IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

REPLY BRIEF IN SUPPORT OF MOTION BY DEFENDANTS TO DISMISS

I. Plaintiffs' Arguments for Standing and Against Mootness Misunderstand the Required Showing for Injunctive and Declaratory Relief.

A. Due to the Absence of a Substantial Threat of Irreparable Harm, Plaintiffs Lack Standing for any of their Claims.

Plaintiffs came into Court breathing apocalyptic threats of drastic and immediate harm by Defendants in violation of Title II of the Americans with Disabilities Act (ADA), as amended, 42 U.S. Code § 12131, et seq., Section 504 of the Rehabilitation Act of 1973 (RA), as amended, 29 U.S.C. §§794, et seq., and the Due Process Clause of the Fourteenth Amendment.

They alleged that Defendants' "refusal to provide communication access . . . leaves deaf people unable to understand the complex rules and requirements of their probation or parole, putting them at constant risk of incarceration." (Doc. 1 ¶ 1). Plaintiffs pled some 15 times in their complaint that they could not understand the

terms of their probation or parole. (Doc. 1 ¶¶ 1, 2, 8, 9, 10, 11 ("no Plaintiff fully understands the terms of his supervision"), 11, 13, 33, 39, 44, 47, 57, 85, 86). And Plaintiffs also alleged some 15 times in their complaint that they faced a constant risk of incarceration. (Doc. 1 ¶¶ 1, 2, 7, 8, 11, 33, 46, 47, 51, 52, 57, 86-89).

These allegations form an essential premise of their claims—although Plaintiffs now seek to disavow them. (Doc. 78 at 6) (Defendants' emphasis on Plaintiffs' claims of the "threat of reincarceration" is "misplaced"). Based on their dire allegations, Plaintiffs sought a preliminary injunction, permanent injunction, and declaratory judgment.

As discussed in Defendants' principal brief (Doc. 76 at 7, 24),[1] the Supreme Court has prescribed these bedrock requirements for standing: (1) "an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) caused by the defendant, which means it is "fairly ... trace[able] to the challenged action of the defendant," and (3) "likely, as opposed to merely speculative." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). There is no room in this formulation for standing based on the mere possibility of harm. *See also* City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983).

[1]Court filings are cited by ECF pagination. And, due to space limitations, all citations are omitted and emphases are added in this brief unless otherwise noted.

In addition to basic standing for permanent equitable relief, a party seeking the " 'extraordinary and drastic' remedy" of a preliminary injunction, Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016), must establish additional strict legal requirements. These are: " '(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the potential harm to the defendant; and (4) that the injunction will not disserve the public interest.' " Friedenberg v. Sch. Bd. of Palm Beach Cty., 911 F.3d 1084, 1090 (11th Cir. 2018).

In Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), the Supreme Court reviewed a preliminary injunction against the U.S. Navy limiting sonar training exercises based on potential harm to marine mammals. The Court held that the "possibility" of harm is not sufficient to support a preliminary injunction: "We agree with the Navy that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." Id. at 22. The Court reversed the lower courts although the record showed some possibility harm: "564 physical injuries to marine mammals, as well as 170,000 disturbances of marine mammals' behavior." Id. at 19-20.

In reversing and remanding in Winter, the Supreme Court emphasized that its

ruling on the preliminary injunction would also control the outcome of the request for permanent injunctive relief. Id. at 33 ("our analysis of the propriety of preliminary relief is applicable to any permanent injunction as well"). This principle is certainly applicable for our case as well.

The requirements for a permanent injunction are similar to those for a preliminary injunction, but without the same measure of urgency: "To obtain a permanent injunction, a plaintiff must show (1) that he has suffered an irreparable injury; (2) that his remedies at law are inadequate; (3) that the balance of hardships weighs in his favor; and (4) that a permanent injunction would not disserve the public interest." Barrett v. Walker County School District, 872 F.3d 1209, 1229 (11th Cir. 2017) (*citing* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)).

The Eleventh Circuit has summarized the standing requirements for injunctive and declaratory relief, as follows: "In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a ***plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future***." AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 938 F.3d 1170, 1179 (11th Cir. 2019).

As Defendants argued at the September 12-13, 2019 hearing, Rizzo v. Goode,

423 U.S. 362 (1976), is instructive for our case. There, the Supreme Court reversed an injunction against the Philadelphia Police Department comprehensively "overhauling police disciplinary procedures." Id. at 373. The Court held that sixteen constitutional violations by 7,500 policemen in Philadelphia—a city of three million inhabitants—over a period of one year did not support injunctive relief. Id. at 374-75. The Court noted that the plaintiffs "lacked the requisite 'personal stake in the outcome' " necessary for standing because their claims depended "upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures." Id. at 372-73. Because the district court had certified the class and granted injunctive relief, the Supreme Court reached and reversed on the merits, not resting its holding on lack of standing.

Thus, the allegations of Plaintiffs that they have not been communicated the conditions of their probation and they face the constant risk of revocation resulting in incarceration are essential to their putative standing, despite their attempt to retreat from them. (Doc. 78, at 6). In other words, these allegations are the express basis upon which Plaintiffs contend they face: (1) "an injury in fact . . . (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) "fairly ... trace[able] to the challenged action of the defendant," and (3) "likely, as opposed to merely speculative." Lujan, 504 U.S. at 560-61.

Plaintiffs offer a false analogy to medical care decisions, relying on Silva v. Baptist Health South Florida, 856 F.3d 824 (11th Cir. 2017). (Doc. 78 at 5-6). Health care decisions are necessarily expansive and open-ended. In Silva, the Eleventh Circuit held that hearing impaired hospital patients had standing to seek injunctive relief under the ADA and RA because "they 'will likely experience a denial of benefits or discrimination' upon their return" to the hospital. Id. at 832. The court explained that hearing impaired medical patients are entitled to "equal opportunity to participate in healthcare services." And, according to the court, this participation includes an "expansive informational exchange":

> When a hearing (i.e., non-disabled) person goes to the hospital, that person is not limited only to describing symptoms and receiving the treatment plan and discharge instructions. The patient's conversation with the doctor could, and sometimes should, include a whole host of other topics, such as any prior medical conditions and history, medications the patient is taking, lifestyle and dietary habits, differential diagnoses, possible follow-up procedures and tests, informed-consent issues, and side effects and costs of potential courses of treatment.

Id. at 835.

In contrast, our Plaintiffs and other criminal offenders have been provided with the conditions of their probation/parole by state actors other than DCS and these other actors are not parties to this lawsuit. Those on probation were informed by the trial courts at sentencing of the conditions of probation. The only Plaintiff on parole, Brandon Cobb, was informed of the conditions of parole by the Georgia Board of

Pardons and Parole. (Doc. 34-1 (Brandon Cobb) ¶¶ 9, 15, Attachment 1; Doc. 34-2 (Jerry Coen), ¶¶ 9, 15, Attachment 1; Doc. 34-3 (Herrera) ¶¶ 19, 15, Attachment 1; Doc. 34-4 (Nettles) ¶¶ 9, 14, Attachment 1; Doc. 34-5 (Wilson) ¶¶ 9, 15, Attachment 1; Doc. 34-6 (Woody) ¶¶ 9, 15, Attachment 1).

As Defendants have previously emphasized, Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. DCS is not involved in, and has no control over, these court proceedings.

And probation/parole revocation proceedings, over which DCS also has no authority, are accompanied by all required due process rights, including the right to interpreters outlined above. O.C.G.A. §§ 42-8-34.1, 42-9-48, et seq.; Lewis v. Sims, 277 Ga. 240, 241 (2003); Williams v. Lawrence, 273 Ga. 295, 298 (2001). (Doc. 76 at 18-19). Thus, at revocation proceedings, hearing impaired offenders are guaranteed due process including accommodations for their hearing issues.

Thus, if criminal offenders in Georgia are not provided hearing accommodations adequate for communicating terms and conditions of probation/parole or are not provided accommodations at revocation proceedings, those matters are outside the purview and responsibility of DCS. The same is true of any issues in communicating the conditions of sex offenders' registration.

Four of the six Plaintiffs in our case are registered sex offenders, i.e., Herrera, Nettles, Wilson, and Woody. Under state law, Georgia Department of Corrections (DOC), DCS, Georgia sheriffs, Georgia Bureau of Investigation, and other state agencies have various responsibilities regarding sex offenders registration. The governing statute provides regarding communications with sex offenders:

> (b) Before a sexual offender who is required to register under this Code section is released from prison or placed on parole, supervised release, or probation, the appropriate official shall:
>
> (1) Inform the sexual offender of the obligation to register, the amount of the registration fee, and how to maintain registration;
>
> (2) Obtain the information necessary for the required registration information;
>
> (3) Inform the sexual offender that, if the sexual offender changes any of the required registration information, other than residence address, the sexual offender shall give the new information to the sheriff of the county with whom the sexual offender is registered within 72 hours of the change of information; if the information is the sexual offender's new residence address, the sexual offender shall give the information to the sheriff of the county with whom the sexual offender last registered within 72 hours prior to moving and to the sheriff of the county to which the sexual offender is moving within 72 hours prior to moving;
>
> (4) Inform the sexual offender that he or she shall also register in any state where he or she is employed, carries on a vocation, or is a student;
>
> (5) Inform the sexual offender that, if he or she changes residence to another state, the sexual offender shall register the new address with the sheriff of the county with whom the sexual offender last registered and that the sexual offender shall also register with a designated law enforcement agency in the new state within 72 hours after establishing residence in the new state;
>
> (6) Obtain fingerprints and a current photograph of the sexual offender;
>
> (7) Require the sexual offender to read and sign a form stating that the obligations of the sexual offender have been explained;

> (8) Obtain and forward any information obtained from the clerk of court pursuant to Code Section 42-5-50 to the sheriff's office of the county in which the sexual offender will reside; and
>
> (9) If required by Code Section 42-1-14, place any required electronic monitoring system on the sexually dangerous predator and explain its operation and cost.

O.C.G.A. § 42-1-12(b)(1-9). DCS is the "appropriate official" responsible for communications to offenders ***only*** with respect to those "sentenced to probation without any sentence of incarceration in the state prison system or who [are] sentenced [as] first offenders." O.C.G.A. § 42-1-12(a)(2).

All of our sex offender Plaintiffs served time in prison before entering probation. (Doc. 1 ¶¶ 23-29). Thus, the Department of Corrections (DOC) and local sheriffs have had the responsibility of communicating the terms of sex offenders registration to them, not DCS. If Plaintiffs contend they have not been adequately informed of the conditions of their registration, they should have sued DOC and the sheriffs of the counties in which they have resided. DCS has had no responsibility to communicate to them the terms of their sex offenders registration.

When Community Supervision Officers (CSO) make home visits of offenders they are only confirming their address, work status, compliance with conditions regarding possession of forbidden materials, and similar matters. Often, there is little if any need for communications. This bears no resemblance to the "expansive" open-ended information exchange required for effective medical care.

Other differences in our case and Silva are that the patients in Silva were "likely [to] experience a denial of benefits or discrimination' upon their return" to the hospital and there was a pattern of Video Relay Interpreting (VRI) technology failure. Id. at 830, 832-33, 836-40. The record here shows it is not likely our Plaintiffs will suffer the adverse consequences they allege, i.e., "incarceration."

Plaintiffs also have repeatedly misstated that Defendants are required to use each Plaintiff's "preferred method of communication." (Doc. 1 ¶ 3; Doc. 2 at 4, 9; Doc. 53-1 at 17, 19). This would include for Cobb and Herrera two ASL interpreters (one hearing and one deaf). (Doc. 1 ¶¶ 4, 21, 23, 24). The DOJ regulation codified at 28 C.F.R. § 35.160(b)(2) says that "a public entity shall give primary consideration to the requests of individuals with disabilities." But this does not mean that the entity is required to provide the requested accommodation(s). Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) ("Title II does not require States to employ any and all means" to provide accessibility and there often are "a number of ways" to satisfy the requirements of the law.); McCullum v. Orlando Reg'l Healthcare Sys., Inc., 768 F.3d 1135, 1147 (11th Cir. 2014) ("The regulations do not require healthcare providers to supply any and all auxiliary aids even if they are desired and demanded."); Silva v. Baptist Health South Florida, 856 F.3d 824, 840 n.14 (11th Cir. 2017) ("[A] patient is not entitled to an in-person interpreter in every situation,

even if he or she asks for it. The hospital ultimately gets to decide, after consulting with the patient, what auxiliary aid to provide.") (*citing* McCullum).

B. Plaintiffs Have by their Delay Also Forfeited any Argument for Standing to Seek a Preliminary Injunction.

Plaintiffs have apparently abandoned their request for a preliminary injunction. Plaintiffs filed a motion for preliminary injunction the same day they filed suit. (Doc. 2). The Court quickly scheduled a hearing and received two days of testimony on the motion September 12-13, 2019 and continued the hearing to October 30-31, 2019. (Doc. 44). However, Plaintiffs initiated a joint motion to continue the hearing without requesting new dates. (Text Order, Oct. 10, 2019).

Although, as Defendants have argued, Plaintiffs never had standing to pursue their claims, Defendants have by their delay plainly forfeited any basis for a preliminary injunction. Plaintiffs waited months and even years after the allegedly illegal and ineffective communications began with Georgia agencies to seek an injunction. Plaintiff Nettles completed his prison sentence in 2011, Coen in 2017, Wilson in 2017, Woody in 2017, and Herrera in 2018. Cobb completed his prison sentence April 1, 2019. (Doc. 1 ¶¶ 23-28; Doc. 34-1 (Mitchell Decl., re Brandon Cobb), ¶ 15). Although Plaintiffs have been on probation and/or parole since their prison release dates, Plaintiffs did not seek preliminary injunctive relief until July 19, 2019. Now, they have created another long delay by not pursuing their motion.

Federal courts have made clear that delay counts against a request for a preliminary injunction. In Benisek v. Lamone, 138 S. Ct. 1942, 1944 (2018), the Supreme Court recognized that "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request." *See also* Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm. A preliminary injunction requires showing 'imminent' irreparable harm."). Plaintiffs' previous argument is wrong that only delay in seeking a preliminary injunction ***after*** filing suit counts against the motion. (Doc. 41 at 18) (only delay "between the filing of the complaint and the subsequent request for injunctive relief" counts against the request). As recognized in Redbox Automated Retail, LLC v. Xpress Retail LLC, 310 F. Supp. 3d 949, 952 (N.D. Ill. 2018), "It has often been held that unreasonable ***delay in filing suit and/or in moving for a preliminary injunction*** can contribute to a defeat of a motion for preliminary injunction . . . for the reason that delay negates the moving party's ability to show the kind of 'irreparable injury' needed for preliminary relief."

II. Even if Plaintiffs had Standing When Suit was Filed, Defendants' New Practices and Polices Have Rendered their Claims Moot and Plaintiffs' Objections to the New DCS Policy are Trivial.

Due to the absence of any "substantial likelihood" of future injury in the form

of incarceration (as Plaintiffs allege but for which they have no evidence), they never had standing as required by Lujan and other case law discussed above. But, even assuming they had standing earlier, their standing has now evaporated in view of Defendants' new practices and policies. (Doc. 76, at 15-17; Doc. 67, at 12-13).

The new DCS practices and policy actually show good faith on the part of the agency and its Commissioner. There is no basis for Plaintiffs' argument that DCS may quickly renege and revoke its new practices and policy after this litigation is concluded. (Doc. 78 at 2-3, 9-21).

Absent strong evidence to the contrary, courts presume that government actors and agencies will abide by a change in their policies. The Eleventh Circuit has recognized that "governmental entities and officials [are] given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1333-34 (11th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). The court also quoted Wright and Miller: " 'Courts are more apt to trust public officials than private defendants to desist from future violations.' " Nat'l Adver. Co., 402 F.3d at 1334 (*quoting* 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3533.7 (2d ed. 2004)). Our Plaintiffs offer only unfounded speculation that DCS may repeal its new policy, a contention the Eleventh Circuit expressly rejected in Nat'l Adver. Co.: "Mere speculation that the City may return to its previous ways is no substitute for concrete evidence of

secret intentions." Nat'l Adver. Co., 402 F.3d at 1334.

The three cases cited by Plaintiffs in which motions to dismiss under Fed. R. Civ. P. 12(b)(1) for mootness after a change in policy were denied are very different from our case. (Doc. 78 at 4-6). These cases were Title III ADA cases against private businesses operating places of public accommodation. Smith v. Morgan, 2019 WL 1930764 (N.D. Ala. May 1, 2019); Dunn v. Eagle Holdings, LLC, 2015 WL 760247 (M.D. Ala. Feb. 23, 2015); and Leon v. Cont'l AG, 301 F. Supp. 3d 1203 (S.D. Fla. 2017). These private businesses were not entitled to the presumption DCS enjoys that a change in its policy is sincere and permanent.

Plaintiffs obviously have no response to Defendants' arguments and citations showing that a government or other entity is not required to have a policy that excludes all possibility of legal violations. *See* City of L.A. v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); Kerr v. City of W. Palm Beach, 875 F.2d 1546, 1554 (11th Cir. 1989) ("general policy that may permit unconstitutional seizures in some circumstances" but "not unconstitutional on [its] face" provided "no standing to seek injunctive or declaratory relief against the policy's continued usage"); Temkin v. Frederick Cty. Comm'rs, 945 F.2d 716, 723-24 (4th Cir. 1991).

Woody's new declaration does nothing to show a substantial threat of future violations of the ADA or other law. One can always disagree with a CSO's decision to engage VRI or not and one can always imagine a scenario in which a citizen's rights are not fully protected. But those possibilities do not establish a substantial or imminent threat, which are necessary for standing and ultimate injunctive relief.

Plaintiffs never had standing inasmuch as they never faced "a substantial likelihood that [they] will suffer injury in the future." AA Suncoast Chiropractic Clinic, 938 F.3d at 1179. A sprinkling of past communications problems does not show a substantial or imminent threat of future harm, no more than did showings of past harms in City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983) (police chokeholds); Rizzo v. Goode, 423 U.S. 362 (1976) (police constitutional violations); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008) (harm to marine mammals).

III. Conclusion

For these additional reasons, the Court should dismiss Plaintiffs' complaint due to lack of standing and mootness.[2]

[2]This document has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed a copy of the foregoing REPLY BRIEF IN SUPPORT OF MOTION BY DEFENDANTS TO DISMISS with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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