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

Defendants' Emergency Opposed Motion to Stay, or, in the Alternative, Motion to Continue the Preliminary Injunction Hearing and Consolidate with Expedited Hearing on the Merits

Harris County, the Hearing Officers, the County Criminal Court at Law Judges Nos. 1 through 15, and Sheriff Gonzalez (collectively, "Defendants") file this Emergency Motion to Stay, or, in the Alternative, Motion to Continue the Preliminary Injunction Hearing and Consolidate with Expedited Hearing on the Merits.

The entire Criminal Justice Coordinating Counsel and other stakeholders in Harris County were working to modernize the pretrial criminal justice system long before Plaintiffs filed suit. Many initiatives devised by these stakeholders are starting to come online, such as implementation of the Laura and John Arnold Public Safety Assessment ("PSA"), hiring a new Pretrial Services Director, hiring additional Hearing Officers, the recent award of a $2 million grant to improve the criminal justice system, and construction of the Joint Processing Center. These programs and changes will make the pretrial process in Harris County a model for the rest of the nation and will address all the issues Plaintiffs raise. Implementation of the PSA, which

will result in the most radical change to the post-arrest process, will begin in July after the stakeholders develop the decision-making framework and new bond schedule and the necessary technology is in place.

Defendants request a stay so that they may implement the changes that were coming before Plaintiffs filed suit. It makes no sense for the Court to evaluate the constitutionality of a system that will soon not exist. Rather, the Court should stay the proceedings, allow the elected officials and other stakeholders to implement changes that were underway before Plaintiffs filed suit, and then evaluate the constitutionality of the system. (Or not. Defendants firmly believe that, once the changes have been implemented, Plaintiffs will be more than satisfied with the state-of-the-art pretrial system.) Defendants request that this motion be heard on an emergency, expedited basis.

Alternatively, Defendants request that the Court continue the preliminary injunction and decide the case on the merits on an expedited basis. This case has been pending for nine months. The parties have exchanged a significant amount of discovery (and plan to take the first deposition this Sunday, February 5) and could be ready to try this case soon. At this point, it makes far more sense to try this case on the merits than to have a multiple-day hearing to determine whether a preliminary injunction should issue, only to retry the case just a few months later.

Moreover, the Court set aside only one day for the preliminary injunction hearing. But the hearing will require at least three to four days. The nuances of the pretrial system are complex. It will take several days of testimony to explain how the system works and why the processes in place in Harris County are reasonable and constitutional. Defendants intend on

presenting live testimony of a minimum of ten witnesses. Plaintiffs will also likely have some witnesses. One day is not realistic.

A. A stay will allow Defendants to complete improvements to the system that were underway before Plaintiffs filed suit.

Courts have the inherent authority to control their docket. *See, e.g., United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005) (discussing the scope of the court's inherent powers to control its docket and giving numerous illustrations of how courts exercise this power). The court in *Cain v. City of New Orleans*, a similar suit filed by Plaintiffs' counsel, exemplifies the discretion that a court has in controlling the docket by postponing the preliminary injunction hearing (ECF Nos. 44, 47) ultimately dismissing Plaintiffs' request for preliminary injunction without prejudice (ECF No. 61), and later suspending all deadlines. *See* ECF No. 205, *Cain v. City of New Orleans*, 2:15-cv-4479 (E.D. La. 10/4/2016).

The principles of efficiency, fairness, and federalism should drive the Court's exercise of its inherent authority regarding whether to stay this case. *See Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 390–91 (5th Cir. 2003). In the declaratory judgment context, which Plaintiffs cite as a source of jurisdiction, in determining whether to stay a case courts consider a series of non-exclusive factors. *See Am. Guar. & Liab. Ins. Co. v. Anco Insulations, Inc.*, 408 F.3d 248, 250 (5th Cir. 2005); *Sherwin-Williams Co.*, 343 F.3d at 390–91; *Liberty Mut. Ins. Co. v. Jack Raus Inc.*, No. H-06-1595, 2007 WL 556896, at *2 (S.D. Tex. Feb. 14, 2007). The most relevant factor here is whether the relief "would increase the friction between our federal and state courts and improperly encroach upon state jurisdiction." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 554, 560 (6th Cir. 2008); *see Sherwin-Williams Co.*, 343 F.3d at 390–91 (5th Cir. 2003) (commenting favorably on the Sixth Circuit's factors).

A stay is warranted because Plaintiffs' proposed relief unnecessarily intrudes into areas that should be left to the local government. In reality, this case is not about the Constitution or the law. Rather, this case is about Plaintiffs' attempt to force policy changes—changes that should be made by elected officials, not a federal court. Plaintiffs seek to impose their vision of what they think the criminal justice system should be (unrelated to any actual legal principles), without any regard to the practical issues facing Harris County. Such intrusive relief, if imposed by a federal court, is quintessentially the type of relief that "improperly encroach[es] upon state jurisdiction." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 554, 560 (6th Cir. 2008). It is better for the elected officials of Harris County to make these changes, as they fully understand the challenges faced by Harris County and the complexities of local government, than to have haphazard changes thrust upon the system by a civil rights group that does not understand the workings of the Texas state criminal justice system or Harris County government.

Specifically, the Court should briefly stay these proceedings and allow Defendants' efforts (along with the efforts of many other local governmental officials and stakeholders) to modernize the criminal justice system, which were underway before Plaintiffs filed suit, to come to fruition, because these changes will likely moot this lawsuit. The most significant change is implementation of the PSA. The PSA is a "data-driven risk assessment tool that provides objective information that judges can use when deciding whether to release or detain a defendant prior to trial." (Ex. A, Press Release Regarding Arnold Tool);[1] (Ex. B, Lynda Frost, *Current Bail System in Texas Needs Change*, MyStatesman.com, March 25, 2016) ("The Public Safety Assessment is a data-driven tool that takes money out of the equation.").[2] Harris County had

[1] *Available at* http://www.arnoldfoundation.org/data-driven-tool-gives-harris-county-judges-new-way-assess-defendants-pretrial-risk-level/ (last visited February 2, 2017).
[2] *Available at http://www.mystatesman.com/news/opinion/frost-current-bail-system-texas-needs-change/IQddWPT6x1axFbPojIYodO/* (last visited February 2, 2017).

been in discussions with Arnold Foundation since the summer of 2015, and requested Commissioners Court approval to enter into the agreement to implement the tool on May 17, 2016—before the lawsuit was filed—and that agreement was approved on March 24, 2016. (*See* Ex. C, Commissioners Court Approval of Memorandum of Understanding); (Ex. D, Declaration of C. Cosper). (Plaintiffs' counsel should welcome these changes, as one of their benefactors is the Arnold Foundation).

The PSA is set to come online in July, and will help judges and the Hearing Officers make better, more informed decisions regarding appropriate bail.[3] (*See* Ex. D, Declaration of C. Cosper.) As part of implementing the tool, the stakeholders will be working with the Arnold Foundation-contracted consultant to significantly overhaul the pre-trial process by revising the bail schedule, expanding the practice of "early presentments" whereby misdemeanor arrestees are released on personal bond before the 15.17 hearing, expanding the number of presumptive personal bonds issued based on the PSA's objective assessment of risk, as well as offering a broader range of non-financial conditions of release. (*Compare* Exhibit E, New System *with* Exhibit F, Current System); (*See also* Ex. G, Declaration M. Harris.) Moreover, due to the PSA's objective, static criteria for assessing risk, the entire process will be significantly more efficient (as an interview will no longer be required to complete the risk assessment), leading to quicker release for a large segment of the misdemeanor population.

The PSA is not the only change. In 2009, Harris County formed the Criminal Justice Coordinating Council to get members of the community and bar involved in studying the criminal justice system and proposing various solutions. Due to the Council's hard work and vision, the MacArthur Foundation recently awarded the Council a $2 million grant to

[3] The Arnold Tool was set to be implemented much earlier, but due to circumstances beyond Harris County's control, the Arnold Foundation delayed implementing the tool.

"implement reforms to safely reduce Harris County's jail population and address racial and ethnic disparities in the justice system." (Ex. H, MacArthur Grant Press Release.)

Harris County also recently hired a new Pretrial Services director, Mr. Kelvin Banks, after a nation-wide search. Pretrial Services is on the frontline working directly with the criminally accused to gather vital information to aid the judges in making informed decisions about release, as well as supervising those on bond and ensuring future court appearances. Mr. Banks is working diligently to improve his department. Harris County also hired two new Hearing Officers to help ease the load and process arrestees more quickly.

The Texas Legislature is also currently considering statewide changes to pretrial procedures. (Ex. I, Texas Judicial Council, Criminal Justice Report and Resolution.) These changes could also resolve Plaintiffs' issues in this lawsuit as a matter of law.

Fundamentally, a stay is warranted because Plaintiffs are seeking to enjoin a system that, as of July, will no longer exist. Briefly staying this case will allow implementation of the PSA and will allow sufficient time to study its effects. Many of the key stakeholders in the criminal justice system, who all desire to see the system modernized, agree that allowing the planned for changes to take place makes far more sense than having Plaintiffs' injunction thrust upon the system, and agree that such an injunction could actually hinder the current progress. (*See* Ex. D, Declaration of C. Cosper.) During the stay, Defendants can make periodic status updates to the Court, and, if they are off track, the Court can lift the stay and proceed with the injunction hearing. But determining whether the current system violates the Constitution (it does not), is a futile and needless exercise, and is not an efficient use of the Court's resources.

Defendants request that the Court consider this motion on an emergency basis, before the February 21, 2017 preliminary injunction hearing. Defendants, therefore, request a hearing, so

that the Court can consider this request, allow some of the stakeholders to explain the coming changes, and allow the Court and Plaintiffs to ask questions.

B. Alternatively, the court should continue the preliminary injunction hearing and expedite consideration on the merits.

Federal Rule of Civil Procedure 65(a)(2) allows courts to consolidate a preliminary injunction hearing with a trial on the merits. *See also* 11A Charles A. Wright & Arthur Miller, FED. PRAC. & PROC. CIV. § 2950 (3d ed.) ("It long has been recognized that an accelerated trial on the merits often is appropriate when a preliminary injunction has been requested."). This case is nine months old. (*See* Docket Entry No. 3, filed May 19, 2016.) The parties have exchanged a significant amount of discovery and should be ready to try this case on the merits in just a few months. At this point, it would be far more efficient to try this case on the merits as opposed to having a multiple-day hearing on a preliminary injunction where the issue is a "likelihood of success on the merits," followed by another multiple-day hearing on the actual merits.

Furthermore, the preliminary injunction will take longer than the one day the Court has set aside. Defendants collectively intend on presenting at least ten live witnesses. In addition, Plaintiffs will likely have live witnesses. The parties will need at least three to four days for this hearing. The Court should, at a minimum, postpone the hearing until a time when the Court has at a minimum three consecutive days available.[4] And if the preliminary injunction is going to be delayed, it only makes sense to proceed directly to a hearing on the merits.

It is also unclear whether the parties will be fully ready for a hearing on February 21. The parties, at the Court's direction, agreed to exchange exhibit and witness lists two weeks before the hearing. (Ex. J, Hearing Transcript, 10/26/2016, 56:1–4.) Defendants requested that Plaintiffs set aside a few days in the two weeks prior to the hearing so that Defendants could depose any

[4] Plaintiffs' lead counsel has oral argument in the Eleventh Circuit on February 23, so it is difficult to imagine that Plaintiffs will be able to go beyond just February 21 if the hearing is not moved. And one day is plainly insufficient.

Plaintiffs' testifying witnesses or experts. Plaintiffs were unwilling to agree to this reasonable proposal and even indicated that it was "highly unlikely" that these depositions could occur given their own preparations. (Ex. K, Email A. Karakatsanis to P. Morgan, January 20, 2017.) Plaintiffs cannot prioritize their own preparation over Defendants' preparation. Defendants are entitled to depose any witnesses, particularly experts, that Plaintiffs intend to present at the injunction hearing. And if Plaintiffs cannot ensure that this is possible before the hearing, this alone should be grounds for a short extension.

Also, in recent correspondence, Plaintiffs bemoan how preparing for the hearing on the current timeline is "overwhelming" and is "an enormous undertaking," which is a dramatic shift from Plaintiffs' position before the August hearing. (*See* Ex. L, Email A. Karakatsanis to P. Morgan, January 18, 2017.) Before the last preliminary injunction hearing setting, Plaintiffs had not served a single discovery request. Plaintiffs even represented that "it's not clear . . . that there's going to be a need for discovery and in any event, not extensive discovery." (Ex. M, Transcript from Motion Hearing, 8/18/16.) Yet over the last three months, Plaintiffs have served a barrage of discovery and demanded to know exact, minute details about the workings of the system in Harris County. This demonstrates Plaintiffs' belief that the facts and nuances are critical to this case (and also shows that a one day hearing is unrealistic).

This case presents extremely important and complex issues; it is in all parties' best interest to be fully prepared. At this juncture, the parties will be fully prepared to present their entire case in just a few months. All that remains is disclosing and deposing experts and fact witnesses and finishing written discovery, which could be accomplished in just a few months. The sensible approach is to continue the preliminary injunction hearing, consolidate it with a

hearing on merits, and try this case on the merits in late spring, which will ensure that all parties are fully prepared.

Conclusion

It would benefit all the parties to build extra time into the schedule. Given the significant changes (that were coming long before Plaintiffs filed suit) to the post-arrest processes on the near horizon, the most pragmatic approach would be to stay this case while these changes are implemented. At that point, the Court should evaluate the constitutionality of the system as it exists, as opposed to a system that will not exist in a few months.

At a minimum, however, the Court should postpone the preliminary injunction hearing and consolidate it with a hearing on the merits.

Respectfully Submitted,

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Certificate of Conference

I certify that on February 2, 2017, I conferred with Plaintiffs' counsel and that they are opposed to the relief sought. I further certify that I conferred with counsel for Defendant Judge Jordan, and he is opposed to the relief sought.

/s/ Katharine D. David
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Certificate of Service

I certify that on the 2nd of February, 2017, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court.

/s/ Katharine D. David
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