No. 23-30633

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

SUSAN HUTSON, SHERIFF, ORLEANS PARISH,
Successor to MARLIN N. GUSMAN

Defendant/Third-Party Plaintiff-Appellant

v.

CITY OF NEW ORLEANS,

Third-Party Defendant-Appellee

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

APPELLEE UNITED STATES' OPPOSITION TO OPPOSED EMERGENCY MOTION TO STAY JAIL CONSTRUCTION ORDERS PENDING APPEAL

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INTRODUCTION

The Sheriff has moved for an emergency stay pending appeal of the district court's denial of her Motion to Terminate All Orders Regarding the Construction of the Phase III Jail. This Court should deny the Sheriff's motion. First, the motion is procedurally improper under Rule 8 of the Federal Rules of Appellate Procedure because the Sheriff has failed to demonstrate the existence of any extraordinary circumstances allowing her to bypass Rule 8's directive that motions for a stay of a district court order must be decided in the first instance by the *district* court. Even if this Court addresses the merits, the Sheriff cannot satisfy the four factors this Court applies in determining whether to grant a stay, particularly that the Sheriff is likely to prevail on the merits.

FACTS AND PROCEDURAL HISTORY

1. Private plaintiffs filed this action in 2012 against then-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 detainees' serious mental-health and medical needs. Doc. 1.[1] The United States intervened, alleging, as relevant here, violations of the Civil Rights

[1] "Doc.__, at __" refers to the docket entry and page number of documents filed on the district court's docket. "Mot. __" refers to page numbers in the Sheriff's Motion for Stay.

of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997. Doc. 68-2. 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. Docs. 75, 76.

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 detainees with serious mental-health and medical needs. Doc. 466. In mid-2016, after years of delay and disagreements about implementation of the Consent Judgment, the parties entered into a Stipulated Agreement for Appointment of Independent Jail Compliance Director, which the district court entered as an order (Stipulated Order). Doc. 1082. Among other things, the Stipulated Order provided for the appointment of a Compliance Director, with final authority to operate the jail and to make binding decisions regarding how to implement certain aspects of the Consent Judgment. Doc. 1082, at 2-15.

The Stipulated Order also resolved a disagreement between the City and Sheriff regarding control of Federal Emergency Management Agency (FEMA) funds provided to compensate for damage incurred during Hurricane Katrina to a jail facility known as Templeman II. Doc. 1082, at 14-15. Sheriff Gusman abandoned his claim to those funds in exchange for the City's agreement to use

them *exclusively* for three specific objectives, including housing prisoners with mental-health and medical needs. Doc. 1082, at 14.

In January 2017, after extensive consultation with the parties, the Compliance Director submitted a Supplemental Compliance Action Plan (SCAP). Doc. 1106. The SCAP recommended the construction of a new treatment facility known as "Phase III" on existing OPSO property, with 89 beds to house inmates with acute and sub-acute mental-health needs. Doc. 1106, at 8-9. Sheriff Gusman signed the SCAP, along with the Compliance Director. Doc. 1106, at 13.

2. For the next two years, the City represented to the district court that it was working toward constructing Phase III. But 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. Doc. 1385, at 18. 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." Doc. 1221, at 3 (January 2019 Order).

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." Doc.

1222, at 4. Based on this representation, on March 18, 2019, the district court ordered the City and Sheriff 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." Doc. 1227, at 2-3 (March 2019 Order).

3. On June 5, 2020, the City unilaterally ordered the architect and project manager for Phase III to stop work. Doc. 1385, at 22. The City then 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). Docs. 1281, 1281-1. After the other parties, including the Sheriff, opposed the City's Rule 60(b) motion, the City advanced a new argument in its reply brief—that Section 18 U.S.C. 3626(a)(1)(C) of the Prison Litigation Reform Act (PLRA) prohibited the court from ordering the construction of a new jail facility. Doc. 1312, at 2-4. Specifically, it argued that Section 3626(a)(1)(C)'s language stating that "[n]othing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons" precluded the district court from issuing the 2019 Orders. Doc. 1312, at 2.

The magistrate judge held an eight-day hearing, involving testimony from approximately two dozen witnesses. Doc. 1385, at 28. Subsequently, the magistrate judge issued a Report and Recommendation recommending that the district court should deny the City's motion. Doc. 1385, at 1, 71.

4. As relevant here, the magistrate judge 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. Doc. 1385, at 29-30. The magistrate judge also concluded that, even if the argument were not waived, it failed on its merits because the 2019 Orders did not "order[]" the City to build a jail. Doc. 1385, at 30-36. 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 Doc. 1385, at 31. 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.*" Doc. 1385, at 31 (second emphasis added).[2]

[2] In the alternative, the magistrate judge also concluded that, although the plain language of the PLRA did not authorize courts to order the construction of prisons, it also did not *prohibit* courts from doing so. Doc. 1385, at 35-36.

The district court adopted the magistrate judge's recommendation on January 25, 2021, and the City appealed. Docs. 1396, 1399.[3] This Court affirmed the district court's decision in a published opinion on June 30, 2022. *Anderson* v. *City of New Orleans*, 38 F.4th 472 (5th Cir. 2022). The Court dispensed with the City's argument that the PLRA prohibited the district court from ordering the construction of prisons on other grounds, but did not reverse the district court's factual or legal conclusions on this issue. *Id.* at 479.

5. On May 2, 2022, Sheriff Hutson was inaugurated as the new Sheriff of Orleans Parish. Sheriff Hutson was automatically substituted as a party under Federal Rule of Civil Procedure 25(d), replacing previous Sheriff Gusman.[4]

6. On June 26, 2023, approximately one year after this Court affirmed the district court's denial of the City's Rule 60(b) motion and 13 months into her term as Sheriff, Sheriff Hutson filed a Motion to Terminate All Orders Regarding the Construction of the Phase III Jail (Motion to Terminate). Doc. 1617. Sheriff Hutson argued that "[Section] 3626(a)(1)(C) [of the PLRA] expressly prohibits

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[3] This Court granted then-Sheriff-elect Hutson leave to file an amicus brief in that appeal and allowed her to participate in oral argument. Docs. 00516199962, 00516200006, 00516211675, *Anderson* v. *City of New Orleans*, 38 F.4th 472 (5th Cir. 2022) (No. 21-30072).

[4] Federal Rule of Civil Procedure Rule 25(d) provides that "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party."

federal courts from 'order[ing] the construction of prisons' as prospective relief in consent decrees." Doc. 1617, at 1-2 (alteration in original). In the alternative, Sheriff Hutson argued that "the pending prospective relief ordering the construction of the Phase III jail and the associated orders requiring the City of New Orleans * * * to do the same" were private settlement agreements, and therefore the PLRA forbid the court from enforcing them. Doc. 1617, at 1 (citing 18 U.S.C. 3626(g)(6)).

Following briefing by the parties, the magistrate judge issued a Report and Recommendation (R&R) to deny the Motion to Terminate. Doc. 1634, at 15. The magistrate judge explained that the district court's prior ruling that the PLRA did not bar the district court's 2019 Orders was the law of the case and could not be challenged anew. Doc. 1634, at 5-8. The magistrate judge also rejected the Sheriff's argument that the district court's orders were private settlement agreements and therefore could not be federally enforced under the PLRA, and her argument that she was not bound by commitments made by the previous sheriff. Doc. 1634, at 8-18.

After considering the Sheriff's objections to the R&R and the United States' response, the district court issued an order adopting the R&R and denying the Motion to Terminate. Doc. 1648. The district court accepted all of the magistrate judge's conclusions (Doc. 1648, at 3-12) and described the Sheriff's Motion to

Terminate as "yet another thinly-veiled attempt to end-run the original decision not to appeal those specific orders" (Doc. 1648, at 7).

The Sheriff appealed. Doc. 1652.

On September 10, five days after the district court issued its order denying the Motion to Terminate, the Sheriff filed in the district court a motion to stay pending appeal of all orders regarding the construction of the Phase III facility, along with a motion to expedite the court's ruling on the motion to stay. Docs. 1650, 1651. The district court denied the Sheriff's motion to expedite the next day, explaining that "Sheriff Hutson could have filed this motion [to terminate] as early as May 2, 2022, when she was sworn into office following her December 11, 2021 election," and "could have filed her motion for a stay several days earlier than [September 10]." Doc. 1655, at 2. The court stated that it would "not permit Sheriff Hutson's own unjustifiable delays to usher in an unusually expedited briefing schedule requiring the other parties in this case to rush a responsive pleading and this Court to rush consideration of the same." Doc. 1655, at 2. The court set a briefing schedule for the motion to stay pursuant to the district's local rules. Doc. 1655. Under that schedule, responses to the Sheriff's motion are due September 26, and the court will rule by October 4. E.D. La. L.R. 7.5.

Notwithstanding that the Sheriff's motion to stay remains pending in the district court, on September 13, 2023, the Sheriff filed the instant emergency

motion in this Court to stay pending appeal all orders relating to the Phase III facility construction. The Sheriff requested that the Court issue a decision by September 15, 2023, because the City planned to begin construction of Phase III on that date. After this Court entered an administrative stay, however, the City informed counsel for private plaintiffs that the City would not in fact begin construction on September 15. 5th Cir. Doc. 19, at 1.

ARGUMENT

This Court should deny the Sheriff's motion for an emergency stay pending appeal of the district court's orders regarding construction of the Phase III facility. First, the motion is procedurally improper under Rule 8 of the Federal Rules of Appellate Procedure, because the district court has not yet denied the Sheriff's motion filed in that court, nor has the Sheriff shown (or even argued) that seeking a stay in the district court would be futile. But, even if the Sheriff's motion to stay were procedurally proper, the Sheriff cannot satisfy the four factors that this 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 SHERIFF'S MOTION FOR AN EMERGENCY STAY BECAUSE THE SHERIFF HAS FAILED TO SATISFY THE REQUIREMENTS OF FEDERAL RULE OF APPELLATE PROCEDURE 8

Federal Rule of Appellate Procedure 8 provides that "a party must ordinarily move first in the district court for * * * a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1). The Rule further provides that a motion for a stay pending appeal may be made in the court of appeals, but that motion "must" (1) "show that moving first in the district court would be impracticable," or (2) "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2). The Sheriff's motion fails to comply with these requirements and should be denied.

First, the Sheriff's motion does not show that it would be impracticable to move first in the district court. On the contrary, the Sheriff has filed a motion in the district court and that motion remains pending. Because she "has moved for relief from judgment in the district court and no ruling has been made," her motion is "premature" and should be denied without prejudice. *Rhone* v. *City of Texas City, Texas*, No. 22-40551, 2022 WL 4310058, at *1 (5th Cir. Sept. 19, 2022).

Second, the Sheriff's motion fails to state, contrary to Rule 8's requirements, that the district court denied her motion (because it has not) or that the district

court "failed to afford the relief requested." Fed. R. App. P. 8(a)(2). Instead, the Sheriff states that "the City plans to begin construction on" September 15, 2023, and that the district court's refusal to expedite a ruling on her motion "effectively denied" her request for relief. Mot. 5. Even if this were sufficient to satisfy Rule 8's requirement that the motion state that the district court denied her motion or the relief requested, the motion fails to "state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2). The Sheriff's failure to comply with Rule 8's requirements render it procedurally improper and are "sufficient grounds to deny [her] motion." *Whole Woman's Health* v. *Paxton*, 972 F.3d 649, 654 (5th Cir. 2020); see also *ibid.* (collecting cases from other circuits denying stay motions for failure to comply with Rule 8's procedural requirements).

In any event, on September 14, 2023, the City advised counsel for the private plaintiffs that, in accordance with this Court's administrative stay, it will *not* issue a notice to proceed with construction on September 15. 5th Cir. Doc. 19, at 1. Accordingly, there is no longer "an emergency sufficient to justify disruption of the normal appellate process." 5th Cir. R. 27.3. Therefore, this Court should deny the Sheriff's motion without prejudice to give the district court an opportunity to rule, which it is scheduled to do by October 4. If the district court ultimately denies the relief requested, the Sheriff may then "revive the motion in

this Court," consistent with Rule 8's requirements. *Rhone*, 2022 WL 4310058, at *1.

II

EVEN IF THE SHERIFF'S STAY MOTION WERE PROPER UNDER RULE 8, THIS COURT SHOULD DENY IT ON THE MERITS

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." *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 Sheriff 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 Sheriff Is Unlikely To Succeed On The Merits

The Sheriff has failed to establish that she is likely to succeed in her appeal of the district court's denial of her Motion to Terminate for four reasons. First, as the district court correctly held, the Sheriff's argument that the 2019 Orders violated Section 3626(a)(1)(C) of the PLRA is barred under the law-of-the-case

doctrine. Second, even if it were not the law of the case, the district court's conclusion that Section 3626(a)(1)(C) of the PLRA does not apply because the district court has never ordered the construction of Phase III is correct. Third, a motion to terminate under Section 3626(b) of the PLRA is not an appropriate vehicle for the Sheriff's argument. And finally, the Sheriff's argument in the alternative that the orders at issue were merely private settlement agreements and are thus unenforceable by federal courts under the PLRA is meritless.

1. The law-of-the-case doctrine forecloses the Sheriff's argument that the district court "order[ed] the construction of a jail." Mot. 15. In the R&R to deny the City's Rule 60(b) motion, the magistrate judge explained that the court had "never ordered the City to build a jail." Doc. 1385, at 30 (brackets in original; citation omitted). Rather, it had "ordered the City to solve a problem, and the City has chosen on multiple occasions to submit [Phase III] to the Court in response to that." Doc. 1385, at 30. The district court adopted the magistrate's R&R in full and reiterated that "*the City, not this Court*, decided to construct Phase III." Doc. 1396, at 2. The district court's factual finding that it did not order the parties to construct a jail—and its resulting legal conclusion that Section 3626(a)(1)(C) of the PLRA does not apply—are the law of the case.

Under the law of the case doctrine, "an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the

appellate court on a subsequent appeal." *United States* v. *Bazemore*, 839 F.3d 379, 385 (5th Cir. 2016) (citation omitted). Although this Court dispensed with the same PLRA argument in connection with the City's Rule 60(b) motion on other grounds, it did not reverse the district court's findings or conclusions on this issue. Those conclusions therefore continue to govern this case. See *Stewart Enters., Inc.*, v. *RSUI Indem. Co.*, 07-cv-4514, 2009 WL 1668502, at *6 (E.D. La. June 15, 2009), affirmed in part and reversed in part by 614 F.3d 117 (5th Cir. 2010) ("To the extent that this [c]ourt has made findings with respect to the proper interpretation of the policy provisions contested by the parties' motions, those findings are the law of the case, unless such findings are reversed on appeal."); *Robertson* v. *LSU Med. Ctr.*, No. 99-cv-1688, 2002 WL 1000974, at *4 (E.D. La. May 14, 2002) ("These factual findings were not challenged by [the appellant] on appeal and are the law of the case.").

2. Even if it were not the law of the case, the Sheriff is not likely to succeed on the merits because the district court's conclusion that Section 3626(a)(1)(C) of the PLRA does not apply because the district court never ordered the City (or the Sheriff) to build a jail is correct. 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 *Plata* v. *Schwarzenegger*, No. C-01-1351, 2008 WL 4847080, at *6 (N.D. Cal. Nov. 7, 2008) (rejecting the same PLRA argument the Sheriff 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").

3. The Sheriff's argument that the district court's 2019 Orders violated Section 3626(a)(1)(C) of the PLRA also fails because such argument is not a proper ground for a PLRA Motion to Terminate. The Sheriff purports to move to terminate pursuant to Section 3626(b) of the PLRA. Doc. 1617, at 1. That section provides that "[i]n any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party * * * [:] (i) 2 years after the date the court granted or approved the prospective relief; [or] (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph." 18 U.S.C. 3626(b)(1). Alternatively, a party may move for termination at any time "if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation

of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. 3626(b)(2).[5]

The section further provides, however, that relief shall not terminate if the court finds "that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and * * * is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. 3626(b)(3). Taken together, these provisions make clear that the purpose of Section 3626(b) is to provide for termination of prospective relief that is no longer necessary to correct a current and ongoing violation of federal rights. It is *not* a vehicle for reviving a legal argument that has nothing to do with whether the constitutional violations have been cured, and that the district court already has rejected.[6] See Doc. 1648, at 6-7.

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[5] The Sheriff does not specify under what part of subsection 3626(b) she is moving to terminate, but only Section 3626(b)(i) could apply. The court has not issued any orders denying termination of prospective relief; nor has the court made any orders without making the requisite findings under the PLRA.

[6] As the United States pointed out in its brief as appellee in connection with the City's appeal of the district court's denial of its Rule 60(b) motion, the proper time to raise the argument that the PLRA prevented the district court from ordering construction of a new prison 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 U.S. Appellee Br. at 27-29, *Anderson*, No. 21-30072, *supra*. But the Sheriff failed to raise the issue at either of those junctures, and indeed opposed *the City* when the City belatedly (and unsuccessfully) raised this argument in connection with its Rule 60(b) motion. See *Anderson* v. *City of New Orleans* (No. 21-30072), Doc. 00515950813, at 31-34.

4. Finally, the Sheriff argues that if the district court did not order the City to build a jail, then the orders in question are merely private settlement agreements and are not subject to judicial enforcement. Mot. 4-5, 11 (citing 18 U.S.C. 3626(c)(2) and (g)(6)).

As the magistrate judge stated, this argument "borders on frivolous." Doc. 1634, at 8. The Stipulated Order was negotiated by the parties, after which all parties, including the Sheriff, expressly moved the district court to enter it "as an order of the [c]ourt." Doc. 1083, at 1. The court did so and included the required findings of compliance under the PLRA. See Doc. 1634, at 9-10. The Stipulated Order provided that the Compliance Director, in consultation with the City and Sheriff, would choose a plan to present to the court to address the care of detainees with serious mental-health and medical needs. Doc. 1082, at 14-15. The Compliance Director ultimately submitted the SCAP, which proposed the 89-bed facility known as Phase III. Doc. 1106, at 8-10.

After the City failed to make progress on Phase III, the district court issued the 2019 Orders, requiring the parties "to begin the programming phase of the Phase III facility as soon as possible and to update the [c]ourt on the progress of those efforts at the next scheduled status conference," and to "work collaboratively to design and build a facility that provides for the constitutional treatment of the special populations discussed herein without undue delay, expense[,] or waste."

Doc. 1222; see also Doc. 1227, at 2-3. These were obviously orders of the court, not private settlement agreements. Even so, as the magistrate judge recognized, these orders "did not direct the City to build Phase III. Rather, they 'ordered the City to effectuate a plan it had voluntarily and contractually bound itself to undertake.'" Doc. 1634, at 11 (citing Doc. 1385, at 33-34).[7]

B. The Sheriff Will Not Be Irreparably Injured Absent A Stay

The Sheriff argues that she will be irreparably injured if work on Phase III is not stopped during the pendency of this appeal because "the City will be compelled to reallocate millions of dollars in funds, formerly allocated to important public works projects, and spend [more than] $100 million to build the Phase III jail." Mot. 20. This argument fails.

As explained supra p. 2-3, the City is *contractually obligated* to cover $47.9 million of the cost of the facility with FEMA money that it received as reimbursement for the hurricane-damaged Templeman II facility. In May 2020, the City represented to the district court that Phase III was estimated to cost $51

[7] The Sheriff remarkably argues that "any purported agreement by former Sheriff Gusman to construct the Phase III jail was not binding on Sheriff Hutson as a successor sheriff." Mot. 12. She cites in support a state-law case, *Cott Index Co.* v. *Jagneaux*, 685 So. 2d 656, 658 (La. Ct. App. 1996), which held that a contract for lease of computer equipment signed by a predecessor county clerk of court was unenforceable against a successor clerk. This holding is irrelevant to the issue here, and directly contradicts Federal Rule of Civil Procedure 25(d) on substitution of parties.

million to build; at that time, the FEMA funds would have covered 94% of the total cost. Doc. 1385, at 52; Doc. 1634, at 21. As the magistrate judge recognized, the reason that "the project has become so expensive" since May 2020 is "the passage of time." Doc. 1634, at 21. Any increase in the cost of Phase III is a direct result of the Sheriff and City's "previous delays and foot-dragging." Doc. 1634, at 21. This Court should not permit the Sheriff to rely on a problem of her own making to avoid complying with the district court's orders.

The Sheriff also argues it will suffer irreparable harm absent a stay because "[t]he Court has not considered all the alternatives to Phase III." Mot. 21 (emphasis omitted). But the court *did* consider all alternatives offered by the City in ruling on the City's Rule 60(b) motion. Doc. 1385, at 58-63. Neither the Sheriff nor the City have submitted any proposed alternatives to Phase III since then, and detainees with serious mental-health and medical needs continue to suffer.

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

Granting the Sheriff's motion for a stay permitting the City to stop work on Phase III would substantially injure the private plaintiffs and other inmates with serious mental-health or medical needs. Among other things, suicidal patients currently are in non-suicide resistant cells, putting them at serious risk for self-harm. Doc. 1366, at 97-99; Doc. 1369, at 144-145. The current facilities lack

programming space for group and individual therapy, a critical need for individuals with mental-health needs. See Doc. 1369, at 149-150. And the current facilities lack an infirmary, which the City's own witness testified is constitutionally required for jails of OJC's size. See Doc. 1385, at 42; Doc. 1369, at 229-230, 233. And not only are the current facilities for inmates with serious mental-health and medical needs inadequate—they are also insufficient in number. As of August 16, 2023, six inmates remained on a wait list to get into the Temporary Mental Health units.

The Sheriff ignores the substantial harm to inmates with serious mental-health and medical needs, arguing only that "where less intrusive, less costly, more expeditious, and more effective alternative exist, the interests of the prisoner population will be better served by a stay." Mot. 22. But as explained *supra*, the Sheriff has not submitted *any* proposed alternatives to Phase III. Meanwhile, the July 5, 2023 report from the independent monitors showed that the Sheriff's compliance with the Consent Judgment's constitutional requirements *regressed* from the previous report. Doc. 1623, at 6. At a June 28, 2023, status conference, the lead monitor testified that the construction of Phase III was "essential to providing constitutional medical and mental health care to the inmates in the custody of the OPSO." Status Conf. Tr. 5, li: 12-16 (App. 5).

The balance of harms strongly weighs against a stay.

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

Finally, the public interest weighs against granting a stay. In urging that the public interest favors a stay, the Sheriff recycles the same arguments about the cost of the facility and her preference for using funds for other projects. Mot. 22. But as the Sheriff does not even dispute, OPSO does not currently provide constitutional care to inmates with serious mental-health or medical needs. See Doc. 1623, at 11-12 (documenting continuing deficiencies in OPSO's provision of medical and mental-health care). Additionally, 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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 15, 2023, I electronically filed the foregoing APPELLEE UNITED STATES' OPPOSITION TO OPPOSED EMERGENCY MOTION TO STAY JAIL CONSTRUCTION ORDERS PENDING APPEAL 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 EMERGENCY MOTION TO STAY JAIL CONSTRUCTION ORDERS PENDING APPEAL does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A).

The brief was prepared using Microsoft Office Word for Microsoft 365 and contains 5,199 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
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Date: September 15, 2023