No. 24-_____

In the Supreme Court of the United States

SUSAN HUTSON,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Prison Litigation Reform Act of 1995 (PLRA) establishes, among other things, "standards for the entry and termination of prospective relief in civil actions challenging prison conditions." *Miller v. French*, 530 U.S. 327, 331 (2000). Relevant here, "such relief shall be terminable upon the motion of any party ... 2 years after the date the court granted or approved the prospective relief." 18 U.S.C. § 3626(b)(1)(A)(i). Upon the timely filing of any such motion, "[t]he supervising court may refuse to terminate jurisdiction only if it makes [certain] written findings" specified by the PLRA. *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 182 (3d Cir. 1999) (Alito, J.) (citing § 3626(b)(3)).

The question presented is:

> Whether a State or local official who moves to terminate prospective relief under 18 U.S.C. § 3626(b)(1)(A) bears any affirmative burden beyond demonstrating that the requisite amount of time has passed.

PARTIES TO THE PROCEEDING

Petitioner is Susan Hutson. Petitioner was the defendant-appellant below.

Respondents are the United States of America (an intervenor plaintiff-appellee below), as well as Kent Anderson, Steven Dominick, Anthony Gioustavia, Jimmie Jenkins, Greg Journee, Richard Lanford, Leonard Lewis, Euell Sylvester, and Lashawn Jones (all plaintiffs-appellees below).

Though not a respondent here, the City of New Orleans was a defendant-appellee below but took no position on the merits of Sheriff Hutson's appeal.

STATEMENT OF RELATED CASES

Anderson v. Hutson, No. 23-30633 (5th Cir.). Judgment entered Aug. 26, 2024; order denying petition for rehearing en banc entered Jan. 28, 2025.

Jones v. Gusman, No. 12-859 (E.D. La.). Order entered Sept. 5, 2023.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT OF RELATED CASES iii

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 5

JURISDICTION 5

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 7

A. LEGAL BACKGROUND 7

B. PROCEDURAL BACKGROUND 8

REASONS FOR GRANTING THE PETITION 15

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED. 15

A. The Ninth Circuit Requires *Movants* to Prove Not Only the Requisite Passage of Time But Also That the Prospective Relief Does Not Satisfy the § 3626 (b)(3) Factors. 15

B. The First and Fifth Circuits, and Numerous Courts Within Other Circuits, Require Movants to Show Only the Requisite Passage of Time, Recognizing That *Plaintiffs* Bear the Burden to Prove That the Prospective Relief Satisfies the § 3626 (b)(3) Factors. 19

C. The Decision Below Brings This Split Within the Fifth Circuit Itself..... 23

II. THE DECISION BELOW IS WRONG. 25

A. The PLRA's Burden-Shifting Framework Requires That a Movant Establish Only the Requisite Passage of Time. 25

B. The Ninth Circuit's Side of the Circuit Split Is Wrong. 28

III. THE QUESTION PRESENTED IS "OBVIOUSLY IMPORTANT." 30

IV. THIS CASE IS AN IDEAL VEHICLE. 32

CONCLUSION 36

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 28, 2025……1a

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 26, 2024……43a

APPENDIX C — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA FILED SEPTEMBER 5, 2023……81a

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA FILED JULY 19, 2023……107a

TABLE OF AUTHORITIES

Cases

Anderson v. City of New Orleans,
38 F.4th 472 (5th Cir. 2022)..... 10
Anderson v. Hutson,
No. 23-30633 (5th Cir.)..... iii
Balla v. Idaho Bd. of Corr.,
2019 WL 9831671 (D. Idaho Apr. 18, 2019)..... 18, 26, 27
Balla v. Idaho,
29 F.4th 1019 (9th Cir. 2022)..... 17, 18
Benjamin v. Shriro,
2009 WL 3464286 (S.D.N.Y. Oct. 26, 2009)..... 22
Berwanger v. Cottey,
178 F.3d 834 (7th Cir. 1999)..... 8
Brown v. Collier,
929 F.3d 218 (5th Cir. 2019)..... 3, 21
Brown v. Plata,
563 U.S. 493 (2011)..... 28
Busby v. Bonner,
2021 WL 4100290 (W.D. Tenn. Aug. 30, 2021)..... 23
Cason v. Seckinger,
231 F.3d 777 (11th Cir. 2000)..... 8
Gilmore v. California,
220 F.3d 987 (9th Cir. 2000)..... 3, 15, 16, 18, 28, 29
Graves v. Arpaio,
623 F.3d 1043 (9th Cir. 2010)..... 3, 16, 17
Guajardo v. Tex. Dep't of Criminal Justice,
363 F.3d 392 (5th Cir. 2004)..... 3, 14, 20, 21, 22, 23, 24, 26

Hadix v. Johnson,
228 F.3d 662 (6th Cir. 2000) 8
Hedrick v. Grant,
648 F. App'x 715 (9th Cir. 2016) 3, 17
Imprisoned Citizens Union v. Ridge,
169 F.3d 178 (3d Cir. 1999) ..... i, 2, 8, 22
Imprisoned Citizens Union v. Shapp,
11 F. Supp. 2d 586 (E.D. Pa. 1998) 21
Jones v. Gusman,
No. 12-859 (E.D. La.) iii
Laaman v. Warden, N.H. State Prison,
238 F.3d 14 (1st Cir. 2001) 3, 19, 20, 22
Miller v. French,
530 U.S. 327 (2000) ..... i, 7, 11, 27, 29
Parker v. Hooper,
128 F.4th 691 (5th Cir. 2025) 31
Porter v. Clarke,
923 F.3d 348 (4th Cir. 2019) 8
Regan v. Cnty. of Salt Lake,
2006 WL 3613217 (D. Utah Dec. 11, 2006) 22
Rufo v. Inmates of Suffolk Cty. Jail,
502 U.S. 367 (1992) 15, 17
Ruiz v. United States,
243 F.3d 941 (5th Cir. 2001) 35
Skinner v. Lampert,
457 F. Supp. 2d 1269 (D. Wyo. 2006) 22
United States v. Territory of the Virgin Islands,
884 F. Supp. 2d 399 (D.V.I. 2012) 22
Valentine v. Collier,
993 F.3d 270 (5th Cir. 2021) 28, 36

Woodford v. Ngo,
548 U.S. 81 (2006) 27

Statutes

18 U.S.C. § 3626 ..... i, 1, 2, 3, 4, 5, 7, 8, 10, 11, 13, 14, 15, 16, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36
28 U.S.C. § 1254 5
28 U.S.C. § 1291 31
42 U.S.C. § 1983 8

PETITION FOR WRIT OF CERTIORARI

The United States and its private-plaintiff partners "want[] to build a prison"—a $100+ million prison—on New Orleanians' dime. App.42a (Oldham, J., dissenting from the denial of rehearing en banc) (quoting App.64a (Smith, J., dissenting)). For over a decade, the United States, a friendly (to the United States) former Sheriff, and others have willed this construction project into existence. First through a consent decree, and then through a series of judicial orders mandating a new prison, come hell or high water. Indeed, the district court's most recent directives are unequivocal:

> [A]ny further delay in the construction of [the prison] shall not be tolerated by the Court, and any party's failure to abide by this Court's orders shall result in severe sanctions, including consideration of whether that party is to be held in contempt of court. App.82a.

But there is, as they say, "a new Sheriff in town"—Petitioner Susan Hutson. App.44a. When she took office, she recognized the utter unlawfulness of what has happened. To take the starkest example, in curtailing federal courts' ability to interfere with State and local prisons, the Prison Litigation Reform Act (PLRA) states that "[n]othing" within its provisions "shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons." § 3626(a)(1)(C). Yet, Petitioner is under the gun to build a prison that her predecessor agreed—and now the courts are ordering her—to build.

Petitioner moved to terminate the orders mandating the prison construction. The PLRA's termination provisions state that orders granting prospective relief "shall be terminable" upon the filing of any termination motion filed at least two years after the date they were entered—a condition undisputedly satisfied here. § 3626(b)(1)(A)(i). "After that, the burden shifts to the parties opposing termination to provide sufficient evidence to support [certain] findings required by" § 3626(b)(3). App.40a (Oldham, J.). As then-Judge Alito put it, a district court "may refuse to terminate jurisdiction only if it makes" those § 3626(b)(3) findings. *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 182 (3d Cir. 1999); *see* § 3626(b)(3) (stating that prospective relief "shall not terminate if the court makes written findings based on the record that," among other things, "prospective relief remains necessary to correct a current and ongoing violation of the Federal right" and "the prospective relief is narrowly drawn").

But the district court refused to terminate its orders—and the Fifth Circuit affirmed in a decision that Judges Oldham and Smith described as "inscrutable," "jurisdictionally dysphoric," "totally unhinged," "incomprehensible," and, ultimately, "tak[ing] a hatchet to the [PLRA]." App.15a (Oldham, J.); App.64a (Smith, J.); *see* App.3a (Ho, J., dissenting from denial of rehearing en banc) (recognizing that this is an "obviously important case"). As best Petitioner can understand that decision, it holds that Petitioner did not file "a *proper* motion to terminate" because she "has not argued that the relief is no longer necessary to correct the existing constitutional violations." App.59a, 61a

(citing § 3626(b)(3)). In other words, merely filing a timely motion under § 3626(b)(1)(A) does not suffice; Petitioner was additionally required to allege and prove that the § 3626(b)(3) factors for continuing prospective relief are not satisfied.

That holding implicates a longstanding and entrenched circuit split regarding the burden-shifting framework in the PLRA's termination provisions. On one side, the Ninth Circuit has long rejected the notion that termination flows "automatically" from a movant's timely filed motion; instead, "the burden is on the *movant* to demonstrate" also that the § 3626(b)(3) factors are not satisfied. *Hedrick v. Grant*, 648 F. App'x 715, 716 (9th Cir. 2016) (citing *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (per curiam); *Gilmore v. California*, 220 F.3d 987, 1007–08 (9th Cir. 2000)) (emphasis added). On the other side, the First and Fifth Circuits have long held that *plaintiffs* bear the burden of preventing termination by proving up the § 3626(b)(3) factors. *See Laaman v. Warden, N.H. State Prison*, 238 F.3d 14, 20 (1st Cir. 2001); *Brown v. Collier*, 929 F.3d 218, 228 (5th Cir. 2019) (citing *Guajardo v. Tex. Dep't of Criminal Justice*, 363 F.3d 392, 396 (5th Cir. 2004) (per curiam)). That is, a movant's only burden is to "establish the requisite passage of time," after which "the burden of proof then shifts to the prisoners to demonstrate" the § 3626(b)(3) factors. *Guajardo*, 363 F.3d at 395.

That split now exists within the Fifth Circuit itself. Nearly half of its judges continue to adhere to the *Guajardo* rule, while the majority below required Petitioner to demonstrate more than just the requisite passage of time. *See* App.73a (Smith, J.) ("What must

Sheriff Hutson do to move for termination of relief? Nothing but show the requisite passage of time—*e.g.*, '2 years after the date the court granted or approved the prospective relief.'"); App.39a (Oldham, J.) ("[T]he Sheriff's only burden is to make her motion '2 years after the date the court granted or approved the respective relief.'").

The decision below (as well as the Ninth Circuit's view) is also profoundly wrong. Until the decision below, virtually no federal court agreed with the Ninth Circuit's view that the PLRA requires a movant to demonstrate more than the requisite passage of time. That is because § 3626(b) sets out a textbook burden-shifting framework: *First*, a movant must show that the motion is timely; and, *second*, if the movant demonstrates timeliness, the burden then shifts to the plaintiff to prevent termination by proving up the § 3626(b)(3) factors. The movant bears no further burden. The statutory context confirms that straightforward reading given the PLRA's presumption in favor of termination of prospective relief—a presumption that, logically, only a plaintiff has the burden to overcome. And that accords with the PLRA's history: The whole point of the PLRA was to curtail federal courts' micro-management of prisons, which Petitioner's reading advances.

This issue is extraordinarily important on many levels. The inter- and intra-circuit splits speak for themselves. Resolving those splits is especially warranted because of their impact on two of the largest federal courts of appeals where PLRA litigation is pervasive. In addition, the decision below is emblematic

of a growing trend to undercut the PLRA, which warrants special attention by this Court. And of course, the millions of dollars of taxpayer money that is at stake in this case—"sticker shock," the Magistrate Judge admitted, App.132a—is equally important.

Finally, this petition is a perfect vehicle to decide the question presented. That question presents a clean issue of statutory interpretation, completely devoid of fact-bound questions. Moreover, that this issue arises in a case where a federal court is directing the construction of a jail only underscores the appropriateness of taking this opportunity to protect and enforce the PLRA.

OPINIONS BELOW

The Fifth Circuit's opinion (App.43a–80a) is reported at 114 F.4th 408. The Fifth Circuit's order denying the petition for rehearing en banc and dissenting opinions are reproduced at App.1a–42a. The district court's opinion (App.81a–106a) is available at 2023 WL 11910564. The magistrate judge's report and recommendation is also not reported but is reproduced at App.107a–179a.

JURISDICTION

The Fifth Circuit issued its decision on August 26, 2024, App.43a–80a, and denied the petition for rehearing en banc on January 28, 2025, App.1a–42a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3626(b) provides:

(1) Termination of Prospective Relief.

(A) In 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 or intervener—

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate Termination of Prospective Relief.

In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief 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.

(3) Limitation.

Prospective relief shall not terminate if the court makes written findings based on the record 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 that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

STATEMENT OF THE CASE

A. Legal Background

"[T]he PLRA establishes standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities." *Miller v. French*, 530 U.S. 327, 333 (2000). In particular, "a court 'shall not grant or approve any prospective relief unless the court finds that such 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.'" *Id.* (quoting § 3626(a)(1)(A)). Moreover, "[n]othing" in the PLRA "shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons[.]" § 3626(a)(1)(C).

The PLRA also expressly provides that "a defendant or intervenor is entitled to 'immediate termination'" if prospective relief under an existing injunction "does not satisfy these standards." *Miller*, 530 U.S. at 331 (quoting § 3626(b)(2)). Specifically, such relief "shall be terminable upon the motion of any party or intervener ... 2 years after the date the court granted or approved the prospective relief." § 3626(b)(1)(A)(i). A court "may refuse to terminate jurisdiction only if it makes [certain] written findings"—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 that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.'" *Imprisoned Citizens Union*, 169 F.3d at 182 (Alito, J.) (quoting § 3626(b)(3)). (These are commonly known as the § 3626(b)(3) "factors," "criteria," or "findings.")

The upshot of these termination provisions is clear and well settled: "[I]n ruling on a motion for termination, the district court must determine whether prospective relief is justified according to § 3626(b)(3)'s criteria; if the district court does not make the requisite findings, it must terminate the consent decree." *Hadix v. Johnson*, 228 F.3d 662, 670 (6th Cir. 2000) (Moore, J.); *Porter v. Clarke*, 923 F.3d 348, 374 (4th Cir. 2019) (Niemeyer, J., dissenting) (prospective relief shall be terminated on a party's timely motion "*unless*" the district court makes the required findings); *Cason v. Seckinger*, 231 F.3d 777, 781 (11th Cir. 2000) (Carnes, J.) (on a party's timely motion, "the relief is terminable unless the limiting provisions of § 3626(b)(3) prohibit termination"); *Berwanger v. Cottey*, 178 F.3d 834, 838 (7th Cir. 1999) (Easterbrook, J.) (a timely motion requires immediate termination "unless the judge makes the termination-avoiding findings specified in subsection (b)(3)").

B. Procedural Background

1. In 2012, prisoners at the Orleans Parish Prison (OPP) filed this 42 U.S.C. § 1983 lawsuit against then-Sheriff Marlin Gusman of Orleans Parish and other

local officials, alleging "abusive and unconstitutional conditions of confinement." Dist.Ct.Doc. 1 at 1 ¶ 1. Within the same year, the United States filed a complaint in intervention, claiming that Sheriff Gusman was "engaging in a pattern or practice of violating the constitutional rights of prisoners" at OPP. Dist.Ct.Doc. 70 at 1 ¶ 1. In 2013, the district court entered a consent judgment at the behest of the United States, the private plaintiffs, and Sheriff Gusman. Dist.Ct.Doc. 465.

"In 2016, the parties implemented their consent decree via an agreement that the district court entered as a stipulated order ('Stipulated Order')." App.12a–13a (Oldham, J.). "The Stipulated Order stated that 'the City [of New Orleans], the Sheriff, and the Compliance Director shall develop and finalize a plan for ... appropriate housing for prisoners with mental health issues and medical needs.'" *Id.* at 13a (alteration in original). Key here is that "[t]he Compliance Director's [subsequent] plan recommended construction of 'Phase III,' a new facility at the existing jail designed to house detainees with mental-health needs." *Id.*

In 2019, the district court entered two orders (the 2019 Orders) giving rise to the issues in this appeal. *First*, in January 2019, "the district court ordered the City ... to begin construction of the Phase III jail facility and related programming 'as soon as possible.'" *Id.*; *accord* App.91a. *Second*, in March 2019, "the district court ordered the City to continue renovating the existing 'temporary accommodations' for the prison's detainees with mental-health conditions during the construction of the Phase III jail facility, and it ordered

the City and Sheriff to continue the 'programming' aspect of Phase III." App.13a (Oldham, J.); *accord* App.91a. In addition, the district court "ordered the City to provide monthly progress reports concerning the construction of the Phase III jail facility." App.13a (Oldham, J.).

2. In 2020, the City of New Orleans filed a Rule 60(b) motion seeking, among other things, the "indefinite[] suspen[sion] [of] the programming, design, and construction of a new Phase III jail facility." Dist.Ct.Doc. 1281-1 at 1. The district court denied that motion, and the Fifth Circuit affirmed. *Anderson v. City of New Orleans*, 38 F.4th 472 (5th Cir. 2022). Relevant here, the City asserted in its district court reply brief that the PLRA, § 3626(a)(1)(C), "barred the court from ordering the city to construct a new facility." *Id.* at 477. The Fifth Circuit declined to address the merits of that claim because Rule 60(b)(5) "requires a change '*in factual conditions or in law*,'" and the court held that "[t]he city's PLRA issue [wa]s based on neither." *Id.* at 479 (citation omitted). "Therefore, the claim fails under Rule 60(b)(5); accordingly, we need not consider whether it has been waived." *Id.*

3. In May 2022, Petitioner took her oath as the new Sheriff of Orleans Parish, having defeated Sheriff Gusman in a 2021 election. One of Petitioner's principal campaign pledges was to halt the unlawful Phase III project. Once in office, she made good on that promise by filing a "Motion to Terminate All Orders Regarding Construction of the Phase III Jail," including the 2019 Orders. App.107a, 113a; *see* App.119a–20a (Magistrate describing the 2019 Orders as "the essential orders regarding construction of Phase III"); *see*

also § 3626(b)(1)(A)(i) ("relief shall be terminable upon the motion of any party ... 2 years after the date the court granted or approved the prospective relief"). She also advised the Magistrate Judge that she did not intend "to sign a Cooperative Endeavor Agreement ('CEA') with the City for the construction of Phase III, which agreement was due to be discussed on the Council's agenda the next day." App.108a. In response, the Magistrate "ordered the parties to 'file memoranda addressing whether the Court should issue an order embodying the terms of the CEA currently before the City Council.'" *Id.*

A core piece of Petitioner's termination motion is that the Phase III mandate violates the PLRA, which bars courts from directing the construction of prisons—either directly or indirectly. *See* § 3626(a)(1)(C); *see also* § 3626(c)(2)(A). On this question, the Magistrate Judge vehemently disclaimed doing so. App.120a ("[T]he Orders at issue did not direct the City to build Phase III."). Yet the Magistrate also went out of his way to explain that, even if he had, "the PLRA does not prohibit courts from ordering the construction of a jail in the exercise of their equitable powers." App.122a. In the Magistrate Judge's view, "[t]he plain language of [§ 3626(a)(1)(C)] simply says that the PLRA does not, in and of itself, *authorize* federal courts to order prison construction; it does not say that federal courts *are prohibited from* doing so or that the PLRA somehow repealed the courts' equitable powers to remedy the violation of constitutional rights." App.123a; *but see Miller*, 530 U.S. at 339 ("curbing the equitable discretion of district courts was one of the PLRA's principal objectives").

In the end, the Magistrate Judge deemed Petitioner's termination motion "not a serious motion." App.140a. The Magistrate conceded that Phase III could be viewed as "bad politics and bad policy." App.141a. He also "fully underst[ood] the sticker shock associated with" the $100+ million price tag. App.132a. Yet he promised that "we will" have a prison. App.142a. To that end, the Magistrate recommended the denial of Petitioner's motion. App.144a. Further, to override Petitioner, the Magistrate recommended that the district court enter "the attached 'Order Setting Conditions of Construction' ... as an order of this Court, which conditions will be in force as though they had been agreed to by the City and Sheriff as a [CEA], for the duration of the project." App.143a.

The Order Setting Conditions of Construction reads: "The Court is issuing this Order in lieu of the [CEA] that Sheriff Hutson has refused to sign in this matter. It will be in effect just as if the parties had signed it as an agreement." App.146a. And the Order sets out specific terms and conditions for requiring Petitioner to "collaboratively design and construct the new Mental and Medical Health Services Facility commonly known as Phase III." *Id.*

4. The district court largely followed suit. Like the Magistrate, it vigorously denied ever ordering the construction of Phase III. *E.g.*, App.90a ("[T]he Court did not order the construction of the Phase III jail."); *accord* App.94a. But, unlike the Magistrate, the district court deemed unnecessary "a comprehensive discussion of whether the PLRA prohibits federal courts from ordering the construction of prisons." App.94a. Instead—and especially relevant here—the district

court observed that "Sheriff Hutson has not argued that the relief is no longer necessary to correct constitutional violations," *i.e.*, she has not argued and disproved the § 3626(b)(3) factors. App.88a. In addition, the district court purported to make the § 3626(b)(3) findings (mirrored in § 3626(a)(1)(A))—summarily stating that "[t]he Court has already found that proceeding with Phase III is necessary to remedy a constitutional violation and there is no reason to think that Phase III is no longer necessary." App.103a (footnotes omitted). (There is no finding or reasoned explanation that ordering the construction of a $100+ million jail is the narrowest and least intrusive means of remedying any alleged violation.)

The district court thus denied Petitioner's termination motion and entered the Order Setting Conditions of Construction. App.106a. The district court continued (*id.*):

> Any further delay in the construction of Phase III shall not be tolerated by the Court and any party's failure to abide by this Court's orders shall result in severe sanctions, including consideration of whether that party is to be held in contempt of court.

5. Petitioner then appealed to the Fifth Circuit, which resulted in the majority decision below. There are voluminous writings in this case, engendered by the majority's "incomprehensible," App.64a (Smith, J.), and "inscrutable," App.15a (Oldham, J.), opinion. But for present purposes, the key aspect of the decision is that the majority confirmed that it has appellate jurisdiction over a district court's denial of "a

proper motion to terminate under the PLRA." App.50a, 53a. A "proper" motion, by the majority's telling, is one in which the movant seeks to satisfy the § 3626(b)(3) factors by "argu[ing] that the relief is no longer necessary to correct the existing constitutional violations." App.61a. The majority deemed Petitioner's motion improper, however, because she claims only "that Section 3626(a)(1)(C) prohibits the existence of the 2019 Orders and Stipulated Order." *Id.* The majority then "dismiss[ed] this appeal," App.63a, although it is anyone's guess whether dismissal was for lack of jurisdiction or on the merits, hence Judge Oldham's characterization of the majority's opinion as "jurisdictionally dysphoric," App.15a.

Citing the Fifth Circuit's *Guajardo* decision, Judge Smith firmly dissented, emphasizing—as relevant here—that Petitioner "need do nothing more" than "show[] the requisite passage of time" (*i.e.*, two years) to seek termination. App.73a. "From that point onward, the PLRA shifts the burden to the parties *opposing* termination. It is their job—not Hutson's—to provide sufficient proof to support the findings required by § 3626(b)(3)." *Id.*

6. The Fifth Circuit denied en banc review in a 6-11 vote, with Judges Jones, Smith, Richman, Ho, Duncan, and Oldham voting in favor of en banc review. Judge Oldham (joined by Judges Jones, Smith, and Duncan) dissented, explaining—as Judge Smith had—that the majority "incorrectly placed the burden on the Sheriff to argue that the prospective 'relief is no longer necessary to correct the existing constitutional violations.'" App.39a. "[T]he Sheriff's only burden is to make her motion '2 years after the date the court

granted or approved the prospective relief,'" and "[s]he did that." *Id.* at 39a–40a (citation omitted). "After that, the burden shifts to the parties opposing termination to provide sufficient evidence to support the findings required by the limitation clause in § 3626(b)(3)." *Id.* at 40a. Judge Ho filed a separate dissent underscoring "this obviously important case" and "fully agree[ing] with [Judge Oldham's] analysis." App.3a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED.

A. The Ninth Circuit Requires *Movants* to Prove Not Only the Requisite Passage of Time But Also That the Prospective Relief Does Not Satisfy the § 3626 (b)(3) Factors.

The Ninth Circuit's entrenched view is that a movant who seeks to terminate prospective relief under the PLRA bears the burden of proving that such relief is no longer warranted—merely showing the requisite passage of time is insufficient.

That view first appeared in *Gilmore*, where the Ninth Circuit equated the PLRA's termination provisions with Rule 60(b)(5). 220 F.3d at 1006–07. Specifically, the Ninth Circuit reasoned that, in the Rule 60(b)(5) context, "modification is warranted if there is 'a significant change either in factual conditions or in law.'" *Id.* at 1007 (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992)). And "the burden of establishing such a change rests on the party seeking modification." *Id.*

The Ninth Circuit acknowledged that, "[o]bviously, the PLRA creates a more exacting standard for federal courts to follow." *Id.* But the Ninth Circuit refused to relinquish a court's "equitable discretion" in favor of "a rule of decision." *Id.* Instead, the Ninth Circuit claimed that "nothing in the [PLRA's] termination provisions can be said to shift the burden of proof from the party seeking to terminate the prospective relief." *Id.* The Ninth Circuit also argued that a district court's determination whether to keep prospective relief in place "requires real adjudication—the careful application of law to fact—not the wooden ratification of a legislatively prescribed conclusion." *Id.* at 1008. It thus falls to the movant to prove whether the prospective relief is "necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum." *Id.* (citing § 3626(b)(3)).

This holding was dispositive in *Gilmore*. In particular, the Ninth Circuit criticized the district court for "plac[ing] the burden on plaintiffs to establish a current and ongoing violation of a Federal right rather than requiring the CDC, which had moved to terminate the decree, to prove its compliance with inmates' access to the courts." *Id.*; *see id.* ("We conclude that the court erred in its allocation of the burden of proof ....").

In *Graves*, the Ninth Circuit reiterated that, "[w]hen a party moves to terminate prospective relief under § 3626(b), the burden is on the movant to demonstrate that there are no ongoing constitutional violations, that the relief ordered exceeds what is necessary to correct an ongoing constitutional violation, or both." 623 F.3d at 1048. The Ninth Circuit reprised *Rufo*'s statement that "a party seeking modification of

a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* (quoting *Rufo*, 502 U.S. at 383) (alteration omitted). The Ninth Circuit rejected Sheriff Arpaio's "argu[ment] that the district court erred by placing the burden on him to demonstrate that the § 3626(b) requirements were met." *Id.* And again, this holding was dispositive. *See id.* at 1051 ("As the movant, the burden was on Sheriff Arpaio to demonstrate that the relief ordered by the Amended Judgment went beyond what is necessary to remedy the ongoing constitutional violations at the Maricopa County jails."); *id.* at 1050 n.3 ("[T]he burden was on Sheriff Arpaio, not the plaintiffs, to prove current jail conditions.").

Similarly, in *Hedrick*, the Ninth Circuit recognized that it was "bound by *Graves*' and *Gilmore*'s direct holding." 648 F. App'x at 716 n.1. It thus specifically rejected the argument "that termination should have followed automatically" once the defendants established "that (b)(1) allowed them to move for termination because enough time had passed." *Id.* at 716. "Rather," the Ninth Circuit said, "Defendants still were required to meet the burden described above"—*i.e.*, "to demonstrate that there are no ongoing constitutional violations, that the relief ordered exceeds what is necessary to correct an ongoing constitutional violation, or both." *Id.* (quoting *Graves*, 623 F.3d at 1048).

Most recently, confronted with arguments that "the burden framework established in *Graves* and *Gilmore*'is wrong,'" the Ninth Circuit refused to change its position. *Balla v. Idaho*, 29 F.4th 1019, 1028 (9th Cir. 2022). The rule, the Ninth Circuit continued, is

that "[t]he movant must prove ... that the (b)(3) limitation does not apply." *Id.* "We are bound by the law of our circuit, and only an en banc court or the U.S. Supreme Court can overrule a prior panel decision." *Id.* So, the Ninth Circuit "continue[s] to follow" its current position, which places "the burden of proof [on] the party seeking to terminate the prospective relief." *Id.* (quoting *Gilmore*, 220 F.3d at 1007).

But this continued position has not escaped criticism from within the Ninth Circuit. The district court in *Balla* criticized the Ninth Circuit for not "adopt[ing] what this Court believes is the better view, the view more in keeping with the language of § 3626(b)." *Balla v. Idaho Bd. of Corr.*, 2019 WL 9831671, at *3 n.2 (D. Idaho Apr. 18, 2019). The court explained that the better view is that § 3626(b) "set[s] forth a burden-shifting framework." *Id.* at *3. Specifically, "the *defendants* have the burden—as the moving party—of proving *that two years have passed* since the relevant date under § (b)(1)." *Id.* If they "satisfy that initial burden, then the statutory 'limitation' [in § 3626(b)(3)] would allow the court to refuse termination only if the *plaintiffs* can prove *that the relief satisfies the need-narrow-intrusiveness requirements*." *Id.* The district court thus emphasized that, if it "were writing on a clean slate, it would so hold." *Id.* But the court recognized that its hands were tied by *Graves* and *Gilmore*—and thus, "[t]his Court must follow Ninth Circuit precedent." *Id.*

B. The First and Fifth Circuits, and Numerous Courts Within Other Circuits, Require Movants to Show Only the Requisite Passage of Time, Recognizing That *Plaintiffs* Bear the Burden to Prove That the Prospective Relief Satisfies the § 3626 (b)(3) Factors.

The First and Fifth Circuits, by contrast, emphatically reject the Ninth Circuit's view. And that is echoed by courts in numerous other circuits, including the Second, Third, and Tenth Circuits.

First Circuit. Start with the First Circuit's decision in *Laaman*, which is the foundation of the various judicial decisions on this side of the circuit split. *Laaman* addressed the question whether, in adjudicating a PLRA motion to terminate, a district court must "afford inmates who allege 'current and ongoing' violations of federal rights the opportunity to supplement the existing record." 238 F.3d at 15. In answering yes (at least sometimes), the First Circuit repeatedly emphasized that *plaintiffs* bear the burden to prevent automatic termination upon the timely filing of a motion to terminate.

It recognized first that "[t]he district court [] found that 'plaintiffs have failed to demonstrate that a basis currently exists for finding that the decree extends no further than necessary to correct the violation of the Federal right, or that the decree is narrowly drawn and the least intrusive means to correct any alleged violations of the plaintiffs' federal rights.'" *Id.* at 18 (internal quotation marks omitted). The First Circuit

then adopted that view as its own. It held that the district court should give the plaintiffs "the opportunity to demonstrate 'current and ongoing' violations of constitutional rights that would prevent termination of the Consent Decree pursuant to § 3626 (b)(3)." *Id.* at 20. But the First Circuit went out of its way to emphasize that "the burden remains on the plaintiffs to show that such violations persist." *Id.*

Fifth Circuit. Three years later, the Fifth Circuit added its now-longstanding view agreeing with *Laaman*. In *Guajardo*, the district court held that the Texas Department of Criminal Justice "was entitled to termination [of a consent decree], unless plaintiffs established that the relief remained necessary to correct an ongoing violation." 363 F.3d at 394. On appeal, the plaintiffs advanced the Ninth Circuit's view, complaining that "the district court erred by ... placing the burden of proof on them to show ongoing violations rather than requiring TDCJ, the party seeking relief, to demonstrate none." *Id.* at 394–95. The Fifth Circuit rejected that view, citing *Laaman* and other cases.

The Fifth Circuit explained (as the *Balla* district court did) that the PLRA's termination provisions establish a burden-shifting framework. At the first step, the movant, "in seeking termination, must initially establish the requisite passage of time" under § 3626(b)(1)(A)—*i.e.*, one or two years, depending on the particular circumstances. *Id.* at 395. If the movant meets that burden, "the burden of proof then shifts to the prisoners to demonstrate ongoing violations and that the relief is narrowly drawn" as required by § 3626(b)(3). *Id.*

The Fifth Circuit did not think this was a close question: "[A] plain reading of the PLRA, including its structure, imposes the burden on the prisoners." *Id.* at 395–96. Specifically, § 3626(b)(3) "places a limitation on the termination of prospective relief under a consent decree if the court makes the requisite written findings based on the record; but the burden of proof to support these findings is obviously on the party opposing termination." *Id.* at 396. For that reason, the Fifth Circuit concluded that this burden "was allocated correctly to plaintiffs." *Id.*

After *Guajardo*, the Fifth Circuit has reaffirmed its view that the PLRA places on plaintiffs the burden to avoid termination upon the filing of a timely motion to terminate. *See Brown*, 929 F.3d at 228 ("We have held that 'the burden of proof to support these findings is obviously on the party opposing termination.'" (quoting *Guajardo*, 363 F.3d at 396)); *see id.* at 254 (King, J., concurring in part and concurring in the judgment) (stating that "[t]he inmates [] fail[ed] to meet their burden under the [PLRA] to continue the Consent Decree").

Other Courts. This view also extends into other circuits as well. Although the Third Circuit itself has not directly addressed the issue, *Guajardo* invokes then-Judge Alito's decision for the Third Circuit in *Imprisoned Citizens*. *See Guajardo*, 363 F.3d at 395. In that case, the Pennsylvania federal district court expressly stated that "the burden imposed by the PLRA['s termination provisions]" is that "inmates prove a 'current and ongoing violation' of a federal right." *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 604 (E.D. Pa. 1998); *see also id.* at 606

("[T]he plaintiffs have not attempted to establish the facts necessary to meet the standard which would permit the Court to deny defendants' Motion to Terminate.").

The Third Circuit affirmed, although not on that basis. *See Imprisoned Citizens*, 169 F.3d 178. But the Fifth Circuit nonetheless counted the district court decision ("*aff'd sub nom.*" by the Third Circuit) as reflecting the position "held by most courts." *Guajardo*, 363 F.3d at 395. And at least one other district court in the Third Circuit has taken the same route, flagging the *Imprisoned Citizens* district court decision as "*aff'd on other grounds sub nom.*" *United States v. Territory of the Virgin Islands*, 884 F. Supp. 2d 399, 415 (D.V.I. 2012) (citing *Imprisoned Citizens*, *Guajardo*, and *Laaman* to hold that "Plaintiff bears the burden of proving the existence of a 'current and ongoing violation of a Federal right' under § 3626(b)(3)").

Similarly, courts within the Second and Tenth Circuits routinely cite some combination of *Guajardo*, *Laaman*, and related decisions to reach the same result. *See Benjamin v. Shriro*, 2009 WL 3464286, at *4 (S.D.N.Y. Oct. 26, 2009) ("This Court previously has found that, upon a termination motion, the burden is on the Plaintiffs to show that the relief meets this test." (citing *Guajardo*)); *Skinner v. Lampert*, 457 F. Supp. 2d 1269, 1276 (D. Wyo. 2006) ("The burden is upon the Plaintiffs to prevent termination of the Remedial Plan." (citing *Laaman* and *Guajardo*)); *Regan v. Cnty. of Salt Lake*, 2006 WL 3613217, at *3 (D. Utah Dec. 11, 2006) ("Plaintiffs, who have the burden to demonstrate ongoing violations[,] have not shown a

current and ongoing violation of a federal right of detainees, and more significantly, have not even alleged any facts which, if true, would amount to a current and ongoing violation." (citing *Guajardo*) (footnote omitted)).

C. The Decision Below Brings This Split Within the Fifth Circuit Itself.

Until the decision below, it was widely acknowledged that "[a] circuit split exists"—between the Ninth Circuit on one side and the First and Fifth Circuits on the other side—"as to which party bears the burden of demonstrating that there are, or are not, ongoing constitutional violations and that the relief is narrowly drawn." *Busby v. Bonner*, 2021 WL 4100290, at *2 (W.D. Tenn. Aug. 30, 2021). But the decision below directly rejects the Fifth Circuit's earlier decision in *Guajardo*, creating an intra-circuit split that the en banc Fifth Circuit refused to address and that is emblematic of the broader circuit split.

1. As recounted above, *Guajardo* held that the PLRA's termination provisions establish a two-step, burden-shifting framework: (a) The movant need only "initially establish the requisite passage of time" (under § 3626(b)(1)(A)); and then (b) "the burden of proof [] shifts to the prisoners to demonstrate ongoing violations and that the relief is narrowly drawn" (under § 3626(b)(3)). 363 F.3d at 395. Nearly half of the Fifth Circuit judges currently maintain that view.

"What must Sheriff Hutson do to move for termination of relief," asked Judge Smith. App.73a. "Nothing but show the requisite passage of time—*e.g.*, '2 years after the date the court granted or approved the

prospective relief.'" *Id.* (citation omitted). And Petitioner "has done just that" because "[m]ore than two years have elapsed since" the 2019 Orders. *Id.* "She need do nothing more." *Id.* For "[f]rom that point onward, the PLRA shifts the burden to the parties *opposing* termination. It is their job—not Hutson's—to provide sufficient proof to support the findings required by § 3626(b)(3)." *Id.*

Similarly, Judge Oldham (on behalf of himself and Judges Jones, Smith, and Duncan) emphasized that "the Sheriff's only burden is to make her motion '2 years after the date the court granted or approved the respective relief.'" App.39a (citations omitted). "She did that," he explained—and "[a]fter that, the burden shifts to the parties opposing termination to provide sufficient evidence to support the findings required by the limitation clause in § 3626(b)(3)." *Id.* at 40a; *accord* App.3a (Ho, J.) ("fully agree[ing] with that analysis").

2. The *Guajardo* view is now in limbo, however, because the other half of the Fifth Circuit has rejected it. The decision below does not (and cannot) dispute that Petitioner carried her burden of showing that the requisite amount of time (two years) passed before she filed her motion to terminate the prospective relief requiring the construction of Phase III. The majority below should have recognized that this undisputed fact "then shift[ed] to the prisoners" the burden of proof to prevent termination. *Guajardo*, 363 F.3d at 395. But instead, the majority faulted Petitioner for not filing what, in the majority's view, is "a proper motion to terminate under the PLRA." App.53a. Petitioner's supposed sin? Her central claim is that § 3626(a)(1)(C)

bars the district court's "build the prison" mandate, while the panel required her also to argue that the mandate "is no longer necessary to correct the existing constitutional violations" under § 3626(b)(3). App.61a. And that reasoning turns both the PLRA and *Guajardo* "upside down." App.73a (Smith, J.).

3. The inter- and intra-circuit splits on this issue are compounded by the fact that a majority of the Fifth Circuit refused to resolve the issue in an en banc decision. As a result, the existing circuit split is 2-1, but without any clue as to whether the Fifth Circuit remains with the First or now stands with the Ninth. Whatever the answer, there is a clear and intractable split both within and without the Fifth Circuit that requires this Court's intervention.

II. THE DECISION BELOW IS WRONG.

A. The PLRA's Burden-Shifting Framework Requires That a Movant Establish Only the Requisite Passage of Time.

On the merits, the majority below is just wrong.

Text. Start with the text. The PLRA states 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 or intervener ... 2 years after the date the court granted or approved the prospective relief." § 3626(b)(1)(A)(i). It then adds a "[l]imitation": "Prospective relief shall not terminate if the court makes written findings based on the record 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 that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." § 3626(b)(3).

Those two provisions establish a straightforward two-step, "burden-shifting framework that is familiar to lawmakers from other contexts." *Balla*, 2019 WL 9831671, at *3. *First*, the movant, "in seeking termination," bears the burden of "initially establish[ing] the requisite passage of time"—*i.e.*, two years since entry of the challenged relief. *Guajardo*, 363 F.3d at 395. *Second*, if the movant carries that burden, "the burden of proof then shifts to the prisoners to demonstrate ongoing violations and that the relief is narrowly drawn." *Id.* (citing § 3626(b)(3)). Put otherwise, "if the [movant] satisf[ies] that initial burden, then the statutory 'limitation' on the [movant's] right to termination would allow the court to refuse termination only if the *plaintiffs* can prove *that the relief satisfies the need-narrowness-intrusiveness requirements*." *Balla*, 2019 WL 9831671, at *3.

The upshot is that a movant like Petitioner may file a motion to terminate for any reason or no reason at all. So long as they show (as Petitioner did) that two years have passed since the district court entered the relevant orders, the PLRA requires nothing more of them—for, at that point, the ball is in the plaintiffs' court to prevent termination. App.73a (Smith, J.); App.39a (Oldham, J.).

Context. Surrounding features of the PLRA reinforce this interpretation. For example, § 3626(a)(2) requires preliminary injunctive relief to "automatically expire" 90 days after it is entered "*unless*"—among

other things—"the court makes the findings required under subsection (a)(1)" (which track the § 3626(b)(3) factors). § 3626(a)(2). Similarly, § 3626(e)(2) enters an "automatic" stay of prospective relief 30 days after the filing of a motion to modify or terminate the prospective relief. *Miller*, 530 U.S. at 337. And, in fact, Congress provided for an immediate appeal where "courts [] circumvent[] the PLRA's plain commands" by trying to sidestep "the mandatory stay." *Id.* at 339–40 (citing § 3626(e)(4)).

In each of these examples, the statutory default is firmly in favor of *pausing* and *terminating* prospective relief. It is thus unsurprising that § 3626(b) is structured in precisely the same way—requiring termination upon a timely filed motion, unless the § 3626(b)(3) factors are satisfied. Given that overall theme, therefore, it would make no sense to conclude that the *movant* bears the burden to avoid the statutory default. It is the *plaintiff* who wishes to maintain the prospective relief—and, thus, it is the *plaintiff* who logically bears the burden to prevent termination under the PLRA. Once the movant has established that the motion is timely, therefore, the movant has no other pleading or evidentiary burden under § 3626(b).

History. This interpretation likewise accords with "the entire purpose of the PLRA." *Balla*, 2019 WL 9831671, at *3. "The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons[.]" *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). After all, "[f]ederal judges are particularly ill-equipped to manage state prisons: 'Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the

management of social institutions.'" *Valentine v. Collier*, 993 F.3d 270, 294 (5th Cir. 2021) (Oldham, J., concurring in the judgment) (quoting *Brown v. Plata*, 563 U.S. 493, 558 (2011) (Scalia, J., dissenting)).

Yet that is the upside-down world endorsed by the Ninth Circuit and the majority below. By their telling, State and local officials affirmatively must prove that interference with State and local prison administration is unwarranted. That is backwards. The PLRA says such interference is impermissible *unless* plaintiffs can meet the demanding standards for prospective relief. And only Petitioner's view properly respects that statutory design: Upon the timely filing of a termination motion, termination is automatic, unless plaintiffs carry their burden to prevent termination under § 3626(b)(3).

B. The Ninth Circuit's Side of the Circuit Split Is Wrong.

To the extent the majority decision below reflects the Ninth Circuit's own view, the Ninth Circuit is wrong. *First*, the Ninth Circuit invoked Rule 60(b)(5) and imported its burden framework into the PLRA. *Gilmore*, 220 F.3d at 1007. Despite admitting that, "[o]bviously, the PLRA creates a more exacting standard for federal courts to follow," the Ninth Circuit concluded that—as in Rule 60(b)(5) cases—"the burden of establishing such a change rests on the party seeking modification." *Id.*

The Ninth Circuit is wrong. For the reasons just explained, the PLRA's text, context, and history refute the Ninth Circuit's reading. But, more fundamentally,

the Ninth Circuit's view renders the PLRA's termination provisions superfluous; for defendants like Petitioner already had Rule 60(b)(5) in their toolbox. In fact, and if anything, the Ninth Circuit's view means that the PLRA makes it *harder* for defendants to terminate prospective relief—because they must satisfy not only Rule 60(b)(5)'s dictates but also the § 3626(b)(3) factors. That makes zero sense.

As Judge Smith explained, "[t]he PLRA expressly provides that motions to terminate exist *in addition to* 'otherwise ... legally permissible' grounds for modification and termination." App.71a n.7 (Smith, J.) (quoting § 3626(b)(4)). Conflating Rule 60(b)(5) and the PLRA's termination provisions—as the Ninth Circuit has done—is thus misguided.

Second, in justifying its view, the Ninth Circuit complained about giving up a district court's "equitable discretion." *Gilmore*, 220 F.3d at 1007. But "curbing the equitable discretion of district courts was one of the PLRA's principal objectives." *Miller*, 530 U.S. at 339. The Ninth Circuit's death grip on such discretion thus betrays the mistake in that court's approach to the PLRA.

Finally, the Ninth Circuit worried that a district court's determination to keep prospective relief "requires real adjudication—the careful application of law to fact—not the wooden ratification of a legislatively prescribed conclusion." *Gilmore*, 220 F.3d at 1008. That may well be correct, assuming a plaintiff actually attempts to prevent termination by proving up the § 3626(b)(3) factors. But this point does not answer the question who bears the burden to supply the

relevant arguments and evidence in the first instance—and whether a movant bears any burden other than establishing that the termination motion is timely.

At bottom, the Ninth Circuit (as well as the majority below) is simply wrong in holding that a movant must establish something more than the requisite passage of time to secure termination of the challenged prospective relief.

III. THE QUESTION PRESENTED IS "OBVIOUSLY IMPORTANT."

The issues presented by this case also are "obviously important." App.3a (Ho, J.). There are at least four overarching ways in which this is true.

First, as detailed above, *supra* Section I, the jurisprudence is a mess. It was a mess before the majority decision below because of the circuit split. But it is even messier now that the Fifth Circuit has dueling decisions. This Court should thus intervene to correct course both inside and outside the Fifth Circuit.

Second, the majority decision below "takes a hatchet to the [PLRA]." App.64 (Smith, J.). If the Court does not intervene, plaintiffs in the Fifth Circuit (now, in addition to the Ninth Circuit) will cite the majority decision below in inappropriately foisting *plaintiffs' own PLRA burden* onto States and localities, which are statutorily entitled to automatic termination under the PLRA. And those who seek termination in two of the largest federal courts of appeals where PLRA litigation is especially pervasive will have no recourse.

Third, this issue is uniquely important because it exemplifies a larger problem in the Fifth Circuit. The decision below is one of two recent (and published) PLRA decisions in which the Fifth Circuit has attempted to foreclose appellate review of PLRA problems. In *Parker v. Hooper*, 128 F.4th 691 (5th Cir. 2025) (per curiam), the Fifth Circuit refused (under either 28 U.S.C. § 1291 or § 1292(a)(1)) to allow Louisiana to appeal a final judgment that (a) "closed" decade-long litigation over conditions at the State's largest prison, (b) ordered the plaintiffs to move for attorney's fees as "prevailing parties," and (c) ordered the State to provide "special masters" immediate access to the prison, prisoners, and records and pay for said masters' activities. *See id.* at 710 (Jones, J., dissenting) ("How preposterous. And unauthorized.").

The Fifth Circuit has requested a response to the State's en banc petition in that case. But whether the Fifth Circuit itself fixes the *Parker* problem or not, the broader effort to undercut the PLRA is unmistakable. The Court should thus take into account the potentially sweeping ramifications of this effort absent the Court's intervention.

Finally, the issue presented is, of course, important to Petitioner herself and the New Orleanians whose taxpayer dollars are on the line. Even the Magistrate registered "sticker shock" in response to the Phase III price tag, "above $100 million." App.132a. With so much money on the line, therefore, the core legal question in this case plainly warrants the Court's review.

IV. THIS CASE IS AN IDEAL VEHICLE.

1. Finally, this case is an exceptional vehicle to decide the question presented. As recounted above, that issue presents a clean question of statutory interpretation: Does the framework in § 3626(b) impose on a movant seeking termination any affirmative burden beyond showing the requisite passage of time? The answer to that question is not fact-bound in any way. And if the Court answers "no" (as it should), then the Court need only reverse the decision below on that basis alone and remand for further proceedings.

Reversal would require the majority below to ask and answer—for the first time—whether *the United States and the private plaintiffs* carried their burden to *prevent* termination of the prospective relief requiring the construction of Phase III by satisfying the § 3626(b)(3) factors. The majority below never did so because it required Petitioner to show more than the requisite passage of time in filing her termination motion. By correcting that error, this Court's reversal will thus properly send the case back for a do-over under the proper burden-shifting framework.

2. Petitioner notes that the majority below included approximately three to four statements at the end of its opinion that appear intended to insulate the opinion from this Court's review. *See* App.61a–63a. These faux alternative holdings (under a misapprehension of the PRLA's burden-shifting framework, no less) cannot keep the case out of this Court's hands.

First, the panel stated (in one sentence) that the denial of Petitioner's termination motion was proper because "the district court's 2023 order includes the

PLRA findings that 'prospective relief' extends 'no further than necessary to correct the violation of the Federal right' in this case"—so no § 3626(b)(3) problem. App.62a. Demonstrably wrong.

As Judges Smith and Oldham explained, the district court's decision quite literally never identifies any specific conditions that constitute a current and ongoing violation of a federal right, let alone specifies how the "build the prison" mandate is narrowly drawn. App.75a–78a (Smith, J.); App.40a–41 (Oldham, J.). Judge Smith aptly summed up the problem: "[T]he [district] court's analysis leaves us with no idea *what* the current violations are (if any), *how* any violations are addressed by the consent judgment's conditions (if they are at all), or *why* those conditions are the least intrusive means to remedy the violation." App.77a; *see id.* at 78a ("The PLRA does not allow the district court to deny termination of relief merely by speculating that 'there is no reason to think that Phase III is no longer necessary.'"). And this Court does not need to take Judges Smith and Oldham's word for it; the district court's failure to comply is readily apparent on the face of its own decision. *See* App.103a.

On remand, therefore, that defect will independently require the Fifth Circuit to reverse the denial of Petitioner's termination motion. And if the Court wishes, it may include one sentence in its decision stating that the Fifth Circuit should reconsider the issue in the first instance.

Second, the majority stated that "[t]he district court has also made abundantly clear that it did not

order the construction of a prison"—so no § 3626(a)(1)(C) problem. App.62a; *see* § 3626(a)(1)(C) ("Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons[.]"). Again, with great respect, the majority is not forthcoming.

However the Court conceives of what the district court has done in this case, § 3626(b)(3)—through the limitation set out in § 3626(a)(1)(C)—requires "the *termination* of current, ongoing prospective relief that orders the construction of prisons." App.41a (Oldham, J.); *see* App.79a (Smith, J.) ("Section 3626(b)(3) is constrained by § 3626(a)(1)(C), which applies to all parts of § 3626."). Put otherwise, a district court's ordering the construction of a jail "can never qualify as preliminary relief that, in the words of § 3626(a)(1)(C), 'shall not terminate' under § 3626(b)(3)." App.79a (Smith, J.). It thus would not matter "if the district court makes more [§ 3626(b)(3)] findings on remand," for it has no authority to "continue[] enforcing prospective relief relating to the construction of the Phase III facility." App.79a–80a (Smith, J.).

Here, too, this defect will independently require the Fifth Circuit to reverse the denial of Petitioner's termination motion. And if the Court wishes, it may (but need not) add a sentence in its decision instructing the Fifth Circuit to reconsider the issue under the proper burden-shifting framework.

Third, the majority stated that Petitioner's motion is "premature" because "Phase III is 'in progress at 12.82% complete' and the Sheriff and the City have been slow to effectuate any stipulated remedy."

App.63a. No. Judge Oldham described the majority as "simply incoherent" on this point because Petitioner's motion is unquestionably timely under § 3626(b)(1)(A)—and nothing in the PLRA permits a district court to decline to adjudicate a termination motion simply because the movant has not effectuated the prospective relief quickly enough (and the district court did not even do so). App.37a (Oldham, J.).

3. Petitioner also notes that the majority's handwringing about appellate jurisdiction is a red herring. The majority expressly acknowledged—and in fact, the private "Plaintiffs and the United States argue[d]"—that the Fifth Circuit had "jurisdiction over the denial of [the] motion to terminate." App.50a. The majority limited its exercise of that jurisdiction, however, to reviewing what, in the majority's view, is "a proper motion to terminate under the PLRA"—*i.e.*, the precise question addressed in the issue presented. App.53a; *see* App.67a (Smith, J.) ("Denials of motions to terminate under the PLRA are treated as 'refusal[s] to dissolve an injunction.' … That alone ends the jurisdictional dispute." (quoting *Ruiz v. United States*, 243 F.3d 941, 945 (5th Cir. 2001) (first alteration in original))). Accordingly, this Court's reversal on the issue presented would confirm the Fifth Circuit's jurisdiction to review and reverse the denial of Petitioner's termination motion. *Cf.* App.15a (Oldham, J.) (describing the majority's decision as "jurisdictionally dysphoric"); *id.* at 37a ("The panel's chimerical holdings—part jurisdictional, part merits—are ... malformed hybrid monsters.").

4. Finally, these remarkable facts offer the perfect vehicle to address the question presented: In a post-

PLRA world, a federal district court is threatening a local sheriff with "severe sanctions" and "contempt" if she does not build a jail fast enough. App.82a. If that sounds familiar, that is because these facts "harken[] back to the institutional-reform litigation of yesteryear—back before the [PLRA], when federal supervision of state prisons was normal." *Valentine*, 993 F.3d at 291 (Oldham, J., concurring in the judgment). Indeed, that is why the PLRA expressly states that "[n]othing" within its terms "shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons[.]" § 3626(a)(1)(C). What better vehicle to correct a misunderstanding about the PLRA's burden-shifting framework, therefore, than one that "takes a hatchet to the [PLRA]." App.64a (Smith, J.).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 28, 2025 . . . . . 1a

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 26, 2024 . . . . . 43a

APPENDIX C — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, FILED SEPTEMBER 5, 2023 . . . . . 81a

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED JULY 19, 2023 . . . . . 107a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30633

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.

Appendix A

Filed January 28, 2025

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:12-CV-859

Before Smith, Wiener, and Douglas, *Circuit Judges.*

ON PETITION FOR REHEARING EN BANC

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges.*

Per Curiam:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5th Cir. R. 35).

In the en banc poll, six judges voted in favor of rehearing, Judges Jones, Smith, Richman, Ho, Duncan, and Oldham, and eleven judges voted against rehearing, Chief Judge Elrod, and Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Engelhardt, Wilson, Douglas, and Ramirez.

Appendix A

JAMES C. HO, *Circuit Judge*, dissenting from denial of rehearing en banc:

The panel majority dismissed this appeal for lack of jurisdiction. *See Anderson v. Hutson,* 114 F.4th 408, 421 (5th Cir. 2024). I would reach the merits and reverse the district court, and accordingly voted to rehear this obviously important case en banc. To begin with, we have jurisdiction under 28 U.S.C. § 1292(a)(1), because the district court's denial of the motion to terminate is an appealable interlocutory order. *See Ruiz v. United States,* 243 F.3d 941, 945 (5th Cir. 2001); *Abbott v. Perez,* 585 U.S. 579, 594 (2018). And as to the merits, the decision of the district court does not comply with the Prison Litigation Reform Act. *See* 18 U.S.C. §§ 3626(a)(1)(C), (b)(3); *Ruiz,* 243 F.3d at 950. My dissenting colleagues detail the substantive legal reasons why I reach these conclusions, and I fully agree with that analysis.

Appendix A

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, and DUNCAN, *Circuit Judges,* dissenting from the denial of rehearing en banc:

The Prison Litigation Reform Act prohibits federal courts from ordering the construction of prisons or enforcing consent decrees and settlement agreements that provide for the construction of prisons. Such prospective relief exceeds the remedial authority of federal courts. *See Miller v. French,* 530 U.S. 327, 347 (2000). The district court nevertheless ordered the New Orleans Parish Sheriff and the City of New Orleans to build a prison and then denied the Sheriff's motion under the statute to terminate that prospective relief.

Bizarrely, the panel in this case dismissed the Sheriff's appeal for lack of appellate jurisdiction. That dismissal was egregiously wrong; defied landmark jurisdictional precedents stretching from *Hayburn's Case* to *Steel Co.*; and "force[d] the political subdivision of a coordinate sovereign to build a prison, in conformance with that court's specifications, under express threats of 'severe sanctions' and 'contempt of court'" in violation of federal law. *Anderson v. Hutson,* 114 F.4th 408, 422 n.5 (5th Cir. 2024) ("*Anderson II*") (Smith, J., dissenting). The en banc court should have granted rehearing. I respectfully dissent.

Appendix A

I

A

Before getting to the facts and procedural history of this case, I explain (1) the nature of prospective relief in consent decrees, (2) the limits Congress has placed on federal courts' remedial authority in prison litigation, and (3) the appealability of motions to terminate prospective relief in prison litigation.

1

In federal court, a consent decree is an agreement by parties to waive their rights to litigate issues involved in their case, typically embodying a compromise where the defendant agrees to change its conduct under the supervision of the district court. *See United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Despite "closely resembl[ing] contracts," consent decrees also "bear some of the earmarks of judgments." *Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986). They are enforceable by a court and "subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). Hence the Supreme Court's comment that consent decrees have a "hybrid nature." *Int'l Ass'n of Firefighters*, 478 U.S. 501 at 519.

Consent decrees must protect federal interests, and they are generally limited to addressing the "general scope of the case made by the pleadings," and they must

"further the objectives of the law upon which the complaint was based." *Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 437 (2004). Consent decrees between private parties and States or political subdivisions have arisen in many areas of federal law, and they often involve prospective injunctive relief requiring States or political subdivisions to correct ongoing violations of federal rights.[1] Compliance with prospective relief issued under a consent decree is enforceable by contempt proceedings in the issuing court. *Int'l Ass'n of Firefighters,* 478 U.S. at 523.

Although consent decrees are "enforceable in the same way as court injunctions," they do not require any "determination by the court either that the party thus bound had violated the law or that the relief thus granted was legally warranted." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change,* 1987 U. Chi. Legal F. 295, 296. And the prospective relief ordered under a consent decree may "sweep more broadly" than the relief a "court could have awarded after a trial." *Smith v. Sch. Bd. of Concordia,* 906 F.3d 327, 335 (5th Cir. 2018) (quoting *Int'l Ass'n of Firefighters,* 478 U.S. at 525).[2] But that scope is not

1. For example, *Frew* involved States' obligations under Medicaid. *Miller* and *Rufo* involved prison conditions. *International Ass'n of Firefighters* involved government hiring. And *Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237 (1991), involved school desegregation.

2. I note that consent decrees and injunctions in institutional reform litigation "often raise sensitive federalism concerns," *Horne v. Flores,* 557 U.S. 433, 448 (2009), which loom over this case. These concerns have generated plentiful judicial criticism. *See, e.g., ibid.*;

unlimited. Because the court's "remedial authority" over the case "derives from the consent decree" itself, *Smith,* 906 F.3d at 334, the "scope of a consent decree" is limited to its "four corners," *Armour & Co.,* 402 U.S. at 682.

2

Federal judges' powers to govern States via consent decrees are limited in other ways, too. In 1996, Congress passed the Prison Litigation Reform Act ("PLRA"). Pub. L. No. 104-134, 110 Stat. 1321 (codified at 18 U.S.C. § 3626).

Missouri v. Jenkins, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds to the [court-ordered plan] at the expense of other citizens, other government programs, and other institutions not represented in court."); *Frew,* 540 U.S. at 441 ("[R]emedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers. They may also lead to federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law."); *Valentine v. Collier,* 993 F.3d 270, 291 (5th Cir. 2021) (Oldham, J., concurring) ("[F]ederal supervision of state prisons . . . is unlawful" and "imposes grave federalism costs that should be avoided not celebrated.").

And powerful scholarly criticism too. McConnell, *supra,* at 297 ("To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government."); *see also generally* Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases,* 16 U. Pa. J. Const. L. 637 (2014) (arguing that consent decrees raise Article III and separation of powers concerns).

It recognized that "[f]ederal judges are particularly illequipped to manage state prisons." *Valentine v. Collier,* 993 F.3d 270, 294 (5th Cir. 2021) (Oldham, J., concurring). And it was designed to bring "prisoner litigation in the federal courts . . . under control." *Woodford v. Ngo,* 548 U.S. 81, 84 (2006).

The PLRA limits the remedial power of district courts in prison litigation by restricting "courts' authority to issue and enforce prospective relief concerning prison conditions." *Miller,* 530 U.S. at 347. "The PLRA strongly disfavors continuing relief through the federal courts; indeed, its fundamental purpose was to extricate them from managing state prisons." *Brown v. Collier,* 929 F.3d 218, 228 (5th Cir. 2019) (quoting *Guajardo v. Tex. Dep't of Crim. Just.,* 363 F.3d 392, 394 (5th Cir. 2004) (per curiam)).

The PLRA provides "standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities." *Miller,* 530 U.S. at 331. One of those standards is that a court "shall not grant or approve any prospective relief unless the court finds that such 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." *Id.* at 333 (quoting 18 U.S.C. § 3626(a)(1)(A)). That standard also applies to existing injunctions. *See ibid.* (citing 18 U.S.C. § 3626(b)(2)).

The PLRA also specifies that "[n]othing in this section shall be construed to authorize the courts, in exercising

their remedial powers, to order the construction of prisons." 18 U.S.C.A. § 3626(a)(1)(C). And it prohibits court enforcement of consent decrees and private settlement agreements that fail to "comply with the limitations set forth in subsection (a)," *id.* § 3626(c)(1), (2), including the prohibition against orders to construct new prisons provided by § 3626(a)(1)(C). These limitations apply irrespective of the validity of the prospective relief at the time it was issued by a court. *See Miller,* 530 U.S. at 347-48. Accordingly, the PLRA provides no way for a court to order the construction of a prison, either directly or via the enforcement of private agreements.

If prospective relief "d[id] not satisfy these standards" when it was granted, "a defendant or intervenor is entitled to '*immediate* termination' of that relief." *Miller,* 530 U.S. at 331 (emphasis added) (quoting 18 U.S.C. § 3626(b)(2)). In other words, the statute "prohibits the continuation of prospective relief" that did not meet the statute's standards *ab initio. Miller,* 530 U.S. at 346. And "the PLRA entitles a State to terminate" *any* prospective relief concerning prison litigation still in place "after two years." *Brown v. Plata,* 563 U.S. 493, 515 (2011); *see also* 18 U.S.C. § 3626(b)(1)(A)(i) ("In 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 or intervener 2 years after the date the court granted or approved the prospective relief." (cleaned up)).

The PLRA's presumption against continuing prospective relief is so strong that it expressly authorizes mandamus actions to "remedy any failure to issue a prompt

ruling on such a motion." *Id.* § 3626(e)(1). And "[a]ny motion to modify or terminate prospective relief" triggers an "automatic stay" of the prospective relief starting 30 days after the motion is filed. *Id.* § 3626(e)(2); *see also Miller,* 530 U.S. at 350 (upholding the constitutionality of the automatic stay and noting that "Congress clearly intended to make operation of the automatic stay mandatory").

The movant's right to terminate prospective relief two years after it was granted is subject to the limitations of § 3626(b)(3). That provision limits the termination of such prospective relief when "the district court finds that the relief '*remains* necessary to correct a current and ongoing violation of the Federal right,'" *Plata,* 563 U.S. at 515 (emphasis added) (quoting 18 U.S.C. § 3626(b)(3)), "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). The district court's findings must be "written" and "based on the record." *Ibid.* And "the burden of proof to support these findings is obviously on the party opposing termination," *Collier,* 929 F.3d at 228 (quoting *Guajardo,* 363 F.3d at 396), not the movant.

3

Denials of motions to terminate prospective relief under the PLRA are appealable as interlocutory orders "refusing to dissolve . . . injunctions." 28 U.S.C. § 1292(a)(1). Long-settled precedent in our circuit so holds. *See Ruiz v. United States,* 243 F.3d 941, 945 (5th Cir. 2001) ("[T]his Court has jurisdiction over the appeal of both

orders under 28 U.S.C. § 1292(a)(1) as refusals to dissolve an injunction.").

Congress has granted this court jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). This statute carves out an exception to the "general principle that only *final* decisions of the federal district courts would be reviewable on appeal." *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 83 (1981) (citing 28 U.S.C. § 1291). Unlike other interlocutory orders, orders concerning injunctions are "immediately appealable as of right." *Ali v. Quarterman,* 607 F.3d 1046, 1048 (5th Cir. 2010) (quotation omitted).

It does not matter whether the word "injunction" appears on a district court's order because "the label attached to an order is not dispositive." *Abbott v. Perez,* 585 U.S. 579, 594 (2018). If "an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Ibid.* (quoting *Carson,* 450 U.S. at 83). In practice, a court "grants an injunction when an action it takes is 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) (quotation omitted).

None of this turns on an "individualized jurisdictional inquiry." *Mohawk Indus., Inc. v. Carpenter,* 558 U.S. 100,

107 (2009) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 473 (1978)). That means "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States,* 354 U.S. 394, 405 (1957). The appeals court is not supposed to scrutinize individually every order that gets appealed to it, looking for "particular injustice[s]" that might be "averted" or whether the "litigation at hand" might benefit from an appeal of that order. *Mohawk Indus.,* 558 U.S. at 605 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868 (1994)). Instead, the inquiry focuses on "the entire category to which a claim belongs." *Ibid.*

B

This appeal arises out of longstanding constitutional litigation about conditions at the Orleans Parish Prison relating to detainees with mental-health needs. The procedural history of this litigation is lengthy and complex, stretching back to a consent decree entered in 2013. The two panel opinions in this case provide the factual and procedural background. *See Anderson v. City of New Orleans,* 38 F.4th 472, 472-78 (5th Cir. 2022) ("*Anderson I*"); *Anderson II,* 114 F.4th at 408-14. The instant appeal involves the district court's denial of a motion to terminate prospective relief that requires New Orleans Parish Sheriff Hutson ("the Sheriff") to construct a new prison facility. *Anderson II,* 114 F.4th at 412.

1

In 2016, the parties implemented their consent decree via an agreement that the district court entered

as a stipulated order ("Stipulated Order"). *Ibid.* The Stipulated Order stated 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." *Id.* at 413. The Compliance Director's plan recommended construction of "Phase III," a new facility at the existing jail designed to house detainees with mental-health needs. *Ibid.*

In January 2019, the district court ordered the City of New Orleans (the "City") to begin the construction of the Phase III jail facility and related programming "as soon as possible." ROA.13075. Then, in March 2019, the district court ordered the City to continue renovating the existing "temporary accommodations" for the prison's detainees with mental-health conditions during the construction of the Phase III jail facility, and it ordered the City and Sheriff to continue the "programming" aspect of Phase III. ROA.13225. It also ordered the City to provide monthly progress reports concerning the construction of the Phase III jail facility. I refer to the January and March orders as the "2019 Orders."

In June 2020, the City moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the 2019 Orders, arguing that "significant change[s] in the factual conditions . . . render programming, design, and construction of the Phase III jail facility unsustainable." ROA.14102. It argued that the prison provided "medical and mental healthcare that is above the minimal constitutional standard"; the "COVID-19 pandemic w[ould] cause a significant budgetary shortfall for the City"; and "the decrease in the

inmate population ma[de] the programming, design, and construction of a new Phase III jail facility unnecessary." ROA.14104. The City also argued that § 3626(a)(1)(C) of the PLRA prohibited the district court from ordering the construction of Phase III.

The district court adopted the magistrate judge's report and recommendation to deny the City's Rule 60(b)(5) motion. The district court found that the City had waived its PLRA argument and, in any event, that the court had never ordered the construction of the Phase III jail facility. Instead, the district court found that it had merely enforced the City's contractual obligation under the Stipulated Order to build the Phase III jail facility. The district court also held that the City failed to show changed factual conditions. The City appealed.

In *Anderson I,* a panel of this court affirmed. 38 F.4th at 481. That panel refused to rule on the City's PLRA argument because "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Id.* at 478 (quoting *Horne v. Flores,* 557 U.S. 433, 477 (2009)). In its view, the panel "lack[ed] jurisdiction to review the substance of the January and March 2019 orders" from which the City sought relief. *Ibid.* Accordingly, the panel evaluated the City's PLRA argument only to the extent it constituted a change in factual conditions or law per Rule 60(b)(5). *Id.* at 479. Under that abuse-of-discretion review, the panel held that the City's PLRA claim failed. *Ibid.*

2

Then, in June 2023, the Sheriff moved under the PLRA, 18 U.S.C. § 3626(b), to "terminate all prospective relief regarding the construction of the Phase III jail." ROA.19054. The Sheriff argued that the district court had ordered "the parties to abide by their private agreement to build" the Phase III jail facility, ROA.19055, which is forbidden by the PLRA, *see* 18 U.S.C. § 3626(c)(2), (g)(6).

The district court adopted the magistrate judge's report and recommendation to deny the Sheriff's motion to terminate. It also entered an "Order Setting Conditions of Construction" for the Phase III jail facility, which incorporated the terms of a previous, unsigned Cooperative Endeavor Agreement ("CEA") between the City and The Sheriff. The Sheriff appealed.

C

A panel of this court dismissed the Sheriff's appeal for lack of appellate jurisdiction. *Anderson II,* 114 F.4th at 412, 418, 421. The panel's opinion is sometimes inscrutable, sometimes inconsistent, and jurisdictionally dysphoric. As Judge Smith noted in his powerful dissenting opinion: "[The majority] takes a hatchet to the [PLRA] and turns a blind eye to binding circuit precedent. The result? An opinion with reasoning that, at every turn, is fatally compromised. Some parts are totally unhinged. And the remainder is incomprehensible." *Id.* at 421 (Smith, J., dissenting).

Here, I do my best to explicate the panel's reasoning in service of criticizing it. There seem to be three holdings: (1) the panel lacked appellate jurisdiction over the denial of the motion to terminate to the extent it was really an appeal of the 2019 Orders; (2) the motion to terminate itself, to the extent it was a *bona fide* motion to terminate, was inadequately pleaded and therefore destroyed jurisdiction; and (3) even if the panel could reach the merits, a motion to terminate was premature, somehow also destroying jurisdiction.

1

The panel first explained why it had "jurisdiction to review the denial of the . . . motion, but not the underlying . . . orders." *Id.* at 415 (majority opinion) (quoting *Anderson I,* 38 F.4th at 477-78; citing *Ruiz,* 243 F.3d at 945).

The panel's analysis proceeded as if the Sheriff had attempted to appeal the 2019 Orders directly, rather than the district court's denial of her motion to terminate prospective relief under the PLRA. Acknowledging that the Sheriff "styled her motion as one to 'terminate' rather than vacate or reverse the Phase III orders," the panel claimed that the Sheriff "[wa]s directly attacking the validity of the orders as being prohibited under the PLRA." *Id.* at 416.[3] The panel then accused the Sheriff of

3. The panel supports this point by analogy to *Moody National Bank v. GE Life & Annuity Assurance Co.,* 383 F.3d 249 (5th Cir. 2004). In that case, this court held that "a motion to allocate costs" that was labeled as a Rule 59(e) motion should be characterized as a Rule 54(d) motion instead. *Id.* at 251. This

"attempt[ing] to circumvent procedural history and rules under the guise of a PLRA motion." *Id.* at 418 n.13. Thus, to the panel, the Sheriff's "filing is a 'motion to terminate' in name only." *Id.* at 419. [4] The panel held this destroyed § 1292(a)(1) jurisdiction for three reasons.

First, the panel construed the district court's denial of the Sheriff's motion as an implementation of its prior orders. *See id.* at 416. The panel reasoned that "a court has not modified an injunction when it simply implements an injunction according to its terms or designates procedures for enforcement without changing the command of the injunction." *Id.* at 415 (quoting *In re Deepwater Horizon,*

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court reasoned that "any post-judgment motion addressing costs or attorney's fees must be considered a collateral issue even when costs or attorney's fees are included in a final judgment." *Id.* at 253. But without more, that logic does not extend to equate PLRA motions to terminate prospective relief with direct appeals of orders.

4. Why does the panel reach this conclusion, despite *Ruiz*'s clear statement that a denial of a motion to terminate categorically is, in substance, a refusal to dissolve an injunction that grounds jurisdiction under § 1292(a)(1), which the panel cites? Because, according to the panel, in *Ruiz,* the defendants moved to terminate a consent decree; here, the Sheriff challenges the Stipulated Order and 2019 Orders. *See Anderson II,* 114 F.4th at 419 n.14.

How is that a distinction with a difference? Beats me. In any event, "we have not allowed district courts to 'shield [their] orders from appellate review' by avoiding the label 'injunction.'" *Abbott,* 585 U.S. at 595 (quoting *Sampson v. Murray,* 415 U.S. 61, 87 (1974)) (alteration in *Abbott*); *see also Sampson,* 415 U.S. at 87-88 (treating an order labeled as a TRO, which is not appealable under § 1292(a)(1), as a preliminary injunction, which is).

793 F.3d at 491) (cleaned up). From that premise alone, the panel concluded that the district court's orders "simply implement the consent decree without changing the command of the injunction." *Id.* at 416 (quoting *In re Deepwater Horizon,* 793 F.3d at 491) (cleaned up).

Second, because § 1292(a)(1)'s exception to the final-judgment rule is "narrow," the panel reasoned, "a party challenging an interlocutory order" on appeal must also "show serious, perhaps irreparable, consequences" arising from the order. *Id.* at 415 (quoting *In re Deepwater Horizon,* 793 F.3d at 492) (cleaned up). Thus, the panel concluded, even if the district court's "observation" (observation?) "was a modification of an injunction, or refusal to dissolve an injunction," the Sheriff had not met her burden to establish "serious, perhaps irreparable, consequences." *Id.* at 416.

Third, the panel held that it was "bound" by *Anderson I* under the law of the case doctrine or the rule of orderliness. *See id.* at 416-17 & n.11 (citing *Anderson I,* 38 F.4th 472). (The panel was not sure which.) The panel stated that *Anderson I* and *Anderson II* both "concern the well-settled principles of post-judgment proceedings." *Id.* at 417.[5] The logic seems to be that because the

5. As best I can tell, the actual *holding* of *Anderson I* that apparently controlled *Anderson II* was the workaday rule that an appeal of a post-judgment motion such as one under Rule 60(b) is "restricted to the questions properly raised by the postjudgment motion" and does "not extend to revive lost opportunities to appeal the underlying judgment." *Anderson II,* 114 F.4th at 417 (quoting 15B Charles Alan Wright & Arthur R. Miller, Federal

Anderson I panel held that the appeal of an order denying a changed-circumstances Rule 60(b)(5) motion for relief from a judgment did not give it jurisdiction to review the substance of the underlying judgment, it followed that *no* post-judgment motion could ever give a future Fifth Circuit panel jurisdiction to review the legality of the ongoing prospective relief in this case. Further, the panel concluded that *Anderson I* precluded the Sheriff's arguments that the 2019 Orders violated § 3626(a)(1)(C) because *Anderson I* had held that the PLRA worked no new change in the law, but that *Anderson I* did not preclude the Sheriff's new arguments about private settlement agreements under § 3626(c)(2). *Id.* at 418. Nevertheless, the panel declined to "reach those other" issues because it lacked jurisdiction. *Ibid.*

For these three reasons, the panel concluded that it "lack[ed] appellate jurisdiction over the substance of the 2019 Orders, and the PLRA is not a proper vehicle to challenge them." *Ibid.*

2

After concluding it lacked jurisdiction because the district court's injunction was not really an injunction, the panel went on to evaluate the "procedural basis for the district court's denial of the Sheriff's motion to terminate." *Ibid.* Analogizing to *Anderson I*'s Rule 60(b) holding again, the panel again disclaimed jurisdiction over

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PRACTICE & PROCEDURE § 3916 (2d ed. 1990); citing *Bowles v. Russell,* 551 U.S. 205, 209 (2007)).

the 2019 Orders (which no one argues are on appeal) but concluded it could review "the procedural basis for the district court's denial of the Sheriff's motion to terminate." *Ibid.*

The panel then held that the Sheriff's motion to terminate "fails procedurally" under PLRA § 3626(b) because it did not show that prospective "relief is no longer necessary to correct the existing constitutional violations." *Id.* at 420. Next, the panel mentioned that 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," which was apparently "a finding of compliance with the limitations set forth in § 3626(a)." *Ibid.* Plus, the district court's denial of the motion to terminate stated that "prospective relief extends no further than necessary to correct the violation of the Federal right in this case." *Ibid.* (quotation omitted). Finally, it reasoned that "nothing in Section 3626(b) supports" the argument that "Section 3626(a)(1)(C) prohibits the existence of the 2019 Orders." *Ibid.*

3

The panel concluded the apparently jurisdictional portion of its opinion by stating that "the district court has not erred in denying the motion." *Ibid.* Then the panel further asserted hypothetical jurisdiction to resolve the merits of an appeal that (it said) was beyond its jurisdiction: "Even assuming *arguendo* that we could reach the merits of the Sheriff's claim," the panel

reasoned, "the lack of effort and time implementing Phase III would undermine a motion for termination," which it thought "premature." *Ibid.*

The panel was not forthcoming with an explanation for how these maneuvers comported with Article III limitations on its subject matter jurisdiction, which require the court to dismiss as soon as it realizes it lacks jurisdiction and forbid the court from exercising hypothetical jurisdiction over the merits. *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1869); *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998).

Neither of those bedrock legal principles troubled the panel, however. The panel opined on the merits, but rather than affirm the district court, it stated: "We therefore DISMISS this appeal." *Anderson II,* 114 F.4th at 421.

*

So much for explicating the panel's opinion. In the following parts, I (II) explain why the panel undoubtedly had jurisdiction. Then I (III) show how the panel improperly analyzed the merits under the heading of jurisdiction. And I (IV) turn to the merits myself and conclude that the motion to terminate prospective relief should have been granted, as required by the PLRA.

II

The panel piles jurisdictional misconstruction on top of misunderstanding on top of egregious legal mistake.

A mistake because ample precedent establishes that this court has jurisdiction to hear the Sheriff's appeal of the denial of her motion to terminate. And egregious because this court has a "virtually unflagging obligation . . . to exercise the jurisdiction given" it. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *accord Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.").

I (A) show why this court had jurisdiction to review the district court's denial of the Sheriff's motion to terminate prospective relief under the PLRA. Then I (B) explain why the panel's arguments to the contrary were wrong.

A

This court has § 1292(a)(1) appellate jurisdiction over the Sheriff's appeal of the district court's denial of her motion to terminate prospective relief under the PLRA because such denials are categorically appealable as interlocutory orders "refusing to dissolve . . . injunctions." 28 U.S.C. § 1292(a)(1).

Long-settled precedent in our circuit supports that conclusion. *See Ruiz*, 243 F.3d at 945 ("[T]his Court has jurisdiction over the appeal of both orders [denying motions to terminate] under 28 U.S.C. § 1292(a)(1) as refusals to dissolve an injunction."); *see also Brown*, 929 F.3d at 254 (reversing a district court's denial of a motion to terminate prospective relief under the PLRA); *Guajardo*, 363 F.3d at 398 (affirming a district court's

grant of a motion to terminate prospective relief under the PLRA).

That makes sense. Denials of motions to terminate prospective relief have the "practical effect" of granting an injunction or refusing to dissolve an injunction, *Abbott,* 585 U.S. at 594 (quotation omitted), because they affirmatively authorize courts to continue issuing prospective relief—and congressionally disfavored relief at that. As Judge Smith's dissent made exceedingly clear, the "order denying the motion to terminate contains all of the requisite features of an injunction": It is an *in personam* order directed at a party, the Sheriff; it contemplates enforcement by means of contempt and sanctions; and it "refuses to dissolve any part of the consent judgment." *Anderson II,* 114 F.4th at 422 (Smith, J., dissenting); *see also In re Deepwater Horizon,* 793 F.3d at 491 ("A district court grants an injunction when an action it takes is 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." (cleaned up)).

It does not matter whether the word "injunction" appeared in the district court's denial of the motion to terminate because "the label attached to an order is not dispositive." *Abbott,* 585 U.S. at 594. Thus, these denials "should be treated as such for purposes of appellate jurisdiction," *ibid.,* and *Ruiz* was right to so hold. Indeed, that treatment should be—and has been—categorical, as the Supreme Court has instructed. *See Mohawk Indus.,* 558 U.S. at 107.

Put simply, denials of motions to terminate under the PLRA fall within "a class of orders for which appellate jurisdiction lies." *Anderson II,* 114 F.4th at 422 (Smith, J., dissenting). The denial of the Sheriff's motion is in that class, so this court has appellate jurisdiction to review it. *QED.*

B

Instead, the panel conducted the verboten "individualized jurisdictional inquiry" rather than focusing on "the entire category to which a claim belongs." *Mohawk Indus.,* 558 U.S. at 107 (quotations omitted). The panel carved out the Sheriff's "particular motion from the class of motions to which it belongs," *Anderson II,* 114 F.4th at 422 (Smith, J., dissenting), by scrutinizing the Sheriff's motion for "particular injustices" that might be "averted," *Mohawk Indus.,* 558 U.S. at 107 (cleaned up).

To accomplish this task, the panel concocted three made-to-order reasons to dismiss the Sheriff's appeal. It (1) implausibly construed the district court's denial of the motion to terminate as a mere "implementation" of the district court's previous orders. It then (2) applied the inapplicable "irreparable consequences" standard. And finally it (3) misapplied the law of the case and rule of orderliness doctrines. In doing all this, the panel ignored this court's plain holding in *Ruiz.*

1

The panel's first maneuver was to construe the district court's denial of the Sheriff's motion as an implementation

of its prior orders rather than a modification. *See Anderson II,* 114 F.4th at 416. That is, the district court's orders "simply implemented the consent decree without changing the command of the injunction." *Ibid.* (quoting *In re Deepwater Horizon,* 793 F.3d at 491) (cleaned up).

It is difficult to imagine how this could be more wrong.

For one, the denial of the motion to terminate is itself a refusal to dissolve an injunction, immediately appealable under its own name under 28 U.S.C. § 1292(a)(1). *See Ruiz,* 243 F.3d at 945.

Moreover, the Cooperative Endeavor Agreement ("CEA") modified the district court's prior orders rather than merely implementing them. Recall that in denying the Sheriff's motion, the district court also entered an "Order Setting Conditions of Construction" for the Phrase III jail facility. Those conditions incorporated the terms of a previous, unsigned CEA between the City and the Sheriff. The CEA purports to bind the Sheriff and the City to new terms and obligations regarding the construction of the Phase III facility. None of the CEA's terms—which specify precisely how the City must construct Phase III—appeared in the district court's prior orders.[6]

6. Not relevant to this appeal, but worth noting, is some of the CEA's highly questionable substance. The CEA requires that "[a]ny party to this contract," including "any subcontractors," "must take all necessary affirmative steps to assure that minority businesses" and "women's business enterprises . . . are used when possible." ROA.19347. "Affirmative steps must include," among

The CEA is not an implementation of the district court's prior orders: It is plainly a modification. Under penalty of contempt and sanction, the construction of Phase III must now—because of the court's new order—"proceed pursuant to the . . . terms of the CEA." ROA.19519. Those new injunctive obligations undoubtedly modifed the substantive relief sought in the complaint. *Cf., e.g., Integrity Collision Ctr. v. City of Fulshear,* 837 F.3d 581, 586 (5th Cir. 2016) (holding that an order requiring the city to include two companies on its call list for towing impounded vehicles "provides substantive relief" and "is therefore an injunction, appealable under Section 1292(a)(1)").

Put simply, prior to the district court's order, actions taken by the Sheriff and the City that were inconsistent with the CEA were accorded no special status; after the order, those actions became punishable by contempt and sanctions. That is a modification "changing the command of the injunction," *In re Deepwater Horizon,* 793 F.3d at 491 (quotation omitted), not an implementation of it. Not that any of this matters, because even if the district court simply refused to change the injunction, that would be appealable too.

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others, "[a]ssuring that . . . minority businesses, and women's business enterprises are solicited whenever they are potential sources." ROA.19347-48. These provisions at a minimum offend the maxim that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181, 208 (2023).

The panel next conjured an inexplicable hurdle for the Sheriff's motion to be appealable: "a party challenging an interlocutory order" on appeal must also "show serious, perhaps irreparable, consequences" arising from the order. *Anderson II,* 114 F.4th at 415 (quoting *In re Deepwater Horizon,* 793 F.3d at 492) (cleaned up).

Again, no. The "serious, perhaps irreparable consequences" language comes from *Carson v. American Brands, Inc.,* 450 U.S. 79 (1981). It helps an appellate court evaluate jurisdiction under § 1292(a)(1) when it is not clear whether a district court's order "was the practical equivalent of an order denying an injunction." *Abbott,* 585 U.S. at 595 (citing *Carson,* 450 U.S. at 83-84). It is not an independent bar to appealing a district court order; indeed, it appears nowhere in the text of § 1292(a).

In any event, ample judicial precedent establishes that this so-called "requirement" "does not apply to orders specifically granting or denying injunctions." *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.,* 875 F.2d 1174, 1176 (5th Cir. 1989). Such orders "are immediately appealable as of right; no additional finding of immediate, irreparable injury is required." *Quarterman,* 607 F.3d at 1048 (quoting *Sherri A.D. v. Kirby,* 975 F.2d 193, 203 (5th Cir. 1992)).

As *Ruiz* establishes, a denial of a motion to terminate under § 3626(b)(2) of the PLRA is categorically a "refusal to dissolve an injunction." 243 F.3d at 945. No one could

seriously contend that the district court's denial of the motion to terminate and its order enforcing the CEA did not have the "practical effect" of granting an injunction (or refusing to dissolve one). So the "serious, perhaps irreparable consequence" test does not apply to the denial of the Sheriff's motion to terminate.

But even if that test did apply, it is easy to see the serious and irreparable consequences of the district court's denial of the motion to terminate the prospective relief from the 2019 Orders.

The consequences are serious. The City and Sheriff will have to build and operate an entirely new jail facility, per the district court's minute specifications, under the threat of "contempt of court" and "severe sanctions." ROA.19520. The Sheriff tells us that complying with this order creates "the need to re-appropriate" upwards of $110 million "from other municipal public works projects." Pet. for Reh'g En Banc at 8, *Anderson v. Hutson,* No. 23-30633 (5th Cir. Sept. 9, 2024). That is a "big deal." *Anderson II,* 114 F.4th at 422 n.5 (Smith, J., dissenting).

And those consequences are irreparable. What remedy could provide the defendants relief other than the dissolution of the injunction ordering them to build, maintain, and operate the Phase III facility?

These consequences are nothing like those complained of in the *Deepwater Horizon* case cited breathlessly by the panel. *See Anderson II,* 114 F.4th at 416 (citing *In re Deepwater Horizon,* 793 F.3d at 492). In that case, this

court held that BP had not shown serious or irreparable consequences in its challenge to a settlement agreement where it wanted to claw back settlement funds that had been awarded to fraudulent nonprofit organizations. *See In re Deepwater Horizon,* 793 F.3d at 492. The court reasoned that these consequences were "adequately reparable through the multiple avenues BP ha[d] to pursue awards obtained fraudulently" and recover monies. *Ibid.* Indeed, the court noted, "an injury is irreparable" when it "cannot be undone through monetary remedies." *Ibid.* (quoting *Miss. Power & Light Co. v. United Gas Pipe Line Co.,* 760 F.2d 618, 629 (5th Cir. 1985)). That is the case here, where the injury is the ongoing prospective relief requiring political subdivisions to construct a prison facility in open defiance of the PLRA.

3

The panel's third attempt to skirt jurisdiction also fails. Implausibly, the panel held that it was bound by *Anderson I*'s jurisdictional holding under the law of the case doctrine or the rule of orderliness. *See Anderson II,* 114 F.4th at 416-17 (citing *Anderson I,* 38 F.4th 472).[7]

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7. The panel seemed unsure about which doctrine to rely on. It appeared to ground its arguments primarily in law of the case doctrine, which the district court ruled on and the parties briefed. *See Anderson II,* 114 F.4th at 416-417. But in a footnote, the panel suggested it was also bound by the rule of orderliness. *See id.* at 416 n.11. Ultimately, this confusion does not matter, because no holding of *Anderson I* speaks to the issues underlying this appeal—so neither doctrine applies.

Given the amount of precedent from both the Supreme Court and our court that the panel openly disregarded, in addition to the amount of statutory text from Congress that the panel openly contravened, it is difficult to take seriously the idea that the panel decision was somehow a jurisprudentially modest attempt to follow the law. And in any event, neither the law of the case doctrine nor the rule of orderliness supports, much less compels, *Anderson II*'s holding that it lacked jurisdiction.

"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." *Id.* at 416 (quoting *Bigford v. Taylor,* 896 F.2d 972, 974 (5th Cir. 1990)) (cleaned up). And the rule of orderliness means that "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *Id.* n.11 (quoting *United States v. Traxler,* 764 F.3d 486, 489 (5th Cir. 2014)).

But *Anderson I* rendered exactly zero holdings about whether this court would have jurisdiction over future appeals based on different motions in the case or whether the prospective relief ordered by the district court violated the PLRA. *Anderson II* involved no "reexamination of issues of law" decided in *Anderson I* and finding jurisdiction would not have "overturn[ed] another panel's decision,"[8] especially not *Anderson I.*

8. Adding irony to injury, *Anderson II* quietly disregarded *Ruiz,* 243 F.3d at 945.

The Sheriff's instant appeal for the denial of her motion to terminate raised different challenges than the City's Rule 60(b) appeal in *Anderson I.* In *Anderson I,* the City had moved in the district court under Rule 60(b)(5) for relief from the 2019 Orders on a "changed circumstances" theory. *Anderson I,* 38 F.4th at 478-79. Attached to that motion was an argument that § 3626(a)(1)(C) of the PLRA barred the district court from ordering the defendants to build the Phase III jail facility, because that provision does not authorize "the courts, in exercising their remedial powers, to order the construction of prisons." 18 U.S.C. § 3626(a)(1)(C). The *Anderson I* panel noted it lacked jurisdiction over the 2019 Orders but held that the PLRA claim failed under the Rule 60(b)(5) motion because there was no change in factual conditions or law. *Anderson I,* 38 F.4th at 479. It certainly never purported to divest future panels of the Fifth Circuit of jurisdiction over other appeals in the case.

Strange, then, to invoke the law of the case doctrine and our rule of orderliness. As the panel admits, the *Anderson I* panel "declined to rule on the merits of the City's PLRA argument." *Anderson II,* 114 F.4th at 417. Nor does "the Sheriff make[] the same argument" now that the City had made in *Anderson I. Anderson II,* 114 F.4th at 417. Although the district court and the United States (as intervenor-plaintiff) maintained that the law of the case doctrine precluded the Sheriff's attempt to "revive the City's already-rejected argument that the 2019 Orders violated Section 3626(a)(1)(C) [of] the PLRA," *even they* (*i.e.,* the district court and the United States) "agreed that the law of the case doctrine d[id] not bar the

Sheriff's private settlement agreement argument" under the banner of §§ 3626(c)(2) and (g)(6). *Id.* at 418.[9]

Turning baffling into bewildering, after admitting all that, the panel declined to "reach the issue of private settlement agreements" because it lacked jurisdiction over the substance of the 2019 Orders. *Ibid.* Even if one spots the panel that *Anderson I* foreclosed the Sheriff's § 3626(a)(1)(C) arguments (which it did not), it is a blatant non sequitur to conclude from that that the court lacked jurisdiction over the *non*-foreclosed § 3626(c)(2) and (g)(6) arguments.

Moreover, the Sheriff's motion to terminate, on appeal here, brought PLRA challenges under a completely different procedural heading. Due in part to the district court's conclusion that it had not ordered the defendants to build the Phase III jail facility, as prohibited by § 3626(a)(1)(C) of the PLRA, but rather ordered them to abide by their private agreement, the Sheriff brought her motion to terminate under § 3626(c)(2) and (g)(6). Those provisions, the Sheriff argued, forbid federal courts from enforcing private settlement agreements to construct a prison and limit remedies for breach to reinstatement of the case in federal court and breach-of-settlement claims in state court. The Sheriff did not bring this motion under Rule 60(b) for relief from a judgment. She brought it under § 3626(b) of the PLRA itself, which authorizes motions for termination of prospective relief. *See Anderson II,* 114 F.4th at 419.

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9. How, then, can the panel maintain that "the substance of the motions are identical"? *Anderson II,* 114 F.4th at 418. I have not a clue.

That procedural difference matters. The panel cannot ignore that difference by calling the Sheriff's motion to terminate one "in name only," *ibid.*, and acting as if it were "attacking the validity of the [2019] orders," *id.* at 416. The Sheriff's PLRA motion did not attack the validity of the 2019 Orders as if it were a direct appeal. It asserted limitations on the district court's remedial authority to continue maintaining the prospective relief then in place. The Sheriff's appeal to our court is over the *denial* of that motion—itself a refusal to dissolve an injunction—not the 2019 Orders.

As Judge Smith made clear in dissent, "[a]n order issuing prospective relief can be both (1) completely valid and enforceable at the time it was ordered and (2) subsequently terminable for providing relief beyond the scope permitted by the PLRA." *Anderson II,* 114 F.4th at 423 (Smith, J., dissenting) (quotation omitted). So again, the procedural difference matters: The Sheriff's motion to terminate prospective relief under the PLRA is not a rehash of the City's Rule 60(b)(5) motion for changed circumstances (interred by *Anderson I*), and it is not an attack on the validity of the 2019 Orders when issued or the 2013 consent decree. It is a motion to terminate the relief *currently* in place.

So it is surely not the case that the Sheriff's motion to terminate is an "end run to effect an appeal outside the specified time limits." *Id.* at 417 (majority opinion) (quoting *Anderson I,* 38 F.4th at 478). If that were true, the Sheriff's motion to terminate under the PLRA would have been timely only if brought within 60 days of the

district court's 2019 Orders. *See* Fed. R. App. P. 4(a)(1)(B). But the PLRA allows motions to terminate only one or two years after the district court grants or denies termination of prospective relief. *See* 18 U.S.C. § 3626(b)(1)(A)(i)-(iii). On the panel's read, then, defendants in prison litigation could *never* bring motions to terminate prospective relief, "thereby erasing PLRA motions to terminate from the U.S. Code." *Anderson II*, 114 F.4th at 424 (Smith, J., dissenting). *Anderson I* held no such thing.

III

The panel's next set of blunders is even more confusing. After finding that it lacked jurisdiction over the appeal of the motion to terminate, the panel *twice* proceeded to the merits anyway, but then purported to dismiss for lack of jurisdiction rather than affirm the district court's denial.

First, the panel concluded that the Sheriff's motion to terminate "fails procedurally" under § 3626(b) of the PLRA because she did not argue that prospective "relief is no longer necessary to correct the existing constitutional violations." *Id.* at 420. As a result of the Sheriff's failure to meet this supposed pleading burden, the panel dismissed the Sheriff's appeal of the denial of her motion, seemingly for lack of jurisdiction (again).

Second, the panel made a failed attempt at an advisory opinion on the merits. After two purportedly jurisdictional holdings, the panel exercised hypothetical jurisdiction. "Even assuming *arguendo* that we could reach the merits of the Sheriff's claim, the lack of effort

and time implementing Phase III would undermine a motion for termination." *Ibid.* Reaching the merits, the panel reasoned that the Phase III jail facility was "12.82% complete and the Sheriff and City ha[d] been slow to effectuate any stipulated remedy," so "a motion to terminate [was] at best premature." *Id.* at 420-21 (quotation omitted). But then the panel concluded it "lack[ed] jurisdiction to review" the motion's denial. *Id.* at 421.

These mystifying statements are wrong twice over: They (A) sound in merits analysis, not in jurisdiction. And (B) by proceeding to the merits after finding a lack of jurisdiction, the panel violated fundamental dictates of Article III.

A

1

First, the "procedural failure." The panel opinion was confused on its face about whether this holding was jurisdictional or merits based. At the end of the section discussing how the Sheriff's motion "fails procedurally," the panel concluded that "the district court ha[d] not erred in denying the motion." *Anderson II,* 114 F.4th at 420. That sounds like affirmance on the merits to me. But the decretal line ambiguously states: "We therefore DISMISS this appeal." *Id.* at 421. And other parts of the opinion sound in jurisdictional defects as to the entire case. *See id.* 420-21 ("[T]he record shows that a motion to terminate is at best premature and we lack jurisdiction to

review it."); *id.* at 420 ("Even assuming arguendo that we could reach the merits of the Sheriff's claim . . . "); *id.* at 412 ("We agree and DISMISS for lack of jurisdiction.").

Despite that language, the panel's reasoning sounds in merits. The panel identified a burden (an improper one, as I discuss below) to show "relief is no longer necessary to correct the existing constitutional violations" and held that the Sheriff failed to meet it. *Id.* at 410. When other appellate courts have agreed, as the panel did, that "the district court ha[d] not erred in denying the motion" to terminate prospective relief, they have affirmed the denial, not dismissed for lack of jurisdiction. For example, when the Supreme Court upheld a court's remedy of mandating a lower prison population in California against a challenge under § 3626 of the PLRA, it affirmed rather than dismissed for lack of jurisdiction. *See Brown v. Plata,* 563 U.S. 493, 545 (2011). But the panel provides not a single reason why the Sheriff's failure to meet a pleading burden destroyed its appellate jurisdiction over the denial of the motion.

2

Second, the supposed "prematurity" of the motion to terminate.

The panel purported to "assum[e] *arguendo*" that it could "reach the merits of the Sheriff's claim." *Anderson II,* 114 F.4th at 420. Did it? It seemed like the panel did, because it assessed the motion's so-called "maturity" under the merits heading. That would have made for an interesting advisory opinion (given the panel had already

dismissed for lack of jurisdiction twice over). But finding the motion premature, the panel declined to affirm the district court's denial of the motion. Instead, it concluded (again) that it lacked jurisdiction to review it, (again) for no apparent reason and without citation to supporting legal materials. *Id. at* 420-21. That is simply incoherent.

In any event, the statute literally says the opposite of what the panel holds: "In 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 or intervener . . . 2 years after the date the court granted or approved the prospective relief." 18 U.S.C. § 3626(b)(1)(A)(i). The Sheriff's 2023 motion to terminate came more than two years after the 2019 Orders. It was not "premature," and block quotes from *Brown v. Plata,* 563 U.S. 493 (2011), do not suggest otherwise. *See Anderson II,* 114 F.4th at 420.

B

The panel's chimerical holdings—part jurisdictional, part merits—are not only malformed hybrid monsters. *See* Homer, The Iliad 275 (A.T. Murray trans., 1924) ("The raging Chimaera . . . [was] not of men, in the fore part a lion, in the hinder a serpent, and in the midst a goat, breathing forth in terrible wise the might of blazing fire."). Worse still, they also violate fundamental dictates of Article III.

"Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle,* 74 U.S. (7 Wall.) 506,

514 (1869). So once a court decides it lacks jurisdiction over the case, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ibid.* In assuming jurisdiction and opining on the merits anyway, a court engages in the repudiated practice of "hypothetical jurisdiction," which "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998) (citing *Muskrat v. United States,* 219 U.S. 346, 362 (1911); *Hayburn's Case,* 2 Dall. 409 (1792)). To issue such an opinion is "to act ultra vires." *Id.* at 102. Thus, as I have clarified before, a "jurisdictionless court cannot reach the merits." *Spivey v. Chitimacha Tribe of La.,* 79 F.4th 444, 449 (5th Cir. 2023).

The panel violated these bedrock principles several times over. First, the panel concluded it lacked statutory appellate jurisdiction under § 1292(a)(1) to review the denial of the motion to terminate. As I explained, that was wrong; the court definitely had appellate jurisdiction. But having decided it lacked jurisdiction, the panel should have done nothing more than announced that fact and dismissed, as *Ex parte McCardle* requires. Instead, the panel went on to consider whether the motion "fails procedurally" because the Sheriff did not meet a pleading standard, and it concluded that the "district court ha[d] not erred in denying the motion." As discussed above, that was a merits analysis, not a jurisdictional one. And as discussed below, the panel placed the burden on the wrong party anyway. So having just declared itself "jurisdictionless," the panel should not have proceeded to the merits. *Spivey,* 79 F.4th at 449.

But even if one were to spot the panel that it lacked jurisdiction to review the denial of the Sheriff's motion for two independent reasons, its holding that the motion was premature is indefensible. It is an open and notorious violation of the Supreme Court's teaching in *Steel Co.* The panel *admitted* that it was "assuming *arguendo*" it "could reach the merits of the Sheriff's claim" before ruling the Sheriff's motion to terminate was "premature." That is exactly the sort of "hypothetical jurisdiction" that *Steel Co.* made clear is an "ultra vires" act. 523 U.S. at 102. And it is no improvement to conclude, as if by magic, that a failure on the merits yields a lack of jurisdiction. *See Anderson II,* 114 F.4th at 420-21.

IV

Despite the panel's purported dismissal(s) for lack of jurisdiction, the panel did reach the merits of the Sheriff's motion to terminate under the heading of "procedural basis." *Anderson II,* 114 F.4th at 418. Unfortunately, that analysis was deficient top to bottom. Three of the panel's "patent error[s]" merit emphasis here. *Id.* at 424 (Smith, J., dissenting).

First, the panel incorrectly placed the burden on the Sheriff to argue that the prospective "relief is no longer necessary to correct the existing constitutional violations." *Id.* at 420 (majority opinion). Because "prospective relief . . . must be terminated on the motion of any party," *Collier,* 929 F.3d at 228, the Sheriff's only burden is to make her motion "2 years after the date the court granted or approved the prospective relief," 18 U.S.C. § 3626(b)

(1)(A)(i). She did that. After that, the burden shifts to the parties opposing termination to provide sufficient evidence to support the findings required by the limitation clause in § 3626(b)(3). *See Collier,* 929 F.3d at 228; *see also Guajardo,* 363 F.3d at 396 (explaining that the burden of proving the requisite § 3626(b)(3) findings "is obviously on the party opposing termination").

Second, the district court did not make the requisite findings. "Prospective relief *must* be terminated unless 'a court makes specific written findings regarding the continuing necessity of [such] relief.'" *Anderson II,* 114 F.4th at 425 (Smith, J., dissenting) (quoting *Ruiz,* 243 F.3d at 950) (alteration in *Anderson II*). These findings must be "written" and "based on the record." 18 U.S.C. § 3626(b)(3). The court cannot "simply . . . state in conclusory fashion that the requirements of the consent decrees satisfy" the PLRA's "criteria." *Anderson II,* 114 F.4th at 425 (Smith, J., dissenting) (quoting *Castillo v. Cameron County,* 238 F.3d 339, 354 (5th Cir. 2001)).

The magistrate judge's report and recommendation failed to conduct the analysis required by § 3626(b)(3) beyond two "fleeting reference[s]" to previous findings. *Id.* at 425. Even counting those references, the district court's analysis never "identifie[d] any specific conditions in the [prison system] at the time termination was requested that constituted a current and ongoing violation of a federal right." *Id.* at 426 (quotation omitted). It never mentioned whether the Sheriff failed to comply with any of the terms of the consent decree. *Ibid.* And it never showed that any of the consent decree's terms, "or the relief previously

ordered by the court," were "still needed to cure ongoing constitutional violations." *Ibid.*

Third, the PLRA requires termination of the prospective relief ordered by the district court in its 2019 Orders and CEA order as a matter of law. *See id.* at 427. That is true even if the district court had made the necessary findings required by § 3626(b)(3) of the PLRA. Why? Section 3626(a)(1)(C) of the PLRA 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." So § 3626(b)(3) cannot be construed to stop the *termination* of current, ongoing prospective relief that orders the construction of prisons.

As Judge Smith put it, "the court necessarily acts *ultra vires* if it continues enforcing prospective relief relating to the construction of the Phase III facility," *Anderson II,* 114 F.4th at 427 (Smith, J., dissenting), because that order exceeds the district court's "authority to issue and enforce prospective relief," *Miller,* 530 U.S. at 347; *see also Saahir v. Estelle,* 47 F.3d 758, 762 (5th Cir. 1995) ("Just as the scope of the consent decree does not enlarge the court's jurisdiction, the way the parties agreed to implement the remedy contained in the consent decree likewise cannot affect the jurisdictional bounds of the federal courts.").

Accordingly, the panel should have reached the merits and reversed. The district court should have granted the Sheriff's motion for termination of prospective relief, because "such relief shall be terminable upon the motion

of any party" brought "2 years after the date the court granted or approved the prospective relief," 18 U.S.C. § 3626(b)(1)(i), unless the limitations of § 3626(b)(3) are met. The Sheriff's motion was procedurally valid, and the limitations were not met. The panel instead erred coming (in its erroneous finding of no jurisdiction) and going (in its erroneous merits holding).

* * *

The panel "majority wants to build a prison," *Anderson II,* 114 F.4th at 421 (Smith, J., dissenting), in direct contravention of the Prison Litigation Reform Act. Along the way, the panel made a mess of our great jurisdictional doctrines and flouted foundational Supreme Court precedents. Regrettably, the en banc court today grants the panel's wish. I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30633

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.

Appendix B

Filed August 26, 2024

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:12-CV-859

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges*.

DANA M. DOUGLAS, *Circuit Judge*:

This appeal stems from twelve years of litigation against, *inter alia*, the Orleans Parish Sheriff's Office regarding constitutionally inadequate housing and medical care for jail detainees at Orleans Parish Prison. In 2013, the district court approved a consent decree proposed by Plaintiffs, the United States, and former Sheriff Gusman. The City and Sheriff also stipulated to developing the plan for adequate housing and care. After years of stalemate, a compliance director and the former Sheriff proposed a plan to construct a mental health annex, known as Phase III, at the existing jail. The former Sheriff was a driving force behind that decision. But as temporary housing for detainees became untenable, the district court ordered the parties to proceed with their stipulations and Phase III. No party appealed those orders. Now, there's a new Sheriff in town, and she has moved to terminate all orders concerning Phase III. The district court denied the motion. Plaintiffs class and the United States argue chiefly that this court lacks jurisdiction to hear the appeal. We agree and DISMISS for lack of jurisdiction.

Appendix B

I.

We previously described the facts in detail. *See Anderson v. City of New Orleans*, 38 F.4th 472, 475-78 (5th Cir. 2022) ("*Anderson I*"). We do not repeat them here. However, because the arguments are strikingly similar, we begin with *Anderson I*. There, we considered the City of New Orleans's ("City") motion for relief from the orders on Phase III.

In 2016, after years of delay and disagreements about implementation of the consent decree, the parties entered a stipulated order which, at the parties' request, the district court entered as an order of the court ("Stipulated Order"). 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."

After extensive consultation with the parties, the Compliance Director submitted a Supplemental Compliance Action Plan ("Plan"). The Plan recommended the construction of a new treatment facility called "Phase III" on existing Orleans Parish Sheriff's Office property, with eighty-nine beds to house detainees, an infirmary, and treatment space for all detainees with certain medical and mental-health needs. In 2017, Sheriff Gusman signed the Plan, along with the Compliance Director. The City indicated that the parties were "moving forward" with the construction of Phase III and that "the project should be completed within 24 to 40 months."

Two years later, in 2019, despite its earlier commitment to the Stipulated Order, the City wanted to explore alternatives to Phase III. The district court ordered the City to comply with the Plan and direct the architect to begin Phase III construction and programming "as soon as possible" ("January 2019 Order"). Subsequently, the City informed the district court that it was "actively working" with Sheriff Gusman and the 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." Accordingly, the 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" ("March 2019 Order").[1]

After entry of the March 2019 Order, however, the City unilaterally ordered the architect and project manager to stop Phase III. The City filed a motion 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 (collectively "2019 Orders"). Specifically, the City argued that Section 3626(a)

1. To be clear, this appeal does not concern the consent decree referenced by the dissent. The Sheriff 's motion only addresses the Stipulated Order and 2019 Orders, *not* the 2013 consent decree. Thus, we consider whether we have jurisdiction over those orders only.

(1)(C) of the Prison Litigation Reform Act ("PLRA") prohibited the court from ordering the construction of a new jail facility. The City also moved for a stay of those orders. Following a two-week hearing, the magistrate judge issued a report and recommendation, later adopted by the district court, denying the City's motions. The City appealed.

In *Anderson I*, we affirmed the district court's decision.[2] As relevant here, we 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." *Anderson I*, 38 F.4th at 478, 479. We 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." *Id.* (citation omitted); *see also id.* ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." (quoting *Horne v. Flores*, 557 U.S. 433, 477, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009))).

After *Anderson I*, Sheriff Hutson was automatically substituted as a party under Federal Rule of Civil

2. The panel permitted Sheriff Hutson, who was inaugurated as the new Sheriff of Orleans Parish in May 2022, to file an amicus brief and participate in oral argument with respect to the City's appeal. *Anderson I*, 38 F.4th at 480.

Procedure 25(d), replacing Sheriff Gusman.[3] Meanwhile, the City entered a construction contract and began work on Phase III. Sheriff Hutson, her counsel, and several members of her Office's staff were included in monthly discussions regarding the ongoing construction of Phase III.

Over a year after Sheriff Hutson was sworn into office, however, she moved to "terminate all prospective relief regarding the construction of the Phase III jail pursuant to 18 U.S.C. § 3626(b)." The magistrate judge recommended the denial of the Sheriff's motion and the entry of an order embodying the terms of the Cooperative Endeavor Agreement ("CEA"), which was negotiated by the parties and signed by the former Sheriff.[4] In July

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

4. To clarify, the terms of the CEA are not in dispute. Sheriff Hutson did not object to any of its discrete provisions despite having the opportunity to do so. Nonetheless, the dissent takes issue with the CEA's terms involving a federal contract clause. *Compare post* at 2 n.1 (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023)) *with* 2 C.F.R. § 200.321 ("The non-federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible."). Setting aside the red herring, the record reflects that the order "embodying the terms of the CEA would not be an order 'authorizing' a project. Rather, it would 'set out the various conditions under which the project will be conducted and spell out the City's and the Sheriff 's respective obligations during the project.'" After all, that is the natural result of parties negotiating and signing an agreement.

2023, the district court adopted that recommendation with amendments unrelated to this appeal. In so doing, the district court made findings pursuant to Section 3626(a)(1)(A), (B) of the PLRA for at least the third time in this case.

The Sheriff appealed and twice moved to stay "all orders regarding the construction of the Phase III jail." A panel of this court denied those motions. The Phase III facility remains "in progress at 12.82% complete."

II.

This case is déjà vu all over again.[5] Similar to the City, Sheriff Hutson argues—under a different procedural mechanism—that the PLRA bars the district court from ordering the construction of Phase III. *Anderson I*, 38 F.4th at 478. As always, we have jurisdiction to determine our own jurisdiction. *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 390 (5th Cir. 2006).

The Sheriff suggests two primary bases[6] for appellate jurisdiction over the 2019 Orders.[7] First, the Sheriff

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5. *Springboards to Educ., Inc. v. Pharr-San Juan-Alamo Indep. Sch. Dist.*, 33 F.4th 747, 748 (5th Cir. 2022) (footnote citation omitted).

6. The Sheriff asserts a third basis for appellate jurisdiction: federal question jurisdiction pursuant to 28 U.S.C. § 1331. As Plaintiffs explain, Section 1331 speaks only to the "original jurisdiction" of the "district courts," not to our appellate authority. *See* 28 U.S.C. § 1331.

7. Although the Sheriff has not specified the exact orders on appeal, we assume the Sheriff challenges the 2019 Orders. To

contends that we have jurisdiction over a court's denial of a motion to terminate pursuant to the PLRA. Second, the Sheriff argues that we have jurisdiction over the refusal to modify a consent decree. *See* 28 U.S.C. § 1292(a)(1).

In opposition, Plaintiffs and the United States argue that we have jurisdiction over the denial of a motion to terminate, but we lack jurisdiction over the substance of the 2019 Orders and Stipulated Order. Moreover, they contend that the Sheriff's motion is not the proper procedural mechanism for the relief sought.[8]

We now turn to jurisdiction and the function and scope of the Sheriff's motion. As before, "we have jurisdiction to review the denial of the . . . motion, but not the underlying . . . orders." *Anderson I*, 38 F.4th at 477-78; *see Ruiz v. United States*, 243 F.3d 941, 945 (5th Cir. 2001).

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the extent the Sheriff challenges additional orders, such as the Stipulated Order, our analysis encompasses all.

8. Separately, Plaintiffs note that the Sheriff 's and City's reliance on 28 U.S.C. § 1292(a)(1) undermines the Sheriff 's purported basis for termination: that the district court's enforcement of a "private settlement agreement" to build Phase III violates the PLRA. To invoke § 1292(a)(1), however, there must be a "consent decree" or "injunction" that the Sheriff 's motion sought to "modify." § 1292(a)(1). Here, the Sheriff disavows the existence of any consent decree regarding the Phase III facility. Thus, the Sheriff 's § 1292(a)(1) argument is a nonstarter.

Appendix B

A.

Section 1292(a)(1) confers jurisdiction over appeals from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). "Just as it has done with the collateral order doctrine, the Court has 'approached this statute somewhat gingerly lest a floodgate be opened' that permits immediate appeal over too many nonfinal orders." *In re Deepwater Horizon*, 793 F.3d 479, 491 (5th Cir. 2015) (quoting *Switz. Cheese Ass'n, Inc. v. E. Home's Mkt., Inc.*, 385 U.S. 23, 24-25, 87 S. Ct. 193, 17 L. Ed. 2d 23 (1966)). "A district court 'grants' an injunction when an action it takes is '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.'" *Id.* at 491 (quoting *Police Ass'n of New Orleans Through Cannatella v. City of New Orleans*, 100 F.3d 1159, 1166 (5th Cir. 1996)). "On the other hand, a court has not modified an injunction when it 'simply implements an injunction according to its terms or designates procedures for enforcement without changing the command of the injunction.'" *Id.* "Interpretation, then, is not modification. . . . [T]aking a practical view of modification, [we] 'look [] beyond the terms used by the parties and the district court to the substance of the action.'" *Id.* (quoting *In re Seabulk Offshore Ltd., 158 F.3d 897, 899 (5th Cir. 1998)*).

"In addition to showing that an order granted, modified, refused, or dissolved an injunction, a party challenging an interlocutory order must show 'serious,

perhaps irreparable, consequences,' because the § 1292(a)(1) 'exception is a narrow one.'" *In re Deepwater Horizon*, 793 F.3d at 492 (quoting *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480, 98 S. Ct. 2451, 57 L. Ed. 2d 364 (1978)).

For example, in *In re Deepwater Horizon*, we dismissed the appeal for lack of jurisdiction regarding an order interpreting part of a massive class-action settlement.[9] *Id.* at 492. There, defendants argued that an order constituted an injunction or, alternatively, the court's subsequent denial of the motion for reconsideration was a modification of the injunction. *Id.* We assumed *arguendo* that the order was an injunction or modification but explained that defendants failed to "'show serious, perhaps irreparable, consequence[s].'" *Id.* (quoting *Gardner*, 437 U.S. at 480). Thus, we concluded that defendants could not invoke jurisdiction under Section 1292(a)(1). *Id.* at 492.

Like *In re Deepwater Horizon*, the Sheriff's jurisdictional argument fails under Section 1292(a)(1). As the district court observed, "the Sheriff has styled her motion as one to 'terminate' rather than vacate or reverse the Phase III Orders. That turn of phrase does not change the fact that she is directly attacking the validity of the orders as being prohibited under the PLRA." The Sheriff has not shown that the district court refused to modify or dissolve an injunction. Rather, the court's orders "'simply implement[]'" the consent decree "'without changing the

9. *See* 15B Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Juris.* § 3916 (2d ed.) (hereinafter "Wright & Miller").

command of the injunction.'" *In re Deepwater Horizon*, 793 F.3d at 491 (quoting *Switz. Cheese Ass'n Inc.*, 385 U.S. at 24-25). Accordingly, the court's orders were an interpretation of the stipulated relief. *Id.* To suggest otherwise would open a "floodgate" of repetitive and untimely appeals. *Id.*

To be clear, this does not mean that the parties are prohibited from filing a proper motion to terminate under the PLRA. But, as discussed in Part B, the Sheriff has not done so. Even assuming *arguendo* that the district court's observation was a modification of an injunction, or refusal to dissolve an injunction, the Sheriff has not pointed to any "'serious, perhaps irreparable, consequence[s].'" *In re Deepwater Horizon*, 793 F.3d at 492 (quoting *Gardner*, 437 U.S. at 480).[10] However, there *are* well-documented risks of inadequate housing and care for detainees at Orleans Parish Prison. *Anderson I*, 38 F.4th at 475 (explaining that the jail was still "not adequate for detainees with mental-health needs or who were suicidal"). Indeed, despite the

10. On this, the dissent misconstrues this opinion. *Post* at 3 n.5. First, the issue is that the Sheriff has not satisfied any evidentiary burden. Second, it is false to suggest that the district court ordered the construction of a prison. Anyone familiar with this case can recall the factual and procedural history that refutes any assertion that courts have ordered the construction of a prison. Third, and to reiterate, *the Sheriff does not challenge the 2013 consent decree.* Instead, she challenges the judicially enforceable orders that came years later. That argument was foreclosed in *Anderson I*. Finally, the dissent raises arguments concerning "irreparable consequences" that the Sheriff herself has not raised in the district court or on appeal. Thus, we do not entertain them here.

consent decree requiring the Sheriff's Office to implement systemic and durable reforms, the independent monitor has reported that the jail "has regressed slightly" and "the same deficiencies are likely to continue to be noted time and time again." Hence, the 2019 Orders and CEA followed.

In addition, we are bound by *Anderson I*. 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.'"[11] *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990) (quoting *Todd Shipyards Corp. v. Auto Transp., S.A., 763 F.2d 745, 750 (5th Cir. 1985)*; *see Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)). However, "the issues need not have been explicitly decided; the doctrine also applies to those issues decided by 'necessary implication.'" *In re AKD Invs.*, 79 F.4th 487, 491 (5th Cir. 2023) (quoting *Alpha/Omega Ins. Servs. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001)).

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11. In addition to the law of the case doctrine, we are bound by the rule of orderliness: "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court." *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (internal citations and quotation marks omitted). Thus, we cannot ignore the well-settled principles that *Anderson I* applied to the facts of this exact case.

Appendix B

In *Anderson I*, the City moved to "suspend all orders regarding the programming, design, and construction of a new Phase III jail facility" because, *inter alia*, the PLRA purportedly prohibits the construction of Phase III. The magistrate judge conducted a two-week hearing on that motion and recommended that the court deny the City's motion. It did so. Then, we affirmed the district court's decision. Although we declined to rule on the merits of the City's PLRA argument, we nonetheless concluded that the City's post-judgment motion under "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests," and we lacked jurisdiction over "the substance of the January and March 2019 orders." *Anderson I*, 38 F.4th at 478, 479. "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." *Id.* (citation omitted).

Now, the Sheriff makes the same argument but with different procedural mechanisms: motions to terminate and stay all orders regarding the construction of Phase III. We have already denied the motions to stay[12] Phase III, and we now address the motion to terminate.

Again, "we have jurisdiction to review the denial of the . . . motion, but not the underlying . . . orders." *Anderson I*, 38 F.4th at 477-78. The Sheriff's appeal is "restricted to the questions properly raised by the post-judgment motion" and it does "not extend to revive lost opportunities

12. *See Men v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

to appeal the underlying judgment." 15B Wright & Miller § 3916 (quoting *Anderson I*, 38 F.4th at 478); *see Bowles v. Russell*, 551 U.S. 205, 209, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is mandatory and jurisdictional" (internal citations and quotation marks omitted)). Just 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." *Id.* at 478 (internal quotation and citation omitted). The decision in *Anderson I* applies here "by 'necessary implication'" as both cases concern the well-settled principles of post-judgment proceedings. *In re AKD Invs.*, 79 F.4th at 491 (quoting *Alpha/Omega Ins. Servs.*, 272 F.3d at 279); *see* 15B Wright & Miller § 3916. Contrary to the Sheriff's suggestion, the law of the case does not change based on the name of the motion "for that would exalt nomenclature over substance." *Browder v. Dir., Dep't of Corr. of Illinois*, 434 U.S. 257, 272, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978) (Blackmun, J., concurring). This is particularly true when the substance of the motions are identical. The issue here and in *Anderson I* was whether the PLRA prohibits the 2019 Orders and Stipulated Order. Like *Anderson I*, "the timely notice of appeal in a civil case is a jurisdictional requirement" and we cannot create an exception for the Sheriff's motion as that time has long passed. *Funk v. Stryker Corp.,* 631 F.3d 777, 781 (5th Cir. 2011). Accordingly, we lack appellate jurisdiction to review the substance of the 2019 Orders and Stipulated Order.[13]

13. The dissent concedes that the Sheriff's motion seeks relief from the 2019 Orders but nonetheless suggests that the

The dissent argues that the law of the case doctrine does not apply. In so doing, it mischaracterizes the position of the United States and the orders of the district court. *Post* at 4. In reviewing the court's denial of the Sheriff's motion, we find that the Sheriff made the same post-judgment arguments as the City did in *Anderson I*. The Sheriff later clarified that she is relying on a different subsection of the PLRA. Accordingly, what the United States and district court correctly explained is: "to the extent that the Sheriff was attempting to revive the City's already-rejected argument that the 2019 Orders violated Section 3626(a)(1)(C) the PLRA, such argument was precluded under the law of the case doctrine." Then, the district court and the United States agreed that the law of the case doctrine does not bar the Sheriff's private settlement agreement argument regarding Section 3626(c)(2), (g)(6). The United States contends that the Sheriff's argument "nonetheless fails for other reasons." Here, we do not reach those other reasons because we lack jurisdiction. Indeed, as the United States principally argued, this court lacks appellate jurisdiction over the substance of the 2019 Orders, and the PLRA is not a proper vehicle to challenge them. Thus, because we lack jurisdiction, we do not reach the issue of private settlement agreements.

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post-judgment rule addressed *in Anderson I* has no impact on this appeal. *Post* at 7. But "[o]bviously, this well-established rule is critical to this appeal." *Anderson I*, 38 F.4th at 478. The fact that the Sheriff attempts to circumvent procedural history and rules under the guise of a PLRA motion does not mean we can ignore *Anderson I*.

B.

Next, we address the procedural basis for the district court's denial of the Sheriff's motion to terminate. Again, in *Anderson I we* concluded that we may review the district court's denial of the City's motion, but it would be improper to review the 2019 Orders and Stipulated Order. "Interpreting effective unreviewability to permit appeal in this case would signify that each time [the Sheriff or City] could show a handful of claims arguably impacted by the district court's interpretation of the [Stipulated] Agreement, it could immediately appeal to this court. The limited benefits of such unrestricted access to the appellate court are outweighed by the attendant systemic disruption and institutional cost." *See In re Deepwater Horizon*, 793 F.3d at 489 (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)).

As a procedural matter, Plaintiffs and the United States argue that the Sheriff has not presented a proper basis for a motion to terminate under Section 3626(b) of the PLRA. The district court agreed. The Sheriff argues that the 2019 Orders and Stipulated Order impermissibly enforce a private settlement agreement under the PLRA. On the other hand, the City, which already made similar arguments in *Anderson I*, states that "its legal challenges to the Phase III facility have come to a definitive end . . . and the City does not now espouse a position contrary to the prior rulings of the magistrate, district or appellate courts in this appeal."

To begin, simply naming a document "motion to terminate" does not automatically establish a basis for jurisdiction or relief. *See, e.g.*, *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 251 (5th Cir. 2004) ("As an initial matter, it is important to make clear that the 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."). Moreover, it is true that a district court's denial of a *proper* motion to terminate relief under Section 3626(b)(1)(A) is subject to appeal. But, as Plaintiffs argue, the Sheriff's filing is a "motion to terminate" in name only.[14]

Section 3626(b) establishes the parameters in a prison conditions civil action for "termination of relief." "Although the PLRA entitles [a party] to terminate remedial orders such as these after two years unless the district court finds that the relief 'remains necessary to correct a current and ongoing violation of the Federal right,' § 3626(b)(3), [the Sheriff] has not attempted to obtain relief on this basis." *Brown v. Plata*, 563 U.S. 493, 515, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011).

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14. The dissent relies on *Ruiz v. United States* to argue that the Sheriff 's motion is a proper vehicle for challenging the 2019 Orders and Stipulated Order. *Post* at 7. In *Ruiz*, the defendants moved to terminate a consent decree and this court had jurisdiction pursuant to § 1292(a)(1). Ruiz, 243 F.3d at 945. Here, it bears repeating that the Sheriff has not moved to terminate the consent decree. Rather, she challenges the Stipulated Order and 2019 Orders. Thus, *Ruiz* does not support the dissent's contention that we may review those orders.

The Sheriff claims instead that the March 2019 Order and "associated orders" violate the PLRA. *See Moody Nat'l Bank of Galveston*, 383 F.3d at 251.[15]

The Supreme Court has made clear that Section 3626(b) acts as a mechanism for termination of prospective relief when such relief is no longer necessary to correct a violation of a federal right. *Id.* Our court has done the same. For example, in *Castillo v. Cameron County*, 238 F.3d 339 (5th Cir. 2001), we explained that, in deciding whether to grant a motion to terminate, a district court should consider whether a "current and ongoing violation" exists, based on "conditions in the jail at the time termination is sought . . . to determine if there is a violation of a federal right." *See also Ruiz*, 243 F.3d at 950-951; *Brown v. Collier*, 929 F.3d 218, 253 (5th Cir.

15. In addition, the Sheriff argues that she cannot be bound by her predecessor's prior decisions as to the Stipulated Order and CEA. Specifically, she contends that even if the district court's orders are enforceable, they are not enforceable against her because she was not a party to the stipulated agreement. Because that argument is a procedural matter, we will briefly address it. In actions against defendants in their official capacity, individual office holders may come and go, but the defendant never changes because the office, not the person occupying it, is the party. *See* Fed. R. Civ. P. 25(d), 1961 Advisory Committee Note; *see also*, *e.g.*, *Deauville Assoc, v. Murrell*, 180 F.2d 275, 277 (5th Cir. 1950) (explaining that even if a party has changed, such as in the case of a transfer or assignment of rights under Federal Rule of Civil Procedure 25(c), that "would not justify our disturbing all prior orders and decrees entered in this controversy and unfavorable to" the current party); *In re Bernal*, 207 F.3d 595, 599 (9th Cir. 2000). Therefore, the Sheriff fails to furnish any legal support for this argument, and it is foreclosed.

2019) (affirming district court's termination of a consent decree that was no longer "necessary to correct current and ongoing violations" of federal law); *Guajardo v. Texas Dep't of Crim. Just*, 363 F.3d 392, 398 (5th Cir. 2004) (per curiam) (same). Our sister circuits agree. *See*, *e.g.*, *Porter v. Clarke*, 923 F.3d 348, 367 (4th Cir. 2019), *as amended* (May 6, 2019) ("Congress's use of 'current and ongoing' in Section 3626(b)(3) demonstrates that it knew how to "clear[ly] command" that courts may not use their equitable authority in the case of a violation that is not 'current and ongoing.'").

In this case, Sheriff Hutson has not argued that the relief is no longer necessary to correct the existing constitutional violations. Rather, she alleges that Section 3626(a)(1)(C) prohibits the existence of the 2019 Orders and Stipulated Order. But nothing in Section 3626(b) supports this argument. Thus, the "motion to terminate" fails procedurally because it neither provides a basis for the district court to grant it under Section 3626(b), nor a basis to review the 2019 Orders and Stipulated Order.

Here, the Stipulated Order provided, *inter alia*, 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." The Stipulated Order and March 2019 Order each included a finding of compliance with the limitations set forth in § 3626(a). This court has already rejected the argument that the unchanged text of the PLRA somehow constitutes a circumstance justifying the suspension of the 2019 Orders and the Stipulated Order. *See Anderson*

I, 38 F.4th at 477-78. Moreover, the district court's 2023 order includes the PLRA findings that "prospective relief" extends "no further than necessary to correct the violation of the Federal right" in this case. The district court has also made abundantly clear that it did not order the construction of a prison, but rather enforced the Stipulated Order. Thus, the district court ordered the parties to effectuate the plans they had voluntarily and contractually bound themselves to undertake.[16] Therefore, the district court has not erred in denying the motion.

III.

Even assuming *arguendo* that we could reach the merits of the Sheriff's claim, the lack of effort and time implementing Phase III would undermine a motion for termination. The Supreme Court has explained that appeals such as this one are premature.

> When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution, such as this . . . prison system, it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each

16. The dissent chooses to ignore those contractual obligations by suggesting that the Sheriff may turn back the clock to reconsider all orders that her predecessor stipulated and agreed to. No cases support such a broad interpretation of the PLRA and appellate jurisdiction. Perhaps that is why a panel, including JUDGE SMITH, denied the Sheriff 's motions to stay the construction of Phase III twice.

> new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts.

Brown, 563 U.S. at 516. Given that Phase III is "in progress at 12.82% complete" and the Sheriff and City have been slow to effectuate any stipulated remedy, the record shows that a motion to terminate is at best premature and we lack jurisdiction to review it.

We therefore DISMISS this appeal.

Appendix B

JERRY E. SMITH, *Circuit Judge*, dissenting:

The majority wants to build a prison. Though the law and the facts stand in its way, that hardly thwarts its zealous resolve. So it takes a hatchet to the Prison Litigation Reform Act ("PLRA") and turns a blind eye to binding circuit precedent.

The result? An opinion with reasoning that, at every turn, is fatally compromised. Some parts are totally unhinged. And the remainder is incomprehensible. I respectfully dissent.

I.

Twice the majority acknowledges that "we have jurisdiction to review the denial of the . . . motion." Op. at 6, 10 (quotation omitted). *A fortiori*, it has conceded that, instead of dismissing, it must consider the merits of the motion to terminate.

So, even before we consider any of the majority's assertions in detail, already shaky is its decree that the appeal be dismissed "for lack of jurisdiction." Op. at 14. The majority has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *NOPSI v. Council of the City of New Orleans*, 491 U.S. 350, 358, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (quotation omitted). Frivolous and futile are the majority's attempts to abandon its "virtually unflagging obligation . . . to exercise [its] jurisdiction." *Colo. River*

Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

First, the majority tries to recast the district court's denial merely as an "interpretation" of its prior orders. Op. at 8-9. That is an epic blunder. The majority has totally overlooked the fact that as part of its order denying Hutson's motion to terminate, the district court's entered "the terms of the Cooperative Endeavor Agreement ("CEA") previously negotiated by former . . . Sheriff Gusman . . . and the City." ROA.19500.

The CEA contains new terms purporting to bind Orleans Parish Sheriff's Office ("OPSO") and the city to various terms and obligations regarding the construction of the Phase III facility.[1] None of the CEA's terms was contained in the district court's previous orders, which merely required the city to construct Phase III. But its latest specifies *precisely how* the city must construct that new facility.

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1. Included in those terms, *inter alia*, is the requirement that "[a]ny party to [the CEA]," including "any subcontractors," "take all necessary affirmative steps to assure that minority businesses[ ]. . . are used when possible." ROA.19347. "Affirmative steps must include," *inter alia*, "[a]ssuring that . . . minority businesses[ ]. . . are solicited whenever they are potential sources." ROA.19347-48. *But see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (quotation omitted)).

Now, per court order, Phase III construction must "proceed pursuant to the . . . terms of the CEA." ROA.19519. That plainly affects the substantive relief sought in the complaint.[2] So it is, by definition, a further grant of injunctive relief that provides an independent basis for appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

Second, the majority's recharacterizing of the refusal to terminate relief as a "modification" doesn't hold any water. *See* Op. at 8-9. *Per Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), "[a] district court's order denying [a] motion[] to terminate [a] consent decree" is "a refusal to dissolve an injunction," *see id.* at 945.[3]

No wonder the order denying the motion to terminate contains all of the requisite features of an injunction.[4] It

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2. *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 586 (5th Cir. 2016) (ordering the city to include two particular companies on its non-consent tow list "provides substantive relief " and "is therefore an injunction appealable under [§]1292(a)(1)").

3. *See also Ruiz v. Scott*, Nos. 96-21118, 97-20068, 1997 U.S. App. LEXIS 42073, 1997 WL 533095, at *6 (5th Cir. Aug. 6,1997) (unpublished) ("[S]hould the district court deny, in whole or in part, defendants' motion to terminate, [they] may then appeal under [§] 1292(a)(1).").

4. Injunctions are "[o]rders that are 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." *Police Ass'n of New Orleans Through Cannatella v. City of New Orleans*, 100 F.3d 1159, 1166 (5th Cir. 1996) (quoting 16 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. §3922 (West)) (alteration in original).

(1) is directed to Hutson—a party to the proceedings—and (2) expressly contemplates enforcement through "cit[ations] for contempt" and "severe sanctions." Further, it (3) both (a) refuses to dissolve any part of the consent judgment and (b) purports further to enjoin OPSO by entering it into an agreement with the city that "set[s] conditions of construction for the Phase III facility" in furtherance of the consent judgment's aims. Thus, the court has appellate jurisdiction to review the denial of the motion to terminate under § 1292(a)(1), which provides that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders . . . refusing to dissolve or modify injunctions."

Third, two judges on a panel cannot exclude Hutson's motion to terminate by creating a one-off exception to our statutory appellate jurisdiction. Any such attempt is bound to crash and burn. "When assessing an order's appealability, courts should not engage in an 'individualized jurisdictional inquiry.'" *In re Deepwater Horizon*, 793 F.3d 479, 485 n.5 (5th Cir. 2015) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)). "Instead, the focus should be on the entire category to which a claim belongs." *Id.* (cleaned up).

Denials of motions to terminate under the PLRA are treated as "refusal[s] to dissolve an injunction." *Ruiz*, 243 F.3d at 945. Thus, the denial of Hutson's motion belongs to a class of orders for which appellate jurisdiction lies. That alone ends the jurisdictional dispute. Pointless is the

majority's attempt to differentiate Hutson's particular motion from the class of motions to which it belongs.[5]

Lastly, the majority posits that it is bound by the law-of-the-case doctrine and the rule of orderliness, because the decision in *Anderson I*, 38 F.4th 472 (5th Cir. 2022), "concern[s] the well-settled principles of post-judgment proceedings." Op. at 11 (citations omitted).

As to that, the majority stands alone. That position is frivolous, and the DOJ flatly rejects it: "The United States [] agrees that the law of the case doctrine does not bar this argument."

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5. That includes the majority's flippant assertion that the denial of Hutson's motion does not impose "any serious, perhaps irreparable, consequences." Op. at 9 (cleaned up).

Yes, you read that right—according to the majority, it is no big deal if a federal court forces the political subdivision of a coordinate sovereign to build a prison, in conformance with that court's specifications, under express threats of "severe sanctions" and "contempt of court." ROA.19520.

So unhinged and so indefensible, the majority's assertion hardly merits a response. That's because the "serious consequence" prong from *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981), "does not apply to orders specifically granting or denying injunctions," *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1176 (5th Cir. 1989). "Orders which explicitly grant or deny injunctive relief are immediately appealable as of right; no additional finding of immediate, irreparable injury is required." *Ali v. Quarterman*, 607 F.3d 1046, 1048 (5th Cir. 2010) (cleaned up). Thus, the order denying Hutson's motion to terminate is "appealable as of right, right away." *Sherri A.D. v. Kirby*, 975 F.2d 193, 203 (5th Cir. 1992) (cleaned up).

For good reason too, as *Anderson I* considered only the City of New Orleans's direct appeal of a Rule 60(b)(5) motion for relief from a judgment or order. *See* 38 F.4th at 478. No other independent issue of law was appealed by the city. *See id.* at 479 ("[T]he only basis for appeal is the Rule 60(b) motion."). So nothing in *Anderson I* bears on this panel's jurisdiction over a motion proceeding under a completely distinct procedural mechanism—*i.e.*, § 3626(b) of the PLRA.

The majority's position also fails at an even more fundamental level. Namely, it relies on the assumption that the motion to terminate constitutes a direct attack on the original consent judgment itself. But Hutson's motion does nothing of the sort.

The consent judgment provides prospective relief for unconstitutional prison conditions. That relief is implemented and enforced by the district court through its continuing supervisory jurisdiction. Such jurisdiction, however, is limited—the court cannot "grant[] further relief [that] exceed[s] its remedial authority." *Smith v. Sch. Bd. of Concordia Parish*, 906 F.3d 327, 335 (5th Cir. 2018).

Relevant here, the PLRA limits *both* (1) the scope and extent of relief that courts can grant in prison conditions cases, *see* 18 U.S.C. § 3626(a)(1)(A), and (2) the court's power to continue enforcing (*i.e.*, not terminate) relief that it had previously granted, *see* § 3626(b). Put another way, the provisions in PLRA are "restrict[ions on] courts' authority to issue and enforce prospective relief." *Miller v. French*, 530 U.S. 327, 347, 120 S. Ct. 2246, 147 L. Ed. 2d

326 (2000). Relief ordered in excess *of either* (1) or (2) is necessarily an *ultra vires* act by the district court.

Motions to terminate must therefore be granted where the continued enforcement of pre-existing relief—*irrespective* of any prior determinations of validity—fails to satisfy § 3626(b)'s requirements. An order issuing prospective relief can be *both* (1) completely valid and enforceable at the time it was ordered *and* (2) subsequently terminable for providing relief beyond the scope permitted by the PLRA.

Consequently, Hutson's motion to terminate can be granted even if we assume, *arguendo*, that the prior orders are fully valid and enforceable. *A fortiori*, Hutson's motion is not a direct attack on the validity of the consent judgment. Baseless is the majority's claim to the contrary.

The majority's position becomes even more untenable if we take as given, *arguendo*, its assertion that a motion to terminate the continuation of non-PLRA-compliant relief is a mere "end run to effect an appeal" of the order that initially granted such relief. Op. at 11 (cleaned up). Per the reasoning of the majority, Hutson's motion would be timely only if she appealed within sixty days of the district court's 2019 orders. *See* Fed. R. App. P. 4(a)(1)(B).[6]

6. *See* Op. at 11 ("the timely notice of appeal in a civil case is a jurisdictional requirement and we cannot create an exception for the Sheriff 's motion as that time has long passed.") (cleaned up).

The majority's groundbreaking rule proves way too much, as it would turn the *entirety* of § 3626(b) into a dead letter. That's because the PLRA sets a minimum amount of time that must pass before a motion to terminate can be filed:

> (i) 2 years after the date the court granted or approved the prospective relief;
>
> (ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or
>
> (iii) in the case of an order issued on or before the date of enactment of the [PLRA], 2 years after such date of enactment.

§ 3626(b)(1)(A)(i)-(iii).

None of the requisite time periods in § 3626(b)(1)(A) falls within the initial time to appeal directly an order granting relief. *See* Fed. R. App. P. 4(a)(1)(A)-(B). So, per the majority's rationale, orders prescribing prospective relief are *interminable* once the time for direct appeal has expired—thereby erasing PLRA motions to terminate from the U.S. Code.[7]

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7. Nor does Rule 60(b) get the majority out of its legal quandary. The PLRA expressly provides that motions to terminate exist *in addition to* "otherwise . . . legally permissible" grounds for modification and termination. § 3626(b)(4).

In sum, this court's appellate jurisdiction is indisputably secure. The majority is duty-bound to exercise that jurisdiction and decide the merits of Hutson's motion to terminate.

II.

The majority claims that "the 'motion to terminate' fails procedurally because it [does not] provide[] a basis for termination under Section 3626(b)" of PLRA. Op. at 13. That is patent error—and plainly so, too—had the majority carefully considered the text of the statute.

A. Burden Allocation

PLRA provides that "prospective relief . . . *must* be terminated on the motion of any party,"[8] *unless* the district court finds that the prospective relief

> (1) remains necessary to correct a current and ongoing violation of the Federal right,
>
> (2) extends no further than necessary to correct the violation of the Federal right, *and* . . .
>
> (3) is narrowly drawn and the least intrusive means to correct the violation.[9]

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8. *Brown v. Collier*, 929 F.3d 218, 228 (5th Cir. 2019) (emphasis added); *see* § 3626(b)(1)(A); *see also Ruiz*, 243 F.3d at 950.

9. § 3626(b)(3) (cleaned up) (emphasis added).

What must Sheriff Hutson do to move for termination of relief? Nothing but show the requisite passage of time—*e.g.*, "2 years after the date the court granted or approved the prospective relief."[10]

Hutson has done just that. Her motion expressly invoked § 3626(b)(1)(A) and referenced the "Orders of January 25, 2019 and March 18, 2019 Regarding Phase III Jail Facility." More than two years have elapsed since "the date the court granted or approved" those orders. § 3626(b)(1)(A)(i). Thus, Hutson has carried her burden of proof by showing the requisite passage of time. *See Guajardo*, 363 F.3d at 395. She need do nothing more.

From that point onward, the PLRA shifts the burden to the parties *opposing* termination. It is their job—not Hutson's—to provide sufficient proof to support the findings required by § 3626(b)(3).[11] Put another way, the private plaintiffs and the DOJ—alone—must prove that the prospective relief complies with the § 3626(b) factors.

So the majority turns PLRA upside down when it faults Hutson for failing to provide a basis for termination under § 3626(b) because she "ha[d] not a[verred] that the relief is no longer necessary to correct constitutional violations." Op. at 13. The burden of proving the requisite

10. § 3626(b)(1)(A)(i); *see also Guajardo v. Tex. Dep't of Crim. Just.*, 363 F.3d 392, 395 (5th Cir. 2004) (per curiam).

11. *Brown*, 929 F.3d at 228; *see also Guajardo*, 363 F.3d at 396 (explaining that the burden of proving the requisite § 3626(b) findings "is obviously on the party opposing termination").

§ 3626(b) findings "is obviously on the party opposing termination." *Guajardo*, 363 F.3d at 396.

B. Requisite Findings

Prospective relief *must* be terminated unless "a court makes specific written findings regarding the continuing necessity of [such] relief." *Ruiz*, 243 F.3d at 950; *see also supra* part II.A. The three findings must be "written" and "based on the record." § 3626(b)(3). "It is not enough . . . simply [to] state in conclusory fashion that the requirements of the consent decrees satisfy those criteria." *Castillo*, 238 F.3d at 354 (quoting *Cason*, 231 F.3d at 784-85).

To make the first finding—that is," a current and ongoing violation"—the court "must look at the conditions in the [institution] at the time termination is sought." *Id.* at 353. Violative conditions that have "existed in the past," or those that "may possibly occur in the future," are wholly inapposite. *Id.* In other words, nothing but violations "exist[ing] at the time the district court conducts the § 3626(b)(3) inquiry" will suffice. *Id.* (quoting *Cason*, 231 F.3d at 784).

The second and third findings require the district court to find "that *each* requirement imposed . . . satisfies the need-narrowness-intrusiveness criteria." *Id.* at 354 (quoting *Cason*, 231 F.3d at 784-85) (emphasis added). Those findings must be "particularized" and made "on a provision-by-provision basis." *Id.* (quotation omitted). Additionally, they must be based solely on "the nature of

the *current and ongoing* violation." *Id.* (quotation omitted) (emphasis added).

Relief must be terminated unless it" *currently* complies with the need-narrowness-intrusiveness requirements." *Id.* (emphasis added). That is, the court *must* grant the motion to terminate any provision granting relief not supported by all three requisite findings. *Ruiz*, 243 F.3d at 950. The denial of Hutson's motion falls far short of the "specific standards" that the district court was required "to . . . follow[] when [it] consider[ed] whether to terminate a consent decree providing for prospective relief." *Id.*

For starters, the magistrate judge's report and recommendation lacks any of the analysis required under § 3626(b)(3). The closest the R&R gets to any finding regarding the necessity of relief is a fleeting reference to years'-old findings from the 2019 orders themselves.

Similarly, much of the order relies on past findings. Just like the R&R, the order explicitly relies on years-old findings from its March 2019 order. Indeed, the court expressly relied on its having "*already found* that proceeding with Phase III is necessary to remedy a constitutional violation."

Plainly, *past* findings of compliance with PLRA's limitations on prospective relief are insufficient to comply with § 3626(b)'s requirements. *Castillo* held—in no uncertain terms—that courts must make "make *new* findings" based on "the conditions . . . at the time termination *is sought*, not at conditions that existed in the

past." 238 F.3d at 353-54 (quotation omitted) (emphasis added). Nothing in the district court's denial shows that any of the prospective relief "*currently* complies with the need-narrowness-intrusiveness requirements, given the nature of the *current* violations." *Id.* at 354 (emphasis added).

That conclusion remains, notwithstanding the court's two fleeting references to a monitors' report post-dating the 2019 orders. Its first merely restates the monitors' conclusion that "the design and construction of Phase III" is "[a]n important part of the long-term solution to the lack of compliance with the consent judgment in the areas of medical and mental health." Likewise, the second blindly regurgitates the monitors' opining that "hous[ing] in [Orleans Justice Center ("OJC")] . . . is inadequate for the housing of [inmates with acute mental health issues]."

Even considering those two references, the court's analysis still fails to meet § 3626's requirements in any regard.

First, it never identifies any specific "conditions in the [OPSO system] at the time termination was requested" that constituted "a 'current and ongoing' violation of a federal right." *Castillo,* 238 F.3d at 354.

Second, not once does it mention whether OPSO was failing to comply with any of the terms of the consent judgment. The closest it gets is its reference to the monitors' report. But even that just alludes to "the areas of medical and mental health." Such a conclusory

statement—made at the highest levels of generality—provides zero insight into which of the consent judgment's sixty-nine provisions relating to health or mental care might continue to satisfy § 3626(b)(3)'s requirements.

Third, there is no analysis showing that *any* of the consent judgment's conditions, or the relief previously ordered by the court, is still needed to cure ongoing constitutional violations. At most, its quoting the monitors' report merely suggests that Phase III *can* contribute to compliance with *the consent judgment's requirements*. But sufficiency is not necessity—nothing guarantees that the report's recommendations or the initial consent judgment continues to track constitutional minima, as § 3626(b) requires.[12]

In short, the court's analysis leaves us with no idea *what* the current violations are (if any), *how* any violations are addressed by the consent judgment's conditions (if they are at all), or *why* those conditions are the least intrusive means to remedy the violation.

So its conclusion—that "'no other option' short of ordering the parties to proceed pursuant to the

12. That's because some of the conditions specified in the report might not be *per se* violations of any constitutional right. *See Castillo*, 238 F.3d at 354. Improving conditions may therefore render previously PLRA-complaint requirements no longer necessary and, thus, properly terminable. After all, "[t]he Constitution does not mandate comfortable prisons." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (cleaned up).

previously[]negotiated terms [regarding the Phase III construction] w[ould] correct the ongoing violation of plaintiffs' federal rights"—"does not reach the needed level of particularization" and "is not supported with enough evidence in the record," *Castillo,* 238 F.3d at 354 (cleaned up). The PLRA does not allow the district court to deny termination of relief merely by speculating that "there is no reason to think that Phase III is no longer necessary."

C. Termination Is Required as a Matter of Law

Termination of relief is the only valid course of action—even if we assume, *arguendo*, that the district court's findings were not plainly deficient, *but see supra* part II.B. That's because the district court would commit *per se* error in finding that the prospective relief enforced in the *status quo* satisfies § 3626(b)(3)'s criteria.

Section 3626(b)(3) is constrained by § 3626(a)(1)(C), which applies to all parts of § 3626. Section 3626(a)(1)(C) expressly 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 or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts."

We must therefore construe situations in which relief may continue under § 3626(b)(3) consistently with § 3626(a)

(1)(C)'s limitations.[13] So the kinds of relief that have been identified as unauthorized in § 3623(a)(1)(C)—including " order[ing] the construction of prisons"—can never qualify as preliminary relief that, in the words of § 3626(a)(1)(C), "shall not terminate" under § 3626(b)(3).

Were that not so, a district court would be required to *continue enforcing* (*i.e.*, refuse to terminate) relief that it has no authority to continue providing. That would indisputably butcher the plain meaning of the statutory text. Section 3626(a)(1)(C) means what it says when it uses the phrase "[n]othing in this section."[14]

Even if the district court makes more findings on remand, it cannot find that the prospective relief enforced in the status quo satisfies § 3626(b)(3)'s requirements. Section 3626(a)(1)(C) "has restricted [the district] court['s] authority to issue and enforce prospective relief." *Miller*, 530 U.S. at 347.[15] Thus, the court necessarily acts *ultra*

13. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 179-181 (2012) (harmonious-reading canon).

14. *See United States v. Rayo-Valdez*, 302 F.3d 314, 318 (5th Cir. 2002) ("It is a basic tenet of statutory construction that "it is necessary to give meaning to all [ ] words and to render none superfluous.").

15. *See also Saahir v. Estelle*, 47 F.3d 758, 762 (5th Cir. 1995) ("Just as the scope of the consent decree does not enlarge the court's jurisdiction, the way the parties agreed to implement the remedy contained in the consent decree likewise cannot affect the jurisdictional bounds of the federal courts."); *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015) ("Jurisdiction

vires if it continues enforcing prospective relief relating to the construction of the Phase III facility. Granting Hutson's motion to terminate is therefore the only valid course of action.

* * * *

Albeit well intentioned, a majority of two has decided that the construction of a new prison is "a cause so compelling" that the law can be skirted.[16] To the contrary, however, this court's jurisdiction is secure, and the motion to terminate should have been granted. I respectfully dissent.

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in an ongoing institutional reform case 'only goes so far as the correction of the constitutional infirmity.'" (quoting *United States v. Texas*, 158 F.3d 299, 311 (5th Cir.1998)).

16. *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 U.S. App. LEXIS 4347, 2022 WL 486610, at *37 (5th Cir. Feb. 17, 2022) (unpublished) (cleaned up) (Smith, J., dissenting).

APPENDIX C — ORDER & REASONS OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, FILED SEPTEMBER 5, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LASHAWN JONES, *et al.*

VERSUS

MARLIN N. GUSMAN, *et al.*

CIVIL ACTION No. 12-859

SECTION I

Filed September 5, 2023

ORDER & REASONS

Before the Court is a "motion to terminate all orders regarding the construction of the Phase III jail,"[1] filed by Orleans Parish Sheriff Susan Hutson ("Sheriff Hutson" or "the Sheriff"). The United States Magistrate Judge (the "Magistrate Judge") has provided a report and recommendation,[2] recommending the denial of the Sheriff's motion and the entry of an order embodying the terms of the Cooperative Endeavor Agreement ("CEA")

1. R. Doc. No. 1617.

2. R. Doc. No. 1634.

previously negotiated by former Orleans Parish Sheriff Marlin Gusman ("Sheriff Gusman") and the City of New Orleans (the "City").[3] The Magistrate Judge also recommended that, should any party cite the lack of a CEA or funding as a basis for delaying this project any longer, that party be cited for contempt and made to answer to the undersigned.[4]

Sheriff Hutson filed objections[5] to the report and recommendation, the United States filed a response[6] to those objections, and Sheriff Hutson filed a reply.[7] For the reasons below, the Court adopts the report and recommendation as stated herein, denies Sheriff Hutson's motion, overrules Sheriff Hutson's objections, and enters the proposed order embodying the terms of the CEA. The Court will amend the report and recommendation's statement regarding future citations of the lack of a CEA or funding as a basis for delaying Phase III, and simply caution the parties that any further delay in the construction of Phase III shall not be tolerated by the Court, and any party's failure to abide by this Court's orders shall result in severe sanctions, including consideration of whether that party is to be held in contempt of court.

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3. *Id.* at 29.

4. *Id.*

5. R. Doc. No. 1636.

6. R. Doc. No. 1641.

7. R. Doc. No. 1647.

Appendix C

I. BACKGROUND

The parties are by now familiar with the lengthy factual and procedural history of this lawsuit, which was filed in 2012 and involves, among other things, the serious, ongoing problem of inadequate constitutional medical and mental health care for individuals detained in the Orleans Parish Jail. In the interest of brevity, the Court will not repeat that history here.[8]

II. LAW & ANALYSIS

The Court will consider each of Sheriff Hutson's objections to the report and recommendation in turn.

a. Whether the Law of the Case Doctrine Prevents Sheriff Hutson from Re-Arguing that This Court's Orders Violate the PLRA's Purported Prohibition on Court-Ordered Prison Construction

Sheriff Hutson's first objection pertains to the report and recommendation's application of the law of the case doctrine. "The law of the case doctrine 'is based on the salutary and sound public policy that litigation should

8. As the Magistrate Judge pointed out, the plaintiffs' response memorandum sets forth a detailed and accurate procedural history of the question now at issue. R. Doc. No. 1634, at 3 n.1 (citing R. Doc. No. 1625, at 5–16). Further, the Court once again notes that continued delay on this project places at risk any FEMA funding that is slated to be used for its construction. R. Doc. No. 1634, at 20 (citing R. Doc. No. 1488).

come to an end.'" *In re AKD Investments, L.L.C.*, No. 22-30602, 2023 WL 5316715, at *3 (5th Cir. Aug. 18, 2023) (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967)). "Generally, 'when a court decides' an issue, 'that decision should continue to govern the same issues in subsequent stages of the same case.'" *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). The doctrine "applies only to issues that were *actually decided*, rather than all questions in the case that might have been decided but were not." *Id.* (quoting *Alpha/Omega Ins. Servs. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (internal quotations omitted)). However, "the issues need not have been explicitly decided; the doctrine also applies to those issues decided by 'necessary implication.'" *Id.* (quoting *Alpha/Omega Ins. Servs.*, 272 F.3d at 279 (internal quotations omitted)).

The report and recommendation correctly explained that the law of the case doctrine prevents Sheriff Hutson from re-litigating the question of whether the challenged orders violate any purported prohibition on courts ordering the construction of prisons based on the Prison Litigation Reform Act ("PLRA").[9] As the Magistrate Judge noted, in 2020, the City filed a "Motion for Relief from Court Orders of January 25, 2019 and March 18, 2019

9. *See* R. Doc. No. 1634, at 5–8. The relevant provision of the PLRA provides: "Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts." 18 U.S.C. § 3626(a)(1)(C).

Regarding Phase III Jail Facility."[10] Pursuant to Federal Rule of Civil Procedure 60(b), the City requested that the Court "suspend all orders regarding the programming, design, and construction of a new Phase III jail facility" based on changed circumstances.[11] In a reply memorandum, the City argued for the first time that the PLRA prohibited this Court from ordering the construction of the jail.[12] The Magistrate Judge then permitted the parties to file supplemental memoranda addressing that argument, conducted a two-week hearing on the City's motion, and recommended the undersigned deny the City's motion.[13]

While the Magistrate Judge did note that the City had waived the PLRA argument by raising it in reply, his 2020 report and recommendation nevertheless assessed the merits of that argument. Specifically, that report and recommendation found that "the Court has *never* ordered the City to build a jail," but rather ordered it to solve a problem.[14] This Court then adopted the report and recommendation, specifying that "[n]otwithstanding the waivers, the U.S. Magistrate Judge's alternative disposition on the merits of these untimely arguments

10. R. Doc. No. 1281.

11. *See generally* R. Doc. No. 1281-1.

12. R. Doc. No. 1312.

13. R. Doc. No. 1634, at 6.

14. R. Doc. No. 1385, at 30 (emphasis in original).

is affirmed."[15] The U.S. Court of Appeals for the Fifth Circuit subsequently considered the PLRA argument and concluded: "the claim fails under Rule 60(b)(5) [because there has been no change in factual conditions or in the PLRA]; accordingly, we need not consider whether it has been waived." *Anderson v. City of New Orleans*, 38 F.4th 472, 479 (5th Cir. 2022).[16]

Sheriff Hutson now objects to the instant report and recommendation, arguing that it erred in applying the law of the case doctrine because of the Magistrate Judge's 2020 finding that the City waived the PLRA argument.[17] According to Sheriff Hutson, this means "any subsequent statements concerning the merits of the City's PLRA argument are dicta" and dicta does not constitute the law of the case.[18]

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15. R. Doc. No. 1396, at 4.

16. As the Magistrate Judge pointed out, the Fifth Circuit permitted Sheriff Hutson to file an amicus brief and participate in oral argument with respect to the City's appeal. R. Doc. No. 1634, at 6 n.3; *Anderson*, 38 F.4th at 480.

17. R. Doc. No. 1636-1, at 3; *see also* R. Doc. No. 1385 (report and recommendation regarding the City's motion for relief from court orders), at 27–36.

18. R. Doc. No. 1636-1, at 3. Sheriff Hutson cites *Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981) for the proposition that the law of the case doctrine does not apply where a party has not had its "day in court" on "an issue presented to the district court that the district court declined to rule on and the appellate court did not decide." *Id.* at 2. In *Conway*, the plaintiffs moved for a new trial on various grounds, and the district

Sheriff Hutson's objection is misplaced. The assertion that any statements concerning the merits of the PLRA argument are dicta because of the waiver contravenes the Fifth Circuit's opinion. As mentioned, the Fifth Circuit specifically addressed the City's PLRA argument pursuant to Rule 60(b) and it concluded that it need not consider whether that argument had been waived. *Anderson*, 38 F.4th at 478–79. Ultimately, the Fifth Circuit rejected the City's argument because "[t]he pertinent portion of the PLRA [had] not changed." *Id.*

Although the Fifth Circuit examined this argument in a slightly different procedural posture—pursuant to a Rule 60(b) motion as opposed to a motion to terminate—the legal question is the same. When ruling on the City's motion, the Fifth Circuit found pursuant to Rule 60(b) that the PLRA was not a changed circumstance warranting the suspension of the orders. *Id.* Notably, it also cautioned

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court granted their motion on one of those grounds. *Conway*, 644 F.2d at 1062. The appellate court then found that ground to be deficient. *Id.* The plaintiffs moved again for a new trial based on a ground which they had raised in their original motion for a new trial but which the district court never considered because it had granted their motion based on a different ground. *Id.* The *Conway* court held that the law of the case doctrine did not prevent the district court from considering "a meritorious issue never previously passed upon by it and never submitted to or decided by the appellate court." *Id.* Accordingly, *Conway* is inapposite. First, the Sheriff's argument is far from meritorious. Second, as discussed throughout this section, it has already been litigated and considered by the Magistrate Judge, the undersigned, and the Fifth Circuit.

that Rule 60(b) should not be used as an end run to effect an untimely appeal. *Id.*[19]

Similarly, pursuant to the PLRA, "[p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of a Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). Sheriff Hutson has not argued that the relief is no longer necessary to correct constitutional violations.[20] Rather, she has urged—yet again—that the PLRA prohibits this Court from ordering the construction of Phase III. This Court and the Fifth Circuit have already rejected the argument that the unchanged text of the PLRA somehow constitutes a changed circumstance justifying the suspension of the relevant orders. And this Court has already made abundantly clear that it did not order the construction of Phase III, but rather enforced judicially-enforceable agreements concerning its construction. The Sheriff's motion is yet another thinly-veiled attempt to end-run the original decision not to appeal those specific orders.

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19. The Fifth Circuit also explained that "[p]roposing alternatives [to Phase III] . . . does not fall within the relief available under Rule 60(b)(5)." *Anderson*, 38 F.4th at 480.

20. To the contrary, the record is replete with evidence that the relief remains necessary. *See, e.g.*, R. Doc. No. 1623 (Monitors' Report No. 17).

Sheriff Hutson also suggests that the report and recommendation erred in applying the law of the case doctrine because the instant motion raises "a new and different argument."[21] According to the Sheriff, the instant motion argues that the orders requiring the construction of Phase III should be terminated because the Court lacks authority to enforce the parties'"private settlement agreement" to build Phase III under § 3626(c)(2)(A)" of the PLRA.[22] The Sheriff contends the law of the case doctrine does not bar this argument since it differs from the City's Rule 60(b) argument pursuant to § 3626(a)(1)(C) of the PLRA.[23]

To be clear, the report and recommendation applied the law of the case doctrine only to the Sheriff's argument that § 3626(a)(1)(C) barred the Court from ordering the construction of Phase III. The Magistrate Judge explicitly acknowledged that Sheriff Hutson's argument pursuant to § 3626(c)(2)(A) was "novel" and considered it on the merits, as discussed below.[24]

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21. R. Doc. No. 1636-1, at 4.

22. *Id.* at 3–4. That provision of the PLRA provides: "Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(c)(2)(A).

23. *Id.*

24. R. Doc. No. 1634, at 8.

b. Whether the Magistrate Judge's Finding Regarding the Enforceable Court Orders in the Record Constitutes an Attempt to "Circumvent" the PLRA's Prohibition on Courts Enforcing Private Settlement Agreements

Sheriff Hutson next argues that the report and recommendation "erred in ruling that the Court ordered the construction of the Phase III jail."[25] According to Sheriff Hutson, the report and recommendation's statement that "there are no 'private agreements' to build Phase III in this record, only enforceable Court orders" represents an effort to "circumvent" the PLRA's prohibition on courts enforcing private settlement agreements.[26]

However, as the report and recommendation made clear and as stated above, the Court did not order the construction of the Phase III jail.[27] Rather, the parties—including Sheriff Hutson's predecessor, Sheriff Gusman—moved the Court to enter their agreed-upon stipulated order "as an order of the Court,"[28] which it did.[29] Along with Sheriff Gusman, the Independent Compliance Director appointed in accordance with the stipulated order then submitted a "Supplemental Compliance Action Plan,"

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25. R. Doc. No. 1636-1, at 5.

26. *Id.* at 6 (quoting R. Doc. No. 1634, at 15).

27. R. Doc. No. 1634, at 11–13.

28. *Id.* at 9–10 (citing R. Doc. No. 1083 (joint motion for approval of stipulated order)).

29. R. Doc. No. 1082.

recommending the construction of Phase III.[30] All parties agreed to implement that plan pursuant to the stipulated order.[31] At a status conference in June of 2017, the City Attorney told the Court that the parties were "moving forward" with the construction of Phase III and that "[the] project should be completed within 24 to 40 months."[32] In 2019, after little progress had been made, the Court issued two additional orders, ordering the parties "to begin the programming phase of the Phase III facility as soon as possible and to update the Court on the progress of those efforts"[33] 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."[34]

The Magistrate Judge correctly explained that the PLRA provides for two kinds of agreements between parties: private settlement agreements and consent

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30. R. Doc. No. 1106, at 8. The Compliance Director met with numerous stakeholders prior to making his recommendation, including "advocacy groups, community groups, OPSO employees, Correct Care Solutions (CCS), architects, City administration, City Council Members, the Federal Monitors, the Federal Emergency Management Agency (FEMA), and citizens of New Orleans." *Id.* at 6.

31. R. Doc. No. 1634, at 10.

32. R. Doc. No. 1127, at 17:17–18:2.

33. R. Doc. No. 1221, at 3.

34. R. Doc. No. 1227, at 2–3. These were the orders challenged by the City in 2020.

decrees. A private settlement agreement is "an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(g)(6). By contrast, a consent decree is "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlement agreements." *Id.* § 3626(g)(1). Courts may not enter or approve a consent decree unless it complies with certain limitations set forth in § 3626(a).

Sheriff Hutson appears to argue that the orders in this case must be either court orders to build Phase III or private settlement agreements. In reality, the previous orders of this Court are subject to judicial enforcement and based in whole or in part upon the consent or acquiescence of the parties. As such, they fit the PLRA's definition of a consent decree. 18 U.S.C. § 3626(g)(1).[35] That is why the stipulated order and the March 18, 2019 order each included a finding of compliance with the limitations set forth in § 3626(a).[36] These

35. *See also Pigford v. Veneman*, 292 F.3d 918, 923 (D.D.C. 2002) (explaining that a consent decree maintains a "hybrid character, having qualities of both contracts and court orders" (citing *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992))).

36. R. Doc. No. 1083, at 16 ("Based on a robust case record including over 80 status conferences and the evidence presented in these proceedings, the Court finds that the additional relief set forth above complies in all respects with the provisions of 18 U.S.C. § 3626(a). The relief is narrowly drawn, extends no further than necessary to correct violations of federal rights affected by the Consent Judgment, is the least intrusive means necessary to

orders simply hold the parties to their judicially-enforceable agreements.

The Sheriff makes much of the fact that the Magistrate Judge wrote both that "the Court has never ordered the City to build a jail" and that "there are no 'private agreements to build Phase III in this record, only enforceable Court orders.'"[37] That the Sheriff views these statements as contradictory is evidence of her fundamental misunderstanding of the nature of this Court's orders. Accordingly, the Sheriff's second objection is overruled.

c. Whether the Report and Recommendation Erred in Suggesting that the Court *Could* Order the Construction of Phase III

Sheriff Hutson also contends that the report and recommendation "erred in ruling that the Court *could*

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correct those violations, and will not have an adverse impact on public safety or the operation of the criminal justice system."); R. Doc. No. 1227, at 3 ("The Court specifically finds that 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.").

37. R. Doc. No. 1636-1, at 5 (citing R. Doc. No. 1385, at 30 and R. Doc. No. 1634, at 15).

order construction of the Phase III jail."[38] Because the Court agrees with the Magistrate Judge that the Court did not order the construction of Phase III, a comprehensive discussion of whether the PLRA prohibits federal courts from ordering the construction of prisons is unnecessary.

d. Whether Sheriff Hutson Is Bound by Sheriff Gusman's Alleged "Private Settlement Agreement" and/or Rule 25(d)

The Court has already found that the consent decrees in this case are not "private settlement agreements." Accordingly, the report and recommendation correctly held that there is no "private settlement agreement" that could purport to bind Sheriff Hutson in violation of any Louisiana law.

Sheriff Hutson also argues that the report and recommendation erroneously "reasoned that Rule 25(d) of the Federal Rules of Civil Procedure bound Sheriff Hutson to former-Sheriff Gusman's agreements and 'all of this Court's orders in litigation.'"[39] The Sheriff submits that Rule 25(d) does not prevent a party from moving to terminate relief under the PLRA.[40]

The report and recommendation does not suggest that Rule 25(d) prevents a party from moving to terminate

38. *Id.* at 8 (emphasis added).

39. R. Doc. No. 1636-1, at 18 (citing R. Doc. No. 1634, at 18).

40. *Id.* at 18–19.

relief under the PLRA. Rather, the Magistrate Judge merely observed that Sheriff Hutson was substituted as a party by operation of law pursuant to Rule 25(d) since Sheriff Gusman was sued in his official capacity.[41] As the plaintiffs explained in their opposition to the Sheriff's otion to terminate,[42] even where the party in litigation *has* actually changed, substituted parties "must stand in [the] shoes [of predecessor litigants] with respect to all phases of the litigation. The fact that [a predecessor's] litigation may have impaired or adversely affected the rights of [a current party] would not justify [] disturbing all prior orders and decrees entered in [the] controversy and unfavorable to [a current party], which were binding on [the predecessor] when made." *Deauville Assocs., Inc. v. Murrell*, 180 F.2d 275, 277 (5th Cir. 1950).

Accordingly, the Sheriff's theory that a "successor official should not be bound by its predecessor's decisions in a consent decree, especially when their views of the relief differ" lacks merit.[43] There is no legal basis to suggest that the authority of a federal court to enforce its prior orders depends upon the outcome of a local election. Sheriff Hutson is bound by the Court's orders in this lawsuit as Sheriff Gusman's successor.

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41. Rule 25(d) states: "An action does not abate when a public officer who is a party in an official capacity ... ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party."

42. R. Doc. No. 1625, at 16–19.

43. R. Doc. No. 1634, at 15 (quoting R. Doc. No. 1617-2, at 16).

e. Whether the Report and Recommendation Erred in Recommending the Entry of an Order Embodying the Terms of the Proposed CEA

i. State and Local Law

Sheriff Hutson's final objection pertains to the Magistrate Judge's recommendation that the terms of the proposed CEA be entered as an order of the Court. The CEA was negotiated by the parties and signed by Sheriff Hutson's predecessor, Sheriff Gusman, but not officially approved by the City Council in office during Sheriff Gusman's tenure.[44] Sheriff Hutson suggests that the entry of such an order would violate state and local law.[45]

First, Sheriff Hutson argues that the entry of this order would violate the Louisiana Constitution's prohibition on the gratuitous donation of public funds.[46]

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44. R. Doc. No. 1613, at 1.

45. R. Doc. No. 1636-1, at 19. Sheriff Hutson is the only party raising an objection to the entry of the terms of the CEA as an order of this Court. R. Doc. No. 1634, at 25. Sheriff Hutson is also the party refusing to sign the CEA, which was already signed by her predecessor. *See id.* at 22. As the Magistrate Judge explained, "[the Sheriff's] strategy amounts to this very simple premise: 'I must sign this document for the court-ordered process to begin. I will not sign the document so the court-ordered process will not begin.' This is certainly a far cry from 'the Sheriff is not attempting, and would not attempt, to undermine the District Court's order.'" *Id.* (quoting R. Doc. No. 1546, at 2).

46. *Id.* at 190–20; R. Doc. No. 1647, at 5–7.

Pursuant to Article VII, Section 14(A) of the Louisiana Constitution, subject to certain exceptions, "the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private." La. Const. art. VII, § 14(A). Sheriff Hutson appears to argue that the proposed order would violate Section 14(A) by "skipping the combined executive and legislative process for authorizing a costly, multi-year public works project."[47] Additionally, she states that, based on Section 14(C) of the Louisiana Constitution, "[a] voluntary agreement is required before any jail construction begins, governing how the City and the Sheriff plan to collaborate for the use of public funds."[48] In her reply to the United States' response to her objections, Sheriff Hutson adds that "a CEA *must be in place* to overcome the Louisiana Constitution's prohibitory language in Section 14(A)."[49]

The first problem with these arguments is that they ignore what the CEA actually says. Crucially, as the Magistrate Judge explained, an order embodying the terms of the CEA would not be an order "authorizing" a project.[50] Rather, it would "set out the various conditions under which the project will be conducted and spell out the City's and the Sheriff's respective obligations during

47. R. Doc. No. 1629, at 2.

48. R. Doc. No. 1636-1, at 19.

49. R. Doc. No. 1647, at 6 (emphasis in original).

50. R. Doc. No. 1634, at 24.

the project."[51] The Sheriff objects to the entry of an order embodying the CEA, but she has not objected to a single, discrete provision of the CEA, despite having been given the opportunity to do so.[52]

Moreover, Sheriff Hutson's assertions are divorced from the constitutional text she cites. Section 14(C) of the Louisiana Constitution states: "For a public purpose, the state and its political subdivisions or political corporations *may* engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual." La. Const. art. VII, § 14(C) (emphasis added). As the United States explained in its response, Section 14(C) merely *permits* local governments to engage in CEAs.[53] That provision plainly does not *require* a CEA to be signed prior to any jail construction.

The central case the Sheriff cites in support of her position actually underscores that Section 14(C) is not an exception to Section 14(A)'s prohibition. *See Bd. of Dirs. of the Indus. Dev. Bd. Of the City of Gonzales, La., Inc. v. All Taxpayers, Prop. Owners, Citizens of the City*

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51. *Id.*

52. *Id.*; R. Doc. No. 1633, 40:12–41:12 (transcript of questioning regarding Sheriff Hutson's specific objections to the CEA); 42:1–6 (transcript of Magistrate Judge advising the parties that he would require briefing on the question of whether the Court can issue an order embodying the terms of the CEA); R. Doc. No. 1629 (Sheriff Hutson's brief regarding that issue).

53. R. Doc. No. 1641, at 9.

of Gonzales, 938 So. 2d 11, 20 (La. 2006).[54] A CEA may sometimes help ensure that a public entity is complying with Section 14(A), but a CEA standing alone would not necessarily overcome Section 14(A)'s prohibition on the gratuitous donation of public funds.[55]

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54. In that case, the Louisiana Supreme Court found that a statute authorizing "the public financing of any project in any industry that the local governmental subdivision determined would create economic development" did not violate Section 14(A) of Article VII as applied to a Project involving the development of a private retail sporting goods store and park. *Bd. of Dirs.*, 938 So. 2d at 29. Regarding Section 14(C), the court stated that it "*authorizes* cooperative endeavors among the stated entities, but does not serve as an exception to subsection (A)." *Id.* at 20 (emphasis added). That is consistent with this Court's finding that Section 14(C) merely *permits* local governments to engage in CEAs; it does not require them to do so before jail construction can begin.

55. The cases Sheriff Hutson cites in reply do not alter this analysis. In *Gullette v. Caldwell Parish Police Jury*, 765 So. 2d 464 (La. App. 2000), the court found that the Louisiana Department of Corrections owed no duty to an incarcerated individual to protect him against the alleged negligence of the Caldwell Parish Sheriff's employees. While the court did note that there was a cooperative endeavor agreement between Caldwell Parish Law Enforcement District and the Department of Corrections pertaining to the construction of a new jail, that is different from holding that a CEA is *required* for construction of a new jail pursuant to a consent decree and stipulated order. Likewise, none of the Attorney General opinions the Sheriff cites suggests that a CEA is required before construction of Phase III can begin. *See* La. Att'y Gen. Op. No. 21-0109 (2021) (stating only that "[w]e have found nothing in our analysis that would *prevent* the Police Jury from entering into programmatic or extended agreements with these

As the United States observed, Sheriff Hutson did not explain how, absent a CEA, public funds would be gratuitously alienated if the Court orders the Sheriff and the City to abide by the terms of numerous court orders in this case regarding constitutional medical and mental health care in the jail.[56] Sheriff Hutson appears to suggest that the "reciprocal obligations" antithetical to gratuitous alienation can only exist following "give-and-take negotiations," but she cites no authority for that proposition and ignores the fact that the CEA was previously negotiated and that Sheriff Gusman signed it.[57]

Second, although the City makes no such claim, Sheriff Hutson argues that the entry of this order would violate the City's Home Rule Charter. Sheriff Hutson cites Section 9-314(3) of that document, which provides: "Any proposed cooperative endeavor agreement having a term greater than one year, shall, prior to its execution by the Mayor, be published once in the official journal and submitted to the Council for approval, but not modification,

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local entities" and noting that a cooperative endeavor agreement would be required pursuant to Section 14(B)(8)(14), which is not at issue here but explicitly mentions "a written agreement") (emphasis added); La. Att'y Gen. Op. No. 19-0134 (2019) (finding that a proposed agreement did not "gratuitously alienate" funds, not because of the existence of a cooperative endeavor agreement, but because law enforcement districts have authority to enter into certain contracts and the transfer of materials and buildings did not appear gratuitous when taken as a whole).

56. R. Doc. No. 1641, at 9.

57. R. Doc. No. 1636-1, at 20; R. Doc. No. 1613, at 1.

by a majority of its entire membership." Home Rule Charter, Cooperative Endeavors, Ch. 3, § 9-314(3), https://council.nola.gov/laws/. As the United States rightly noted, this hardly mandates that the Mayor and Sheriff enter into a CEA before constructing Phase III.[58] Rather, it states that, if the Mayor plans to execute a CEA with a term greater than one year, the Mayor must satisfy certain requirements.[59] It does not require the Mayor to execute a CEA prior to a construction project that will last more than one year.[60]

Accordingly, Sheriff Hutson is incorrect that the entry of an order embodying the terms of the proposed CEA would violate the Louisiana Constitution or the City's Home Rule Charter.[61]

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58. R. Doc. No. 1641, at 9–10.

59. *Id.*

60. *Id.*

61. In reply, Sheriff Hutson also suggests that the entry of such an order would violate two Louisiana statutes. R. Doc. No. 1647, at 7. Again, Sheriff Hutson overlooks the patently permissive language of those statutes. *See* La. R.S. § 33:1324 ("Any parish, municipality or political subdivision of the state ... *may* make agreements between or among themselves to engage jointly in the construction, acquisition, or improvement of any public project or improvement, the promotion and maintenance of any undertaking or the exercise of any power, provided that [certain conditions are met]." (emphasis added)); La. R.S. § 33:1325 (providing that "[a]ll arrangements *concluded under the authority of R.S. 33:1324* shall be reduced to writing" and that the writing requirement is satisfied if each party to the agreement "accept[s] the agreement by the passage of an ordinance or resolution setting out the terms of the agreement" (emphasis added)).

ii. The PLRA

Because the Court finds that no state or local law would be violated by the proposed order, it need not address Sheriff Hutson's argument that the proposed order would violate § 3626(a)(1)(B) of the PLRA, which prohibits prospective relief that "violates State or local law" absent certain findings.

However, the Court will make findings pursuant to § 3626(a)(1)(A) of the PLRA. Additionally, for the sake of completeness and in the interest of moving this project forward, the Court will also make findings pursuant to § 3626(a)(1)(B) of the PLRA.

A. *Findings Pursuant to § 3626(a)(1)(A)*

Section 3626(a)(1)(A) requires "prospective relief in any civil action with respect to prison conditions ... to extend no further than necessary to correct the violation of the Federal right of a particular plaintiff." It states that a court "shall not grant or approve any prospective relief unless the court finds that such 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(a)(1)(A). The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The Court finds that an order embodying the terms of the CEA is necessary for Phase III to proceed given

Sheriff Hutson's announcement that she will not sign the CEA and her contention that the CEA is necessary for the project to commence.[62] The Court has already found that proceeding with Phase III is necessary to remedy a constitutional violation[63] and there is no reason to think that Phase III is no longer necessary. As the court-appointed monitors recently explained,

> [a]n important part of the long-term solution to the lack of compliance with the Consent Judgment in the areas of medical and mental health is the design and construction of Phase III, a specialized building which will contain an infirmary and housing for inmates with acute mental health issues.... Inmates with acute mental health issues continue to be housed in OJC which is inadequate for the housing of these inmates.[64]

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62. R. Doc. No. 1634, at 21–22 (citing R. Doc. No. 1633, at 39:5–39:25). As stated, Sheriff Hutson has not objected to a single, discrete provision of the CEA, despite having been given the opportunity to do so.

63. *See* R. Doc. No. 1227 (ordering that "the City and the Orleans Parish Sheriff's Office are directed to continue the programming phase of Phase III" and that "the parties are 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[,]" and finding that this relief "extends no further than necessary to correct the violations of federal rights, and is the least intrusive means necessary to correct such violations").

64. R. Doc. No. 1623, at 11.

Based on the extensive record in this case, the Court finds this relief is narrowly drawn, extends no further than necessary to correct the constitutional violation, and is the least intrusive means necessary to correct it. The Court has given substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.

B. *Findings Pursuant to § 3626(a)(1)(B)*

Section 3626(a)(1)(B) requires the Court to make three findings before ordering relief that violates state or local law: (1) that "Federal law requires such relief to be ordered in violation of State or local law;" (2) that "the relief is necessary to correct the violation of a Federal right;" and (3) that "no other relief will correct the violation of the Federal right." As explained, the Court disagrees with Sheriff Hutson's claim that an order adopting the terms of the CEA—which the parties previously negotiated and Sheriff Gusman signed—would violate state or local law. The Court nonetheless makes these findings easily based on the extensive record in this case.

As discussed, the Court has already found that federal law requires the construction of Phase III, that Phase III is necessary to correct the violations of plaintiffs' federal rights, and that no other relief would correct that violation. As mentioned, the Sheriff has now announced that she refuses to sign the CEA and believes Phase III cannot move forward without her signature.[65] Accordingly, the

65. R. Doc. No. 1634, at 21–22 (citing R. Doc. No. 1633, at 39:5–39:25).

Court finds "no other option" short of ordering the parties to proceed pursuant to the previously-negotiated terms of the CEA will correct the ongoing violation of plaintiffs' federal rights. *Doe v. Cook County*, 798 F.3d 558, 564 (7th Cir. 2015).

III. CONCLUSION

This Court recognizes that the parties have divergent views with respect to the appropriate constitutional remedy in this case. The Court appreciates these opposing views, as they help avoid the risk that the Court might only see things one way. However, the debate and political posturing that have preceded this order have reached the finish line. It is the Court's expectation that the parties will finally work hand in hand to remedy the constitutional violations that have resulted in the needless deaths and injuries of persons charged with crimes which do not include being in need of constitutional medical or mental health care. A failure to provide the meaningful remedy in this case would be an injustice to those individuals in the Orleans Parish jail who are severely mentally ill or in need of care, and to the public at large, which lives side-by-side with formerly incarcerated persons who have transitioned back to the community. Having considered the report and recommendation as well as Sheriff Hutson's objections,

IT IS ORDERED that the report and recommendation[66] of the United States Magistrate Judge is approved, though the Court amends the Magistrate Judge's

66. R. Doc. No. 1634.

recommendation that, should any party cite the lack of a cooperative endeavor agreement or funding as a basis for delaying this project any longer, that party be cited for contempt and made to answer to the undersigned.[67] The Court expects that the parties will comply with its orders and that the City shall issue a Notice to Proceed to the Phase III contractor no later than September 15, 2023, as scheduled.[68] Any further delay in the construction of Phase III shall not be tolerated by the Court and any party's failure to abide by this Court's orders shall result in severe sanctions, including consideration of whether that party is to be held in contempt of court. With that change, the Court adopts the report and recommendation as its opinion in this matter.

IT IS FURTHER ORDERED that Sheriff Hutson's motion[69] is **DENIED** and Sheriff Hutson's objections[70] are **OVERRULED**.

IT IS FURTHER ORDERED that the "Order Setting Conditions of Construction,"[71] which embodies the cooperative endeavor agreement negotiated by the parties and signed by former Sheriff Gusman, is entered as an order of the Court in lieu of the parties' agreement to a cooperative endeavor agreement.

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67. *Id.* at 29.

68. *See* R. Doc. No. 1642; R. Doc. No. 1643.

69. R. Doc. No. 1617.

70. R. Doc. No. 1636.

71. R. Doc. No. 1634-1.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED JULY 19, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER: 12-859
SECTION: "I"(5)

LASHAWN JONES, *et al.*

VERSUS

MARLIN N. GUSMAN, *et al.*

Filed July 19, 2023

REPORT AND RECOMMENDATION

I. Introduction

Before the Court is a variety of matters pertaining to the construction of the OJC Mental and Medical Health Services Facility (aka "Phase III"). First, there is the "Motion to Terminate All Orders Regarding Construction of the Phase III Jail," filed by Sheriff Susan Hutson, which is before the undersigned pursuant to an order of reference from the District Judge. (Rec. docs. 1621, 1619). The Department of Justice ("DOJ") and Plaintiffs filed response memoranda (rec. docs. 1624, 1625) and the Sheriff filed a reply. (Rec. doc. 1627).

Prior to filing that motion, on June 21, 2023, the Sheriff sent a letter to the Court (which she simultaneously filed in the record (rec. doc. 1615)), asking that the Phase III project be put on hold indefinitely—yet again. That letter is awash in misstatements of fact along with flawed and previously rejected arguments about possible alternatives to that facility. These maladies were pointedly identified by the Court at a status conference called for that purpose. (Rec. doc. 1616). At the end of that status conference, the Sheriff, through counsel, announced her intention not to sign a Cooperative Endeavor Agreement ("CEA") with the City for the construction of Phase III, which agreement was due to be discussed on the Council's agenda the next day. (Rec. doc. 163 at 39). Owing to that announcement, the Court ordered the parties to "to file memoranda addressing the question whether the Court should issue an order embodying the terms of the CEA currently before the City Council." (Rec. doc. 1621). Those briefs have been filed and the Court will address the matter of the CEA in this Report and Recommendation.

While the City of New Orleans filed no pleadings in support of or in opposition to the Sheriff's pending motion to terminate and did not file a brief regarding the CEA, the City Council did write to the Court via letter correspondence on June 23, 2023, asking that the Court "assist the City of New Orleans and/or the Orleans Parish Sheriffs Office to determine the best approach to audit and analyze whether the significant increase in cost of construction for the new Medical and Mental Health Services Facility (Phase III) at the Orleans Justice Center is appropriate." (Rec. doc. 1626). The Court will address that request in this Report and Recommendation as well.

Finally, three days after sending the aforementioned letter, five of the seven members of the New Orleans City Council sent another letter to the Court, weighing in on the Sheriffs June 21 letter. (Rec. doc. 1620). In that letter, Councilpersons J.P. Morrell, Joseph Giarrusso, Lesli Harris, Freddie King, and Eugene Green, citing the "the supremacy of the United States Constitution over City laws as well as the legally binding final judgments of the magistrate [judge], district, and appellate courts regarding Phase III," take the Sheriff to task in four particulars for her eleventh-hour efforts to "slow roll compliance with the Court's judgments." (*Id.*). More pointedly, these five Councilpersons observe:

> After its losses in the courts, the City of New Orleans also has embraced the Council's sentiments. Any reasonable and responsible actor understands the fight is over. OPSO, however, refuses to accept its loss and chooses to publicly pander instead.

(*Id.*).

This letter will also be addressed herein.

II. Analysis

Even one with only a passing knowledge of this case will see all of this for what it is and what it is not. It is clearly *not* a legitimate effort to revisit or reverse court orders advanced by good-faith advocacy based on fact and law. It is, instead, a politically motivated stunt. If

nothing else, the timing of the Sheriff's current effort establishes that.

Thousands of pages and hundreds of hours have been expended by many trying to solve the problem of constitutional care for inmates with medical or mental-health issues in the custody of Orleans Parish. Time being of the essence, the Court finds it unnecessary to repeat that history here.[1] It is enough to say that the Court's patience has been fully exhausted with the well-documented, repeated, and unnecessary delays and it will tolerate no additional ill-conceived, eleventh-hour challenges to meaningful progress addressing these issues.

A. The Sheriff's Motion to Terminate

In their opposition memorandum to the motion, Plaintiffs characterize it as an "effort to re-animate the exhaustively litigated and fully settled matter of the construction of the Phase III facility" and observe that "much of OPSO's motion is substantially similar to many of the arguments the City put forth in its failed 2020 motion for relief. . . ." (Rec. doc. 1625). The Court agrees.

The arguments in both the motion and the Sheriff's June 21 letter have largely been made and rejected—repeatedly. It is difficult to understand how so much of the

1. For further reference, Plaintiffs' Response Memorandum, at pages 5-16, sets forth a detailed (and accurate) procedural history of this issue. (Rec. doc. 1625).

history of this case in general and this issue in particular could have escaped the attention of the Sheriff. That the current Sheriff was not part of that history does not justify her ignoring it. To be clear, though, while the Sheriff paints something of an alternative reality when it comes to the procedural history of this issue, the Court knows exactly what has happened—and why.

The entirety of the present effort appears to be a hastily thrown together, last-ditch effort to disrupt the construction of this facility—something the Sheriff has repeatedly told the Court she would not do. *See*, *e.g.* rec. doc. 1546 ("While Sheriff Hutson is entitled to hold these opinions [opposing Phase III], the Sheriff is not attempting, and would not attempt, to undermine the District Court's order."). The Sheriff has obviously decided to abandon this commitment to the Court -after waiting the entirety of her 13 months in office to do it.

That this latest motion was hastily concocted is evident in the fact that the Sheriff seeks to terminate "all orders regarding construction" of Phase III but doesn't bother to indicate to the Court exactly *which* orders she wants to terminate. There are quite a few in this record. At this point—based upon the arguments made in her pending motion and letter of June 21—it appears to the Court that the Sheriff may not be fully aware just how many such orders are in this record or where they can be found. No matter—as the undersigned will recommend the motion be denied, it is unnecessary to catalog every order that *might* have been subject to the motion.

The arguments pressed by the Sheriff in this motion can be broken down as follows:

- "The pending prospective relief ordering the construction of the Phase III jail and the associated orders requiring the City of New Orleans (the "City") to do the same [Docs. 1221, 1227] violate the Prisoner Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626."

- "The parties' contractual agreement to build a Phase III jail must constitute a private settlement agreement for purposes of the PLRA, not a consent decree. Because the prospective relief at issue comes from a private settlement agreement, the PLRA prohibits the Court from enforcing that agreement."

- "Even if the Court had the authority to enforce the agreement, which it does not, the Court could not enforce the agreement against Sheriff Hutson because she is neither a party to the agreement nor bound by the actions of her predecessor."

- "A successor official should not be bound by its predecessor's decisions in a consent decree, especially when their views of the relief differ."

(Rec. doc. 1617-2). The Court will address these arguments in turn.

Appendix D

1. That the Court's Orders Are *Not* Prohibited by the PLRA Is the Law of the Case

To the extent the Sheriff is arguing that the January and March 2019 orders violate the PLRA generally,[2] that argument is barred by the law of the case doctrine.

In 2020, the City filed a Motion for Relief from Court Orders of January 25, 2019 and March 18, 1019 Regarding Phase III Jail Facility. (Rec. doc. 1281). In that motion, the City argued primarily that the subject orders (which are also subject of the present motion) should be vacated based on changed circumstances pursuant to Federal Rule of Civil Procedure 60. (*Id.*). In a reply memorandum, the City raised (for the first time) an argument that the PLRA prohibits this Court from ordering the construction of a jail. (Rec. doc. 1312). Because the argument was first raised in a reply memorandum, the Court allowed the parties to file supplemental memoranda addressing the argument. (Rec. doc. 1313). The Sheriff at the time, Marlin Gusman, vigorously opposed the City's motion.

After a two-week hearing on the City's motion and a round of post-hearing briefing in which the PLRA argument was made again, the undersigned issued a lengthy Report and Recommendation ("R&R") finding

2. In the first paragraph of her brief, the Sheriff states generally, "The pending prospective relief ordering the construction of the Phase III jail and the associated orders requiring the City of New Orleans (the "City") to do the same [Docs. 1221, 1227] violate the Prisoner Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626." (Rec. doc. 1617 at 1).

the motion to be without merit and recommending the District Judge deny it. (Rec. doc. 1385). (*Id.*). In that R&R, this Court found the PLRA argument was waived by the City because it was made for the first time in a reply brief. (*Id.*). However, the undersigned also found that, even if the argument was not waived, it lacked merit. (*Id.*).

The R&R was adopted by the District Judge. (Rec. doc. 1396). The City appealed that Order to the Fifth Circuit, which held oral argument and ultimately affirmed the District Court's Order in all respects.[3] (Rec. doc. 1548). In its opinion, the Fifth Circuit panel found that the argument that the January 2019 and March 2019 Orders violated the PLRA was without merit and declined to consider whether the argument had been waived. (*Id.*). Importantly, that Court noted that

> 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. "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."

(*Id.* at 8, citing *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993)). This passage calls to mind a crucial fact—the two orders that were subject of the City's motion and are targeted now by the Sheriff's

3. The Fifth Circuit allowed Sheriff Hutson to file an amicus brief *and* participate in oral argument on the City's appeal.

current motion *were never appealed*. This Court found that the City's Rule 60 motion was the very "end run to effect an appeal outside the specified time limits" to which the Fifth Circuit later alluded; the Sheriff's motion here is no different.

Perhaps recognizing this fatal malady, the Sheriff has styled her motion as one to "terminate" rather than vacate or reverse the Phase III Orders. That turn of phrase does not change the fact that she is directly attacking the validity of the orders as being prohibited under the PLRA, which no one can now do because (1) they were not timely appealed and (2) they are, by virtue of the Fifth Circuit's opinion, the law of the case.

As to the first observation, it seems clear to the Court that the Sheriffs efforts here do, in fact, constitute an untimely appeal of two four-year-old orders. By claiming now that the orders are violative of the PLRA and/or *unenforceable* by the Court, she is saying they are invalid *ab initio.* This is a direct attack on the validity *vel non* of these two un-appealed orders. This is reason enough to deny the motion as a disguised untimely appeal.

As to the second fatal flaw in the Sheriffs argument, 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.' *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990) (quoting *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745, 750 (5th Cir. 1985)), *see also Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir.1978).

"It is well established that an appellate court decision establishes 'the law of the case' which must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court. . . ." *Williams v. Riley*, 392 F. App'x 237, 240 (5th Cir. 2010).[4]

This Court has previously ruled that the subject orders do not violate the PLRA and that ruling has been affirmed by the Fifth Circuit. The law of the case doctrine prevents the re-litigation of the orders' validity.

2. The Stipulated Order and Supplemental Compliance Action Plan Are Not "Private Settlement Agreements" under the PLRA.

The Sheriff claims in her reply memorandum that the law of the case doctrine does not apply to her motion because she is making a novel argument, *i.e.*, that the agreement between the former Sheriff, City, Plaintiffs, and DOJ was a "private agreement" under the PLRA, which she says is unenforceable by the Court.

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4. *See also* 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4418 (3d ed.) ("[I]ssue preclusion may well be appropriate when a party fails to appeal a traditional final judgment and then becomes embroiled in post-judgment proceedings. . . . It may be even more important to establish issue preclusion in cases that require continuing supervision of an injunction, perhaps for years after the final judgment. *Institutional reform litigation frequently involves such protracted proceedings*." (emphasis added)).

This argument is novel, all right. It also borders on frivolous. All one need do to determine that the subject orders in this case are not "private agreements" is read the text of the statute and the subject orders. What the Sheriff has done is twist that text into a convoluted, circular argument that defies logic and completely ignores the lengthy history of this case.

There are three orders of this Court pertaining to Phase III that are relevant to this analysis. One is the Stipulated Order for Appointment of Independent Jail Compliance Director ("Stipulated Order"). (Rec. doc. 1082). The others are the January and March 2019 Orders that were the subjects of the City's failed Rule 60 Motion for Relief. (Rec. docs. 1221, 1227).

The Stipulated Order *began* as an agreement, reached between the parties to resolve a motion to place the jail in receivership. Once the agreement was reached, the parties, *including Sheriff Gusman*, expressly moved the Court to enter the Stipulated order "as an order of the Court." (Rec. doc. 1083). The Court did just that.[5]

Notably, as it regards compliance with the PLRA, the parties included the following language in the Stipulated Order:

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5. As the undersigned noted in the R&R on the City's Motion for Relief: "To be sure, that Order is a binding contract, but it is more. When it was signed by Judge Africk the 'agreement' became an 'order.' And it's an order that has never been appealed."

H. Compliance with the Prison Litigation Reform Act (PLRA)

The Court further finds that:

1. OPSO is in non-compliance with Consent Judgment Sections IV.A.1-8, 10-11, IV.B.5, IV.D.1-4, and IV.G, which were entered as an Order of this Court on June 6, 2013.

2. As a result, more specific remedial relief is necessary, as set forth below; and

3. Based on a robust case record including over 80 status conferences and the evidence presented in these proceedings, the Court finds that the additional relief set forth above complies in all respects with the provisions of 18 U.S.C. § 3626(a). The relief is narrowly drawn, extends no further than necessary to correct violations of federal rights affected by the Consent Judgment, is the least intrusive means necessary to correct these violations, and will not have an adverse impact on public safety or the operation of the criminal justice system.

(*Id.*). Former City Attorney Dietz testified at the Rule 60 hearing that the inclusion of this language was not a *pro forma* exercise and that the precise language was specifically negotiated by the parties before it was included in the Stipulated Order ultimately signed by the District Judge. (Rec. doc. 1368 at 46-47).

According to the terms of that *Order*, the Compliance Director was tasked with choosing the final proposal to present to the Court that would address the care of inmates with acute mental and medical health needs pursuant to the Consent Judgment. (Rec. doc. 1082). The Compliance Director eventually chose an 89-bed facility—the same one we now refer to as Phase III. This choice, which includes cells, an infirmary, programming space, visitation areas, and a laundry, was announced in the Supplemental Compliance Action Plan. (Rec. doc. 1106).

Eventually, *all* parties agreed to implement that plan, pursuant to the Stipulated Order.

After little progress was made, the Court issued two additional *orders.* On January 28, 2019, the Court ordered the parties "to begin the programming phase of the Phase III facility as soon as possible and to update the Court on the progress of those efforts at the next scheduled status conference." (Rec. doc. 1221). Following up a few weeks later, the Court ordered that "the parties are 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." (Rec. doc. 1227). Again in this second order, the Court made this specific finding pursuant to 18 U.S.C. § 3626(a):

> The Court specifically finds that 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.

(*Id.*).

These are the essential orders regarding construction of Phase III. The Sheriff now argues they are not, in fact, orders of the Court, but are "private agreements" as defined by the PLRA. They clearly are no such thing.

One thing the Sheriff is correct about is that the Orders at issue did not direct the City to build Phase III. Rather, they "ordered the City to effectuate a plan it had voluntarily and contractually bound itself to undertake." (Rec. doc. 1385 at 33-34). For the Sheriff, this is all it takes to label these *orders* as "private agreements." This is a distortion of the PLRA's plain language.

The PLRA provides for two kinds of "settlements" between parties. Here is the complete provision:

> **(c) Settlements.—**
>
> > (1) **Consent decrees.**—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

> (2) **Private settlement agreements.**—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.
>
> (B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

18 U.S.C. § 3626(c). The statute goes on to expressly define the two terms:

> the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

18 U.S.C. § 3626(g)(1)

> the term "private settlement agreement" means an agreement entered into among the parties that is *not subject to judicial enforcement* other than the reinstatement of the civil proceeding that the agreement settled. . . .

18 U.S.C. § 3626(g)(6).

The Sheriff's argument that the Court's orders are invalid boils down to this statement from her Reply Memorandum: "[A] court's consent decree may not order the construction of a jail, and although the parties may privately agree to do so, the court may not enforce that agreement." There is no authority provided for this proposition, which flies in the face of established precedent and common sense.

First, as pointed out in detail in the undersigned's R&R on the City's Motion for Relief,[6] the PLRA does not prohibit courts from ordering the construction of a jail in the exercise of their equitable powers. That *this* Court did not do so here does not change the fact that it is not prohibited from doing so.

The *Plata v. Schwarzenegger* case in California has taken its place as a leading case on any number of issues in prison/jail consent decree litigation. No. C01-1351, 2008 WL 4847080 (N.D. Cal. Nov. 7, 2008). In addressing the very argument that underlies the Sheriff's faulty premise here—that the PLRA prohibits courts from ordering prison construction—the *Plata* Court undertook a helpful, plain-language analysis of the PLRA's text:

> The statute provides only that "[n]othing in this section shall be construed" to authorize courts to order construction of prisons. The plain-language interpretation of this language is that

6. The Sheriff quoted generously from the undersigned's R&R but managed to ignore this entire discussion.

> the PLRA does not, in and of itself, authorize federal courts to order prison construction, but that the PLRA does not repeal the courts' equitable powers to remedy the violation of constitutional rights. Had Congress intended to bar courts from ordering prison construction under any circumstances, it would have done so explicitly.

Plata, 2008 WL 4847080 at *1. The remainder of the text of the PLRA bears out this analysis. The provision of the statute relied upon by the Sheriff in this case states simply that "[n]othing in this section shall be construed" to authorize courts to order construction of prisons. The Sheriff (as the City before her) extrapolates this one sentence to reach the conclusion that this Court's orders on Phase III are overreaching. They are not.

The plain language of this statutory provision simply says that the PLRA does not, in and of itself, *authorize* federal courts to order prison construction; it does not say that federal courts *are prohibited from* doing so or that the PLRA somehow repealed the courts' equitable powers to remedy the violation of constitutional rights. "Had Congress intended to bar courts from ordering prison construction under any circumstances, it would have done so explicitly." *Id.* at *7.

The Sheriff might suggest (as the City did before her) that the *Plata* Court and this one are wrong. But, as pointed out previously by Plaintiffs, in the context of this PLRA argument, "courts, constitutional scholars, and

United States attorneys general agree that courts should strictly interpret statutes purporting to curtail remedies for constitutional violations."[7]

Because this underlying premise—that the Court cannot enforce any agreement to build a jail—is wrong, the Sheriff's entire argument here fails.

Moreover, the very definitions of the relevant terms also demonstrate the fallacy of that argument. "The term 'private settlement agreement' means an agreement entered into among the parties that is not subject to judicial enforcement. . . ." 18 U.S.C. § 3626(g) (6). For any of the subject orders, including the Stipulated Order that gave rise to the Phase III plan, to comprise "private agreements," then, they would have to be unenforceable by the Court. Anyone who knows anything about this case knows that is an absurd proposition.

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7. (Rec. doc. 1327 at 5) ("[W]here constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it has set itself against the Constitution." Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 88 (1981); *see also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 249 (1970) (accord); *North Carolina v. Swann*, 402 U.S. 43, 45-46 (1971) (holding that when a remedy is required to eliminate a constitutional violation, the remedy cannot be statutorily eliminated); Letter from Attorney General of the United States to Chairman of the Judiciary Committee, May 6, 1982 (The court must retain "adequate legal or equitable powers to remedy whatever constitutional violation may be found to exist in a given case.").

First, it bears repeating that none of these orders was ever appealed—indeed the former Sheriff himself was a mover on the motion seeking to have the Stipulated Order signed as such by the District Judge. It is far too late now for the Sheriff to seek to overturn, vacate, or "terminate" such orders on the grounds that they are *unenforceable.* That's what an appeal is for, and there has never been one.

To the extent the Sheriff is arguing that these orders are unenforceable because they seek to effectuate a separate private agreement that has never been entered into the record, that proposition is equally misinformed. The entirety of the parties' agreements to build Phase III are incorporated into the Stipulated Order and Supplemental Compliance Action Plan. To suggest that the Stipulated Order is unenforceable now, seven years after its issuance, is nothing short of frivolous. Indeed, even *this* Sheriff has been in office for 13 months—subject to the order's terms—before making this absurd suggestion.

In sum, there are no "private agreements" to build Phase III in this record, only enforceable Court orders. None of those orders have ever been appealed, and two have been left in place by the Fifth Circuit after the City's Rule 60 Motion for Relief was denied. The Sheriffs argument that any of these orders is unenforceable should be dismissed out of hand.

3. Sheriff Hutson Is Bound by the Actions and Arguments of Her Predecessor.

The Sheriffs final arguments involve a theory that she cannot be held responsible for the actions of Sheriff

Gusman while he was the nominal defendant in this lawsuit for two reasons. First, she argues, because she was not a party to the alleged "private agreement" to build Phase III, she is not bound by said agreement. Because of the Court's finding that no such "private agreements" exist in this litigation, this argument is easily dismissed.

Second, the Sheriff argues that "[a] successor official should not be bound by its predecessor's decisions in a consent decree, especially when their views of the relief differ." (Rec. doc. 1617-2). In support of this bold statement, the Sheriff cites *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). Neither of these cases stands for the proposition for which they are cited.

Rufo is a pre-PLRA case in which modification of a jail consent decree was sought via a Rule 60 motion. The Sheriffs motion is not a Rule 60 motion seeking to *modify* anything, it is a motion to *terminate* any number of valid court orders because she disagrees with their objective. This may be contrasted with the City's prior Rule 60 Motion for Relief,[8] which was premised on various alleged changes in circumstances. No changed circumstances are suggested here by the Sheriff—she just disagrees with the Court, its experts, the former sheriff, the plaintiffs, and the Department of Justice. *Rufo* does not support her argument here.[9]

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8. Indeed, the City cited *Rufo* exhaustively in its motion and on appeal.

9. In *Rufo*, the Supreme Court explored the application of Rule 60 to consent decrees involving institutional reform. The

Similarly, *Frew* is inapposite. That case, which involved an attempt by state officials to modify a state Medicaid consent decree on Eleventh Amendment grounds, simply does not speak anywhere to the discrete issue raised by the Sheriff—a successor official's obligations under consent decrees entered into by their predecessors. The case simply does not support the Sheriffs argument.

The fact of the matter in this case is that, upon taking office in May 2022, Sheriff Hutson was substituted as a party by operation of law pursuant to Federal Rule of Civil Procedure 25(d). Sheriff Gusman was sued as a named defendant in his official capacity—no one disputes this fact. Accordingly, once he ceased to hold office, "[t]he officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d). In their opposition memorandum, Plaintiffs correctly observe:

> For nearly half a century, the United States Supreme Court, the Fifth Circuit, and its District Courts have recognized that when defendants are named in their official capacity, the claim is against the entity: "the distinction between official-capacity suits and personal-capacity suits is more than ' mere pleading device.' . . . State officers sued . . . in their official capacity are not 'ersons' for purposes of the suit because they assume the identity

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Court noted that district courts should apply a "flexible standard" to the modification of consent decrees when a *significant change in facts or law warrants their amendment*. *Id.* at 393. No such change in law or circumstances is cited by the Sheriff.

> of the government that employs them." So while an action may not be styled as against the Orleans Parish Sheriff's Office, an action styled against the Orleans Parish Sheriff is functionally against the entity. Thus, in actions against defendants in their official capacity, individual office holders may come and go, but the defendant never changes because the office, not the person occupying it, is the party.

(Rec. doc. 1625 at 16) (citing *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.4 (1985)); *Jenkins v. Jefferson Par. Sheriff' Office*, 402 So. 2d 669, 671 (La. 1981) (reversing *Jenkins v. Jefferson Par. Sheriff' Office*, 385 So. 2d 578, 579 (La. Ct. App. 4 Cir. 1980) and holding that certain state tort liability in official capacity runs with the office, not the individual holding the office)).

This notion is borne out by the Advisory Committee notes to the 1961 amendment that added section (d) to Rule 25:

> The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel

> performance of official duties or to obtain judicial review of their orders.

Fed. R. Civ. P. 25, 1961 Advisory Committee Note.

The question for the Court, then, is not whether the Sheriff, acting in her official capacity, is bound by private contracts or agreements entered into by her predecessor. Rather, the question is whether the Sheriff, acting in her official capacity, is bound by all of this Court's orders in litigation that has been ongoing for more than a decade. There is no serious argument that she is not.

Accordingly, based upon the foregoing, the undersigned will recommend that the Sheriff's Motion to Terminate be denied.

B. The City Council's Letters to the Court

As noted earlier, the Council recently sent two letters to the Court regarding Phase III that the undersigned finds it appropriate to address here. First, on June 23, 2023, the Council wrote to the Court asking it to "assist the City of New Orleans and/or the Orleans Parish Sheriffs Office to determine the best approach to audit and analyze whether the significant increase in cost of construction for the new Medical and Mental Health Services Facility (Phase III) at the Orleans Justice Center is appropriate." (Rec. doc. 1626). The Court's response to this request will be informed to some extent by the *second* letter that five of the seven members of the Council sent to the Court a few days later.

In that letter, sent three days after the above-referenced "audit" request, five members of the Council accused the Sheriff of attempting to "slow roll compliance with the Court's judgments." (Rec. doc. 1620). The councilmembers observed that the City had been repeatedly rebuffed by the Courts in its attempts to delay or stop Phase III, making the following observations:

> Any reasonable and responsible actor understands the fight is over. OPSO, however, refuses to accept its loss and chooses to publicly pander instead.
>
> and
>
> [The plaintiffs] are the people who are incarcerated in the jail, understand its conditions, and still maintain Phase III is what should be constructed. Maybe, we should be listening most intently to them.
>
> and
>
> [The Sheriff's] June 21 letter with little explanation apparently is repackaging a plan rejected by an expert and this Court. Nearly three years ago, an expert offered three alternatives to building Phase III. At the October 2020 hearing, the expert repudiated the first two options and affirmed only the retrofitting option. If the June 21 letter is avowing the first two options, that has been

> considered and disavowed by the proponents already. If the June 21 letter is pursuing retrofitting, that option too has been rejected. The parties and this Court have heard this argument for years. Are we really going down this road again? [This] option has been debated, litigated, and decided. (Rec . Doc. . 1385 at pp . 57-62). It is a waste of time, money and resources for the Council, the City, the parties, and the Court to raise it again.
>
> and
>
> The idea that the City or Council are moving too fast is not only wrong but is also another futile attempt to slow roll compliance with the Court's judgments. It is time to move on.

(*Id.*).

The very sentiments expressed by these Councilmembers explain why the Court cannot accede to any requests for audits, analyses, or examinations that would delay this project one more day. Moreover, an audit is unnecessary—the Court can answer the question why the cost of this project increased so dramatically from what was "expected" in 2017. By far the primary driver of this increase was delay—delay caused *solely* by the current administration and whoever within that administration decided to derail the project for over two years beginning with the filing of the Rule 60 Motion for Relief.

In the last status report filed before that motion was filed, the City informed the Court it had "budgeted" $51 million for the construction of Phase III. (Rec. doc. 1276). By the time the project finally went out for bid over two years later, the City had set aside $71 million for the project (which included approximately $36 million in FEMA funds).[10] (Rec. doc. 1580). When the sole bid was opened on December 22, 2022, the bid amount was $86.4 million. (*Id.*). This amount was approximately $15 million over what the City had budgeted, but did not include so-called "soft costs" of $18.2 million, which brough the total projected cost to $104.6 million.

When the Court permitted the City to re-bid the project, it again received only one bid (from the same bidder), with a base amount of $88.7 million. The associated soft costs mean the projected cost remains above $100 million.

This is, to be sure, a very big number. The Court fully understands the sticker shock associated with this number. But there is little mystery as to *why* the number is now so high. Recall that in June 2017, former City Attorney, Rebecca Dietz, reported in open Court that "[t] his project should be completed within 24 to 40 months." (Rec. doc. 1127) (emphasis added). That would have had

10. As has been discussed in this case on multiple occasions, continued delay by the City and/or Sheriff in beginning construction on this project places at risk any FEMA funding that is slated to be used for its construction. *See*, *e.g.*, rec. doc. 1488 (Court's discussion with Michael Gaffney at Status Conference concerning the risk that FEMA funds would expire if the project was not substantially completed by August 29, 2023).

the project completed at almost *exactly* the same time the City filed its Rule 60 Motion. And construction *still* has not begun some *six years* after the City attorney made this statement.

When the City represented to the Court in May 2020 that the project cost would be $51 million and then said in 2022 it had set aside $71 million, it is not clear whether those figures contemplated some $18 million in "soft costs." Either they did and the architect, project manager, and the City's Capital Projects Department grossly underestimated the costs of the project or they did not and the difference between the estimated and actual cost is substantially less than we're being told. In any case, there were always going to be substantial "soft costs" (architect and project management fees, contingencies, etc.) associated with this project regardless of the bid amount.

In any event, it is clear to the Court why the project has become so expensive—the passage of time. And, after seeing what the previous delays and foot-dragging have done to the price tag, the Court is not going to let that happen again by further delaying the project so all of this can be "audited and analyzed." To do so would be irresponsible; to do so and think anything would change for the better would probably be delusional.

C. The Cooperative Endeavor Agreement

The latest obstacle being thrown in the path of this project is the so-called "cooperative endeavor agreement"

("CEA") that some of the parties claim must be executed between the City and Sheriff before this project can commence. This has become the latest tool of delay for the Sheriff.

At a status conference called by the undersigned to discuss the Sheriff's June 21 letter, this exchange took place with counsel for the Sheriff:

> THE COURT: All right. Let me ask you a practical question.
>
> MR. WILLIAMS: Sure.
>
> THE COURT: So I've read this Cooperative Endeavor Agreement that's before the City Council, or some form of it, a number of times. For a project such as this to go forward given the interplay between the responsibilities of the Sheriff's Office and the City, the provisions in that agreement are important to be in place.
>
> MR. WILLIAMS: Yes, your Honor.
>
> THE COURT: How does this project go forward if that agreement is not in place?
>
> MR. WILLIAMS: Well, as you said, there are a lot of legal regimes involved in what the CEA stands for. I've looked at some of that. I don't feel good about telling you definitively what would happen, but my feeling is that the CEA

> must be signed in order for this project to move forward.
>
> THE COURT: So if that's your feeling and that's ultimately the Sheriff's position, then not signing the CEA means the project doesn't go forward.
>
> MR. WILLIAMS: Right.

(Rec. doc. 1633 at 39).

The strategy amounts to this very simple premise: "I must sign this document for the court-ordered process to begin. I will not sign the document so the court-ordered process will not begin." This is certainly a far cry from "the Sheriff is not attempting, and would not attempt, to undermine the District Court's order." (Rec .doc. 1546).

The Sheriffs recalcitrance is not the Court's only concern with respect to the CEA. After the Sheriff announced that she would not sign the CEA and after five Councilpersons wrote the Court on June 27 criticizing that decision and accusing the Sheriff of "slow rolling" compliance, there was a meeting of the Council's Criminal Justice Committee on July 12, 2023. At that meeting, some of the same advocates who testified for the City in support of its Rule 60 Motion, including James Austin and Susan Guidry, offered the same one-sided and misleading testimony that this Court heard and rejected almost two years ago. After hearing only one side of the story

(through largely disingenuous testimony, at that)[11] at least one of the Councilpersons who signed the June 27 letter to the Court completely changed course, publicly announcing he would oppose the ordinance approving the CEA. Moreover, in its latest Status Report to the Court, the City has replaced all "Project Milestone" dates with a "TBD" designation. (Rec. doc. 1632-1). This is all too much at this point.

The Court is now forced to take up the matter of this CEA and decide whether it should enter the specific terms of the CEA in the form of an order, rather than wait and hope that the parties will ever sign the document voluntarily. To that end, the Court ordered the parties to brief whether the Court could or should do just that.

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11. Here are two examples: First, Dr. Austin testified to the Committee on July 12 that there were multiple alternatives to Phase III that involve retooling the old Temporary Detention Center ("TDC"), which was built by FEMA as a temporary facility after Hurricane Katrina. This was a surprise to the Court, given that he testified under oath at this Court's Rule 60 hearing that alternatives involving the use of TDC were, in his own words, "not viable." (Rec. doc. 1366 at 258-59). This episode was actually alluded to in the Councilmembers' June 27 letter. Despite this, before the Committee on July 12, Austin inexplicably presented the use of TDC as a viable alternative to the Criminal Justice Committee. Second, Austin engaged in vigorous criticism of the design of the proposed facility without informing the Councilmembers in attendance that he has been actively participating in design and project meetings for years and has never articulated any of those criticisms at any of those meetings. The Court has taken judicial notice of the July 12 Criminal Justice Committee meeting, which is available on the web at https://www.youtube.com/watch?v=ds07iShH97E.

After considering those briefs,[12] the Undersigned will recommend to the District Court that the terms of the CEA be issued as an order of this Court, thus eliminating the need for an agreement.

The Sheriff argues that it would be inappropriate for the Court to enter the terms of the CEA as an order because (1) it would be "in furtherance of a private agreement that is not binding on Sheriff Hutson and that is not enforceable in this proceeding"; (2) and because it would violate state law, the City's Home Rule Charter, and the PLRA. (Rec. doc. 1629).

The first argument is easily dismissed for the same reasons the Court has found the Sheriff's Motion to Terminate should be denied—the Court's orders regarding Phase III are not "private agreements" under the PLRA; they are enforceable, are being enforced, and will continue to be enforced.

The Sheriff's second argument is that

> issuing an order embodying the terms of the CEA—thereby skipping the combined executive and legislative process for authorizing a costly, multi-year public works project—would violate state and local law by ignoring the requirements of Louisiana's Constitution and the City's Home Rule Charter ("HRC").

(*Id.*). This one misses the mark as well, for two reasons.

12. The Sheriff, Plaintiffs, and DOJ filed briefs. The City did not.

First, the CEA does not purport to "authorize" anything—that was done years ago by the parties' agreement and the entry of multiple orders of this Court. What the CEA does is set out the various conditions under which the project will be conducted and spell out the City's and the Sheriff's respective obligations during the project. No one has suggested why these conditions and obligations cannot be established by court order rather than agreement. Importantly, the Sheriff has not objected to a single, discrete provision of the CEA, despite being given the opportunity to do so.

Second, the idea that the action contemplated by the Court violates State or local law ignores the essential fact that the consent decree in this case was entered to correct violations of the United States Constitution. As noted by the DOJ in its response memorandum,

> it is well established that the U.S. Constitution and the laws of the United States reign supreme over state and municipal laws. U.S. Const. art. VI, cl. 2. Specifically, state and local entities are bound to the holdings of federal courts where determinations of constitutional and federal rights are at issue. *Cooper v. Aaron*, 358 U.S. 1, 4, 18 (1958) (local hostility, defiance, and a lack of political will, could not invalidate a federal court order); *see also Bush v. Orleans Par. Sch. Bd.*, 190 F. Supp. 861, 863-66 (E.D. La. 1960) (same). Preemption applies when "state action directly conflicts with the force or purpose of federal law." *Cardinal Towing & Auto Repair,*

> *Inc. v. City of Bedford, Tex.*, 180 F.3d 686, 690 (5th Cir. 1999). And "[p]reemption of municipal ordinances is governed under the same standards as would apply to a state *law*." *Id.*

(Rec. doc. 1630).

Any state law or municipal ordinance cited by the Sheriff that purportedly imposes a requirement that a CEA be agreed-to does not invalidate this Court's previous valid orders. These orders prevail. *See Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990) ("Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy.").

The Sheriff is the only party objecting to the issuance of the CEA terms in the form of an order. Notably, she has not taken issue with a single specific element of that CEA, despite being asked and being given that opportunity to do so in brief by the Court. Otherwise, the Sheriff's arguments in this regard are without merit.

A proposed CEA, *previously negotiated and approved by the City and the former Sheriff*, was presented to Sheriff Hutson in March of this year. She must have known the Court and parties expected her to sign the CEA. Despite this, and the obvious and oft-repeated concerns of this Court that there be no impediments to the beginning (and ultimate completion) of this project, the

Sheriff waited and waited and waited. Then—at the final moment—she announced she would not sign. But she has never articulated a single specific objection to anything in that document.

It also now appears that approval of the CEA by the Council is being delayed as well, for any number of reasons not entirely clear to the Court.

To address the recalcitrance of the Sheriff and any other potential delays that might be occasioned by the stalling of the approval process in the Council, the undersigned will recommend the terms of that proposed agreement be issued in the form of an order. *See Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990) ("Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy."). The Court finds that any objections by the Sheriff to any specific provisions of the CEA that she has been quietly sitting on for months are considered by this Court to have been waived for failing to raise them, even when given that opportunity.

III. Conclusion

In the final analysis, this is not a serious motion. Indeed, the Sheriff herself has made statements in the very recent past concerning this case that are *directly* at odds with the newly concocted "private agreement" argument:

> The Sheriff is deeply committed to meeting the requirements of the consent judgment and doing so as quickly as possible. Sheriff Hutson also understands that, under the consent judgement, the District Court has concluded that the construction of Phase III is the ultimate solution to the long-term infrastructural needs of the OJC. Further, *the Fifth Circuit has declined to find that the District Court's order contravenes the Prison Litigation Reform Act* ("PLRA"). *The District Court's order. thus. remains in effect.*

(Rec. doc. 1546) (emphasis added).

What a difference a few months make. On the very eve of the City Council taking up the CEA, the same official who had represented to the Court her understanding that the Phase III orders "remain[] in effect," filed a motion arguing the same orders were void *ab initio* because they violated the PLRA.

The Court's patience has run out insofar as these last-ditch, half-baked efforts to delay this project are concerned. The Court understands that, for some, the Phase III project is bad politics and bad policy. We respect and understand that view and we always have. Indeed, we share the concerns of many vocal advocates that our community sorely lacks resources for those in need of mental-health treatment who are not incarcerated. But we are charged, in *this* case, not only with implementation of the consent judgment, but with avoiding and preventing, to the extent that we can, one more moment of unnecessary

suffering, one moment of preventable crisis, one more suicide in our jail. We can prevent this. It will take all of us—the Court, counsel, experts, advocates, elected officials, and citizens. Right now we are failing the people in this jail who need us most. That's on all of us.

One after the other, back and forth, the City and the Sheriff have attempted to throw up roadblocks to completion of this project. And through it all, people continue to suffer and die in the jail. People whose lives might have been spared had they been housed in a constitutionally appropriate facility—the kind of facility we don't have in New Orleans.

But we will.

The Court can't wait any longer for officials responsible for the constitutional care of these inmates to see *that* as the issue in this case rather than money, blame, or politics. The Court cannot and will not put a price tag on the Constitutional rights of the people in the custody of Orleans Parish nor will it allow the Sheriff or the City to do so.

So the undersigned is recommending to the District Judge, yet again, that we heed the well-considered advice and recommendations of the Court-appointed Mental Health Working Group; Drs. Patterson, Greifinger, Thompson, Vasallo, and Johnson; Sheriff Frasier, Directors Maynard and Hodge; the Plaintiffs, and the Department of Justice and maintain the directives regarding the Medical and Mental Health Services Facility (Phase III). And in order to ensure that happens

without further delay, it is further recommended that the attached "Order Setting Conditions of Construction" be entered as an order of this Court, which conditions will be in force as though they had been agreed to by the City and Sheriff as a cooperative endeavor agreement, for the duration of the project. It is further recommended that, to the extent any party finds the Order Setting Conditions of Construction requires amendment or adjustment, that party shall raise the matter with Magistrate Judge North for resolution.

The Court expects that the entry of these conditions as an order will eliminate once and for all any argument that this project cannot go forward because the parties have not signed an agreement. This Court finds that any further delay based on such an argument would amount to contemptuous conduct and recommends to the District Judge that it be punished as such, should it occur.

The same goes for any funding delays. Particularly given that a majority of the City Council has clearly indicated that it recognizes "the supremacy of the United States Constitution over City laws as well as the legally binding final judgments of the magistrate [judge], district, and appellate courts regarding Phase III," and understands that "[a]ny reasonable and responsible actor understands the fight is over," the Court should treat any further delay associated with funding for this product as contemptuous conduct and punish it as such should it occur.

Appendix D

RECOMMENDATION

Accordingly, it is **RECOMMENDED** that the Sheriff's Motion to Terminate be **DENIED.** It is further **RECOMMENDED** that the attached "Order Setting Conditions of Construction" be entered as an order of the Court in lieu of the parties' agreement to a Cooperative Endeavor Agreement. Finally, it is **RECOMMENDED** that should any party cite the lack of a cooperative endeavor agreement or funding as a basis for delaying this project any longer, that party be cited for contempt and made to answer to the District Judge.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation contained in a magistrate judge's report and recommendation within 14 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United States Auto. Assoc.*, 79 F.3d 1415 (5th Cir. 1996) (en banc).[13]

The Court's orders regarding Phase III and its construction shall remain in full effect during the 14-day period the parties have to object to this

13. *Douglass* referenced the previously-applicable 10-day period for the filing of objections. Effective December 1, 2009, 28 U.S.C. §636(b)(1) was amended to extend that period to 14 days.

Appendix D

Recommendation. The Court expects that the project will not be delayed in any respect as a result of the Sheriff's June 21, 2023 letter or her Motion to Terminate.

New Orleans, Louisiana, this 19th day of July, 2023.

/s/
MICHAEL B. NORTH
UNITED STATES MAGISTRATE JUDGE

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER: 12-859
SECTION: "I"(5)

LASHAWN JONES, *et al.*

VERSUS

MARLIN N. GUSMAN, *et al.*

ORDER SETTING CONDITIONS OF CONSTRUCTION FOR OJC MENTAL AND MEDICAL HEALTH SERVICES FACILITY

The Court is issuing this Order in lieu of the Cooperative Endeavor Agreement that Sheriff Hutson has refused to sign in this matter. It will be in effect just as if the parties had signed it as an agreement.

ARTICLE I—SCOPE OF WORK

The Orleans Parish Sheriff's Office ("OPSO") shall work with the City of New Orleans ("City"), under the City's administration, to collaboratively design and construct the new Mental and Medical Health Services Facility commonly known as Phase III. Upon final acceptance, this facility will be turned over to the OPSO for operation and maintenance by the OPSO as part of the Criminal Justice Facility.

Appendix D

A. The new Mental and Medical Health Services Facility will be designed and constructed to comply with the provisions of the Federal Consent Judgment.

B. The new Mental and Medical Health Services Facility will be constructed with a footprint which is located on the site of the now demolished Templeman 1 and 2 facilities. Portions of the land are owned by the City and other portions are owned by OPSO.

C. The new Mental and Medical Health Services Facility will be constructed with a footprint located near Perdido Street with an entrance on Perdido Street.

D. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and use certain utilities from the OPSO Central Plant located in the Kitchen Warehouse including, but not limited to, power systems (including, but not limited to, the electric power distribution system which will consist of two substations served from the existing electrical vault located between the IPC Building and the new Mental and Medical Health Services Facility, and emergency and standby electrical power which will be supplied by the generators located in the Central Plant).

E. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and use certain utilities from the OPSO Central Plant located in the Kitchen Warehouse including, but not limited to, the HVAC system (including, but not limited to, power for the HVAC system, chilled

water and hot water from chiller condensers, compressors, expansion valves, pumps, heat exchangers, boilers, piping, power controls, control units, water boxes, water cooling towers, water, fuel supply systems, and heated hot water for heating purposes).

F. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and compatible for use with certain security electronics components, including, but not limited to, computer controls located at the central IT control unit.

G. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and compatible for use with certain of the OPSO computer systems, including, but not limited to, the BAS control system which will tie into the existing dedicated HVAC fiber cable located on the utility bridge.

H. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and compatible for use with a sanitary sewer system wherein the overall waste from the new Mental and Medical Health Services Facility will be routed to and pass through the existing grinder and materials removal system.

I. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and use the existing electric-driven fire pump located on the Phase II facility.

J. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to, integrated with, and compatible for use with the fire alarm command center in the IPC building. This will require that fiber be routed from the new command center in the Mental and Medical Health Services Facility to the 3rd floor IT room located in the IPC building via the existing conduit network located on the utility bridge.

K. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and compatible for use with the telecommunications systems which as currently designed will end at the 3rd floor IT room located in the Administration Building. The terminations inside the 3rd floor IT room will be made a part of the current design now that this Order has been entered.

L. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and compatible for use with the generator annunciation communication cables from the existing generator switch gear in the Kitchen Warehouse building. The existing generator switch gear will be routed to the new generator annunciators to be located in the new Mental and Medical Health Services Facility.

M. The new Mental and Medical Health Services Facility will be designed and constructed in such a manner that it will be connected to and use the existing utility bridge with two connections, one from the Central Plant and

Kitchen Warehouse and the second from the Phase II building.

N. The City and OPSO shall provide reasonable access to the other parties' personnel to discuss the design and construction of the Mental and Medical Health Services Facility.

O. The City will provide the laydown area necessary for the construction of the Mental and Medical Health Services Facility which laydown area will be located outside of the OPSO correctional facility site.

P. The funding for the new Mental and Medical Health Services Facility shall be provided by the City which shall be responsible for the costs and expenditures on the Project and Scope of Work under this Order, except for any costs or expenditures not included in the final Scope of Work produced by the architect as subject to City approval.

Q. The contract documents will contain provisions for safety, which include the use of POST certified law enforcement officer details as reasonably required.

R. The City is currently responsible for building the Phase III building, except for any costs or expenditures not included in the final Scope of Work produced by the architect as subject to City approval. The new Mental and Medical Health Services Facility will be powered by OPSO's previously built power plant.

Appendix D

ARTICLE II- OPSO'S OBLIGATIONS

A. Administration. OPSO will:

1. Work with the City, as required by the City or to complete the Project, in the preparation of the design drawings and specifications for the Project and the scope of work

2. Collaborate with the City, as required by the City or to complete the Project, on the construction of the Project.

3. Have the appropriate OPSO representatives present at all design, procurement, and construction meetings with the authority to provide direction as required.

4. Grant the City and its contractors, subcontractors, consultants, inspectors, or any others involved in design, construction, and/or administration/ management of the Project, access to sites reasonably required for design, construction, and/or administration/management of the Project provided there is compliance with all OPSO security rules, regulations, and protocols.

5. OPSO will provide reasonable access to the secure inmate housing correctional site which access is necessary to construct the new Mental and Medical Health Services Facility commonly known as Phase III.

6. OPSO will provide the City any documents or access to OPSO facilities needed for the City to comply with any funding requirements for this Project, including, without limitation, for reporting, insurance, and non-insurance compliance obligations.

7. Maintain and operate the Project after the date of completion.

8. Comply with all applicable governmental laws, rules, regulations, licensing, and other requirements.

9. Facilitate the pursuit of reimbursement from GOHSEP/FEMA for the cost expended by OPSO for the construction of the Central Plant. If OPSO needs assistance from the City, the City will provide such assistance as deemed reasonable. These costs are attributable to the use of the Central Plant by Phase III. The City will not be responsible for the Central Plant construction cost if OPSO does not receive reimbursement from GOHSEP/FEMA.

10. Provide the City with all reasonable documentation, information, and access to OPSO personnel reasonably required for the performance of the City's obligations under this Order.

11. Handle all warranty claims and warranty work necessary after final acceptance of the Project.

12. Make timely decisions on all matters requiring OPSO direction to not delay the Project.

13. OPSO acknowledges the City's separate ownership of any buildings or improvements constructed, built, or provided by the City associated with Phase III to the extent that any such improvements are or may be on OPSO property. OPSO will allow any such buildings or improvements to remain on OPSO property until the later of the City providing express, written permission to allow the removal of any buildings or improvements or the expiration or removal of any funding requirements for the buildings or improvements to remain.

ARTICLE III—CITY'S OBLIGATIONS

A. Administration. The City will:

1. Work jointly with the OPSO in obtaining and/or preparing the design drawings and specifications for the Project and the Scope of Work.

2. Administer this Order through the City of New Orleans' Capital Projects Administration department.

3. Provide all the appropriate funds that are to be invested in this Project and assume responsibility for the reporting, insurance, and non-insurance compliance obligations that the funds carry.

4. Collaborate with OPSO, as necessary, on the construction of the Project.

5. Promptly advertise bids for all construction work, procure consultant services, including design services,

and promptly award the construction contract. The selected contractor will be responsible to complete construction of the Project and the Scope of Work in a good, careful, proper, and workmanlike manner in accordance with industry standards.

6. Assume management, oversight authority, and responsibility with respect to its contractors, subcontractors, vendors/suppliers, and consultants with respect to the construction of the Project.

7. Have the right to perform any monitoring and inspection of construction carried out on OPSO property relating to the Project.

8. Comply with all applicable governmental laws, rules, regulations, licensing, and other requirements.

9. The City will be responsible for the costs incurred for the Phase III construction project, except for any costs or expenditures not included in the final Scope of Work produced by the architect as subject to City approval.

10. Have OPSO named as an additional insured on any and all Contractors' insurance policies and the policies shall be endorsed to provide a waiver of subrogation in favor of OPSO.

11. Acknowledge that OPSO does not have any obligation to perform any construction, repairs, improvements, or any other construction work on

the Phase III construction project or scope of work, except as otherwise provided in this Order.

12. Provide OPSO with all documentation, information, and access to personnel reasonably required for the performance of OPSO's obligations under this Order.

13. Provide OPSO with all warranty documentation and assign such warranties. In the event that the warranties are not assignable, then the City will work with OPSO to present and follow up on all warranty claims.

14. Test jointly with OPSO all new systems in Phase III, including but not by way of limitation, the elevator, intercom, BAS, video surveillance, locking system, etc., so that they work properly both independently and in connection with the OPSO systems.

15. After final acceptance of the construction project, deliver possession to the OPSO for its sole operation of the new facility.

16. Make timely decisions on all matters requiring City direction to not delay the project

17. The City specifically reserves its separate ownership of any buildings or improvements constructed, built, or provided by the City associated with Phase III to the extent that any such buildings or improvements are or may be on OPSO property. This reservation of separate ownership shall survive this

Order and continue for so long as any such buildings or improvements remain.

ARTICLE IV—NO FUNDING OR COMPENSATION

A. No Funding or Compensation. This Order imposes no obligations and grants no rights to receive any compensation or funding by one Party from the other Party.

ARTICLE V—INDEMNITY

A. City Indemnity:

1. To the fullest extent permitted by law, the City will indemnify, defend, and hold harmless the OPSO, and its and their officers, directors, officials, contractors, subcontractors, consultants, advisors, agents, employees, officials, volunteers, insurers, self-insurance funds, other representatives, and assigns (collectively, the "OPSO Indemnified Parties") from and against any and all claims, demands, suits, expenses, liability, and judgments of sums of money accruing against the OPSO Indemnified Parties: for loss of life or injury or damage to persons or property that may occur, arise out of, or in any way relate to: (i) the acts, omissions, or misconduct of the City, its agents or employees, under this Order; (ii) the breach by the City of any of its obligations under this Order; and (iii) City's operations within, on, and adjacent to property being used for the construction of the Project, under this Order.

2. Limitation. The City's indemnity does not extend to any loss arising from the gross negligence or willful misconduct of any of the OPSO Indemnified Parties, provided that neither the OPSO nor any of its agents or employees contributed to such gross negligence or willful misconduct.

3. Independent Duty. The City has an immediate and independent obligation to, at the OPSO's option: (a) defend the OPSO from or (b) reimburse the OPSO for its costs incurred in the defense of any claim that actually or potentially falls within this indemnity, even if: (1) the allegations are or may be groundless, false, or fraudulent; or (2) the City is ultimately absolved from liability.

B. OPSO Indemnity:

1. To the fullest extent permitted by law, the OPSO will indemnify, defend, and hold harmless the City and its and their officers, directors, officials, contractors, subcontractors, consultants, advisors, agents, employees, officials, volunteers, insurers, self-insurance funds, other representatives, and assigns (collectively, the "City Indemnified Parties") from and against any and all claims, demands, suits, expenses, liability, and judgments of sums of money accruing against the City Indemnified Parties: for loss of life or injury or damage to persons or property which may occur, arise out of, or in any way relate to: (i) the acts, omissions, or misconduct of OPSO, its agents or employees, under this Order; (ii) the breach

by OPSO of any of its obligations under this Order; and (iii) OPSO's operations within, on, and adjacent to property being used for the construction of the Project, under this Order.

2. Limitation. The OPSO's indemnity does not extend to any loss arising from the gross negligence or willful misconduct of any of the City Indemnified Parties, provided that neither the City nor any of its agents or employees contributed to such gross negligence or willful misconduct.

3. Independent Duty. The OPSO has an immediate and independent obligation to, at the City's option: (a) defend the City from or (b) reimburse the City for its costs incurred in the defense of any claim that actually or potentially falls within this indemnity, even if: (1) the allegations are or may be groundless, false, or fraudulent; or (2) the OPSO is ultimately absolved from liability.

4. Expenses. Notwithstanding any provision to the contrary, the OPSO shall bear the expenses including, but not limited to, the City's reasonable attorneys' fees, costs, and expenses, incurred by the City in enforcing this indemnity.

ARTICLE VI—INSURANCE

A. City Insurance:

1. The City is fully and adequately insured for the injury of its employees and any persons incurring

loss or injury as a result of the actions of the City or its employees, contractors, or subcontractors in the performance of its obligations under this Order. The OPSO, its elected and appointed officials, boards, commissions, agents, directors, employees, and volunteers shall be named as Additional Insureds and provided a Waiver of Subrogation in their favor on the City's Liability insurance program. A copy of the City's Certificate of Insurance evidencing these coverages shall be provided to the OPSO's Risk Manager within ten (10) days after signing this Order.

2. The preceding paragraph notwithstanding, the City's self-funded program(s) will be deemed satisfactory evidence of the coverages, limits, terms, and conditions required by this Order. A writing or attestation from the City regarding the self-insurance plan(s) shall meet the requirements of producing a Certificate of Insurance as provided in this Order.

B. City Contractor's Insurance. The City may require in any Project-related contracts for the City, that OPSO be provided with the same rights, benefits, and privileges as provided to the City by its contractors or subcontractors, including, without limitation, such rights, benefits, and privileges to: Additional Insured Status; Primary Coverage; Waiver of Subrogation; Notice of Cancellation; and Indemnification.

C. OPSO Insurance:

1. The OPSO is fully and adequately insured for the injury of its employees and any persons incurring

loss or injury as a result of the actions of the OPSO or its employees, contractors, or subcontractors in the performance of its obligations under this Order. The City, its elected and appointed officials, boards, commissions, agents, directors, employees, and volunteers shall be named as Additional Insureds and provided a Waiver of Subrogation in their favor on the OPSO's Liability insurance program. A copy of the OPSO's Certificate of Insurance evidencing these coverages shall be provided to the City's Risk Manager within ten (10) days after signing this Order.

2. The preceding paragraph notwithstanding, the OPSO's self-funded program(s) is deemed as satisfactory evidence of the coverages, limits, terms, and conditions required by this Order. A writing or attestation from the OPSO regarding the self-insurance plan(s) shall meet the requirements of producing a Certificate of Insurance as provided in this Order.

D. The OPSO may seek to obtain the required insurance coverages for FEMA Public Assistance funded projects in the event the City is unable to satisfy the requirements stated above.

ARTICLE VII—NATIONAL FLOOD INSURANCE REQUIREMENT

A. City must obtain and maintain Flood Insurance coverage when required for any structures for which FEMA Public Assistance funds are expended directly.

B. Any such structure must be covered by flood insurance to an amount at least equal to the project cost or to the maximum limit of coverage made available with respect to the particular structure, whichever is less.

C. Federal law requires that flood insurance coverage on the subject structure must be maintained during the life of the structure regardless of transfer of ownership.

ARTICLE VIII—PERFORMANCE MEASURES

A. Factors. The City and OPSO will measure the performance of both respective parties according to the following non-exhaustive factors: timely coordination and accessibility of site and staff to the Phase III substantial completion date as stated in the executed contractual construction contract; work performed in compliance with the terms of the Order; staff availability; staff training; staff professionalism; staff experience; customer Services; communication and accessibility; prompt and effective decisions, correction of situations and conditions; timeliness and completeness of submission of requested documentation (such as records, receipts, invoices, insurance certificates, and computer-generated reports).

B. Failure to Perform. If the City fails to perform according to the Order, then the OPSO will notify the City. If there is a continued lack of performance after notification, the OPSO may pursue any appropriate remedies available with the District Court.

C. Failure to Perform. If the OPSO fails to perform according to the Order, then the City will notify OPSO. If there is a continued lack of performance after notification, the City may pursue any appropriate remedies available with the District Court.

ARTICLE IX—NOTICE

A. In General. Except for any routine communication, any notice, demand, communication, or request required or permitted under this Order will be given in writing and delivered in person or by certified mail, return receipt requested, as follows:

1. To the City:

Vincent A. Smith, Director

Capital Projects Administration

City of New Orleans

1300 Perdido Street, Suite 6E15

New Orleans, LA 70112

&

Donesia Turner, City Attorney

City of New Orleans

1300 Perdido Street, Suite 5E03

New Orleans, LA 70112

2. To the OPSO:

Susan Hutson, Sheriff

Orleans Parish Sheriff's Office

Chief Executive Officer

Law Enforcement District of the

Parish of Orleans, State of Louisiana

2800 Perdido Street

New Orleans, LA 70119

B. Effectiveness. Notices are effective when received, except any notice that is not received due to the intended recipient's refusal or avoidance of delivery is deemed received as of the date of the first attempted delivery.

C. Notification of Change. Each party is responsible for notifying the other in writing that references this Order of any changes in its address(es) set forth above.

ARTICLE X—ADDITIONAL PROVISIONS

A. Exhibits. The following exhibit will be and is incorporated into this Order:

Exhibit A—Special Conditions for FEMA Compliance.

B. Ownership of Records. All data collected and all products of work prepared, created or modified by OPSO in

the performance of this Order, including without limitation any and all notes, tables, graphs, reports, files, computer programs, source code, documents, records, disks, original drawings or other such material, regardless of form and whether finished or unfinished, but excluding OPSO's personnel and administrative records and any tools, systems, and information used by OPSO to perform the Servicess under this Order, including computer software (object code and source code), know-how, methodologies, equipment, and processes and any related intellectual property (collectively, "Work Product") will be the exclusive property of the City and the City will have all right, title and interest in any Work Product, including without limitation the right to secure and maintain any copyright, trademark, or patent of Work Product in the City's name. No Work Product may be reproduced in any form without the City's express written consent.

C. Prohibition on Political Activity. None of the funds, materials, property, or Services provided directly or indirectly under the terms of this Order shall be used in the performance of this Order for any partisan political activity, or to further the election or defeat of any candidate for public office.

D. Special Conditions for FEMA Contracts. The "Special Conditions for FEMA Compliance," are attached as Exhibit "A" to this Order, are expressly incorporated in the Order and will be effective, notwithstanding any provision of the Order or any incorporated documents, to the contrary.

New Orleans, Louisiana, this ___ day of _____ 2023.

_____
LANCE M. AFRICK
UNITED STATES DISTRICT
JUDGE

Appendix D

EXHIBIT "A"
ATTACHMENT: FEDERAL CONTRACT CLAUSES SPECIAL CONDITIONS FOR FEMA COMPLIANCE

Since the parties anticipate that federal funding will be applied to this Agreement, the following federal contract clauses must be complied with, where applicable, in addition to the clauses already mentioned.

EQUAL EMPLOYMENT OPPORTUNITY

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to

section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, that if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and

that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

COMPLIANCE WITH THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics

shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of $27 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) *Withholding for unpaid wages and liquidated damages.* The City of New Orleans shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract

or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

CLEAN AIR ACT

(1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C.§ 7401 *et seq.*

(2) The Contractor agrees to report each violation to the GOHSEP and understands and agrees that the GOHSEP will, in turn, report each violation as required to assure notification to FEMA, and the appropriate Environmental Protection Agency Regional Office.

(3) The Contractor agrees to include these requirements in each subcontract exceeding $150,000 financed in whole or in part with Federal assistance provided by FEMA.

Appendix D

ENERGY POLICY AND CONSERVATION ACT

The Contractor hereby recognizes the mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).

CLEAN WATER ACT

The Contractor hereby agrees to adhere to the provisions which require compliance with all applicable standards, orders, or requirements issued under Section 508 of the Clean Water Act which prohibits the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities.

FEDERAL WATER POLLUTION CONTROL ACT

(1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 7401 *et seq.*

(2) The Contractor agrees to report each violation to the GOHSEP and understands and agrees that the GOHSEP will, in turn, report each violation as required to assure notification to the FEMA, and the appropriate Environmental Protection Agency Regional Office.

(3) The Contractor agrees to include these requirements in each subcontract exceeding $150,000 financed in whole or in part with Federal assistance provided by FEMA.

Appendix D

SUSPENSION AND DEBARMENT

(1) This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such, the contractor is required to verify that none of the contractor's principals (defined at 2 C.F.R. § 180.995) or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).

(2) The contractor must comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.

(3) This certification is a material representation of fact relied upon by the City of New Orleans. If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to the City of New Orleans, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

(4) The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

Appendix D

BYRD ANTI-LOBBYING ACT

The Contractor will be expected to comply with Federal statutes required in the Anti-Lobbying Act.

Contractors who apply or bid for an award shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any Agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

PROCUREMENT OF RECOVERED MATERIALS

In the performance of this Contract, the Contractor shall make maximum use of products containing recovered materials that are EPA-designated items unless the product cannot be acquired—

i. Competitively within a timeframe providing for compliance with the Contract performance schedule;

ii. Meeting Contract performance requirements; or

iii. At a reasonable price.

Information about this requirement, along with the list of EPA-designate items, is available at EPA's Comprehensive Procurement Guidelines web site, https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program.

CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN'S BUSINESS ENTERPRISES, AND LABOR SURPLUS AREA FIRMS.

(a) Any party to this contract must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. These steps are required for the hiring of any subcontractors under this contract.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation

by small and minority businesses, and women's business enterprises; and

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.

PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT.

Any procurement of telecommunications and video surveillance services or equipment must comply with the provisions of 2. C.F.R. §200.216.

DOMESTIC PREFERENCES FOR PROCUREMENTS.

As appropriate and to the extent consistent with law, the parties should, to the greatest extent practicable, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

ACCESS TO RECORDS

The following access to records requirements apply to this contract:

(1) The Contractor agrees to provide the State of Louisiana, the City of New Orleans, the FEMA Administrator, the Comptroller General of the United States, or any of their authorized representatives access to any books, documents, papers, and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts, and transcriptions.

(2) The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

(3) The Contractor agrees to provide the FEMA Administrator or his authorized representatives access to construction or other work sites pertaining to the work being completed under the contract.

(4) In compliance with the Disaster Recovery Act of 2018, the City of New Orleans and the Contractor acknowledge and agree that no language in this contract is intended to prohibit audits or internal reviews by the FEMA Administrator or the Comptroller General of the United States.

DHS SEAL, LOGO, AND FLAGS

The contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre-approval.

Appendix D

COMPLIANCE WITH FEDERAL EXECUTIVE ORDERS

This is an acknowledgement that FEMA financial assistance will be used to fund the Contract only. The Contractor will comply will all applicable federal law, regulations, executive orders, FEMA policies, procedures, and directives.

NO OBLIGATION BY THE FEDERAL GOVERNMENT

The Federal Government is not a party to this Contract and is not subject to any obligations or liabilities to the non-Federal entity, Contractor, or any other party pertaining to any matter resulting from the Contract.

PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS OR RELATED ACTS

The Contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to the Contractor's actions pertaining to this contract.