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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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BRIEF FOR THE UNITED STATES AS APPELLEE

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## **STATEMENT REGARDING ORAL ARGUMENT**

The United States believes that this appeal can be resolved on the briefs.

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## STATEMENT OF JURISDICTION

The United States intervened as a plaintiff in this action to enforce the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Title VI). On June 29, 2020, third-party defendant-appellant City of New Orleans (the City) moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the district court's orders of January 25, 2019, and March 18, 2019 (collectively, the 2019 Orders), which directed the City to follow through on its longstanding commitment to build an 89-bed facility to house inmates with serious mental-health and medical needs. See ROA.14076-14096; ROA.13047-13049; ROA.13198-13200.<sup>1</sup> The district court denied the City's motion on January 25, 2021, and the City filed a timely notice of appeal on February 2, 2021. ROA.16447-16517; ROA.16607-16611; ROA.16616. This Court has jurisdiction under 28 U.S.C. 1292(a)(1), which vests the Court with jurisdiction over "[i]nterlocutory orders of the district courts of the United States \* \* \* refusing to dissolve or modify injunctions."

The district court's denial of the City's Rule 60(b) motion has no bearing on the continuing validity of the district court's 2019 Orders, which remain in effect. The City did not appeal these orders when they were issued, and thus this Court

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<sup>1</sup> "ROA. \_\_\_\_" refers to page numbers of the Record on Appeal. "Br. \_\_\_\_" refers to page numbers in the City's opening brief.

does not have jurisdiction over their merits. To the extent the City argues that this Court may address the merits of the 2019 Orders because the district court's denial of its Rule 60(b) motion is "injunctive in nature," Br. 3, that is incorrect. This Court squarely has held it "may not treat the appeal from the ruling on the rule 60(b) motion as an appeal from the underlying order itself." *Aucoin v. K-Mart Apparel Fashion Corp.*, 943 F.2d 6, 8 (5th Cir. 1991) (internal quotation marks, brackets, and citation omitted). Put simply, "[t]he *denial* of a Rule 60(b) motion does not bring up the underlying judgment for review." *In re Ta Chi Navigation (Pan.) Corp. S.A. v. United States*, 728 F.2d 699, 703 (5th Cir. 1984).

### **STATEMENT OF THE ISSUES**

1. Whether the district court correctly concluded that the City had waived its argument that the Prison Litigation Reform Act, 18 U.S.C. 3626, prohibited the district court from ordering the City to fulfill its agreed-to obligations to build an 89-bed facility to house inmates with serious mental-health and medical needs and that the argument in any case lacks merit.

2. Whether the district court abused its discretion in denying the City's motion under Federal Rule of Civil Procedure 60(b)(5) for relief from the district court's 2019 Orders due to changed circumstances.

## **STATEMENT OF THE CASE**

This case concerns the City of New Orleans' responsibility to provide appropriate housing and care for jail inmates with serious mental-health and medical needs consistent with the Eighth and Fourteenth Amendments to the Constitution. In 2013, the United States, the plaintiff class, and the Orleans Parish Sheriff's Office entered into a Consent Judgment setting forth, among other things, procedures for addressing constitutional deficiencies in the treatment of these individuals. The parties, including the City, later agreed on the appointment of a Compliance Director who was given final authority to operate the jail and to make binding decisions regarding how to implement certain aspects of the Consent Judgment. The Compliance Director ultimately recommended that the City fund the construction of a new jail facility to house detainees with serious mental-health and medical needs. The City accepted this recommendation.

After representing to the Court for more than two years that it was working toward constructing the new jail facility, the City changed its mind and decided instead to retrofit a floor of an existing jail facility. In early 2019, the district court issued the 2019 Orders, directing the City to follow through on its contractual obligation to construct the new jail facility. The City continued for another year to represent that it was working toward building the facility, but in June 2020, filed a motion for relief under Federal Rule of Civil Procedure 60(b)(5), arguing that

changed circumstances warranted relief from the district court's 2019 Orders. Specifically, it argued: (1) its current jail facilities already provide medical and mental healthcare that is above minimal constitutional standards; (2) the COVID-19 pandemic had caused a significant budgetary shortfall for the City; and (3) a decrease in inmate population makes the programming, design, and construction of a new jail facility unnecessary. 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.

Following an eight-day hearing, the magistrate judge recommended denial of the City's Rule 60(b) motion, finding: (1) the City's existing jail facilities do not provide constitutional care to detainees with mental-health and medical needs; (2) any budget shortfall due to the COVID-19 pandemic is irrelevant because the City is obligated to use existing FEMA funds to construct the new jail facility and any additional operating costs will not be needed until the City has financially recovered from the pandemic; and (3) the decrease in inmate population was expected and thus does not represent a changed circumstance warranting relief under Rule 60(b)(5) and, in any event, does not obviate the need for the new jail facility. The magistrate judge also rejected the City's argument under the PLRA, holding that it was waived and, in any case, the court had not ordered the City to

build a jail. The district court adopted the magistrate judge's recommendation, and the City appealed.

*1. Early Litigation And Consent Judgment*

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. The United States intervened, alleging claims under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Title VI).<sup>2</sup> ROA.1193-1209. In October 2012, OPSO filed a third-party complaint against the City, seeking funding for any prospective relief the court might order. ROA.1321-1381.

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<sup>2</sup> CRIPA allows the Attorney General to intervene in private litigation "seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm." 42 U.S.C. 1997c(a)(1). Title VI prohibits entities receiving Federal financial assistance from discriminating on the ground of race, color, or national origin. 42 U.S.C. 2000d. The United States' claims under Title VI were related to allegations regarding the provision of services to persons with limited English proficiency, which are not at issue in this litigation. ROA.1193.

On June 6, 2013, the plaintiffs, the United States, and OPSO entered into a Consent Judgment, ROA.4861-4913, setting forth, among other things, procedures for addressing constitutional deficiencies in the treatment of inmates with mental-health and medical needs. ROA.4884-4895. The Consent Judgment also laid out plans for a new jail facility to replace the former Orleans Parish Prison. ROA.4902-4903. The Consent Judgment required the parties to select an independent monitor to oversee implementation of the Consent Judgment and to evaluate the defendants' compliance. See ROA.4904-4906.<sup>3</sup>

Notably, the parties stipulated that the Consent Judgment “comple[d] in all respects with the provisions of 18 U.S.C. § 3626(a) [of the PLRA].” ROA.4908. The parties also stipulated, and the district court found, that the relief set forth in the Consent Judgment complied with the PLRA because it was “narrowly drawn, extend[ed] no further than necessary to correct the violations of federal rights” set forth in the plaintiffs' complaints, “[wa]s the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system.” ROA.4908.

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<sup>3</sup> There typically have been several monitors in this position—a lead monitor and additional monitors charged with evaluating compliance with a specific provision or provisions of the Consent Judgment. See, *e.g.*, ROA.6290; ROA.16627.

2. *Initial Discussions On Housing Inmates With Serious Mental-health And Medical Needs*

Shortly after the district court entered the Consent Judgment, the court and parties learned that the new jail then under construction—the Orleans Justice Center (OJC)—would not be equipped to house inmates with acute and sub-acute mental-health needs. ROA.4585-4586.<sup>4</sup> The parties, including the City, agreed to work toward a plan to address how to house and care for these inmates. ROA.5103-5104.

On August 20, 2013, the City sent a letter to the Court on behalf of all parties, proposing to finish the OJC as designed (*i.e.*, without including housing for inmates with serious mental-health needs), and to permit an existing temporary facility to remain in place to house these inmates until a new facility, known as “Phase III,” could be built. ROA.5375-5376. After nearly a year of discussions among the parties with no agreement on a resolution, the district court accepted OPSO’s plan to temporarily house inmates with serious mental-health needs at the existing Elayn Hunt Correctional Center, a state-owned facility, and ordered the City to pay the costs. ROA.7867; ROA.7887.

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<sup>4</sup> Dr. Raymond Patterson, the independent mental health monitor, testified that mental health needs are considered “acute” when the patient has “increased risk of [self-] harm or suicide,” and needs “hospital level services.” ROA.22958. “Subacute” patients, on the other hand, have “less need for intensive services” but still may need “stabilization.” ROA.22958-22959.

In August 2014, the City had a change of heart. Contradicting its earlier position, the City proposed that, rather than construct a new Phase III facility to house inmates with serious mental-health issues on a permanent basis, it instead would retrofit part of the newly constructed OJC. ROA.7495-7498. OPSO continued to advocate for the construction of Phase III. ROA.7512-7514. The district court referred both plans to a Mental Health Working Group (MHWG) it had appointed to “assist[] the [OPSO] and the City in attaining compliance with the Consent Judgment.” ROA.8130.<sup>5</sup> In September 2014, the MHWG unanimously recommended the adoption of OPSO’s plan for construction of a Phase III facility as the “most appropriate to meet the individual needs of mentally ill prisoners and support the safety and security of the institutions.” ROA.8133-8134. But the MWHG’s recommendation was not binding, and the project did not move forward at that time.

After negotiations stalled for another year, the magistrate judge ordered the City and OPSO to submit proposals for resolving all outstanding issues. ROA.9897-9898. OPSO again recommended construction of a Phase III facility to permanently house inmates with serious mental-health needs. ROA.16432-16435. The City submitted two plans—one to retrofit the fourth floor of the OJC to create

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<sup>5</sup> The MHWG was comprised of three members appointed by OPSO, three by the City, and three independent mental health professionals. ROA.8130.



160 beds for inmates with medical or mental-health issues and another to construct a new Phase III facility with 88 beds for inmates with mental-health needs.

ROA.16418-16420. But still, no progress was made toward any of these plans.

3. *The Stipulated Order And The Supplemental Compliance Action Plan*

On June 21, 2016, all parties, including the City, submitted to the district court a Stipulated Agreement for Appointment of Independent Jail Compliance Director, which the district court entered as an order (Stipulated Order).

ROA.11277-11297.<sup>6</sup> The Stipulated Order created the Office of the Compliance Director. ROA.11298. The Compliance Director would be chosen by the parties and approved by the district court, and have final authority for, among other things, bringing the jail into compliance with the Consent Judgment. ROA.11279-11291.

Of particular relevance here, the Stipulated Order directed the City, Sheriff, and Compliance Director to develop and finalize plans for: (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.”

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<sup>6</sup> The Stipulated Order came about as a result of a motion by the private plaintiffs, the United States, and later the City to appoint a receiver to take over the duties of the sheriff. See ROA.10627-10630. The motion alleged that OPSO had failed to comply with the Consent Judgment and argued that the appointment of a receiver was necessary to ensure OPSO’s compliance. ROA.10627-10630. As the magistrate judge explained, ROA.16458-16459, the parties (including the City) entered into the Stipulated Order to “resolv[e] the issues raised in the receivership motion” and to “set[] the jail on a path for compliance with the Consent Judgment.”

ROA.11290. The Stipulated Order also resolved a disagreement between the City and OPSO regarding control of FEMA funds provided to compensate for damage incurred during Hurricane Katrina to a jail facility known as Templeman II.

ROA.11290. The Sheriff abandoned his claim to those funds in exchange for the City's agreement to use them *exclusively* for the three objectives described above.

ROA.11290; ROA.22709-22710.

To address the housing needs of inmates with serious mental-health and medical needs, the Compliance Director reviewed plans submitted by the parties and consulted with many stakeholders, including the City, extensively.

ROA.11657. He discussed his proposal with New Orleans Mayor Landrieu, members of the City Council, and the City Attorney. ROA.22750.

The Compliance Director submitted his Supplemental Compliance Action Plan (SCAP) to the district court on January 4, 2017. ROA.11652-11667. In it, he recommended the construction of a Phase III facility 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 Mayor Landrieu and the City Attorney, both of whom accepted the recommendation. ROA.22714; see also ROA.23211-

23212 (the Compliance Director's recommendation of an 89-bed facility was based on the City's agreement to accept that recommendation).

For two years after the SCAP was submitted, the City repeatedly represented that it actively was working to design and construct the Phase III facility. In May 2017, the City Council forwarded the Phase III plan to the City Planning Commission for consideration. See ROA.22085-22086. The next month, City Attorney Rebecca Dietz told the district court that the City was finalizing a Request for Proposal for designing the facility and that it should be completed within 40 months. ROA.21878-21879. The City made the same representation in a letter from Mayor Landrieu to the State Department of Corrections. ROA.15976. Throughout 2018, the City continued to represent to the Compliance Director that it was building the Phase III facility. ROA.15988-15989.

4. *The City Retreats From Complying With The Stipulated Order And The District Court Issues The 2019 Orders*

In late 2018, the City learned that, as of October 2019, the Elayn Hunt facility would no longer be available to temporarily house detainees with serious mental-health and medical needs. ROA.13050. On January 12, 2019, the Sheriff and Compliance Director met with the City to discuss plans for temporarily housing those detainees until the Phase III facility could be completed. During that meeting, the City proposed that, in lieu of building Phase III to permanently house those inmates, it would instead either renovate buildings in a FEMA facility known

as the Temporary Detention Center (TDC) or would renovate the fourth floor of the OJC. ROA.13051. The Compliance Director and Sheriff responded that these options were not “viable as a long term solution for housing” detainees with serious mental-health and medical needs and “the [Phase III facility] as previously planned should go forward.” ROA.13060.

The City then took its proposal for alternatives to the district court. On January 25, 2019, the parties met for a status conference. Although the focus of the status conference was the temporary housing of detainees once the Elayn Hunt facility was no longer available, the parties also discussed plans for the permanent Phase III facility. ROA.16464. For the first time, the City informed the court 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.

On February 25, 2019, the City submitted a short-term plan to temporarily house inmates with serious mental-health needs. ROA.13050-13053. The plan

called for renovating two buildings of the TDC to house 65-69 inmates.<sup>7</sup>

ROA.13051. At the same time, the City informed the district court 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 Court ordered the City and Sheriff’s Office 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 18, 2019 Order also made specific findings pursuant to the PLRA. It stated:

The orders herein extend no further than necessary to correct violations of the federal rights of the plaintiff class. The Court further specifically finds that such relief is narrowly drawn, extends no further than necessary to correct the violations of federal rights, and is the least intrusive means necessary to correct such violations. The Court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief ordered herein.

ROA.13200.

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<sup>7</sup> The district court ultimately approved that plan, ROA.13198-13199, and most inmates were transferred from Elayn Hunt to the renovated TDC in late 2020.

For the next year, from April 2019 through April 2020, the City submitted fourteen monthly reports to the district court representing that it was actively working toward designing and completing the Phase III facility.<sup>8</sup>

5. *The City Unilaterally Shuts Down Work On Phase III*

Despite the City's representations to the district court, the City was preparing in mid-2020 to retreat fully from its commitment to build Phase III. On May 31, 2020, the City again told the district court that design work for Phase III was ongoing. ROA.14044. But the City asserted that its ability to construct Phase III would be impacted by revenue shortfalls resulting from the COVID-19 pandemic. ROA.14045-14047. The City also stated the project was \$15 million over budget, and that a projected reduction in inmate population "alleviated the need for such an expanded jail capacity." ROA.14045-14047.

Days later, on June 5, 2020, the City ordered the architect and project manager for Phase III to stop work. After learning of the City's actions, the district court ordered a status conference for June 10, at which the City confirmed it unilaterally had stopped work on Phase III and had not planned to inform the Court until the end of June. ROA.16468. The City submitted an updated status report

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<sup>8</sup> See ROA.13208; ROA.13212-13213; ROA.13219; ROA.13221; ROA.13229; ROA.13231-13232; ROA.13239-13240; ROA.13246; ROA.13248; ROA.13254; ROA.13260; ROA.13374; ROA.13387; ROA.13391; see also ROA.16467.

the same day, reiterating the financial concerns it asserted in the May 31, 2020, status report and stating further work on Phase III would be “a waste of taxpayer dollars.” ROA.14067.

6. *The City’s Rule 60(b) Motion For Relief*

On June 29, 2020, the City moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the district court’s 2019 Orders, arguing “there has been significant change in the factual conditions which render programming, design, and construction of the Phase III jail facility unsustainable.” ROA.14076. The City set forth three grounds for relief: (1) “the [OJC] currently provides medical and mental healthcare that is above the minimal constitutional standard”; (2) “the decrease in the inmate population makes the programming, design, and construction of a new Phase III jail facility unnecessary”; and (3) “the unexpected COVID-19 pandemic will cause a significant budgetary shortfall for the City.” ROA.14078.

After the plaintiffs, the United States, the Sheriff, and the Compliance Director all filed memoranda opposing the City’s motion, the City filed its reply brief. ROA.15412-15442. In it, the City identified three alternatives to building

Phase III.<sup>9</sup> The first two options involved renovations to the TDC facility, and the third proposed renovations to the second floor of the OJC. ROA.15429.

Also in its reply brief, the City argued that the district court's 2019 Orders violated the PLRA, 18 U.S.C. 3626(a)(1)(C), which states that nothing in the PLRA "shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons." ROA.15413-15415. Because the City had failed to raise this argument in its Rule 60(b) motion or argue it in the accompanying opening brief, the district court allowed the parties to file sur-replies addressing that argument. ROA.15540.

After an eight-day hearing involving testimony from approximately two dozen witnesses, the magistrate judge issued a Report and Recommendation (R&R) recommending the district court deny the City's motion. ROA.16474, 16517. As an initial matter, the magistrate judge found 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. But the magistrate judge 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. Rather, the R&R explained, "in the Stipulated Order signed

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<sup>9</sup> The City's motion and accompanying memorandum did not propose any alternatives to Phase III. The City provided these alternatives in its reply brief only after the district court ordered it to do so. ROA.15396-15397.



by the parties, including the City Attorney on behalf of the City, the parties agreed the Compliance Director would submit a plan for housing inmates with mental-health and medical needs.” ROA.16477. The magistrate judge pointed out that “[t]he City worked closely with the Compliance Director to fashion that Plan, which ultimately called for the construction of an 89-bed Phase III facility,” and “[t]he City \* \* \* accepted that plan and committed to it, not only to the parties but to the Court—on multiple occasions.” 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 (emphasis added).<sup>10</sup>

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 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 independent monitors, that the existing facilities were inadequate to house detainees with serious mental-health and medical needs and that “Phase III

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<sup>10</sup> In the alternative, the magistrate judge also concluded that the plain language of the PLRA did not prohibit courts from ordering the construction of prisons, but meant only that the PLRA itself did not authorize courts to do so. ROA.16481-16482.

[i]s still a critical need.” ROA.16485. For example, the testimony reflected that the current OJC facilities are dangerous for detainees at risk for suicide, and lack “sufficient space for individual and group programming activities, which are not only critical elements of mental-health treatment but are also *required* to be provided by the Consent Judgment.” ROA.16485-16486. The testimony also reflected that the current OJC facilities lack an infirmary, which leads to inmates being denied constitutionally-required follow-up medical care. ROA.16486.

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. For example, the magistrate pointed out that in late 2018, the City forecasted that the jail’s population could reach as low as 980 inmates by 2020. ROA.16491. And indeed, at the end of 2020 there were 984 inmates in OJC custody. ROA.16491.

Third, the magistrate judge rejected the City’s arguments related to its budget. Accepting the City’s representation that the Phase III project was \$15 million over budget, the magistrate judge stated that the City’s assertion that it would have to sell new bonds or borrow money to make up the difference was untrue. ROA.16492. The magistrate judge explained that the City had received

more than \$70 million in reimbursement for Hurricane Katrina’s destruction of the Templeman II jail facility, which the City was obligated to spend for the three projects specified in the Stipulated Order—youth housing, renovation of the “Docks” facility, and Phase III. ROA.16493-16497. The magistrate judge also pointed out 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; ROA.15043-15044. Moreover, the magistrate judge noted that the City’s federal grants manager testified that at least \$81 million in FEMA funds remained available to the City and could be used for Phase III. ROA.22066; ROA.22080-22082.

The magistrate judge also rejected the City’s argument that it could not afford the \$9 million in annual operating costs Phase III would require. ROA.16498-16501. The magistrate judge pointed out that the City was already incurring those operating costs while temporarily housing detainees with mental-health and medical needs at the TDC, which would close when Phase III opens and the detainees are transferred there. Phase III’s operating costs would thus be offset by the closing of the TDC. ROA.16499-16501. And in any case, the magistrate judge also noted 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.15501.

Finally, the magistrate judge rejected the City's three proposed alternatives to Phase III. The magistrate judge did not discuss the first two because, at the hearing, the City's expert conceded they were "not viable," due to susceptibility to hurricane damage. ROA.16504. As to the third option—a retrofit of the OJC's second floor—the court found it was not acceptable because, among other reasons, the facility'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 OJC's size, and there was "insufficient programming space in the retrofit plan to comply with the Consent Judgment." ROA.16485; ROA.16506-16509.

On January 25, 2021, the district court adopted the R&R in full and overruled all objections. Decrying the City's "revisionist history" and "distortion of the record," the district court pointed out that "*the City, not this Court*, decided to construct Phase III." ROA.16607-16608. The district court also specifically held that "new arguments first raised by the City in its reply brief, as well as those not initially made before the U.S. Magistrate Judge, are deemed waived." ROA.16610. As to the City's asserted changed circumstances, the district court agreed with the magistrate judge that relief under Rule 60(b) was unwarranted. Specifically, it agreed: (1) "OJC does not currently provide medical and mental healthcare that is compliant with the [C]onsent [J]udgment"; (2) "the impact of the

COVID-19 pandemic on the City's budget is both speculative and irrelevant"; and (3) "there has not been an unexpected or substantial decline in the inmate population at OJC." ROA.16610. Stating that it would "hold the City to its previously chosen course of action," the district court denied the City's motion for relief. ROA.16611.

The City filed a timely notice of appeal. ROA.16616.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

As the district court found, the City's Rule 60(b) motion embodies the "simple truth" that the City "doesn't like the result of the very process that it bargained for, helped develop, and thereafter fully embraced in open court as the most reasonable and feasible alternative for addressing the issue of housing special-needs inmates." ROA.16479. To wrest itself free of its commitment to build Phase III, "the City has concocted a haphazard collection of unconvincing arguments, some of which appear suddenly overnight only to be later abandoned, others of which change from day to day." ROA.16471. This Court should affirm the district court's order.

1. a. The district court correctly held that the City waived its argument that Section 3626(a)(1)(C) of the PLRA precluded the district court from issuing the 2019 Orders because the City raised this argument for the first time in its reply

brief. But in any case, a Rule 60(b) motion is not a proper vehicle for raising new legal arguments which could have been made before the judgment issued.

b. The district court properly concluded in the alternative that the PLRA did not prohibit it from ordering the City to fulfill its previous commitment to build the Phase III facility because the 2019 Orders did not order the City to construct a prison. Rather, the 2019 Orders merely instructed the City to follow through on its own agreed-upon commitment to solve the problem of housing prisoners with mental-health and medical needs by building Phase III.

c. The district court's decision denying the City's motion for relief under Rule 60(b) does not contravene the PLRA's directive that relief for constitutional violations be narrowly tailored to address violations of a federal right. The district court specifically found that the March 18, 2019 Order complied with the requirements of Section 3626(a)(1)(A) of the PLRA. Moreover, the City's alternative plan for housing prisoners with mental-health and medical issues does not adequately address the constitutional violations at issue.

2. The district court did not abuse its discretion in holding the City's asserted "changed circumstances" failed to justify relief under Rule 60(b).

a. The district court correctly rejected the City's argument that it currently provides a constitutional level of care to inmates with serious mental-health and

medical needs. The record fully supports the court's holding that the OJC remains constitutionally deficient in providing care to these inmates.

b. The district court also correctly rejected the City's argument that budgetary shortfalls caused by the COVID-19 pandemic should relieve it of its commitment to build Phase III. The district court explained that the Stipulated Order, which the City signed, contractually obligates the City to use FEMA funds received as reimbursement from the hurricane-damaged Templeman II facility to address the housing needs of detainees with mental-health and medical issues.

Moreover, the district court correctly rejected the City's argument that budgetary shortfalls from the COVID-19 pandemic meant that the City could no longer afford the \$9 million in annual operating costs for the Phase III facility. The district court pointed out that the City is *already* spending money to operate the TDC facility, where inmates with serious mental-health and medical issues are being housed temporarily. The district court correctly observed that when Phase III opens, the staff at the TDC will simply move to the Phase III facility, which is expected to require only six or seven more staff than the TDC. Thus, any increased cost associated with operating Phase III, as opposed to the TDC, will be insubstantial. Additionally, the Phase III facility is not expected to be operational for another three years, by which time the City expects to have almost fully recovered financially from the COVID-19 pandemic.

c. The district court also correctly rejected the City's argument that a decrease in the inmate population should relieve it from its commitment to build Phase III. The district court noted that to warrant relief under Rule 60(b), the circumstances must actually have *changed* since the time of the underlying judgment. Here, the City knew at the time it signed the Stipulated Order and agreed to the SCAP that the OJC's population was expected to decrease. That the decrease in fact happened is therefore not a changed circumstance.

Additionally, the district court correctly found that the decline in general inmate population had not led to a corresponding decrease in detainees with serious mental-health and medical needs. And in any event, the problems at OJC with respect to housing prisoners with serious mental-health and medical needs are largely structural, and thus unrelated to the size of the inmate population.

d. Finally, the district court did not abuse its discretion in rejecting the City's proposed retrofit of the second floor of the OJC as an alternative to building Phase III. The district court correctly found that the OJC's mezzanine-based structure was dangerous for inmates at risk of self-harm or suicide, and that the proposed retrofit lacked sufficient programming space for individual and group therapy. And it is undisputed that the City's proposed OJC retrofit would not create an infirmary, which the City's own witness testified is necessary for a jail of OJC's size. Although the City proposes that it could simply send inmates with



medical needs to a secure ward in a nearby hospital, the district court correctly found that the City had not shown that this was a feasible alternative to an infirmary.

## **ARGUMENT**

### **I**

#### **THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE PLRA DID NOT PROHIBIT IT FROM ORDERING THE CITY TO COMPLY WITH THE STIPULATED ORDER AND THE SCAP**

##### *A. Standard Of Review*

Because the City waived the argument that the PLRA prohibited the court from ordering the City to follow through on its commitments under the Stipulated Order and the SCAP, this Court should decline to address it. See *Fednav Int'l Ltd. v. Continental Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) (“[A] party who fails to adequately present an issue to the district court has waived the issue for purposes of appeal.”).<sup>11</sup> If not waived, and this Court addresses the merits of the district court’s alternate conclusion that there was no PLRA violation here, the district court’s underlying factual findings are reviewed for clear error, *Cooper v. Noble*, 33 F.3d 540, 545, opinion supplemented, 41 F.3d 212 (5th Cir. 1994), and

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<sup>11</sup> Because the City has failed to make a plain error argument in its opening brief, this Court should refuse to conduct a plain error analysis and decline to address the argument altogether. See, e.g., *Havens v. Colorado Dep’t of Corr.*, 897 F.3d 1250, 1260 (10th Cir. 2018).

underlying legal conclusions are reviewed de novo, *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015), cert. denied, 577 U.S. 1137 (2016).

*B. The City Waived The Argument That The PLRA Prohibited The District Court From Ordering It To Comply With The Stipulated Order And The Supplemental Compliance Action Plan, And Therefore This Court Should Not Review It*

Section 3626(a)(1)(C) of the PLRA states that nothing in the PLRA “shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons.” 18 U.S.C. 3626(a)(1)(C). The district court correctly concluded that the City waived its argument that this provision precludes the relief to which the City agreed—building the new Phase III jail facility—because the City raised it for the first time in its reply brief. This Court thus should not address the City’s PLRA argument. Moreover, even if the City had raised this issue in its initial Rule 60(b) motion, it still would not have been appropriate for the district court to consider it because it is not a proper basis for relief under Rule 60(b).

1. The City’s Rule 60(b) motion cited three categories of “changed circumstances” as its *only* grounds for relief: (1) “the [OJC] currently provides medical and mental healthcare that is above the minimal 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. It was only after the other parties filed briefs

opposing the motion that the City, in its reply brief, asserted that the 2019 Orders are orders to build a jail and thus are prohibited by the PLRA. ROA.15413-15415.

In these circumstances, the City's PLRA argument is waived. As this Court often has recognized, an argument made for the first time in a reply brief is waived. See, e.g., *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 702 (5th Cir. 2010). Indeed, as the district court held, the City waived this argument with respect to the 2019 Orders when it did not appeal them or otherwise object to them "for more than *fourteen months after* the last supposedly flawed order." ROA.16610. See *Lowry Dev., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382, 387 (5th Cir. 2012) ("[A] Rule 60(b) motion may not be used as a substitute for a timely appeal.").

2. This Court should not address the City's PLRA argument for an additional reason. As this Court has explained, a Rule 60(b) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory." *Dial One of the Mid-South, Inc. v. BellSouth Telecomm., Inc.*, 401 F.3d 603, 607 (5th Cir. 2005) (citation omitted); see also *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016) ("[A] Rule 60(b) motion is not an appropriate vehicle to advance new arguments or supporting facts that were available but not raised at the time of the original argument."). Thus, even if the City had asserted its PLRA

argument in its Rule 60(b) motion, rather than only belatedly in its reply brief, this “new” argument would not have been properly before the district court.

The City has had ample opportunity to raise its PLRA argument before now.<sup>12</sup> It could have done so in January 2017, when the Compliance Director first submitted the SCAP recommending building Phase III, see ROA.11659-11660. It also could have done so when the City again notified the Court that it would prefer “alternatives” to building Phase III, see ROA.16464. And this argument was available to the City in January 2019 and March 2019 when the district court ordered the City to fulfill its agreed-to obligation to fund and proceed with Phase III. But the City failed to raise the argument at any of these times. Instead, the

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<sup>12</sup> During the hearing on the 60(b) motion, the City pointed out that it previously had raised this argument in 2015 in connection with briefing on OPSO’s motion to hold the City in contempt for failing to construct Phase III in response to the recommendation of the MHWG. See ROA.23154-23155; ROA.9859. The court ultimately denied the contempt motion on the ground that the MHWG’s recommendation was not a court order, and expressly declined to decide whether the PLRA would bar it from ordering the construction of a jail. ROA.9923 & n.21.

That the City raised the argument years ago in a different context is of no moment. To avoid waiver, the City must have raised its PLRA argument *in response to the 2019 Orders*, as those are the orders which the court declined to modify. See, e.g., *Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (“Merely mentioning [a legal issue] in another context is not enough.”); *Fibrogen, Inc. v. Cellex-C Intern, Inc.*, 122 F. App’x 121, 123 (5th Cir. 2005) (holding an issue waived though the party previously had raised it in another context earlier in the litigation).

City repeatedly represented to the district court that it was actively working on designing and programming Phase III. See ROA.16468. Questioned by the magistrate judge at the hearing on the Rule 60(b) motion, the City was unable to explain why it failed to raise this argument earlier. See ROA.23275-23279. For this reason as well, this Court should not address this issue.<sup>13</sup>

*C. The District Court Correctly Rejected The City's PLRA Argument Because The District Court Did Not Order The City To Build A Jail*

Even if the City had not waived its argument that the PLRA prohibited the district court from ordering it to fulfill its agreed-upon commitment to fund and proceed with Phase III (it did), and even if the City were permitted to advance a new legal argument in the context of a Rule 60(b) motion (it is not), the City's PLRA argument would fail because, as the district court found, the 2019 Orders did not *order* the City to build a jail. 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 recommended by the Compliance Director for housing inmates with mental-health or medical needs.

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<sup>13</sup> The City's assertion that it "raised the issue of whether the PLRA restricts the Court's authority to order the construction of a new jail as early as 2013," Br. 27, is disingenuous. To support this statement, the City cites to an earlier decision in this case, *Jones v. Gusman*, 296 F.R.D. 416, 459 (E.D. La. 2013). There, the City had submitted a proposed finding of law that the "Court may not approve a proposed consent decree that results in the raising of taxes," and cited Section 3626(a)(1)(C) as authority. *Id.* at 458-459. As set forth *supra* note 12, it is not enough that the City raised this argument in a different context years ago.

1. *The City Voluntarily Contracted To Fund The Construction Of Phase III*

The City's PLRA argument is based on a false premise—that the district court *ordered* it to build a new jail. The court did not. In the R&R, the magistrate judge explained that the court had “never ordered the City to build a jail.”

ROA.16476. 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.” ROA.16476.

As the magistrate judge correctly found, ROA.16476-16480, the City contractually obligated itself to fund Phase III and build the new facility. The magistrate judge explained that “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 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, subsequently, “[t]he City worked closely with the Compliance Director to fashion” the plan for Phase III, “accepted that plan and committed to it, not only to the parties but to the Court—on multiple occasions.” ROA.16477. It further stated

that the City “did this voluntarily and as part of a binding agreement with the other parties to the litigation. It did not do so because it was ordered to.” ROA.16477.

Thus, the magistrate judge’s conclusion that the City *agreed* to build the new jail facility is amply supported by the evidence and does not constitute clear error. See *McLane Foodservice, Inc. v. Table Rock Restaurants, L.L.C.*, 736 F.3d 375, 377 (5th Cir. 2013) (“[T]he district court’s findings of fact as to the intent of the parties are reviewed for clear error.”). Indeed, with respect to the intent of the parties, the magistrate judge noted that former City Attorney Rebecca Dietz, who negotiated the Stipulated Order on behalf of the City, *confirmed* at the motion hearing that she understood the City to be bound by the Compliance Director’s subsequent recommendation. ROA.16479; ROA.22716-22717; ROA.22736-22737.

This conclusion is also supported by the fact that the agreement was not a one-way street, but also benefited the City. In exchange for the City’s agreement to fund Phase III with FEMA reimbursement for the loss of the hurricane-damaged Templeman II facility, the OPSO promised to drop any lawsuits against the City relating to control over that funding. ROA.16495-16496. The OPSO fulfilled its end of the bargain. ROA.16496. The City has not done the same.

The City argues that the district court erred in finding that it voluntarily contracted to build Phase III because the City never received proper approval to do

so under its Home Rule Charter. Br. 25, 32. The City never advanced this argument in the briefing on its Rule 60(b) motion, but rather raised it for the first time in its objections to the R&R. This Court has held that “issues raised for the first time in objections to the report of a magistrate judge are not properly before the district judge.” *Finley v. Johnson*, 243 F.3d 215, 219 n.3 (5th Cir. 2001). The district court thus did not err in deeming that argument waived. ROA.16610.

In any case, the City’s argument essentially boils down to an acknowledgment that the City never took the proper steps to obtain authorization to fulfill *its own* contractual obligation. As this Court recognized in *In re Deepwater Horizon*, 786 F.3d 344, 361 (5th Cir. 2015), “fulfillment of a contract promise \* \* \* is not excused by failure of a condition \* \* \* which the promisor himself causes to happen.” (citation and alterations omitted). Rather, “[i]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, \* \* \* he cannot take advantage of the failure.” *Ibid.*

2. *The PLRA Does Not Prohibit The Court From Ordering The City To Fulfill Its Contractual Obligation To Build Phase III*

Moreover, the district court correctly concluded that ordering the City to follow through on *its voluntary commitment* to fund construction of Phase III does not violate the PLRA. In *Plata v. Schwarzenegger*, No. C01-1351, 2008 WL 4847080 (N.D. Cal. Nov. 7, 2008), the court addressed a similar argument. In that case, involving a challenge to medical care in the California prison system, a court-



appointed receiver submitted a plan for, among other things, “construction projects that would both upgrade clinical space at existing prisons and result in entirely new healthcare facilities.” *Id.* at \*1. As here, for some time the defendant did not object to the receiver’s authority to develop a remedial plan or to the plan itself. *Ibid.* But the State later changed its mind about funding the new construction, raising the same argument that the City makes here—that the PLRA prohibited the district court from ordering the construction of prisons. *Id.* at \*6. The *Plata* court held that the State’s argument “fail[ed] on its face because,” among other reasons, “the State has consented to the Receiver’s facilities program.” *Ibid.* Similarly, in *Harris v. City of Phila.*, No. CIV.A. 82-1847, 2000 WL 1978, at \*17 (E.D. Pa. Dec. 23, 1999), the court ordered the city of Philadelphia to use certain funds to fulfill its prior “commitment” to build a women’s detention facility to relieve overcrowding in its prison system. There, the court held that its order did not violate Section 3626(a)(1)(C) of the PLRA 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.” *Ibid.*

The City fails to cite any binding authority from this Court or any other court holding that the PLRA bars a district judge from ordering a litigant to comply with its own contractual agreement to address unconstitutional jail conditions by building a new jail facility. It cites *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998),

cert. denied, 526 U.S. 1158 (1999), but that case had nothing to do with building a new jail and instead concerned whether a consent order constituted a “prisoner release order” under the PLRA. See *id.* at 825. Here, the district court’s denial of the Rule 60(b) motion did not contradict *Ruiz*’s holding that the PLRA restricts the prospective relief that a consent decree may afford “to the same extent \* \* \* as it restricts the prospective relief which may be afforded by a judgment entered pursuant to adversarial litigation without agreement.” *Id.* at 825. Rather, the district court explained that it had “never ordered the City to build a jail.” ROA.16476. Instead, it “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.” ROA.22115.

The City asserts that other courts confronted with this issue have acknowledged that, “even if there is a prior agreement to build a new jail facility, the PLRA prevents the court from enforcing that agreement.” Br. 36. In support of this statement, the City cites a single unpublished decision from the Southern District of Indiana, *Huerta v. Ewing*, No. 2:16-cv-00397, 2018 WL 4922038 (Oct. 10, 2018), involving allegations of unconstitutional overcrowding in a county jail.<sup>14</sup> In that case, the parties agreed that the only way to solve the overcrowding

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<sup>14</sup> In a footnote, the City also cites *Chatmon v. Winnebago Cnty.*, No. 00-50084, 2002 WL 424617 (N.D. Ill. Mar. 18, 2002). Br. 36 n.135. But there is no  
(continued...)

problem was to build a new jail, *id.* at \*8. The court stated that “the PLRA prevents the [c]ourt from ordering [d]efendants to build a new jail \* \* \* [,] *at least at this stage in the litigation.*” *Ibid.* (emphasis added). The court further stated that if the defendant failed to follow through on its commitment to build a new jail, “the [c]ourt \* \* \* reserves the right to provide additional or alternative relief.” *Id.* at \*9. Nowhere did the *Huerta* court say or suggest that if the defendant failed to follow through on its commitment to build a new jail, the district court could *never* order it to do so. Nor did the decision in *Huerta* indicate that the defendants had entered into any contractual agreement with the other parties to build a jail facility as the City has done here. *Huerta* does not support the City’s argument.

In sum, as the magistrate judge explained, “once the Compliance Director chose Phase III as the solution to” the problem of housing detainees with mental-health and medical needs, “the City was, in fact, contractually obligated to construct that facility. This is reflected in the plain language of the [Stipulated] Order,” “was confirmed by [the] former City Attorney,” and “is reinforced by the City’s more than four-year long acquiescence in and acceptance of the Phase III plan submitted by the Compliance Director” and “its repeated assurances to the

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(...continued)

indication in that case that the defendant previously had agreed to build a jail facility.

Court that it was in the process of designing and building that facility.”

ROA.16478-16479. Thus, the district court did not order the City to build the new facility; the City agreed to do so.

3. *The District Court’s Order Denying The City’s Motion For Relief Does Not Violate Section 3626(a)(1)(A) Of The PLRA*

Finally, the City argues that the 2019 Orders violate the PLRA because Phase III “extends further than necessary to correct the purported violation of a federal right, and plainly is not the least restrictive means to address the needs of the inmates at issue here.” Br. 37-38. It argues that its proposed retrofit to the second floor of the OJC “would address any remaining constitutional inadequacies,” in a manner more amenable to the City. Br. 38. The City is wrong. As stated *supra* p. 13, the district court specifically found that its March 18, 2019 Order met each of the PLRA’s requirements (see ROA.13200), and the City has failed to show that this finding was an abuse of discretion.

Indeed, in the years-long history of this litigation, the City has failed to offer a more narrowly tailored alternative to Phase III that would remedy the constitutional violations at issue. As explained *infra* pp. 50-53, the magistrate judge correctly found that the City’s *current* purported alternative solution—retrofitting the second floor of the OJC—would not adequately remedy those violations. See ROA.16506-16509. Among other things, the proposed retrofit does not adequately solve problems with respect to OJC’s physical layout, which

include dangerous mezzanine levels from which prisoners can jump or hang themselves, a lack of programming space for group and individual therapy, and a lack of an infirmary. ROA.16485-16486.

\* \* \* \* \*

The City asks this Court to hold that in the wake of rampant constitutional deficiencies, the City can agree to build a constitutionally-compliant facility, represent to plaintiffs, the United States, the OPSO, and the district court for years on end that it is doing so, then unilaterally change its mind, and when a court orders it to fulfill its commitment, raise a new legal argument as an excuse for its failure to keep its promises. That is not, and cannot be, the law. This Court should reject the City's belated argument that the PLRA relieves it of its long-standing commitment to build the new jail facility.

## II

### **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE CITY'S RULE 60(b) MOTION**

In its Rule 60(b) motion seeking relief from the district court's 2019 Orders, the City argued that "there has been significant change in the factual conditions which render programming, design, and construction of the Phase III jail facility unsustainable." ROA.14076. The City asserted three changed circumstances: (1) "the [OJC] currently provides medical and mental healthcare that is above the minimal 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. In its reply brief, the City suggested several alternatives to Phase III, including retrofitting the second floor of the OJC. ROA.15441. The district court correctly rejected the City’s arguments and alternatives.

A. *Standard Of Review*

This Court reviews a district court’s denial of a motion for relief under Rule 60(b) for abuse of discretion, and the magistrate judge’s factual findings for clear error. *Cooper v. Noble*, 33 F.3d 540, 543, 545, opinion supplemented, 41 F.3d 212 (5th Cir. 1994); see also *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (“The decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for abuse of that discretion.”) (alteration and citation omitted); *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 286 (5th Cir. 1985) (This Court’s “review of denial of Rule 60(b) relief” is “meaningfully narrower than” it would be if it were a “direct appeal of the underlying order from which relief was sought by the Rule 60(b) motion.”).

B. *The District Court Correctly Rejected Each Of The Reasons The City Sought Relief From The 2019 Orders, As Well As The City’s Alternate Remedy*

A motion under Rule 60(b) for relief due to changed circumstances should not be granted unless the movant will suffer “hardship and oppression” that is

“extreme and unexpected.” *Valentine Sugars, Inc. v. Sudan*, 34 F.3d 320, 322 (5th Cir. 1994) (citation omitted). Even under the “flexible standard” the Supreme Court articulated in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 393 (1992), a “party seeking modification \* \* \* must establish that a significant change in facts or law warrants revision \* \* \* and that the proposed modification is suitably tailored to the changed circumstance.” The district court did not err in concluding that the City had failed to meet this burden. Nor did it err in rejecting the City’s proposed alternative remedy of retrofitting the second floor of the OJC.

*1. The District Court Correctly Rejected The City’s Argument That It Currently Provides A Constitutional Level Of Care To Inmates With Mental-health And Medical Needs*

The City asserts (Br. 42-44) that it currently is providing a constitutional level of care to inmates with mental-health and medical needs, and therefore the new facility is unnecessary. The district court correctly rejected this argument, calling it “disconnected from reality.” ROA.16483-16489.

First, the record reflects that suicidal patients currently are being housed 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. 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; see also ROA.23050-23051; ROA.23054.

The independent monitors' most recent report, filed February 8, 2021, further supports the magistrate judge's conclusion that the OJC's constitutional deficiencies have not been remedied.<sup>15</sup> In that report, the independent monitors found that the OJC was in full compliance with only four of the eleven specific requirements relating to suicide precautions set forth in Section IV.B.5 of the Consent Judgment. ROA.16702-16706. For example, the independent monitors found that "[i]nmates on suicide watch \* \* \* continue to be placed in non-suicide resistant cells without direct observation"; "[d]eputies are providing suicide watches with minimal to no documented training in conducting watches and reportedly varying degrees of understanding of their responsibilities"; and "[t]reatment services are very limited and inadequate for inmates on suicide watch because of staffing and space needs." ROA.16703.

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<sup>15</sup> As noted *supra*, the district court specifically found that the relief set forth in the Consent Judgment was "narrowly drawn, extends no further than necessary to correct the violations of federal rights, \* \* \* is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of a criminal justice system." ROA.4908. As such, a failure to comply with the Consent Judgment is, by definition, a failure to comply with constitutional requirements.



The monitors similarly found that OJC was in only partial compliance with the requirements of the Consent Judgment relating to medical care. Specifically, the monitors documented delays with laboratory testing and chronic care visits, as well as “persistent and significant lags” in providing medication to inmates in the process of detoxing. ROA.16714-16715. Independent medical monitor Dr. Greifinger testified that of the 18 areas of the Consent Judgment that he monitors, the jail was in compliance with only seven. ROA.23049.

The City points (Br. 42-43) to its hiring of Wellpath to provide care for the medical and mental-health needs of its inmates to support its argument that it is providing constitutionally compliant levels of treatment. But while Wellpath and its subcontractor, Tulane University, have been valuable additions to the New Orleans jail system, particularly with respect to eliminating the backlog in providing psychiatric services (see ROA.22661), they have not solved all of the constitutional deficiencies that the Consent Judgment aimed to remedy. As explained above, substantial deficiencies remain, particularly with respect to inmates at risk for self-harm and suicide. See ROA.16702-16707. And, of course, the presence of Wellpath and Tulane cannot remedy the serious physical deficiencies of the OJC facility, such as the dangerous mezzanine levels, the lack of space for individual and group therapy and programming, and the lack of an infirmary—problems that would be addressed by the construction of a Phase III

facility. See ROA.22684-22685 (testimony of Dr. Rouse that having a “dedicated special needs and mental health treatment facility” would eliminate many of the difficulties he encounters in providing mental-health services at the jail).

2. *The District Court Correctly Found That Budget Shortfalls Associated With COVID-19 Did Not Constitute A Changed Circumstance Under Rule 60(b)*

a. *The City Has Sufficient Funding To Construct Phase III*

The City also argues (Br. 39-49) that budgetary shortfalls caused by the COVID-19 pandemic should excuse the City from building Phase III. The district court correctly rejected this argument because the City is able—and indeed contractually obligated—to use previously-identified FEMA funds to construct Phase III.

As the magistrate judge explained, the City received approximately \$70 million in post-Katrina FEMA funds to compensate it for the damaged Templeman II facility. ROA.16494. Because the OPSO originally had built Templeman II with its own bond funds, it argued that it, and not the City, should control the FEMA reimbursement for Templeman II. ROA.16494. The City and OPSO settled this disagreement in the Stipulated Order, which provided that “the City, the Sheriff, and the Compliance Director shall develop and finalize a plan for” addressing three specific issues: (1) “appropriate housing for prisoners with mental-health issues and medical needs; (2) addressing the housing needs of

youthful offenders; and (3) addressing the current conditions of the ‘Docks’ facility.” ROA.16495 (citation omitted). The Stipulated Order further provided that “the City of New Orleans shall maintain final authority and approval over capital expenditures associated with that plan, *including use of Templeman II FEMA funding exclusively for implementation of the plan.*” ROA.16495 (emphasis added; citation omitted). Thus, by signing the Stipulated Order, the City agreed to use the \$70 million in Templeman II funds *exclusively* to fund those three specific projects, which include housing for detainees with mental-health issues and medical needs. ROA.16459; see also ROA.22709-22710 (testimony of City Attorney stating that the Stipulated Order “was intended to resolve [the dispute between OPSO and the City] such that the FEMA funding belonged to the City and we would use it to implement the plan”).

Approximately \$47.9 million in FEMA funds from the Templeman II facility remain available to build the new Phase III facility. ROA.16498 & n.31. The City spent around \$22 million on the other two components of the three-part plan—housing for youthful offenders and renovation of the Docks. See ROA.16498; ROA.15043-15044. Thus, the remaining money is available for—and is required to be used for—construction of Phase III, estimated to cost \$51 million. ROA.16492. Indeed, the City’s federal grants manager testified that at least \$81 million in FEMA funds (including the \$47.9 million in Templeman II

funds) remains available to the City, all of which could be used for construction of Phase III. ROA.16497-16498; ROA.22066. The City need only reallocate money from other projects (*i.e.*, projects that are not necessary to remedy identified constitutional violations) to have more than enough to fully fund Phase III. ROA.16497-16498; ROA.22080-22083.

The City acknowledges that it was obligated to use the Templeman II funds for the three projects enumerated in the Stipulated Order, including housing detainees with serious mental-health and medical issues, but disagrees that it was required to use the funds to build Phase III. Br. 46. This is incorrect. As the magistrate judge found, in signing the Stipulated Order, which obligated the City to work with the Sheriff and the Compliance Director to “develop *and finalize* a plan for \* \* \* housing for prisoners with mental health issues and medical needs,” ROA.11290 (emphasis added), the City bound itself to comply with the plan chosen by the Compliance Director. ROA.16478-16479. “[O]nce the Compliance Director chose Phase III as the solution” for housing detainees with mental-health and medical needs, “the City was, in fact, contractually obligated to construct that facility.” ROA.16478-16479; see also ROA.16479 (finding that “the City entered into a binding contract with the other parties in the case to allow the Compliance Director to develop a plan,” and “once that plan was submitted the

City fully accepted it for over four years”). Again, these findings are supported by the evidence and do not constitute clear error.

Thus, the City has more than enough funding to build the Phase III facility in a way that corrects all the constitutional deficiencies that led to this litigation. Instead, the City attempts to use the COVID-19 pandemic as an excuse to spend only \$9 million (Br. 40) of the remaining \$47.9 million to retrofit one floor of the OJC in a manner that, as explained *infra* pp. 50-53, will not fully address the constitutional problems the Consent Judgment aimed to remedy. The district court properly rejected this request.

*b. The District Court Did Not Err In Rejecting The City’s Argument Regarding Operating Costs*

The district court also correctly rejected the City’s argument that the budget crunch caused by the COVID-19 pandemic makes covering the approximately \$9 million in annual operating costs of the Phase III facility “untenable.” Br. 48; ROA.16498-16499. As the magistrate judge correctly found, the operating costs of the Phase III facility will be substantially offset by the closing of the TDC—the temporary location where detainees with serious mental-health and medical needs currently are housed—when Phase III is completed. See ROA.16498-16501.

As set forth above, when the parties learned that the Elayn Hunt facility would become unavailable, the City renovated the TDC facility to house detainees with serious mental-health and medical needs until the Phase III facility could be

built. ROA.16499-16500. The TDC has been in use since late 2020 and requires 102 security staff. ROA.16499; ROA.22869. The OPSO's Chief of Investigations, Michael Laughlin, testified that when Phase III is completed, OPSO would shut down the TDC and move TDC's staff to the Phase III facility. ROA.22857, 22870; see also ROA.22505. The current staffing plan for Phase III calls for 109 security staff—a minor increase in staffing. ROA.16500; ROA.22783; ROA.22870.<sup>16</sup> The OPSO's Chief Administrative Officer testified that the cost of staffing Phase III would be only about \$300,000 more per year than the current cost for staffing the TDC. ROA.22784-22785. Thus, the Phase III facility will not require \$9 million *more than the City currently is spending* to care for detainees with mental-health and medical needs.

In any event, even if the City were correct that budgetary shortfalls due to the COVID-19 pandemic would make \$9 million in operating costs difficult for the City to pay *now* (an argument undermined by the fact that the City *currently* is paying nearly the same amount to operate the TDC without objection), the district court still properly held that a current budgetary shortfall is not a sufficient

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<sup>16</sup> The City argues that “although to fully staff TDC, OPSO would need 102 employees, they currently employ only 60.” Br. 47-48 (emphasis omitted). 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.

changed circumstance to warrant relief under Rule 60(b). This is because Phase III will not be ready for occupancy for another three years, by which time the City is predicted to be close to full financial recovery from the effects of the COVID-19 pandemic. ROA.16500-16501; see also ROA.21963-21965. As the magistrate judge correctly concluded, “the City cannot avoid its obligations to construct the Phase III facility because of a speculative budgetary shortfall three years from now.” ROA.16501.

3. *The District Court Correctly Concluded That An Anticipated Decrease In Inmate Population Did Not Constitute A Changed Circumstance Under Rule 60(b)*

The City next argues (Br. 41-42) that a decrease in inmate population constitutes a sufficient changed circumstance to warrant relief under Rule 60(b). The magistrate judge correctly rejected this argument, explaining that the decrease in the general inmate population was not unexpected, and the number of detainees needing mental-health or medical facilities has not substantially decreased.

As stated above, to warrant relief under Rule 60(b), there must be a change in circumstances that was *unexpected* when the court issued the judgment or order from which a party seeks relief. *Valentine Sugars*, 34 F.3d at 322; see also *Rufo*, 502 U.S. at 385 (“[M]odification should not be granted where a party relies upon events that actually were anticipated at the time” of the court’s order.). Here, the City has long been aware that OJC’s population was steadily declining and “could

reach 980 inmates by 2020.” ROA.15988. Indeed, the Compliance Director based his recommendation to construct Phase III as an 89-bed facility on predictions of a steadily declining jail population. ROA.15988; ROA.11656-11660; ROA.22746.

The inmate population decreased during the COVID-19 pandemic in part because “[a]rrests were down during the shutdown and many non-violent inmates were released on bond.” ROA.16490. But by late November 2020, the number of inmates had crept back up to 984 inmates, “a number exactly aligned with [the City]’s estimate for 2020.” ROA.16491. Thus, as the magistrate judge found, the decline in number of inmates “[w]as neither dramatic nor unexpected,” and “[t]o suggest otherwise, as the City does here, is to rewrite history.”<sup>17</sup> ROA.16490.

Further, it is undisputed that the decrease in number of total inmates has not led to a *corresponding* decrease in the number of inmates with mental-health needs. Lead OJC psychiatrist Jeffrey Rouse testified that OJC has “had more and more and more psychiatric patients occupying a larger and larger percentage of the overall inmate count [at OJC].” ROA.22679. He further testified that as of

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<sup>17</sup> 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. Dr. Hardyman, the Custodial Placement Monitor, testified that detainees must be separated according to security level, Prisoners Rape Elimination Act (PREA) designation (*i.e.*, capacity for sexual predation or vulnerability), and other considerations. ROA.23098-23099. This need for separation necessarily renders many beds empty for occasional periods of time. See ROA.23182-23183; see also ROA.22836; ROA.22858-22860.



October 1, 2020, there were 477 inmates at OJC taking psychiatric medications, which was “greater than it was before COVID.” ROA.22679; see also ROA.22039-22040. Similarly, William Kissell of Wellpath testified that approximately 750 detainees—representing 93% of OJC’s population—receive mental-health services. ROA.22305.<sup>18</sup> And as of April 22, 2021, when the City filed its opening brief, there were approximately 65 inmates with acute or sub-acute mental-health needs occupying the TDC. See, *e.g.*, Br. 22. It remains plausible that that number could increase to 89 inmates—the number of beds in the Phase III facility—particularly with such a high percentage of OJC’s population having mental-health needs.

In any event, the City’s proposed plan for housing inmates on the second floor of the OJC is constitutionally deficient in ways unrelated to inmate population levels. As described below (p. 53), the City’s retrofit plan lacks an infirmary, which its own expert agrees is necessary for a jail with more than around 500 inmates. ROA.22392. It also would locate detainees with tendencies toward self-harm on dangerous mezzanine levels, from which they could jump or hang themselves. See, *e.g.*, ROA.22968; ROA.23168-23171. And the City’s retrofit plan lacks sufficient programming space for individual and group therapy,

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<sup>18</sup> The vast majority of these prisoners are not classified as acute or subacute and are housed in the general population. See, *e.g.*, ROA.22592-22593.

essential to caring for detainees with mental-health needs. See generally ROA.22970-22989.

4. *The District Court Did Not Abuse Its Discretion In Concluding That The City's Proposed Second Floor Retrofit Plan Would Not Remedy The Constitutional Violations At Issue*

The magistrate judge correctly found that the City's current proposed alternative to Phase III—retrofitting the OJC's second floor—would not provide a constitutional level of care for inmates with serious mental-health and medical needs. ROA.16483-16489. The City's argument (Br. 49-52) that this finding was an abuse of discretion is belied by the record, which adequately supports the court's conclusion.

First, the record reflects that the OJC's physical structure—four floors of rectangular, tiered mezzanines—presents dangerous conditions for detainees at risk for self-harm. Margo Frasier, the lead independent monitor, testified that detainees using the mezzanine to “tie off a suicide ligature or to attempt to jump from the mezzanine” was a “pretty constant issue.” ROA.23164, 23170. She further testified that “seldom does a week go by \* \* \* that there isn't one of those kinds of reports. Sometimes several a day.” ROA.23170; see also generally ROA.23168-23171. And Dr. Raymond Patterson, the independent mental-health monitor, testified that he could not “count the number of times where there's been an incident of a detainee running up to the mezzanine, threatening to jump off,

actually jumping off, threatening to hang himself, actually hanging, or, in other ways, increasing their risk of harm.” ROA.22968; see also ROA.15301-15304; ROA.15614-15615.

The City posits that installing protective fencing around the mezzanine would solve the problem of inmates jumping or hanging themselves. Br. 51 n.186. But Dr. Patterson testified that this was not an adequate solution because fencing can be climbed, giving inmates with an “increased risk of self-harm \* \* \* a ladder to climb up to the ceiling and jump off.” ROA.22967-22968; see also ROA.22675 (Dr. Rouse testifying to concerns that patients might be able to climb fencing around mezzanines). The record also reflects that use of mesh barriers with small holes that cannot be climbed is not feasible because such barriers are difficult for deputies to see through, “like looking through a screen door that’s 40 or 50 feet away.” ROA.22968-22969. And although the City asserts that the retrofit would create additional suicide-resistant cells, City witnesses failed to explain how deputies would visually monitor those cells, which would be located on a mezzanine level, presumably behind some sort of fencing or mesh. See ROA.22969-22970 (testimony of Dr. Patterson, explaining that it would be difficult to observe detainees with mental-health issues on the second floor of OJC because the mezzanine structure and fencing would interfere with sight lines); ROA.22674, 22677-2268 (testimony of Dr. Rouse that there already are difficulties

with lines of sight into cells on the second-floor mezzanine at OJC and that the circular design of Phase III would allow for better monitoring).

Second, Dr. Patterson testified that the proposed retrofit did not create sufficient programming space. See generally ROA.22970-22989. The City's assertion otherwise appears to be based on dividing the number of people needing mental-health treatment by the number who can fit into a room. See ROA.14773; ROA.22982-22983. Dr. Patterson provided several reasons why this calculation does not support a finding that there is sufficient programming space, including a failure to consider that different detainees need different treatments or that inmates might need to be separated by classification in group therapy sessions. ROA.22976-22977; ROA.22980.

Dr. Patterson also explained that he did not believe that the retrofit's plan to convert three cells to counseling rooms was appropriate or would be accepted by clinicians. ROA.22970-22971; ROA.23013-23015. He explained that these spaces lack the privacy necessary for the honest exchange of personal information essential to individual therapy. ROA.22970; see also ROA.12857 (noting in a monitoring report that the lack of private treatment space is an impediment to the delivery of mental-health services). For the same reason, Dr. Patterson disagreed with City witness Dr. Kottraba's assertion that cell-front visits by a mental-health professional constitute appropriate individual therapy. See ROA.22597. Dr.

Patterson explained that such sessions can be heard by nearby inmates and jail personnel, and thus are “not [] confidential individual session[s]” and “should not count as such.” ROA.22985.

Finally, the City’s proposed retrofit does not include an infirmary. Independent medical monitor Dr. Greifinger testified that an infirmary is important for providing skilled nursing services, including “evaluation [and] monitoring [of] acute care patients who might not be sick enough to be in the hospital, but who might deteriorate or decompensate.” ROA.23051. Indeed, the City’s own medical expert, Dr. Shansky, submitted an affidavit opining that for OJC to provide constitutional care without an infirmary, six specific conditions must be met, including the availability of a secure ward at a local hospital to treat inmates with medical needs. ROA.14781. During his testimony, Dr. Shansky added two additional requirements, including that the local hospital should be within walking distance of the jail. ROA.22362. There is only one hospital within walking distance of the OJC—University Medical Center (UMC). ROA.22362-22363. But there is no evidence in the record to suggest that *any* of Dr. Shansky’s enumerated conditions have been met, at UMC or at any other hospital. ROA.16488.<sup>19</sup>

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<sup>19</sup> Dr. Greifinger pointed out in his testimony that the City has not budgeted for securing any beds at UMC. ROA.23071-23072. He also testified that the secure unit at UMC is often full of inmates from a different entity, the State  
(continued...)

In sum, the evidence adduced at the hearing amply supported the district court's finding that changed circumstances did not justify relief under Rule 60(b). The district court did not abuse its discretion in so holding.<sup>20</sup>

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For the reasons set forth above, the magistrate judge correctly rejected the City's Rule 60(b) motion, declining to let the City "rewrite the important history of this case because it has become politically or financially expedient." ROA.16479. In adopting the magistrate judge's R&R, the district court likewise decried the City's "tortured attempts to revise history," and implored the City "to live up to its word" and fulfill its commitment to construct a facility that will provide adequate care for inmates with serious mental-health and medical issues. ROA.16611. This Court should do the same.

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(...continued)

Department of Corrections. ROA.23072; see also ROA.22775 (testimony of the former compliance director that UMC's secure unit was often full).

<sup>20</sup> Even aside from the deficiencies described above, there is an additional problem with retrofitting the OJC instead of building Phase III—namely, doing so might cause the City to lose tens of millions of dollars in FEMA funding. See ROA.22914-22915.

## **CONCLUSION**

For the foregoing reasons, this Court should affirm the district court's denial of the City's Rule 60(b) motion.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on July 27, 2021, I electronically filed the foregoing BRIEF FOR UNITED STATES AS APPELLEE 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**

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2019 and contains 12,969 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

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Date: July 27, 2021