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

v.

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

OPPOSITION OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC

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In response to this Court's Order dated September 10, 2024, the United States submits this opposition to the Petition for Rehearing En Banc.

Although the Sheriff labeled her district court pleading a "motion to terminate" under Section 3626(b) of the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626(b), she does not even ostensibly seek termination on the grounds authorized by that provision—that the relief is unnecessary to correct a current and ongoing violation of a federal right, extends further than necessary to correct the violation of that right, or is not the most narrowly drawn or least intrusive means to correct the violation. Rather, her motion collaterally attacks the lawfulness of orders the district court issued in early 2019—orders from which neither the City of New Orleans (City) nor the Sheriff appealed.

While the panel acknowledged the Court generally has jurisdiction over a district court's denial of a PLRA motion to terminate, it correctly held that it lacked jurisdiction to consider the substance of the orders the Sheriff challenges here, just as this Court ruled in *Anderson v. City of New Orleans*, 38 F.4th 472 (5th Cir. 2022) (*Anderson I*) that it had jurisdiction over an appeal of a Federal Rule of Civil Procedure 60(b) motion but could not consider the City's PLRA-based arguments challenging the lawfulness of those same orders. Although some of the Sheriff's purported reasons for the unlawfulness of the orders differ slightly from those advanced by the City years ago, the outcome is the same—the Court lacks

jurisdiction to consider legal challenges that should have been raised in 2019.

Finally, even if the Court were otherwise inclined to consider the Sheriff's PLRA arguments, this case would be the wrong vehicle for doing so. The panel made no rulings interpreting any section of the PLRA for this Court to reconsider en banc; rather, it issued a factbound jurisdictional holding based on a straightforward application of federal rules respecting the timeliness of appeals. And that the Sheriff should be judicially estopped from taking the opposite position from that taken by her predecessor, who repeatedly and successfully argued in support of the very orders the Sheriff seeks to terminate here, is all the more reason for this Court to reject the petition.

STATEMENT

1. a. Plaintiffs filed this action in 2012 against then-Orleans Parish Sheriff Marlin Gusman and other officials of the Orleans Parish Sheriff's Office (OPSO) in their official capacities, alleging unconstitutional jail conditions in violation of the Eighth and Fourteenth Amendments. ROA.174-211.[1] The United States intervened to enforce the Civil Rights of Institutionalized Persons Act, 42 U.S.C.

[1] "ROA.__" refers to the page numbers of the Record on Appeal. "Op.__" refers to page numbers in the panel opinion. "Pet.__" refers to page numbers in the Sheriff's petition. "Doc.__" refers to documents on the district court's docket. "U.S. Appellee Br.__" refers to page numbers in the Brief for the United States as Appellee.

1997, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. ROA.1212-1251. The Sheriff filed third-party complaints against the City, seeking funding for any court-ordered prospective relief. ROA.1347-1407.

In 2013, plaintiffs, the United States, 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, the parties entered into a Stipulated Order for Appointment of Independent Jail Compliance Director (Stipulated Order), which, at the parties' request, the district court entered as an order. ROA.11303-11323. As relevant here, the Stipulated Order provided that "the City, the Sheriff, and the Compliance Director shall develop and finalize a plan for . . . appropriate housing for prisoners with mental health issues 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 constructing a new treatment facility known as "Phase III" on existing OPSO property, with 89 beds to house detainees with serious mental-health needs, an infirmary, and treatment space. ROA.11685-11686. Sheriff Gusman, along with the Compliance Director, signed the SCAP. ROA.11690.

b. For the next two years, the City represented to the district court that it was working toward constructing Phase III. In January 2019, the parties learned that the state facility where detainees with serious mental-health and medical issues were temporarily being housed was soon to become unavailable. ROA.13050. The district court scheduled a status conference for January 25, 2019, to discuss what to do about the impending loss of the temporary facility. At the status conference, the City informed the court that it was interested in exploring alternatives to Phase III. ROA.16490. Given the City's prior commitments and the pressing need to find adequate housing for detainees with serious mental-health and medical issues, the court ordered it 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).[2]

A month later, the City informed the district court it was "actively working" with Sheriff Gusman and the Compliance Director to build Phase III. 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

[2] As of September 16, 2024, the Phase III facility is 33.78% complete. Doc. 1717-1. The mandates of the January 2019 Order—to direct the architect to design Phase III and to begin the programming phase of the facility—have long been done. The Sheriff's motion to terminate that order is thus moot. *See University of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981).

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).

c. In June 2020, the City filed a motion under Rule 60(b)(5), arguing that changed circumstances warranted relief from the district court's January 2019 and March 2019 Orders (collectively, the 2019 Orders). ROA.14102-14122. After the other parties opposed the motion, the City advanced a new argument in its reply brief—that Section 3626(a)(1)(C) of the PLRA prohibited the court from ordering construction of Phase III. ROA.15439-15441.[3]

The magistrate judge issued a Report and Recommendation (R&R) finding, as relevant here, that the City's PLRA argument was waived because the City had not raised it until 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 district court adopted the magistrate's R&R, and the City appealed. ROA.16633-16637, 16642-16643.

[3] Section 3626(a)(1)(C) provides that "[n]othing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons."

d. This Court affirmed in a published opinion. *See Anderson I*, 38 F.4th 472 (5th Cir. 2022). As relevant here, the Court declined to rule on the merits of the City's PLRA argument, holding, "[a] Rule 60(b) motion, of course, is not a substitute for a timely appeal from the judgment or order from which relief is requested." *Id.* at 475. Therefore, while accepting that it had jurisdiction to review the denial of the Rule 60(b) motion, the Court held that it lacked jurisdiction over "the underlying January and March 2019 orders." *Ibid.*; *see also id.* at 478-479.

2. a. 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 Sheriff Gusman.

b. More than a year after taking office, on June 26, 2023, Sheriff Hutson filed a Motion to Terminate All Orders Regarding the Construction of the Phase III Jail. ROA.19050-19070. She argued, among other things, "[t]he pending prospective relief ordering the construction of the Phase III jail and the associated orders" were private settlement agreements, and therefore the PLRA forbade the court from enforcing them. ROA.19050-19051, 19054-19055 (citing 18 U.S.C. 3626(b), (c)(2) and (g)(6), and the 2019 Orders (ROA.13075, 13225-13226)). The Sheriff did not assert she was entitled to termination of these orders based on the factors specified in Sections 3626(b)(2) and (b)(3), which address "the continuing necessity of prospective relief." *Ruiz v. United States*, 243 F.3d 941, 950 (5th Cir.

2001). Following briefing by the parties, the magistrate judge issued an R&R to deny the Sheriff's motion. ROA.19304-19333.

The district court adopted the R&R and denied the Sheriff's motion, which it described as "yet another thinly-veiled attempt to end-run the original decision not to appeal [the 2019] [O]rders." ROA.19506. To avoid further delay, the court also entered an order embodying the terms of a Cooperative Endeavor Agreement (CEA Order) setting out certain details regarding construction of Phase III, which were previously negotiated by the parties and signed by Sheriff Gusman. ROA.19521 (referencing ROA.19334-19349).

c. The Sheriff appealed. ROA.19536. On August 26, 2024, a panel of this Court dismissed that appeal for lack of jurisdiction.

First, the panel agreed it had appellate jurisdiction over a district court's denial of a PLRA motion to terminate (Op. 7, 11 (citing *Ruiz*, 243 F.3d at 945)), just as the Court in *Anderson I* agreed it had jurisdiction over the district court's denial of the City's Rule 60(b) motion, 38 F.4th at 475, 478. But the panel held, as in *Anderson I*, that it lacked jurisdiction to consider whether the underlying 2019 Orders violated the PLRA at the time they were issued because the time for appealing those orders had long passed. Op. 7, 11-12; *accord Anderson I*, 38 F.4th at 475, 478-479. The panel explained that it was bound by this holding in *Anderson I* under the law-of-the-case doctrine, which "generally prevents

reexamination of issues of law or fact decided on appeal . . . by the appellate court itself on a subsequent appeal." Op. 10 (internal quotation marks omitted) (quoting *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990)); *see also* Op. 12 (explaining that "[l]ike *Anderson I*, the timely notice of appeal in a civil case is a jurisdictional requirement" (citation and internal quotation marks omitted)).

The panel rejected the Sheriff's attempt to distinguish *Anderson I* on the theory that *Anderson I* had analyzed the PLRA argument in the context of a motion for relief under Rule 60(b) while the Sheriff had labeled her latest filing a motion to terminate under Section 3626(b)(1)(A) of the PLRA. Op. 11-13. The panel explained that "[j]ust as 'a Rule 60(b) motion may not be used as a substitute for a timely appeal from the judgment or order from which the motion seeks relief,' a purported motion to terminate under the PLRA cannot 'be used as an end run to effect an appeal outside the specified time limits.'" Op. 11 (quoting *Anderson I*, 38 F.4th at 478).

The panel observed that "the Sheriff's filing is a 'motion to terminate' in name only." Op. 14. It explained that "Section 3626(b) [of the PLRA] acts as a mechanism for termination of prospective relief when such relief is no longer necessary to correct a violation of a federal right." Op. 14-15 (citing Supreme Court and Fifth Circuit precedent). But here, the panel emphasized, "Sheriff Hutson has not argued that the relief is no longer necessary to correct the existing

constitutional violations." Op. 15. "Rather," the panel stated, "she alleges that Section 3626(a)(1)(C)" of the PLRA prohibited the district court from entering the challenged orders in the first place. *Ibid.*

Judge Smith dissented. Op. 18-29. He would have held that the Court had jurisdiction because the district court also entered the CEA Order, which was not at issue in *Anderson I* and, according to Judge Smith, was "an independent basis for appellate jurisdiction." Op. 18-19. Additionally, Judge Smith would have held that the Sheriff's motion was appealable under Section 1292(a)(1). Op. 19-20. And Judge Smith would have held that *Anderson I*'s jurisdictional holding did not bar the Sheriff from raising the same argument by way of a PLRA motion to terminate. Op. 21. After finding jurisdiction, Judge Smith would have granted the Sheriff's motion on the ground that the plaintiffs had not shown a continuing violation (Op. 24-28), and even if they had, the 2019 Orders *per se* violated the PLRA's ban on district courts' ordering the construction of prisons (Op. 28-29).

ARGUMENT

En banc review is "not favored" and is warranted only where a panel decision conflicts with a decision of the Supreme Court or this Court, or where "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 35(a) and (b). The panel's factbound holding that it lacked jurisdiction to hear the Sheriff's challenge to the 2019 Orders was correct and does not conflict

with any opinion of the Supreme Court or this Circuit. Moreover, the panel did not reach any of the PLRA-related questions the Sheriff claims constitute issues of exceptional importance. Even if the petition presented questions meriting en banc review—which it does not—this case would be a poor vehicle to consider them because the Sheriff should be estopped from challenging the very district court orders her predecessor urged the court to enter. Accordingly, this Court should deny the petition.

I. The panel's decision does not conflict with any decision of the Supreme Court or this Circuit.

A. The panel's factbound jurisdictional holding was correct and does not warrant en banc review.

The panel majority held, consistent with *Anderson I*, that it lacked jurisdiction over the Sheriff's collateral challenge to the 2019 Orders because those orders were never appealed.[4] That conclusion was correct and does not conflict with any decision of the Supreme Court or this Court.

[4] At oral argument before the panel, the Sheriff, for the first time in this litigation, suggested the 2019 Orders were not appealable when issued. Oral Argument 6:43-7:50; *see also* Pet. 12. The Sheriff is wrong. The 2019 Orders were injunctive in nature and thus appealable under 28 U.S.C. 1292(a)(1), because they were "directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought in the complaint in more than a temporary fashion." *In re Deepwater Horizon*, 793 F.3d 479, 491 (5th Cir. 2015) (citation omitted).

The Sheriff claims this holding is in tension with *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), where the parties agreed the Court had jurisdiction under 28 U.S.C. 1292(a)(1) over denials of PLRA motions to terminate. Pet. iii, 6. There is no conflict; indeed, the panel recognized it has appellate jurisdiction over PLRA motions to terminate. Op. 7, 14 n.14 (citing *Ruiz*). But the panel correctly pointed out that the Sheriff's motion was "a 'motion to terminate' in name only." Op. 14; *see Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.*, 383 F.3d 249, 251 (5th Cir. 2004) ("[T]he fact that GE labeled its motion as a Rule 59(e) motion to alter or amend is immaterial; a motion's substance, and not its form, controls.").

The Sheriff and dissent challenge the panel's holding that the Sheriff's motion was not a proper motion to terminate (Pet. 12-14; Op. 23-25), but the panel was correct. As its text makes clear, Section 3626(b) provides a mechanism to terminate prospective relief when such relief is no longer "necessary" to correct a violation of a federal right. *See* U.S. Appellee Br. 16-19; *see also Tyler v. Murphy*, 135 F.3d 594, 597 (8th Cir. 1998) (The "purpose" of Section 3626(b)(1) is "to authorize periodic new motions to terminate prospective relief that was *initially based upon the proper findings*." (emphasis added)). The government is aware of no case in this Circuit or any other suggesting that Section 3626(b) may be used to terminate a district court order based on the purported invalidity of that un-

appealed order when issued—rather than on the factors set forth in Section 3626(b)(2) and (3).

The Sheriff and dissent argue that the Sheriff's motion was nonetheless proper because her only burden on a motion to terminate under Section 3626(b)(1)(A) is to move for termination "2 years after the date the court granted or approved the prospective relief," which she did. Pet. 12-13 (citation omitted); Op. 24. It is certainly true that, at an evidentiary hearing on a (proper) motion to terminate, the government (not the Sheriff) would bear the burden of meeting Section 3626(b)(3)'s requirements—*e.g.*, that prospective relief remains necessary to correct an ongoing violation. *See Guajardo v. Texas Dep't of Crim. Just.*, 363 F.3d 392, 395 (5th Cir. 2004). But that does not mean she can simply repackage a legal argument she could have but failed to raise on direct appeal, label it a motion to terminate, and obtain this Court's review of four-year-old orders. That approach not only flouts the well-established rule that "the taking of an appeal within the prescribed time is mandatory and jurisdictional," *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citation and internal quotation marks omitted), but disregards the grounds the PLRA identifies for terminating prospective relief.

Had the Sheriff filed a proper motion to terminate alleging the 2019 Orders did not satisfy Section 3626's requirements, the district court would have done what other courts in this Circuit have done when considering such a motion: It

would have held an evidentiary hearing, where the plaintiffs and the United States would have been required to show that Phase III "remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation," and "is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. 3626(b)(3); *see Ruiz*, 243 F.3d at 950-951; *Castillo v. Cameron Cnty.*, 238 F.3d 339, 353-355 (5th Cir. 2001); *Brown v. Collier*, 929 F.3d 218, 226-227 (5th Cir. 2019). But recognizing the Sheriff's motion was a "'motion to terminate' in name only" (Op. 14), the district court correctly rejected her repackaged PLRA argument outright. *See* ROA.19505-19506.

Finally, the fact that, in addition to denying the Sheriff's motion, the district court entered the terms of the CEA negotiated and signed by Sheriff Gusman and the City does not provide a basis for this Court's jurisdiction. *See* Pet. 7; Op. 18. The Sheriff appealed only the district court's denial of her purported motion to terminate. She has never moved to terminate the CEA Order, which was issued on September 5, 2023, *after* she filed her motion to terminate. Nor could she have moved to terminate the CEA Order under the PLRA, because the two years required under 18 U.S.C. 3626(b)(1)(A) have not yet elapsed.

B. The panel's decision does not conflict with any decision of the Supreme Court or this Circuit regarding the law-of-the-case doctrine.

The Sheriff contends the panel opinion conflicts with this Court's jurisprudence regarding the law-of-the-case doctrine, but her argument misconstrues the opinion. According to the Sheriff, the law-of-the-case doctrine does not apply because her motion to terminate contended that the district court's orders were barred by Sections 3626(c)(2) and (g)(6) of the PLRA, while the City argued in *Anderson I* that the orders were barred by Section 3626(a)(1)(C). Op. 9. But the panel did not hold differently; on the contrary, it *agreed* that "the law of the case doctrine does not bar the Sheriff's private settlement argument regarding Section[s] 3626(c)(2)[] [and] (g)(6)." Op. 12.

What the panel held instead was that it was the law of the case that the Court lacks appellate jurisdiction over the 2019 Orders because they were never appealed. Op. 10-12. Just as *Anderson I* held it had jurisdiction to review the denial of the Rule 60(b) motion but no jurisdiction to review the un-appealed 2019 orders, 38 F.4th at 475, 478-479, the panel here ruled it had "jurisdiction to review the denial of the . . . motion, but not the underlying . . . orders." Op. 7, 11 (alterations in original) (quoting *Anderson I*, 38 F.4th at 475).

This holding does not conflict with this Court's opinions in *Bigford v. Taylor*, 896 F.2d 972 (5th Cir. 1990), or *Conway v. Chemical Leaman Tank Lines,*

Inc., 644 F.2d 1059 (5th Cir. 1981). The panel correctly cited and applied *Bigford*'s holding that "the law of the case doctrine 'generally prevents reexamination of issues of law or fact decided on appeal "either by the district court on remand or by the appellate court itself on a subsequent appeal."'" Op. 10 (quoting *Bigford*, 896 F.2d at 974); *see also Conway*, 644 F.2d at 1061. There is no question that the Court's lack of jurisdiction over the substance of the 2019 Orders was squarely decided in *Anderson I*; that holding is therefore the law of the case, and nothing in this Court's precedent suggests otherwise.

II. The panel did not reach the PLRA issues that the Sheriff contends are of "exceptional importance."

The Sheriff argues that en banc reconsideration is further warranted "because this proceeding involves questions of exceptional importance regarding the PLRA." Pet. iv. But the panel opinion did not purport to interpret any provision of the PLRA, holding instead, consistent with *Anderson I*, that it was without jurisdiction to consider the Sheriff's PLRA-based collateral attack on the 2019 Orders because they were never appealed. Op. 12-13. The Sheriff fails to point to any case where this Court has granted en banc review to consider a legal argument a panel held it was without jurisdiction to reach.

III. The Sheriff is judicially estopped from arguing that the 2019 Orders violate the PLRA.

Finally, even if the Court had jurisdiction to consider the Sheriff's PLRA argument, this case would be a poor vehicle to so. As the plaintiffs and United States argued before the panel (*see, e.g.*, U.S. Appellee Br. 19-22), the Sheriff should be judicially estopped from arguing that the 2019 Orders violate the PLRA because her predecessor in office repeatedly argued otherwise, and those arguments were relied upon by the parties and district court in moving the project forward.

Judicial estoppel prevents a party "from 'playing fast and loose' with the courts" by barring the 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: (1) "the position of the party to be estopped is clearly inconsistent with its previous one," and (2) the party "convinced the court to accept that previous position." *Hall*, 327 F.3d at 396 (citation omitted). Both showings are satisfied here. *See* U.S. Appellee Br. 20-21. Because the Sheriff's predecessor successfully argued that the district court had authority under the PLRA to enforce the parties'

agreement to build Phase III, the Sheriff should be judicially estopped from taking the opposite position now.[5]

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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[5] This Court has held that a successor in interest may be judicially estopped from taking a position contrary to that of their predecessor in the same litigation. *See In re Coastal Plains, Inc.*, 179 F.3d 197, 203, 205 (5th Cir. 1999).

CERTIFICATE OF SERVICE

I certify that on October 4, 2024, I electronically filed the foregoing OPPOSITION OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

CERTIFICATE OF COMPLIANCE

The attached OPPOSITION OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 35(b)(2)(A).

The brief was prepared using Microsoft Office Word for Microsoft 365 and contains 3,900 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/ Elizabeth P. Hecker
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Date: October 4, 2024