No. 24-1022

In the Supreme Court of the United States

SUSAN HUTSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Prison Litigation Reform Act of 1995 provides a mechanism for termination of prospective relief in prison-conditions cases when such relief is no longer necessary to correct a violation of a federal right. 18 U.S.C. 3626(b). Under Section 3626(b)(1)(A)(i), such relief is "terminable upon the motion of any party * * * 2 years after the date the court granted or approved the prospective relief." That termination provision is limited by Section 3626(b)(3), which states that "[p]rospective relief shall not terminate" if it "remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct" the violation, and "is narrowly drawn and the least intrusive means to correct the violation."

The question presented is:

Whether a filing is properly considered a motion to terminate under Section 3626(b)(1)(A)(i), when it seeks termination more than two years after prospective relief was issued, but does not dispute that prospective relief remains necessary under Section 3626(b)(3), and instead raises untimely objections to whether the prospective relief was originally issued in violation of other legal provisions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43a-80a) is reported at 114 F.4th 408. The order of the court of appeals denying rehearing en banc (Pet. App. 1a-42a) is reported at 132 F.4th 751. The order of the district court (Pet. App. 81a-106a) is available at 2023 WL 11910564. The magistrate judge's report and recommendation (Pet. 107a-179a) is unreported. A prior order of the court of appeals is reported at 38 F.4th 472.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2024. A petition for rehearing was denied on January 28, 2025 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 21, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. 3626, governs cases alleging violations of federal rights involving prison conditions. Congress passed the PLRA "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). Among other things, the PLRA "imposes limits on the scope and duration of preliminary and permanent injunctive relief" against prison systems. *Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004). Three provisions of the PLRA are particularly relevant here.

First, Section 3626(a)(1) requires that prospective relief in prison-conditions cases "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. 3626(a)(1)(A). The court "shall not" award 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." *Ibid.* Section 3626(a)(1) also instructs the court to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system" that the prospective relief may cause. *Ibid.* The provision prohibits courts from ordering prospective relief that "requires or permits a government official to exceed his or her authority under State or local law" except in certain, limited circumstances. 18 U.S.C. 3626(a)(1)(B). And it clarifies 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." 18 U.S.C. 3626(a)(1)(C).

Second, Section 3626(b) authorizes the termination of prospective relief in prison-condition cases. Such relief "shall be terminable upon the motion of any party" at various times, including "2 years after the date the court granted or approved the prospective relief." 18 U.S.C. 3626(b)(1)(A)(i). But under a "[l]imitation" on granting the motion, "[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." 18 U.S.C. 3626(b)(3). In addition, a party "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 Section 3626(a)(1) requirements for issuing such relief were satisfied. 18 U.S.C. 3626(b)(2).

Third, Section 3626(c) addresses settlement and distinguishes "consent decrees" from "private settlement agreement[s]." 18 U.S.C. 3626(c)(1) and (2). The provision prevents the court from "enter[ing] or approv[ing] a consent decree unless it complies with the limitations on relief set forth in subsection (a)." 18 U.S.C. 3626(c)(1). Private settlement agreements, by contrast, need not comply with those limitations, but the terms of such agreements "are not subject to [federal] court enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. 3626(c)(2); see 18 U.S.C. 3626(g)(6) (defining "'private settlement agreement'" as "an agreement entered into among the parties that is not subject to judicial enforcement" other than as stated in 18 U.S.C. 3626(c)(2)(A)).

2. a. Private respondents are detainees at Orleans Parish jail facilities. In 2012, they filed this action against then-Sheriff Marlin Gusman and other officials of the sheriff's office in their official capacities. 38 F.4th 472, 474. Respondents alleged that the prison provided inadequate housing for detainees with mental-health needs in violation of the Eighth and Fourteenth Amendments. *Id.* at 475. The United States intervened, pursuant to 42 U.S.C. 1997c, and the sheriff filed a third-party complaint against the City of New Orleans, seeking funding for any court-ordered prospective relief. 38 F.4th at 474-475.

In 2013, the district court approved a consent judgment that provided an operating plan for the prison to address the constitutional violations. 38 F.4th at 475. In 2016, after years of delay and disagreement regarding implementation of the consent judgment, the parties requested that the court enter a stipulated order appointing an independent jail compliance director. The court entered the order, which 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." Pet. App. 45a. In 2017, the compliance director submitted a supplemental compliance plan recommending the construction of a new treatment facility known as "Phase III" on existing sheriff's office property, with 89 beds to house detainees with mental health needs. *Ibid.* Sheriff Gusman and the compliance director signed the plan. *Ibid.*

For the next two years, the City represented to the district court that it was working toward constructing Phase III. But in January 2019, the City informed the court that it was interested in exploring alternatives to

Phase III. Pet. App. 46a. Given the City's prior commitments and the pressing need to find adequate housing for detainees with serious mental-health and medical issues, the court "ordered the City to comply with the [p]lan and direct the architect to begin Phase III construction and programming 'as soon as possible.'" *Ibid.*

Soon after, the City informed the district court that it was "actively working" with Sheriff Gusman and the compliance director to build Phase III. Pet. App. 46a. Based on this representation, the court issued an order in March 2019 instructing 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." *Ibid.* (citation omitted; brackets in original).

b. In 2020, the City filed a motion under Federal Rule of Civil Procedure 60(b)(5), arguing that certain changed circumstances warranted relief from the district court's January 2019 and March 2019 orders (the 2019 orders). Pet. App. 46a. The City also argued that Section 3626(a)(1)(C) prohibited the court from ordering construction of Phase III. *Id.* at 46a-47a.

After a two-week hearing, the magistrate judge issued a report and recommendation in which it recommended denial of the City's motions. Pet. App. 47a. The district court adopted the magistrate judge's report and recommendation, and the City appealed. *Ibid.*

c. The court of appeals affirmed. 38 F.4th 472. The court declined to rule on the merits of the City's Section

3626(a)(1)(C) argument. *Id.* at 478-479. The court explained that "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, 447 (2009)). To the extent the City sought to raise its argument "independent of the Rule 60(b) motion," the court held that it "would lack jurisdiction because the only basis for appeal is the Rule 60(b) motion." *Id.* at 479. And to the extent the City appealed under Rule 60(b), the court rejected the challenge because Rule 60(b)(5) "requires a change 'in factual conditions or law,'" and the City's argument "is based on neither." *Ibid.* (emphasis and citation omitted).

3. a. While the City's appeal was pending, petitioner was inaugurated as the new sheriff of Orleans Parish. Pet. App. 47a-48a. Petitioner was automatically substituted as a party under Federal Rule of Civil Procedure 25(d), replacing Sheriff Gusman. *Ibid.*

More than a year after taking office, petitioner filed a motion to terminate all prospective relief regarding the construction of the Phase III jail pursuant to 18 U.S.C. 3626(b). Pet. App. 48a. Petitioner argued that "[t]he pending prospective relief ordering the construction of the Phase III jail and the associated orders" were private settlement agreements, and thus the PLRA forbade the court from enforcing them. *Id.* at 15a (citing 18 U.S.C. 3626(c)(2) and (g)(6)); see *id.* at 112a. Although petitioner invoked Section 3626(b)(1)(A)(i)'s two-year termination provision, she argued only that the 2019 orders were originally issued in violation of other legal provisions. D. Ct. Doc. 1617-2, at 1, 9-17 (June 26, 2023). She thus did not dispute that the prospective relief remained necessary or that Section 3626(b)(3) barred termination. *Ibid.*

b. The magistrate judge issued a report and recommendation that recommended denying petitioner's motion, Pet. App. 107a-145a, reasoning that the motion was an improper attempt to relitigate the prior challenge to the validity of the 2019 orders, *id.* at 115a. Petitioner filed objections to the report and recommendation, but did not argue that the magistrate judge had improperly placed the burden on her to show that relief is no longer necessary to correct a current and ongoing violation of a federal right, or that the magistrate judge had failed to conduct an evidentiary hearing on this issue. D. Ct. Doc. 1636, at 1-2 (Aug. 2, 2023).

The district court adopted the report and recommendation and denied petitioner's motion, which it described as "yet another thinly-veiled attempt to end-run the original decision not to appeal" the 2019 orders. Pet. App. 88a. To avoid further delay, the court also entered an order embodying the terms of a Cooperative Endeavor Agreement, which the parties had previously negotiated and which petitioner had signed. That agreement outlined details for construction of Phase III. *Id.* at 48a-49a, 106a.

c. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 43a-63a.

The panel noted that 28 U.S.C. 1292(a)(1) confers jurisdiction over appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Pet. App. 51a (quoting 28 U.S.C. 1292(a)(1)). The panel explained that Section 1292(a)(1) conferred jurisdiction to review the denial of the motion to terminate, but as in the prior appeal, the panel lacked jurisdiction to consider whether the underlying 2019 orders violated the PLRA at the time they were issued. *Id.* at 50a, 55a-56a. Because of

the prior appeal, the court viewed itself as bound by the "law of the case doctrine," which "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 54a (citation and quotation marks omitted). The court explained that, in the earlier appeal, the City had moved to suspend the 2019 orders based on the argument that the PLRA prohibited the construction of that facility. *Id.* at 55a. Just as with the Rule 60(b) motion at issue in that appeal, the court concluded that 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 56a (quoting 38 F.4th at 478).

The court of appeals also held that petitioner had not filed a proper motion to terminate. Pet. App. 58a-59a. The court explained that Section 3626(b) "establishes the parameters in a prison conditions civil action for 'termination of relief,'" *id.* at 59a—*i.e.*, that the relief is no longer "necessary to correct a current and ongoing violation of the Federal right," 18 U.S.C. 3626(b)(3). But here, petitioner "ha[d] not argued that the relief is no longer necessary to correct existing constitutional violations." Pet. App. 61a. Instead, petitioner claimed only that the 2019 orders violate Section 3626(a)(1)(C). *Ibid.* The court thus concluded that the motion petitioner filed was a "'motion to terminate' in name only," *id.* at 59a, and that it "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 district court's 2019 orders, *id.* at 61a. The court of appeals further noted that the district court's order incorporating the Cooperative Endeavor Agreement had made findings that "prospective relief extends no further than

necessary to correct the violation of the Federal right in this case." *Id.* at 62a (quotation marks omitted).

Judge Smith dissented. Pet. App. 64a-80a. He would have held that the court of appeals had jurisdiction of an appeal from the denial of the motion to terminate under 28 U.S.C. 1292(a)(1), either based on that denial alone or, alternatively, because the district court also entered the Cooperative Endeavor Agreement in its order. Pet. App. 65a-67a. He rejected the majority's view that the prior appeal of a Rule 60(b)(5) motion for relief could bar petitioner from raising the same argument in an appeal of a motion to terminate. *Id.* at 68a-69a. And he likewise disputed the majority's holding that the motion to terminate was procedurally improper. *Id.* at 72a-74a. In his view, all petitioner needed to do was "show the requisite passage of time" had occurred since the court granted or approved prospective relief. *Id.* at 73a. After concluding petitioner's motion was proper, Judge Smith would have granted it on the ground that respondents had not carried their burden to show a continuing violation, and even if they had, the orders violated what Judge Smith perceived to be the PLRA's ban on ordering the construction of prisons. *Id.* at 74a.

d. The court of appeals denied rehearing en banc by an 11-6 vote. Pet. App. 1a-2a.

Judge Oldham, joined by three judges (including Judge Smith), dissented from the denial of rehearing en banc. Pet. App. 4a-42a. Judge Oldham would have found that the court of appeals had appellate jurisdiction and would have held that the district court should have granted the motion to terminate, for substantially the reasons articulated by Judge Smith's dissent. *Ibid.*

Judge Ho also dissented from the denial of rehearing en banc. Pet. App. 3a. He explained that he would have

"reach[ed] the merits and reverse[d] the district court" because "the decision of the district court does not comply with the [PLRA]." *Ibid.*

4. The district court ordered the City to submit status reports informing the court of the progress of the Phase III construction. D. Ct. Doc. 1403 (Feb. 3, 2021). According to the most recent status report, construction of Phase III is 68.60% complete. See D. Ct. Doc. 1755, at 1 (July 16, 2025).

ARGUMENT

Petitioner contends (Pet. 15-23) that the circuits are in conflict as to which party bears the burden of proof to show whether relief remains necessary to correct a current and ongoing violation of a federal right under 18 U.S.C. 3626(b)(1)(A). But while a shallow split on that question exists, it is not implicated here. The court of appeals did not place, and the United States did not seek to place, a burden on petitioner to prove or disprove the need for ongoing relief. Rather, the court correctly recognized that petitioner's motion was a motion to terminate under Section 3626(b) "in name only," because it was untimely relitigating whether the 2019 orders were validly issued in the first instance, rather than contesting whether the 2019 orders remained necessary. Pet. App. 59a. In light of that fact and petitioner's related preservation failures, this case is a poor vehicle for considering the question presented in the petition—all the more so because it is doubtful that a decision in this case would have any practical effect given the substantial progress on Phase III construction that has already occurred and will occur before June of 2026. Further review is unwarranted.

1. The court of appeals below did not address the allocation of the ultimate burden of proving that the pro-

spective relief remains necessary when a party files a motion to terminate under Section 3626(b)(1)(A)—an issue that petitioner did not raise. Instead, the court simply held that petitioner had not filed a proper motion to terminate and denied relief on that basis. That holding—which does not implicate the circuit split raised by the petition—was correct.

Generally, a district court should determine the nature of a motion by its contents, rather than its label. See, *e.g.*, *United States* v. *Sutton*, 127 F.4th 1067, 1071 (7th Cir. 2025); *United States* v. *Amado*, 841 F.3d 867, 871 (10th Cir. 2016); *Ahmed* v. *Dragovich*, 297 F.3d 201, 208 (3d Cir. 2002); cf. *Gonzalez* v. *Crosby*, 545 U.S. 524, 531 (2005) (holding that a Rule 60(b) motion may be "in substance a successive habeas petition and should be treated accordingly"). "When the substance and label" of a motion "are not in accord, district courts should evaluate it 'based on the reasons expressed by the movant.'" *Obriecht* v. *Raemisch*, 517 F.3d 489, 493 (7th Cir.) (quoting *Jennings* v. *Rivers*, 394 F.3d 850, 855 (10th Cir. 2005)), cert. denied, 555 U.S. 953 (2008); see *Moody Nat'l Bank of Galveston* v. *GE Life & Annuity Assurance Co.*, 383 F.3d 249, 251 (5th Cir. 2004) ("[T]he fact that GE labeled its motion as a Rule 59(e) motion to alter or amend is immaterial; a motion's substance, and not its form, controls."), cert. denied, 543 U.S. 1055 (2005). A district court's "characterization decision is a pragmatic judgment that turns on specific facts, so the decision warrants deference." *Sutton*, 127 F.4th at 1071.

Here, the magistrate judge, district court, and court of appeals all found that petitioner's motion was "a 'motion to terminate' in name only." Pet. App. 59a; see *id.* at 88a, 115a. As its text makes clear, Section 3626(b)

provides a framework for terminating prospective relief that is no longer necessary to correct a current and ongoing violation of federal rights. See, *e.g.*, *Tyler* v. *Murphy*, 135 F.3d 594, 597 (8th Cir. 1998) (The "purpose" of the termination provisions in Section 3626(b)(1) is "to authorize periodic new motions to terminate prospective relief that was initially based upon the proper findings."); *Ruiz* v. *United States*, 243 F.3d 941, 950-951 (5th Cir. 2001) (explaining that under Section 3626(b)(3)'s "specific standards," courts must separately consider each consent decree provision and consider whether there is a current and ongoing violation). Indeed, Section 3626(b)(3) expressly provides that prospective relief "shall not terminate" if the court finds that the prospective relief remains necessary. 18 U.S.C. 3626(b)(3). It would make little sense to treat a filing as a Section 3626(b) motion when the movant does not dispute that the opposing party can make the showing that would preclude termination under Section 3626(b)(3). Yet that is precisely what petitioner did. As the district court observed, petitioner "has not argued that the relief is no longer necessary to correct constitutional violations." Pet. App. 61a. In other words, petitioner's motion did not seek termination on the basis afforded under Section 3626(b).

To be sure, petitioner titled her motion, "Motion To Terminate All Orders Regarding The Construction Of The Phase III Jail." D. Ct. Doc. 1617 (capitalization altered). Petitioner stated once at the beginning of her motion, and once in her memorandum in support, that she moved "pursuant to 18 U.S.C. § 3626(b)." *Id.* at 1; D. Ct. Doc. 1617-2, at 1. And in a footnote, petitioner quoted the language of Section 3626(b)(1)(A). *Ibid.* But petitioner's 17-page supporting memorandum argued

only that the 2019 orders were unlawful under the PLRA when they were issued, without addressing Section 3626(b) or its governing standard. See D. Ct. Doc. 1617-2, at 1-17. Likewise, petitioner's opening brief on appeal contained a single citation to Section 3626(b) in her jurisdictional statement, but did not substantively address the termination provision. See Pet. C.A. Br. xi, 2. And nowhere in either her briefing before the district court or her merits briefing on appeal did petitioner argue that respondents could not show that the ordered relief "remains necessary to correct a current and ongoing violation," "extends no further than necessary," and is "narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. 3626(b)(3).

Rather, petitioner's motion "allege[d] that Section 3626(a)(1)(C) prohibits the existence" of the orders. Pet. App. 61a. But as the First Circuit has recognized, "[n]othing in subsection (b) or in its legislative history speaks of *vacating* consent decrees"; it speaks "only of *terminating* them." *Morales Feliciano* v. *Rullan*, 378 F.3d 42, 52 (2004) (referring to 18 U.S.C. 3626(b)), cert. denied, 543 U.S. 1054 (2005). That "word choice is significant." *Ibid.* Although Section 3626(b) grants petitioner "a right to move for the termination of prospective relief," it does not "confer any right to argue, [many] years after the fact, that an order should be deemed void ab initio" for violating the PLRA. *Ibid.*

Petitioner, like the dissenters in the court of appeals, argues that her motion was nonetheless proper because her only burden on a motion to terminate under Section 3626(b)(1)(A) was to move for termination "2 years after the date the court granted or approved the prospective relief," which she did. Pet. 23-24 (quoting Pet. App. 73a); see Pet. App. 39a-40a. Petitioner and the dissenters are

correct that, under the Fifth Circuit's precedent, respondents would bear the burden of meeting Section 3626(b)(3)'s requirements at an evidentiary hearing on a proper motion to terminate. See *Guajardo* v. *Texas Dep't of Criminal Justice*, 363 F.3d 392, 395 (per curiam), cert. denied, 543 U.S. 818 (2004). The United States acknowledged that point in the proceedings below. See Gov't C.A. Br. in Opp. 13. But that point was immaterial in this case, because petitioner's motion and merits briefing on appeal never even put at issue whether respondents could satisfy Section 3626(b)(3)'s requirements, or sought an evidentiary hearing in which respondents would be required to bear their burden on the continuing need for injunctive relief.

That respondents bear the ultimate burden of persuasion does not mean that petitioner can repackage an untimely legal argument she failed to raise on direct appeal, append the label of a motion to terminate, and obtain appellate review of four-year-old orders. Petitioner's obligation to file a motion that, at the very least, puts the Section 3626(b)(3) requirements at issue is akin to a burden of production that requires a party to plead facts sufficient to make out a prima facie case, without imposing the burden on that party to prove the alleged facts are true. See 2 Kenneth S. Broun, *McCormick on Evidence* § 336 (9th ed. 2025). In both instances, a party must take some minimal step to tee up a contested issue before the opposing party is obligated to introduce evidence in response.

Petitioner's alternative approach, by contrast, would be pointless at best and unlawful at worst. There is no need to force respondents to make an evidentiary showing if petitioner herself does not dispute that Section 3626(b)(3)'s standards are met and thus effectively con-

cedes that the termination motion must be denied. And petitioner cannot evade the inevitable denial by instead arguing, as she did below, that the prospective relief was originally issued in violation of other legal provisions. That would flout the jurisdictional time limits on taking an appeal, see *Bowles* v. *Russell*, 551 U.S. 205, 209 (2007), and would disregard the PLRA's clear framework for assessing the propriety of terminating prospective relief. As the court of appeals correctly held, a legal argument independent of Section 3626(b) that could have been raised on direct appeal years ago is not a proper basis for a motion to terminate under Section 3626(b). Pet. App. 61a.

2. Petitioner correctly identifies a decades-old circuit conflict on the question of the allocation of the burden of proof for a proper motion to terminate under Section 3626. But that conflict is not implicated by the decision below, which leaves in place Fifth Circuit precedent holding—as petitioner urges and the United States did not contest below—that the party opposing termination bears the burden of satisfying Section 3626(b)(3)'s standard for denying termination.

In *Gilmore* v. *California*, 220 F.3d 987 (2000), the Ninth Circuit analogized a motion to terminate under the PLRA to a Rule 60(b) motion, in which the burden of establishing a change in circumstances that warrants relief from a decree "rests on the party seeking modification" of the existing order. *Id.* at 1007. The court concluded that "nothing in the termination provisions" of the PLRA "can be said to shift the burden of proof from the party seeking to terminate the prospective relief." *Ibid.*; see *Graves* v. *Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) ("When a party moves to terminate prospective relief under § 3626(b), the burden is on the mo-

vant 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.").

Following *Gilmore*, the First and Fifth Circuits reached the opposite conclusion, holding that the party opposing termination bears the burden of showing that there are current and ongoing violations of federal rights. *Laaman* v. *Warden*, 238 F.3d 14, 20 (1st Cir. 2001); *Guajardo*, 363 F.3d at 395-396. The Fifth Circuit rested its conclusion on a "plain reading of the PLRA, including its structure," and noted that the "great majority" of district courts that have addressed this issue agree. *Guajardo*, 363 F.3d at 395-396; see Pet. 21-23 (collecting cases). The Ninth Circuit's approach is therefore an outlier, and the en banc Ninth Circuit has not yet considered the issue.

That shallow disagreement does not warrant this Court's review, particularly in this case. The Fifth Circuit in *Guajardo* placed the burden on the party opposing termination—the result that petitioner advocates. And contrary to petitioner's contention (Pet. 23-25), nothing in the decision below suggests that the Fifth Circuit has endorsed the Ninth Circuit's view or otherwise departed from its own precedent. In *Guajardo*, the court held that in seeking termination under Section 3626(b), the movant "must initially establish the requisite passage of time," and then the burden of proof shifts to the party opposing termination "to demonstrate ongoing violations and that the relief is narrowly drawn." 363 F.3d at 395. Here, the court of appeals did not address the burden of proof on a motion to terminate because it held that petitioner's motion could not properly be characterized as a motion to terminate at

all, given that it solely argued that the prospective relief was improperly issued in the first instance under provisions unrelated to Section 3626(b) and the question whether the prospective relief remained necessary. Neither *Guajardo* nor any other decision petitioner cites addresses a similar circumstance or indicates that another court would reach a different outcome.

3. Finally, this case would be a poor vehicle for this Court's review. On the burden-of-proof question presented in the petition, the parties are in agreement, but the question does not matter if the court of appeals was correct that petitioner did not file a true Section 3626(b) motion in the first place. And on *that* issue, petitioner failed to preserve any objection.

To begin, Petitioner did not object to the report and recommendation on the ground that the magistrate judge erred in deeming the Section 3626(b) motion improper due to the motion's failure to even contest whether the Section 3626(b)(3) standard was satisfied. See D. Ct. Doc. 1636, at 1-2 (Aug. 2, 2023). Nor did petitioner raise that issue in her opening brief before the court of appeals. See Pet. C.A. Br. 4. Instead, the assertion that a Section 3626(b) motion need only allege the passage of the requisite time period, in light of the opposing party's ultimate burden of persuasion on the Section 3626(b)(3) standard, arose for the first time in the panel dissent, see Pet. App. 72a-74a, where the majority declined to engage with it. Petitioner then briefly raised the issue in her petition for rehearing en banc. See C.A. Doc. 139, at 13-14 (Sept. 9, 2024). But it is well established that courts of appeals are not obligated to address matters first raised in petitions for rehearing. See, *e.g.*, *United States* v. *Lewis*, 412 F.3d 614, 615-616 (5th Cir. 2005) (per curiam); *United States* v. *Patzer*,

284 F.3d 1043, 1045 (9th Cir. 2002); *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1133 (1997). The issue thus hardly qualifies as one that was "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

In all events, success on this argument would likely have little practical significance for petitioner. Construction of Phase III is progressing, and, as of Ju1y 16, 2025, it is 68.60% complete. D. Ct. Doc. 1755, at 1. With that progress made, it is doubtful that a decision by this Court, which likely would not be issued before mid-2026, will make a difference with respect to whether the facility is ultimately completed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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