



**PROCEEDINGS**

1  
2 THE COURT: Good afternoon. This is Jeff Brown  
3 at the federal courthouse in Galveston. This is a hearing  
4 in Cause Number 3:21-CV-317, Rodden and others v. Fauci  
5 and others.

03:11:34

6 Would the attorneys make their appearances for the  
7 record, starting with the attorneys for the movants.

8 MR. VECCHIONE: Yes, Your Honor. This is John  
9 Vecchione for the plaintiffs. And I am joined by Rob  
10 Henneke. And I may be joined by Harriet Hageman and Jenin  
11 Younes at some point. I don't know if they are on, but  
12 they won't be arguing.

03:11:55

13 THE COURT: Okay. Great. Welcome.

14 MS. HAGEMAN: Harriet Hageman is on.

03:12:08

15 THE COURT: Great. Welcome to all of you.

16 And for the defense.

17 MR. RODRIGUEZ: Your Honor, this is Jimmy  
18 Rodriguez from the U.S. Attorney's Office. I feel a  
19 little bit like the Lone Ranger in that I don't have my  
20 DOJ handlers on the call.

03:12:21

21 THE COURT: All right. One riot. One ranger.

22 MR. RODRIGUEZ: Yeah. Exactly.

23 THE COURT: Okay. Let me tell y'all kind of what  
24 I'm hoping to cover, and then I'll hear back from y'all on  
25 what you think we need to -- what you think we need to get

03:12:34

1 covered.

2 We have got -- I have got a hard deadline of just over  
3 an hour from now tops on -- we don't have to spend that  
4 much time, but we can't today spend more than that.

03:12:54

5 I know that -- I recognize that I have briefing from  
6 the movants and not from the defense yet, and I do not  
7 intend to rule on anything until I get some real briefing  
8 from the defense.

03:13:14

9 So to the extent that -- and I want to talk about --  
10 at some point during this hearing I want to talk about a  
11 post-hearing briefing schedule with y'all, but I wanted to  
12 reassure you that the time that we spend this afternoon is  
13 not all the time that you are going to have in this case  
14 on this issue.

03:13:33

15 But I want to start. I have some questions for the  
16 plaintiffs that I want to start with. Mr. Vecchione, are  
17 you going to take the lead?

18 MR. VECCHIONE: I am, Your Honor.

19 THE COURT: Did I say your name correctly?

03:13:48

20 MR. VECCHIONE: Beautifully, actually.

21 THE COURT: Oh, great. Thanks. All right.

22 As far as the scope of the relief that you are looking  
23 for, are y'all looking for a nationwide injunction or a  
24 more limited in geographic reach?

03:14:03

25 MR. VECCHIONE: Nationwide because it's a class

1 action, Your Honor; and we're asking it for the class.

2 THE COURT: Right. Right. Are you aware of any  
3 other lawsuits that are seeking -- around the country that  
4 are seeking this same relief; and if so, how many there  
5 are?

03:14:18

6 MR. VECCHIONE: I believe we are the only natural  
7 immunity case that has been filed. In other words, this  
8 is a -- to one extent, it's limited. It's for federal  
9 civilian employees who have natural immunity and have  
10 taken the antibody test so they can show it. I don't -- I  
11 don't know of any other case like that that's been filed  
12 in the country.

03:14:33

13 THE COURT: Okay. And what do you contend is the  
14 real deadline here? Like, if I don't get relief from the  
15 Court by this date, it won't do me any good to get it at  
16 all.

03:14:49

17 MR. VECCHIONE: I believe it's the 28th because  
18 in the 22nd -- on the 22nd of November I believe the  
19 federal agencies and the federal government and the United  
20 States will begin having negative employment consequences  
21 for anyone who falls within the class and hasn't gotten  
22 vaccinated. I believe it starts on the 22nd; but there is  
23 five days of counseling which stops, you know, the real --  
24 what I call the real negative employment consequences.

03:15:05

03:15:30

25 So I believe it's November 28th. But I did call

1 Mr. Rodriguez to say that I am willing to be disabused of  
2 that.

3 THE COURT: All right. Mr. Rodriguez, do you  
4 agree with that?

03:15:44

5 MR. RODRIGUEZ: I agree that there is a five-day  
6 counseling period that will take place before any  
7 enforcement action against any federal employee takes  
8 place; and as far as I know, no employee named here or  
9 that I'm otherwise aware of, none of that counseling has  
10 begun. So if it begins on the 22nd, then it would be five  
11 days of counseling from that date.

03:16:04

12 But, Your Honor, in dealing with the named plaintiffs  
13 here, ten of the eleven named plaintiffs, based on  
14 information that I have received -- and I have been  
15 scrambling to get information and I've got my latest  
16 update as of about an hour ago -- ten of the eleven  
17 plaintiffs here have requested an exception.

03:16:19

18 So part of the process, you can ask for an exception  
19 for religious or medical reasons. Ten of the eleven  
20 plaintiffs have asked for an exception. So as long as  
21 that exception is pending, there is no enforcement or  
22 disciplinary action that is going to be taken against  
23 them.

03:16:37

24 If any of those exceptions are denied, which I have no  
25 basis to say "yea" or "nay" on or speculate about whether

03:16:49

1 they will or won't; but if any of those exceptions are  
2 denied, then they will have 14 days from that denial of  
3 the exception to start the vaccination process.

03:17:09 4 And then there is one plaintiff, a named plaintiff,  
5 that has not, as far as I can tell and been able to  
6 identify, has not applied for an exception and that is  
7 Ms. Mezzacapo, which she is covered by a  
8 collective-bargaining agreement. And so she is entitled  
9 to additional procedural protections that employees of the  
03:17:27 10 federal government in general are not entitled to. As a  
11 result of that, the agency has advised me that the  
12 earliest that a proposed termination could take place  
13 would be the beginning of the next year.

14 But this is just a long way of, Your Honor, saying  
03:17:46 15 that I don't believe that there is any imminent risk of  
16 someone being fired or even proposed for termination in  
17 the near future. And when I say "near future," I would  
18 say next seven or ten days.

19 I would ask that Your Honor provide leave until Monday  
03:18:01 20 to file a response. I want my response to be helpful to  
21 the Court. I want to provide all the information that I  
22 need to the Court so the Court can make a sound decision,  
23 whatever that decision is.

24 And I, of course, want to be able to answer any  
03:18:20 25 questions the Court has in that briefing in black and

1 white. Even the things that I've just said today, you  
2 know, as a trial attorney it always makes me nervous to be  
3 talking about these timelines and facts without affidavits  
4 and declarations of the people who really know and having  
5 that evidence before the Court.

03:18:37

6 So I want to gather all of that and provide it to the  
7 Court; and, of course, I want to address the merits of the  
8 plaintiffs' claims in writing.

9 THE COURT: Mr. Vecchione, are you disabused?

03:18:57

10 MR. VECCHIONE: I'm not fully disabused because I  
11 don't -- I don't know which of the clients. I did know  
12 some of them told me they were going to apply for an  
13 exemption of some sort, but I didn't -- I'm unaware  
14 whether it's ten or not. I could find that out. And I  
15 don't know anything about any collective-bargaining  
16 situation for anybody.

03:19:12

17 I do know that it's a class, though, and I don't know  
18 that it applies to the whole class. I am getting  
19 inundated with calls from everybody all over the country  
20 and e-mails and ever -- ever since I filed this thing, I  
21 have been getting calls; and I have just put them off and  
22 said, well, listen, if you are in the class that will --  
23 you know, I don't want to amend and put hundreds of people  
24 on a complaint, Your Honor.

03:19:25

03:19:41

25 So I do know that there are other people affected, and

1 it was filed as a class action. So even if the individual  
2 plaintiffs get a little extra time, I don't think that  
3 solves the problem; but I cannot say that anything  
4 Mr. Rodriguez just said is untrue or wrong.

03:19:58

5 THE COURT: Okay. What do you think about his  
6 proposal to get some briefing in to me by the close of  
7 business next Monday?

03:20:18

8 MR. VECCHIONE: Well, Your Honor, I think that's  
9 a quick timeline for him and I'm happy to wait but I don't  
10 see why that there couldn't be -- when I originally filed  
11 this, I thought the TRO, because everything was emergent,  
12 might have to be issued before there were written  
13 documents, and the Court has indicated you don't want to  
14 do that.

03:20:36

15 I don't know, though, whether or not people are going  
16 to start being fired willy-nilly who are part of the class  
17 but are not here. So that's my real concern.

03:20:51

18 Obviously, if the representations of counsel are  
19 correct, then I am happy to wait for the filing of papers  
20 to have a full -- a fuller discussion of this.

21 But it does seem to me that counsel can't represent  
22 that the members of the class aren't going to start being  
23 fired *en masse* after the 28th.

03:21:10

24 MR. RODRIGUEZ: Your Honor, this is Jimmy  
25 Rodriguez, if I may.



1 THE COURT: Yes. Go ahead.

2 MR. RODRIGUEZ: I think, you know, the class  
3 representatives must, of course, be effectually  
4 representative of the class. So if ten of the eleven have  
03:21:25 5 applied for the exception and the one that hasn't is a  
6 part of a collective-bargaining agreement that provides  
7 additional time, those named class members can't purport  
8 to represent class members who are in different factual  
9 situations.

03:21:38 10 I understand why, you know, opposing counsel has not  
11 added additional persons up to this point; but I think  
12 there has to be one person in the factual circumstance  
13 that he is requesting relief based on.

14 THE COURT: Okay. Y'all hold on for just a  
03:21:54 15 second.

16 (Recess from 3:21 p.m. to 3:24 p.m.)

17 THE COURT: Okay. Thank you for standing by. I  
18 would like for the defense to get a brief in response to  
19 the motion for injunctive relief in by close of business  
03:24:20 20 on Monday, close of business 5:00 p.m. Central on Monday.

21 And then, Mr. Vecchione, if y'all want to get a reply  
22 brief in, you can get it in just as quickly as you can  
23 after that. I know we're talking Thanksgiving week now.

24 MR. VECCHIONE: It's all right.

03:24:36 25 THE COURT: Okay.

1 MR. VECCHIONE: Your Honor, I am -- I'll tell you  
2 what I'm going to address. And because this is emergent,  
3 I was going to have a brief in the next day. As long as  
4 Rob can file it, I can have something in Tuesday at close  
03:24:50 5 of business because I have a feeling I'm primarily going  
6 to address the case -- the Fifth Circuit decision that  
7 came out Friday night, which was not in our papers and  
8 which, you know, I think I am going to have to address  
9 that. But as soon thereafter as a hearing could have, I  
03:25:11 10 would like to put in a piece of paper that at least states  
11 that.

12 THE COURT: Okay. And one thing I would like for  
13 you to work on while Mr. Rodriguez is working on his brief  
14 is if you would kind of chase down the issues with your  
03:25:27 15 named -- with the named plaintiffs and let the Court know  
16 if Mr. Rodriguez's investigation is correct. And if so,  
17 how that does or doesn't change the urgency of the issue  
18 before us.

19 And if you would like to also throw in something about  
03:25:49 20 the -- how the Fifth Circuit opinion affects your motion,  
21 I think that would be fine, too.

22 And then that would give Mr. Rodriguez, you know,  
23 something to respond to by Monday, if you happen to get it  
24 in before then.

03:26:10 25 MR. VECCHIONE: Oh, okay.

1 THE COURT: Is that okay?

2 MR. VECCHIONE: That's fine.

3 THE COURT: Okay. And then, I'll tell you what.

03:26:21

4 I do have kind of a list of questions here, Mr. Vecchione,  
5 that came from my review of y'all's briefing. And I could  
6 run through those with you real quick, and you can answer  
7 them as you can or -- and that would also give  
8 Mr. Rodriguez an idea of some of the issues that are of  
9 interest to the Court as he is preparing his brief.

03:26:43

10 MR. VECCHIONE: I think that would be helpful,  
11 Your Honor.

12 THE COURT: Okay. Great. All right.

13 You argue for strict scrutiny. Can you win under  
14 rational basis review?

03:26:54

15 MR. VECCHIONE: I believe we can, Your Honor. We  
16 can win under rational basis because, particularly, the  
17 statutory construction of the emergency use authorization  
18 and the fact that there is no evidence that natural  
19 immunity isn't better than all the vaccines, particularly  
20 a foreign vaccine. So I believe we could, Your Honor.

03:27:15

21 But in the old days, when we were all going to law  
22 school, rational basis was anything anyone could think up.  
23 I don't know that that's the case anymore, but I do  
24 believe we could win under any review. But because this  
25 is a medical procedure on a person, I do believe strict

03:27:32

1 scrutiny is better, more accurate.

03:27:49

2 THE COURT: Well, that was my next question for  
3 you. You argue that *Jacobson* should be distinguished from  
4 this case, but if we -- if we don't look there for a  
5 standard of review, where should we look? It seems like  
6 the real injury here -- there is an argument that the real  
7 injury here wouldn't be a forcible violation of bodily  
8 autonomy but would be losing one's job.

03:28:07

9 MR. VECCHIONE: I think there are two -- there  
10 are two answers to that, Your Honor.

03:28:25

11 One is the Fifth Circuit analysis of this on Friday,  
12 which was that a jab or a job is -- interferes with your  
13 right to make your own medical decisions. So that is  
14 argued in our brief, and I think it's strengthened by what  
15 the Fifth Circuit said Friday -- Saturday -- Friday night.  
16 So I don't think that's the standard in the Fifth anymore,  
17 if it ever was.

03:28:46

18 I also think that the federal government impinging --  
19 the federal government doesn't have police powers, as we  
20 say; and in order for it to mandate some medical procedure  
21 on you, it has to have some other power from somewhere.  
22 And so part of our argument is it doesn't have that power  
23 from anywhere.

03:29:00

24 And the other argument is to the extent it did, the  
25 statutory emergency use authorization of all these

1 vaccines says you have to have informed consent. And  
2 informed consent is not, oh, we're informing you that you  
3 are fired if you don't violate your own view of your  
4 medical situation.

03:29:21

5 THE COURT: Okay. You also argue that the  
6 mandate can't survive APA review, but I can't see where  
7 the APA is implicated here. There is an executive order.  
8 But what is the agency action that brings the APA into it?

03:29:40

9 MR. VECCHIONE: It's each -- the executive action  
10 came through, and then each of the agencies puts out a  
11 mandate. That mandate is a final agency action,  
12 particularly if it goes to firing people for not having  
13 the vaccine.

03:29:53

14 The government in general, even under constitutional  
15 review rather than APA, is not -- is not supposed to act  
16 arbitrarily and capriciously. I'll give you an example,  
17 Your Honor. If people were overweight and this was seen  
18 to be a health problem and it was injuring people, if the  
19 government ordered liposuction or if the government

03:30:15

20 ordered some invasive procedure to knock down your weight,  
21 I think we would all agree, I think, that that would be  
22 violative of your rights to personal autonomy and it would  
23 be reviewed on -- it would have to be something more than  
24 just I want to do it. The government isn't allowed to

03:30:35

25 say, under either constitutional or APA, I want to do it

1 and that's the whole answer. It's got to be a little bit  
2 more than that.

03:30:53

3 THE COURT: You argue that the defendants are not  
4 giving employers the option to accept or refuse  
5 administration of the product but under the claim --

6 MR. VECCHIONE: Employees.

03:31:07

7 THE COURT: But under the plain language of the  
8 statute aren't they getting an option? It's just that the  
9 option to refuse means loss of employment. I realize that  
10 is kind of -- your argument is probably going to be, well,  
11 that's a false choice; but in a plain language  
12 interpretation of the statute, is an option being given?

03:31:21

13 MR. VECCHIONE: No. I don't think so. Because  
14 what the statute says -- and I have the language in front  
15 of me, Your Honor.

16 THE COURT: I may not have gotten it exactly  
17 right.

03:31:37

18 MR. VECCHIONE: What it says is because the EUA  
19 was put in to be an option, it was there -- it wasn't  
20 supposed to be mandatory and no one was supposed to be  
21 able to make it mandatory. And that's how it differs from  
22 other -- like, look, the military -- the president is  
23 allowed to order military members -- and there are no  
24 military members in this -- to take an EUA vaccine, but  
25 that's a special statute that says he can do that.

03:31:56

1 Here it says that the secretary has authorized the  
2 emergency use of the product. Okay. That has happened.

3 Two, of the significant known and potential benefits  
4 and risks of such use and the extent to which those  
03:32:12 5 benefits and risks are unknown. That's the other thing  
6 you have to tell the person.

7 And then, three, of the option to accept or refuse  
8 administration of the product.

9 Now, under the statute you have the right to accept or  
03:32:25 10 refuse the administrative product. That is -- that is not  
11 transferred to your employer because he doesn't like your  
12 choice. Nothing in the statute gives that to the federal  
13 government or your employer the right to make that choice  
14 for you at the loss of your job or any other -- the only  
03:32:43 15 thing the statute talks about is the risk of the drug and  
16 the benefits of the drug. It doesn't talk about risks and  
17 benefits of anything else they might do to you.

18 THE COURT: I would -- and, Mr. Rodriguez, I  
19 would flag that for you. I did find the distinction  
03:32:59 20 between -- I did find the fact that the president is  
21 expressly authorized to require the military to take these  
22 vaccines, to take these products. If Congress thought  
23 they needed to write a special statute, a special  
24 provision to authorize the president to do that, it sure  
03:33:20 25 seems like he would need the same kind of express

1 authority to compel nonmilitary civilian employees to do  
2 the same thing. So I am sure that's going to be addressed  
3 in your briefing.

03:33:39

4 Mr. Vecchione, if the -- and this is just a -- and I  
5 realize that you are trying to -- well, I appreciate the  
6 fact that this is a limited -- that you are trying to get  
7 to a limited class of plaintiffs in this case, but it does  
8 seem if the mandate is unconstitutional, it's

03:34:01

9 unconstitutional for all employees, not just those with  
10 natural immunity, right?

11 MR. VECCHIONE: Well, it would be, Your Honor.  
12 But I am -- here is the other thing. I am asking for a  
13 TRO and a preliminary injunction. So there the question  
14 of harms and benefits and all these other things come into  
15 it.

03:34:17

16 And one of the things that I believe is strongest for  
17 this class and these people are they are not a danger to  
18 anybody else. This is not the case where if the Court  
19 rules one way or the other there is, oh, the constitution  
20 has been vindicated but there are all these dangers to  
21 other people or to its own people. There is just not.

03:34:31

22 So under the TRO preliminary injunction standard,  
23 that's an equitable consideration and it's just absent  
24 here. I don't want to concern myself with all the other  
25 factual patterns of all the unvaccinated people because

03:34:52



1 those aren't my clients and also because there may be  
2 other injunctive considerations on that. They just  
3 don't -- they don't appear here.

03:35:05

4 THE COURT: Well, and you have flagged something  
5 that I want to make sure that Mr. Rodriguez covers in his  
6 briefing. I know he would. It's one of the requirements  
7 to get injunctive relief. But I think that the third  
8 requirement is -- definitely weighs in favor of the  
9 plaintiffs in this case, and that is the weighing of the  
10 harm to the plaintiffs if the injunctive relief is not  
11 granted versus the harm to the defendants if the  
12 injunctive relief is granted. Did I get that right? Harm  
13 to plaintiffs if injunctive relief is not granted versus  
14 harm to defendants if it is.

03:35:40

15 And I think that weighs very heavily in favor of the  
16 plaintiffs in this case. And so, Mr. Rodriguez, you  
17 should brief knowing that's the way the Court is looking  
18 at it right now.

03:35:54

19 MR. RODRIGUEZ: This is Jimmy Rodriguez. I  
20 appreciate that, Your Honor; and I will certainly do that.

21 THE COURT: Do you have any response right now or  
22 do you want to save it for your briefing?

03:36:06

23 MR. RODRIGUEZ: Well, on that last point -- and  
24 I'll cite cases to this fact -- I think a lot of times  
25 when the defendant is the government as opposed to the

1 run-of-the-mill defendant, that in weighing the balancing  
2 of the harms it's consolidated with the consideration of  
3 the public interests.

03:36:23

4 And there are certainly cases, including cases that  
5 have addressed and denied TRO, PI requests in the federal  
6 vaccine employee mandate context that have had a very good  
7 analyses of why the public interest actually weighs  
8 strongly in favor of the government in imposing the  
9 vaccine requirement; but, you know, that will be fully  
10 addressed in our briefing.

03:36:42

11 I would also direct the Court -- and I'll do this in  
12 the briefing -- to Judge Hughes' decision in the *Bridges*  
13 case, which was the challenge to the Methodist Hospital's  
14 vaccine requirement for their employees. In that, Judge  
15 Hughes addresses many of the issues concerning the  
16 emergency use authorization. But more importantly than  
17 that, it addresses this idea that it's some form of  
18 coercion; and Judge Hughes does a much better job than I  
19 could in explaining why, no, it is, in fact, you know, a  
20 right of an employer to impose this requirement.

03:37:17

21 And that is very much where the government is here. I  
22 know Your Honor has heard arguments concerning the  
23 government is a contractor and there are other cases,  
24 including the Fifth Circuit case, where the government is  
25 a regulator. Here the government is an employer, and it's

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1 imposing this requirement on its employees. And that  
2 takes it -- you know, makes it easily very factual  
3 distinguishable from the OSHA case but also brings it in  
4 line with this wide body of case law of recognizing an  
03:37:52 5 employer's right to impose these types of requirements and  
6 mandates on its employees.

7 But all of that will be addressed in our brief. And,  
8 Your Honor, I appreciate you giving me the time that I  
9 requested to file that brief; and I'm confident that we'll  
03:38:09 10 be able to file something that you will find helpful in  
11 making your decision.

12 THE COURT: Okay. Great.

13 Mr. Vecchione, anything to add?

14 MR. VECCHIONE: I don't, Your Honor. I will try  
03:38:20 15 to get something in earlier than his -- I think the way to  
16 do this, because I do want a decision for the folks who --  
17 this thing is coming up fast.

18 So I think what I may do is take your suggestion and  
19 put in the emergent authority that just came in and put  
03:38:41 20 something in, hopefully tomorrow night, but certainly by  
21 the next morning, so that Mr. Rodriguez can take into  
22 account that and put it in. Maybe I'll call it a  
23 supplement or something. But I'll put that in as soon as  
24 may be.

03:38:56 25 THE COURT: Okay. Great. The Court would

1 appreciate that very much.

2 And as of right now, I'm still looking at this case as  
3 the drop-dead deadline being November 28th. So that's the  
4 way the Court is looking at it until I -- and it could be  
03:39:14 5 that down the line, which won't be very long, I feel there  
6 is a reason that maybe that deadline is softer than it  
7 looks to me right now. But right now, I'm considering it  
8 a hard deadline, and that's the way that the Court is  
9 going to treat this motion for injunctive relief.

03:39:34 10 If there is not anything else, I will await the rest  
11 of y'all's briefing. And then, we'll get a ruling out to  
12 y'all as quickly as we can following that.

13 Anything else from anybody?

14 MR. HENNEKE: Judge Brown, this is Robert Henneke  
03:39:49 15 with the Texas Public Policy Foundation.

16 THE COURT: Yes, sir.

17 MR. HENNEKE: My paralegal has had a personal  
18 emergency that is making her availability very limited,  
19 and I am a one-paralegal shop. Is there a way that I  
03:40:05 20 could move here on the record for my co-counsel to be  
21 admitted *pro hac* or something that we could do so that  
22 they have access to PACER or to the ECF system or a way  
23 that we could bring that in front of the Court for  
24 consideration?

03:40:22 25 THE COURT: Hold on one second.

1 (Discussion off the record.)

2 THE COURT: Mr. Vecchione is admitted *pro hac*  
3 *vice* to the Southern District of Texas.

4 MR. VECCHIONE: Thank you, Your Honor.

03:40:48

5 MR. HENNEKE: Thank you, Your Honor.

6 THE COURT: And, Mr. Vecchione, to the extent  
7 that you need any assistance in getting set up so that you  
8 can file stuff, just shoot an e-mail or give a call to  
9 George Cardenas, my case manager; and he will help you out  
10 so that you can file it yourself.

03:41:02

11 MR. VECCHIONE: He was very helpful when I wasn't  
12 admitted. So I'm sure he will be even more helpful now.  
13 Thank you very much.

14 THE COURT: Okay. If that's it, the Court will  
15 stand in recess; and I'll await y'all's briefing. Y'all  
16 have a good afternoon.

03:41:16

17 ALL COUNSEL: Thank you, Your Honor.

18 *(Proceedings concluded at 3:41 p.m.)*

19 *Date: November 17, 2021*

20 ***COURT REPORTER'S CERTIFICATE***

21 *I, Laura Wells, certify that the foregoing is a*  
22 *correct transcript from the record of proceedings in the*  
23 *above-entitled matter.*

24 \_\_\_\_\_ */s/ Laura Wells*

25 *Laura Wells, CRR, RMR*