No. 21-5853

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAVIAN BUSBY and MICHAEL EDGINGTON, on their own behalf and on behalf of those similarly situated,

Petitioners-Appellees

v.

FLOYD BONNER, JR., in his official capacity as the Shelby County, TN Sheriff; SHELBY COUNTY, TN SHERIFF'S OFFICE

Respondents-Appellants

On Appeal from the United States District Court for the Western District of Tennessee
No. 2:20-cv-2359-SHL-atc
Hon. Sheryl H. Lipman

PETITIONERS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO STAY THE DISTRICT COURT'S ORDER DENYING TERMINATION OF THE CONSENT DECREE AND THE CONSENT DECREE OR TO EXPEDITE THE APPEAL

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PRELIMINARY STATEMENT

As the COVID-19 pandemic rages in the U.S. and in Shelby County, Tennessee, people incarcerated in jails and prisons are at extremely great risk of severe illness and death. To protect the shifting population of some 2,200 people held (mostly pretrial) in the Shelby County Jail, detainee plaintiffs and the Shelby County Sheriff and Sheriff's Office entered into a class-wide Consent Decree to settle a habeas lawsuit brought by medically vulnerable and disabled detainees alleging the Jail was deliberately indifferent to their health and safety during the pandemic and seeking releases from the Jail. In reaching the mutual decision to enter the Decree, the Jail Defendants ("Appellants") agreed that its protections should "remain in place for the duration of the pandemic." ECF No. 161 at PageID 3187–88.[1] After notice and a hearing, the district court approved the Decree in April 2021. Appellants agreed to abide by the terms of the Decree, which remains in effect. Especially with the current and worsening outbreak of COVID-19 among Jail detainees and staff, in a state leading the nation for per capita cases,[2] Appellants'

[1] The Appellants have not yet filed a Record on Appeal. Citations in this memorandum to the proceedings below are designated with district court ECF numbers. Citations to filings on this stay application are designated with "Br."

[2] *See* New York Times, *Coronavirus in the U.S.: Latest Map And Case Counts*/*State Trends*, NEW YORK TIMES (Sept. 19, 2021), https://www.nytimes.com/interactive/2021/us/covid-cases.html.

compliance with the negotiated terms of the Consent Decree is essential.

One day after the Court approved the Consent Decree, the Shelby County Sheriff's office issued a press release, wrongly declaring that their obligations had been met and the Decree was over. ECF No. 216-3. In the weeks that followed, Appellants continued to state that the Decree had terminated. ECF No. 216-4. Because of significant noncompliance, in May 2021, the Plaintiff class ("Appellees") filed their Motion to Enforce and Modify the Consent Decree, which is pending in the district court. After Appellees brought to Appellants' attention the impropriety (under the Decree itself and the time frames imposed by the PLRA) of unilaterally declaring the Court's Order and Consent Decree to be terminated, Appellants moved to terminate the Decree. Following briefing, expedited discovery, and a two-day evidentiary hearing including expert testimony and testimony from people currently incarcerated at the Jail, the district court denied Appellants' motion and found that the Jail population is in "deep peril." ECF No. 258 at PageID 5083.

Appellants filed a notice of appeal and proceeded directly to this Court to seek a stay of the termination ruling, a stay of the entire Consent Decree, and in the alternative, expedited briefing on their appeal. Appellants have not met their burden to show this Court should intervene and stay the district court's Order, much less stay the operation of the entire Decree. Appellees oppose the stay motion because it is procedurally improper under Fed. R. App. P. 8(a)(2), distorts the requirements and

law under the Prison Litigation Reform Act ("PLRA"), and fulfills none of the factors legally required for a stay. Appellees would not oppose expedited briefing of the merits of Appellants' appeal if this Court denies the stay motion.

PROCEDURAL BACKGROUND

I. Appellants' Recounting of the Procedural and Factual History of this Case is Rife with Misrepresentations and Omissions

Appellants present a warped and incomplete picture of the proceedings below. For instance, Appellants' brief is notably silent with respect to their April 13, 2021 press release in which they misleadingly declared this case "dismissed," and indicated that two days later, they would take their "final action" to comply with the Decree they negotiated and agreed to. ECF No. 216-3. Appellants also leave out entirely the fact that the PLRA prohibits a motion to terminate (except by agreement of all parties) based on a lack of current and ongoing constitutional violations before two years have passed since the Consent Decree was approved by the district court. 18 U.S.C. § 3626(b)(1).[3] Appellants similarly omit the numerous conferences between the parties prior to Appellees' filing their Motion to Enforce and Modify, during which Appellants repeatedly asserted their view that—notwithstanding an absence of vaccine educational materials and incentives—the Decree had terminated

[3] As discussed *infra*, the PLRA at 18 U.S.C. § 3626(b)(4) preserves the right of defendants to move to terminate on bases *other than alleged ongoing constitutional violations* before two years.

of its own accord. *See* ECF No. 216-4. Nor do Appellants address the considerable evidence put forth over the course of a two-day evidentiary hearing, including the testimony of two experts (one originally nominated to serve as court-appointed inspector *by the Appellants*) and three detainee witnesses, all of which the Court relied on in concluding that termination of the Decree was premature. ECF No. 258 at PageID 5068, 5070 n. 11, 5071–73, 5073 n.10, 5074–82. Elsewhere, Appellants have skewed the record, by mischaracterizing the district court as failing to "justify its interpretation of the Consent Decree's termination provision," and fabricating an assertion that leaving the Decree operative somehow "*rewards*" detainee Appellees and their pro bono legal counsel. Br. at 8, 19–20.

A. Appellees' Aim Has Always Been Ensuring the Health and Safety of Medically Vulnerable and Disabled Detainees

Appellees filed their class action habeas petition[4] on May 20, 2020, seeking release of medically-vulnerable and disabled detainees at the Shelby County Jail

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[4] While Appellees later sought leave to amend their complaint to add claims under 42 U.S.C. § 1983, the parties settled the case before the Court ruled on their Motion for Leave. ECF Nos. 135; 162 at PageID 3234. This case has proceeded as a habeas petition under 28 U.S.C. § 2241. The parties agreed to the PLRA's needs-narrowness-intrusiveness findings in the Consent Decree (ECF No. 161-2, ¶ 31) out of an abundance of caution; Appellees note the PLRA does not necessarily govern this appeal. *See, e.g.*, ECF No. 38 at PageID 683 ("Given that Plaintiffs' claims are cognizable under § 2241, the PLRA's requirements do not apply here."); *see also Wilson v. Williams,* 961 F.3d 829, 839 (6th Cir. 2020) ("The PLRA does not apply in habeas proceedings.") (citing 18 U.S.C. § 3626(g)(2)).

facility at 201 Poplar Avenue, Memphis. ECF No. 1. Conditions were dire: COVID-19 had entered the facility, already killing one member of jail staff, yet public health precautions were scant to nonexistent. *Id.* at PageID 11 (citing Yolanda Jones, *Sheriff's Office Employee Dies from COVID-19*, Daily Memphian (Apr. 21, 2020), https://dailymemphian.com/article/13185/sheriffs-office-employee-dies-from-covid-19). When a group of 266 detainees were tested for COVID-19 in late April 2020, 72% of those tested were positive for the virus. *Id.* at PageID 10. Social distancing was impossible and masks and sanitation supplies scarce and deficient. *Id.* at PageID 12, 14. On at least two occasions, jail staff pepper-sprayed detainees who were in medical isolation. *Id.* at PageID 13.

On June 12, 2020, the district court issued an order seeking further fact-finding regarding the conditions in the Jail in order to determine whether emergency habeas relief was appropriate. ECF No. 45. The Court ultimately appointed Michael K. Brady, whom the Appellants nominated under Fed. R. Evid. 706, to serve as the Independent Inspector and to "render an expert opinion on the current health and safety of medically-vulnerable Plaintiff-detainees at the Shelby County Jail in light of the COVID-19 pandemic." ECF No. 56 at PageID 843; ECF No. 49.

The supplemented record further demonstrated that Appellants' response to the COVID-19 crisis required serious and immediate improvement. From June 23 to June 25, 2020, Brady conducted a three-day inspection of the Jail. ECF No. 80 at

PageID 1170, 1173. Among other things, Brady observed that "[t]he Shelby County Jail is not maximizing its efforts to enforce social distancing in its living units," *id.* at PageID 1189, educational materials regarding COVID-19 were inaccessible for detainees with learning disabilities, developmental disabilities, or mental illness, *id.* at PageID 1192, and the medical response plan in the Jail was "inadequate to protect the vulnerable inmates housed in the [] Jail," for a number of reasons including an "ineffective and useless" strategy of not testing for COVID-19. *Id.* at PageID 1187.

On August 7, 2020, the district court denied without prejudice Appellees' Motion for emergency habeas relief. ECF No. 124. The district court noted that "the proof before [it] certainly shows failures with how the Jail is detaining medically vulnerable detainees amid this pandemic,"[5] but ultimately concluded that habeas relief was not appropriate because "these failures can likely be remedied quickly." *Id.* at PageID 2815. Despite not ordering habeas releases, the district court indicated that, as of early August 2020, "grave areas of concern persist[ed]."

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[5] The Court noted that the Jail's "non-testing" strategy had "critical system failure[s]," that the method of transporting detainees to court appearances "presented an unreasonable risk of [COVID-19] exposure," and that it was a "grave problem" if the virus could be spread via aerosolized droplets because medically-vulnerable detainees were housed in units adjacent to COVID-positive detainees with open bars and free movement of air. ECF No. 124 at PageID 2816–17.

B. The Parties Entered into the Consent Decree Explicitly to Protect Medically-Vulnerable and Disabled Detainees So Long As COVID-19 Threatened Their Health and Safety

The district court's August 7, 2020 Order denying Appellees' motion yet documenting numerous "grave areas of concern," created "additional impetus" to the parties' settlement efforts. ECF No. 161 at PageID 3186. The parties participated in three days of mediation in December 2020, ECF No. 160 at PageID 3173, which resulted in the Decree. *See* ECF No. 161. In jointly moving for approval of the Consent Decree, Appellants agreed that the Decree "ensures that [Appellees] will continue to be safe for the duration of the pandemic," and "serves the public interest." *Id.* at PageID 3186. The parties also agreed to the PLRA's need-narrowness-intrusiveness findings, included in the Consent Decree at Paragraph 31 and approved by the district court:

> For purposes of jurisdiction and enforcement of this Decree only, the parties jointly request that the Court find that this Decree satisfies the requirements of 18 U.S.C. § 3626(a)(1)(A) in that it is narrowly drawn, extends no further than necessary to correct any violation of a federal right, and is the least intrusive means necessary to correct any violation of the federal rights of the Plaintiffs.

In negotiating and entering the Decree, the parties' purpose was straightforward: to protect medically vulnerable and disabled detainees for as long as COVID-19 presented a threat to their health and safety. *See* ECF No. 161 at PageID 3187–88 (joint motion indicating the Decree "will remain in place for the duration of the pandemic"). This purpose is encapsulated in the Decree's specific

provisions. *Id*. at PageID 3192; *see also* ECF No. 161-2, at ¶ 13 (contemplating a ventilation expert to evaluate whether "air quality within the Jail is safe as it relates to COVID-19"); ¶ 20 (discussing distancing measures and a determination by the independent inspector as to whether population levels are safe vis-à-vis COVID-19); ¶ 22 (empowering Appellees' counsel to seek swift judicial resolution of any matters that "pos[e] an immediate and serious risk to the health and safety of Plaintiffs or Class or Subclass members"). Indeed, the fact that the Decree is to terminate only upon the implementation of an adequate vaccination program or "a declaration by the CDC and the Tennessee Department of Health that the COVID-19 pandemic is over and/or has ended" makes clear the parties' intent that the Decree should run until detainees at the Jail are afforded adequate protections from the virus. *Id*. at ¶ 28. The district court reaffirmed this framing and purpose in its Order Granting Final Approval of the Class Action Settlement, noting that at the core of this litigation lies a desire to "protect as much as possible Plaintiffs' safety while detained in the Shelby County Jail ('the Jail') during the current pandemic caused by COVID-19." ECF No. 209 at PageID 3485.

C. Immediately After the Decree was Adopted, Appellants Announced Their Limited Commitment to its Terms

On April 13, 2021, one day after the district court entered its final approval of the class settlement and Consent Decree, Appellants issued a press release entitled "COVID-19 CLASS ACTION LAWSUIT DISMISSED." ECF No. 216-3. The

release further indicated that Appellants had unilaterally deemed that their "final action to be taken pursuant to the Consent Decree," was to be the administration of a single dose of vaccine to a small portion of the Jail population on April 15, 2021. *Id*. When the parties conferred on April 16, 2021, Appellants represented that fewer than 200 detainees had been given a single dose of a COVID-19 vaccine, yet their position that the Decree had terminated was unflinching. ECF No. 216-4 at PageID 3574, 3577. Numerous times, counsel for Appellees attempted to engage Appellants regarding the vaccine program, but Appellants provided limited information—only after multiple declarations that the Decree had terminated—and refused to adopt Appellees' suggestions for improving the efficacy of the vaccine program. *Id*. at PageID 3562.

Brady inspected the Jail on March 17, 2021,[6] May 6-7, 2021,[7] June 16, 2021,[8] and August 5, 2021.[9] Brady's reports reflect his escalating concerns that Appellants are failing to respond to the COVID-19 crisis and dangerous Delta variant by, *inter alia,* operating a "completely ineffective" vaccine program that was "poorly thought out and poorly administered." ECF No. 256-1 at PageID 4937, 4954. Brady also

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[6] ECF No. 216-5.
[7] ECF No. 221-4.
[8] ECF No. 244-4.
[9] ECF No. 256-1.

raised alarms with respect to Appellants' lack of testing,[10] failure to medically isolate and quarantine,[11] refusal to take steps to reduce the jail population,[12] and extended reliance on locking detainees in their cells without access to phones, kiosks,[13] showers, or recreation time for days or weeks on end.[14] Appellants' responses to the Brady reports reveal their unwillingness to make best efforts to adopt and execute an effective COVID-19 response, including a minimally effective vaccine program.[15]

Rather than honor the terms and spirit of the Decree and act to protect medically vulnerable and disabled detainees, Appellants have spent time and

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[10] ECF No. 256-1 at PageID 4981–84 (noting that Appellants and their health care personnel "simply ignore th[e] potentially superspreader group of [asymptomatic] infected inmates").

[11] ECF No. 256-1 at PageID 4920.

[12] *Id.* at PageID 4920 ("The Shelby County Jail population is going up not down," which "continues to be a serious concern.").

[13] Due to the severity of lockdowns in the facility, long stretches of time go by during which Appellees could not request a vaccine due to lack of access to the jail kiosks. *See id*. at PageID 4925 (finding that "Whole sides of floors if not more had not been out of their cells for days if not weeks at a time"); *see also* ECF No. 258 at PageID 5080 n.19 (noting Brady explained "that with no out-of-cell time, detainees do not have access to kiosks and educational materials and cannot put in sick calls").

[14] ECF No. 256-1 at PageID 4925 ("[T]here were a total of 86 [custody staff] out sick on the day prior to my inspection" and the detainees were therefore "locked down for days if not weeks at a time."); PageID 4944.

[15] *See* ECF Nos. 244-5, 244-6.

resources resisting the Decree and the Inspector's recommendations, and now filing this appeal and stay petition.

ARGUMENT

II. Appellants' Motion is Improper, as It Is Not Impracticable for Appellants to First Move the District Court for a Stay.

Appellants flout Rule 8, which requires parties to "ordinarily move first in the district court" or show that moving below would be impracticable. Fed. R. App. P. 8. Appellants claim that because they disagree with the district court's ruling against their primary argument—that the Appellees must prove ongoing violations of federal rights—raising the "identical issue" in a motion to stay would be impracticable under Rule 8(a)(2)(A). A party's failure to prevail under a district court's prior rulings does not by itself make moving the same court for a stay impracticable. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 844 (D.C. Cir. 1977) (contemplating that a court may stay its own order when ruling on difficult legal questions and to maintain status quo). Moreover, Appellants mischaracterize the district court's prior rulings.

The requirement that a party ordinarily move first in the district court for a stay pending appeal is "[t]he cardinal principle of stay applications." *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (quoting 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3954 (3d ed. 1999)) (denying stay for failure to seek stay before district

court). "[A party's] failure to show the impracticability of moving first in the district court is sufficient grounds to deny its motion." *Whole Woman's Health v. Paxton*, 972 F.3d 649, 654 (5th Cir. 2020) (citing *Baker*, 310 F.3d at 930).

Further, a district court's prior refusal to grant a party's requested relief does not suffice to show that moving first for a stay in the district court would be impracticable—otherwise, nearly every stay pending appeal would be "impracticable." *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 43–44 (1st Cir. 2021); *see also Bayless v. Martine*, 430 F.2d 873, 879 n.4 (5th Cir. 1970); *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844. "Impracticability" often involves a time-sensitive or otherwise urgent request for relief. *See, e.g., Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (stay involving school attendance on the eve of school year was urgent and therefore impracticable to raise in district court); *Bos. Parent Coal.*, 996 F.3d at 44("tight timeframe").

Here, Appellants have not alleged that a stay is urgently needed or time sensitive.[16] They claim that seeking a stay "based on there being no ongoing federal

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[16] Appellees waited 15 days to seek a stay—and almost a week after they had filed a Notice of Appeal. *See* ECF No. 258 (Order issued August 30, 2021); Br. (filed Sept. 14, 2021). There is no basis to suggest that the district court could not have ruled swiftly: most recently, the district court responded to Parties' Joint Notice (ECF No. 260) within two days. ECF No. 262.

rights violations" is impracticable in the district court because the court would not find ongoing violations. Br. at 8–9. However, in denying Appellants' Motion to Terminate, the district court wrote it "ha[d] not yet had the occasion to reach or rule on alleged ongoing violations of federal rights" (ECF No. 258, PageID 5064)—not that it baldly "*will not consider* the PLRA's requirements." as Appellants assert.[17] Br. at 9 (emphasis added). The district court has never, in fact, denied Appellees relief on these grounds, which are not required to defeat termination, as it has never reached this issue. *Cf. Baker*, 310 F.3d at 931 (denying stay under Rule 8 where grounds for stay were never raised before district court).

II. Appellants Have Not Met Their Burden to Justify a Stay

Because a stay "is an intrusion into the ordinary processes of administration and judicial review," "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken v. Holder,* 556 U.S. 418, 433–34 (2009) (internal quotations omitted). Appellants have not satisfied their burden to justify eliminating their obligations under the Decree pending their appeal of the denial of their termination motion.

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[17] As the increasingly alarming reports of the independent inspector suggest, the record will in any event establish current and ongoing violations of federal rights. *See* ECF Nos. 216-5, 221-4, 244-4, 256-1. Appellees have a pending Motion to Enforce and Modify the Decree (ECF. No. 216-1).

In deciding a motion to stay pending appeal, courts consider factors including "(1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker*, 310 F.3d at 928 (6th Cir. 2002) (citations omitted). These factors are to be balanced, and none favor Appellants.

A. Jail Appellants Are Not Likely to Succeed on the Merits

i. Jail Appellants' Termination Motion Was Premature Under the PLRA, and the PLRA Does Not Require New Needs-Narrowness-Intrusiveness Findings

Appellants' motion to terminate the decree was premature and thus procedurally improper under the PLRA. 18 U.S.C. Section 3626(b)(1)(A) prohibits a motion by one party alone to terminate before two years following entry of a consent decree. It is true that § 3626(b)(4) of the PLRA allows for termination "to the extent that modification or termination would otherwise be legally permissible." Appellants sought termination on separate legal grounds by arguing that the contract terms of the Decree had been satisfied, and the district court allowed them to pursue that argument. ECF No. 233 at PageID 3944–45.

However, the PLRA distinguishes between these avenues for termination: *i.e.*, those based on an alleged lack of current and ongoing constitutional violations

(subject to the two-year provision of § 3626(b)(1)), and those based on other legally permissible grounds (falling under § 3626(b)(4)). While the PLRA allowed Appellants to seek termination on contract law grounds, argument regarding an alleged lack of current and ongoing federal rights violation is improper and premature.

According to Appellants' flawed logic, if the constitutional deliberate indifference standard is not met repeatedly and continuously after a Decree is entered, the Decree is no longer valid. Br. at 2, 7–8, 11–14. To the contrary, the PLRA does not require new PLRA needs-narrowness-intrusiveness findings each time a PLRA-compliant order must be enforced or to simply remain in effect. The PLRA requires that all orders for prospective relief include a finding that the relief is necessary to correct a violation of a federal right, as narrowly drawn as possible, and the least intrusive means possible. 18 U.S.C. § 3626(a)(1)(A). The parties agreed that the Decree meets those requirements, and the Court entered the Decree reciting those findings. *See* ECF No. 161-2, ¶ 31; ECF No. 209. The Court retained jurisdiction to enforce the Decree. ECF No. 209 at 3; *see also United States v. Bd. of Cnty. Comm'rs of Hamilton Cnty., Ohio*, 937 F.3d 679, 688 (6th Cir. 2019) (quoting *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir.

1994) ("'[C]ourts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them.'")).[18]

Appellants cite the earlier case *Hadix v. Johnson*, 228 F.3d 662 (6th Cir. 2000), contending that a motion to terminate any consent decree governed by the PLRA requires new findings. Br. at 12. That case is distinct. There, the district court never at any point, including in entering the operative Decree, made the requisite Section 2626(b) findings. 228 F.3d at 670. This was simply a straightforward application of Section 3626(b)(2) and (b)(3), which entitles a movant to immediate termination if the requisite findings were not originally made, unless the court at that point makes findings of continuing violations. *Id*. This Court quoted the Second Circuit's statement that "we think it clear from the statute itself that, *if those findings were not made in connection with the entry of the decree*, and if the court does not proceed to make the requisite findings . . ., the Act requires the termination of such a consent decree." *Id.* (quoting *Benjamin* v. *Jacobson*, 172 F.3d 144, 158 (2d Cir. 1999) (*en banc*) (emphasis added). Both this language, and the plain language of

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[18] Appellants' lengthy discussion about the standards for proving deliberate indifference is consequently not relevant here. The question is not whether Appellees can prove current deliberate indifference (or a violation of the Americans with Disabilities Act) to avoid termination, but rather whether Appellants have complied with the Consent Decree's termination provision concerning their COVID-19 vaccination program.

Section 3626(b)(2) referring to findings made pursuant to relief "approved or granted," makes clear that inclusion of the findings in the Decree here suffices.

Appellants also argue repeatedly and wrongly, that the district court here actually "found no ongoing federal rights violations" in its decision denying their motion to terminate. Br. at 14; *see also* Br. at 2, 7–8, 11–14. In fact, the district court, not needing to address this improper question, made no such findings one way or the other in the decision below (ECF No. 258 at PageID 5063–64).

This Court recently denied two stay motions made by a federal prison in Ohio in a case involving a preliminary injunction in favor of COVID-19 protections for incarcerated people, before ruling in the prison's favor on the appeal itself. *Wilson v. Williams*, No. 20-3447 & 20-3547 (6th Cir. May 4, 2020). Here, the Jail Appellants' case for a stay is even less compelling, as the district court is interpreting a Consent Decree voluntarily entered into by the parties.

ii. Although Appellees Need Not Prove Violations of Constitutional Rights on an Ongoing Basis, Detainees' Rights Continue to Be Violated at the Jail

As part of their legally unfounded argument that ongoing violations of federal rights must be shown, Appellants assert that Appellees are no longer entitled to the protections of the Decree because they may now "voluntarily" decide whether to obtain a COVID-19 vaccine. Br. at 13–14. But Appellees are entitled to more than just individual vaccines; they are entitled to a carceral environment safe from the

risk of serious harm, and the record clearly indicates they do not have it. The Eighth and Fourteenth Amendments are violated when jail or prison officials show deliberate indifference to a substantial risk of serious harm. *See Helling v. McKinney*, 509 U.S. 25 (1993); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Brawner v. Scott Cnty., TN*, No. 19-5623 (6th Cir. Sept. 22, 2021). Where vaccination rates are "shockingly low" (ECF No. 258 at PageID 5072) due to a "completely ineffective" vaccination program (ECF No. 256-1 at PageID 4937), and where testing and quarantine are inadequate (*id*. at PageID 4922–24, 4942, 4949, 4981), the environment is not adequately safe, and the Appellants' deliberate indifference is the cause. The district court's extensive findings of fact thus far included that there remains a substantial risk of serious harm—a population in "deep peril"—and the Jail's deliberate indifference is established by their persistent failure to act to safeguard detainees.

Appellants' "voluntary conduct" argument also fails legally. In *Rhodes v. Michigan*, this Court recently rejected that argument. The panel's language was clear that no voluntariness inquiry is required:

> The dissent . . . would hold that the Eighth Amendment is inapplicable to Rhodes's circumstances because she *volunteered* to be a laundry porter—because she was not *compelled* to engage in a dangerous activity. . . . Nowhere in *Estelle*, *Farmer*, or the Court's other Eighth Amendment jurisprudence does the Court qualify Eighth Amendment conditions-of-confinement protections as does the dissent. To the contrary, those cases establish a clear standard: "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an

> inmate violates the Eighth Amendment." *Farmer*, 511 U.S. at 828. As simple as that.

Rhodes v. Michigan, et al., No. 20-1246 (recommended for publication), 6th Cir. August 24, 2021, at 12.

iii. The Court Justified its Decision not to Terminate the Consent Decree in Painstaking Detail, After a Two-Day Evidentiary Hearing

Appellants repeatedly accuse the district court of having "ignored" or overlooked Appellants' arguments and proof in support of its motion to terminate. *See, e.g.*, Br. at 15, 17. Nothing could be further from the truth: The district court carefully considered the substantial evidence submitted by the parties, admitting more than 30 exhibits and hearing testimony from five witnesses offered by Appellees and one by Appellants. ECF No. 250 at PageID 4499–500.

Based on a thorough analysis of the evidence, the district court determined Appellants had not met their burden. *See, e.g.*, ECF No. 258 at PageID 5069 (noting that Appellants had "provided no evidentiary support" of their compliance with Decree's requirement that they offer the vaccine to all detainees confined in the Jail for more than 14 days; *id*. at PageID 5072 n.9 (raising questions about reading level of educational materials); *id*. at PageID 5074–75 (citing testimony from detainee and inspector that educational materials were not physically accessible to detainees); *id*. at PageID 5076 (noting lack of in-person education for detainees about vaccines, because town halls have not been held in all housing pods and the one "pep rally"

was limited to 300 attendees); *id*. at PageID 5078–79 (questioning availability of education materials on kiosks as kiosks are inaccessible to detainees locked in cells, are sometimes broken, and because requests made through the kiosks are sometimes ignored); *id*. at PageID 5082 ("disputes" exist and there is a "lack of consistency" as to whether detainees are being offered incentives to receive the vaccine); *id*. at PageID 5082 n.20 (Appellants had not adduced evidence that every eligible detainee received the promised $20 in commissary funds).The Court cited the testimony of every witness offered by Appellees and found that Appellants' rebuttal testimony from Chief Jailer Kirk Fields failed to undermine that of Appellees' witnesses. *Id*. at PageID 5078 n.16; PageID 5079 n.17.

Thus, after affording Appellants an exhaustive opportunity to justify their attempt to terminate the Decree, the district court described Appellants' posture in this case as "concerning" and found the detainees confined in the Jail are "in deep peril." *Id*. at PageID 5083.

The district court's decision was based on Appellants having not complied with their obligation under the Decree's termination provision to offer the vaccine, educational materials, and non-punitive incentives in a way that effectuates that purpose. This Court has affirmed district court orders where it was even less clear that defendants were acting contrary to the letter of the consent decree. *See, e.g.*, B*rown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) (enjoining behavior that violated the

overall purpose, rather than specific provision, of consent decree). Here, Appellants remain at grave risk, and terminating the Decree during an outbreak in a facility with what another expert has called a "shockingly low" vaccination rate, ECF No. 258 at PageID 5072, would "make a mockery of the consent decree." *Brown*, 644 F.2d at 558.

B. Appellants Will not be Irreparably Harmed if the Consent Decree is Not Stayed

Appellants have not shown that they will be irreparably harmed absent a stay. Appellants' only conceivable harm would be any effort and expense involved in complying with the Consent Decree's terms during the pendency of the appeal. But "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Baker*, 310 F.3d at 929–30 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Here, the time and effort involved is not even substantial. *See, e.g.,* ECF No. 258 at PageID 5069, 5072-79, 5082 (district court findings regarding failure to make substantial efforts in its vaccine program). And free assistance in improving those efforts from the Independent Inspector is available (though Appellants have declined it). ECF No. 256-1 at PageID 4554.

The lack of irreparable harm is especially apparent where the defendant assumed the risk, knowing it might be subject to an injunction. *United States v. Edward Rose & Sons, Inc.,* 384 F.3d 258, 264 (6th Cir. 2004); *Baker*, 310 F.3d at

930. Here, Appellants knowingly and voluntarily agreed to the requirements of the Consent Decree, including providing adequate vaccine education and non-punitive incentives. Appellants cannot now plausibly claim unfair surprise that their demonstrably bare-bones conduct in this area might be deemed inadequate, and that, given the severity of the COVID-19 pandemic, their obligations under the Decree might conceivably continue.

C. Appellees Will be Substantially Injured if the Consent Decree is Stayed

On the other hand, Appellees will suffer substantial and irreparable harm if the Decree is stayed. The record contains abundant evidence that medically vulnerable Appellees continue to be in "deep peril" (ECF No. 258 at PageID 5072) of contracting and suffering ill effects from COVID-19 in the forced congregate setting of the Jail due to, *inter alia*, the physical impossibility of social distancing (ECF No. 256-1 at PageID 4960), the inadequacy of the Jail's testing and medical response to COVID infections (*id*. at PageID 4981), and the insufficiency of its vaccination efforts (*id*. at 4936–40).

This peril is particularly acute given the rise of the Delta COVID-19 variant and our increasing medical understanding that even COVID-19 survivors can suffer long-term or permanent impairments. A substantial risk of illness, permanent impairment, or death are quintessential irreparable harms. This is specifically true with respect to a substantial risk of medically vulnerable persons contracting

COVID-19 in a carceral setting. *See, e.g.*, *Malam v. Adduci*, 453 F. Supp. 3d 543, 658 (E.D. Mich. 2020) (finding irreparable harm supporting an injunction under the described circumstances); *see also Coreas v. Bounds,* 458 F. Supp. 3d 352, 361 (D. Md. 2020). There "can be no more irreparable injury than lasting illness or death." *Perez-Perez v. Adducci*, 459 F. Supp. 3d 918, 930 (E.D. Mich. 2020). Additionally, a continued substantial and unjustified risk of contracting COVID in the Jail would constitute a violation of Appellees' constitutional rights. Violation of a constitutional right is by definition an irreparable harm justifying an injunction, without need of further proof. *Overstreet v. Lexington-Fayette Urban Cnty. Ctr.*, 305 F.3d 566, 578 (6th Cir. 2002).

Thus, the balance of harms clearly favors denial of the stay. If this Court ultimately decides in favor of Appellees, Appellants will only have to continue to abide by the terms of a Decree they negotiated and agreed to. But if this Court rules for Appellants, the result would be unnecessary illness on the part of medically vulnerable detainees, possibly resulting in permanent impairment or even death.

D. The Public Interest Strongly Supports Keeping the Consent Decree in Place

Given the peril Appellees face, the public interest in preserving the lives and health of detainees and Jail staff alike is best served by allowing the Consent Decree to remain in place and allowing the district court to oversee and enforce its provisions.

This is particularly the case given the unrebutted record evidence that the Jail conditions pose a threat not just to Appellees but to Jail staff and the wider Shelby County community.[19] Again, this applies specifically to the need to prevent the unnecessary spread of COVID-19 among detained persons. *Fofana v. Albence*, 454 F. Supp. 3d 651, 666 (E.D. Mich. 2020) ("the public has a strong interest in preventing the rapid spread of COVID-19 in immigration detention facilities").

III. There is No Basis to Stay the Entire Consent Decree

Appellees have provided no legal basis for the second prong of their motion seeking a stay of the entire Consent Decree. This Court's case law is clear that "an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case." *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 626 (6th Cir. 2013) (citation omitted). An "injunction [] is one of those 'other issues' over which the trial court retains jurisdiction." *Id*. And "[o]nce approved, the prospective provisions of the consent decree operate as an injunction,"

[19] In a recent deposition, Chief Jailer Fields agreed that the Shelby County "community would be safer if everyone was vaccinated." ECF No. 248-2 at PageID 4454. The Independent Inspector has also found that "[t]here is a very high turnover in inmates on a daily basis" and that "[f]or the protection of the community, we should be doing everything in our power to get all inmates and staff vaccinated." ECF No. 256-1 at PageID 4944. *See also* Gregory Hooks and Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread* (Dec. 2020), https://www.prisonpolicy.org/reports/covidspread.html#summary.

Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983). The aim of the district court's retaining jurisdiction is "to act to preserve the status quo." *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). Here, only one provision of that Decree, the termination conditions, is being appealed. The district court continues to have jurisdiction over the remainder of the Decree and that court may, pending the appeal, continue to enforce the other provisions of the Decree. Thus, even if this Court were to issue a stay pending appeal, Appellees submit that such a stay should be limited to interpretation of the termination paragraphs.

CONCLUSION

The stay motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The Court granted Petitioners-Appellees' motion for leave to file excess pages on September 22, 2021, allowing a maximum length of 6,200 words. *See* Order, Sixth Circuit ECF No. 14; Motion, Sixth Circuit ECF No. 11. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), as amended by the Court's September 22 Order, because, excluding the parts of the document exempted by 6th Cir. R. 27(a)(2)(B), it contains 6,115 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2021, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit, causing notice of such filing to be served upon all parties registered on the CM/ECF system.

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