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

MARANDA LYNN ODONNELL, et al., Plaintiffs, vs. HARRIS COUNTY, TEXAS, et al. , Defendants.	No. 4:16-CV-01414 (Consolidated Class Action) Honorable Lee H. Rosenthal U.S. District Judge

EMERGENCY MOTION OF DEFENDANTS FOR STAY PENDING APPEAL AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 62(c), defendants Harris County, Texas; the Hearing Officers; and the Judges for Harris County's Criminal Courts at Law 1-15 (collectively "Defendants") respectfully move that this Court stay its Order of Preliminary Injunction (Doc. 304) pending appeal. In the alternative, Defendants request that the Court stay the preliminary injunction long enough to give Defendants a reasonable time to prepare, and the court of appeals a reasonable time to consider and rule upon, a stay application submitted to that court.

Statement

On April 28, 2017, this Court granted the Plaintiffs' Amended Motion for Preliminary Injunction (Doc. 143) and ordered that all misdemeanor defendants not subject to a formal hold, pending a finding of mental competency, or subject to family violence procedures, may provide a financial affidavit setting forth the amount the amount of bail they could pay, which is the upper limit of any secured bail that may be enforced. If they submit a financial affidavit indicating inability to obtain funds sufficient to pay a commercial surety's premium within 24 hours of arrest, they "must be promptly released on unsecured money bail by the Harris County Sheriff no

later than 24 hours after arrest." Order of Prelim. Inj. at 2 (Doc. 304). The Court has also ordered the release of all misdemeanor defendants not subject to a formal hold, pending a finding of mental competency, or subject to family violence procedures, who have not appeared at a probable cause and bail-setting hearing with 24 hours of arrest. *Id*. at 2-3. The Court has further ordered that these provisions apply to defendants who are re-arrested on new misdemeanor charges or on warrants for failure to appear. *Id*. at 3. The order states that it will take effect on May 15, 2017. *Id*. at 4.

Argument

Defendants have noticed their appeal of the Court's preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). The appeals raise serious legal issues of first impression that the Court of Appeals for the Fifth Circuit should be permitted to review before longstanding bail procedures are altered by judicial decree. Defendants have presented the Court with a substantial case on the merits regarding these legal issues. The equities strongly support the issuance of a stay inasmuch as the preliminary injunction will upend the pretrial bail system in the largest jurisdiction in Texas and the third largest in the United States, one that processes over 50,000 misdemeanor defendants per year; it will interfere with Defendants' ongoing—and already far-advanced—efforts to revise and improve the pretrial bail system in Harris County; it will impose substantial financial costs and administrative burdens on Defendants – and ultimately on Harris County taxpayers – that could not later be recouped; and will subject Defendants to conflicting bail-setting requirements. The public, finally, has a strong interest in ensuring that arrestees appear for trial, in avoiding disruption of the criminal justice system, and ensuring public safety.

Under Rule 62(c), the Court must consider the following factors in deciding whether to issue a stay pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (citations omitted); *see also Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013). "The first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). However, the public interest is a critical factor where government entities are enjoined from enforcing the laws. *Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) ("Enjoining a State from implementing its own law while an appeal is pending before a federal court invokes significant concerns related to principles of federalism and comity.").

A. Defendants' appeal raises serious legal questions and Defendants have presented a substantial case on the merits.

To obtain a stay pending appeal, "where there is a serious legal question involved and the balance of the equities heavily favors a stay . . . the movant only needs to present a substantial case on the merits." *In re Deepwater Horizon*, 732 F.3d 326, 345 (5th Cir. 2013) (quoting *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011)). In *McConnell v. Federal Election Comm'n*, for example, a three judge panel granted a stay of its decision invalidating the Bipartisan Campaign Reform Act of 2002 pending final disposition by the Supreme Court even though it had concluded that the party seeking the stay should *not* prevail on the merits of the constitutional questions at issue. 253 F. Supp. 2d 18, 20 (D.D.C. 2003).

A court will issue a stay pending appeal in cases that raise a serious legal question, therefore, even when the court has not concluded that the parties' arguments are likely to prevail,

provided those arguments are "substantial." A serious legal question would include an unsettled question of constitutional law, *e.g.*, *Corpus Christi Independent School Dist. v. Cisneros*, 404 U.S. 1211, 1211-12 (1971) (reinstating district court's stay in school desegregation case that presented "questions not heretofore passed on by the full Court, but which should be."); *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22–23 (D.D.C. 2003) (granting stay pending appeal, where, despite risks of harm to plaintiffs, case clearly presented "a serious legal question" on issue of first impression), as well as legal matters raising complex questions about which reasonable jurists might disagree, *e.g.*, *Westmore Equities, LLC v. Village of Coulterville*, No. 15-CV-0241, 2016 WL 7521151, *2 (S.D. Ill. Dec. 30, 2016) (granting stay, although court was "not persuaded that the Appellants are likely to succeed," where "reasonable jurists could differ on the interpretation of the parties' contractual powers and obligations that this Court was required to interpret in granting summary judgment").

The Defendants' appeal raises serious legal questions, many of first impression, that warrant the issuance of a stay. These include the constitutionality of requiring indigent misdemeanor defendants to post secured bail and whether Plaintiffs' claims are cognizable under Section 1983, as well as questions of abstention, judicial immunity, and federalism. These questions arise in an area of the law that is new and evolving as a result of the nationwide legal campaign "challenging long established bail practices" of which this suit is a component. Mem. Op. at 5 (Doc.302). These are questions, moreover, that do not admit of easy resolution; rather, as the Court itself recognized, "[t]his case is difficult and complex," Mem. Op. at 4 (Doc. 302), and raises "difficult issues." *Id.* at 5. See also *id.* at 192 ("This case is not easy."). Defendants likewise raise purely legal challenges on appeal that will be reviewed *de novo* by the Fifth Circuit. Cf. *Halliburton Energy Services, Inc. v. NL Indus.*, No. H-05-4160, 2008 WL 2787247, at *8 (S.D. Tex. July 16, 2008) ("It would be difficult for Halliburton to show a strong likelihood

of success on the merits given the narrow judicial review of arbitration awards."). This case thus presents serious, novel legal issues of precisely the sort that warrant entry of a stay.

Defendants have presented a substantial case on the merits. To be sure, as is clear from the Court's opinion of April 28, 2017, the Court undoubtedly disagrees that Defendants have a substantial likelihood of prevailing on appeal. But a district court asked to stay an injunction it has just issued will always believe that the appealing party is not likely to prevail on the merits. For this reason, this Court need not find that its own ruling is likely to be reversed in order to grant the motion for a stay; it need find only that the case on the merits is substantial. This Court is familiar with Defendants' arguments—Defendants nevertheless incorporate those arguments herein by reference[1]—regarding both the merits and the justiciability of Plaintiffs' claims. And while the Court has rejected those arguments, Defendants respectfully submit that the arguments are—as the Court's 193-page opinion amply confirms—substantial.

In addition to the many authorities identified in our earlier briefs, we are obliged to draw the Court's attention to relevant decisions on two points that we have not previously cited. First, with respect to our argument that abstention is required under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971), the Fifth Circuit held in *Tarter v. Hurley*, 646 F.2d 1010, 1013

[1] *See* Def's' Mot. to Dismiss (Mot. June 16, 2016) at 6-11 (Doc.20); to Dismiss all Claims (June 27, 2016) at 4-20 (Doc.25); Def's' Resp. in Opp. to Pl's Mot. for Prelim. Inj. (Jul 18, 2016) at 6-25 (Doc.26); Resp. to Mot. to Cert. Class (July 18, 2016) at 3-14 (Doc.28); Sur-reply in Opp. to Plaintiffs' Mot. for Prelim. Inj. (August 12, 2016) at 1- 5 (Doc.34); Sheriff's Mot. to Dismiss (Sept. 7, 2016) at 5-18 (Doc.61); Judges Mot. to Dismiss (Nov. 9, 2016) at 24-49 (Doc.80); Harris County Mot. to Dismiss (Nov. 9, 2016) 7-25 (Doc.83); Sheriff's Amend. Mot. to Dismiss (Nov. 9, 2016) at 5-21 (Doc.84); Hearing Officers' Mot. to Dismiss (Nov. 9, 2016) at 8-15 (Doc.85); Hearings Officers Rep. ISO Mot. to Dismiss (Nov. 23, 2016) at 1-4 (Doc.98); Sheriff's Rep. ISO Mot. to Dismiss (Nov.23, 2016) at 1-9 (Doc.100); Hearing Officers' Mot. for Partial SJ (Nov.23, 2016) at 5-19 (Doc.101); Harris County's Reply ISO Mot. to Dismiss (Nov. 23, 2016) at 2-11 (Doc.102); Judges' Repl. ISO Mot. to Dismiss (Nov. 25, 2016) at 7-24 (Doc.106); Hearing Officers' Reply ISO Mot. for Partial SJ (Feb. 2, 2017) at 1-8 (Doc.161); Resp. to Am. Mot. for PI (Doc.2, 2017) at 7-24 (Doc.162); Joint Opp. to Pl. Am. Mot. for Class Cert. (Feb. 2, 2017) at 4-18 (Doc.164); Judges' Opp. to Pls' Mot. for PI (Feb. 2, 2017) at 6-25 (Doc.166); Harris County and Hearing Officers' Brief on App. Lev. of Scrutiny (March 24, 2017) at 1-10 (Doc.256); Harris County and Hearing Officers' Obj. to Pls.' Proposed Injunctive Relief (March 27, 2017) at 1-9 (Doc.260); Post-Trial Briefing on Appropriate Legal Standards (March 29, 2017) at 1-4 (Doc.263).

(5th Cir. Unit A 1981), that abstention was required in a section 1983 action challenging the systematic imposition of excessive bail by Texas state court judges. The plaintiff in *Tarter* sought, *inter alia*, "equitable relief against the judges based on the imposition of excessive bail." *Id.* The Court held that abstention was required under *Younger* and *O'Shea v. Littleton*, 414 U.S. 488 (1974), which addressed a claim on behalf of "financially poor persons 'who, on account of their poverty, are unable to afford bail . . . in city ordinance violation cases.'" 414 U.S. at 491. "Because O'Shea involved a challenge to the imposition of excessive bail," the Fifth Circuit held, "it is conclusive as to Tarter's claim for equitable relief on that ground." 646 F.2d at 1013.

Second, the relief Plaintiffs have sought and the Court has entered—an order requiring Harris County to release them from detention on an unsecured basis—is unavailable to Plaintiffs as a matter of law under the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Court held that a prisoner seeking release from confinement may obtain such relief only through a petition for habeas corpus, and that claims seeking such relief are not cognizable under 42 U.S.C. § 1983. The Court explained that "the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law," whether "imposed pursuant to conviction" or "prior to trial." *Id.* at 485. Because habeas has thus "been accepted as the specific instrument to obtain release from [unlawful] confinement," the Supreme Court held in Preiser that this specific remedy displaces the general cause of action granted by 42 U.S.C. § 1983 for constitutional torts. *Id.* at 486; *see also Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975) (challenge to pre-trial detention rules could proceed under Section 1983 only because "release was neither asked nor ordered, [and so] the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy") (citing *Preiser*). Defendants thus satisfy the first and most important prong under Rule 62(c). As Defendants demonstrate below, the equities weigh heavily in favor of the issuance of a stay.

B. Defendants would be irreparably harmed absent a stay.

If the Court declines to stay the proposed injunction pending appeal, Defendants will suffer irreparable harm for at least three reasons.

1. ***The preliminary injunction prohibits the enforcement of state and federal law.***

When a state or local agency is enjoined from applying state law, that agency necessarily suffers irreparable harm inasmuch as it is precluded from performing its duty to serve the public by enforcing the people's duly-enacted laws. Quite simply, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (*quoting New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Nken*, 556 U.S. at 435; *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

Here, the preliminary injunction requires Defendants to release on an unsecured personal bond every bail-eligible misdemeanor defendant who asserts that he or she is unable to obtain the funds necessary to post secured bail within 24 hours of the arrest, even where an unsecured bond has already proven inadequate to guarantee the defendant's appearance. The Texas Constitution requires that arrestees for non-capital offenses "shall be bailable by sufficient sureties." TEX. CONST. art. 1 § 11. The Texas Code of Criminal Procedure and the *Roberson* consent decree provide the five-factor framework for judicial officers to determine a "sufficient surety." TEX. CODE CRIM. PROC. art. 17.15. The injunction effectively strips the County Criminal Court at Law Judges and Hearing Officers of the discretion provided by the Texas Constitution, state law, and the *Roberson* consent decree to determine whether bail shall be secured or unsecured. It instead mandates that the County Criminal Court at Law Judges and Hearing Officers set secured bail according to only one factor – the amount a defendant states she is able to pay – or else set the

amount as unsecured, with no judicial discretion otherwise. In doing so, the preliminary injunction prevents the County Criminal Court at Law Judges and the Hearing Officers from enforcing state laws.

2. ***There are significant obstacles to implementing the injunction during the pendency of the appeal.***

Implementing the Court's preliminary injunction would require significant coordination among the County Criminal Court at Law Judges, the Hearing Officers, district attorneys, Pretrial Services, the City of Houston Police Department (which is not a party to this lawsuit), and the Harris County Sheriff's Office. The preliminary injunction will require Pretrial Services to perform increased levels of supervision over the arrestees the Court has ordered released. Kelvin Banks, the current director of Pretrial Services in Harris County, has explained that a system of releasing those misdemeanor arrestees in Harris County who certify that they are unable to provide secured bail would likely overwhelm the system of supervision that is a blanket condition of such releases (Tr. 17-19, 77-78 [Mar. 9 – AM]; Tr. 143-44, 160 [Mar. 8 – PM]). Under normal circumstances, the implementation of these changes would take months—as indicated by evidence of the implementation of other bail reforms (both in Harris County and in other jurisdictions), and the testimony of Kelvin Banks (Tr. 28-29 [Mar. 9 – AM] Tr. 159-60 [Mar. 8 – PM]). The relief that the Court has ordered would likewise overwhelm and delay the day-to-day process of providing misdemeanor defendants with an article 17.15 probable cause and bail hearing and, ultimately, with a first appearance before the County Criminal Court at Law Judges—as required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), and by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Such a slowdown would, of course, also harm members of the plaintiff class.

3. ***Implementation of the injunction will impose significant and unnecessary costs on Harris County.***

To meet its statutory duties to require sufficient sureties to ensure that the defendant will appear, to consider the nature of the offense, and to ensure the safety of the victim and of the general public, while complying with the Court's prohibition on the use of secured bail to achieve those aims in the case of defendants who certify that they are unable to post secured bail, Harris County's Pretrial Services will have to devise and implement a new system to supervise individual arrestees who will now be released on unsecured personal bonds.

This supervision will come at a high and unrecoverable cost. These costs, which will cover everything from GPS monitoring devices to hiring additional Pretrial Services officers and caseworkers, could run to the tens of millions of dollars. Absent a stay, the people of Harris County will not recover that expense from the plaintiffs or any other source if the Court's decision is reversed on appeal.

C. Issuing the stay would not cause Plaintiffs substantial injury and would protect the public interest.

"The final two factors—the potential for substantial injury to the [Plaintiffs] and the public interest—are less significant in [the district court's] analysis." *Tangipahoa Parish Sch. Bd.*, 507 F. App'x at 399. Both of these factors, however, weigh in favor of a stay.

First, a stay of the preliminary injunction pending appeal will not substantially injure the Plaintiff class. "A stay pending appeal 'simply suspends judicial alteration of the status quo.'" *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken*, 556 U.S. at 429). In this case, that status quo is longstanding – indeed, it pre-dates the founding of our country – and ubiquitous throughout the country. The status quo has been maintained over the course of the year that has elapsed since the original complaint was filed. Permitting the County Criminal Court at Law Judges and Hearing Officers to continue to exercise the discretion to require secured bail when

they determine that the risk of non-appearance or danger to the community requires it during the relatively brief period necessary for appellate review will not substantially injure the class.

Second, a stay of the injunction pending appeal will protect the public interest. "As the State is the appealing party, its interest and harm merges with that of the public." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (citing *Nken*, 556 U.S. at 435). The public has an interest in the safety of the community and in having the criminally-accused appear at future court appearances—and secured bail is a time-honored and rational means of accomplishing this goal. The logistical problems, described above, in complying with the Court's preliminary injunction would impair this public interest. *See Veasey*, 769 F.3d at 893, 896 (noting logistical problems of having to retrain and educate polling officials at polling stations across the State). A stay would allow for orderly resolution of this dispute and allow the county and its departments to carry out the statutory policy of the Texas legislature, which "is in itself a declaration of public interest and policy which should be persuasive." *Va. Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *Ill. Bell Tel. Co. v. WorldCom Tech., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.").

D. This Court should not require a bond as a condition of the stay.

There is a "public interest" exception to requiring a bond for an injunction under Rule 65. *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981). For similar reasons, Defendants respectfully ask this Court to dispense with the requirement of a bond here, under Rule 62(c). This is an appeal by Defendants essentially on behalf of the public, and there is no reasonable way for the parties to quantify the harm that might accrue to Plaintiffs if any injunction is stayed during the appeal.

E. Alternatively, this Court should at a minimum stay the preliminary injunction pending the filing and resolution of a stay motion in the Fifth Circuit.

If the Court declines to enter a stay pending resolution of the appeal, it should at least stay its preliminary injunction to allow a reasonable period for a stay motion to be presented to, and resolved by, the U.S. Court of Appeals for the Fifth Circuit. Because this Court is already intimately familiar with the complex and extensive factual and legal record that has been compiled and presented during the past year, highly abbreviated briefing by Defendants and consideration by this Court are sufficient to litigate the stay request in this Court. Briefing of a stay request to a Fifth Circuit motions panel completely unfamiliar with the case, with this Court's 193-page preliminary injunction opinion, and with this Court's 78-page opinion denying Defendants' motion to dismiss will plainly have to be far more extensive, but the Defendants commit to prepare and file a stay motion in the U.S. Court of Appeals **no more than 30 days from entry of the Court's preliminary injunction order**.

Request for Relief

Defendants ask this Court to stay its Order of Preliminary Injunction (Doc. 304) pending appeal. In the alternative, the Defendants ask that, at a minimum, this Court stay its injunction pending resolution of Defendants' motion for emergency relief from the court of appeals.

Respectfully submitted,

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Certificate of Conference

I certify that on May 8, 2017, I conferred with counsel for Plaintiffs regarding the relief requested herein, and that on May 8, 2017, the Office of the Harris County Attorney conferred both with counsel for Judge Jordan and with counsel for Sheriff Ed Gonzalez regarding the relief requested herein, and counsel cannot agree about the disposition of the motion.

/s/ Philip J. Morgan
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Certificate of Service

I certify that a copy of this document was served by delivering it to the following on **May 9, 2017**, by email or through the CM/ECF system:

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