No. 24-1022

In the Supreme Court of the United States

SUSAN HUTSON,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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August 20, 2025

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REPLY BRIEF

The United States' soft opposition well signals that certiorari is warranted. The United States agrees (U.S.Br.15) that there is a "circuit conflict" on "[w]hether 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," Pet.i. Because that conflict is indisputable, the Class Plaintiffs opt to ignore the split altogether and instead praise (Class.Br.19–22) what the United States describes (U.S.Br.16) as the Ninth Circuit's "outlier" view. The only question, therefore, is whether the Court should resolve that split. It should—and neither the United States' nominal opposition nor the Class Plaintiffs' confused opposition persuades otherwise.

The United States' best counterargument is that the split is not implicated because Sheriff Hutson did not make out a "prima facie case" for termination by arguing that respondents are unable to satisfy the need-narrowness-intrusiveness finding requirements of § 3626(b)(3). U.S.Br.14. Setting aside that she *has* done so, the United States just begs the question presented: If (as Judges Smith and Oldham explained below) Sheriff Hutson's only burden was to "establish the requisite passage of time," *Guajardo v. Tex. Dep't of Crim. Justice*, 363 F.3d 392, 395 (5th Cir. 2004), then the United States' "prima facie case" argument falls apart. The United States cannot assume its own preferred answer to the question presented—that Sheriff Hutson *does* bear a burden beyond demonstrating the requisite passage of time—and then try to avoid review on that basis.

This case is profoundly serious—and the scathing dissents by Judges Smith and Oldham below are scathing for a reason: What is happening in this build-the-prison lawsuit is wildly unlawful. And the panel below improperly contorted the Prison Litigation Reform Act (PLRA) to immunize that illegality from judicial review. The Court should grant the petition, resolve the split, and admonish lower courts to stop fighting the PLRA.

I. THE CIRCUIT SPLIT IS UNDISPUTED AND SQUARELY IMPLICATED HERE.

A. The United States rightly agrees (U.S.Br.10, 11, 15) that the circuits are split over the PLRA's termination provision. That provision directs that prospective relief "shall be terminable upon the motion of any party … 2 years after the date the court granted or approved the prospective relief." § 3626(b)(1)(A)(i). As then-Judge Alito explained, upon the timely filing of a termination motion, "[t]he supervising court may refuse to terminate jurisdiction *only if* it makes" the specific findings set out in § 3626(b)(3). *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 182 (3d Cir. 1999) (emphasis added); *see* Pet.8 (collecting cases). In other words, relief is terminated, *unless* the court satisfies the PLRA's requirements for maintaining the relief.

The circuit split is over what burden the movant bears to trigger the termination. The Fifth Circuit's longstanding view is that the movant bears only the burden to "initially establish the requisite passage of time"—*i.e.*, that two years have passed since the court granted or approved the prospective relief. *Guajardo*, 363 F.3d at 395; *accord Laaman v. Warden, N.H. State*

Prison, 238 F.3d 14, 20 (1st Cir. 2001). That is the view that Judges Smith and Oldham (joined by others below) hold. 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.'"); *id.* at 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.'"). By contrast, the Ninth Circuit rejects the Fifth Circuit's view "that termination ... follow[s] automatically" once the movant establishes that "enough time ha[s] passed." *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)). Hence the United States' criticism of the Ninth Circuit's "approach" as "an outlier." U.S.Br.16.

The Class Plaintiffs say Sheriff Hutson "incorrectly asserts that the Ninth Circuit's applications of the PLRA's termination provisions conflict with the Fifth Circuit's approach in *Guajardo*." Class.Br.19. Rather than substantiate that claim, however, they just praise the Ninth Circuit's outlier approach. *See id.* at 19–22. They do not substantiate their claim because they cannot: With due credit to the United States for its candor, the split is undeniable.

The resolution of that split, moreover, is dispositive. If Sheriff Hutson bore no burden beyond demonstrating that two years had passed since the district court entered its Phase III orders, then she carried that burden—and reversal is warranted because the Fifth Circuit panel below required her to do more.

B. Because the circuit split is unquestionable, the United States tries only to distance this case from the split. But the United States' uncharacteristically soft opposition betrays that it goes nowhere.

Specifically, the United States asserts that the split is not implicated because Sheriff Hutson did not file "a proper motion to terminate," U.S.Br.14—notwithstanding that she complied with the two-year rule in § 3626(b)(1)(A)(i). According to the United States, Sheriff Hutson *also* bore the "obligation ... [to] put[] the Section 3626(b)(3) requirements at issue." *Id.* In other words (and as the panel below reasoned), Sheriff Hutson was required to argue that respondents cannot show Phase III prospective relief is "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); *see* U.S.Br.14; App.61a. That is the "prima facie case" Sheriff Hutson must make out, says the United States. U.S.Br.14.

This token opposition is unavailing for two reasons. *First*, it just begs the question presented. The question presented is whether Sheriff Hutson "bears any affirmative burden beyond demonstrating that the requisite amount of time has passed." Pet.i. The Fifth Circuit's answer in *Guajardo*, Judge Smith's answer, Judge Oldham's answer, and Sheriff Hutson's answer is no. *Supra* pp.2–3. If the answer is indeed no, then the United States is dead wrong to claim that Sheriff Hutson also has an "obligation" to make out a "prima facie case" by "put[ting] the Section 3626(b)(3) requirements at issue." U.S.Br.14. The United States

is free to press that merits argument on plenary review. But the United States cannot assume its own preferred answer to the question presented—that Sheriff Hutson *does* bear a burden beyond demonstrating the requisite passage of time—and then attempt to avoid review of the question on that basis.

Second, the United States' argument rests on an erroneous premise—that Sheriff Hutson has not put the § 3626(b)(3) requirements "at issue." That is not correct for the reasons Judges Smith and Oldham explained and the United States never acknowledges.

Sheriff Hutson's motion to terminate argues that § 3626(a)(1)(C)—"which applies to all parts of § 3626"—prohibits a federal court from directing the construction of a prison. App.78a (Smith, J.). To maintain the Phase III orders, therefore, the district court must find that "continu[ing]" the Phase III relief satisfies the § 3626(b)(3) requirements. *Id.* at 78a–79a. The court cannot do so, however, because § 3626(b)(3) is "constrained" by § 3626(a)(1)(C), the very provision that requires the termination of the Phase III orders. *Id.*; *id.* at 41a (Oldham, J.) ("§ 3626(b)(3) cannot be construed to stop the *termination* of current, ongoing prospective relief that orders the construction of prisons."). Thus, Sheriff Hutson has, in fact, "put" the § 3626(b)(3) requirements "at issue." U.S.Br.14.

The cert-worthiness of the question presented is not in dispute. The two largest circuits notorious for PLRA litigation are split, and this case—in which federal courts are actively directing the construction of a prison—is the right vehicle to resolve that split.

II. THE DECISION BELOW IS WRONG.

Respondents also do not seriously defend the panel decision below on the merits. Indeed, they do not even acknowledge Sheriff Hutson's textual, contextual, and historical arguments for why the decision below (and the Ninth Circuit's view) is wrong. *See* Pet.25–30.

As previewed above, the United States summarily announces that movants like Sheriff Hutson have an "obligation" to "put[] the Section 3626(b)(3) requirements at issue"—a burden "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." U.S.Br.14. Although the argument goes nowhere (*see supra* Section I.B), the United States does not even try to ground that supposed obligation in the PLRA's text. Nor could it: The § 3626*(b)(3)* finding requirements appear nowhere in § 3626*(b)(1)*—the actual provision that governs the filing of a motion to terminate. The only "prima facie case" in § 3626(b)(1) is Sheriff Hutson's obligation to show the requisite passage of time. She fulfilled that obligation.

The United States claims that "[t]here 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 concedes that the termination motion must be denied." U.S.Br.14–15. As just explained, that seriously mischaracterizes the facts: Because the district court cannot satisfy the § 3626(b)(3) requirements consistent with § 3626(a)(1)(C), termination is required. And the United States offers no response to Sheriff Hutson's

independent point that the PLRA's plain text permits "a movant like Petitioner [to] file a motion to terminate for any reason or no reason at all"—a natural consequence of the PLRA's defaults *in favor of* terminating prospective relief. Pet.26.

The United States also complains that allowing termination "would flout the jurisdictional time limits on taking an appeal" because the district court entered the Phase III orders years ago. U.S.Br.15. That view is illogical—as Judges Smith and Oldham explained and as the United States does not acknowledge.

For one thing, it would require a district court to (*forever*) maintain blatantly illegal relief under the PLRA so long as a plaintiff could claim that the illegality was live when the prospective relief was originally issued. A defendant never could move to terminate such illegal relief, notwithstanding that the PLRA expressly gives defendants the right to terminate after two years. *See* App.33a–34a (Oldham, J.); *id.* at 70a–71a (Smith, J.). That is nonsense.

For another thing, the United States' argument rests on a repeated mischaracterization—that Sheriff Hutson's motion is "a motion to terminate under Section 3626(b) 'in name only.'" U.S.Br.10, 11. By that mischaracterization, the United States suggests Sheriff Hutson is trying to take a belated appeal from the 2019 Phase III orders. But (cue the broken record) the United States does not answer Judge Oldham's takedown of that mischaracterization:

> 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.

App.33a (Oldham, J.) (emphasis omitted and added).

Sheriff Hutson wins this case on the merits.[1]

III. RESPONDENTS' REMAINING ARGUMENTS ARE MERITLESS.

The remaining issues merit little time. *First*, the Class Plaintiffs reprise the panel's "jurisdictional[] dysphori[a]." App.15a (Oldham, J.). They claim that the district court did not actually refuse to dissolve an injunction and thus the panel had no jurisdiction. Class.Br.14. Sheriff Hutson addressed (Pet.35) this argument, which rests on the mischaracterization of her motion as "improper"; the Class Plaintiffs do not answer her. Similarly, the Class Plaintiffs claim that the law of the case doctrine somehow applies. Class.Br.15–16. They do not answer Judge Oldham's response to that frivolous argument—frivolous be-

[1] The Class Plaintiffs add nothing of value on the merits. They do, however, misattribute a view to Justice Alito that warrants a response: They say that, in *Brown v. Plata*, 563 U.S. 493 (2011), Justice Alito "noted that 'evidence' 'that all violations had ceased' is 'the showing needed to obtain the termination of relief under § 3626(b).'" Class.Br.22 (quoting *Brown*, 563 U.S. at 569 (Alito, J., dissenting)). As the context reveals, Justice Alito was repeating the "burden" that "the Ninth Circuit place[d] ... on the State" in *Gilmore*, *see Brown*, 563 U.S. at 569 n.3—not adopting that view as his own.

cause, before the decision below, the Fifth Circuit "rendered exactly zero holdings about ... whether the prospective relief ordered by the district court violated the PLRA." App.30a–32a. The United States' refusal to defend that argument confirms as much.

Second, the Class Plaintiffs argue that Sheriff Hutson "should be judicially estopped" from taking positions purportedly contrary to ones taken by former Sheriff Gusman. Class.Br.17. Not even the panel below credited that argument—and not even the United States stands by that misguided argument here.

Third, the United States briefly "doubt[s]" that Sheriff Hutson would receive practical relief from a victory in this case because the Phase III construction is approximately two-thirds complete. U.S.Br.18. The United States misunderstands that the completion percentage refers only to the shell of the building; it does not include furniture, fixtures, and equipment, the addition of which will likely extend through 2027.

In all events, the United States assumes that business would proceed as usual during this Court's plenary review—but a grant of certiorari would allow Sheriff Hutson to ask the district court to stay any Phase III-related activities, including implementation of the Cooperative Endeavor Agreement (CEA).[2] In

[2] The United States says that Sheriff Hutson "signed" the CEA. U.S.Br.7. That is incorrect and, in fact, points up one of the most egregious aspects of this case. *See* App.146a ("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.").

addition, the United States assumes that Sheriff Hutson could not reconfigure the prison to serve purposes other than those ordered by the district court. But a favorable decision from this Court would allow her to do so, while the absence of such a decision binds her to the unlawful Phase III orders on pain of "severe sanctions, including consideration of whether [she] is to be held in contempt of court." *Id.* at 82a.

More fundamentally, the illegality will not end the day the last worker leaves the jobsite. The CEA requires Sheriff Hutson to "[m]aintain and operate the Project after the date of completion," and also "[h]andle all warranty claims and warranty work necessary after final acceptance of the Project." *Id.* at 152a. The CEA likewise imposes indemnification and insurance obligations on Sheriff Hutson based on virtually all conduct related to Phase III. *Id.* at 157a–58a, 159a–60a. A favorable decision from this Court would stop these requirements in their tracks.

Last, it bears noting why the Attorney General of Louisiana has partnered with Sheriff Hutson in this petition: State and local officials and entities frequently are subject to varying forms of prospective relief governed by the PLRA. Like Sheriff Hutson, the State has a profound interest in correcting the panel's overt attempt to undermine the PLRA's termination framework. *See id.* at 30a (Oldham, J.) ("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."). This Court's resolution of that problem is deeply important and will have a sweeping impact on Louisiana and all other States subjected to nonstop PLRA litigation.

Finally, the Class Plaintiffs and the United States complain that Sheriff Hutson did not sufficiently air the question presented below. *E.g.*, Class.Br.10–13; U.S.Br. 17–18. That is incorrect.

The United States argued below that Sheriff Hutson's termination motion "fails as a procedural matter" because she "'has not argued that the relief is no longer necessary to correct constitutional violations.'" C.A. Doc. 100 at 16. In response, Sheriff Hutson argued that her motion was "procedurally proper" and rejected the notion that her entitlement to termination depends on whether she argues that "the relief is no longer necessary." C.A. Doc. 102 at 5–6. Her position there, as here, was unequivocal: "[A] motion to terminate may seek to terminate relief that the district court did not have the authority to grant and that violates federal law." *Id.* at 7.[3]

On rehearing, she reinforced her position that she "satisfied the only procedural criteria for her Motion to Terminate—waiting more than two years after the relief had been granted to file her motion." C.A. Doc.

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[3] The United States oddly complains that Sheriff Hutson did not add that she "need only allege the passage of the requisite time period," U.S.Br.17—but that was the whole point of her stated position: She complied with "§ 3626(b)(1)" (which has the two-year rule) and so she is entitled "to terminate the relief ordered by the District Court" regardless whether "the relief is no longer necessary." C.A. Doc. 102 at 5–6.

139 at 13. She also argued that the panel "incorrectly placed the burden of proof on [her] because she 'had not argued that the relief is no longer necessary to correct the existing constitutional violations.'" *Id.*

Sheriff Hutson preserved this issue. And if there were any doubt, the longstanding, entrenched circuit split—combined with exhaustive dissents from Judges Smith and Oldham—has squarely prepared the issue for this Court's review. *Cf. Landor v. La. Dep't of Corr. & Pub. Safety*, No. 23-1197 (U.S.) (certiorari granted despite conceded circuit consensus where Judge Oldham dissented from that consensus view).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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