No. 21-30072

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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KENT ANDERSON; STEVEN DOMINICK; ANTHONY GIOUSTAVIA; JIMMIE JENKINS; GREG JOURNEE; RICHARD LANFORD; LEONARD LEWIS; EUELL SYLVESTER; LASHAWN JONES,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellee

MARLIN N. GUSMAN, SHERIFF, ORLEANS PARISH,

Defendant/Third-Party Plaintiff-Appellee

v.

CITY OF NEW ORLEANS,

Third-Party Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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# APPELLEE UNITED STATES' OPPOSITION TO OPPOSED MOTION FOR A STAY BY THIRD-PARTY DEFENDANT-APPELLANT CITY OF NEW ORLEANS

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## INTRODUCTION

The City has moved for a stay pending appeal, under Rule 8 of the Federal Rules of Appellate Procedure, of the district court's denial of its Rule 60(b) motion for relief from the district court's 2019 Orders regarding the parties' agreement to construct a new Phase III facility for inmates with serious mental-health and medical needs. This Court should deny the City's motion. First, the motion fails as a procedural matter; the stay the City seeks would not permit it to stop work on Phase III. And even if this Court addresses the merits, the City cannot satisfy the four factors the Court applies in determining whether to grant a stay under Rule 8, particularly that the City is likely to prevail on the merits.

## FACTS AND PROCEDURAL HISTORY[1]

1. Private plaintiffs filed this action in 2012 against Orleans Parish Sheriff Marlin Gusman and other officials of the Orleans Parish Sheriff's Office (collectively, OPSO), alleging unconstitutional jail conditions in violation of the Eighth and Fourteenth Amendments to the Constitution, including deliberate indifference to inmates' serious mental-health and medical needs. ROA.148-185.[2]

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[1] The underlying facts and procedural history are set forth in greater detail on pages 3-21 in the Brief for the United States as Appellee, filed with this Court in this appeal on July 27, 2021.

[2] "ROA._____" refers to page numbers of the Record on Appeal. "Br. __" refers to page numbers in the City's opening brief in support of its Motion for Stay.

(continued…)

The United States intervened, alleging, as relevant here, violations of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997. ROA.1193-1209. In October 2012, OPSO filed third-party complaints against the City of New Orleans (City), seeking funding for any prospective relief the court might order. ROA.1321-1381.

In 2013, the United States, the plaintiff class, and OPSO entered into a Consent Judgment setting forth, among other things, procedures for addressing constitutional deficiencies in the treatment of inmates with serious mental-health and medical needs. ROA.4861-4913. In mid-2016, after years of delay and disagreements about implementation of the Consent Judgment, the parties, including the City, entered into a Stipulated Agreement for Appointment of Independent Jail Compliance Director, which the district court entered as an order (Stipulated Order). ROA.11277-11297. Among other things, the Stipulated Order provided for the appointment of a Compliance Director, who would have final authority to operate the jail and to make binding decisions regarding how to implement certain aspects of the Consent Judgment. ROA.11279-11291.

The Stipulated Order also resolved a disagreement between the City and OPSO regarding control of FEMA funds provided to compensate for damage

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(…continued)
"U.S. Appellee Br. __" refers to page numbers in the Brief for the United States as Appellee.

incurred during Hurricane Katrina to a jail facility known as Templeman II. ROA.11290-11291. The Sheriff abandoned his claim to those funds in exchange for the City's agreement to use them *exclusively* for three objectives—(1) housing prisoners with mental-health and medical needs; (2) housing youthful offenders; and (3) addressing various issues regarding a jail space known as the "Docks." ROA.11290; ROA.22709-22710.

In January 2017, after extensive consultation with the parties, including the City, the Compliance Director submitted a Supplemental Compliance Action Plan (SCAP). ROA.11652-11667. The SCAP recommended the construction of a new facility known as "Phase III" within the secure perimeter of OPSO property, with 89 beds to house inmates with acute and sub-acute mental-health needs. ROA.11659-11660; ROA.22736. The Phase III facility also would include a 12-16 bed infirmary, visitation space, programming and counseling space, and a laundry. ROA.11660-11661. Before he submitted the plan to the court, the Compliance Director met with then-Mayor Landrieu and the City Attorney, both of whom accepted the recommendation. ROA.22701, 22714; see also ROA.22716-22717 (testimony from former City attorney that the City understood the Stipulated Order and the SCAP to have "resolved" the issue of housing for inmates with serious mental-health and medical issues); ROA.23211-23212 (the Compliance Director's

recommendation of an 89-bed facility was based on the City's agreement to accept that recommendation).

2. For the next two years, the City continued to represent to the district court that it was working toward constructing Phase III. But at a status conference on January 25, 2019, the City informed the court that it was interested in exploring alternatives to constructing Phase III and asked the court for more time. ROA.16464. In response, given the City's prior agreement to the Stipulated Order and to the recommendation of the SCAP, the court ordered the City to "direct the architect chosen to design the permanent facility described in the [SCAP] to begin the programming phase of the Phase III facility as soon as possible." ROA.13049 (January 2019 Order).

The City appeared at first to accept the district court's directive. A month after the court issued the January 2019 Order, the City informed the district court that it was "actively working" with the Sheriff and Compliance Director "to program, design, and construct a Phase III project that meets the requirements of the Consent Decree, and does so in a cost-effective manner." ROA.13053. Based on this representation, on March 18, 2019, the district court ordered the City and OPSO to "continue the programming phase of Phase III," to "work collaboratively to design and build a facility that provides for the constitutional treatment of [detainees with serious mental-health and medical needs] without undue delay,

expense or waste," and to provide monthly progress reports to "advise the Court of the City's progress toward construction of Phase III." ROA.13199-13200 (the March 2019 Order). For the next year, from April 2019 through April 2020, the City submitted 14 monthly reports to the district court representing that it was actively working toward designing and completing the Phase III facility. See ROA.16467-16468.

3. The City's promises proved empty. On June 5, 2020, the City unilaterally ordered the architect and project manager for Phase III to stop work. ROA.16468.

Several weeks later, on June 29, 2020, the City moved for relief under Federal Rule of Civil Procedure 60(b)(5) arguing that changed circumstances warranted relief from the district court's January 2019 and March 2019 Orders (the 2019 Orders). ROA.14076. Specifically, it argued that: (1) its current jail facilities already provide medical and mental healthcare that is above minimal constitutional standards; (2) a decrease in inmate population makes the programming, design, and construction of a new jail facility unnecessary; and (3) the COVID-19 pandemic had caused a significant budgetary shortfall for the City. ROA.14078. After the other parties opposed the City's Rule 60(b) motion, the City advanced a new argument in its reply brief—that the Prison Litigation Reform

Act (PLRA) prohibited the court from ordering the construction of a new jail facility. ROA.15413-15415.

The magistrate judge held an eight-day hearing, involving testimony from approximately two dozen witnesses. ROA.16474. Subsequently, the magistrate judge issued a 71-page Report and Recommendation recommending that the district court deny the City's motion. ROA.16447, 16517.

4. The magistrate judge first found that the City's argument that the PLRA prohibited the district court from issuing the 2019 Orders was waived because the City had not raised it until it filed its reply brief. ROA.16475-16476. The magistrate judge also concluded that, even if the argument were not waived, it lacked merit because the 2019 Orders did not "order[]" the City to build a jail. ROA.16476-16481. The magistrate judge explained that in the Stipulated Order the City bound itself to whatever plan the Compliance Director ultimately submitted, and then worked closely with the Compliance Director to fashion an acceptable plan. See ROA.16477. The magistrate judge stated that the City "did this voluntarily and as part of a binding agreement with the other parties to the litigation," and "*not * * * because it was ordered to.*" ROA.16477 (second emphasis added).

The magistrate judge then rejected each of the City's three arguments regarding changed factual circumstances. First, the magistrate judge characterized

the City's argument that the City's jail—the Orleans Justice Center (OJC)—already provided medical and mental healthcare that exceeded constitutional standards, as "plainly disconnected from reality." ROA.16483. The magistrate judge cited testimony from multiple witnesses, including the court-appointed independent monitors, who had concluded that the existing facilities were inadequate to house detainees with serious mental-health and medical needs and that "Phase III [i]s still a critical need." ROA.16485.

Second, the magistrate judge rejected the City's argument that a decline in the OJC's population rendered Phase III unnecessary. The magistrate judge pointed to evidence that the decline in the jail's population was "fully expected and therefore does not amount to 'changed circumstances' under Rule 60." ROA.16491.

Third, the magistrate judge rejected the City's arguments related to its budget. The magistrate judge explained that the City had received more than $70 million in reimbursement for Hurricane Katrina's destruction of the Templeman II facility, which it was obligated under the Stipulated Order to spend for three projects—youth housing, renovation of the "Docks" facility, and Phase III. ROA.16493-16497. The magistrate judge explained that "after renovation of the Youth Studies Center and the Docks (the other two elements of the [plan in the Stipulated Order]), some $47.9 million remains for Phase III, *just from Templeman*

*II funds*." ROA.16498 (citing ROA.15043-15044). Moreover, the City's federal grants manager had testified that approximately $81 million in FEMA funds remained available to the City and could be used for Phase III. ROA.22066; ROA.22080-22083.

The magistrate judge also rejected the City's argument that it could not afford the $9 million in annual operating costs that Phase III would require. ROA.16498-16502. The magistrate judge pointed out that the City already was incurring those operating costs while temporarily housing detainees with mental-health and medical needs at a temporary facility known as the Temporary Detention Center (TDC), which would close when Phase III opens and the detainees are transferred there. Phase III's operating costs would thus be almost completely offset by the closing of the TDC. ROA.16499-16501. And in any case, the magistrate judge pointed out that Phase III was not set to open for another three years, by which time the City was expected to have recovered financially from the COVID-19 pandemic. ROA.16501.

Finally, the magistrate judge rejected the City's proposed alternative to Phase III—a retrofit to the second floor of the OJC. The magistrate judge found that, among other reasons, the OJC's mezzanine structure was dangerous for inmates at risk for self-harm, the proposed retrofit did not include an infirmary that the City's own medical expert admitted was expected of a jail of New Orleans'

size, and there was "insufficient programming space in the retrofit plan to comply with the Consent Judgment." ROA.16485; ROA.16506-16509.

The district court adopted the magistrate judge's recommendation on January 25, 2021, and the City appealed. ROA.16616. The City's appeal is fully briefed and is pending in this Court.

5. On February 19, 2021, the City filed in the district court, under Federal Rule of Civil Procedure 62 ("Stay of Proceedings to Enforce a Judgment"), a motion for a stay pending appeal of the court's denial of its Rule 60(b) motion. ROA.16757-16774. The City argued that it met the four-prong test for a stay: (1) a strong showing of likelihood of success on the merits; (2) irreparable harm in the absence of a stay; (3) a stay would not substantially injure other interested parties; and (4) granting the stay was in the public interest. ROA.16759-16773. The plaintiffs opposed the stay, arguing, in part, that the City's motion was procedurally flawed. ROA.25506-25507.

In its reply brief, the City again switched gears. The City argued, *for the first time*, that granting a stay of the denial of the court's Rule 60(b) motion would reinstate an automatic stay of the 2019 Orders that went into effect, unbeknownst to the plaintiffs or the district court, under Section 3626(e) of the PLRA.[3]

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[3] Section 3626(e)(2) provides that "[a]ny motion to modify or terminate prospective relief" made under Section 3626(b) "shall operate as a stay during the (continued…)

ROA.25508. Under that provision, according to the City, the PLRA's automatic stay went into effect on December 26, 2020 (*i.e.*, 180 days after the Rule 60(b) motion was filed), and terminated when the district court denied the Rule 60(b) motion on January 25, 2021. ROA.25091. The City reasoned that, if the district court were to grant its motion to stay the denial of its Rule 60 motion, the termination of the automatic stay that occurred when the court denied the motion would be vacated and the automatic stay of the 2019 Orders would remain in effect. ROA.25091.

Because the City had raised a new argument, the magistrate judge permitted all plaintiffs to file sur-replies. ROA.25503.

6. After a hearing on the motion, the magistrate judge issued a Report and Recommendation recommending that the district court deny the City's motion for a stay. ROA.25503-25516. First, the magistrate judge held that the City's Rule 62 motion to stay was procedurally improper because it would not provide a path to the relief the City seeks—to stop work on the new Phase III facility. ROA.25509-25511. As the magistrate judge explained, there would be no practical effect to granting a stay because the requested stay would do nothing more than stay an

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(…continued)
period (A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or (ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and (B) ending on the date the court enters a final order ruling on the motion."

order that *denied* the City's Rule 60(b) motion for relief from the 2019 Orders. This would leave in place the status quo prior to the City's filing of its Rule 60(b) motion, under which the City *is obligated* to build Phase III. ROA.25511.

The magistrate judge also rejected the City's new argument (from its reply brief) that staying the denial of the Rule 60(b) motion would somehow reinstate an automatic stay under Section 3626(e) of the PLRA. The magistrate judge explained that because the City had originally moved for relief under Rule 60(b), not Section 3626(b) of the PLRA, there was no automatic stay. ROA.25512-25515. The magistrate judge summarized its decision this way:

> [T]here is simply no basis to find in this case that a PLRA automatic stay was ever triggered by the filing of the City's Rule 60 motion. It therefore follows that staying the effect of [the court's] denial of that motion would be an exercise in futility, as the status quo would not change in any way. As for the City's stated desire that the Court stay [the 2019 Orders], that relief is simply not procedurally available to the City, given the manner in which they originally moved for relief.

ROA.25515.

After the parties filed objections and responses, the district court adopted the magistrate judge's Report and Recommendation. ROA.25520-25555; ROA.25574-25588; ROA.25964.

7. The City now moves for a stay in this Court under Federal Rule of Appellate Procedure 8, advancing many of the same arguments that the district court rejected.

## ARGUMENT

This Court should deny the City's motion for a stay pending appeal. First, the motion fails as a procedural matter because staying the denial of the Rule 60(b) motion would simply return the parties to their respective positions before the district court ruled on the motion, when the Stipulated Order, the SCAP, and the 2019 Orders remained in full effect, with Phase III proceeding. And even if the Court were to agree with the City that the 2019 Orders were automatically stayed before the district court denied the Rule 60(b) motion, that would not allow the City to stop work on Phase III because the 2019 Orders are not the source of the City's obligation to build the Phase III facility. That obligation instead originated with the Stipulated Order and the SCAP. Finally, even if the City's motion to stay were procedurally appropriate, the City cannot satisfy the four factors the Court applies in determining whether to grant a stay under Federal Rule of Appellate Procedure 8—particularly the factor requiring it to show that it is likely to prevail on the merits.

### I

### THIS COURT SHOULD DENY THE CITY'S MOTION FOR A STAY BECAUSE GRANTING THE STAY WILL NOT PROVIDE THE CITY WITH THE RELIEF IT SEEKS

The City seeks a stay of the district court's denial of its Rule 60(b) motion, because it assumes that such a stay would permit it to stop working on Phase III.

Not so. The stay the City seeks would simply put the parties in the same position they were in before the district court ruled on the City's Rule 60(b) motion, and the Stipulated Order, SCAP, and 2019 Orders would remain in effect. For this reason alone, the motion should be denied.

*A. Staying The Denial Of The City's Rule 60(b) Motion Would Not Provide The City The Relief It Seeks—To Stop Work On Phase III*

The City's legal obligation to fund and build the Phase III facility began in January 2017 when the Compliance Director issued the SCAP. As the magistrate judge found in ruling on the City's Rule 60(b) motion, "in the Stipulated Order signed by the parties, including the City Attorney on behalf of the City, the parties agreed that the Compliance Director would submit a plan for housing inmates with mental-health and medical needs." ROA.16477; see also ROA.11290 (Stipulated Order providing that "the City, the Sheriff, and the Compliance Director shall develop *and finalize* a plan for * * * housing for prisoners with mental health issues and medical needs") (emphasis added). The magistrate judge explained that "[t]he City worked closely with the Compliance Director to fashion [the Phase III] plan," and that the City "accepted that plan and committed to it, not only to the parties but to the Court—on multiple occasions." ROA.16477. And in exchange for the City's agreement to build Phase III with FEMA reimbursement for the loss of the hurricane-damaged Templeman II facility, OPSO agreed to drop any lawsuits against the City relating to control over that funding. ROA.11290-11291.

The 2019 Orders merely instructed the City to undertake specific tasks toward fulfilling this preexisting legal obligation. See ROA.13049 (January 2019 Order instructing the City to "direct the architect chosen to design the permanent facility described in the [SCAP] to begin the programming phase of the Phase III facility as soon as possible"); ROA.13199-13200 (March 2019 Order directing the City to "continue," with the programming of Phase III, to "work collaboratively to design and build" Phase III "without undue delay, expense or waste," and to provide monthly progress reports to "advise the Court of the City's progress toward construction of Phase III"). Thus, before the district court denied the City's Rule 60(b) motion, the status quo was as it had been for more than three years—the City was required to build Phase III.

The purpose of a stay is to *maintain* the status quo pending appellate review of contested litigation. As this Court has explained, "[a] stay pending appeal 'simply suspend[s] judicial alteration of the status quo,' so as to allow appellate courts to bring 'considered judgment' to the matter before them and 'responsibly fulfill their role in the judicial process.'" *Texas Alliance for Retired Americans* v. *Hughs*, 976 F.3d 564, 566 (5th Cir. 2020) (second brackets in original) (quoting *Nken* v. *Holder*, 556 U.S. 418, 427, 429 (2009)). Here, the City's motion seeks permission from this Court to stop work on Phase III; thus, the motion seeks not to *maintain* the status quo as it has been since the Compliance Director issued the

SCAP in January 2017, but to *change* it. That is not a proper purpose for a motion to stay under Rule 8.

Indeed, the relief the City seeks here—permission to stop work on Phase III—would be more appropriately framed as a request for an injunction. The Supreme Court has recognized that "[a] stay pending appeal certainly has some functional overlap with an injunction," in that "[b]oth can have the practical effect of preventing some action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 428. "But a stay achieves this result by temporarily suspending" the appealed order, here the denial of the Rule 60(b) motion. *Id.* at 428-429.

Here, staying the denial of the City's Rule 60(b) motion would simply put the parties in the same situation they were in before the district court *ruled* on the motion. Both the SCAP and the 2019 Orders would remain in effect, and therefore so too would the City's obligation to proceed with Phase III.[4] The *only* way the City could get what it seeks—to *stop work* on Phase III—would be for this Court to issue an injunction suspending both the SCAP and the 2019 Orders.

[4] Not only is the City's obligation to build Phase III the *legal* status quo, it is also the *de facto* status quo. The City continues to submit monthly reports to the court documenting its progress toward constructing Phase III. A status report filed on September 30, 2021, describes the City's ongoing progress toward building Phase III, with construction scheduled to conclude in January 2024. See ROA.26391.

But the City has never sought such an injunction. This may be because an injunction "'demands a significantly higher justification' than a request for a stay, because unlike a stay," an injunction issued by a court of appeals "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). As set forth below (pp. 23-34), the City has not established the requisite factors for a *stay*, much less for an *injunction*.[5]

In sum, as the magistrate judge correctly held, the City's current vehicle—a motion to stay the denial of its Rule 60(b) motion—simply does not provide a path to allowing the City to stop work on Phase III. See ROA.25511. Because staying the denial of the Rule 60(b) motion would have no practical effect on the City's obligations under the SCAP and the 2019 Orders, this Court should deny the City's motion for a stay.

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[5] The City argues (Br. 10-12) that the 2019 Orders were appropriately subject to a stay in the district court under Rule 62(d), which provides that "[w]hile an appeal is pending from a[] * * * final judgment that * * * refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." The district court rightly declined to suspend its 2019 Orders under this provision, explaining that the City's argument was a thinly veiled attempt to get the court to reconsider the denial of the Rule 60(b) motion. ROA.25512. And in any case, the City's instant motion is governed by Federal Rule of Appellate Procedure 8, not Federal Rule of Civil Procedure 62(d).

*B. Because The City Failed To Move For Relief Under The PLRA, Section 3626(e)(2) Of The PLRA Does Not Impose An Automatic Stay Here*

The City, tacitly acknowledging that granting its motion to stay under Federal Rule of Civil Procedure 62 would not provide it with the relief it seeks, came up with a new argument in its reply brief in the district court. There, the City argued for the first time that its Rule 60(b) motion was a motion to "modify or terminate prospective relief in a civil action with respect to prison conditions," thereby triggering the automatic stay provisions of Section 3626(e)(2) of the PLRA. ROA.25086, 25091, 25508 (citation omitted). The City is wrong here too. Section 3626(e)(2) provides:

> Any motion to modify or terminate prospective relief made under subsection [3626](b) [of the PLRA] shall operate as a stay during the period (A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or (ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and (B) ending on the date the court enters a final order ruling on the motion.

Thus, the City's argument goes, because its June 29, 2020 Rule 60(b) motion was a motion to terminate prospective relief (in its view, the 2019 Orders), Section 3626(e)(2)(A)(ii) applies and the PLRA's automatic stay kicked in 180 days later (December 26, 2020) and ended the day the court denied the motion (January 25,

2021).[6] Br. 12-14. From there, the City's argument seems to be that (1) staying the denial of the Rule 60(b) motion would make it as if the denial never occurred; and (2) if the denial never occurred, then the automatic stay would have remained in effect. Thus, according to the City, staying the district court's denial of its Rule 60(b) motion would have the effect of thereby *reinstating* the automatic stay, presumably allowing the City to stop work on Phase III. Br. 10.

The district court correctly rejected this argument, holding that the automatic stay was not triggered because the City had moved for relief *only* under Federal Rule of Civil Procedure 60(b), and not under any provision of the PLRA. ROA.25512-25515. This Court should reject it as well.

1. The City's argument ignores the plain text of Section 3626(e)(2), which provides that the automatic stay applies only to "motion[s] to modify or terminate prospective relief *made under subsection (b)*" of the PLRA (emphasis added). As the magistrate judge correctly found, the City's argument "depends on the City having filed the underlying motion pursuant to *some* provision of the PLRA, which it quite obviously did not do." ROA.25512-25513. See *Miller* v. *French*, 530 U.S.

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[6] The City acknowledges that it did not move to terminate the 2019 Orders under Section 3626(b)(1), which provides for termination of prospective relief after a certain amount of time has passed, or (b)(2), which provides for termination of prospective relief where the court granted or approved the relief without making the findings required under Section 3626(a)(1). Br. 13.

327, 337 (2000) ("The stay is 'automatic' once a state defendant has filed a [Section] 3626(b) motion."). Rather, "[t]he City moved solely under Rule 60—the PLRA was not mentioned once in its original motion or memorandum in support." ROA.25513. In other words, "[t]he City cannot seek a stay based on a statute under which it did not seek substantive relief." ROA.25513 (quoting ROA.25116).[7]

There are good reasons for limiting the automatic stay to cases where the defendant actually has filed its motion under Section 3626(b) of the PLRA. The purpose of the automatic stay is to incentivize district courts to rule in a timely manner on motions seeking to modify or terminate prospective relief in prison conditions cases. See *Miller*, 530 U.S. at 350 ("The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and *encourages courts to apply that standard promptly*.") (emphasis added). This incentive is absent where, as here, the defendant does not actually *file* its motion under Section 3626(b), or even cite the provision in its motion. In such cases, the

[7] It is unclear whether Section 3626(e)(2)(A)(ii) even applies to motions for relief under Rule 60(b), which is the *only* ground on which the City based its motion for relief. The City's argument assumes that the phrase "any other law" in Section 3626(e)(2)(A)(ii) encompasses Rule 60(b). See Br. 13-14. But the government is unaware of any case applying Section 3626(e)(2)(A)(ii) to a motion for relief made solely under Rule 60(b), and the City has not put forth any argument supporting the statute's application to Rule 60(b) motions.

court may be unaware that its failure to rule within the prescribed time will lead to an automatic stay of the prospective relief it has ordered.

Similarly, had the City actually relied on Section 3626(b) of the PLRA in its motion for relief, the district court would have been put on notice of the time constraints in Section 3626(e)(2), and would have had the opportunity to postpone the automatic stay by 60 days under Section 3626(e)(3) (allowing the court to postpone the effective date of an automatic stay for good cause). This would have pushed the effective date of the automatic stay to February 24, 2021. Because the district court actually denied the City's Rule 60(b) motion before that date—on January 25, 2021—the automatic stay never would have gone into effect. The City cannot hide the ball by failing to move for relief under Section 3626(b), but then rely on that statute to back into a theory of relief it has never mentioned before.

2. Nor did the City *act* as if there was a stay. From December 26, 2020 through January 25, 2021, the time period it claims the stay was in place, the parties were actively engaged in litigating the City's objections to the magistrate judge's Report and Recommendations recommending denial of the City's Rule 60(b) motion. See ROA.25610. Nowhere in these filings did the City suggest that the subjects of its Rule 60(b) motion—the district court's January 2019 and March 2019 Orders—had been automatically stayed. See ROA.25610.

Indeed, on December 21, 2020—five days before the City contends the automatic stay began—the City filed a status report stating that it had directed the architect for Phase III to submit plans for the facility to the New Orleans Fire Department "for a life safety review based on direction from the City's Board of Building Standards and Appeals, and to submit their proposed plan for completing design." ROA.16523. It also represented that, "[a]dhering to the Court's prior Orders, the City is taking immediate steps to further engage the Architect in the completion of design work." ROA.16523. The district court had no reason to believe that its orders would soon be automatically stayed by a provision of the PLRA the City had never cited. See ROA.25514. As the magistrate judge correctly observed, "if the City ever truly believed that a statutory stay had been triggered on December 26, 2020 while it was desperately seeking to stop work on Phase III, any reasonable observer would have expected it to inform the Court of that fact the very day it happened." ROA.25514. But "[n]ot only did the City say nothing, *it continued work on the facility*." ROA.25514.

### *C. Even If The PLRA's Automatic Stay Applied Here, Staying The District Court's 2019 Orders Would Not Permit The City To Stop Work On Phase III*

Even if the City were correct that staying the denial of the City's Rule 60(b) motion would somehow reinstate an automatic stay under the PLRA that no one knew existed, this would still not provide the City the relief it seeks—permission to stop work on Phase III. This is because, as set forth above, the orders that

purportedly were subject to the automatic stay—the 2019 Orders—were not the source of the City's obligation to build Phase III. The district court's 2019 Orders *reinforced* the City's existing legal obligation to build Phase III. But the source of the City's obligation to build Phase III was its commitment in the Stipulated Order to comply with whatever solution the Compliance Director chose to address the housing needs of inmates with acute mental-health and medical needs. ROA.16477.

As set forth above, the January 2019 Order merely instructed the City to "direct the architect chosen to design the permanent facility described in the [SCAP] to begin the programming phase of the Phase III facility as soon as possible." ROA.13049. The City is now well into the programming phase of the facility. See, *e.g.*, ROA.26391. There is simply nothing more in the January 2019 Order for this Court to stay.

The March 2019 Order directed the City to "continue," with the programming of Phase III, to "work collaboratively to design and build" Phase III "without undue delay, expense or waste," and to provide monthly progress reports to "advise the Court of the City's progress toward construction of Phase III." ROA.13199-13200. Thus, even if staying the denial of the City's Rule 60(b) motion would somehow reinstate an automatic stay of the 2019 Orders, such automatic stay would *at most* suspend the district court's specific directives for the

City to "work collaboratively" to design and build Phase III "without undue delay, expense or waste" and to submit progress reports. It would not permit the City to stop work on Phase III.

* * *

Simply put, there is no procedural mechanism available at this juncture for the City to obtain a stay that would allow it to stop work on the Phase III facility. This Court should deny the City's motion for a stay on this ground alone.

## II

## EVEN IF THE RELIEF THE CITY SEEKS WERE PROCEDURALLY AVAILABLE, THE CITY'S MOTION FOR A STAY SHOULD BE DENIED

As discussed above, the City's motion for a stay does not seek to preserve the status quo; rather, it seeks to change the current status quo by allowing the City to stop working on Phase III. That relief is more like an injunction than a stay. As such, the City's motion "'demands a significantly higher justification' than a request for a stay, because unlike a stay," an injunction issued by a court of appeals "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). But because the City's motion fails even under the less stringent factors traditionally used to

determine whether to grant a stay, it necessarily fails under the standards applicable for an injunction.

In considering whether to grant a stay under Federal Rule of Appellate Procedure 8, this Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[8] *Freedom from Religion Found., Inc.* v. *Mack*, 4 F.4th 306, 311 (5th Cir. 2021) (quoting *Nken* v. *Holder*, 556 U.S. 418, 426 (2009)). Under this "traditional standard," the first two factors "are the most critical." *Nken*, 556 U.S. at 434. The last two factors "merge when the [federal] Government is the opposing party." *Id.* at 435. The City bears the burden of showing that a stay is justified. *Id.* at 433-434. Here, all four factors mitigate against granting a stay.

*A. The City Is Unlikely To Succeed On The Merits*

The City has failed to establish that it is likely to succeed in its appeal of the district court's denial of its Rule 60(b) motion. The City identified three purportedly changed circumstances to support its Rule 60(b) motion: (1) "the [OJC] currently provides medical and mental healthcare that is above the minimal

[8] Because the district court found that the City's motion to stay was procedurally improper, it did not consider whether these four factors weighed in favor of a stay. ROA.25516 n.12.

constitutional standard"; (2) "the unexpected COVID-19 pandemic will cause a significant budgetary shortfall for the City"; and (3) "the decrease in the inmate population makes the programming, design, and construction of a new Phase III jail facility unnecessary." ROA.14078. As the United States set forth in its merits briefing, see U.S. Appellee Br. 37-54, the district court did not abuse its discretion in rejecting each of these arguments. The City also has failed to establish that the district court abused its discretion in rejecting the City's argument under Section 3626(a)(1)(C) of the PLRA, which states that the PLRA does not authorize the courts "to order the construction of prisons." See U.S. Appellee Br. 25-37.

1. The district court correctly rejected the City's argument that a decrease in the OJC's inmate population constituted a sufficient changed circumstance to warrant relief under Rule 60(b). As the court noted, the decrease was anticipated at the time the district court issued the 2019 Orders. ROA.16490; see *Rufo* v. *Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 385 (1992) ("[M]odification should not be granted where a party relies upon events that actually were anticipated at the time" of the court's order.); see also U.S. Appellee Br. 47-48.[9] Indeed, the City's progress report filed on September 30, 2021, states that the jail's population has

[9] The fact that the OJC has more beds than prisoners does not mean that the empty beds could be used to house prisoners with serious mental-health and medical needs. See U.S. Appellee Br. 48 n.17.

increased to 885 inmates, a 9% increase from the previous progress report filed two months earlier. ROA.26387-26388.

Additionally, testimony established that the decrease in the number of total inmates has not led to a *corresponding* decrease in the number of inmates with serious mental-health needs. See U.S. Appellee Br. 48-49. And in any case, the City's current proposed plan for housing inmates on the second floor of the OJC is constitutionally deficient in structural ways that are unrelated to inmate population levels. For example, the City's proposed retrofit lacks an infirmary, lacks sufficient programming space for individual and group therapy, and would locate detainees with tendencies toward self-harm on dangerous mezzanine levels, from which they could jump or hang themselves. See U.S. Appellee Br. 49-50, 53. The City thus has not established that a decrease in inmate population constitutes a changed circumstance justifying relief under Rule 60(b).

2. The district court properly rejected the City's argument that budgetary shortfalls caused by the COVID-19 pandemic should excuse the City from building Phase III. As the district court found, the City is able—and contractually obligated—to use previously-identified FEMA funds to construct Phase III. See generally U.S. Appellee Br. 42-45. The City received approximately $70 million in FEMA funds to compensate it for a jail facility that was damaged by Hurricane Katrina. ROA.16494. The City and OPSO initially disagreed about which entity

should control these funds, and the parties settled this disagreement in the Stipulated Order, which provided that the City would control the funds but would use them for specific projects including, among other things, "appropriate housing for prisoners with mental health issues and medical needs." ROA.16494-16495 (citation omitted). It is undisputed that approximately $47.9 million of these funds remain available to build Phase III, and indeed the City's federal grants manager testified that the City has on hand at least $81 million in FEMA funds that it could use to build the facility. ROA.16497-16498.

The district court also did not err in rejecting the City's argument that it could not afford the operating costs for the Phase III facility. As the court noted, these costs will be substantially offset by the closing of the TDC, where detainees with serious mental-health and medical needs are being housed temporarily, when Phase III is completed. See ROA.16498-16502; U.S. Appellee Br. 45-47.

For similar reasons, the magistrate judge correctly rejected the City's argument regarding staffing shortages. The TDC currently requires 102 employees, while Phase III requires 109—an increase of only seven staff members. ROA.16499-16500; ROA.22783; ROA.22869-22870. As such, the City's argument (Br. 19-20) that construction of Phase III would substantially *exacerbate*

the staffing shortage is incorrect.[10] Moreover, Phase III is not projected to open until—at the earliest—January 2024, by which time the City is projected to be substantially recovered from the COVID-19 pandemic. ROA.16500-16501; ROA.26391.

3. The district court correctly found that, contrary to the City's argument (Br. 24-27), the City's current proposed alternative to Phase III—retrofitting the second floor of the OJC—would not provide a constitutional level of care to inmates with serious mental-health and medical needs. The OJC's physical structure—four floors of rectangular, tiered mezzanines—presents dangerous conditions for detainees at risk for self-harm. Inmates often have attempted to jump from the mezzanines or hang themselves from them. See ROA.15301-15304; ROA.15614-15615; ROA.22968; ROA.23164, ROA.23170. The City's proposal to install fencing around the mezzanine is inadequate because, as several witnesses testified, fencing can be climbed. See ROA.22675; ROA.22967-22968. And fencing with small holes that cannot be climbed presents it own problem, as such fencing is difficult to see through, making it impossible to monitor the suicide-resistant cells behind it. ROA.22674, 22677-22678; ROA.22968-22970.

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[10] The City asserts that there currently are 100 staff vacancies at the OJC. Br. 19. If OPSO is short-staffed at the TDC, it may be similarly short-staffed at a new Phase III facility. But that does not change the fact that the *authorized* staffing level at the Phase III facility is substantially the same as at the TDC and that existing TDC staff will simply transfer to Phase III when it opens.

Moreover, the court heard testimony that the City's proposed retrofit to the OJC would not create sufficient programming space for individual and group therapy sessions. See generally ROA.22980-22989. According to this testimony, the City's plan to convert three cells to counseling rooms was inappropriate, as these spaces lack the privacy necessary for the type of honest exchange of personal information essential to individual therapy. See ROA.22970-22971; ROA.23013-23015; see also U.S. Appellee Br. 52-53. Further, the City's retrofit plan does not include an infirmary, which witnesses testified is essential for a jail of OJC's size to ensure adequate medical care. Although the City's expert, Dr. Shansky, testified that the OJC could provide constitutional medical care without an infirmary if a secure ward were available at a local hospital to treat inmates with medical needs and certain other specific conditions were met, see ROA.14778, 14781; ROA.22361-22362, there was no evidence in the record that *any* of Dr. Shansky's conditions for using the local hospital were met, nor that they readily *could be* met. ROA.16488.

4. Finally, the City has failed to establish that the district court abused its discretion in rejecting the City's argument under Section 3626(a)(1)(C) of the PLRA, which states that the PLRA "shall [not] be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons." First, the magistrate judge correctly held that the City waived this argument

because the City raised this argument for the first time in its reply brief. See ROA.16475-16476; see also *Medina Cnty. Env't Action Ass'n* v. *Surface Transp. Bd.*, 602 F.3d 687, 702 (5th Cir. 2010); U.S. Appellee Br. 26-27. Additionally, a Rule 60(b) motion is not a proper vehicle for raising new legal arguments which could have been made before the judgment issued. See *Dial One of the Mid-South, Inc.* v. *BellSouth Telecomm., Inc.*, 401 F.3d 603, 607 (5th Cir. 2005) (A Rule 60(b) motion "cannot be used to argue a case under a new legal theory.") (citation omitted). The proper time for raising this argument was when the Compliance Director first submitted the SCAP recommending building Phase III, or at the very latest, in a direct appeal of the 2019 Orders. See generally U.S. Appellee Br. 27-29.

In any event, the City's PLRA argument fails because, as the district court found, the 2019 Orders did not *order* the City to build a jail. ROA.16476-16481. Rather, the 2019 Orders merely ordered the City to follow through on a contractual obligation, entered into voluntarily with the other parties in this case, to allocate FEMA funds to the solution chosen by the Compliance Director for housing inmates with mental-health or medical needs. See U.S. Appellee Br. 29-36; see also *Plata* v. *Schwarzenegger*, No. C-01-1351, 2008 WL 4847080, at *6 (N.D. Cal. Nov. 7, 2008) (rejecting the same PLRA argument the City makes here, in part because "the State ha[d] consented to the Receiver's facilities program."); *Harris*

v. *City of Phila.*, No. CIV.A. 82-1847, 2000 WL 1978, at *17 (E.D. Pa. Dec. 23, 1999) (rejecting the city's argument that the PLRA barred the court's order to build a new prison facility because the city already had "committed" to build the facility, and "the site has been selected and prepared by [c]ity officials, not the court"). As such, the City is unlikely to succeed on its argument that Section 3626(a)(1)(C) of the PLRA prohibited the court from issuing the 2019 Orders.

*B. The City Will Not Be Irreparably Injured Absent A Stay*

The City argues that it will be irreparably injured if it is not allowed to stop work on Phase III during the pendency of this appeal because it will be "compelled to expend considerable taxpayer funds and community resources complying with the [district court]'s orders." Br. 33. But this argument fails. As explained above, the City is *contractually obligated* to cover $47.9 million of the estimated $51 million cost of the facility (94%) with FEMA money that it received as reimbursement for the hurricane-damaged Templeman II facility.[11] Further, construction on Phase III is not actually set to begin until mid-2022. See ROA.26391. By this time, it is likely that this Court already will have decided the

[11] For this reason alone, the City's reliance on *Ruiz* v. *Estelle*, 650 F.2d 555, 559 (5th Cir. 1981), see Br. 32, is misplaced. There is no indication in that case that the state defendant had received federal funding that it had already committed to use to construct the new facilities.

City's pending appeal. Accordingly, the City will not be irreparably harmed by a denial of a stay.

*C. The Issuance Of A Stay Would Substantially Injure The Plaintiffs And Other Inmates With Serious Mental-Health Or Medical Needs*

Permitting the City to stop work on Phase III would substantially injure the private class plaintiffs and other OJC inmates with serious mental-health or medical needs, who presumably would continue to be housed at the TDC and in OJC. Among other things, the record reflects that suicidal patients currently are in non-suicide resistant cells, putting them at serious risk for self-harm. ROA.22322-22324; ROA.22964-22965. The current facility lacks programming space for group and individual therapy, a critical need for individuals with mental-health needs. See ROA.22970-22971. And the current facility lacks an infirmary, which the City's own witness testified is constitutionally required for jails of OJC's size. See ROA.16488; ROA.23050-23051; ROA.23054. See also U.S. Appellee Br. 39-42. The longer these violations continue, the more harm these inmates will suffer.

Contrary to the City's representations, see Br. 34-36, the addition of Wellpath and its subcontractor, Tulane University, have not solved the constitutional deficiencies at the OJC. In the independent monitors' report filed on February 8, 2021, the monitors found that OPSO was in full compliance with only four of the 11 specific requirements relating to suicide preventions set forth in Section IV.B.5 of the Consent Judgment. See ROA.16702-16706. And with

respect to medical care, OPSO was in substantial compliance with only seven of the 18 requirements of the Consent Judgment. ROA.23049. And in any case, the presence of staff from Wellpath and Tulane cannot remedy the serious physical deficiencies at the TDC and OJC, such as the dangerous mezzanine levels, the lack of space for individual and group therapy and programming and lack of an infirmary—problems that would be addressed by the construction of Phase III.[12] See U.S. Appellee Br. 41-42.

*D. The Public Interest Weighs Against Permitting The City To Stop Work On Phase III*

Finally, the public interest weighs strongly against granting the City permission to stop work on Phase III. Most importantly, as discussed above, the City does not currently provide constitutional care to inmates with serious mental-health or medical needs, and its proposed plan to retrofit the second floor of the OJC is insufficient to remedy the existing constitutional deficiencies. See pp. 28-29, 32-33, *supra*. As the magistrate judge noted, the City's responsibility to "provide basic constitutional care to the most vulnerable of our citizens who wind

[12] The fact that the City has increased its per-inmate spending over the past several years (Br. 34) is irrelevant. That the City spent significantly more money and still has yet to achieve constitutional compliance (as evidenced by, among other things, the most recent report from the independent monitors, see ROA.16635-16636) is simply evidence of how far the OJC had to go when this litigation began.

up incarcerated in the [OJC] * * * continues to evade the City and its attorneys." ROA.25504.

Nor is the City correct that this factor weighs in its favor because, as a public entity, its interest and harm "merge with that of the public." Br. 36-37 (citation omitted). Here, because the United States is party to this litigation and opposes the stay, the public interest merges with the interest of the *federal* government. See *Nken*, 556 U.S. at 435. This is particularly true here, where the City's interest in allocating these funds to other projects does not outweigh the federal government's (and plaintiffs') interest in ensuring that inmates with serious mental-health and medical needs are provided with constitutionally adequate care.

## CONCLUSION

For the foregoing reasons, this Court should deny the City's motion for a stay.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on October 13, 2021, I electronically filed the foregoing APPELLEE UNITED STATES' OPPOSITION TO OPPOSED MOTION FOR A STAY BY THIRD-PARTY DEFENDANT-APPELLANT CITY OF NEW ORLEANS with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

## CERTIFICATE OF COMPLIANCE

The attached APPELLEE UNITED STATES' OPPOSITION TO OPPOSED MOTION FOR A STAY BY THIRD-PARTY DEFENDANT-APPELLANT CITY OF NEW ORLEANS exceeds the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A). On October 7, 2021, the United States filed an unopposed motion to file an oversized opposition brief of no more than 8,700 words. That motion remains pending.

The brief was prepared using Microsoft Office Word 2019 and contains 8,230 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Elizabeth P. Hecker
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Date: October 13, 2021