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 SHERIFF SUSAN HUTSON'S RENEWED MOTION TO STAY JAIL CONSTRUCTION ORDERS PENDING APPEAL

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INTRODUCTION

The Sheriff has moved for a stay pending appeal (Motion to Stay) of the district court's denial of her Motion to Terminate All Orders Regarding the Construction of the Phase III Jail (Motion to Terminate). This Court should deny the motion. The Sheriff cannot satisfy the four factors this Court applies in determining whether to grant a stay, particularly that she 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 in their official capacities (collectively, the Sheriff), 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. ROA.174-211.[1] The United States intervened, alleging, as relevant here, violations of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997. ROA.1212-1251. In October 2012, the Sheriff filed

[1] "ROA.__" refers to the page numbers of the Record on Appeal. "Br. __" refers to page numbers in the Sheriff's opening brief in her appeal of her Motion to Terminate. "Doc. __, at __" refers to the docket number and page numbers of the docket on appeal. "Stay Mot. __" refers to page numbers in the Sheriff's Motion to Stay.

third-party complaints against the City of New Orleans (City), seeking funding for any prospective relief the court might order. ROA.1347-1407.

In 2013, the United States, the plaintiff class, and the Sheriff 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. ROA.4887-4939. 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, at the parties' request, the district court entered as an order (Stipulated Order). ROA.11303-11323. Among other things, the Stipulated Order provided for the appointment of a Compliance Director, with final authority over the Sheriff to operate the jail and to make binding decisions regarding how to implement certain aspects of the Consent Judgment. ROA.11304-11317.

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. ROA.11316-11317. The Sheriff abandoned any 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. ROA.11316.

In January 2017, after extensive consultation with the parties, the Compliance Director submitted a Supplemental Compliance Action Plan (SCAP). ROA.11678-11693. The SCAP recommended the construction of a new treatment facility known as "Phase III" on existing Orleans Parish Sheriff's Office property, with 89 beds to house inmates with acute and sub-acute mental-health needs. ROA.11685-11686. Sheriff Gusman signed the SCAP, along with the Compliance Director. ROA.11690.

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. ROA.16490. 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.13075 (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." ROA.13079. 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." ROA.13225-13226 (March 2019 Order).

3. On June 5, 2020, the City unilaterally ordered the architect and project manager for Phase III to stop work. ROA.16494. 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). ROA.14102-14122. 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 3626(a)(1)(C) of the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626 *et seq.*, prohibited the court from ordering the construction of a new jail facility. ROA.15439-15441. 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. ROA.15439 (citation omitted).

4. After a two-week hearing, the magistrate issued a Report and Recommendation (R&R) recommending denial of the City's motion. ROA.16473, 16543. The magistrate found that the City's argument that the PLRA prohibited the district court from issuing the 2019 Orders was waived because the City had not raised it until it filed its reply brief. ROA.16501-16502. The magistrate 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." ROA.16502-16508. The magistrate explained that in the Stipulated Order the City bound itself to whatever plan the Compliance Director ultimately submitted, and then worked closely with the Compliance Director to fashion an acceptable plan. *See* ROA.16503. The magistrate 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.16503.

The district court adopted the magistrate's recommendation on January 25, 2021, and the City appealed. ROA.16633-16637, 16642-16643.[2] 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). As relevant here,

[2] 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).

the Court declined to rule on the merits of the City's PLRA argument, holding that because "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests," the Court lacked jurisdiction over "the substance of the January and March 2019 orders." *Id.* at 478 (citation omitted); *see also id.* at 479 (observing that if the City asserted its PLRA argument "as an independent issue of law," then the Court "would lack jurisdiction because the only basis for appeal is the Rule 60(b) motion").

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.[3]

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. ROA.19050-19070. Sheriff Hutson argued that "[Section] 3626(a)(1)(C) [of the PLRA] expressly prohibits federal courts from 'order[ing] the construction of prisons' as prospective relief in consent decrees." ROA.19050-19051 (third alteration in original). In the alternative, Sheriff Hutson

[3] "An 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." Fed. R. Civ. P. 25(d).

argued that "the pending prospective relief ordering the construction of the Phase III jail and the associated orders" were private settlement agreements, and therefore the PLRA forbid the court from enforcing them. ROA.19050 (citing 18 U.S.C. 3626(g)(6)).

Following briefing by the parties, the magistrate issued an R&R to deny the Motion to Terminate. ROA.19304-19333. The magistrate 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. ROA.19308-19311. The magistrate 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, as well as her argument that she was not bound by commitments made by the previous sheriff. ROA.19311-19321.

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. ROA.19500-19521. The district court accepted the magistrate's conclusions. ROA.19502-19511. In particular, the district court observed that this Court previously had declined to reach the City's argument that the 2019 Orders violated the PLRA, on the ground that the City had never appealed those orders. The district court 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." ROA.19505-19506.

The Sheriff appealed the denial of the Motion to Terminate. ROA.19536.

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 all orders regarding the construction of the Phase III facility. The Sheriff also filed a motion to expedite the court's ruling on the motion to stay, which the district court denied. ROA.19522-19535, 19540-19541.

On September 13, before the district court decided the Sheriff's motion for a stay, the Sheriff moved in this Court to stay pending appeal all orders relating to the Phase III facility construction. This Court denied the motion without prejudice on September 20. Doc. 40-2.

The district court denied the Sheriff's motion to stay on November 15. On November 27, 2023, the Sheriff filed the instant Motion to Stay.

ARGUMENT

This Court should deny the Sheriff's Motion to Stay. 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 that she is likely to prevail 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 warranted. *Id.* at 433-434. Here, all four factors mitigate against granting a stay.

I. 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 this Court has already recognized, it lacks jurisdiction over the 2019 Orders because they were never appealed. Second, even if the Court had jurisdiction over the 2019 Orders, it should decline to reach the Sheriff's arguments because a motion to terminate under Section 3626(b) of the PLRA is not an appropriate vehicle for challenging the orders. Third, the Sheriff is judicially estopped from arguing that the 2019 Orders violate the PLRA. And finally, even if this Court

were to reach the merits of the Sheriff's motion to stay, it should deny the motion because the district court correctly rejected her argument that the 2019 Orders unlawfully enforced private settlement agreements in violation of the PLRA.

A. The 2019 Orders are not properly before the Court.

The Sheriff argues that she "need only present a substantial case on the merits" rather than a strong likelihood of success because her appeal raises a "serious legal question," regarding whether the district court's 2019 Orders violate the PLRA. Stay Mot. 11-12 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 556 (5th Cir. 1981)). But even if such "serious legal question" existed, jurisdictional and procedural rules prevent this Court from reaching it.[4]

[4] The Sheriff purports to base this Court's jurisdiction on three grounds. Br. 2. None is apposite. She first relies on the Court's general "federal question jurisdiction under 28 U.S.C. 1331 to hear disputes involving prison reform litigation arising from constitutional violations." *Ibid.* But this Court has federal question jurisdiction under Section 1331 *only* where such federal question arises in the context of an *appealable order*, which, as explained *infra*, is not the case here. She also claims jurisdiction under 28 U.S.C. 1292(a)(1), arguing that the district court's order denying her motion to terminate was a "refusal to modify a consent decree." *Ibid.* But the Sheriff is not seeking to *dissolve* or *modify* an injunction or consent decree—she is challenging the legality of the 2019 Orders *at the time they were issued*, which she cannot do because, as explained *infra*, she failed to timely appeal those orders. Finally, she states that "the denial of a motion to terminate, filed under the [PLRA], is appealable." *Ibid.* This would be correct if the Sheriff's arguments were proper subjects of a PLRA motion to terminate—for example, if she argued that the constitutional violations underlying this matter had been cured. But as explained *infra*, the Sheriff cannot use a PLRA motion to terminate as an end-run around the failure to timely appeal the 2019 Orders when they were issued.

1. First and foremost, the Court lacks jurisdiction over the 2019 Orders because the Sheriff never appealed them. Indeed, this Court has already held that it lacks jurisdiction over these *same* Orders in connection with the City's appeal of its Rule 60(b) motion, because they were not appealed. *See Anderson v. City of New Orleans*, 38 F.4th 472, 478 (5th Cir. 2022).

In its Rule 60(b) motion, the City argued that changed conditions warranted relief from the Court's 2019 Orders, and that the Orders violated Section 3626(a)(1)(C) of the PLRA, which, the City contended, prohibited the court from ordering the construction of a jail. *Anderson*, 38 F.4th at 477. The Court held that, although it had jurisdiction over the City's Rule 60(b) motion regarding changed conditions, it *lacked* jurisdiction over "the substance of the January and March 2019 orders from which the city's motion seeks relief." *Id.* at 478. The Court explained that "Rule 60(b) simply may not be used as an end run to effect an appeal outside the specified time limits, otherwise those limits become essentially meaningless."[5] *Ibid.* (citation omitted); *see also ibid.* ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests."

[5] The Sheriff's attempts to relitigate the propriety of the 2019 Orders also violate the law of the case doctrine. *In the Matter of AKD Invests., L.L.C.*, 79 F.4th 487, 491 (5th Cir. 2023) ("Generally, when a court decides an issue, that decision should continue to govern the same issues in subsequent stages of the same case…the issues need not have been explicitly decided; the doctrine also applies to those issues decided by necessary implication." (citation and internal quotation marks omitted)).

(quoting *Horne v. Flores*, 557 U.S. 433, 477 (2009))). Consistent with this "well-established rule," the Court held that it lacked jurisdiction over the 2019 Orders. *Ibid.*

The same is true here. The Sheriff never appealed the 2019 Orders, and the time to do so has long expired.[6] Like Rule 60(b), a PLRA Motion to Terminate "is not a substitute for a timely appeal from" the 2019 Orders. *Anderson*, 38 F.4th at 475. Rather, as explained *infra*, the purpose of a Motion to Terminate under Section 3626(b) of the PLRA is to provide for termination of prospective relief that is no longer necessary to correct a current and ongoing violation of federal rights. This Court therefore lacks jurisdiction over the 2019 Orders now just as it did in 2022. *See Bowles v. Russell*, 551 U.S. 205, 209 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional." (citation and internal quotation marks omitted)). The Sheriff's motion is unlikely to succeed for this reason alone.

[6] In its opposition to the City's appeal of its Rule 60(b) motion, the Sheriff specifically argued that this Court lacked jurisdiction over the 2019 Orders because they were never appealed. *See* Doc. 005515950813, at 12, *Anderson v. City of New Orleans*, 38 F.4th 472 (5th Cir. 2022) (No. 21-30072) ("To the extent the City's motion seeks to reopen and attack the substance of the District Court's [2019 O]rders, it is nothing more than an attempt at an untimely appeal. Any such appeal, however disguised, is time-barred."); *see also id.* at 45. The Sheriff is judicially estopped from taking a contrary position now. *See Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003); *see also* pp. 14-16, *infra*.

2. Even if this Court had jurisdiction over the 2019 Orders, the Sheriff's argument that the Orders violated the PLRA fails as a procedural matter because such argument is not a proper ground for a Motion to Terminate under Section 3626(b) of the PLRA. Rather, the purpose of Section 3626(b) is to provide a mechanism for termination of prospective relief when such relief is no longer necessary to correct a violation of a federal right.

Section 3626(b) 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). 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 challenging a four-year-old district court order that the losing party failed to appeal at the time, based on a legal argument that has nothing to do with whether the constitutional violations have been cured. *See* ROA.19505-19506.

3. Finally, the Sheriff's motion is procedurally barred because the Sheriff is estopped from arguing that the 2019 Orders violated the PLRA. "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citation omitted). To warrant judicial estoppel, this Court has required two showings: that "the position of the party to be estopped is clearly inconsistent with its previous one," and that the party "convinced the court to accept that previous position." *Ibid.* (citation omitted).

Both provisions are satisfied here. The Sheriff previously "adopt[ed] and incorporate[d] the arguments and authorities set forth in" the Compliance Director's briefing opposing the City's Rule 60(b) motion, including those

regarding the City's arguments that the PLRA prohibited the district court from issuing the 2019 Orders. *See* ROA.16394. These positions included arguments that "[t]he [c]ourt has never ordered the City to build a jail, but it does have the authority to enforce the City's agreement with the parties to build Phase III," that "[n]othing in the PLRA limits a [c]ourt's authority to enforce its own orders or to require a party to fulfill its contractual agreements and promises," and that "[n]either of the [2019 O]rders violate any provisions of the PLRA." *See* ROA.16358-16359 (citation omitted). These positions are "clearly inconsistent with" the arguments the Sheriff makes now. *See* Br. 20-43.

It is equally apparent that the district court was "convinced . . . to accept" those "previous position[s]." *Hall*, 327 F.3d at 396 (citation omitted). In its order denying the City's Rule 60(b) motion, the district court ruled consistently with the Sheriff's positions. *See* ROA.16502 ("First and foremost, the Court has *never* ordered the City to build a jail."); ROA.16635-16336 (agreeing with magistrate that it never ordered the City to build a jail); ROA.16501-16508 (rejecting City's argument that the PLRA prohibited the district court from issuing the 2019 Orders); ROA.16637 (holding the City to its "previously chosen course of action" to build Phase III).

Throughout this litigation, the Sheriff has fought against the City's arguments that the PLRA prevents the district court from enforcing the parties'

agreement to build Phase III. The Sheriff is estopped from "playing fast and loose" with the courts by taking a contrary position now. *Hall*, 327 F.3d at 396 (citation omitted).

B. The Sheriff's argument fails on the merits because the 2019 Orders did not enforce a private settlement agreement.

Even if the Sheriff's motion were jurisdictionally and procedurally appropriate, the Sheriff is not likely to succeed on the merits because the district court's conclusion that its 2019 Orders did not violate PLRA Sections 3626(c)(2) and (g)(6) by enforcing the parties' agreement to build Phase III was correct.[7]

As the magistrate observed, the argument that the Stipulated Order and SCAP were mere private settlement agreements "borders on frivolous." ROA.19311. 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." ROA.11324. The court did so and included the required findings of compliance under the PLRA. *See* ROA.19312-19313. The Stipulated

[7] In her Motion to Stay, Sheriff Hutson appears to persist in arguing that the 2019 Orders violate Section 3626(a)(1)(C) the PLRA. *See, e.g.*, Stay Mot. 12-14; *id.* at 16. But as she explains in her opening merits brief, "Sheriff Hutson's legal argument in her Motion to Terminate was entirely distinct from that" advanced by the City in its Rule 60(b) motion, in that the Sheriff's motion was "grounded in the prohibition on enforcing a private settlement agreement, under 18 [U.S.C.] 3626(c)(2), (g)(6), rather than the prohibition on ordering construction, under 18 [U.S.C.] 3626(a)(1)(C)." Br. 22. The Sheriff cannot base a motion to stay on the legal viability of an argument that she is not making in her case in chief.

Order provided that the Compliance Director, in consultation with the City and Sheriff, would choose a plan to address the care of detainees with serious mental-health and medical needs. ROA.11316-11317. The Compliance Director ultimately submitted the SCAP, which reflected the parties' agreement to build an 89-bed facility known as Phase III. ROA.11685-11687.

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." ROA.13076-13079; ROA.13225-13226. These 2019 Orders were aimed toward enforcing the terms of the Stipulated Order, which was a court order, not a private settlement agreement.[8]

[8] In her opening brief on appeal, Sheriff Hutson remarkably argues that she is not bound by the former sheriff's agreement to build Phase III "because she is neither a party to the agreement nor bound by the actions of her predecessor." Br. 44. This argument directly contradicts Federal Rule of Civil Procedure 25(d), regarding substitution when a party is a "public officer who is a party in an official capacity." Courts consistently have recognized that public officials are bound by consent orders and other agreements entered into by their predecessors. *See, e.g.*, *Harris v. City of Philadelphia*, 47 F.3d 1311, 1327 (3d Cir. 1995) ("[T]he election of a new administration does not relieve [a City] of valid obligations assumed by previous administrations," and "changes in administrative policy alone do not

II. 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." Stay Mot. 18. This argument fails.[9]

As explained p. 2, *supra*, the City is *contractually obligated* to cover $47.9 million of the cost of the facility with FEMA money 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 million to build; at that time, the FEMA funds would have covered 94% of the total cost. ROA.16524, 19324. As the magistrate recognized, the reason that "the project has become so expensive" since May 2020 is "the passage of time." ROA.19324. Any increase in the cost of Phase III is a direct result of the Sheriff's and City's "previous delays and foot-dragging." ROA.19324. This Court should not permit

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permit the City to unilaterally default on its obligations to the court and other litigants."); *see also Morales Feliciano v. Rullan*, 378 F.3d 42, 49 (1st Cir. 2004); *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003).

[9] It is unclear how the *Sheriff*, a Parish employee, has standing to challenge the expenditure of funds by the *City*, a different entity. This is particularly true when this Court has already rejected the City's attempt to avoid spending money on Phase III.

the Sheriff to rely on a problem of her own making to avoid complying with the district court's orders. *See also Smith v. Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement."); *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974) ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage[s] . . . have been rejected by the federal courts.").

The Sheriff also argues that she will suffer irreparable harm absent a stay because "the [c]ourt has *not* considered *all* the alternatives to Phase III and has not considered the financial feasibility of Phase III at this time." Stay Mot. 19. But the court *did* consider all alternatives offered by the City in ruling on the City's Rule 60(b) motion. *See* ROA.16530-16535. 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.

III. 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 to Stay would substantially injure the private plaintiffs, particularly those 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. ROA.25284-25286, 25927-25928. The current facilities lack programming space for group and individual therapy, a critical need

for individuals with mental-health needs. *See* ROA.25932-25933. They also lack an infirmary, which the City's own witness testified is constitutionally required for jails of the Orleans Justice Center's (OJC) size. *See* ROA.16514, 26012-26013, 26016. The October 6, 2023, report by the independent monitors observed that "the facilities within OJC to house inmates with mental health issues are inadequate and create security and safety issues for both staff and inmates." ROA.19608. And not only are the current facilities inadequate—they are also insufficient in number. *See* ROA.19608 (referencing a "backlog of inmates with acute mental health issues continuing to be housed in OJC which is inadequate for the housing of these inmates").

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 alternatives exist, the interests of the prisoner population will be better served by a stay." Stay Mot. 19-20. But as explained *supra*, the Sheriff has not submitted *any* proposed alternatives to Phase III. Meanwhile, the October 6, 2023 report from the independent monitors showed that the Sheriff's compliance with the Consent Judgment's constitutional requirements continued to *regress* from the previous report. ROA.19602; *see also* ROA.19608 ("The inadequacy of the OJC facility and the lack of training on the part of the security staff are reflected in the high number of uses of force, attempted suicides,

and assaults on staff and inmates on the mental health units."). 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 Sheriff's] custody." ROA.26739.

The balance of harms strongly weighs against a stay.

IV. The public interest weights against granting the stay.

Finally, the public interest weighs against granting a stay. In urging otherwise, the Sheriff recycles the same arguments about the cost of the facility and her preference for using funds for other projects. Stay Mot. 19-21. But as the Sheriff does not dispute, the existing facilities do not provide constitutional care to inmates with serious mental-health or medical needs. *See* ROA.19683-19720 (documenting continuing deficiencies in the 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. *Nken*, 556 U.S. at 435.

CONCLUSION

For the foregoing reasons, this Court should deny the Sheriff's Motion to Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2023, I electronically filed the foregoing APPELLEE UNITED STATES' OPPOSITION TO SHERIFF SUSAN HUTSON'S RENEWED 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
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CERTIFICATE OF COMPLIANCE

The attached APPELLEE UNITED STATES' OPPOSITION TO SHERIFF SUSAN HUTSON'S RENEWED 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).

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s/ Elizabeth P. Hecker
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