IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MARANDA LYNN ODONNELL, et al. Plaintiffs, v. HARRIS COUNTY, TEXAS, et al. Defendants.	Case No. 16-cv-01414 (Consolidated Class Action) The Honorable Lee H. Rosenthal U.S. District Judge

RESPONSE IN OPPOSITION TO MOTION TO STAY OR, IN THE ALTERNATIVE, MOTION TO CONTINUE PRELIMIANRY INJUNCTION HEARING

This case was filed in May 2016, and the constitutional violations described in the Complaint have continued every day since. Defendants' own videos and empirical data prove it. Ever since the date this lawsuit was filed, eight months and two weeks ago, Harris County has continued to operate a system in which more than 40% of all misdemeanor defendants are detained for the entire duration of their cases because they cannot afford relatively small amounts of money set without consideration of alternatives or an inquiry into their ability to pay. Defendants' post-arrest process, plagued by delays and singularly obsessed with money, is flagrantly unconstitutional.

The same Defendants who claimed to this Court that almost no one is stuck in jail because of inability to pay, Docket Entry No. 80 at 28 & at 20 n.28, and who celebrate the 40% misdemeanor detention rate in Harris County as some kind of *success* in repeated court filings, including a document filed within minutes of their extraordinary stay request, Docket Entry No. 101 at 15; No. 161 at 3, now urge this Court to put this case on hold for still more months, all while people charged with low-level misdemeanors remain needlessly and illegally in Defendants' jail.

The stay request is outrageous. All parties agreed, after significant deliberation, to the current hearing date. And when Plaintiffs' tried to move the February 21 hearing to an earlier date due to the potential of a conflicting Eleventh Circuit case for one of the lead counsel and the Defendants' ongoing serious violations, some of the signatories to Defendants' motion actually consented to an *earlier* hearing and other signatories to Defendants' motion opposed the request, calling the Court's February 21 hearing date "well considered." Docket Entry No. 113; 117.

Now, nineteen days before the parties agreed, and the Court ordered, that Plaintiffs would finally have their chance to put on simple evidence of the constitutional violations that they allege, Defendants have filed an "emergency" motion to put the entire case on hold and to postpone the hearing (first scheduled for six months ago) yet again. Nothing has happened in recent weeks that could possibly merit a stay.

The motion is filled with misleading and uncited assertions and represents a turnabout from Defendants' representations to Plaintiffs just days ago. It flies in the face of repeated statements by this Court in both October and November that it did not want further delays. *See, e.g.*, 11-28-2016 Transcript at 148 ("I will promise you that I will find time in January to have this hearing if you are unable to resolve it, whether we meet on a Saturday and Sunday because that's the only time we can do it, I am not going to let this languish, rest assured. So, you will have time to negotiate. You will not be able to do it on a leisurely basis."); 10-26-2016 Transcript ("I am reluctant to extend the time because we have so carefully orchestrated the schedule."). For the reasons explained below, Plaintiffs are vehemently opposed to Defendants' request.

A. Nothing In Defendants' Motion Justifies a Stay or Postponement

1) The serious problems in the administration of justice in the Harris County misdemeanor post-arrest system have been known to Defendants for decades. Nine, seven, five,

three and even one month ago, Defendants did not claim that the case should be stayed or the preliminary injunction hearing delayed because radically new changes were already planned "long before Plaintiffs filed suit" that would "resolve Plaintiffs' issues in this lawsuit." Docket Entry No. 163 at 1, 6.

2) Defendants' claims are untrue. Defendants have shared their plans with Plaintiffs, and they do nothing to cure the constitutional violations alleged in this case. The reason seems to be that, while some of the Defendants believe the existing system to be unconstitutional and unjust and would like to pursue reform, others have vowed privately never to change and claim to this day that they are happy with how the system has been functioning. That internal conflict likely explains why Plaintiffs have been summoned repeatedly since the filing of this lawsuit and as recently as last Friday evening (when it appeared to most parties that an eminently workable settlement was in place in principle), to agree to reasonable settlement terms that would resolve Plaintiffs' claims and fit nicely within the structure of various Harris County reform efforts. But each time, for reasons not explained to Plaintiffs, certain Defendants have blown up the deal and withdrawn the terms offered by other Defendants.[1]

3) Defendants' claim that the hearing would result in a "hastily entered preliminary injunction," Docket Entry No. 165 at 1, is baffling. Both Defendants and Plaintiffs know that the system in place on the ground when this case was filed and that has remained in place ever since is flagrantly unconstitutional. It is understandable that Defendants expect some kind of order to

[1] Defendants paint themselves as leaders at the cusp of the constitutional cutting edge. In reality, they have run and continue to run one of the most devastating and dysfunctional pretrial systems in the country. Although not directly relevant to the legal claims in this case, given the pronouncements in Defendants' motion, Plaintiffs are constrained to note the recent troubled history of Harris County's bail reform efforts because that history is relevant to Defendants' desperate attempt to stay this case and postpone a hearing date that all parties and the Court agreed to. Local media have covered for years the half-hearted and dysfunctional attempts to improve the system given the hardline position taken by some stakeholders that the existing system should never be reformed. Indeed, that hardline position won out when any money bail reform proposals were withheld from the proposal to the MacArthur Foundation at the insistence of certain "stakeholders."

be entered against them. But the suggestion that this Court would "hastily" enter a harmful order is bizarre for several reasons: First, this case has been active for nearly nine months, and the parties have submitted thorough briefing. Second, the parties in their negotiations were hours away from workable solutions that fit with existing structural reforms and would have cured the constitutional violations. Every party knows that complying with the Constitution could not possibly frustrate any identifiable reform effort, and Defendants have not (and could not) explain how requiring them not to keep people in jail because they cannot afford a financial condition without the consideration of their ability to pay and non-financial alternatives could possibly conflict with any particular reform. Defendants' vague operational fear-mongering is disingenuous and an obvious attempt to distract from Plaintiffs' simple legal claims and factual allegations. Third, nothing requires this Court to enter an order that goes into immediate effect without input from the parties. This Court need not "thrust" anything "hastily" on the County. **This Court could recognize the imminent constitutional violations and order the parties to submit proposed changes that address the problems and to work out a reasonable timeline that allows for them to be implemented. The County, Sheriff, and Plaintiffs have already drafted a perfectly workable template of that model.**[2]

4) If some of the Defendants prefer not to work with Plaintiffs but want to make changes in the *future* after relief has been ordered, nothing prevents them from putting those proposed changes before the Court at the appropriate time.

5) Defendants have not cited and could not cite any case to support the remarkable proposition that a federal court should ignore constitutional violations today because a defendant

[2] The parties and the Court have numerous options, including beginning with certain of the most low-level and uncontroversial cases and crafting reasonable relief that prevents imminent constitutional violations for those groups of arrestees while the parties work to resolve other structural issues.

may solve them "in a few months." Docket Entry No. at 7. Nor do Defendants cite a single case that credits a defendant's promise to stop violating the Constitution within a few months — especially while that same defendant continues to claim vigorously that its existing conduct is perfectly lawful (and even laudable). In the similar context of the voluntary cessation doctrine, numerous cases have made clear that a defendant's actual cessation of illegal conduct — not merely the vague promise of future cessation Defendants offer here — is particularly unimpressive when the Defendant vigorously contends that its conduct was lawful all along. *See, e.g.*, *Parents Involved v. Seattle School Dist.*, 551 U.S. 701, 719 (2007) (declining to find mootness where "the [defendant] vigorously defends the constitutionality" of its policy); *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012) ("[S]ince the union continues to defend the legality of the Political Fight–Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.").[3]

6) Moreover, some "stakeholders" have even explained that the entire current "reform" process is potentially insignificant because certain other stakeholders refuse to bind themselves to actually using the new risk assessment tool either at all or without exceptions that could largely defeat its purpose. Indeed, Harris County *already has a validated risk assessment tool,* even though Defendants routinely ignore it when determining conditions of release. The long history of ignoring the current validated risk assessment tool is still another reason to doubt the sudden sincerity of Defendants' lofty last-minute pronouncements.

7) Even if Defendants were committed to actual concrete procedures to fix their system — rather than mere future plans that have yet to be crafted let alone approved by all of the "stakeholders" — that would not justify postponing the hearing. Conversations with key

[3] Defendants even claim in their motion that this case is "not about the Constitution." Docket Entry No 163 at 4.

Defendants reveal that they *have not even begun* critical and hotly disputed parts of the reform process that they describe only in the most vague terms to the Court.[4] Defendants have claimed to Plaintiffs that basic parts of a new process will not be ready *until July at the earliest*. Shockingly, despite knowing that the most basic elements of the new system are not yet determined and that internal stakeholders disagree about them, Defendants now claim boldly that the new system will be a "model for the rest of the nation" and "address all the issues Plaintiffs raise." But the reason that the federal rules provide for preliminary injunctive relief is to protect people from ongoing, serious, and imminent harms that Defendants intend to keep inflicting, even by their own admissions and assuming (incorrectly) that the changes solve the constitutional problems, for at least another five months.

8) Defendants in effect say to the Court: we have dragged this case out so long that there's no harm in dragging it out another five months. But the delay makes the need for a hearing more urgent, not less.

B. All Parties Agreed to the "Well-Considered" Hearing Date, and Defendants Are Not Entitled to Turn the Preliminary Injunction Hearing Into a Trial

9) All Defendants agreed to the current hearing date. Not one Defendant claimed that they needed to call "10 witnesses" and that they would need multiple days of live testimony. In repeated email exchanges between the parties, each group of Defendants represented to Plaintiffs that they agreed with the existing schedule and claimed that it was well-thought out. Defendants have not and cannot point to something that happened this week to create this so-called

[4] Conversations with Defendants also reveal that many of the Defendants do not even understand the basics of the Arnold Foundation PSA tool and intend to use that tool in unlawful ways, in ways in which it was not designed, and in ways not advocated or authorized by its creators. Plaintiffs' counsel, having worked in a number of jurisdictions using the Arnold PSA tool and with many of the people involved in its implementation around the country, is intimately versed in the benefits that the tool can bring, as well as with the limitations that its creators and consultants emphasize when implementing it. Many of the Defendants appear not to have done even the most basic research into the empirical work that underlies the tool so that they can understand how to use it lawfully and effectively.

"emergency." In reality, it is a desperate attempt to move the goalposts once again and to scare Plaintiffs and the Court away from entering simple and much needed *preliminary* relief to protect the constitutional rights of the Plaintiffs while the case proceeds.

10) A preliminary injunction hearing is *not* a trial on the merits. The rules accordingly provide wide discretion for the Court to cease imminent constitutional violations without the lengthy and formal process of a trial. This Court has complete authority to do what it has done: allow extensive briefing over months and direct the parties that they have a day for evidence and argument.[5]

11) No court is precluded from granting preliminary relief because a defendant claims it needs more time than scheduled by the Court, especially when these Defendants all *agreed* after significant discussion to the scheduled hearing and said *nothing* at the time about needing more than one day. All of those discussions occurred more than six months after the case was filed and after all parties had more than enough time to consider what a hearing would look like. Indeed, it occurred months after the parties had showed up prepared to undertake an evidentiary hearing in August 2016.

12) From the beginning of this case, Plaintiffs have sought to stop imminent and devastating constitutional violations as soon as possible. After initial attempts to settle the case collapsed, Plaintiffs were prepared to present all the evidence that they needed in August 2016. Even prior to that, Defendants had asked that initial requests to hold a preliminary injunction hearing shortly after the lawsuit was filed be postponed because they wanted to settle the case. Again, internal disagreements among Defendants doomed that process. The result has been a

[5] If the equities justify scheduling an additional date after February 21, the parties and the court can discuss whether allowing more time for evidence is justified. The Plaintiffs do not expect that to be the case, but the proper way to evaluate it is to do so after the initial evidence is presented.

lengthy delay in Plaintiffs presenting evidence of imminent and serious constitutional violations.

13) The basic facts needed to prove the constitutional violations are relatively simple and, as far as Plaintiffs can tell, are not meaningfully in dispute from the videos and the data that Defendants have provided. For all of the bluster, hundreds of pages of filings and attachments, and apparently millions of dollars spent on a cottage industry of lawyers[6] to defend the existing system, the Defendants cannot dispute the key factual issues that are needed to make out Plaintiffs' claims. A preliminary injunction hearing will establish those violations and enable the Court to craft, in its discretion and with assistance from the parties, temporary measures to ease the constitutional violations while the case is rigorously litigated.

14) Plaintiffs are committed to working with Defendants to proceed to trial in this case as quickly as practicable, although given the history of difficulties obtaining accurate and complete data from the Defendants, the various competing factions within the Defendants, and the Defendants' statements about their intentions in the discovery process, Plaintiffs are more pessimistic than the Defendants that a full trial could be reasonably expected within "a few months."

Conclusion

Plaintiffs have been blindsided by this extraordinary Motion. Certain of the Defendants have delayed the progress of this case and led Plaintiffs to believe that a detailed settlement agreement was imminent. This agreement, negotiated over weeks and consuming countless hours of counsels' time, was withdrawn along with assertions that certain other Defendants would not agree to stop the most objectionable practices at the heart of this case. Enough is enough. The

[6] Because many of these lawyers contradict and disagree with each other to Plaintiffs, it is nearly impossible for Plaintiffs to discern in any given moment the positions of Defendants on material issues.

only way forward is to secure immediate preliminary relief for those whose fundamental rights are being violated while the parties redouble their efforts to resolve this case or to fully litigate it after appropriate discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February 2017, I electronically filed the foregoing with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. The electronic case filing system send a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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