm Plaintiffs, who continue to be denied their Tribal identity and access to tribal resources and benefits.

Respectfully submitted this 14th day of September, 2018.

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