No. 24-1022

IN THE

Supreme Court of the United States

SUSAN HUTSON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit appropriately applied established law to dismiss the appeal below for lack of jurisdiction, where the Orleans Parish Sheriff improperly sought out-of-time review of long-settled orders of the District Court regarding the provision of constitutional mental health care to pretrial detainees?

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INTRODUCTION

In April 2012, Respondents, a plaintiff class of those imprisoned in the Orleans jail, filed suit against the Sheriff challenging the unconstitutional conditions in the facility.[1] The United States joined the class as intervenor-plaintiff.[2] In June 2013, the District Court entered a consent judgment, settling the action between the Sheriff and the Plaintiffs.[3]

Prior to entry of this consent judgment, the Plaintiffs raised concerns that the proposed design for a new Orleans jail[4] could not safely house people with mental illness; would not contain space for provision of mental health or medical services; and could not provide adequate protection for suicidal persons.[5] These serious structural deficiencies were confirmed by the District Court's independent monitoring team.[6]

Briefing, hearings, and meetings of a working group of Sheriff and City[7] appointees followed. The goal: a long-term plan for safe housing of detainees with mental health needs and the Sheriff's compliance with the consent judgment's medical and mental health provisions.[8]

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[1] ROA.174-528.

[2] ROA.1252.

[3] ROA.4783-886. "Plaintiffs" will refer to the United States and Plaintiff Class, jointly.

[4] This facility, referred to as the Orleans Justice Center (OJC) or Phase II, was completed and occupied in September 2015.

[5] ROA.4608-19.

[6] *See, e.g.*, ROA.10193; ROA.10195.

[7] The Sheriff brought the City of New Orleans into the action as a third-party defendant, alleging the City had failed to provide adequate funding for a constitutional jail. ROA.1366-69.

[8] ROA.6276-77; ROA.7037-38; ROA.7200-01; ROA.8156.

In September 2014, the working group unanimously recommended the Sheriff's proposal: construction of a mental health annex, known as Phase III, to provide housing and program space for medical and mental health services at the Orleans jail.[9]

Now, with construction of Phase III over 68 percent complete,[10] the Sheriff asks this Court to take up a question completely divorced from the proceedings below, while the long-awaited provision of adequate mental health services to pretrial detainees hangs in the balance. The circuit court properly dismissed the Sheriff's appeal for lack of jurisdiction,[11] and twice denied her requests for stay.[12] This Court should deny certiorari.

[Phase III as of July 4, 2025][13]

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[9] ROA.8159; ROA.7542-729. The procedural history from 2014 to present will be discussed in the Statement of the Case, below.

[10] City of New Orleans – Project Status Report at 1, *Jones et al v. Gusman et al*, No. 12-859 (E.D. La. July 16, 2025), ECF No. 1755-1.

[11] Pet. App. B at 44a.

[12] *Anderson v. Hutson*, No. 23-30633 (5th Cir. Sept. 20, 2023) (order denying motion to stay); *Anderson v. Hutson*, No. 23-30633 (5th Cir. Dec. 3, 2023) (order denying renewed motion to stay).

[13] City of New Orleans – Project Status Report at 3, *Jones et al v. Gusman et al*, No. 12-859 (E.D. La. July 16, 2025), ECF No. 1755-1.

STATEMENT OF THE CASE

After years of Petitioner's failure to comply with the provisions of the consent judgment, the Plaintiffs moved to hold the Sheriff in contempt and to place the Orleans jail into receivership.[14]

In June 2016, the Sheriff, together with the other parties to this litigation in the District Court, negotiated and signed onto the Stipulated Order for Appointment of Independent Jail Compliance Director, resolving the Plaintiffs' motion.[15] By this Order, the Sheriff, in coordination with the Compliance Director and the City of New Orleans, would "develop and finalize a plan" for "appropriate housing" to address unconstitutional conditions and ongoing harm to detainees in the Orleans jail with medical and mental health needs.[16] In furtherance of this Order, the Supplemental Compliance Action Plan was filed in January 2017, providing for the construction of a Phase III annex to exclusively provide housing and care for detainees with medical and mental health needs.[17] The plan was signed by the Sheriff,[18] and over the next several years, the Sheriff took steps to implement this Plan and repeatedly reaffirmed commitment to completion of the facility.[19]

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[14] ROA.10658-718.

[15] ROA.11303-23. *See, e.g.*, ROA 10329-32.

[16] ROA.11316-17.

[17] ROA.11678-93.

[18] ROA.11690.

[19] *See, e.g.*, Brief of Defendant/Third-Party Plaintiff-Appellee Sheriff, *Anderson v. City of New Orleans*, 38 F.4th 472 (5th Cir. July 23, 2021) (No. 21-20072). As detailed below, the Sheriff actively opposed the City's failed efforts to challenge Phase III.

By January 2019, the state corrections facility used temporarily to hold Orleans detainees with acute mental health needs gave notice that it would soon be unavailable.[20] In response, the District Court "emphasized the importance of a permanent solution designed to provide constitutionally mandated mental health treatment for all OJC prisoners."[21] The City was to "direct the architect chosen to design the permanent facility described in the Supplemental Compliance Action Plan . . . to begin the programming phase of the Phase III facility as soon as possible . . . ."[22] In March 2019, the District Court further directed the parties to continue programming of the permanent mental health annex, working collaboratively on the design.[23] Over the next year, plans for Phase III progressed with the active participation of all parties, including the Sheriff.

Then, in June 2020, the City unilaterally stopped work on Phase III,[24] and moved the District Court to "indefinitely suspend[] the programming, design, and construction" of the mental health facility.[25] After extensive briefing, and a multi-day evidentiary hearing in which the Sheriff, the United States, and the Plaintiff Class all opposed the City's motion, the

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[20] ROA.13040-41; ROA.13074.

[21] ROA.13074.

[22] ROA.13075.

[23] ROA.13225-26. At this time, the District Court also made continued findings consistent with 18 U.S.C. § 3626(a)(1)(A) as to the need, narrowness, and least-intrusiveness of this relief to correct ongoing constitutional violations.

[24] ROA.14834.

[25] ROA.14104.

District Court denied the City's request to "do nothing indefinitely" to provide constitutional care.[26]

The City sought review in the Fifth Circuit Court of Appeals, but its stay request was summarily rejected, the ruling of the District Court was affirmed, and the City's petition for rehearing was denied without any poll requested.[27] In its panel opinion, the Fifth Circuit held it did not have jurisdiction to review "the substance of the January and March 2019 orders from which the city's motion seeks relief,"[28] and otherwise confirmed no changed conditions warranted relief under Rule 60(b).

Since the Fifth Circuit's 2022 ruling, the City has moved forward with construction of the Phase III annex, filing monthly status reports with the District Court and hosting monthly executive group meetings regarding the facility, attended by the Sheriff's counsel and members of her Office's staff.

Over a year after taking office as the Orleans Sheriff, in late June 2023, Hutson moved "to terminate all prospective relief regarding the construction of the Phase III jail pursuant to 18 U.S.C. § 3626(b)."[29] Despite this lip service paid to "prospective relief," the Sheriff's ask explicitly relied on a novel argument: that construction of the Phase III annex arose from private settlement agreement(s), as defined by the Prison

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[26] ROA.16633-37; ROA.16473-543.

[27] *See* docket in *Anderson v. City of New Orleans*, 38 F.4th 472, 478 (5th Cir. 2022) (No. 21-30073).

[28] *Anderson v. City of New Orleans*, 38 F.4th 472, 478 (5th Cir. 2022).

[29] ROA.19050. Hutson was automatically substituted as a party under Federal Rule of Civil Procedure 25(d), replacing Sheriff Gusman.

Litigation Reform Act (PLRA).[30] This distinction was not a coincidence: the Sheriff desperately sought to set her motion apart from the City's unsuccessful attempt to derail the completion of this mental health annex from years earlier.[31] In opposition, the Plaintiffs called out the motion as just the latest iteration of yet another "ask to do nothing, indefinitely," to provide constitutional mental health care to the people detained in the Orleans jail.[32]

The Report and Recommendation to deny the Sheriff's motion reflected this position of the Plaintiff Class and the United States:

> Thousands of pages and hundreds of hours have been expended by many trying to solve the problem of constitutional care for inmates

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[30] ROA.19061-67. "[T]he term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees *but does not include* private settlement agreements." § 3626(g)(9) (emphasis added). "[T]he term 'prospective relief' means all relief other than compensatory monetary damages." § 3626(g)(7).

[31] ROA.19269. The Sheriff claimed that "[t]he City's 60(b) Motion sought entirely different relief – the modification of the Consent Judgment due to a significant change in circumstances. Here, Sheriff Hutson's very different Motion is expressly authorized by PLRA § 3626(b)(1)(A) – a Motion to Terminate all prospective relief regarding construction of the Phase III jail. Specifically, this Court may not enforce the parties' private settlement agreement, which is an issue that has never been litigated." *Id*.

[32] ROA.19226-37; ROA.19238-61. *See also* ROA.19072 (letter from the New Orleans City Council recognizing "the supremacy of the United States Constitution over City laws" and the "legally binding final judgments of the magistrate, district, and appellate courts regarding Phase III," ROA.26700 (remarks of the City's counsel).

> with medical or mental-health issues in the custody of Orleans Parish. . . . 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.[33]

Further, the Magistrate Judge found the law of the case barred Petitioner's argument that the District Court's 2019 orders regarding the Phase III annex are in any way prohibited by the PLRA;[34] that the 2016 Stipulated Order and its Supplemental Compliance Action Plan are not "private settlement agreements," as that term is defined under the PLRA;[35] and that Hutson, in her official capacity as Orleans Parish Sheriff, is bound by the actions and arguments of prior officeholders by simple application of Federal Rule of Civil Procedure 25(d).[36] Over Sheriff Hutson's objections, none of which broached the question presented here,[37] the District Court adopted the recommendation to deny the motion.[38]

Petitioner noticed her appeal,[39] and moved the District Court to stay "all orders" regarding Phase III.[40] Adopting the Report and Recommendation to

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[33] ROA.19306.

[34] ROA.19308-11.

[35] ROA.19311-18.

[36] ROA.19318-21.

[37] ROA.19353-54.

[38] ROA.19500-21.

[39] ROA.1652.

[40] ROA.19522.

deny the stay motion[41] over objections,[42] the District Court concluded Petitioner had neither shown that a "serious legal question" was involved in her appeal, nor that the balance of the equities weighed heavily in favor of granting the stay.[43] On two additional applications to the Fifth Circuit for stays pending appeal, the appellate court agreed, twice denying Petitioner's request.[44]

Hutson's appeal offered four convoluted issues for the Fifth Circuit's review: whether the District Court erred in (1) its application of the law of the case doctrine; (2) determining its "earlier orders" regarding Phase III "did not enforce" private settlement agreements, in violation of the PLRA; (3) ordering construction of Phase III "when the District Court previously held that it was enforcing the parties' private agreement;" and (4) holding that Hutson was bound by the actions and arguments of the Orleans Parish Sheriff during the consent judgment litigation.[45]

In opposition, the United States and the Plaintiff Class each argued the appellate court lacked jurisdiction to review the substance of the 2019 orders; the Sheriff's Office was judicially estopped by its position in the City's prior appeal from arguing that the 2019 orders violate the PLRA; the District Court had not

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[41] ROA.18623-33.

[42] ROA.28634-35.

[43] ROA.28643-45.

[44] Order denying motion to stay, *Anderson v. Hutson*, No. 23-30633 (5th Cir. Sept. 20, 2023); Order denying renewed motion to stay, *Anderson v. Hutson*, No. 23-30633 (5th Cir. Dec. 23, 2023).

[45] Appellant's Brief of Sheriff Susan Hutson at 3-4, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Nov. 27, 2023) (No. 23-30633).

impermissibly enforced a private settlement agreement; and Hutson was bound by consent orders entered into by her predecessor.[46]

Considering these arguments, the Fifth Circuit dismissed Hutson's appeal, applying the law of the case from *Anderson v. City of New Orleans* that the appellate court lacked jurisdiction to review the substance of the 2019 Orders which had never been appealed.[47] Further, the panel majority held 28 U.S.C. § 1292(a)(1) did not confer appellate jurisdiction where the Orders merely implemented the consent judgment without changing "the command of the injunction."[48] Hutson's plea for en banc review was denied by a vote of 11 to 6.[49]

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[46] Brief for United States as Appellee, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Jan. 26, 2024) (No. 23-30633); Brief of Plaintiffs-Appellees, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Feb. 2, 2024) (No. 23-30633). Similarly, the United States also argued that a motion to terminate under the PLRA was an improper vehicle for challenging the 2019 orders.

[47] Pet. App. B at 54a-56a.

[48] *Id*. at 51a-54a.

[49] Per Curiam on Petition for Rehearing En Banc, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Jan. 28, 2025) (No. 23-30633).

REASONS FOR DENYING THE PETITION

I. Petitioner's question presented was neither pressed nor passed upon in the courts below.

"This court sits as a court of review. It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) (ordinarily, this Court "does not decide questions not raised or resolved in the lower court"); *United States v. Williams*, 504 U.S. 36, 41 (1992). Whether this rule "is jurisdictional . . . or prudential," *Illinois v. Gates*, 462 U.S. 213, 222 (1983), consideration of the question Petitioner presents "would be contrary to the sound justifications" for the rule, *id*., including "the benefit of developed arguments and lower court opinions squarely addressing the question." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 521 (1992).

Petitioner Hutson did not advance any arguments below based on the burden(s) carried by a party moving to terminate prospective relief under 18 U.S.C. § 3626(b)(1)(A). As a result, neither the District Court's Order and Reasons, nor the majority opinion of the Fifth Circuit, address the topic.

In moving the District Court to "terminate all prospective relief regarding the construction of the Phase III jail,"[50] Petitioner mentioned § 3626(b)(1)(A) exactly once, in an opening footnote generally quoting from the termination provisions of the PLRA. Hutson did not advance any argument regarding the obligations to be borne by either the moving or non-

[50] ROA.19050.

moving party in seeking such PLRA termination.[51] And in objecting to the Report and Recommendation to deny the motion, Petitioner did not allege any error in the Magistrate's application of § 3626(b)(1)(A) for the District Court's review.[52] Thus, in its Order and Reasons adopting the recommendation to deny Petitioner's motion, the District Court did not refer to this PLRA provision, nor to any allocation of burden on motions to terminate.[53]

Hutson noticed appeal of the Order and Reasons.[54] As required by Rule 28(a)(5) of the Federal Rules of Appellate Procedure, Petitioner's original brief to the Fifth Circuit Court of Appeals included "a statement of the issues presented for review." Hutson provided four discrete topics, but none related to § 3626(b)(1)(A) or questioned the District Court's application of the PLRA's termination provisions.[55] Rather, Hutson pitched the appeal as a matter of first impression for the appellate court: "whether a federal court may circumvent the PLRA's limitations simply by labelling its jail construction order neither a 'consent decree' nor a 'private settlement' agreement,'"[56] an inquiry wholly

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[51] No reference to "burden" is found with a simple word search. *See* ROA.19050; ROA.19054-19070; ROA.19267-19271.

[52] ROA.19353-54. The Report and Recommendation predictably contained no mention of § 3626(b)(1)(A). ROA.19304-33. Additionally, Hutson was granted leave to reply in support of her objections, but this filing also did not contain any reference to or allegations of error in application of § 3626(b)(1)(A). ROA.19491-99.

[53] ROA.19500-21.

[54] ROA.19536.

[55] Appellant's Brief of Sheriff Susan Hutson at 3-4, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Nov. 27, 2023) (No. 23-30633).

[56] *Id*.

removed from the question she now presents to this Court. Hutson's 49-page appellant's brief mentioned § 3626(b)(1)(A) once: in the jurisdictional statement, and for the general proposition that denials of motions to terminate are appealable. Again, neither this original brief nor Hutson's reply in the Fifth Circuit speaks to "burden" or its allocation in moving to terminate prospective relief under the PLRA.

In dismissing the appeal for lack of jurisdiction, the Fifth Circuit majority did not pass upon the question Petitioner presents for this Court's review. Rather, the panel opinion confirmed that "a district court's denial of a *proper* motion to terminate relief under Section 3626(b)(1)(A) is subject to appeal."[57] It was only in dissent – for the first time since Hutson moved for relief in the District Court – that any discussion of "burden allocation" was broached.[58] While Hutson briefly referenced this point in her petition for re-hearing en banc,[59] it was not advanced as an issue for the full court to address.[60] The appellate court declined to hear the petition by a vote of 11 to 6.[61]

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[57] Pet. App. B at 59a (emphasis in original).

[58] Pet. App. B at 72a-74a.

[59] Petition for Rehearing En Banc by Defendant/Third-Party Plaintiff-Appellant Sheriff Susan Hutson, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Sept. 9, 2024) (No. 23-30633).

[60] As discussed at Sec. III. A. below, Hutson's petition for rehearing en banc sought review on completely different grounds than advanced here: purported discrepancies in decisions of the Fifth Circuit regarding jurisdiction over appeals involving motions to terminate prospective relief under the PLRA.

[61] Per Curiam on Petition for Rehearing En Banc, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Jan. 28, 2025) (No. 23-30633).

Where, as here, a petitioner did not press the question presented below, and neither the district court nor the appellate court passed upon it, this Court should deny certiorari.

II. The decision below is correct and aligns with this Court's precedent.

A. The Fifth Circuit properly dismissed the appeal for lack of jurisdiction.

"[The] [p]laintiff[] class and the United States chiefly argue that this court lacks jurisdiction to hear the appeal. We agree and DISMISS for lack of jurisdiction."[62] So begins the Fifth Circuit's decision below. Despite Petitioner's attempt to convert this dismissal into one on the merits, the appellate court clearly and correctly disposed of the case on established jurisdictional grounds.

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[62] Pet. App. B at 44a. *See also* Brief for United States as Appellee at 10, 13-16, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Jan. 26, 2024) (No. 23-30633) ("As this Court *already* had held in connection with the City's appeal of its Rule 60(b) motion, the Court lacks jurisdiction to review the argument that the 2019 Orders violate the PLRA because these orders were not appealed.") (emphasis in original), and Brief of Plaintiffs-Appellees, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Feb. 2, 2024) (No. 23-30633) ("Where the Sheriff's motion, and this appeal of its denial, is centered on the propriety of the District Court's enforcement of what the Sheriff now purports to be a private settlement agreement . . . , neither 18 U.S.C. § 3626(b)(1)(A) nor 28 U.S.C. § 1292(a)(1) can provide for this Court's jurisdiction to reach the merits of this particular appeal. Further, this Court previously held that it did not have jurisdiction to review the 2019 orders issued by the District Court . . . .").

The Sheriff offered "two primary bases" for appellate jurisdiction.[63]

First, the Fifth Circuit looked to 28 U.S.C. § 1292(a)(1), which confers appellate jurisdiction from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Following this Court's caution that the statute be "approach[ed]" "somewhat gingerly lest a floodgate be opened"[64] that "permits immediate appeal over too many nonfinal orders,"[65] the panel majority recognized that a court's implementation or interpretation of an existing injunction should not be equated with modification.[66] Here, the Fifth Circuit found the Sheriff "has not shown that the district court refused to modify or dissolve an injunction. Rather, the court's [2019] orders simply implement the consent decree without changing the command of the injunction."[67]

Further, the appellate court relied on this Court's pronouncement in *Gardner v. Westinghouse Broad*

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[63] Pet. App. B at 49a. The Fifth Circuit summarily rejected another basis – 28 U.S.C. § 1331 – as this provision speaks only to the original jurisdiction of the district courts, not appellate authority. *Id*. *See also* Appellant's Brief of Sheriff Susan Hutson at 2, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Nov. 27, 2023) (No. 23-30633).

[64] Pet. App. B at 51a, quoting *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966).

[65] Pet. App. B at 51a, quoting *In re Deepwater Horizon*, 793 F.3d 479, 491 (5th Cir. 2015).

[66] Pet. App. B. at 51a.

[67] Pet App. B. at 52a-53a, quoting *In re Deepwater Horizon*, 793 F.3d at 491 (internal quotations omitted). "Accordingly, the court's orders were an interpretation of the stipulated relief." *Id*. at 53a.

Co., 437 U.S. 478, 480 (1978): "[t]he exception [under § 1292(a)(1)] is a narrow one and is keyed to the need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence."[68] The panel held that while the Sheriff had "not pointed to any" such consequences,[69] "there *are* well-documented risks of inadequate housing and care for detainees" at the Orleans jail.[70]

Second, the appellate court properly applied the law of the case doctrine, finding itself bound by the Fifth Circuit's prior ruling in *Anderson v. City of New Orleans* 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 the court "lacked jurisdiction over the substance of the . . . 2019 orders."[71] The panel reasoned that the Sheriff was now making "the same argument but with a different procedural mechanism: motions to terminate and stay all orders regarding the construction of Phase III."[72] But "[j]ust as a Rule 60(b) motion may not be used as a substitute for a timely appeal from the judgment or order from which the motion seeks relief,"

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[68] *See* Pet. App. B. at 51a-52a.

[69] *Id*. at 53a.

[70] *Id*. (emphasis in original), relying on reporting of the District Court's independent monitors, as well as the Fifth Circuit's prior ruling in *Anderson v. City of New Orleans*, 38 F.4th 472, 475 (5th Cir. 2022) (recognizing the jail was still "not adequate for detainees with mental-health needs or who were suicidal").

[71] Pet. App. B at 54a-55a, quoting *Anderson v. City of New Orleans*, 38 F.4th at 478-79 (internal quotations omitted).

[72] *Id*. at 55a. The Court found the "substance" of Petitioner's "motion to terminate" "identical" to the City's Rule 60 filing, namely whether the PLRA prohibits the 2016 Stipulated Order and the 2019 Orders. *Id*. at 56a.

so "a purported motion to terminate under the PLRA cannot be used as an end run to effect an appeal outside the specified time limits."[73]

Thus, despite the Sheriff's second suggested basis for appellate jurisdiction, i.e. the district court's denial of a motion to terminate, the panel majority correctly held "[t]he decision in *Anderson I* applies here by necessary implication as both cases concern the well-settled principles of post-judgment proceedings."[74] "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."[75]

B. Petitioner advances no arguments to the contrary.

Other than a section heading stating "the decision below is wrong,"[76] Petitioner's application does not address the Fifth Circuit's rationales for dismissing the appeal for lack of jurisdiction. There is no assessment of whether § 1292(a)(1) could have conferred appellate jurisdiction in this matter, no mention of the law of the case doctrine, and no discussion of *Anderson v. City of New Orleans* (save for one citation in summary of the procedural background).

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[73] *Id*., quoting *Anderson v. City of New Orleans*, 38 F.4th at 478 (internal quotations omitted).

[74] *Id*. (internal quotations omitted).

[75] *Id*., citing *Funk v. Stryker Corp*., 631 F.3d 777, 781 (5th Cir. 2011) (internal quotations omitted).

[76] Petition for Writ of Certiorari at 25.

Further, as argued by the United States and the Plaintiff Class below,[77] Petitioner should be judicially estopped[78] from taking positions directly contrary to ones previously taken and prevailed on by the Orleans Parish Sheriff in this same litigation: (1) that "the construction of the Phase III facility is the only viable long-term solution to care for the medical and mental health needs of the inmates,"[79] and (2) "neither of the [District] Court's [2019] orders violate any provisions of the PLRA."[80] As here, "[w]hen a district court is called upon to manage litigation involving a political entity [like the Sheriff], it must be able to take that entity, acting through legally designated representatives, at its word."[81]

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[77] *See* Statement of the Case and n.45, above.

[78] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (""[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271-72 (5th Cir. 2015).

[79] Opposition of Defendant/Third-Party Plaintiff Appellee Orleans Sheriff to Appellant City of New Orleans' Motion to Stay at 8-9, *Anderson v. City of New Orleans*, 38 F.4th 472 (5th Cir. Oct. 13, 2021) (No. 21-20072).

[80] ROA.16394-95, adopting ROA.16351-61.

[81] ROA.16476.

III. The ruling below is not in conflict with decisions of United States courts of appeals.

A. The Fifth Circuit denied en banc review of the panel decision.

Petitioner asks this Court to burden its docket due to a purported "split within the Fifth Circuit itself."[82] But the court of appeals had a readily-available means of rectifying any incongruity in its panels' opinions, yet found such action unnecessary, handily denying Petitioner's request for en banc review by a vote of 11 to 6.[83]

Tellingly, in seeking en banc review, Petitioner did not even advance the same alleged incompatibility of Fifth Circuit opinions she shops now. To the en banc appellate court, she suggested a need to "secure uniformity with . . . prior decisions concerning jurisdiction over appeals involving motions to terminate prospective relief under the PLRA," citing *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), and *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174 (5th Cir. 1989).[84] But now,

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[82] Petitioner for Writ of Certiorari at 23-25.

[83] App. A. at 2a, denying rehearing.

[84] *See* Petition for Rehearing En Banc by Defendant/Third-Party Plaintiff-Appellant Sheriff Susan Hutson at iii, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Sept. 9, 2024) (No. 23-30633). *See also* Fed. R. App. P. 40(b)(2)(A), providing that a party, in petitioning for rehearing en banc, may assert that "the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions." Of note, in seeking rehearing from the Fifth Circuit, Petitioner did not assert that the panel opinion "conflicts with an authoritative decision of

abandoning that argument entirely, she pushes a new one: the panel's opinion was incompatible with *Guajardo v. Texas Dept. of Criminal Justice*, 363 F.3d 392 (5th Cir. 2004), a case Petitioner did not cite in requesting rehearing by the full court below.[85]

Furthermore, Fed. R. App. P. 40(c) provides Federal courts of appeal a mechanism to order rehearing en banc "[o]n their own," i.e. even without a party's petition, by vote of "a majority of the circuit judges who are in regular active service and who are not disqualified." Surely our circuit courts are best positioned to identify any panel opinions that may be in conflict with their own prior decisions, and utilize the en banc review process to rectify such untenable breaks in jurisprudence. The Fifth Circuit saw no need to do so here.

B. The Ninth Circuit's application of the termination provisions of the PLRA is proper and has never required this Court's intervention.

Petitioner incorrectly asserts that the Ninth Circuit's applications of the PLRA's termination provisions conflict with the Fifth Circuit's approach in *Guajardo*.[86] But since the PLRA's passage, the Ninth Circuit has regularly and routinely applied these provisions without any need for correction by this

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another United States court of appeals," pursuant to Fed. R. App. P. 40(b)(2)(C), which is recognized as another basis for en banc review. This weakens any assertions on petition for writ of certiorari of a circuit split to be remedied.

[85] *See* Petition for Rehearing En Banc by Defendant/Third-Party Plaintiff-Appellant Sheriff Susan Hutson at viii-vix, *Anderson v. Hutson*, 114 F.4th 408 (5th Cir. Sept. 9, 2024) (No. 23-30633).

[86] Petition for Writ of Certiorari at 15-18.

Court. *See, e.g.*, *Gilmore v. People of the State of California*, 220 F.3d 987 (9th Cir. 2000), *Graves v. Arpaio*, 623 F.3d 1043 (9th Cir. 2010), *Hedrick v. Grant*, 648 Fed.Appx. 715 (9th Cir. 2016), and *Balla v. Idaho*, 29 F.4th 1019 (9th Cir. 2022).

Pursuant to § 3626(b)(1), two years after the date a court grants or approves prospective relief, any party may move to terminate said relief. However, this timeline is a necessary but insufficient condition, inseparable from the "limitation" imposed by § 3626(b)(3):

> [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 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.[87]

In *Gilmore*, the Ninth Circuit upheld the constitutionality of the PLRA's termination provisions, and, in keeping with the plain statutory language, directed that its district courts "cannot terminate or refuse to grant prospective relief necessary to correct a current and ongoing violation, so long as the relief is tailored to the constitutional minimum."[88]

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[87] In this matter, the District Court has repeatedly made findings of ongoing constitutional violations and the need, narrowness, and least-intrusiveness of the relief with regard to the provision of constitutional mental health care to Orleans Parish detainees and Phase III. *See* ROA.11318 (2016 Stipulated Order), ROA.13226 (March 2019 Order), and ROA.19516-19 (September 2023 Order & Reasons).

[88] 220 F.3d 987, 1008 (9th Cir. 2000).

Subsequently, in *Graves*, the appellate court found an Arizona district court had provided the defendant sheriff an adequate opportunity to "propose a plan for correcting the ongoing Eighth Amendment violations" in his county jails, and "[t]he prospective relief ordered . . . did not go beyond what was necessary to correct those violations."[89] In reaching this conclusion, the Ninth Circuit applied *Gilmore*, instructing that for a party to prevail on a motion to terminate prospective relief, the movant must "demonstrate that there are no ongoing constitutional violations, that the relief ordered exceeds what is necessary to correct an ongoing constitutional violation, or both."[90] Further, the *Graves* court found this application of the termination provisions congruous with this Court's pre-PLRA reasoning in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992): "a party seeking modification of a consent decree bears the burden of establishing that significant change in circumstances warrants revision of the decree."

And while unpublished, the articulation of the PLRA's termination scheme by the *Hedrick* court merely underscores that the passage of two years is insufficient, standing alone, to entitle a moving party to termination under § 3626(b): "Although Defendants are correct that (b)(1) allowed them to move for termination because enough time had passed, they are wrong that termination should have followed automatically."[91]

Finally, though Petitioner implies that the Ninth Circuit's application of the PLRA's termination prov-

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[89] 623 F.3d 1043, 1051 (9th Cir. 2010).

[90] *Id*. at 1048.

[91] 648 Fed.Appx. 715, 716 (2016).

isions places undue and insurmountable obligations on the moving party, the *Balla* ruling debunks this suggestion. In *Balla*, 29 F.4th at 1023, the Court's application upheld the district court's grant of the defendants' motion to terminate prospective relief, where the parties had engaged in discovery on the motion, the court held an eleven-day hearing on the motion, and the court "ultimately found no current and ongoing constitutional violations in conditions of confinement" at the facility.

Given their alignment with the text of the PLRA's termination provisions, no petition for writ of certiorari was ever sought from this series of Ninth Circuit cases. But the application of these provisions in *Gilmore* has been discussed by at least one Justice of this Court without concern or disagreement. In *Brown v. Plata*, 563 U.S. 493 (2011), dissenting from this Court's decision upholding a three-judge district court's remedial order to reduce the California prison population, Justice Alito recognized that the Ninth Circuit requires the moving party to show the absence of an ongoing violation when seeking to terminate prospective relief, citing *Gilmore*.[92] In so doing, the Justice also noted that "evidence" "that all violations had ceased" is "the showing needed to obtain the termination of relief under § 3626(b)."[93]

IV. This issue is not important enough to warrant this Court's review, and at any rate is a poor vehicle.

This case is not worth an extension of this Court's limited resources.

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[92] 563 U.S. at 568 (Alito, J., dissenting).

[93] *Id*. at 569.

First, the petition does not present any constitutional question for review. And Federal district courts have been regularly applying the PLRA's termination provisions since the law's passage without concern raised to or by this Court. Put simply, lower courts would not benefit from an opinion by this Court on the topic.

Second, this case in particular is not a good vehicle as the question Petitioner presents was never raised below and the appellate court dismissed for lack of jurisdiction, thus no record was developed on this "issue" in either the District Court or on appeal to the Fifth Circuit.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,

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